UDC 341

MINORITY OPINIONS IN THE DECISIONS OF THE INTERNATIONAL CRIMINAL COURT

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When exercising in a particular field of competence, the work of every judge lies in his inalienable freedom to pronounce the law, whether he expresses his own opinion separately or with a panel. Saying so introduces well our paper called "Minority opinions in the decisions of the International Criminal Court". Indeed, it emphasises a finding among the decisions issued by the judges of the International Criminal Court and reflects an analysis of the jurisprudence of this court. It sheds light on what interest there can be in minority opinions that embrace matters relating to a mode of exercising jurisdiction. In other words, how to explain the admissibility of minority opinions? This topic is very relevant given the extent of the practice of minority opinions in most international jurisdictions, whereas in international criminal law it is a matter not sufficiently studied by scholars.

Keywords: Anglo-Saxon system; common law; continental system; core crimes; dissenting opinions; impartiality impunity; independence; individual opinion; International Criminal Court; international criminal law; judges; jurisprudence; majority opinion; minority opinion; Roman law; separate opinions; victims.

МНЕНИЕ МЕНЬШИНСТВА В РЕШЕНИЯХ МЕЖДУНАРОДНОГО УГОЛОВНОГО СУДА

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Деятельность каждого судьи в рамках определенной области компетенции предполагает его неотъемлемую свободу выносить решения независимо от того, выражает ли он собственное мнение отдельно или в составе коллегии судей. Как следует из темы, в исследовании рассматриваются выводы из решений, вынесенных судьями Международного уголовного суда, и проводится анализ соответствующей судебной практики. Выясняется, чем вызван интерес к мнению меньшинства в вопросах, касающихся способа осуществления юрисдикции. Объясняется допустимость принятия мнения меньшинства. Актуальность темы очевидна с учетом масштабов существующей практики выражения мнений меньшинства во многих судах международной юрисдикции, в то время как в международном уголовном праве этот вопрос недостаточно изучен учеными.

Ключевые слова: англосаксонская правовая система; общее право; континентально-европейское право; особо тяжкие преступления; особые мнения; беспристрастность; безнаказанность; независимость; индивидуальное мнение; Международный уголовный суд; международное уголовное право; судьи; юриспруденция; мнение большинства; мнение меньшинства; римское право; особые мнения; жертвы.

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Introduction

The International Criminal Court (ICC), governed by the Rome statute[1], the first permanent, treaty-based international criminal court established to help end impunity. In 2020, 123 countries are states parties to the Rome statute of the ICC (the Statute). The ICC is an independent international organisation and is not part of the United Nations system[2]. The ICC has jurisdiction over the most serious crimes[3] of concern to the international community as a whole, namely genocide, crimes against humanity war crimes, and crime of aggression[4]; and the Statute "shall apply equally to all persons without any distinction based on official capacity"[5] (heads of state or government, members of a government or parliament, etc.). The ICC is intended to complement, not to replace, national criminal justice systems[6]. 18 judges make up the three divisions of the ICC[7]. They are responsible for ensuring that the trials are fair and that justice is properly administered.Their duties also concern the procedure for determining access to reparation for the victims[8].

At the ICC, when a pre-Trial, a Trial or an Appeal Chamber decides with a panel of judges involved, the judges who disagree with the majority vote may supply their own written opinions, expressing their reasons for dissenting. It is a matter still understudied by scholars, which would lead to understanding the institutional and functional significance of a judgment. In a similar vein, there is a need to conduct further and more profound substantial research into dissenting opinions with the aim of discovering possible directions of development for international criminal justice.

So, our paper entitled "Minority opinions in the decisions of the International Criminal Court" underlines a finding through the analysis of the decisions issued by the judges of the ICC and provides an overview of the jurisprudence of this court. The issue is very relevant given the extent of the practice of minority or separate opinion in most international jurisdictions, where it is subject to lengthy debates, namely at the International Court of Justice (ICJ), which has a long tradition in this matter. In this regard, Art. 57 of its Statute provides that "[i]f 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"[9]. Art. 95(§2) of the Rules of ICC recalls that any judge may, if so he desires, attach to the judgment a concurring or dissenting opinion, or merely a statement[10]. The existing studies of the individual opinions in the ICC's system tend to propose three types of solutions to the debate surrounding this practice. The typical proposal is to abolish individual opinions and to establish a rule of the anonymous unanimous decision. The second typical proposal is to prohibit the publication of individual opinions. And the third typical proposal is to maintain the existing system of individual opinions while increasing the level of transparency of the process of deliberations of the ICC [1, p. 5].

