

The Impact of Separate Opinions on International Criminal Law

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Dissents have had a tumultuous history in national and international courts throughout the world. Initially reviled, dissents have come to be a well-accepted, even praiseworthy, component of the American judicial system, and they have traversed the same trajectory in other countries as well as in international courts and tribunals. Particularly noteworthy among international courts are those created to prosecute perpetrators of mass atrocities, such as genocide, crimes against humanity, and war crimes. And nowhere are dissents more common than in these mass atrocity courts. Yet, as prevalent as these dissents are, they have received virtually no scholarly or practical attention. Only a few articles consider international criminal law dissents, and these praise them for enhancing the legitimacy of the international criminal tribunals. This Article, the first in a series, launches a comprehensive empirical treatment of international criminal law separate opinions. The foundation of this project is my careful review of every separate opinion in every Trial Chamber and Appeals Chamber judgment at the four, core international criminal tribunals. My fine-grained assessment of these nearly 300 separate opinions provides a solid basis for my normative conclusions, conclusions that call into question the claims of non-empirical legal scholarship on separate opinions. As the first component of a larger project, this Article makes two substantial contributions: First, it lays the foundation for the remainder of the project by providing core information and statistics about international criminal law's separate opinions. Second, the Article inaugurates the project's normative analyses by empirically assessing one of the most common claims made by proponents of separate opinions: that they help to develop the law. This Article employs a variety of empirical methods to evaluate that claim, including citation counts and a painstaking content analysis of the separate opinions, among others. Each of these analyses suggests that international criminal law's separate opinions, though numerous and voluminous, have not been an influential force in developing international criminal law.

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I. INTRODUCTION	3
II. FROM PERNICIOUS TO PRIZED: SEPARATE OPINIONS ACROSS THE GLOBE.....	9
<i>A. Domestic Courts</i>	9
<i>B. Following the Domestic Script: Separate Opinions in International Courts and Tribunals</i>	15
III. SEPARATE OPINIONS IN INTERNATIONAL CRIMINAL LAW: METHODOLOGY AND FOUNDATIONAL STATISTICS.....	20
IV. INFLUENCING THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE: THE IMPACT OF SEPARATE OPINIONS.....	24
<i>A. The Impact of Separate Opinions in Subsequent Proceedings in the Same Case</i>	26
<i>B. The Impact of Separate Opinions by Citation Count</i>	29
1. <i>Citations to Separate Opinions by Numbers, Locations, and Reasons</i> .	30
2. <i>Dramatic Differences: Citations to Majority and Separate Opinions</i>	42
<i>C. Assessing Impact by Content: The Subjects of Separate Opinions</i>	44
1. <i>Dissents of Law vs. Dissents of Fact: Dramatically Differing Impact</i> ..	44
2. <i>From Minority to Majority: The Rare Separate Opinions that Become Law</i>	50
3. <i>Influence Defined Most Broadly: An In-Depth Assessment of the Content of Separate Opinions</i>	53
V. CONCLUSION.....	60

I. INTRODUCTION

In the American legal imagination, dissents hold an iconic place. Renowned dissents, such as Justice Harlan's in *Plessy v. Ferguson*¹ and Justice Jackson's in *Korematsu v. United States*,² highlight the value of free speech and open contestation, and they provide prominent reminders that court majorities, even very large majorities, sometimes get it shockingly wrong. Historically, however, the practice of issuing separate opinions teemed with controversy. U.S. Supreme Court dissents were almost non-existent when John Marshall was Chief Justice,³ and some state legislatures of that day prohibited the publication of separate opinions.⁴ Indeed, in the early twentieth century, dissents remained one of the most criticized aspects of the American judicial system. Labeled “pernicious,”⁵ and considered by some to be “the most injurious” of “all judicial mistakes,”⁶ dissents were barely tolerated through some eras of American legal history.

Despite this criticism, dissenting opinions in American courts increased dramatically beginning in the 1930s,⁷ and as they became more prevalent, scholars and other commentators began to find virtue in them. Some praised dissents for improving majority opinions⁸ and for showing the public that judges take their work seriously.⁹ But proponents of dissents advanced them primarily through two more weighty arguments. First, they maintained that dissents help to develop the law by convincing later courts to adopt their

1 *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2 *Korematsu v. United States*, 323 U.S. 214 (1944).

3 H. B. Brown, *The Dissenting Opinions of Mr. Justice Harlan*, 46 AM. L. REV. 321, 322 (1912).

4 Art. 92 of both the 1898 and 1913 Constitutions of Louisiana prohibited the publication of concurring and dissenting opinions. See BENJAMIN WALL DART, CONSTITUTIONS OF THE STATE OF LOUISIANA AND SELECTED FEDERAL LAWS 616 (1932). See also Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 207-08 (1922-1923) (stating that, in the mid-19th century, a Pennsylvania law prohibited the publication of minority opinions at the Pennsylvania Supreme Court).

5 C. A. Hereschoff Bartlett, *Dissenting Opinions*, 32 L. MAG. & REV. Q. REV. JURIS. 5th ser. 54, 62 (1906).

6 William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690, 693 (1905).

7 Ben W. Palmer, *Dissents and Overrulings: A Study of Developments in the Supreme Court*, 34 A.B.A. J. 554, 554-55 (1948) (displaying a chart showing increase in non-unanimous Supreme Court decisions from 1910 to 1946).

8 See Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394, 401 (1952); Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 655 (1992).

9 Stephens, *supra* note 8, at 398 (noting that a separate opinion stands as an “affirmative showing of [judicial] vitality and interest, and sometimes serves as a yardstick for ability”); R. Dean Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 822 (1952); Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUD. SOC'Y 78 (1942); Fred M. Vinson, *Work of the Federal Courts*, 69 S. CT. V, X (1949); Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35 (1994).

positions.¹⁰ Second, and even more commonly, supporters of separate opinions credited them with enhancing the transparency and consequently the legitimacy of courts.¹¹

By the last half of the twentieth century, supporters of separate opinions had clearly prevailed: Dissents had become a prevalent and largely uncontroversial feature of the American justice system. Moreover, a similar normative trajectory can be identified in courts throughout the world. Historically, countries of the civil-law tradition prohibited separate opinions,¹² and some still do.¹³ But responding to many of the same arguments that were earlier advanced in the United States,¹⁴ some civil-law countries have introduced separate opinions to their regular court systems,¹⁵ and virtually all have authorized separate opinions in their newly-minted constitutional courts.¹⁶

A similar set of debates occupied the drafters of the first international courts, but there too the right to dissent prevailed in the end, and it prevailed for largely the same reasons it has prevailed in most domestic courts. That is, although critics highlighted the unique costs that separate opinions could impose on international adjudication, supporters nonetheless considered them crucial to developing international law and to maintaining the authority and legitimacy of the international courts. Following this early contestation, the creators of virtually every subsequent international court authorized separate opinions after little or no debate.¹⁷ Consequently, when we fast-forward to the birth of international criminal tribunals to prosecute those accused of genocide, war crimes, and crimes against humanity, we find the creators of these bodies arguing and agonizing over a multitude of procedural and substantive issues,¹⁸ but accepting the judges' right to dissent

10 See, e.g., Vinson, *supra* note 9, at XI; Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118, 119 (1953); Stephens, *supra* note 8, at 404; Michael A. Musmanno, *Dissenting Opinions*, 6 U. KAN. L. REV. 407, 409 (1958); Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future*, 38 OSGOODE HALL L.J. 495, 498 (2000).

11 See *infra* text at notes 67-69.

12 Peter W. Hogg & Ravi Amarnath, *Why Judges Should Dissent*, 67 U. TORONTO L.J. 126, 129 (2017).

13 Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States*, at 17 (Nov. 15, 2012), (noting that “of the 27 Member States [of the European Union] only seven maintain a complete ban on dissenting opinions”), [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET\(2012\)462470_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_EN.pdf).

14 *Id.* at 12.

15 *Id.* at 21 (describing Danish reforms permitting separate opinions).

16 KATALIN KELEMEN, JUDICIAL DISSSENT IN EUROPEAN CONSTITUTIONAL COURTS 10 (2018).

17 See *infra* text at notes 91-99.

18 See, e.g., ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD (Richard May et al. eds., 2001) (describing genesis of many procedural and evidentiary rules).

without the slightest controversy.¹⁹ The procedural systems of the earliest tribunals were modeled on the American criminal justice system,²⁰ so it was unsurprising that they authorized separate opinions. But even subsequent tribunals that incorporated more civil-law procedural elements also unquestioningly authorized judges to issue separate opinions.²¹ Indeed, the practice of separate opinions has been so well-accepted at the international criminal tribunals that when a tribunal's law did not expressly authorize a particular chamber to issue separate opinions, the judges of that chamber simply assumed the right, not only without controversy, but even without discussion.²²

In nearly three decades of international criminal law practice, little has changed. First, separate opinions in international criminal law continue to receive virtually no attention.²³ A few scholars have written a few words, but the topic has been shockingly absent from the massive body of international criminal law scholarship, despite that scholarship's notoriety for dissecting and debating *ad infinitum* even the most minute aspects of international criminal procedure.²⁴ This lacuna is particularly noteworthy given that international criminal judges have not hesitated to make ample use of their right to dissent. Even the most casual glance at tribunal websites reveals that a large proportion of the tribunals' already-lengthy judgments are supplemented by sometimes-even-lengthier separate opinions.²⁵ Finally, the handful of scholars who have considered the topic from a normative perspective have advanced the prevailing wisdom that has developed over

19 See Göran Sluiter, *Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY*, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 191, 199 (Bert Swart et al. eds., 2011) (noting that “there was never any serious question whether individual opinions should be available at the ICTY”); *id.* at 203 (noting that the ICC’s provisions on separate opinions apparently “received little attention during the drafting exercise”).

20 Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 *MICH. J. INT’L L.* 321, 329 (2012).

21 Rome Statute of the International Criminal Court, art. 74(3), (5), July 17, 1998, 2187 U.N.T.S. 3 [Rome Statute]; see *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, art. 14(2), ECCC Doc. No. NS/RKM/1004/006 (Oct. 27, 2004).

22 Sluiter, *supra* note 19, at 203–04.

23 Hemi Mistry, *The Paradox of Dissent*, 13 *J. INT’L CRIM. JUST.* 449, 451 (2015) (noting that the practice of dissents in international criminal law is “often overlooked as a subject of critique in its own right”).

24 See Nancy Amoury Combs, *International Criminal Justice after Atrocities*, in *THE OXFORD HANDBOOK OF MASS ATROCITIES* (Barbora Hola et al. eds., forthcoming 2021); Patricia M. Wald, *Judging War Crimes*, 1 *CHI. J. INT’L L.* 189, 189 (2000); Sergey Vasiliev, *On Trajectories and Destinations of International Criminal Law Scholarship*, 28 *LEIDEN J. INT’L L.* 701, 706 (2015); Elies van Sliedregt, *International Criminal Law: Over-Studied and Underachieving?*, 29 *LEIDEN J. INT’L L.* 1, 1 (2016); Robert J. Currie, Neil Boister, *An Introduction to Transnational Criminal Law*, 13 *J. INT’L CRIM. JUST.* 1166, 1166 (2015).

25 See, e.g., *Prosecutor v. Gotovina & Markač*, Case No. IT-06-90-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (featuring a judgment of 56 pages and separate opinions of 61 pages).

many decades in national criminal justice systems. Specifically, although they acknowledge that separate opinions might appear to undermine the court's legitimacy, they maintain that separate opinions in fact enhance international criminal law's authority, prestige, and legitimacy.²⁶

That claim may well be valid, but "legitimacy" is notoriously difficult to assess, so previous scholarly assertions have remained largely untested. This Article is similarly unable to empirically assess the relationship between separate opinions and international criminal tribunal legitimacy because such an assessment is likely impossible. This Article, however, launches a comprehensive empirical treatment of separate opinions that among other things, considers many of the normative claims commonly advanced in support or opposition to them. That is, it empirically evaluates a variety of costs and benefits to the practice of separate opinions in international criminal law that enable us to reach far better-grounded normative conclusions. In the United States, after advocates of separate opinions had won the normative battle, researchers began empirically assessing the opinions and their authors. They employed statistical analyses to examine the various institutional, organizational, and demographic factors contributing to dissents, and they studied the internal and external ramifications of those dissents.²⁷ Although that literature is valuable, this Article contends that American scholars proceeded in the wrong order. That is, it was only after separate opinions were accepted as an asset to our judicial system that empirical efforts were undertaken to learn about them. International criminal law scholarship on separate opinions has barely begun, but it is following the same trajectory. We know virtually nothing

26 Mistry, *supra* note 23, at 450-51 (2015) (suggesting that "the publication of fundamental dissents . . . plays a constructive role in strengthening the legitimacy of [the international tribunals] and enhances their capacity to pursue the substantive aspiration of justice"); Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUR. J. INT'L L. 1163, 1163 (2018) (arguing that dissents are "a crucial legal device" that can create "a civic space for contestation that paradoxically shores up the legitimacy of the international criminal trial").

27 See, e.g., Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 428 (1981); John Szmer et al., *Gender, Race, and Dissensus on State Supreme Courts*, 96 SOC. SCI. Q. 553 (2015); S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580, 597 (1970) (finding that "humble and regional background[s] correlate with the propensity to dissent in the Supreme Court"); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 56-57 (1990) ("More complex state political, social, and economic environments are believed to produce more frequent expressions of disagreement in judicial institutions . . ."); Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123 (2004); Bradley C. Canon & Dean Jaros, *External Variables, Institutional Structure & Dissent on State Supreme Courts*, 3 POLITY 175, 188 (1970); Dean Jaros & Bradley C. Canon, *Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges*, 15 MIDWEST J. POL. SCI. 322, 322 (1971) (finding the presence or absence of an intermediate level appellate court relevant to dissent rates); Kenneth N. Vines & Herbert Jacob, *State Courts*, in *POLITICS IN THE AMERICAN STATES* 272, 302-03 (Herbert Jacob & Kenneth N. Vines eds., 2d ed. 1971); Kenneth N. Vines & Herbert Jacob, *State Courts and Public Policy*, in *POLITICS IN THE AMERICAN STATES* 242, 263-64 (Herbert Jacob & Kenneth N. Vines eds., 3d ed. 1976).

about the practice of separate opinions at the international criminal tribunals,²⁸ yet the few scholars who have considered them have made bold, seemingly persuasive normative claims.

This Article aims to upend that trajectory by placing the separate opinions themselves at the center of the scholarly discussion. Consequently, the foundation of this project is my careful review of every separate opinion in every Trial Chamber and Appeals Chamber judgment of the four, core international criminal tribunals: The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the global and permanent International Criminal Court (ICC). Having reviewed nearly 300 separate opinions, this Article provides the who, what, and why that has been missing in international criminal law scholarship. In addition, and perhaps most importantly, it provides a more solid basis for our normative understanding of separate opinions.

This project as a whole will assess international criminal law's separate opinions from all angles. This Article in particular quantifies the prevalence of separate opinions, both cumulatively and over time, in each of the four tribunals and as a whole. It considers in fine-grained detail the content of separate opinions and, among other things, quantifies the proportion that address law versus fact and the proportion that promote acquittals versus convictions. It delineates every legal issue contained in every separate opinion. Subsequent work will consider the relationship between separate opinions and a host of judicial characteristics, including gender, background, region of origin, and features of the judges' national legal systems. All of these inquiries are instructive in themselves, as they provide new insights into a burgeoning field. But each of these inquiries is more directly employed in constructing an evidence-based normative assessment of separate opinions. What costs do they impose? What benefits do they provide? And are those benefits worth the costs?

As the first component of this project, this Article makes two substantial contributions: First, it lays the foundation for the project by providing core statistics about international criminal law's separate opinions. Second, the article launches the project's normative analyses by empirically assessing one of the most common claims made about separate opinions: they help to develop the law. This claim was particularly persuasive to the creators of the early international courts²⁹ and has all the more surface plausibility in a burgeoning field such as international criminal law. At their inception, the international criminal tribunals could count on an ample supply of

²⁸ Sluiter also noticed the "lack [of] a solid empirical basis" in scholarship surrounding international criminal law separate opinions. *See* Sluiter, *supra* note 19, at 196.

²⁹ *See infra* text at notes 102-103.

passionate supporters firmly committed to making international criminal justice a reality; but they had virtually no legal precedents on which to base their opinions. Consequently, the Tribunals themselves had to define many of the crimes, defenses, and complicity doctrines essentially from scratch.³⁰ One would expect disagreements to be common in such uncharted waters, and one would expect a sizable proportion of initial losers (i.e., dissenters) to later prevail. This Article confirms the former expectation but refutes the latter. Specifically, the following Parts reveal that a large proportion of international criminal law judgments feature (a sometimes large number of) separate opinions. However, after conducting a variety of empirical analyses, it concludes that separate opinions have not been particularly influential in developing international criminal law doctrine.

Part II sets the stage by providing a brief history of the practice of separate opinions and the normative claims made about those separate opinions in domestic jurisdictions and international courts. The literature on separate opinions in international criminal law is especially sparse, but it generally values separate opinions as assets to the international criminal justice system. Parts III and IV explicate my empirical findings. After explaining my methodology, Part III lays the foundation for the many analyses that follow by providing core statistics and foundational information about the 289 separate opinions in my dataset. Part IV turns to the primary normative inquiry this article seeks to explore: namely, do separate opinions matter, and if so, how? Part IV considers these questions through a series of empirical assessments. First, Part IV measures the influence of Trial Chamber separate opinions on Appeals Chambers in the same case by quantifying the proportion of separate opinions that advance an argument subsequently adopted on appeal. This analysis reveals that the positions advanced in the vast majority of Trial Chamber separate opinions are either rejected or ignored on appeal.

Next, Part IV turns to a commonly-used measurement of influence: citation counts. Subsection 1 focuses on citations to separate opinions, but it goes beyond the typical citation count, which generates only statistics. In addition, I read each of the nearly 600 citations in context in order to gain a more nuanced understanding of the relevance of the citation and the impact of the separate opinion. This qualitative component of the assessment is informative, as the citation counts alone suggest a greater influence for separate opinions than is likely warranted once we account for who is citing the separate opinions and for what purpose. Subsection 2 provides further support for this conclusion. Employing the same methodology as American scholars who have tested the influence of federal court dissents, Subsection

³⁰ See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PENN. L. REV. 1, 97-98 (2002).

2 compares citations of majority opinions with citations of separate opinions. This subsection reveals that international criminal law majority opinions are cited more than 100 times as often as separate opinions.