This debate concerning international criminal jurisdictions is poorly known or rare. In the Rome statute of the ICC, Art. 74 ("Requirements for the decision") provides the possibility of judges joining a minority opinion as it clearly states: "2. The Trial Chamber's deci-

[1]On 17 July 1998, the international community reached an istoric milestone when 120 states adopted the Rome statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries.

[2]The international community has long aspired to the creation of a permanent international court and, in the 20th century, it reached consensus on definitions of genocide, crimes against humanity and war crimes. The Nuremberg and Tokyo trials addressed war crimes, crimes against peace, and crimes against humanity committed during the World War II. In the 1990s after the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of consensus that impunity is unacceptable. See: Assembly of state parties to the Rome statute [Electronic resource]. URL: https://asp.icc-cpi.int/EN_Menus (date of access: 18.05.2020).

[3]The Office of the Prosecutor of the International Criminal Court is responsible for determining whether a situation meets the legal criteria established by the Rome statute to warrant investigation by the office. For this purpose, the OTP conducts a preliminary examination of all communications and situations that come to its attention based on the statutory criteria and the information available. Ongoing preliminary examination at the ICC: Columbia, Nigeria, Republic of the Philippines, Ukraine, Venezuela II. Situations under investigation: Democratic Republic of the Congo, Uganda, Darfur, Sudan, Central African Republic, Libya, Bangladesh (Myanmar).

[4]The ICC may exercise jurisdiction over such international crimes only if they were committed on the territory of a state party or by one of its nationals. These conditions, however, do not apply if a situation is referred to the prosecutor by the United Nations Security Council, whose resolutions are binding on all UN member states, or if a state makes a declaration accepting the jurisdiction of the ICC. The Assembly of states parties is the court's management oversight and legislative body and is composed of representatives of the states which have ratified or acceded to the Rome statute.

[5]Art. 27 of the Statute. See also: *Nakoulma M. V.* Heads of state international criminal immunity, what's wrong? [Electronic resource]. URL: https://hal-unilim.archives-ouvertes.fr/hal-01580298 (date of access: 18.05.2020).

[6]Art. 1, 17 of the Rome statute. The court can prosecute cased only if national justice systems do not carry out proceedings or when they claim to do so but are unwilling of unable to carry out such proceedings genuinely. This fundamental principle is known as the principle of complementarity.

[7]Pre-trial, trial and appeal.

[8]Rule 94 of the ICC's rules of procedure and evidence about victims' application to participate in proceedings or for reparations.

[9]Also Art. 95(2) of the Regulation of the ICJ ; *Guillaume G.* Statements attached to the decisions of the International Court of Justice. The Hague : M. Ruda, 2000. P. 421.

[10]Art. 107 (§ 3) of the Rules of ICC.

sion shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial. 3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges. 4. The deliberations of the Trial Chamber shall remain secret. 5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority (emphasised)".

But what is the significance of minority and then dissenting opinions? What are their functions and interest? Are there any drawbacks in practice in terms of jurisprudence? Are separate opinions desirable, particularly in criminal matters? Minority opinion means any separate opinion, any comment or remark attached by a judge to a decision or a judgment. It may be a statement, an individual, a separate, concurring, or dissenting opinion. One or more of one judge can join their views in a joint minority opinion or joint dissenting opinion.The distinction between them is not irrelevant. Concerning the ICC, its particularity is that it prosecutes the alleged perpetrators of serious crimes and to fight against impunity[11]. In such a context of prosecuting serious crimes or mass atrocities with thousands and thousands of victims, is it appropriate to have the practice of minority opinions?

If the states parties to the Rome Treaty have decided to provide such a mechanism in the Rome statute, they have done so for reasons they deemed legitimate. From our point of view, minority opinions in the ICC's practice are a path of the international and Anglo-Saxon system; and they constitute an essential exercise in the legal and judicial debate. This may explain why ICC judges widely use them.

A path from the international and Anglo-Saxon system

The legal basis. ***Brief historical recall.*** The authors of the Rome statute of the ICC which combines both Anglo-Saxon and civil law systems[12] have proposed and then endorsed the faculty for a judge, who is a member of a college, to express his views through a dissenting opinion as an expression of minority opinion. The term "shall" in the provision of Art. 74 cited below (*supra*) clearly manifests that a judge is not obliged to express an individual opinion. It is a simple faculty of discretionary nature. The acceptance of this ability was not so evident in the drafting of the Statute of the ICC. Indeed, supporters of the legal tradition of the countries of continental Europe, dominated by the inheritance of Roman law, had to confront those of the Anglo-Saxon tradition of the common law. According to the traditional conception of civil law states of romanistic tradition, judgment is the work of the majority of a court. The well-known old adage is that the judge is only "the mouth that pronounces the words of the law"[13]. Accordingly, there is no room for a "Schismatic" statement of the law. For lack of better, it is the majority. The minority is therefore in error. In this sense, in the majority of the countries of the continental system, the opinion of each of the judges involved in the decision-making is not disclosed. Only the overall judgment, which is collegial, is revealed (except of course in the cases of the single judge).