Section C of Part IV continues to evaluate the influence of separate opinions, here through a quantitative and qualitative examination of their content. For one thing, a separate opinion's potential for influence depends to a large degree on whether the separate opinion addresses factual or legal issues. Accordingly, Subsection 1 classifies every point made in every dissent in order to characterize that dissent as factual, legal or both. Factual separate opinions have dramatically reduced ability to influence later cases, so the remainder of Part IV centers on separate opinions advancing legal positions. Subsection 2 considers the very few separate opinions whose positions have later become law. Subsection 3, then, provides the first-ever in-depth consideration of the legal issues appearing in the Tribunals' 288 separate opinions. Within those 288 separate opinions, I have isolated discussions of several hundred legal issues and classified them so as to identify the legal subjects most commonly appearing.

Learning what's hot and what's not in separate-opinion subjects is instructive because some topics are far more likely to influence future cases than others. This analysis reveals that although international criminal law's separate opinions do address some topics of widespread or continuing interest, most of the most popular topics are anything but. In sum, Subsection 3's conclusions mirror those of the rest of this Part: namely, that international criminal law's separate opinions appear to have had only minimal impact on the development of that body of law.

II. FROM PERNICIOUS TO PRIZED: SEPARATE OPINIONS ACROSS THE GLOBE

A. Domestic Courts

The earliest common-law courts in England issued their opinions *seriatim*,³¹ so there was no opinion for the court; rather, each judge would issue a separate opinion offering his views in each case.³² In the earliest days of the Republic, American courts followed suit, but Chief Justice John

31 Peter Bozzo et al., *Many Voices, One Court: The Origin and Role of Dissent in the Supreme Court*, 36 J. SUP. CT. HIST. 193, 196 (2011) ("America's earliest courts largely adopted the institutions of their English forebears [including] the practice of delivering *seriatim* decisions."); Evan A. Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 MO. L. REV. 120, 120 (1938); Moorhead, *supra* note 9, at 821.

32 J. Lyn Entrikin, *Global Judicial Transparency Norms: A Peek behind the Robes in a Whole New World – A Look at Global Democratizing Trends in Judicial Opinion-Issuing Practices*, 18 WASH. U. GLOB. STUD. L. REV. 55, 62–63 (2019) ("Each justice, one by one, announced an individual opinion on the matter, and when published, all were reported together along with the name of each author, followed by a brief order reflecting the Court's collective judgment.").

Marshall spelled the end to *seriatim* opinions³³ by issuing an opinion for the court to which the Justices were invited to join.³⁴ Separate opinions appeared during this period but were rare until the late 1930s, when their incidence increased dramatically.³⁵ In recent years, separate opinions have appeared, on average, in about 60% of U.S. Supreme Court cases.³⁶

The practice of separate opinions in other countries has largely depended on whether the country followed the common-law tradition (which historically permitted separate opinions) or the civil-law tradition (which did not).³⁷ Judges of the Supreme Court of the United Kingdom, for example, have for centuries issued their opinions *seriatim*.³⁸ The courts of Canada, another common-law country, have also historically permitted separate opinions,³⁹ although Canadian judges are far less inclined to exercise their right to opine individually than their American counterparts.⁴⁰ By contrast, civil-law countries traditionally prohibited separate opinions⁴¹ and announced their decisions *per curiam*.⁴² In recent years, some continental European countries have relaxed the prohibition against separate opinions.⁴³ Moreover, virtually every European country has created a

33 Hampton L. Carson, *Great Dissenting Opinions*, 50 ALB. L.J. 117, 122 (1894).

34 Matthew P. Bergman, *Dissent in the Judicial Process: Discord in Service of Harmony*, 68 DENV. U. L. REV. 79, 81 (1991).

35 Voss, *supra* note 8, at 660-61.

36 Sarah Turberville & Anthony Marcum, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 is Far More Common*, WASH. POST (June 28, 2018), <https://www.washingtonpost.com/news/post-everything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/?noredirect=on> (since 2000, about 36% of all United States Supreme Court decisions have been unanimous).

37 MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 19 (1986).

38 KELEMEN, *supra* note 16, at 52-57; David Vitale, *The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis*, 19 REV. CONST. STUD. 83, 96 (2014); RAFFAELLI, *supra* note 13, at 8. Even in the United Kingdom, however, dissents are restricted in certain judicial segments, including the Court of Appeal Criminal Division. *See* Supreme Court Act 1981 §59; The Special Educational Needs Tribunals; John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 235 (2000).

39 Hogg & Amarnath, *supra* note 12, at 128.

40 Robert G. Richards, *Writing Separately*, 67 U. TORONTO L. J. 149, 149 (2017) (describing separate opinions in Canadian law as “rare birds” and reporting that 70% of Supreme Court of Canada decisions are unanimous); Hogg & Amarnath, *supra* note 12, at 129.

41 Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 133-34 (1990); Hogg & Amarnath, *supra* note 12, at 129.

42 KELEMEN, *supra* note 16, at 78.

43 Sluiter, *supra* note 19, at 193; KELEMEN, *supra* note 16, at 10 (highlighting Spain, Portugal, and Estonia as countries that permit dissenting opinions from judges in ordinary courts); Alder, *supra* note 38, at 237. In some cases, change came only after intense debate. *See* Andreas Paulus, Speech at the European Court of Human Rights Opening of the Judicial Year Seminar: Judgments and Separate Opinions: Complementarity and Tensions (Jan. 25, 2019) (noting that dissenting opinions were introduced in Germany in 1971 only in the Federal Constitutional Court, “after a controversial debate pitting academics against skeptical judges); Arne Marjan Mavčič, *Importance of Dissenting and Concurring Opinions (Separate Opinions) in the Development of Constitutional and Judicial Review with Special Reference to Slovenian Practice*, 4 CONST. L. REV. 99, 100 (2011) (noting the many “theoretical and political

constitutional court during the last half century, and the vast majority of these courts permit separate opinions.⁴⁴ Thus, the clear trend, even on the Continent, has been to authorize and embrace separate opinions.⁴⁵

Normative views on separate opinions have also evolved over time. Commentators in the late nineteenth and early twentieth centuries were particularly negative about the practice.⁴⁶ Although the era featured some proponents,⁴⁷ critics of separate opinions were far more numerous. C.A. Hereschoff Bartlett, for instance, called dissents “pernicious,”⁴⁸ while William Bowen described them as “the most injurious” of “all judicial mistakes.”⁴⁹ Similarly, in a piece colorfully titled, “The Evils of Dissenting Opinions,” Henry Wollman fiercely contended that “[t]here never should be a dissenting opinion in a case decided by a court of last resort.”⁵⁰ Wollman likened a dissenting judge to a boy who makes “faces at a bigger boy across the street, whom he can’t whip.”⁵¹

These critics raised a series of objections to dissenting opinions. For one thing, they complained that dissents create uncertainty about the law⁵² and impair judicial collegiality.⁵³ Early critics also charged dissents with

objections” that preceded the introduction of separate opinions); Caroline Wittig, *Writing Separate Opinions: Acclimation Effects at the German Federal Constitutional Court*, ECPR General Conference (2013) at <https://ecpr.eu/filestore/paperproposal/f7c819b7-335d-450e-a995-d7521ac87087.pdf> (unpublished draft) (noting the controversial discussions).

44 KELEMEN, *supra* note 16, at 10 (observing that the majority of European constitutional courts provide for the publication of dissent); *see also* Alexandra V. Orlova, *The Soft Power of Dissent: The Impact of Dissenting Opinions from the Russian Constitutional Court*, 52 VAND. J. TRANSNAT’L L. 611 (2019) (describing notable dissents from the Russian Constitutional Court).

45 Alder, *supra* note 38, at 237 (“Although the civil law places emphasis on objectivity and consensus there is an increasing tendency towards publishing dissents.”); Mavčić, *supra* note 43, at 100 (asserting that separate opinions have become “gradually accepted in countries with Continental (European) legal systems”).

46 Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J. L. & HUMAN. 507 (2012) (stating that, around the turn of the last century, “many American lawyers wanted to ban dissenting opinions in all courts of last resort”).

47 *See, e.g., Dissenting Opinion*, 20 AM. L. REV. 428 (1886); V. H. Robertson, *Dissenting Opinions*, 39 AM. L. REV. 23 (1905).

48 Bartlett, *supra* note 5, at 62.

49 Bowen, *supra* note 6, at 693.

50 Henry Wollman, *The Stability of the Law – The Income Tax Case, in Evils of Dissenting Opinions*, 57 ALBANY L.J. 74, 74 (1898).

51 *Id.* at 75. In similarly colorful fashion, C.A. Hereschoff Bartlett considered minority opinions to be like “the wailing of a dog whose tail is caught in a trap—you hear it *but the dog is caught all the same.*” Bartlett, *supra* note 5, at 55 (emphasis in original); *see also Should Dissenting Opinions be Reported?*, 1 UPPER CAN. L.J. (n. s.) 177 (1865).

52 *See, e.g., Current Events*, 22 CENT. L.J. 313, 313 (1886); Bowen, *supra* note 6, at 693 (arguing that separate opinions undermine the first duty of judges, which is “to render more exact the science of which they are the chief professors.”); *see also* Bartlett, *supra* note 5, at 62.

53 Peterson, *supra* note 27, at 428; David Danelski, *Conflict and Its Resolution in the Supreme Court*, 11 J. CONFLICT RES. 71, 73 (1967) (maintaining that dissents “may be resented by colleagues [and may] inflame present disagreements and provide fuel for future ones”); *see also* Jeffrey Rosen, *The Trial of John Roberts*, N.Y. TIMES (Sept. 13, 2009) (reporting that Chief Justice Roberts “expressed concern that his

increasing litigation by encouraging litigants to continue bringing suits.⁵⁴ However, the most common—and the most all-encompassing—critique leveled against separate opinions blamed them for undermining the authority, legitimacy, and prestige of the courts.⁵⁵ As early twentieth-century commentator R. Walton Moore put it, the practice of dissent “weakens and injures the Court with the public. It makes the impression that the Court is not as able as it should be; not as learned, not as wise, not as harmonious, and, therefore, not entitled to the full confidence which it should have”⁵⁶

Despite these critiques, separate opinions were decidedly on the rise by the mid-twentieth century and were supported by a passel of state and federal judges.⁵⁷ Scholarly commentators also warmed to separate opinions during this period, with many highlighting potential benefits of the practice. Some maintained that separate opinions improve the reasoning in the majority opinion⁵⁸ and show the public that judges take their work seriously.⁵⁹ Even more prevalent was the contention that separate opinions

colleagues were acting more like law professors than members of a collegial court in their willingness to divide along predictable party lines”).

54 *Should Dissenting Opinions be Reported?*, *supra* note 51, at 178; Wollman, *supra* note 50, at 75.

55 *Cf.* Bergman, *supra* note 34, at 86 (“The most widespread argument against dissenting opinions . . . is that they detract from the authority of the court.”).

56 R. Walton Moore, *The Habit of Dissent*, 8 VA. L. REG. (n.s.) 338, 341 (1922). For additional scholarship advancing these views, see *Should Dissenting Opinions be Reported?*, *supra* note 51; Bowen, *supra* note 6, at 693; Wollman, *supra* note 50, at 75 (arguing that dissents weaken the courts in “popular esteem,” for those who read the dissent believe the court to have “lent itself to injustice and inflicted wrong.”); Bartlett, *supra* note 5, at 56; Moorhead, *supra* note 9, at 821 n.11 (citing popular press articles that criticize the increasing practice of dissent as diminishing confidence in the courts); William E. Hirt, *In the Matter of Dissents* Inter Judices de Jure, 31 PA. B. ASS’N Q. 256, 257 (1960) (“[T]he cumulative value of dissenting opinions is more than nullified by the loss in prestige which our appellate courts suffer in public opinion.”). Even in the 1930s, this criticism of separate opinions was prevalent. Evan Evans, for example, cited survey respondents who opined that dissents “always are an attack upon the decision of the court Their purpose is to discredit the conclusion which the court has reached, and thus to take away from it that respect, both of the parties and the public, which is really essential to the administration of the law through the courts.” Evans, *supra* note 31, at 126.

57 Stone, *supra* note 9, at 78; William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC’Y 104, 106 (1948); Vinson, *supra* note 9, at X (agreeing with Justice Douglas); Carter, *supra* note 10, at 118; Musmanno, *supra* note 10, at 408. Concededly, some judges have issued negative opinions about separate opinions. Learned Hand, for instance, complained that a dissenting opinion “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.” LEARNED HAND, THE BILL OF RIGHTS 72 (1964); see also Musmanno, *supra* note 10, at 410. Justice Potter Stewart called dissents “subversive literature.” William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986). And Justice Oliver Wendell Holmes famously observed that he considered it “useless and undesirable, as a rule, to express dissent” Evans, *supra* note 31, at 122.

58 See Stephens, *supra* note 8, at 401; see also Voss, *supra* note 8, at 655.

59 See Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 927 (1962); Stephens, *supra* note 8, at 398 (noting that a separate opinion stands as an “affirmative showing of [judicial] vitality and interest, and sometimes serves as a yardstick for ability”); Moorhead, *supra* note 9, at 822; Stone, *supra* note 9; Vinson, *supra* note 9, at X; Scalia, *supra* note 9, at 35.

positively influenced the path of the law.⁶⁰ These proponents cited the power of dissents to convince higher courts to reverse lower courts⁶¹ and subsequent higher courts to overturn precedent.⁶² They also credited separate opinions with inducing legislatures to correct unjust majority opinions⁶³ and with influencing subsequent constitutional amendments⁶⁴ and administrative rules.⁶⁵ On this point, Iman Zekri captured the views of many when she asserted, “dissenting opinions are integral to the law’s development, and if judges do not dissent, the law does not develop efficiently.”⁶⁶

Finally, the most effective offensive in the normative battle over separate opinions came when supporters turned the “legitimacy argument” on its head and argued that dissents do not diminish the prestige and authority of the courts but rather augment them. Although dissents admittedly destroy the illusion of judicial certainty and agreement, supporters claimed that prestige and legitimacy cannot be built on illusions.⁶⁷ Instead, courts lose rather than gain when they are artificially engineered to appear infallible.⁶⁸ A far more effective means of enhancing the courts’ prestige and legitimacy, they asserted, is to acknowledge and air good-faith disagreement.⁶⁹

60 See, e.g., Carter, *supra* note 10, at 118 (“Judicial history shows that the dissenting opinion has exercised a corrective and reforming influence upon the law.”); Stone, *supra* note 9, at 78 (“[A dissent’s] real influence, if it ever has any, comes later, often in shaping and sometimes in altering the course of the law.”).

61 Scalia, *supra* note 9, at 36-37.

62 J. Louis Campbell, III, *The Spirit of Dissent*, 66 JUDICATURE 305, 309-10 (1983); Bergman, *supra* note 34, at 82-85.

63 See Robertson, *supra* note 47, at 24; Voss, *supra* note 8, at 653-54; Stephens, *supra* note 8, at 404-06.

64 Stephens, *supra* note 8, at 405.

65 *Id.* at 407-08.

66 Iman Zekri, *Respectfully Dissenting: How Dissenting Opinions Shape the Law and Impact Collegiality Among Judges*, 94 FLA. BAR J. 8, 8 (2020).

67 Stephens, *supra* note 8, at 399; Bergman, *supra* note 34, at 87 (“Dissenting opinions undeniably destroy the illusion of certainty in the law, but the legitimacy of the judicial process ought not to rest upon such illusions.”).

68 See Musmanno, *supra* note 10, at 416. Richard Stephens made a similar point: Noting that scholars will criticize judicial opinions even if dissenters do not, Stephens contended that “[a] frank acknowledgment and full disclosure of disagreement among judges is hardly as damaging to judicial prestige as would be a feigned unanimity seriously and skillfully attacked by persons outside the judiciary.” Stephens, *supra* note 8, at 400.

69 Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMPAR. L. 415, 430 (1959). As Justice William O. Douglas put it: “[a] judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.” William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949). See also L’Heureux-Dube, *supra* note 10, at 503. For a more modern articulation of this position, see Scalia, *supra* note 9, at 35 (“When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern.”).

Proponents of dissents unquestionably carried the day. Modern-day jurists continue to praise dissents primarily for enhancing legitimacy⁷⁰ but also for helping to develop the law. As to the latter point, Justice Carter spoke for many when he maintained that “history shows that the dissenting opinion has exercised a corrective and reforming influence upon the law.”⁷¹ Contemporary scholars, for their parts, have joined the Justices in generally supporting dissenting opinions.⁷² In fact, by 1994, the value of dissenting opinions was described as “beyond question,”⁷³ and just a few years later, another scholar argued for a constitutional right to dissent; he observed that even if such a right did not exist, everyone agreed that “permitting judges to dissent is wise policy.”⁷⁴

Similar normative themes have been sounded on the Continent, and a similar practical and scholarly trajectory can be identified. As noted above, continental European judicial systems traditionally prohibited separate opinions, viewing judicial opinions as authoritative pronouncements of a collective institution.⁷⁵ In recent decades, however, continental European countries have become increasingly willing to permit separate opinions, either throughout their entire court systems⁷⁶ or in selective courts.⁷⁷ Scholars and policy-makers across the Continent have pushed for these

70 Brennan, *supra* note 57, at 435 (extolling dissents for contributing to the integrity of the judicial process); Scalia, *supra* note 9, at 35; Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 5 (2010); L’Heureux-Dube, *supra* note 10, at 512-13 (Canadian judge); Voss, *supra* note 8 (Arizona Court of Appeals Judge).

71 Carter, *supra* note 10, at 118; *see also* Ginsburg, *supra* note 70, at 4-5; Brennan, *supra* note 57, at 435-36; Scalia, *supra* note 9, at 36; Voss, *supra* note 8, at 653.

72 *See, e.g.*, Rory K. Little, *Reading Justice Brennan: Is There a “Right” to Dissent?*, 50 HASTINGS L.J. 683, 688 (1999) (claiming a constitutional right to dissent); Bergman, *supra* note 34, at 82-86 (highlighting the values advanced by dissents); Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996).

73 Edward McGlynn Gaffney Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 591 (1994). To be sure, occasional modern critics of separate opinions can be heard. *See* Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255 (1991). Moreover, Justice Ginsburg, though generally supportive of dissents, did suggest that “United States appellate judges might profitably exercise greater restraint before writing separately.” Ginsburg, *supra* note 41, at 134.

74 Little, *supra* note 72, at 690.

75 *See* Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607, 1611 (2005); Ginsburg, *supra* note 70, at 3. As Dieter Grimm put it, “Divergent solutions were not regarded as alternatives, but as errors.” Dieter Grimm, *Some Remarks on the Use of Dissenting Opinions in Continental Europe (Based on My German Experience)*, in GLOBAL CONSTITUTIONALISM I-1, I-1 (2008). An 1877 German proposal to permit dissenting opinions was rejected because dissents were deemed to be “incompatible with the authority of the courts and good relations between the judges.” Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMPAR. L. 197, 208 n.42 (1956) (quoting *Bericht der Kommission, in DIE GESAMMTEN MATERIALIEN ZU DEM GERICHTSVERFASSUNGSGESETZ* 72 (Carl Hahn ed., 1883)). As Garoupa and Ginsburg put it: “In civil law, there is a general conviction that each legal issue can have only one correct answer.” Tom Ginsburg & Nuno Garoupa, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT’L & COMPAR. L. 539, 547 (2011).

76 Raffaelli, *supra* note 13, at 21 (describing Danish reforms permitting separate opinions).

77 *Id.* at 22 (describing German judges sitting in ordinary courts as “bound to respect the secrecy of deliberations and votes” whereas “constitutional judges represent an exception to this rule”).

reforms, advancing largely the same arguments that eventually carried the day in the United States.⁷⁸ First, the claim that separate opinions positively influence the path of the law is particularly widespread.⁷⁹ Commentators throughout Europe have publicized examples of dissents becoming the law through subsequent cases or legislative reform.⁸⁰ Second, European scholars have successfully propounded the view that true authority cannot rest on secrecy⁸¹ and that democratic legitimacy is more effectively advanced in a transparent judicial system whose inner workings are accessible to the public.⁸² These arguments have had a profound impact on the legality and practice of separate opinions in continental Europe. Currently, only seven countries prohibit separate opinions across their judicial systems.⁸³ Moreover, now, European commentators, like their American counterparts, are very likely to maintain that the “positive effects” of dissents “cannot be denied.”⁸⁴

B. Following the Domestic Script: Separate Opinions in International Courts and Tribunals

When we turn to separate opinions in international courts, we find a familiar story of controversy followed by acceptance. Fierce debate initially surrounded separate opinions when the first international courts and tribunals were being established. One of the earliest treaties addressing the issue was the Hague Convention of 1899 on the Pacific Settlement of Disputes, and it adopted a compromise position: it allowed arbitrators to announce their disagreement with the award, but not to publish a dissenting

⁷⁸ As two examples, European proponents of separate opinions have praised them for enhancing collegiality and clarity. *Id.* at 10-11, 13-14. For clarity, see Council of Europe, *Report on Separate Opinions of Constitutional Courts* ¶ 17 (2018), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)030-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e).

⁷⁹ See Council of Europe, *supra* note 78, at 25; Grimm, *supra* note 75, at I-1, I-4; Marieta Safta, *The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction*, 5 PERSPS. OF BUS. L.J. 207, 211 (2016) (providing examples).

⁸⁰ See, e.g., Safta, *supra* note 79, at 211 (“Such situations can be also found in the case-law of the Constitutional Court of Romania.”); Alpaslan Altan, *The Role of Dissenting and Concurring Opinions in the Turkish Practice*, 4 CONST. L. REV. 116, 128-29 (2011) (discussing the same phenomenon in Turkey); Caroline Elisabeth Wittig, *The Occurrence of Separate Opinions at the Federal Constitutional Court: An Analysis with a Novel Database* (Oct. 27, 2016) (Dissertation, University of Mannheim) (on file with the Virginia Journal of International Law Association).

⁸¹ Raffaelli, *supra* note 13, at 13.

⁸² *Id.* at 13-15; Jutta Limbach, *Das Bundesverfassungsgericht und das Sondervotum*, 32 JRP 10, 11 (1999) (in relation to Germany); Wittig, *supra* note 80, at 63; Elena Safalero, *The Dissenting Opinion of Constitutional Court Judges – One of the Guarantors of the Court’s Independence*, 4 CONST. L. REV. 116, 121 (2011) (“The authority of a constitutional court’s decision, as we view it, is not based on the number of judges voting in favour or against it.”).

⁸³ Raffaelli, *supra* note 13, at 17.

⁸⁴ See Altan, *supra* note 80, at 130.

opinion.⁸⁵ Eight years later, however, even this limited right was eliminated.⁸⁶ The controversy over separate opinions returned with a vengeance both when the Statute of the Permanent Court of International Justice (PCIJ) was being drafted in 1920,⁸⁷ and later when revised in 1929.⁸⁸ But in the end, the right to dissent prevailed at both the PCIJ⁸⁹ and that Court's successor body, the International Court of Justice.⁹⁰

Once these battles had been fought, subsequent international courts unquestioningly accepted separate opinions. The human rights adjudicative bodies authorized separate opinions without debate,⁹¹ and many of their judges have made ample use of the right.⁹² The creators of the International Tribunal for the Law of the Sea likewise permitted separate opinions without controversy,⁹³ as did the creators of the international criminal tribunals.⁹⁴ The only exception is the European Court of Justice (ECJ),

85 Pacific Settlement of International Disputes (Hague, I) art. 52, July 29, 1899, 32 Stat. 1779, T.S. No. 392 (“The award, given by a majority of votes, is accompanied by a statement of reasons. It is drawn up in writing and signed by each member of the Tribunal. Those members who are in the minority may record their dissent when signing.”); IJAZ HUSSAIN, *DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT* 14 (1984).

86 Pacific Settlement of International Disputes (Hague, I) arts. 78–79, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536; HUSSAIN, *supra* note 85, at 15–16.

87 *See* HUSSAIN, *supra* note 85, at 18–22.

88 *See id.* 22–26; *see also* Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 937–40 (1942).

89 Statute of the Permanent Court of International Justice art. 57.

90 Statute of the International Court of Justice, art. 57 (“If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.”).

91 *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 45(2), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221; EUROPEAN COURT OF HUMAN RIGHTS, PREPARATORY WORK ON ARTICLES 45 AND 49 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 42 (Nov. 6, 1970); Inter-American Conference on Protection of Human Rights, *Minutes of the Sixth Session of Committee II, Nov. 19, 1969*, in 2 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, booklet 12, at 211, 215 (Thomas Buergenthal & Robert E. Norris eds., 1982) (noting that on November 19, 1969, the Sixth Session of Committee II approved the relevant provision of the American Convention on Human Rights “without any other observation” and on November 21, 1969, the Third Plenary Session for the Convention approved the provision “without observations”).

92 Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the “Black Box” of International Courts*, 40 MICH. J. INT’L L. 47, 90 (2018) (discussing the European Court of Human Rights’ “relatively frequent” practice of dissent); Ranieri Lima Resende, *Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?*, 17 NW. U. J. INT’L HUM. RTS. 25, 27 (2019) (noting the large number of individual opinions at the Inter-American Court of Human Rights).

93 A. O. ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* 221 (1987) (noting that article 30 of the Statute was “non-controversial”). Article 30(3) provides that “[i]f the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion.” Statute of the International Tribunal for the Law of the Sea, art. 30(3).

94 *See supra* text and note 19. The Tribunal provisions authorizing separate opinions appear at ICJY Statute art. 23(2); ICTR Statute art. 22(2); SCSL Statute art. 18; Rome Statute, *supra* note 21, at arts. 74(5), 83(4).

which requires secret deliberations and *per curiam* decisions.⁹⁵ But even the ECJ has been under increasing pressure to lift the ban of silence and permit judges to express their individual views.⁹⁶ Other international adjudicative bodies, indeed, have succumbed to similar pressure. For example, the World Trade Organization Appellate Body initially suppressed dissents,⁹⁷ but over time, the Appellate Body has begun departing from the norm of unanimity,⁹⁸ and now occasional Appellate Body decisions contain anonymous dissents.⁹⁹

Early normative debates over separate opinions in international bodies took account of their unique needs and the challenges inherent in international adjudication. Indeed, the most persuasive argument against authorizing separate opinions at the PCIJ centered on a uniquely international issue: the real and perceived independence of judges who bore the nationality of a litigant State. Specifically, some were concerned that, if judges' votes (and dissents) were public, then a judge from a litigant State would feel compelled to dissent to any award against their State.¹⁰⁰ Judges from litigant States would thereby appear to be agents of their States rather than independent judges.¹⁰¹ However, despite these legitimate concerns, the

⁹⁵ See Treaty Establishing the European Coal and Steel Community, Protocol on the Statute of the Court of Justice art. 2, 29, Apr. 18, 1951, 261 U.N.T.S. 140 (requiring secret deliberations and that judges take an oath to preserve their secrecy).

⁹⁶ In 2012, the European Parliament's Committee on Legal Affairs commissioned a report examining the practices concerning separate opinions in national courts of member states, after numerous scholars urged the court to reconsider its longstanding practice of maintaining "secrecy of individual opinions." Entrikin, *supra* note 32, at 128; see also Josef Azizi, *Unveiling the EU Courts' Internal Decision-Making Process: A Case for Dissenting Opinions?*, 12 ERA F. 49, 51 (2011) ("[T]ime and again the claim has been made that the publication of such dissenting opinions be admitted in proceedings before the EU judiciary."). The European Court of Justice maintained its prohibition on separate opinions following publication of the report. Entrikin, *supra* note 32, at 128-29.

⁹⁷ See Mark A. Pollack, *The New EU History: What's New, What's Missing?*, 28 AM. U. INT'L L. REV. 1257, 1308 (2013). The World Trade Organization expressly contemplated that votes of the Appellate Body would be anonymous. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, and its Working Procedures discourage even internal dissents; see Pollack *supra* note 97, at 1308.

⁹⁸ Pollack, *supra* note 97, at 1308.

⁹⁹ Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895, 895 (2006).

¹⁰⁰ ADVISORY COMMITTEE OF JURISTS, PROCÈS VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE 531 (1921).

¹⁰¹ HUSSAIN, *supra* note 85, at 19; see also R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L.Q. 788, 798 (1965). For this reason, some diplomats suggested that the right to dissent be available to all but national judges. HUSSAIN, *supra* note 85, at 22-23. Moreover, although these concerns did not carry the day at the PCIJ or the International Court of Justice, they are understood to underly the ECJ's norm of secret deliberations. Giulio Itzcovich, *The European Court of Justice*, in COMPARATIVE CONSTITUTIONAL REASONING 277, 284 (Andras Jakab et al. eds., 2017). Itzcovich believes that *per curiam* opinions have fostered "strong group identity and institutional culture . . . which hinders – although it cannot fully prevent – the risk of a judge acting as a docile instrument of his or her government. *Id.* For other commentators who advance or describe

creators of the PCIJ opted to permit separate opinions because they considered those opinions to be a valuable and necessary means of developing what was then a nascent, embryonic body of international law.¹⁰²

Proponents of separate opinions in international courts continue to credit them with positively influencing the law.¹⁰³ In addition, many of the most prevalent contemporary contentions regarding separate opinions revive the normative battles first fought in domestic jurisdictions. Some worry that dissents will impair collegiality on international courts,¹⁰⁴ for instance, whereas others accuse them of creating uncertainty and continuing litigation.¹⁰⁵ Still other commentators laud dissents for showing that international judges thoroughly considered their cases.¹⁰⁶ Finally, just as in the domestic context, legitimacy looms large in discussions of separate opinions. Whether discussing the ICJ, the ECJ, the European Court of Human Rights (ECtHR), or any other international court, opponents of separate opinions accuse them of undermining the court's authority and legitimacy¹⁰⁷ whereas supporters praise them for augmenting those values.¹⁰⁸

We turn now to the international criminal tribunals. It has now been nearly three decades since the international community created the first modern international courts to prosecute the authors of mass atrocities in

this view, *see* Julia Laffranque, *Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*, 9 JURIDICA INT'L 14, 17 (2004); Pollack, *supra* note 97, at 1269 (noting that ECJ judges have “guarded against the threat of Member State retaliation for adverse votes by adopting a strict rules of deliberating in secrecy and issuing only per curiam rulings with no dissenting votes or opinions”); Anand, *supra* note 101, at 791. In a similar vein, Edward Hambro asserts that national judges on the International Court of Justice, because they are permitted to dissent, feel “under the obligation” to do so and thereby find themselves in an invidious position “standing somewhere between independent judges and representatives of the party.” Edward Hambro, *Dissenting and Individual Opinions in the International Court of Justice*, 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 229, 233, 240 n.51 (1956–1957).

102 HUSSAIN, *supra* note 85, at 20.

103 Sluiter, *supra* note 19, at 197; MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 118 (1944).

104 Azizi, *supra* note 96, at 66 (“[T]he publication of dissenting opinions would dramatically impair the unique and unparalleled form of cooperation and cohesion which privileges and characterises the EU courts in comparison with many other international courts.”).

105 HUSSAIN, *supra* note 85, at 20.

106 Tom Ginsburg & Richard Mosk, *Dissenting Opinions in International Arbitration*, in LIBER AMICORUM BENGT BROMS 259 (1999); Anand, *supra* note 101, at 792.

107 HUSSAIN, *supra* note 85, at 16 (ICJ); Anand, *supra* note 101, at 789 (reporting on commentators who maintain that ICJ dissents “diminish the prestige of the Court” and “lower the persuasive value of the judgments and opinions”); Azizi, *supra* note 96, at 66 (ECJ).

108 Dumbauld, *supra* note 88, at 938 (arguing without dissents, the “prestige and authority” of the ICJ will suffer); Hemi Mistry, *The different sets of ideas at the back of our heads: Dissent and authority at the International Court of Justice*, 32 LEIDEN J. INT'L L., 293, 306 (2019); Cosette D. Creamer & Neha Jain, *Separate Judicial Speech*, 61 VA. J. INT'L L. 1, 53 (2020) (“When a judge is defending the integrity of the judicial institution or engaging in public outreach and education, this might strengthen the judiciary and safeguard the integrity of judicial decision-making process, rather than undermine it.”); Fred J. Bruinsma & Matthijs de Blots, *Rules of Law from Westport to Wladivostok - Separate Opinions in the European Court of Human Rights*, 15 NETH. Q. HUM. RTS. 175, 186 (1997) (noting that separate opinions can be “indispensable for the Court’s legitimation”).

such locations as Rwanda, the former Yugoslavia, Sierra Leone, and the Democratic Republic of the Congo. As noted in the Introduction, these courts and tribunals have spawned a massive body of scholarly literature, canvassing virtually every aspect of international criminal law theory and practice.¹⁰⁹ That said, international criminal law scholars and practitioners have largely ignored separate opinions. The Tribunals' statutory provisions authorizing separate opinions were adopted with virtually no discussion,¹¹⁰ and the Tribunals' practice of issuing separate opinions has generated virtually no comment.¹¹¹ The few scholars who have considered normative questions surrounding separate opinions, unsurprisingly, focused their attention on dissents' capacity to enhance the legitimacy of international criminal law. Nina Jørgensen and Alexander Zahar assert without support that separate opinions are valuable because "they help to reveal the deliberative process, thereby enhancing transparency and legitimacy."¹¹² Hemi Mistry and Neha Jain go further, devoting full-length articles to contending that dissents, and particularly those dissents that reflect a fundamental disagreement between the majority and the dissenters, strengthen the legitimacy of international criminal bodies and thereby enhance their capacity to pursue justice.¹¹³

This project aims to inform those contentions. Although authority and legitimacy are not values that can be precisely quantified, empirical methods can be employed to gain information about the concrete costs and benefits that separate opinions generate for international criminal law. The project as a whole will consider separate opinions from multiple angles, using methodologies similar to the empirical scholarship that has lately addressed separate opinions in American courts. To that end, it will consider various causes of separate opinions including characteristics of their authors (such as gender, geography, national judicial system, and their position at the international tribunal). It will also consider the impact of separate opinions—positive and negative, external and internal. This piece launches the project with two substantial contributions. First, Part III will provide foundational information about separate opinions in international criminal law. These statistics are both informative in themselves and also constitute the core components of many subsequent analyses. Second, Part IV, through a variety of empirical measures, assesses one of the most prominent normative claims made in support of separate opinions, both in the United

109 See *supra* note 24.

110 See *supra* note 19.

111 As noted in Part III, I am aware of two fairly small studies of separate opinions at the ICTY.

112 Nina H.B. Jørgensen & Alexander Zahar, *Deliberation, Dissent, Judgment*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 1151, 1156, 1191 (Göran Sluiter et al. eds., 2013).

113 Mistry, *supra* note 23, at 450-51; Jain, *supra* note 26, at 1163 (arguing that dissents are "a crucial legal device" that can create "a civic space for contestation that paradoxically shores up the legitimacy of the international criminal trial.").

States and internationally: that they influence the development of subsequent case law.

III. SEPARATE OPINIONS IN INTERNATIONAL CRIMINAL LAW: METHODOLOGY AND FOUNDATIONAL STATISTICS

At the foundation of this Article is my review of every separate opinion for every Trial and Appeals final judgment in every atrocity case of the four core international criminal tribunals: the ICTY, the ICTR, the ICC, and the SCSL.¹¹⁴ I am aware of two other articles that conducted some empirical analyses of separate opinions in international criminal law, but both considered separate opinions only at the ICTY, and they ended ten and fifteen years ago, respectively.¹¹⁵ Moreover, they conducted only limited analyses of these opinions.¹¹⁶

My dataset begins with the first judgments issued by the tribunals and extends until February 1, 2021. I would have liked also to include separate opinions from pretrial decisions and interlocutory appellate decisions, but practical constraints cautioned against doing so. Specifically, the Tribunals do not always provide access to intermediate decisions, so only by focusing on final judgments, all of which are available, could I ensure that I am presenting accurate statistics. At the same time, I recognize that pre-trial decisions and interlocutory appeals can feature important legal issues, and some did, particularly when the Tribunals first began hearing cases, and many issues needed resolving.¹¹⁷ Finally, I excluded from my dataset the

114 Although most final judgments addressed both the defendants' guilt and sentences (if convicted), some bifurcated the two so that the Tribunal issued two final judgments for a particular defendant or set of defendants: one for guilt and the other for sentencing. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadić, Case No. IT-94-1-Tbis-R117, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999). I counted each of these as a final judgment. Further, when the Appeals Chamber remanded a case for retrial, then that case generated more than one final judgment, each of which I included. *See, e.g.*, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Haradinaj et al., Case No. IT-04-84bis-T, Public Judgment with Confidential Annex (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2012).

115 *See* Alison Danner & Erik Voeten, *Who Is Running the International Criminal Justice System?* in WHO GOVERNS THE GLOBE? 35, 66 (D. Avant et al. eds., 2010) (considering ICTY separate opinions until March 2006); Sluiter, *supra* note 19, at 204.