In 1942, Edward Dumbauld had already written that "[t]o the Anglo-American lawyer, dissenting opinions are a familiar feature of the judicial process. Indeed, they may constitute one of its glories. To many continental European jurists, on the other hand, dissenting opinions are regarded as anomalous, if not anathema" [2, p. 929]. How can this divergence be explained? [3, p. 819]. And then, what can be the status of minority opinions? According to him, "to a greater extent than his English or American colleague, the Continental European magistrate considers himself as a public official, instead of as the authentic expositor of the law"[14].

In the Roman law conception, there exists the idea of law as a general rule laid down by the lawgiver in advance, as a complete and closed system[15]. Moreover, for the strictest conception, a court acts as a judicial body. As explained by Edward Dumbauld, the deliberation remains secret[16]. The names of the judges who voted for or against a device should not be known[17]. On the contrary, in the Anglo-Saxon conception, which is distinctly more individualistic, judgment is above all a work of eminent magistrates operating on an individual basis. The judgment constitutes a connection of their expressions and is based on the sum of their opinions that one must study one by one. This conception should not deny the importance of recognising that judicial institutions are

[11]ICC. Art. 5 and Preamble of Rome statute.
[12]Art. 36 ("Qualifications, nomination and election of judge") § 8: "The states parties shall, in the selection of judges, take into account the need, within the membership of the court, for (i) The representation of the principal legal systems of the world". Cf: Art. 50(2) of the Rome Statute ; *Bourdon W.* The International Criminal Court. The Rome Statute. Paris : Seuil; 2000. P. 139.
[13]*De Montesquieu C.* The spirit of law. Geneva : Barrilot & Fils, 1748. Chap. VI.
[14]*Jèze G.* The general principles of administrative law. Paris : Dalloz, 1926. P 23–26.
[15]*Langenieux-Tribalat A.* The separate opinions of judges of the French judicial order. Limoges : University of Limoges, 2007.
[16]Art. 200, 304 of the French Criminal Procedure Code of 2020.
[17]For the French doctrine, the confidentiality of deliberation tends to protect judges.

independent legal phenomena and not merely agencies for the mechanical application of substantive law.

Judges from many national, supranational or international jurisdictions [4, p. 788–808], such as the Supreme Court of the United States of America (USA), the European Court of Human Rights (ECHR) in Strasbourg [5] and the ICJ [6, p. 229], use minority opinions, including dissenting opinions, when exercising their jurisdiction. We find this possibility afforded to judges in Art. 74(§2) of the Rules of the European Court of Human Rights on the contents of the judgment which states that "[a]ny judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent" [7, p. 37–60].

It was on the North American continent that the custom of separate opinions developed. Qualified as concurring opinions, these are themselves inherited from British tradition (House of Lords)[18]. However, it is established that the practice of minority opinions has gradually spread in the majority of European countries[19]. More than twenty states allow it to a greater or lesser extent in their jurisdictions[20]. In the countries of the Anglo-Saxon tradition, and in particular in the United Kingdom [8] and the United States of America[21], the practice has long been that a judge who disagrees with the majority of his colleagues and thus with the judgment has the right to make public his individual opinion. The judges have the right to draft a separate, dissenting or concordant opinion, which might be attached to the text of the judgment published.

In Luxembourg, at the Court of Justice of the European Union (CJEU), the rule is reversed: separate opinions do not exist and, logically, the judgments never say whether they have been adopted unanimously or by majority. The same is the case in the courts of Belgium or France, such as the courts of Cassation. In Belgium, as in France, it is the confidential nature of the deliberation which justifies that no dissenting opinion can be disclosed. French judicial tradition strongly opposes the expression of separate opinions. Even if his role has greatly evolved, the judicial judge is historically conceived as an interpreter of the law and not as a creator of the rule of law. In the Statute of the ICC, not only is the practice of minority opinion endorsed, but it also encases plural types of views.

Plural designation. The authors of the Statute have enshrined minority opinions in the Rome Treaty as it is in the common law countries or certain international jurisdictions. There have been many minority opinions in the decision-making of ICC judges since it began exercising its jurisdiction (2002). The expressions used to express minority opinions espouse various designations. Each of them reveals the content of the separate opinion.