116 Danner and Voeten used their data to empirically test two hypotheses: first whether ICTY judges from common law countries were more likely to issue separate opinions than ICTY judges from civil law countries and second whether judges whose previous experience was that of a judge were more likely to issue separate opinions. Danner & Voeten, *supra* note 115, at 66-69. I have pursued similar inquiries through my broader dataset and will discuss the results in a subsequent work. Sluiter does not conduct any statistical analyses but relies on the quantity of separate opinions and their unequal distribution across the judges to draw normative conclusions.

117 *See, e.g.*, Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Dissenting Opinion of Justice Robertson (Special

final judgments in the very small number of cases featuring individuals prosecuted for contempt or other offenses against the administration of justice. The attributes of these cases differed too significantly from the core work of the tribunals: atrocity cases. I will have more to say about specific aspects of my methodology as I delve into particular analyses, but a final over-arching methodological issue concerns peer review: in each area where I was required to make qualitative distinctions (for instance, as to whether a dissent concerned a factual disagreement or a legal disagreement), I cross-checked my conclusions with those of a research assistant who conducted the same analyses independently.

Now, I will provide and explain some foundational statistics. The final judgments of the four tribunals contain 289 separate opinions, 172 of which are dissents and 117 of which are concurrences. These separate opinions appear in 242 final judgments concerning 190 defendants. Many separate opinions are labeled “dissenting” or “concurring,” but some bear other appellations, including “declaration,”¹¹⁸ or the undistinguished “separate opinion.”¹¹⁹ Whatever its title, I considered a separate opinion to be a dissent when it disagreed with the majority’s conclusion on some legal or factual point. All other opinions I considered to be concurring. In some cases, a judge issued one opinion that contained both concurring and dissenting points. I treated such opinions as one dissent and one concurrence. I treated separate opinions that were joined by more than one judge as one opinion when calculating the number of separate opinions or the proportion of judgments featuring separate opinions.¹²⁰ A final complication arose in cases featuring more than one defendant. Because some judgments featured only one defendant whereas other judgments featured multiple defendants, I had to decide what was the relevant unit for my calculations. Specifically, my calculations could treat judgments as the relevant unit, such that I might ask what percentage of *judgments* featured a separate opinion. Alternatively, my calculations could treat defendants as the relevant unit, such that I might ask what percentage of *defendants’ cases* featured a separate opinion. In order to gain maximal relevant information, I ran many of my calculations both ways (i.e., using judgments as the

Ct. for Sierra Leone May 31, 2004); Prosecutor v. Hadžihasanović et al., Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Separate Opinion of Judge Shahabuddeen (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003). For that reason, my focus on final judgments has the greatest impact on ICC statistics because the ICC is the newest international tribunal in my dataset and has the fewest final judgments.

118 *See, e.g.*, Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-A, Judgment, Declaration of Judge Shahabuddeen (Int’l Crim. Trib. for the Former Yugoslavia May 3, 2006).

119 *See, e.g.*, Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, Joint Separate Opinion of Judges Vaz and Meron (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

120 In a subsequent piece, I analyze the relationship between separate opinions and certain demographic attributes of the judges who author them. For purposes of those analyses, I considered an opinion that is jointly signed by two judges to be authored by each of them.

relevant unit and using defendants as the relevant unit). When I used defendants as the relevant unit, I attributed a separate opinion to that defendant only when the separate opinion addressed issues relating to that particular defendant's case. The results of these two sets of analyses did not diverge markedly.

Tables 1 through 3 show the distribution of different kinds of separate opinions across the Trial and Appeals Chambers of the four Tribunals. As these tables indicate, separate opinions are prevalent across all tribunals and all chambers, but they are most prevalent in the Appeals Chambers. In particular, 138 Trial Chamber final judgments featured 83 separate opinions, for an average of .6 separate opinion per Trial Chamber judgment. By contrast, the 104 Appeals Chambers' final judgments featured a whopping 206 separate opinions, for an average of 2 separate opinions per Appeals Chamber judgment. Combined, Trial and Appeals Chamber judgments feature an average 1.2 separate opinions per judgments. Parsing the data in a different way, Tables 4 through 6 show that 78% of Appeals Chamber final judgments contain at least one separate opinion compared to only 37% of Trial Chamber final judgments. Combined, 52% of the 242 total judgments featured at least one separate opinion.¹²¹

Counts of Trial Chamber Judgments & Separate Opinions					
	ICTY	ICTR	SCSL	ICC	Totals
Final Judgments	66	53	8	11	138
Dissents	23	18	8	5	54
Concurrences	14	4	4	7	29
Total Separate Opinions	37	22	12	12	83

Table 1

¹²¹ By American standards, this is a large proportion of separate opinions. Although about two-thirds of U.S. Supreme Court opinions feature a separate opinion, *see supra* text at note 36, only about 10% of published federal court of appeals opinions do, and the percentage is lower if we include unpublished decisions. Virginia A. Hettinger, Stefanie Lindquist & Wendy Martinek, *Separate Opinion Writing on the United States Courts of Appeals*, 31 AM. POL. RSCH. 215 (2003). By contrast, a comparable proportion of human rights court judgments are not unanimous. *See, e.g.*, Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS L. REV. 37, 50 (2009); Resende, *supra* note 92, at 41 (2019).

Counts of Appeals Chamber Judgments & Separate Opinions					
	ICTY	ICTR	SCSL	ICC	Totals
Final Judgments	53	44	3	4	104
Dissents	59	48	6	5	118
Concurrences	55	27	4	2	88
Total Separate Opinions	114	75	10	7	206

Table 2

Counts of Combined Trial and Appeals Chamber Judgments & Separate Opinions					
	ICTY	ICTR	SCSL	ICC	Totals
Final Judgments	119	97	11	15	242
Dissents	82	66	14	10	172
Concurrences	69	31	8	9	117
Total Separate Opinions	151	97	22	19	289

Table 3

Percentages of Trial Chamber Judgments with Separate Opinions					
	ICTY	ICTR	SCSL	ICC	Totals
Judgments with at least 1 Dissent	29%	28%	63%	45%	32%
Judgments with at least 1 Concurrence	17%	8%	38%	55%	18%
Judgments with at least 1 Dissent and Concurrence	14%	6%	38%	27%	13%
Judgments with no separate opinions	68%	70%	38%	27%	63%

Table 4

Percentages of Appeals Chamber Judgments with Separate Opinions					
	ICTY	ICTR	SCSL	ICC	Totals
Judgments with at least 1 Dissent	64%	59%	67%	100%	63%
Judgments with at least 1 Concurrence	66%	39%	67%	25%	53%
Judgments with at least 1 Dissent and Concurrence	47%	27%	33%	25%	37%
Judgments with no separate opinions	17%	30%	33%	0%	22%

Table 5

Percentages of Trial and Appeal Chamber Judgments with Separate Opinions					
	ICTY	ICTR	SCSL	ICC	Totals
Judgments with at least 1 Dissent	44%	41%	65%	69%	44%
Judgments with at least 1 Concurrence	38%	21%	50%	42%	31%
Judgments with at least 1 Dissent and Concurrence	28%	15%	36%	26%	23%
Judgments with no separate opinions	46%	53%	36%	15%	48%

Table 6

Finally, as noted above, the proportions of separate opinions can be calculated by judgment or by defendant. When I performed the above calculations on a per-defendant basis,¹²² the proportion of separate opinions increased slightly. Whereas 52% of all judgments featured at least one separate opinion, 54% of defendants' cases featured a separate opinion.

IV. INFLUENCING THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE: THE IMPACT OF SEPARATE OPINIONS

As discussed above, supporters of separate opinions frequently credit them with helping to shape the law. A position advanced in a separate

¹²² Typically, each defendant appeared in only one case. But on a few occasions, the same defendant appeared more than once either because the Chamber issued a separate judgment for the defendant's sentencing or because the defendant was retried. I counted each of these judgments as a separate appearance.

opinion is obviously not the law at the time it is published, but it has the potential to sway subsequent courts, legislatures, or other decision-making bodies.¹²³ As Chief Justice Hughes put it: “A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”¹²⁴ Indeed, as recently as September 2020, a proponent of separate opinions confidently asserted that: “dissenting opinions are integral to the law’s development, and if judges do not dissent, the law does not develop efficiently.”¹²⁵

That bold normative claim has not been substantiated in empirical studies of American dissents. There has been little effort to quantify the impact of separate opinions on later American cases,¹²⁶ but what studies have been undertaken do not support a positive role for separate opinions in developing the law. Epstein, Landes and Posner, for instance, counted citations to dissents to measure their influence and determined that “dissents are rarely cited either inside or outside” the relevant jurisdiction.¹²⁷

This Part seeks to evaluate the influence of separate opinions on the development of international criminal law. It does so through both quantitative and qualitative methods. Section A begins by quantifying the most direct influence that a separate opinion can have: over a decision by a higher court in the same case. That discussion is necessarily limited to Trial Chamber separate opinions, and it reveals that only a small proportion of them advance positions later adopted on appeal and that the causal relationship between the separate opinion and the Appeals Chamber decision is uncertain at best. Sections B and C widen our lens and consider the impact of separate opinions on subsequent cases both within the relevant jurisdiction and outside of it. Section B assesses the influence of international criminal law separate opinions through a tried-and-true measure: citation counts. These reveal that international criminal law separate opinions, like their American counterparts, are rarely cited within or outside of the relevant jurisdiction, particularly in comparison to citations to majority opinions. But Section B goes beyond presenting average cite counts for separate opinions and majority opinions. Instead of using computer-generated means of counting citations, I hand-counted and read

123 See *supra* text at notes 61-66; Marshall A. Bowen & Xan I. Flowers, *Making Use of Dissenting Opinions*, BUTLER SNOW: BIZLITNEWS BLOG (Nov. 10, 2020), <https://www.butlersnow.com/2020/11/making-use-of-dissenting-opinions/>.

124 Jacob M. Lashly & Paul B. Rava, *The Supreme Court Dissents*, 28 WASH. U. L. Q. 191, 192 (1943).

125 Zekri, *supra* note 66, at 9.

126 See, e.g., Peterson, *supra* note 27, at 412 (canvassing the large body of empirical research on dissents but failing to mention studies assessing their impact on later cases).

127 Lee Epstein, William M. Landes, & Richard A. Posner, *Why (And When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 102 (2011).

each citation in context in order to gain a more nuanced understanding of the relevance of the citation and the impact of the separate opinion. As Section B will describe, my quantitative and qualitative review of separate opinion citations reveal that these opinions have less influence than their citation count would suggest.

Finally, Section C considers the influence of separate opinions on subsequent cases through quantitative and qualitative analyses of their content. Subsection 1 begins by drawing a particularly relevant distinction between dissents featuring factual disagreements and dissents featuring legal disagreements. As we will see, factual dissents have dramatically more limited potential influence, so Subsection 1's classification of separate opinions as factual, legal, or both provides valuable information about their possible impact. Next, Subsections 2 and 3 focus exclusively on the separate opinions' legal content. Subsection 2 considers the rare instances where positions advanced in a separate opinion became the law in a subsequent case. Finally, Subsection 3 considers the potential influence of separate opinions by examining their subject matter. Indeed, Subsection 3 provides the first-ever consideration of the legal issues appearing in the Tribunals' 289 separate opinions. Within those 289 separate opinions, I identified discussions of several hundred legal issues and classified those discussions into 83 sub-categories in order to ascertain the legal subjects most commonly appearing in the separate opinions. This analysis reveals that although international criminal law separate opinions do address some topics of widespread or continuing interest, most of the most popular topics are anything but. In sum, Subsection 3's conclusions are in keeping those of the rest of this Part: separate opinions have had only minimal impact on the development of international criminal law.

A. The Impact of Separate Opinions in Subsequent Proceedings in the Same Case

Although separate opinions can be influential in a host of ways, this Section will seek to quantify what arguably is their most direct impact: over the decisions of higher courts in the same case. I will begin with my conclusion: 86% of Trial Chamber separate opinions had no impact on Appeals Chamber judgments in the same case whereas 14% advanced a position that was adopted on appeal. Concurrences were particularly unimportant: Not a single Trial Chamber concurrence advanced a point that was accepted on appeal. Dissents fared better: 22% of Trial Chamber dissents advanced at least one argument that was adopted on appeal. Table 7 shows the distribution across the four Tribunals. In a somewhat related inquiry, Table 8 shows the percentage of Appeals Chamber reversals that featured arguments raised in Trial Chamber dissents: 14%.

Percentage of Trial Chamber Separate Opinions Advancing a Position Adopted on Appeal					
	ICTY	ICTR	SCSL	ICC	All
Concurrences	0%	0%	0%	0%	0%
Dissents	30%	11%	38%	0%	23%
All Separate Opinions	19%	9%	25%	0%	14%

Table 7

Percentage of Appeals Chamber Reversals Featuring an Argument Advanced in a Trial Chamber Dissent				
ICTY	ICTR	SCSL	ICC	All
16%	6%	50%	0%	14%

Table 8

The statistics appearing in Tables 7 and 8 were calculated on a per judgment basis; that is, I treated each judgment as the relevant unit regardless of the number of defendants in the case or the number of defendants to which a separate opinion applied. In order to be comprehensive, I re-ran the calculations after allocating appellate reversals and Trial Chamber dissents to their respective individual defendants in multi-defendant cases. However, the results were very similar. Specifically, when considering dissents by defendant (instead of dissents by judgment), I found that 18% of Trial Chamber separate opinions featured a position later adopted in an Appeals Chamber reversal,¹²⁸ whereas 16% of Appeals Chamber reversals contained a position raised in a Trial Chamber dissent.¹²⁹

That 14% of Trial Chamber separate opinions advanced a position later adopted on appeal suggests that a small percentage of separate opinions may exert some influence on Appeals Chamber judgments in the same case. However, additional factors indicate that the influence may be less than the statistics would suggest. For one thing, many of the 14% of separate opinions that advanced at least one argument which the Appeals Chamber accepted also advanced a passel of other arguments that the Appeals

¹²⁸ Again, 0% of concurrences contained points adopted in Appeals Chamber reversals, but 27% of Trial Chamber dissents by defendant contained points adopted on appeal.

¹²⁹ In particular, 12 out of 73 ICTY appellate reversals were based on positions advanced in a Trial Chamber separate opinion. The statistics were 2 out of 45 at the ICTR; 6 out of 9 at the SCSL, and 0 of 1 at the ICC.

Chamber rejected.¹³⁰ Moreover, the fact that an appeals court adopts a position advanced in a trial court dissent does not prove a causal relationship between the dissent and the appeals court's conclusion; this caveat seems particularly relevant here because 10 of the 12 Appeals Chambers that adopted a position advanced in their Trial Chamber's dissents made no mention of the dissents in their analysis of the issues.¹³¹ Finally, I calculated reversal rates and determined that Appeals Chambers reverse unanimous Trial Chamber judgments at roughly the same rate that they reverse Trial Chamber judgments with separate opinions. Specifically, Appeals Chambers reversed in whole or in part 74% of the unanimous Trial Chamber judgments that were appealed, whereas they reversed 79% of the non-

130 For instance, the *AFRC* Appeals Chamber adopted Judge Doherty's dissenting views on forced marriage, *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, Judgment, ¶¶ 181-203 (Special Ct. for Sierra Leone Feb. 22, 2008), but not her dissenting views on indictment duplicity. *Id.* ¶ 99-110. Similarly, the *Popović* Appeals Chamber reversed the Trial Chamber on two points raised in Judge Kwon's Trial Chamber dissent, *see Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, ¶ 1069 (Jan. 30, 2015) (reversing murder convictions that failed to fall within the scope of joint criminal enterprise; *id.* ¶ 2026 (finding that factors considered in establishing the gravity of the crime cannot be considered as separate aggravating circumstances). But it affirmed the Trial Chamber on several other points raised in Judge Kwon's dissent. *See, e.g., id.* 72, 130, 1996 (disregarding the points raised in Kwon's dissent regarding the Trial Court's admission of evidence pursuant to Rule 92bis(D), indictment notices, and Pandurević's sentence). Finally, Judge Nyambe would have acquitted Zdravko Tolimir of all offenses and penned a nearly 20,000-word dissent to support her position. *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, Dissenting and Separate Concurring Opinions of Judge Prisca Nyambe (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012). The *Tolimir* Appeals Chamber adopted a few of her positions but affirmed Tolimir's conviction in all other respects and left his sentence unchanged. *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, at Disposition (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

131 The two that did cite the Trial Chamber dissents were *Tadić*, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 85, 111, 148 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), and *AFRC*, *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-A, Judgment, ¶¶ 193-194 (Special Ct. for Sierra Leone Feb. 22, 2008). The Appeals Chambers certainly were aware of the Trial Chamber dissents, not least because litigants in at least ten of the twelve cases cited the dissents in support of their claims. *See Prosecutor v. Perišić*, Case No. IT-04-81-A, Momčilo Perišić's Notice of Re-Classification and Re-Filing of the Public Redacted Version of Appeal, 22 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 10, 2012); *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Prosecution's Appeal Brief, ¶ 74 n.174 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 21, 2009); *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, ¶¶ 99, 1060, 1885 & n.5338 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, ¶¶ 416, 418 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); *Prosecutor v. Šešelj*, Case No. IT-03-67-A, J, Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, ¶ 16 (*Prosecutor v. Šešelj* Aug. 29, 2016); *Ndahimana v. Prosecutor*, Case No. ICTR-01-68-A, Judgment, ¶ 90 n.232 (Int'l Crim. Tribunal for Rwanda Dec. 16, 2013); *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgment, ¶ 123 (Int'l Crim. Tribunal for Rwanda July 7, 2006); *Prosecutor v. Sesay et al.*, Case No. SCSL-04-14-A, Corrected Redacted Grounds of Appeal, ¶¶ 354, 359 (Special Ct. for Sierra Leone June 15, 2009); *Prosecutor v. Sesay et al.*, Case No. SCSL-04-14-A, Judgment, ¶ 173 (Special Ct. for Sierra Leone Oct. 26, 2009); *Prosecution v. Brima et al.*, Case No. SCSL-04-16-A, Appeal Brief of the Prosecution (Special Ct. for Sierra Leone Sept. 13, 2007). I strongly suspect that the Prosecutor in *Tadić* also cited the dissent in that case, but I have not been able to gain access to the Prosecutor's brief in *Tadić*. The one litigant whom we know did not cite the Trial Chamber dissent did not need to because the Appeals Chamber had just issued an opinion reaching the litigant's preferred conclusion in another case, so the litigant could cite that case instead. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

unanimous Trial Chamber judgments that were appealed. Indeed, the fact that Appeals Chambers reversed in whole or in part nearly three quarters of unanimous Trial Chamber judgments shows that Appeals Chambers are perfectly capable of finding fault with Trial Chamber judgments without a dissent to shine a light on alleged errors. Table 9 shows the distribution of these reversals.