Minority opinion can be a statement, usually very brief in which the judge succinctly exposes his agreement or disagreement with the decision, without entering a tight motivation. By an individual opinion or separate concurring opinion, the judge specifically shares the conclusions which the majority expresses in the operative part but bases them on different reasoning. This is noticeable in the *Separate concurring opinion of Judge Erkki Kourula* in which he agreed with the majority's conclusion to reject the requests for disqualification and with the conclusion of the majority opinion, that "Mr Kilolo's submissions do not meet the required threshold for the disqualification of the Prosecutor with respect to the specific allegation of her appointment of the same staff members to the Bemba and Bemba et al. cases"[22]. Finally, Judge Erkki Kourula, particularly, in that case, agreed with the majority's statement that, notwithstandingthat holding, "it is generally preferable that staff members involved in a case are not assigned to related Art. 70 proceedings of this kind…"[23].

By a dissenting opinion [9, p. 167], which can be partial, the judge expresses his disagreement with the ICC's findings in his disposition and sets out his own conclusions and reasons[24]. It means that the judge's opinion diverges from the motivation and all or part of the majority's decision. Judge Sang-Hyun Song expressed his dissenting opinion on the decision on the admissibility of an appeal against the decision on the application for the interim release of certain detained witnesses[25]. Judge Sang-Hyun Song disagreed with that decision in the context of the case Prosecutor v. Mathieu Ngudjolo Chui[26].

In a partly dissenting opinion, the same judge agreed with the majority of the Appeals Chamber "that it is appropriate to reject the Prosecutor and Mr. Lubanga's respective appeals against the Sentencing Decision"[27]. Judge Sang-Hyun Song further agreed with the majority that, based on Art. 78(1) of the Statute and Rule 145(1)(c) and 145(2) of the Rules of proce-

[18] *Gourmelen L.* The virtues of dissenting opinions. Opportunity to allow dissenting opinions at the Belgian Constitutional Court. Louvain : Catholic University of Louvain, 2016. P. 5.
[19] *Riviere F.* The Separate opinions of judges at the European Court of Human Rights. Brussels : Bruylant, 2005.
[20] *Raffaelli R.* Study on the divergent opinions within the supreme courts of the member states. Brussels, 2012. P. 33.
[21] See: The case opinions in Barentblatt v. United States. 360 US 109 (1959).
[22] ICC-01/05-01/13-648-Anx121-10-20141/3RH PT OA. 22 Aug. 2014. Para 1.
[23] Ibid.
[24] Legal dictionary [Electronic resource]. URL: from https://legaldictionary.net/dissenting-opinion (date of access: 19.05.2020)
[25] Prosecutor v. Katanga. ICC-01/04-01/07-3424 (OA 14).
[26] Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350. ICC-01/04-02/12-158-Anx20-01-20141/1NM. 20 Jan. 2014. Para 1.
[27] ICC-01/04-01/06-3122-Anx101-12-20141/3NMA4 A6. ICC-01/04-01/06 A 4 A 6. 1 Dec. 2014. Para 1.

dure and evidence, a Trial Chamber should weigh and balance the following factors when determining a sentence: the gravity of the crime, all the mandatory factors listed in Rule 145(1)(c), any relevant aggravating and mitigating factors, and the individual circumstances of the convicted person[28]. He also agreed with the majority's statement that "the Court's legal texts provide for several potential interpretations of the interaction between the factors of Art. 78(1) of the Statute and those of Rule 145(1)(c) of the Rules of Evidence and Procedure"[29]. However, he disagreed with the majority that it was not necessary in the context of that appeal to determine which of the possible approaches to the interaction between the factors of Art. 78(1) of the Statute and those of Rule 145(1)(c) of the Rules of procedure and evidence was correct[30]. In his view, to ensure a consistent sentencing practice, the Appeals Chamber should have provided further guidance on how a Trial Chamber should take these factors into account when determining sentence.

Concerning majority opinions, it is a ruling agreed upon by more than half of the judges on the panel. A majority decision means that it is the one that will become binding. It might be issued orally then written. At the ICC, the content of each minority opinion depends on the views of the judges involved. The dissenting opinion is necessarily linked to a "vote" contrary to the majority. Among minority opinions, this is the most radical form of disagreement a judge can express. Minority opinions are designated differently according to the content which the judge intends to give to his opinion. As explained, it can be a separate concurring opinion, dissenting opinion, or partially dissenting opinion. In these last years, the latter two are most commonly used in minority opinions at the ICC. Indeed, of all the minority opinions analysed for this article, more than half are thus designated. At the ICC, there is a growing and increasing use of minority opinions.

A growing use in question. ***A risk of a diminishment of the ICC's authority ?*** Is there a correlation between the existence of the practice of minority opinion sand a possible diminishment of the ICC's authority? Some arguments prevail in considering that individual opinions in one way or another lead to a diminishment of the ICC's authority. Firstly and specifically, dissenting opinions might create a schism. That's why in romanistic tradition the dissenting is considered as being in error. The bet is not to be taken to allow the dissenting judge to ventilate his error by spreading the confusion. In such a view, it would be unacceptable to allow dissenting judges to manifest "schism" outwards because the image of the judge as the servant of the law, the prestige of the courts and the public confidence in a procedure which is confined to enforce the law would suffer a fatal weakening.

Secondly, dissenting opinion might "split court", as a result of that "schism". The practice of separate opinions could introduce division between judges. A person by his dissenting opinion can be considered an opponent against the majority, which can lead to a bad co-working climate. To avoid this situation, a judge even convinced of an individual opinion might hesitate to express it, even if he does not agree with the majority. This reasoning is purely theoretical, and this is not so relevant since the purpose of dissenting opinions is not to express alien opinions on the interest of justice. Each judge pursues the rules that govern the jurisdiction of the ICC. Sometimes the difference in perception of the application of the rules is very profound. But it allows judges to introduce dynamism into decision-making mechanisms.

In this matter, one of the emblematic separate opinions was the dissenting opinion of Judge Herrera Carbuccia[31] to the Chamber's Oral Decision of 15 January 2019 on the Requête de la Defense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée and on the Blé Goudé Defence No Case to Answer Motion. Judge Herrera Carbuccia disagreed with the decision of the majority (judge Cuno Tarfusser and judge Geoffrey Henderson). Firstly, she reproached the majority for having delivered an oral decision without any reasoning. Secondly, she criticised their conclusion to grant the defence motions for judgment of acquittal on the basis that there was no evidence capable to sustain a conviction for either one of the two accused in the cited case. As such, it seems that her approach tends to recall the fight against impunity and the interests of victims in the criminal justice system. But, the ICC is not under the government of individual opinions. They don't lead to a "split court". Dissenting opinions system is a guarantee against bias.

A risk of bias? Is the practice of dissenting opinions a subject of bias? In other words, when a judge issues an individual opinion, is that faculty a manifestation of a bias? Art. 36(3)(a) of the Statute of the ICC is very obvious: "The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices". In principle, international criminal tribunals particularly require high standards of judicial impartiality and independence.

[28]ICC-01/04-01/06-3122-Anx101-12-20141/3NMA4 A6. ICC-01/04-01/06 A 4 A 6. 1 Dec. 2014. Para 61.
[29]Ibid.
[30]Ibid.
[31]ICC-02/11-01/15-1234 15-01-2019. No. ICC-02/11-01/15. 15 Jan. 2019.

At the ICC, a judge's impartiality can be the subject of a recusation[32] most often introduced by the defence[33]. As it is abundantly well recalled in judges' response of having been face with the question of recusation:[34]"The disqualification of a judge is not a step to be undertaken lightly, and a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case"[35].

Closely linked with Art. 36, 40 and 41 of the Rome Statute are the provisions to be referred to in the areas of judicial independence and impartiality. In accordance with Art. 40, judges shall be independent in the performance of their functions. Indeed, "judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence". In addition, they "required to serve on a full-time basis at the seat of the court shall not engage in any other occupation of a professional nature". Related to Art. 41(2)(a) of the Statute[36], "a judge shall not participate in any case in which his or her impartiality might reasonably be doubted onany ground…".

A feature necessary for the continuation of judicial independence and impartiality is the immunity afforded to judges. However, this does not mean that judges are not accountable. First, judges are bound by the rule of law. They must decide cases in accordance with the evidence before them and the law. The decisions are subject to appeal and, if warranted, correction or modification by the Appeal Chamber. The reasoning in judicial decisions and the conduct of proceedings are subject to criticism by courts of appeal, by other judges, the legal profession, academics, and by the press and the public [10, p. 173].

According to the jurisprudence of the ICC, there is also a presumption that each judge of the court is capable of determining whether his or her prior undertakings could reasonably raise a doubt of bias about the case assigned to him. This presumption was established by the majority of the judges in the Decision on the motion to challenge Judge Silvia Fernandez in the case of the prosecutor v. Thomas Lubanga Dyilo[37]. In sum, to the question: is the practice of minority, and in particular ofdissenting opinions, a subject of partiality? The response is no. The Core texts of the ICC guarantees the independence and impartiality of judges. Dissenting opinions don't constitute a risk of bias. They serve the interest of justice.