Unanimous and Non-Unanimous Trial Chamber Judgments Reversed on Appeal					
	ICTY	ICTR	SCSL	ICC	Totals
Appealed Unanimous Trial Chamber Judgments	37	29	1	2	69
Appeals Chamber Reversals of Unanimous Trial Chamber Judgments	29 (78%)	20 (69%)	1 (100%)	1 (50%)	51 (74%)
Appealed Non-unanimous Trial Chamber Judgments	15	13	3	2	33
Appeals Chamber Reversals of Non-unanimous Trial Chamber Judgments	14 (93%)	9 (69%)	3 (100%)	0 (0%)	26 (79%)

Table 9

B. The Impact of Separate Opinions by Citation Count

Section A showed that only a small proportion of Trial Chamber separate opinions have even a potential impact on subsequent proceedings in the same case. This Section seeks to measure the impact of separate opinions through citation counts. Admittedly, citation counts stand as an imperfect measurement of influence, as we can never be sure why an author cites one source instead of another or fails to cite any source at all.¹³² At the same time, scholars of American separate opinions generally assume that citations to separate opinions correlate with the influence of those opinions. As Epstein et al. put it: “We assume that the more citations to an opinion, the greater its influence is likely to be in shaping the law.”¹³³

This Section contains two sets of citations counts, discussed in the following two subsections. First, to gain a greater understanding of citations

¹³² See, e.g., GLEIDER HERNANDEZ, *THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION* 113 (2014).

¹³³ Epstein et al., *supra* note 127, at 126.

to separate opinions in themselves, I canvassed the entire body of international criminal tribunal final judgments and counted citations to separate opinions. I did not use mechanical measures; rather, I read each citation to a separate opinion in order to understand the context and classify it into a scheme described in Subsection 1 below. Next, Subsection 2 employs a random sampling to compare citations to majority opinions with citations to separate opinions. This comparison is necessary because without it, we cannot ascertain the significance of a low citation count. That is, a low citation count for separate opinions could mean that separate opinions have little influence, but it could instead mean that ICL judgments generally cite few sources. The citation counts and comparisons appearing in Subsections 1 and 2, however, strongly suggest the influence of separate opinions on the case law of the international tribunals, at least as proxied by citations, is minimal.

1. Citations to Separate Opinions by Numbers, Locations, and Reasons

The citation count described in this subsection centers exclusively on citations to the separate opinions in my database. I begin with a few words on methodology. For purposes of this count, I did not take a sampling but rather canvassed every page of every Trial Chamber and Appeals Chamber final judgment of the ICTY, ICTR, SCSL, ICC, as well as the Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).¹³⁴ To be sure, separate opinions might influence international criminal law through other measures, including domestic mass atrocity prosecutions and scholarship. So, in an ideal world, citations to additional sources such as these would also have been canvassed. But because I placed considerable value on reading each citation in context and because the final judgments of all of the international criminal tribunals themselves ran to tens of thousands of pages, I had to limit myself to these judgments. Finally, I focused on international criminal tribunal final judgments primarily as a result of practical constraints, but I also believe the scope of the study is justified because the vast bulk of international criminal law jurisprudence is contained in international criminal tribunal final judgments. So, if we conclude that separate opinions have not had much influence in those judgments, then it is fair to say that they have not had much influence in the development of international criminal law.

As for the mechanics of the citation count, I counted each citation to a separate opinion. Thus, if a judgment cited a separate opinion three times,

¹³⁴ I did not include separate opinions from the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia in my database because the Special Tribunal issued a final judgment in only one atrocity case, and the Extraordinary Chambers issued final judgments in only two, so their samples were too small to be useful.

then in virtually every instance, I counted that as three citations. The only (rare) exception was when a judgment cited a separate opinion for exactly the same point in successive footnotes. Because I was reading each citation and seeking to understand its influence and purpose, I very occasionally counted such back-to-back citations for the same proposition as one when they appeared to result from footnoting conventions and in substance signified only one reference to the separate opinion.

For the calculations appearing in Part III, I treated a separate opinion containing both dissenting points and concurring points as one dissent and one concurrence. That level of distinction was prohibitively costly for purposes of these citation counts, so for the calculations appearing in this subsection, I treated each separate opinion as one separate opinion but classified it as a dissent, concurrence, or “both,” with “both” referring to separate opinions that contained both dissenting and concurring points. Finally, a few words on timing. Scholars of American dissents can pick a random time period and reasonably assume that citations to those dissents will be relatively constant from the beginning of that time period to the end. The same is not true for citation counts of international criminal law separate opinions, however, because some tribunals were created more recently while others have already completed their work. For instance, the ICTY and ICTR began issuing judgments in the late 1990s. Because they were the first modern tribunals to prosecute international crimes, their first cases had few previous separate opinions to cite. At the same time, the separate opinions of those early cases have the potential to be more widely cited than the separate opinions of later cases simply because more time has elapsed since the former’s publication. As a result of this variance, I used two sets of separate opinions for my initial calculations. The first set contains all of the separate opinions in my dataset (that is, all of the separate opinions from all of the ICTY, ICTR, SCSL, and ICC final judgments until February 1, 2021). The second set excludes separate opinions published in the five years prior to the end of my study (i.e., after February 1, 2016). The separate opinions of the ICTR and SCSL were the same in both sets because all of the ICTR and SCSL final judgments had been issued by February 1, 2016. The second dataset did exclude some ICTY and ICC separate opinions; however, the impact of these exclusions counteracted each other,¹³⁵ so that my counts using both datasets produced virtually identical

¹³⁵ Most of the most recent ICTY separate opinions have not yet been cited so eliminating them from the database increased the proportion of separate opinions that have been cited. But eliminating the most recent ICC separate opinions had the opposite effect, because a greater proportion of recent ICC separate opinions have been cited than older ICC separate opinions. Because these two eliminations cancelled each other out, as it were, excluding the most recent five years of separate opinions barely changed the overall results.

results, as I will discuss below.¹³⁶ For that reason, I employed only the comprehensive dataset for the remainder of my calculations.

Whether we include all of the separate opinions appearing in my database or we exclude the separate opinions published in the last five years, we find that just more than half (53% or 54%) have been cited at least once.¹³⁷ The proportion of separate opinions that have been cited at least once is virtually indistinguishable between Trial and Appeals Chambers, with 54% of all Trial Chamber separate opinions cited at least once compared to 52% of all Appeals Chamber separate opinions.¹³⁸ By contrast, ICTY separate opinions are more likely to be cited than the separate opinions of other tribunals, and this divergence increases when we exclude separate opinions published within the last five years. Specifically, 63% of all ICTY separate opinions have been cited at least once, whereas the percentages for all of the separate opinions of the ICTR, SCSL, and ICC are 41%, 44%, and 53% respectively. When we exclude separate opinions of the most recent five years, we find that 68% of ICTY separate opinions have been cited at least once, compared to 41%, 44%, and 36% of ICTR, SCSL, and ICC separate opinions, respectively.

Of the three kinds of separate opinions (dissents, concurrences, and separate opinions that have elements of both), dissents are the least likely to be cited, and separate opinions that have both dissenting and concurring elements are most likely to be cited. Indeed, nearly two-thirds of “both” opinions have been cited at least once. That compares with 47% of dissents and 56% of concurrences.¹³⁹ Table 10 displays these statistics by tribunal and chamber.

¹³⁶ This rough equivalence may have been predictable. Some scholars have observed that “[a]lthough an older case has more opportunity for citation, . . . citations to cases decline over time.” Kevin M. Morrow, *Dissents of the Bench Court: Empirical Analysis of Unanimity in a State Supreme Court*, 82 ALB. L. REV. 1661, 1670 (2019).

¹³⁷ 53% of all separate opinions have been cited at least once whereas 54% of separate opinions published before February 1, 2016 have been cited at least once.

¹³⁸ When I excluded separate opinions published after February 1, 2016, the divergence between Trial and Appeals Chamber grew, but not by much. In particular, 59% of Trial Chamber separate opinions were cited at least once whereas 53% of Appeals Chamber separate opinions were cited at least once.

¹³⁹ The dataset that excluded the most recent 5 years of separate opinions produced the same basic statistics. Specifically, 48% of dissents were cited at least once compared with 55% of concurrences and 74% of separate opinions that have both dissents and concurrences.

Separate Opinions Cited at Least Once									
	ICTY TC	ICTY AC	ICTR TC	ICTR AC	SCSL TC	SCSL AC	ICC TC	ICC AC	Total
Number of Dissents	17	43	17	38	6	4	5	5	135
Dissents cited at least once	8 (47%)	28 (65%)	8 (47%)	13 (34%)	3 (50%)	0 (0%)	2 (40%)	2 (40%)	64 (47%)
Number of Concurrences	8	39	3	17	3	2	7	2	81
Concurrences cited at least once	5 (63%)	24 (62%)	2 (67%)	6 (35%)	1 (33%)	1 (50%)	4 (57%)	2 (100%)	45 (56%)
Number of “Both” Opinions	6	16	1	10	1	2	0	0	36
“Boths” cited at least once	5 (83%)	11 (69%)	1 (100%)	5 (50%)	1 (100%)	2 (100%)	N/A	N/A	25 (69%)
Total number separate opinions	31	98	21	65	10	8	12	7	252 ¹⁴⁰
Total separate opinions cited at least once	18 (58%)	63 (64%)	11 (52%)	24 (37%)	5 (50%)	3 (38%)	6 (50%)	4 (57%)	134 (53%)

Table 10

Of the 53% of separate opinions that have been cited, many have been cited multiple times. Indeed, the number of citations per separate opinion ranged from zero to 37,¹⁴¹ though if a separate opinion was going to be cited at all, it was more likely to be cited once than any other number of times.¹⁴² On average, each separate opinion was cited 2.25 times, but these statistics belie interesting differences both between tribunals and between different kinds of separate opinions. They also reveal similarities when we might expect differences. As for the latter point, I expected Appeals Chamber separate opinions to be more heavily cited than Trial Chamber separate opinions. Appeals Chamber majority and separate opinions were more heavily cited in my sample set, which was to be expected given that Appeals Chamber opinions of any sort are more authoritative than Trial Chamber

¹⁴⁰ For purposes of this calculation, I treated each separate opinion as one even if it had both concurring and dissenting elements.

¹⁴¹ The 37 citations of Judge Antonetti’s Trial Chamber dissent in *Prlić* are a clear outlier. Indeed, 25 of the 37 citations reflected litigant invocations of the dissent and 11 of the 12 remaining citations involved the Appeals Chamber rejecting the dissent. The final citation was advanced by Judge Antonetti himself in a different separate opinion.

¹⁴² Of the 135 separate opinions that were cited at least once, 44 (or 33%) were cited exactly once.

opinions of the same sort. In addition, Appeals Chamber separate opinions contain a higher proportion of legal issues than Trial Chamber separate opinions, and legal issues generalize to other cases more readily. In fact, however, the rate of citation is virtually identical, with the average Trial Chamber separate opinion cited 2.2 times and the average Appeals Chamber separate opinion cited 2.3 times.¹⁴³ When, later in this subsection, we classify citations by their authors and purposes, we will explain this unexpected similarity.

Citation rates did differ, however, between different kinds of separate opinions. Concurrences are cited the least frequently, garnering on average 1.6 citations per concurrence, compared to 2.1 citations per dissent. But separate opinions that contain both concurring and dissenting positions generated a whopping average 4.4 citations per opinion. We also see significant differences in the citation rates of separate opinions from the different tribunals. In particular, the average ICTY separate opinion generates almost twice the number of citations as the average ICTR and ICC separate opinion and nearly 4 times the number of the average SCSL separate opinion.¹⁴⁴ Another interesting facet of these statistics is the relatively high citation count for ICC separate opinions. The ICC is not only a newer court (so its separate opinions have had less time to be cited) but it has also been floundering in a variety of ways.¹⁴⁵ Consequently, it is unexpected but impressive that its more recent separate opinions have garnered the same average citation-count as the much older ICTR separate opinions. Finally, as Section A reported, 12 Trial Chamber separate opinions advanced positions that were later adopted on appeal. One might expect these separate opinions to have generated greater-than-average citations, and they did but only slightly more: they averaged 2.4 citations per opinion compared to an average of 2.25 for all separate opinions. Moreover, two of

¹⁴³ But this facial equivalence may be misleading. As will be discussed below, Trial Chamber separate opinions are more likely to be cited by litigants, and it is these (almost valueless) citations that could be driving up their citation count.

¹⁴⁴ ICTY separate opinions generate an average 2.9 citations per opinion. ICTR and ICC separate opinions generate an average 1.6 citations per separate opinion. SCSL separate opinions generate only an average .77 citations per separate opinion. The low rate of citation for SCSL cases may be explained by the small number of SCSL cases and separate opinions.

¹⁴⁵ See Douglas Guilfoyle, *Part I- This is not fine: The International Criminal Court*: J. INT'L L.: EJIL: TALK! (Mar. 21, 2019), <https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/>; Mark Kersten, *Why the ICC Should have Opened an Investigation into Afghanistan. And How it could Win a Confrontation with Washington*, JUSTICE IN CONFLICT (Apr. 12, 2019), <https://justiceinconflict.org/2019/04/12/why-the-icc-should-have-opened-an-investigation-into-afghanistan-and-how-it-could-win-a-confrontation-with-washington/>; Kerstin Carlson, *Gbagbo's acquittal suggests confusion and dysfunction at the ICC*, THE CONVERSATION (Jan. 23, 2019, 9:34 AM), <http://theconversation.com/gbagbos-acquittal-suggests-confusion-and-dysfunction-at-the-icc-110200>; Patryk Labuda, *The ICC's 'evidence problem': The future of international criminal investigations after the Gbagbo acquittal*, VÖLKERRECHTSBLOG (Jan. 18, 2019), <https://voelkerrechtsblog.org/the-iccs-evidence-problem/>.

the 12 generated a much larger number of citations than average,¹⁴⁶ thereby driving up the group average. Finally, and most importantly, as we will discuss next, not all citations are created equal, and the vast majority of the citations to these opinions were citations that may not reflect influence.¹⁴⁷

Table 11 displays the cite counts across different kinds of separate opinions, different chambers, and different tribunals.

Citation Counts to Dissents, Concurrences, and “Both” Separate Opinions									
	ICTY TC	ICTY AC	ICTR TC	ICTR AC	SCSL TC	SCSL AC	ICC TC	ICC AC	Total
Total # of Dissents	17	43	17	38	6	4	5	5	135
Citations to Dissents	24 (1.4)	143 (3.3)	23 (1.4)	63 (1.7)	17 (2.8)	0	6 (1.2)	6 (1.2)	282 (2.1)
Total # of Concurrences	8	39	3	17	3	2	7	2	81
Citations to Concurrences	10 (1.3)	63 (1.6)	4 (1.3)	26 (1.5)	2 (0.7)	1 (0.5)	11 (1.6)	9 (4.5)	126 (1.6)
Total # of Both Opinions	6	16	1	10	1	2	0	0	36
Citations to Both Opinions	57 (9.5)	72 (4.5)	6 (6)	18 (1.8)	2 (2)	4 (2)	N/A	N/A	159 (4.4)

Table 11

Table 11’s statistics are themselves instructive, but I also gathered additional information about each citation in order to gain a more nuanced sense of its actual influence. Indeed, instead of simply counting citations, I read each citation in context to determine (1) who was citing the separate opinion and (2) for what purpose. I then classified citations accordingly. Specifically, the judgments of the six Tribunals that I canvassed (the ICTY, ICTR, SCSL, ICC, ECCC, and STL) cited the separate opinions in my dataset 567 times. I classified those 567 citations into the following seven categories.

1. Citations by majority opinion in the same case
2. Citations by separate opinion in the same case

¹⁴⁶ Judge Boutet’s dissent to the *RUF* Trial Chamber Judgment and Judge McDonald’s dissent in *Tadić* were cited 12 and 8 times, respectively.

¹⁴⁷ The twelve dissents generated twenty-nine citations, but only seven of the citations appeared in majority opinions, and six of those cited only one dissent: Judge McDonald’s in *Tadić*.

3. Citations by majority opinion in a different case
4. Citations by separate opinion in a different case
5. Citations by a litigant (in the same or different case)
6. Citations by the author of the cited separate opinion
7. Citations for the purpose of rejecting the separate opinion

A cursory review of the categories shows that some citations could fall into more than one category, but I placed citations into the most specific category into which they fell. Majority opinions, for instance, typically report when litigants invoke a separate opinion in support of the litigant's claim, but even though such a citation is technically a citation by a majority opinion, I classified it as a citation by a litigant if the citation was only to a description of a litigant's claim. If the majority itself later cited the opinion, then I categorized that second citation as "by a majority opinion." And, unsurprisingly, if the majority cited the separate opinion only to reject the points made therein, I classified that citation as a "rejection." Similarly, a citation to a separate opinion by the author of the separate opinion could fall into the category of "separate opinion in another case," but I classified it into the more specific category of "author of the cited opinion."

Another quick review of the categories gives rise to certain, fairly obvious, expectations. For instance, we would expect more Trial Chamber separate opinions to be cited by opinions in the same case than Appeals Chamber separate opinions because Trial Chamber separate opinions can be cited by Appeals Chamber opinions as well as the Trial Chamber case in which the separate opinion appears. By contrast, if an Appeals Chamber separate opinion is going to be cited by opinions in the same case, then it can be cited only by other Appeals Chamber opinions in that case. We also might expect Trial Chamber separate opinions to be more frequently cited by litigants because litigants are especially apt to invoke favorable separate opinions in their appeal. My citation counts reflect these predictions. Specifically, 25% of the citations to Trial Chamber separate opinions appeared in the same case compared to 10% of the citations to Appeals Chamber separate opinions. Even more divergently, nearly half (48%) of the citations to Trial Chamber separate opinions were by litigants compared to only 10% of the citations to Appeals Chamber separate opinions.

For our purposes, however, the most noteworthy comparisons are between categories of citations that reflect endorsement of the cited proposition in the separate opinion and categories that do not. These categories fall on something of a continuum with majority opinions reflecting the greatest endorsement/influence. When majority opinions cite a separate opinion for some proposition, the citation indicates that the separate opinion has exerted influence on the judgment. At the other end of the continuum are citations that specifically reject propositions appearing in

the separate opinion. If anything, these citations bespeak a negative influence. Next to rejection citations, at the uninfluential end of the continuum, are citations by the authors of cited separate opinions. These typically appear when a dissenting judge reiterates a position he advanced in previous dissents. Judge Pocar, for instance, dissented every time the Appeals Chamber entered a conviction on appeal, arguing that the Appeals Chamber lacked authority to enter those convictions.¹⁴⁸ And each time Judge Pocar dissented on this point, he cited all of the previous dissents in which he advanced the point.¹⁴⁹ From all appearances, Judge Pocar's position never got close to commanding a majority; his repeated citations to his own (unsuccessful) dissents drove up their cite count but did not reflect any real influence or impact.

A final set of citations almost wholly lacking in influence are those advanced by litigants. These citations appear in the judgment only because it is customary for international criminal law judgments to recount each of the litigants' arguments, no matter how unpersuasive those arguments might be. That is, when a litigant invokes a separate opinion to support the litigant's claim, that separate opinion will be cited in the judgment. Conversely, if the litigant had not invoked the separate opinion, the majority would not have cited it.¹⁵⁰ To be sure, citations by litigants indicate that the separate opinion exerted some influence on the defense counsel or the prosecutors who invoked it.¹⁵¹ But that influence may not be positive. Historical opponents of separate opinions, indeed, criticized them for extending litigation and giving (unwarranted) hope to unsuccessful litigants.¹⁵²

Finally, in between the clearly influential majority citations and the three categories of likely uninfluential citations just canvassed (citations rejecting separate opinions, citations by the separate opinions' own authors, and citations generated by litigants) stand citations appearing in other separate

148 Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, Partially Dissenting Opinion of Judge Pocar, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Mrkšić & Šljivančanin, Case No. IT-95-13/1-A, Judgment, Partially Dissenting Opinion of Judge Pocar, ¶¶ 1-13 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009); Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Dissenting Opinion of Judge Pocar (Int'l Crim. Tribunal for Rwanda May 26, 2003); Semanza v. Prosecutor, Case No. ICTR-97-20-A, Partially Dissenting Opinion of Judge Pocar, ¶¶ 1-4 (Int'l Crim. Tribunal for Rwanda May 20, 2005); Setako v. Prosecutor, Case No. ICTR-04-81-A, Dissenting Opinion of Judge Pocar, ¶¶ 1-6 (Int'l Crim. Tribunal for Rwanda Sept. 28, 2011); Gatete v. Prosecutor, Case No. ICTR-00-61-A, Judgment, Partially Dissenting Opinion of Judge Pocar, ¶¶ 1-5 (Int'l Crim. Tribunal for Rwanda Oct. 9, 2012).

149 See, e.g., Prosecutor v. Popović et al., Case No. IT-05-88-A, Judgment, Partially Dissenting Opinion of Judge Pocar, ¶¶ 1-2 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015).

150 As noted above, if the majority cited the separate opinion independently, I placed that citation in the majority category.

151 Cf. Bowen & Flowers, *supra* note 123 (noting the power of a dissent to highlight relevant law or significant facts omitted from the majority's analysis).

152 *Should Dissenting Opinions be Reported?*, reprinted in 1 UPPER CAN. L.J. (N. S.) 169, 177-78 (1865).

opinions. These citations obviously do not reflect the level of influence of a majority-opinion citation, given that the citation appears in a separate opinion that is, by definition, not law. But they do reflect some impact.

Classifying citations reveals that a substantial proportion appear to have no influence or negative influence. First off, nearly one-half of the 567 total citations to separate opinions (45%) fall into one of the three uninformative categories.¹⁵³ And that proportion is even higher for some categories of citations. For instance, a full two-thirds of citations to ICTY Trial Chamber separate opinions fall into uninformative categories with more than 50% alone advanced by litigants. Second, we see that only 30% of all citations to separate opinions appear in majority opinions. So, 70% of citations appear in ways that reflect little or no influence in developing case-law. Table 12 shows the distribution of citations within the seven categories and across chambers and tribunals.

Citations to Separate Opinions Classified by Author and/or Purpose									
	ICTY TC	ICTY AC	ICTR TC	ICTR AC	SCSL TC	SCSL AC	ICC TC	ICC AC	Total
Number citations	91	278	33	107	21	5	17	15	567
Majority same case	9 (10%)	3 (1%)	5 (15%)	2 (2%)	3 (14%)	0 (0%)	9 (53%)	0 (0%)	31(5%)
Separate opinion same case	9 (10%)	33 (12%)	4 (12%)	2 (2%)	1 (5%)	0 (0%)	0 (0%)	0 (0%)	49 (9%)
Majority different case	8 (9%)	89 (32%)	2 (6%)	25 (23%)	2 (10%)	1 (20%)	5 (29%)	6 (40%)	138 (24%)
Separate opinion different case	5 (5%)	58 (21%)	3 (9%)	23 (21%)	0 (0%)	1 (20%)	0 (0%)	5 (33%)	95 (17%)
Litigant	46 (51%)	30 (11%)	16 (48%)	7 (7%)	12 (57%)	2 (40%)	3 (18%)	3 (20%)	119 (21%)
Author Separate Opinion	2 (2%)	54 (19%)	1 (3%)	40 (37%)	2 (10%)	0 (0%)	0 (0%)	0 (0%)	99 (17%)

¹⁵³ These again are: separate opinions that are rejected, separate opinions that are cited by their own authors, and separate opinions invoked by litigants.

Citations to Separate Opinions Classified by Author and/or Purpose									
	ICTY TC	ICTY AC	ICTR TC	ICTR AC	SCSL TC	SCSL AC	ICC TC	ICC AC	Total
Rejection	12 (13%)	11 (4%)	2 (6%)	8 (7%)	1 (5%)	1 (20%)	0 (0%)	1 (7%)	36 (6%)

Table 12

Although Table 12 suggests that nearly half of all citations to separate opinions have no influence or negative influence, that statistic tells only part of the story because each separate opinion can be cited by multiple sources. Therefore, a given separate opinion can be the subject of numerous valueless citations but also some valuable ones. To assess that possibility, I ascertained the percentage of cited separate opinions that were cited *only* in seemingly valueless ways and also the percentage of cited separate opinions that were cited by at least one majority opinion.

Table 13 shows the distribution of cited separate opinions that were cited only by litigants, their own authors, or to be rejected. In sum, 22% of cited separate opinions were cited only in these ways that suggest no or negative influence. To my mind, these separate opinions join the 47% of separate opinions that have never been cited. Thus, for nearly 70% of separate opinions we have no evidence of any influence, as measured by citations counts. These statistics are stable across different kinds of separate opinions, with 20% of concurrences cited only in the three valueless ways, compared with 23% of dissents and 24% of “both” opinions. But there are considerable differences between Trial and Appeals Chambers and between different Tribunals. More than double the percentage of Trial Chamber separate opinions have been cited only in valueless ways compared to Appeals Chamber separate opinions (36% of Trial Chamber separate opinions versus 16% of Appeals Chamber separate opinions). As for the different Tribunals, the SCSL had the largest proportion of cited separate opinions to be cited only in valueless ways, at a substantial 38%. The ICTY’s and ICTR’s proportions were 20% and 17% respectively. The ICC had no separate opinions cited only in valueless ways.

Distribution of Cited Separate Opinions That Were Cited Only in Non-Influential Ways									
	ICTY TC	ICTY AC	ICTR TC	ICTR AC	SCSL TC	SCSL AC	ICC TC	ICC AC	Total
Dissents cited at least once	8	28	8	13	3	0	1	1	62
Dissents cited only by litigants, authors or rejected	2 (25%)	5 (18%)	3 (38%)	2 (15%)	2 (67%)	N/A	0 (0%)	0 (0%)	14 (23%)
Concurrences cited at least once	5	24	2	6	1	1	4	2	45
Concurrences cited only by litigants, authors or rejected	4 (80%)	4 (17%)	0 (0%)	1 (17%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	9 (20%)
“Boths” cited at least once	5	11	1	5	1	2	0	0	25
“Boths” cited only by litigants, authors or rejected	3 (60%)	2 (18%)	0 (0%)	0 (0%)	0 (0%)	1 (50%)	N/A	N/A	6 (24%)
Total Separate Opinions cited at least once	18	63	11	24	5	3	5	3	132
Total cited only by litigants, authors or rejected	9 (50%)	11 (17%)	3 (27%)	3 (13%)	2 (40%)	1 (33%)	0 (0%)	0 (0%)	29 (22%)

Table 13

Table 14 shows that only 27% of separate opinions have ever been cited by a majority opinion. Those percentages are fairly stable across the different

kinds of separate opinions and across Trial and Appeals Chambers. Dissents are least likely to be cited by majority opinions at 25%, followed by concurrences at 28% and “both” opinions at 31%. A slightly larger percentage of Trial Chamber separate opinions have been cited at least once by a majority opinion compared to Appeals Chamber separate opinions, but at 28% compared to 26%, they are virtually identical. A significant divergence can be seen, however, between Tribunals. The most noteworthy statistic comes from the ICC, where 42% of its separate opinions have been cited by at least one majority opinion. The ICC is followed by the ICTY at 29%, the ICTR at 22%, and the SCSL at only 17%.

Distribution of Separate Opinions Cited at Least Once in a Majority Opinion									
	ICTY TC	ICTY AC	ICTR TC	ICTR AC	SCSL TC	SCSL AC	ICC TC	ICC AC	Total
# Dissents	17	43	17	38	6	4	5	5	135
# Dissents cited at least once by majority	4 (24%)	14 (33%)	4 (24%)	7 (18%)	1 (17%)	0 (0%)	2 (40%)	2 (40%)	34 (25%)
# Concurrences	8	39	3	17	3	2	7	2	81
# Concurrences cited at least once by majority	1 (13%)	11 (28%)	2 (67%)	3 (18%)	1 (33%)	1 (50%)	4 (57%)	0 (0%)	23 (28%)
# “Both” Opinions	6	16	1	10	1	2	0	0	36
# “Both” cited at least once by majority	2 (33%)	6 (38%)	0 (0%)	3 (30%)	0 (0%)	0 (0%)	N/A	N/A	11 (31%)
Total # separate opinions	31	98	21	65	10	8	12	7	252
# of total cited at least once by majority	7 (23%)	31 (32%)	6 (29%)	13 (20%)	2 (20%)	1 (13%)	6 (50%)	2 (29%)	68 (27%)

Table 14

In this Section we canvassed every final judgment of the international criminal tribunals to consider every citation to a final judgment separate

opinion. With only 30% of all citations to separate opinions appearing in majority opinions, we see most citations do not reflect any influence on the development of international criminal case law. Likewise, with only 27% of all separate opinions cited by a majority opinion, we see that nearly three-quarters of separate opinions have no impact on subsequent case-law, if that impact is measured by citation counts. Subsection 2 supports this conclusion even more dramatically by comparing citations to separate opinions with citations to majority opinions.

2. *Dramatic Differences: Citations to Majority and Separate Opinions*

In their seminal work on the influence of American separate opinions, Epstein, Landis, and Posner compared citations of majority opinions with citations of dissents in federal court opinions that had at least one dissent. They found a dramatic difference between the two citation counts and concluded from this comparison that a court of appeal dissent's impact on the law, as proxied by citations, "is close to zero."¹⁵⁴ Following their lead, I likewise compared citations to international criminal law majority judgments with citations to their separate opinions. My comparison shows an even greater divergence between the two sets of citations; thus, the conclusion that Epstein, Landis, and Posner reached for American dissents seems also to apply to international criminal law separate opinions.

Because international criminal judgments are so voluminous and contain so many citations, I conducted my comparison using a random sampling of 530 pages drawn from ICTY, ICTR, SCSL, ICC, ECCC, and STL Trial Chamber and Appeals Chamber final judgments. Those 530 pages contained 1012 citations to the majority judgments and separate opinions in my dataset, but only 14 of those citations were to the separate opinions. A whopping 95% of separate opinions were never cited, compared with only 35% of majority opinions.¹⁵⁵ When we compare citations to all ICTY, ICTR, SCSL, and ICC majority opinions and separate opinions, the ratio between the two is 71 to 1. The ratio increases even further—to more than 100 to 1—when we confine the comparison to judgments containing at least one separate opinion, as Epstein et al. did. Table 15 shows the distribution of citations among the Trial and Appeals Chambers of the different tribunals. As the Table shows, the ratio of citations between majority and separate opinions is virtually the same between the Trial Chambers and the Appeals Chambers (102 to 1 for Trial Chambers versus 108 to 1 for Appeals Chambers).

¹⁵⁴ Epstein et al., *supra* note 127, at 128.

¹⁵⁵ 83% of the never-cited majority opinions were Trial Chamber opinions. Virtually every Appeals Chamber majority was cited at least once in my sample.

Citations to ICTY, ICTR, SCSL and ICC Majority and Separate Opinions			
Tribunal and Chamber	Average citations per Majority Opinion	Average citations per Separate Opinion	Ratio
ICTY Trial Chamber	1.33 ¹⁵⁶	0.03 ¹⁵⁷	44:1
ICTR Trial Chamber	1.38 ¹⁵⁸	0	--
SCSL Trial Chamber	.40 ¹⁵⁹	0	--
ICC Trial Chamber	1.75 ¹⁶⁰	0	--
Total Trial Chambers	1.32	0.013	102:1
ICTY Appeals Chamber	10.70 ¹⁶¹	0.083 ¹⁶²	129:1
ICTR Appeals Chamber	5.39 ¹⁶³	0.077 ¹⁶⁴	70:1
SCSL Appeals Chamber	3.67 ¹⁶⁵	0	--
ICC Appeals Chamber	1.50 ¹⁶⁶	0	--
Total Appeals Chambers	7.99	0.074	108:1

Table 15

These divergences between citations to majority and separate opinions are greater, and sometimes far greater, than those Epstein et al. found in American opinions. The U.S. Supreme Court cites its majority opinions 32 times as often as it cites dissents.¹⁶⁷ The U.S. Courts of Appeals cite the majority opinions of their own circuit 95.9 times as often as they cite their

¹⁵⁶ My sample revealed 28 citations for 21 ICTY Trial Chamber judgments with at least one separate opinion.

¹⁵⁷ My sample revealed 1 citation for 32 ICTY Trial Chamber separate opinions.

¹⁵⁸ My sample revealed 22 citations for 16 ICTR Trial Chamber judgments with at least one separate opinion.

¹⁵⁹ My sample revealed 2 citations for 5 SCSL Trial Chamber judgments with at least one separate opinion.

¹⁶⁰ My sample revealed 14 citations for 8 ICC Trial Chamber judgments with at least one separate opinion.

¹⁶¹ My sample revealed 471 citations for 44 ICTY Appeals Chamber judgments with at least one separate opinion.

¹⁶² My sample revealed 8 citations for 96 ICTY Appeals Chamber separate opinions.

¹⁶³ My sample revealed 167 citations for 31 ICTR Appeals Chamber judgments with at least one separate opinion.

¹⁶⁴ My sample revealed 5 citations for 65 ICTR Appeals Chamber separate opinions.

¹⁶⁵ My sample revealed 11 citations for 3 SCSL Appeals Chamber judgments with at least one separate opinion.

¹⁶⁶ My sample revealed 6 citations for 4 ICTR Appeals Chamber judgments with at least one separate opinion.

¹⁶⁷ Epstein et al., *supra* note 127, at 126. The 32 to 1 ratio holds for opinions with one dissent. Opinions with more than one dissent are cited only 18.6 times as often as the dissents in those cases. *Id.*

own dissents; however, they cite the majority opinions of other circuits only 38.8 times as often as they cite other circuits' dissents.¹⁶⁸ Epstein et al. relied on these ratios to conclude that federal court dissents do not influence the development of the law, at least if that influence is measured by citation counts.¹⁶⁹ Therefore, the even more dramatic divergences that I found unquestionably lead to the same conclusion. Next, Section C considers other measures of gauging the influence of separate opinions.

C. Assessing Impact by Content: The Subjects of Separate Opinions

This Section considers the influence of separate opinions through an analysis of their content. Subsection 1 distinguishes dissents that disagree with the majority opinions on factual grounds from those that disagree on legal grounds and considers their differential impact. Subsection 2 considers the very few separate opinions whose positions have later become law. Finally, Subsection 3 provides the first-ever in-depth consideration of the legal issues appearing in the Tribunals' 289 separate opinions. Subsection 3 classifies the points made in separate opinions by their legal subject as a means of assessing their short- and long-term impact.

1. Dissents of Law vs. Dissents of Fact: Dramatically Differing Impact

The potential impact of any separate opinion depends to a large degree on whether the separate opinion advances legal points or factual points. Consequently, I characterized each issue raised in each dissent as factual or legal, and I characterized each dissent as wholly factual, wholly legal, or both.¹⁷⁰ To be sure, some scholars dispute the existence of a fact/law distinction,¹⁷¹ and even those who recognize the distinction also recognize that it can be terrifically difficult to draw.¹⁷² Happily, for our purposes, many

¹⁶⁸ *Id.* at 128.

¹⁶⁹ *Id.*

¹⁷⁰ I did not so categorize concurrences because virtually all concurrences concerned wholly legal points. I did come across occasional concurrences on factual grounds, *see, e.g.*, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Separate Opinion of Judge Robinson (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009), but in the vast majority of cases, judges concurred when they agreed with the majority's conclusions but disagreed with its reasoning. That disagreement, therefore, virtually always concerned a legal point. Occasionally, the concurring judge desired to elaborate on the majority's opinion or raise an issue not relevant to the disposition of the case. *See, e.g.*, Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Dissenting Opinion of Judge Tuzmukhamedov, ¶ 29 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014). These issues again were virtually always legal.

¹⁷¹ Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (arguing that the law-fact distinction is a myth); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172-77 (2001) (questioning the law-fact distinction in the context of judicial decisions to defer to Congress).

¹⁷² Allison Orr Larsen, *Factual Precedents*, 162 U. PENN. L. REV. 59, 67 (2013) (conceding that "the line distinguishing law from fact starts to dissolve if one thinks too deeply about it."); Saul M.

of the points raised in separate opinions were self-evidently factual or legal, as I will describe.

I classified a dispute as factual when the majority and dissent disagreed about something that happened in the real world. The majority may have concluded, for example, that the defendant shot a gun, made a speech, or had an intent to kill, and the dissent disagreed with the majority's conclusion. By contrast, I classified a dispute as legal when the dissenting judge disagreed with the majority about the existence or definition of a legal rule. So, when a majority determined that forced marriage is subsumed within the crime of sexual slavery¹⁷³ and the dissent concluded that forced marriage is a separate crime,¹⁷⁴ I considered the dissenting point to be legal.