An essential exercise in the legal and judicial debate

The perils. ***Related to the understanding of the cases.*** When judges can make their separate opinions known, the principle of secrecy of deliberation is distorted. Each judge can be criticised either for implicitly approving the majority solution or for having diverged from it. Beyond that, it could be an issue for the understanding of the case. In the ICC's system, the public has the right to know the decisions or the judgments[38]. Decisions are public[39]. This situation could be considered as topical for the victims because one can naturally imagine that in a context of mass atrocities, it is useless to see how during the making-decision process, judges of the ICC are opposed.

Moreover, the possibility for judges to join a separate opinion might relativise the scope of the decisions. In fact, the understanding of the decisions of a court is also the result of how one can feel or perceive a dissenting opinion as a transparency[40], an opposition, or a mistake, thereby questioning the relevance of the jurisprudence of thiscourt as well. In their joint dissenting opinion[41], judge Ekaterina Trendafilova and judge Cuno Tarfusser expressed their regret that they

[32]Decision of the plenary of judges on the defence application for the disqualification of judge Silvia Fernández de Gurmendi from the case of the prosecutor v. Thomas Lubanga Dyilo. 3 Aug. 2015. ICC-01/04-01/06-3154Anxl.

[33]Judge Sophie Alapini-Gansou. Pre-Trial Chamber I. 6 Aug. 2019. ICC-01/12-01/18-Red. Para 4.

[34]Decision of the plenary of judges on the defence application of 20 Feb. 2013 for the disqualification of judge Sang-Hyun Song from the case of the prosecutor v. Thomas Lubanga Dyilo. 11 June 2013. ICC-01/0401/06-3040-Anx. Para 9. See also: Decision of the plenary of judges on the defence request for the disqualification of judge Kuniko Ozaki from the case of the prosecutor v. Bosco Ntaganda. 20 June 2019. ICC01/04-02/06-2355-AnxI-Red. Para 11.

[35]Judge Sophie Alapini-Gansou. Pre-Trial Chamber I. 6 Aug. 2019. ICC-01/12-01/18-Red. Para 5.

[36]1st and 2nd International criminal law conferences. The establishment of an International Criminal Court (1975). 20 et seq.

[37]The prosecutor v. Thomas Lubanga Dyilo. 3 Aug. 2015. ICC-01/04-01/06-3154Anxl. Para 35.

[38]The latter expression ("the judgment") has been reserved in the ICC framework to the decisions of the Appeals Chamber, under Art. 83. Final decisions of the Appeals Chamber on the guilt or innocence of the accused may be sufficiently distinguished as "final judgment". Cf: Rome Statute. Art. 84(1).

[39]But according to the cases (security of the witnesses, ect.), they can be redacted. So only the redacted versions are public.

[40]See: Mistry H. A performative theory of judicial dissent in international law? [Electronic resource]. URL: https://voelkerrechtsblog.org/event/a-performative-theory-of-judicial-dissent-in-international-law-dr-hemi-mistry-university-of-nottingham (date of access: 19.05.2020).

[41]ICC-01/04-02/12-271-AnxA27-02-20152/26NMA. 27 Feb. 2015.

were unable to join the majority of the Appeals Chamber in confirming the judgment pursuant to Art. 74 of the Statute, rendered by Trial Chamber II of the ICC, in the case against Mathieu Ngudjolo Chui[42]. According to their view, the majority judgment failed to adequately address questions at issue in the appeal which were of fundamental importance for the case, as well as for the jurisprudence of the ICC. They stated that given that the proper resolution of the questions ensuing from the grounds of appeal "shall affect the court's operation for the years to come, they find ourselves judicially compelled to dissent from the majority".

Notwithstanding the controversies, we estimate that minority opinions lead to a better understanding the decisions, the rules or the applicable principles by the ICC, as it is demonstrated by the dissenting opinions of judge Christine Van den Wyngaert of 21 November 2012, and 20 May 2013[43]. She disagreed with her colleagues because according to her, the majority of the chamber had applied Regulation 55 of the Regulations[44] in a manner that exceeded the scope of the charges[45] and violated the rights of Mr. Katanga, the accused[46].