The most difficult disputes to classify concerned the application of law to facts. These disputes arose when the majority and dissent agreed about the facts and agreed about the relevant legal standard but disagreed about whether the facts were sufficient to meet that legal standard. The dissent and the majority might agree, for instance, that the defendant drove attackers to the massacre site, but disagree about whether that drive constituted substantial assistance sufficient to establish aiding and abetting liability. Another particularly common application-of-law dispute appearing in international criminal law dissents concerned the notice provided by an indictment. In these cases, both majority and dissent (not surprisingly) agreed about the text of the indictment, but they disagreed about whether that indictment text provided the defendant adequate notice to prepare his defense.¹⁷⁵

Application of law disputes are not factual in the traditional sense (because the majority and dissent agree on the facts), and they are not legal in the traditional sense (because the majority and dissent agree on the definition of the appropriate legal standard). For this reason, application of law disputes can reasonably be characterized as either factual or legal. I chose to characterize them as legal. As we will see, separate opinions featuring factual disputes have far less potential influence than separate opinions featuring legal disputes. So, in order to ensure that I am giving separate opinions the benefit of any possible doubt, I characterized those that could be either factual or legal as legal. Finally, the vast majority of

Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 379–80 (1984) (finding the line between law and fact to be “slippery”).

¹⁷³ Prosecutor v. Brima, et al., Case No. SCSL-04-16-T, Judgment, ¶¶ 711-713 (Special Ct. for Sierra Leone June 20, 2007).

¹⁷⁴ Prosecutor v. Brima, et al., Case No. SCSL-04-16-T, Judgment, Partly Dissenting Opinion of Justice Doherty on Count 7 (“Sexual Slavery”) and Count 8 (“Forced Marriages”) (Special Ct. for Sierra Leone June 20, 2007).

¹⁷⁵ See, e.g., Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-A, Judgment, Judge Schomburg’s Dissenting Opinion (Int’l Crim. Tribunal for Rwanda July 7, 2006).

dissents featured purely factual or purely legal disputes, but a minority contained both factual and legal disputes. I classified these dissents as legal if they contained a predominance of legal disputes and factual if they contained a predominance of factual disputes. Dissents featuring an equivalent number of legal and factual disputes I classified as “both.” Following this methodology, Tables 16 through 18 show the proportion of dissents that are legal, factual, or both.

Trial Chamber Dissents Classification of Factual, Legal and Both					
	ICTY	ICTR	SCSL	ICC	Totals
Legal	7 (30%)	7 (41%)	5 (63%)	2 (40%)	21 (40%)
Factual	14 (61%)	10 (59%)	1 (13%)	2 (40%)	27 (51%)
Both	2 (9%)	0 (0%)	2 (25%)	1 (20%)	5 (9%)
Totals	23 (100%)	17 (100%)	8 (100%)	5 (100%)	53 (100%)

Table 16

Appeals Chamber Dissents Classification of Factual, Legal and Both					
	ICTY	ICTR	SCSL	ICC	Totals
Legal	40 (68%)	26 (54%)	4 (67%)	3 (60%)	73 (62%)
Factual	15 (25%)	15 (31%)	2 (33%)	1 (20%)	33 (28%)
Both	4 (7%)	7 (15%)	0 (0%)	1 (20%)	12 (10%)
Totals	59 (100%)	48 (100%)	6 (100%)	5 (100%)	118 (100%)

Table 17

All Dissents: Classification of Factual, Legal and Both					
	ICTY	ICTR	SCSL	ICC	Totals
Legal	47 (57%)	33 (51%)	9 (14%)	5 (50%)	94 (55%)
Factual	29 (35%)	25 (38%)	3 (21%)	3 (30%)	60 (35%)
Both	6 (7%)	7 (11%)	2 (14%)	2 (20%)	17 (10%)
Totals	82	65	14	10	171

Table 18

As the Tables 16 through 18 show, factual disputes predominate in Trial Chamber dissents whereas legal disputes predominate in Appeals Chamber dissents. But even on appeal, more than one-quarter of dissents are factual, and when the dissents of both Chambers are cumulated, that proportion rises to 35%. Finally, that statistic understates the prevalence of factual disputes because it does not account for the 10% of “both” dissents that are equally factual and legal. It would be reasonable to evenly distribute those between the factual and legal categories, resulting in a 60-40 proportion of legal and factual dissents, respectively, across all of the separate opinions in my dataset.

As alluded to above, the reason to distinguish between factual and legal dissents is because they have vastly different potential impact. Specifically, it is possible for a Trial Chamber factual dissent to influence the Appeals Chamber in the same case, but that is the only potential impact of any factual dissent. That is, if the Trial Chamber dissent cannot convince the Appeals Chamber in the same case that the Defendant drove the car, made the speech, or was in another part of the country during the massacres, then it is difficult to see when that factual dispute would otherwise be relevant. Because factual disputes virtually never transcend the individual cases in which they appear, an obvious but important implication is that Appeals Chamber factual dissents have virtually no possibility of influence. There are no subsequent proceedings in the same case for the Appeals Chamber dissent to influence, and subsequent cases will not feature the particular facts in dispute. Consequently, we can conclude with some confidence that the 28% of Appeals Chamber’s factual dissents are dead-on-arrival as it were in terms of potential influence.

Trial Chamber factual dissents do have the potential to influence the case’s Appeals Chamber in subsequent proceedings, but my research shows that they rarely exercise that influence. As noted in Section A, 86% of all Trial Chamber separate opinions—factual or legal—do not contain points

accepted on appeal. Further, of the 14% of separate opinions that do advance a point later adopted on appeal, that point is much more likely to be a legal point. Specifically, of the twelve Trial Chamber dissents whose points were adopted on appeal, only two were purely factual.¹⁷⁶ Said differently, only 2% of Trial Chamber factual dissents advance a position adopted on appeal. As noteworthy as this statistic is, it should be unsurprising given the standard for review on appeal. In particular, to reverse a Trial Chamber's factual finding, an Appeals Chamber must conclude that no reasonable fact-finder could have reached that factual finding.¹⁷⁷ Due to that difficult-to-meet standard, factual dissents are far less likely to carry the day on appeal.

Finally, my citation counts confirm the much more limited influence of factual dissents. In particular, they reveal that the average legal dissent generates 3.3 times the number of citations as the average factual dissent. Table 19 shows the distribution of citation counts across factual and legal dissents. And those legal dissents that are cited are cited in far more influential ways than is true for cited factual dissents. As shown in Table 20, nearly three times the percentage of legal dissents are cited in at least one majority opinion compared to factual dissents (36% vs. 13%). By contrast, more than double the percentage of cited factual dissents are cited only in seemingly uninfluential ways compared to legal dissents (35% vs. 17%). Table 21 shows this distribution.

Distribution of Citation Counts Across Factual and Legal Dissents						
	# Factual Dissents	Citation Count Factual Dissents	Citation per Factual Dissent	# Legal Dissents	Citation Count Legal Dissents	Citation per Legal Dissent
ICTY TC	12	7	0.6	7	29	4.1
ICTY AC	16	31	1.9	40	182	4.6
ICTR TC	11	14	1.3	7	15	2.1
ICTR AC	15	4	0.27	26	67	2.6

¹⁷⁶ Those two were *Milutinović* and *Tolimir*. 8 of the remaining 10 dissents advanced purely legal points adopted on appeal. *Tadić*, *Aleksovski*, *Perišić*, *Šešelj*, *Ntagurera*, *AFRC*, and two dissents in *RUF*. The final two advanced both factual and legal points adopted on appeal. *Popović* and *Ndabimana*.

¹⁷⁷ *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-A, Judgment, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia May 3, 2006).

SCSL TC	0	N/A	N/A	3	5	1.7
SCSL AC	2	0	0	4	4	1
ICC TC	2	1	0.5	4	5	1.25
ICC AC	1	2	2	3	4	1.3
Totals	59	59	1	94	311	3.3

Table 19

Distribution of Citations by Majority Opinions Across Factual and Legal Dissents				
	# Factual Dissents	# Factual Dissents cited at least once in majority	# Legal Dissents	# Legal Dissents cited at least once in majority
ICTY TC	14	1 (7%)	7	4 (57%)
ICTY AC	15	2 (13%)	40	18 (45%)
ICTR TC	10	2 (20%)	7	2 (29%)
ICTR AC	15	1 (7%)	26	7 (27%)
SCSL TC	1	0 (0%)	5	1 (20%)
SCSL AC	2	0 (0%)	4	0 (0%)
ICC TC	2	1 (50%)	2	1 (50%)
ICC AC	1	1 (100%)	3	1 (33%)
Total	60	8 (13%)	94	34 (36%)

Table 20

Distribution of Citations by Uninfluential Sources Across Factual and Legal Dissents				
	# Cited Factual Dissents	# Cited Factual Dissents cited only in valueless ways	# Cited Legal Dissents	# Cited Legal Dissents cited only in valueless ways
ICTY TC	6	3 (50%)	5	1 (20%)
ICTY AC	9	2 (22%)	29	4 (14%)
ICTR TC	4	2 (50%)	4	1 (25%)
ICTR AC	1	0 (0%)	14	2 (14%)
SCSL TC	0	0 (0%)	3	1 (33%)
SCSL AC	1	1 (100%)	2	1 (50%)
ICC TC	1	0 (0%)	1	0 (0%)
ICC AC	1	0 (0%)	1	0 (0%)
Total	23	8 (35%)	59	10 (17%)

Table 21

2. *From Minority to Majority: The Rare Separate Opinions that Become Law*

Having addressed the limited impact of factual dissents, this subsection and the next, focus exclusively on separate opinions addressing legal questions. Subsection 3 provides quantitative and qualitative treatment of the legal issues appearing in international criminal law separate opinions. Because different issues have greater or lesser potential impact, this analysis provides valuable general insights into the influence of separate opinions. This subsection introduces that analysis by considering the very rare instances in which positions espoused in separate opinions were adopted by subsequent courts.

Indeed, I was able to unearth only three examples of this phenomenon. The first pertained to the ICTY's doctrine of specific direction for aiding and abetting liability. Specifically, the *Perišić* Appeals Chamber majority found "specific direction" to be an element of aiding and abetting liability,¹⁷⁸ over the dissent of Judge Liu.¹⁷⁹ Subsequently, the *Šainović* Appeals Chamber majority,¹⁸⁰ as well as the *Taylor* Appeals Chamber at the SCSL,¹⁸¹ rejected the *Perišić* majority's position, concluding that specific direction was not an element of aiding and abetting liability.

¹⁷⁸ Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 17-51 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

¹⁷⁹ Prosecutor v. Perišić, Case No. IT-04-81-A, Partially Dissenting Opinion of Judge Liu (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

¹⁸⁰ Prosecutor v. Šainović et al., Case No. IT-05-87-A, Judgment, ¶¶ 1617-1651 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

¹⁸¹ Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment (Special Ct. for Sierra Leone Sept. 26, 2013).

The caveat highlighted in Section A, however, is even more relevant here; specifically, it is impossible to establish that a separate opinion influenced a subsequent decision even in the same case, and we should be all the more careful about postulating such influence when the subsequent decision is in a different case, decided months or even years later. Thus, the influence of Judge Liu's dissent in *Perišić* is speculative at best. For one thing, in rejecting the specific direction doctrine, the *Šainović* and *Taylor* Appeals Chambers never mentioned Judge Liu's dissent; this omission was particularly noteworthy in *Sainović* because that Appeals Chamber canvassed the entire body of ICTY precedent, Nuremberg-era precedent, domestic court precedent, and customary international law.¹⁸² Finally, the *Perišić* holding on specific direction had generated a large body of strident scholarly critiques,¹⁸³ and those critiques seem at least as likely to have influenced the *Šainović* and *Taylor* Appeals Chambers as the Liu dissent.

I am not aware of any other instance in which a position advanced in a separate opinion was adopted by the majority of a different case in the same tribunal. However, I have identified two instances in which a minority position was adopted by a majority in a different tribunal, in one case permanently and in the other, only temporarily. Turning first to the latter, the Trial Chamber in the ECCC's first case adopted the views of the ICTY's *Kordić & Čerkez* dissenters and held that it was impermissibly cumulative to convict the defendant for both murder and persecution as a crime against humanity.¹⁸⁴ But that dissenting victory was short-lived. On appeal, the ECCC Supreme Court promptly reversed the Trial Chamber's holding and adopted the position of the *Kordić & Čerkez* majority.¹⁸⁵

The second and final example, however, has had more staying power. Judge Schomburg's concurrence in *Gacumbitsi* has been credited with influencing the ICC's jurisprudence on modes of liability. What is interesting, however, is that Judge Schomburg's position (advocating for the control theory of joint perpetratorship as an alternative to the joint criminal

182 *Id.*

183 James G. Stewart, *Guest Post: The ICTY Loses its Way on Complicity – Part 1*, OPINIOJURIS (Mar. 3, 2013), <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>; James G. Stewart, *Guest Post: The ICTY Loses its Way on Complicity – Part 2*, OPINIOJURIS (Mar. 4, 2013), <http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-2/>; James G. Stewart, *"Specific Direction" is Indefensible: A Response to Heller on Complicity*, OPINIOJURIS (Dec. 6, 2013), <http://opiniojuris.org/2013/06/12/specific-direction-is-indefensible-a-response-to-heller-on-complicity/>; Kenneth Roth, *A Tribunal's Legal Stumble*, N.Y. TIMES (July 9, 2013), <https://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html>; Owen Bowcott, *Hague war crimes ruling threatens to undermine future prosecutions*, THE GUARDIAN (Aug. 13, 2013), <https://www.theguardian.com/law/2013/aug/13/hague-war-crimes-ruling-prosecutions-serb>.

184 Prosecutor v. Eav, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 565 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010).

185 Prosecutor v. Eav, Case No. 001/18-07-2007/ECCC/SC, Judgment, ¶¶ 304-36 (Extraordinary Chambers in the Cts. of Cambodia Feb. 3, 2012).

enterprise doctrine) began as a majority position in the *Stakić* Trial Chamber, where Judge Schomburg served as presiding judge.¹⁸⁶ The *Stakić* Appeals Chamber reversed, however, and rejected Judge Schomburg's position, thereby sending Judge Schomburg to the dissenting pages of judgments, where he propounded his views in a separate opinion in *Gacumbitsi*¹⁸⁷ as well as in *Simić*¹⁸⁸ and *Martić*.¹⁸⁹ There, those views remained until the ICC's Pre-Trial Chamber cited his *Gacumbitsi* separate opinion in adopting the control-over-the-crime theory of joint perpetratorship in the ICC's first case.¹⁹⁰

A review of the hundreds of remaining separate opinions reveals them to fall into four rough categories. First, early Appeals Chamber cases featured separate opinions about the core legal issues that these early cases decided. What are the standards governing guilty pleas?¹⁹¹ Is duress a defense to crimes featuring an intentional homicide?¹⁹² Does Geneva Convention IV apply to victims who are the same nationality as perpetrators?¹⁹³ These controversial issues understandably generated separate opinions in those early cases,¹⁹⁴ but the majority's resolution of the issues quickly settled them, and judges refrained from penning additional separate opinions. A second category of Appeals Chamber separate opinions similarly involve issues that were settled in early cases, but they nonetheless became the subject of numerous (although ineffective) dissents because the authors of those dissents continued to reiterate their positions. I have already mentioned Judge Pocar's series of dissents contending that the Appeals Chamber lacked the authority to enter convictions or increase sentences.¹⁹⁵ In similar vein are Judge Güney's repeated dissents reiterating

186 Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶¶ 438, 441, 468-98 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003).

187 Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Judgment, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide (Int'l Crim. Tribunal for Rwanda July 7, 2006).

188 Prosecutor v. Simić Case No. IT-95-9-A, Judgment, Dissenting Opinion of Judge Schomburg, ¶¶ 13-17 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006).

189 Prosecutor v. Martić Case No. IT-95-A, Judgment, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008).

190 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 330, n.418 (Jan. 29, 2007).

191 Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, Joint Separate Opinion of Judges McDonald and Vohrah, ¶¶ 2-31 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

192 *Id.*

193 Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 577-608 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

194 *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, Separate and Dissenting Opinion of Judge Cassese (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

195 *See supra* note 148.

his disagreement with the Tribunals' case law on cumulative convictions.¹⁹⁶ A third, much smaller category, includes separate opinions calling for a radical revision to the ICTY's and ICTR's jurisprudence, usually pertaining to modes of liability.¹⁹⁷ As noted, at least one of these opinions seemed influential in subsequent cases at the ICC, which rejected some key ICTY and ICTR modes-of-liability doctrines.¹⁹⁸

Fourth, finally, and most importantly, the majority of what I deemed "legal" separate opinions featured application-of-law disputes. To recap, application-of-law disputes occur when the majority and dissent agree about the facts and the prevailing legal standard but disagree about the application of that legal standard to the facts of the case in question. I have characterized application-of-law disputes as legal, but because they are highly dependent on the facts of the case, they almost certainly will have limited impact on subsequent cases. That is, given the prevalence of application-of-law disputes in the separate opinions, it is unsurprising that the positions appearing in these separate opinions have not been adopted in subsequent cases. Application-of-law disputes will be discussed in more detail in the following subsection.

3. Influence Defined Most Broadly: An In-Depth Assessment of the Content of Separate Opinions

This Part has assessed the impact of international criminal law separate opinions through a variety of means. It considered the proportion of separate opinions that contained positions later adopted on appeal. It provided citation counts for the separate opinions. It distinguished between factual and legal dissents and determined the former to be particularly unlikely to influence later case law. And it considered the rare specific instances in which separate opinions subsequently became the law. This concluding subsection will assess the potential impact of international criminal law's separate opinions by taking a deep dive into their subject matter. Simply put, separate opinions addressing some topics are more apt to develop the law than separate opinions addressing other topics. For this

¹⁹⁶ See, e.g., *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, Partly Dissenting Opinion of Judge Güney (Int'l Crim. Tribunal for Rwanda Nov. 28, 2007); *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, Opinion Dissidente De Juge Güney sur le Cumul de Déclarations de Culpabilité Dissenting Opinion of Judge Güney on Cumulative Convictions (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

¹⁹⁷ See, e.g., *Prosecutor v. Simić*, Case No. IT-95-9-A, Dissenting Opinion of Judge Schomburg, ¶¶ 11-21 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006); *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Judgment, Separate and Partly Dissenting Opinion of Judge Lindholm (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

¹⁹⁸ See *supra* text at notes 186-190.

reason, among others, it is valuable to gain a detailed understanding of the content of international criminal law's separate opinions.