In her dissenting opinion to the Chamber's oral decision of 15 January 2019, judge Herrera Carbuccia stated that the right of the accused to be tried without undue delay must be weighed with other fundamental rights to a fair trial, including the right to know the reasons for the judgment and the right to appeal. She pointed out that these rights do not only belong to the accused. The right to a fair and impartial trial is a paramount pillar of international justice. Without these fundamental rights the prosecutor's obligation to act before the court pursuant to Art. 42(1) of the Statute and on behalf of the international community is hindered. The victims'right to seek justice and ultimately reparations is equally thwarted[47].

In comparison with the Statute of the ICC, Art. 23 of the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY) and its Rules correspond widely with the regulations in Nuremberg and the various Drafts presented since then. While Rule 29 for the ICTY emphasises the private and secret character of the deliberations, Rule 87 states when the hearing shall be closed and that the majority of the Trial Chamber has to be "satisfied that guilt has been proved beyond reasonable doubt". Rule 98ter outlines the conditions and contents of judgments, permitting expressly under "separate or dissenting opinions" which have to be translated if necessary for the accused in a language which he understands: because such separate opinion may contain valuable hints to decide upon reasons for and expectation of an appeal[48].

Related to the mastering of the rules. Judges from many national or supranational jurisdictions use minority opinions. In the system of the ICC, dissenting opinions issued prove that judges master the rules governing the jurisdiction. In another dissenting opinion of judge Christine Van den Wyngaert[49], she underlined that like judge Usacka, she was regretfully unable to join the majority of the Appeals Chamber in confirming the decision on the defence's application for interim release. Her point of view highlighted that the Pre-Trial Chamber II erred in its sole reliance on anonymous hearsay evidence contained in press releases, blog articles and two United Nation reports of the expert groups. In her view, such evidence must be treated with utmost caution in the context of a criminal trial and without considerably more, independently verified.

In the individual opinion against a decision delivered on 29 April 2016 issued by the majority of Pre-Trial Chamber II, judge Marc Perrin de Brichambaut[50] noted that the chamber dismissed the defence request, which contained five issues within the meaning of Art. 82(1)(d) of the Statute[51]. While he could follow his colleagues' reasoning in respect of the first and last two issues contained in the defence request, he could not agree with them on the third issue raised by the defence[52] namely insufficient reasoning of the Decision on the confirmation of charges[53]. *Inter alia,* in that case, the defence emphasised that such a vague decision lacking precise evidentiary citations will cause

[42]Trial Chamber II. Judgment pursuant to Art. 74 of the Statute. ICC-01/04-02/12-3-tENG. 18 Dec. 2012.
[43]ICC-01/04-01/07-3388-Anx. 26 June 2013. p. 1 ; Annex to the Décision relative à la transmission d'éléments juridiques et factuels complémentaires. 20 May 2013. ICC-01/04-01/07-3371-Anx.
[44]Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés. 21 Nov. 2012. ICC-01/04-01/07-3319.
[45]ICC-01/04-01/07-3319. Paras 12–24; ICC-01/04-01/073371-Anx. Paras 5–26.
[46]ICC-01/04-01/073371-Anx. Paras 27–34.
[47]Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law : resolution of 21 March 2006 60/147 : adopt. by the General Assembly principles 11–12.
[48]*Triffterer O.*, *Ambos K*. The Rome Statute of the International Criminal Court. A commentary. London : C.H. BECK. Hart. Nomos, 2015. P. 1828.
[49]ICC-01/04-02/06-271-Anx2, 05-03-20141/2NMPT OA.
[50]ICC-02/04-01/15-428-Anx-tENG 14-09-2016 ; ICC-02/04-01/15. 10 May 2016.
[51]This article entitled "Appeal against other decisions" states that "a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".
[52]ICC-02/04-01/15-423. Paras 25–35.
[53]ICC-02/04-01/15-423. Paras 30, 31.

confusion throughout the rest of the proceedings, especially as it grants the prosecution too much leeway[54].

Another example of dissenting opinion as a demonstration of mastering of the rules appears with judge Ibáñez Carranza's separate opinion to the *judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*[55]. Judge Ibáñez Carranza appended a separate opinion to this judgment[56] in relation to the interpretation of Art. 15 and its relationship with Art. 53 of the Statute as discussed in paragraphs 29–33 of this judgment[57]. As she clearly explained: "In my view, there are clear norms in the Statute that should be interpreted and applied contextually in the present case in light of the Statute's objects and purpose in a way that grants victims standing – in accordance with Art. 21(3) – in a decision rejecting a request for authorisation to investigate. The Statute is centred on the victims and many of the provisions under its statutory framework state that they have a central role, in particular, at the initial Art. 15 stage. Additionally, victims have internationally recognised human rights to access to justice and to obtain effective remedies, which at the initial phase emerging from a request for investigation…"[58].