As noted above, separate opinions devoted to factual disputes are unlikely to have any influence beyond the cases in which they appear, so they will not be discussed. I classified every discussion of every legal issue appearing in the remaining 228 separate opinions. The number of legal discussions varied depending on whether I calculated the legal issues in a separate opinion by judgment or by the defendants to which those opinions applied. A simple example will explicate the different calculation methods. If we count the discussion of legal issues by judgment, then one discussion of hearsay evidence counts as one instance of hearsay evidence even if the discussion relates to two defendants in a multi-defendant case. If we count discussions of legal issues by defendants, in contrast, then we would count the previously-described discussion of hearsay as occurring twice because that discussion impacted two defendants' cases. Both methods of calculation are reasonable. On the one hand, there is only one discussion of hearsay, so counting it multiple times could be seen to over-count. On the other hand, defendants in multi-defendant cases could have been tried separately, and if they had been, then presumably there would have been two discussions of hearsay evidence—one for each defendant. For the sake of comprehensiveness, I calculated discussions of legal issues both ways. I identified 406 discussions of legal issues when I counted each discussion once, even if the discussion applied to more than one defendant. I identified 615 discussions of legal issues when I allocated discussions to the individual defendants to which they applied.

I next classified those discussions into 83 subcategories of legal issues. Although this classification may sound precise, it was necessarily subjective because legal issues can be fairly classified more or less broadly. Dissents concerning joint criminal enterprise, aiding and abetting, and superior responsibility, for instance, can be fairly classified as joint criminal enterprise, aiding and abetting, and superior responsibility. Or they can be grouped together and classified more broadly as modes of liability. Similarly, sentencing issues—which make frequent appearances in separate opinions—can be classified into any number of sub-issues including aggravating factors, mitigating factors, and generic disputes over the appropriate length of a defendant's sentence. Or, again, they can be lumped together into the broader category of sentencing disputes. In an effort to capture both broad trends as well as fine-grained details, I classified legal issues into the 83 subcategories, but I also grouped many of those subcategories together into broader categories, as I will describe.

What is immediately apparent upon reviewing the distribution of legal issues across the various subcategories is that the majority of legal issues appearing in separate opinions are one-hit wonders, as it were. In particular,

45 legal issues appear in only one or two separate opinions.¹⁹⁹ Such subjects as standards for disqualifying judges, alibis, and adjudicated facts, for instance, appeared in only one separate opinion whereas the recusal of judges and the tribunals' temporal jurisdiction, among others, appeared in two. Several factors likely explain the large proportion of legal issues that appear only once or twice. First, a number of the issues that appear only once appear in the extraordinarily voluminous, and dare I say idiosyncratic, separate opinions of Jean-Claude Antonetti,²⁰⁰ a jurist who has been harshly criticized for his proclivity to issue book-length separate opinions on every conceivable topic.²⁰¹ Other topics appear in only one or two separate opinions because they arise in only one international tribunal. Of the Tribunals in my dataset, only the ICC permits victim participation and allows its judges to recharacterize the charges lodged against defendants.²⁰² So, it stands to reason that these topics will appear infrequently, especially given the small number of ICC cases decided heretofore. Third, international criminal defendants rarely invoke criminal law defenses, and some are particularly unlikely to be advanced. Not surprisingly, then, we see only one appearance of the necessity defense, the just war defense, and the occupying force defense, all of which were raised in two SCSL separate opinions.²⁰³ Finally, some legal issues appear in only one or two separate opinions due to the way that I classified legal issues. For instance, I classified each element of crimes against humanity and genocide as a subcategory, and some of these elements appear only once or twice.²⁰⁴ These subcategories could be classified into the broader categories of genocide and crimes against humanity, and if they were, they would necessarily appear in a larger number of separate opinions.²⁰⁵ Although these factors go some ways towards explaining the large proportion of legal issues that appear only in

¹⁹⁹ 26 legal issues appear in one separate opinion, and 19 appear in two separate opinions.

²⁰⁰ Prosecutor v. Prlić et al., Case No. IT-04-74-T, Judgment and Separate Opinion of Judge Antonetti (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013); Prosecutor v. Šešelj, Case No. IT-03-67-T, Judgment and Separate Opinion of Judge Antonetti (Int'l Crim. Trib. for the former Yugoslavia Mar. 31, 2016); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgment and Separate Opinion of Judge Antonetti (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015).

²⁰¹ See, e.g., Marko Milanović, *The Sorry Acquittal of Vojislav Seselj*, EJIL: TALK! (Apr. 4, 2016).

²⁰² See International Criminal Court, Regulations of the Court, ICC-BD/01-01-04, Reg. 55, adopted 26 May 2004 (providing that the Trial Chamber, in its final judgment "may change the legal characterisation of facts to accord with the crimes . . . or to accord with the [defendant's] form of participation...").

²⁰³ Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Judgment, Separate Concurring and Partially Dissenting Opinion of Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute (Special Ct. for Sierra Leone Aug. 2, 2007); Prosecutor v. Sesay, Kallon, and Gbao, Case No. SCSL-04-15-T, Judgment, Separate Concurring Opinion of Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute (Special Ct. for Sierra Leone Mar. 2, 2009).

²⁰⁴ These include the nexus-to-armed-conflict element of the ICTY's definition of crimes against humanity, the actus reus of genocide, and both crimes' mens rea.

²⁰⁵ Combined, topics pertaining to crimes against humanity appear in 29 separate opinions whereas topics pertaining to genocide and incitement to genocide appear in 9 separate opinions.

isolated opinions, my review of the opinions suggests that another—and perhaps the most compelling—explanation is simply that judges often author separate opinions on topics that do not arise frequently or are not of widespread interest.

A few distinctions—some expected, some not—arose when I isolated topics appearing in Trial Chamber separate opinions from those appearing in Appeals Chamber separate opinions. One unsurprising distinction is that Appeals Chamber separate opinions contain numerous discussions of appellate standards of review and various other forms of appellate authority, topics which obviously have no relevance at the Trial Chamber level. A more surprising distinction pertains to cumulative convictions, which appear frequently but almost exclusively in the separate opinions of the Appeals Chambers. Beyond that, few noteworthy differences emerged. That is, most of the legal issues that appear most often in one Chamber are similarly popular in the other. Sentencing issues commonly appear in both Trial and Appeals Chamber separate opinions, for instance, as do issues concerning modes of liability.

Examining the distribution of separate opinion topics by the tribunal in which they appear was more illuminating. This review revealed, for instance, that the separate opinions of some tribunals contain, on average, more legal issues than the separate opinions of other tribunals. From an average low of 1 legal issue per separate opinion at the ICTR, we find the ICC with an average high of 2.26 legal issues per separate opinion.²⁰⁶ When considering the distribution of topics, we find that some legal issues appear in the separate opinions of only one tribunal most probably because the cases of that tribunal are far more likely to give rise to those issues. Separate opinions of the ICTY, for instance, were the only ones to contain discussions of deportation as a crime against humanity, the standards for finding an international armed conflict, and terror as a crime under customary international law. That these topics would appear in ICTY separate opinions and not elsewhere makes sense given the nature of the atrocities committed in the former Yugoslavia. Similarly, the ICC and the SCSL were the only tribunals to feature separate opinion discussions of conscripting and enlisting child soldiers, not surprisingly, as they were the only tribunals to prosecute those crimes.

One would expect the ICTY and ICTR separate opinions to have a reasonable amount of subject matter overlap given that the two Tribunals shared an Appeals Chamber and a Prosecutor for many years and employed virtually identical procedural rules. The separate opinions bore out this intuition to some degree. The law governing cumulative convictions, for instance, was a popular topic in both ICTY and ICTR separate opinions but

²⁰⁶ The ICTY and the SCSL are in the middle with 1.5 and 1.7, respectively.

not elsewhere. At the same time, the separate opinions contained certain surprises. For instance, despite the fact that virtually every ICTR defendant was charged with genocide, the ICTR separate opinions contain virtually no discussions of the crime. Out of nearly 100 ICTR separate opinions, we find only one discussion—of the *actus reus* of genocide—in one Trial Chamber dissent. Moreover, despite a host of tribunal-centric differences—from geographical to jurisdictional to procedural—the most compelling take-away from a review of separate opinion topics by tribunal is that most of the legal issues that are most commonly discussed in one tribunal’s separate opinions are also commonly discussed in the remainder.

So, what are these particularly popular topics? The seven legal issues that appear most commonly in the separate opinions are listed in Table 22 below.

Issues Appearing Most Frequently in Separate Opinions	
Issue	Number of Separate Opinions
Sentence Length	31
Appellate Review Standard	31
Indictment Notice	29
Cumulative Convictions	23
Joint Criminal Enterprise	22
Aiding and Abetting	18
Appeals Chamber’s authority to enter a conviction on appeal	16

Table 22

If we group subcategories into larger categories, additional trends emerge. First, we find, somewhat surprisingly, that legal issues pertaining to international crimes and their defenses do not appear particularly often in separate opinions. Defenses are particularly unlikely to rear their heads. Of 406 discussions of legal issues, only 7 concerned defenses. Equally rare, also at 7, were discussions of any aspect of genocide. Separate opinions featured 16 discussions of all aspects of war crimes and 29 discussions of all aspects of crimes against humanity. However, the 29 discussions of crimes against humanity spread across eight subcategories that included both the jurisdictional elements of crimes against humanity as well as the constituent crimes. Evidentiary issues, grouped together, and fair trial rights also appear less frequently than one might suppose.²⁰⁷ By contrast, among the most

²⁰⁷ The separate opinions contain 23 discussions of evidentiary issues, across 9 subcategories, and 15 discussions of fair trial rights including the right to a trial without undue delay, a right the

commonly discussed legal issues—whether subcategorized individually or grouped together—are modes of liability. Specifically, we find 69 discussions across six subcategories (aiding and abetting, committing, instigating, joint criminal enterprise, superior responsibility, and a residual category of modes of liability for discussions that address the topic more generally). Next popular are sentencing issues, where we find 59 discussions across six subcategories (sentence length, mitigating factors, aggravating factors, sentencing hierarchy of crimes, provisional release, and standards for the Appeals Chamber to revise the Trial Chamber’s sentence).

What conclusions might we draw about the influence of separate opinions from this careful and comprehensive exploration of their contents? First, my review shows that a lot of the legal issues appearing most frequently in the separate opinions appear so frequently because the authors of those separate opinions frequently repeat their claims. As noted above, Judge Pocar’s repeated insistence that the Appeals Chamber lacks authority to enter convictions and increase sentences helped to rocket “appellate review standards” into one of the two most commonly discussed legal issues. Another take-away is that some of the most commonly discussed legal issues in the separate opinions have little real-world impact. Cumulative convictions—the third most discussed legal issue—is a prime example. The issue of cumulative convictions arises when prosecutors wish to convict a defendant for multiple crimes on the same set of facts. A defendant who intentionally kills dozens of civilians, for instance, can be convicted of the war crime of willful killing, or he can be convicted of murder as a crime against humanity. And, depending on the cumulative-conviction rules the Tribunal adopts, the defendant might be convicted of both. A large number of separate opinions concerned themselves both with the rules governing cumulative convictions²⁰⁸ as well as their application to particular categories of crimes.²⁰⁹ But the real-world impact of these discussions is limited at best because sentencing for these crimes is based on the defendant’s conduct, not the number of crimes for which he is convicted.²¹⁰

tribunals are frequently accused of violating. See Hafida Lahiouel, *The Right of the Accused to an Expedient Trial*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 197, 197 (Richard May et al., eds., 2001).

208 See, e.g., Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgment and Separate Opinion of Judges Hunt and Bennouna (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

209 See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 80 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

210 Even the earliest cases to address cumulative convictions recognized that “the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender” regardless of how the convictions are characterized or aggregated. Prosecutor v. Mucić et al., Case No. IT-96-21-A, Judgment, ¶ 430 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001). See also Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion on Form of the Indictment at 10 (Int’l Crim. Trib. for the Former

Third, and by contrast, modes of liability are a common topic appearing in separate opinions, and they *are* of continuing importance and relevance. Modes of liability are among the most widely discussed issues in international criminal law commentary and scholarship,²¹¹ and for good reason. Generally speaking, international crimes are group crimes, so the appropriate conceptualization of the way that members of the group should be held accountable is of the utmost importance. Moreover, some tribunals have adopted controversial liability doctrines, such as joint criminal enterprise, which justifiably generate a great deal of discussion, within the courts and outside of them.²¹² Finally, common-law legal systems address these issues differently from civil-law legal systems, so we can expect judges from the two systems to clash. As noted, modes of liability have been the subject of a voluminous scholarly literature, so separate opinions are not a necessary means of advancing thought on these issues. At the same time, I believe them to have been a valuable means. Certainly, the ICC's citation to Judge Schomburg's separate opinion in *Gacumbitsi* when adopting the position he advanced therein suggested that his views were considered and influential.

With that said, the final and most important conclusion we might draw is that separate opinions address a lot of topics that have virtually no subsequent implications or application. Factual issues top the list, as discussed previously, but many ostensibly legal issues contain heavy factual components that render them of little continuing interest. As noted in Subsection 2, the most prevalent kind of "legal" issues appearing in the separate opinions are the application-of-law issues defined in Subsection 1. These arise when the majority and dissent agree about the facts that occurred and the legal standard that applies but disagree about whether the facts satisfy the relevant legal standard. Because the focus of these disputes is the way in which the facts interact with the law, they are not likely to generalize across cases. And because so many of the legal issues most commonly appearing in the separate opinions are application-of-law issues, then the separate opinions themselves do not typically generalize across cases.

To provide specifics, two of the three legal issues that appear most frequently in the separate opinions are indictment notice and sentence

Yugoslavia Nov. 14, 1995); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 462-66 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

211 The literature on these subjects is vast. For just a sampling, see *MODES OF LIABILITY IN INTERNATIONAL CRIMINAL LAW* (Jérôme De Hemptinne et al., eds. 2019); *MARINA AKSENOVA, COMPLICITY IN INTERNATIONAL CRIMINAL LAW* (2016); Jens David Ohlin, Elies van Sliedreg & Thomas Weigend, *Assessing the Control-Theory*, 26 *LEIDEN J. INT'L L.* 725 (2013).

212 See, e.g., NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 324-25 (discussing literature on joint criminal enterprise).

length, both of which are application-of-law issues that are unlikely to have much application beyond the particular case in question. Indictment notice disputes, as mentioned previously, center on whether the text of the indictment provided the defendant with adequate notice to prepare a defense. In the typical case, the majority will reach one answer to this question whereas the dissent will reach the other, but interest in their discussion is unlikely to extend beyond the particular text of the particular indictment. Separate opinion discussions of sentencing length are even more narrow and fact-based. Tribunal sentencing schemes give judges almost unlimited discretion over the sentences they can impose;²¹³ it should come as no surprise, therefore, that when judges are provided virtually no guidelines and can essentially pick a sentence out of thin air, then other judges on the same panel will pick a different sentence out of thin air. Separate opinions addressing sentence length, then, feature detailed discussions of the particular facts of the case and explain why those facts justify the harsher or more lenient sentence that the dissenter prefers. Certainly, like defendants should be sentenced similarly; for that reason, majority sentencing conclusions create useful precedents for future cases. By contrast, separate opinions that unsuccessfully argue for an increase or a reduction to the sentence the majority imposed are unlikely to spark any continuing interest.

V. CONCLUSION

Separate opinions to international criminal law final judgments span 4498 pages. In these pages we find countless factual issues and all of the legal issues one can imagine arising in an international criminal law prosecution: from substantive to procedural, from weighty to trivial. Some separate opinions are short and respectful; others are lengthy and impassioned. A good number are repetitive; a couple are downright bizarre.

What this article has sought to ascertain is whether these separate opinions are influential. Frankly, they ought to be. Although justice is an ancient concept, international criminal justice is anything but. Coming into being only a few decades ago, international criminal justice is young, vulnerable, and highly contested. Early international criminal law judgments—and even some later ones—addressed issues foundational to the field. What are the elements of international crimes? What defenses can the accused invoke? How will the rules of procedure and evidence ensure fairness for the most unsavory defendants accused of the most monstrous misdeeds known to humankind? The issues were new, the precedents non-

²¹³ Nancy Amoury Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1, 8-9 (2016).

existent, and the judges hailing from legal systems throughout the world. If these ingredients did not produce a robust body of influential separate opinions, none ever would.

A robust body of international criminal law separate opinions we have – nearly 4500 pages worth. What we do not have is any credible evidence that that robust body of separate opinions has influenced the development of international criminal law. A few positions appearing in a few separate opinions have become the law, but very few and usually without indication that the separate opinion was the catalyst for change. A much larger proportion of separate opinions have been cited, some heavily, but most in ways that do not reflect an impact on the development of international criminal law. Indeed, this Article's examination of the contents of the separate opinions reveals that the majority *cannot* exert any influence on the field because the topics they address do not generalize to other cases. Although some judges who author separate opinions may want nothing more than to express their view about an issue that has divided the court, we might expect that most also hope for their dissenting views to have a more tangible impact on the trajectory of international criminal justice. The empirical analyses contained in this article indicate that most such hopes have not been realized.

But those are not the only hopes for international criminal law's separate opinions. Proponents of separate opinions certainly tout their capacity to influence the development of the law, a claim this Article cannot support, but they also allege other benefits, not least the potential for separate opinions to enhance the authority and legitimacy of the courts that issue them. This benefit would be particularly valuable to the international tribunals because their authority and legitimacy are so often challenged.²¹⁴ But that benefit may be as elusive to separate opinions as their influence on the development of the law. Daniel Naurin and Øyvind Stiansen recently published a study suggesting that separate opinions undermine the authority of human rights courts by reducing compliance with their judgments.²¹⁵ Human rights courts differ so significantly from international criminal tribunals that no similar study would shed light on the relationship between

214 See, e.g., Allen Buchanan, *The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court*, 33 TEMP. INT'L & COMP. L.J. 323, 323-24 (2019); Marieke de Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy*, 17 INT'L CRIM. L. REV. 592, 592 (2017); Caleb H. Wheeler, *The Legitimacy of the International Criminal Court*, INT'L LAW BLOG (Oct. 22, 2018), <https://internationallaw.blog/2018/10/22/in-the-spotlight-the-legitimacy-of-the-international-criminal-court/>.

215 Daniel Naurin & Øyvind Stiansen, *Split Judicial Decisions and Compliance with Judgments From the International Human Rights Judiciary*, 53 COMP. POL. STUD. 959, 960-61 (2019). An American study exploring whether the presence of dissents in Supreme Court cases reduced compliance by lower courts found that they did not. See Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 793 (1979).

authority and separate opinions at the international criminal courts. What will shed light on that relationship, however, is the fine-grained, detailed empirical assessments that I commence here and will continue in subsequent work. This Article completes one component of that work: a multi-faceted evaluation of a key potential benefit of separate opinions, namely their influence in the development of international criminal law. My next articles will consider potential costs, including reductions to clarity, collegiality, and most importantly efficiency. 4500 is a lot of pages.