Minority opinions don't become a binding precedent. Sole the Core texts of the ICC and the legal principles guide the judicial work. Moreover, dissenting opinions don't lead to the weakening of the authority of decisions issued in the context of fighting against impunity and prosecuting the alleged perpetrators of crimes against humanity, crime of genocide, war crimes and, one day, crimes of aggression. They are the symbol of the integrity of a criminal judicial system. In this, it is necessary to analyse further the merits of this system in the judicial work of the ICC.

The Merits. ***Minority opinions as a guarantee of judicial transparency.*** The aspect of the reflection consisting in the analysis of the positive aspects of the existence of the system of minority opinions in the judicial work of the ICC can be appreciated in many ways, in particular about the way in which the law is applied at the court. The advantage of this practice is, *inter alia*, to transparently and thoroughly expose the different viewpoints possible on the same judicial questions (procedure and applicable law). This aspect of the topic is interesting for the lawyers, legal representatives of the victims (LRV), legal officers and, of course, for the judges themselves. The law is not an exact science; it is a science that applies the law to the facts.

It is useful that each participant in the proceedings before the ICC knows all the answers raised by the applicable law (to a person or a situation) and the view of each judge, when expressed. In this regard, we are of the view that minority opinions are a guarantee of judicial transparency. Especially, dissenting opinions work as a symbol of judicial transparency and acumen.

In his partially dissenting opinion on the oral rulings on Mr. Ntaganda's absence and request for adjournment (requested by the Defence on 13 September 2016), Judge Robert Fremr recalled that the defence's request was partially granted, namely "to the extent of appointing a medical expert to assess Mr. Ntaganda's fitness pursuant to Rule 135 and in accordance with [the Chamber's] obligation under Art. 64"[59]. He agreed with the majority that a waiver of the right to be present and follow the proceedings need not necessarily be explicit, or made in writing, and can be inferred from an accused's actions. However, he clearly explained that when information is limited at the time of making a decision, a Chamber should not consider itself to be in a position to conclude that an absence should be interpreted as a voluntary waiver of the right to be present and to follow the procedure. Under such circumstances, the Chamber must adjourn for a short period of time to allow for more information, he wrote[60].

We consider minority opinions, even if dissenting, as an important path in decision-making. Minority opinions are also a pledge to enrich the legal and judicial debate.

Minority opinions, a pledge to enrich the legal and judicial debate. The mechanics by which minority opinion operates emphasises judges' statutory duties at the ICC and shows a democratic aspect of the judicial authority. Separate opinions enrich the legal and judicial debate. This is a guarantee of judicial dynamism mentioned above.The function of the system of dissenting opinions, for example, can be a source for interpretation or elucidation of the decision of the ICC; even if they don't constitute the jurisprudence of the ICC.

Indeed, although a judge may issue a dissenting opinion, expressing his or her opposition to the ruling of the majority in a case, nothing in that opinion becomes law. While it may be used in the future by others in an attempt to explain or justify their positions on specific legal issues, no chamber of the ICC is bound by

[54]ICC-02/04-01/15-423. Paras 33, 35.
[55]Judgment on the appeal against the decision on the authorisation of aninvestigation into the situation in the Islamic Republic of Afghanistan. ICC-02/17 OA4. 5 March 2020.
[56]Situation in the Islamic Republic of Afghanistan, dissenting opinion to the majority's oral ruling of 5 Dec. 2019 denying victims' standing to appeal. ICC-02/17 OA OA2 OA3 OA4. 5 Dec. 2019.
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[58]Situation in the Islamic Republic of Afghanistan, dissenting opinion to the majority's oral ruling of 5 Dec. 2019. P. 3. Paras 1, 2.
[59]Partially dissenting opinion. ICC-01/04-02/06. 14 Sept. 2016. P. 4. Para 5.
[60]Idid. P. 4. Para 4.

opinions expressed in dissent. Nevertheless, there are some assumptions that individual opinions form part of the judgment of the ICC.

This reasoning also leads to the conclusion that individual opinions indirectly provide a significant contribution to the development of law [10]. It is due to the richness of the debate which can happen between the dissenting judges and the majority. In turn, this faculty can encourage academics to review the ICC's decision-making actions and processes. Sometimes the decisions of the ICC may be better understood in the cross-reading and cross-checking of minority or individual opinions of judges who have disagreed either with the device or (and) with the reasoning of the majority.

Concordant, concurring, and dissenting opinions have the advantage of clearly determining the contours of legal issues. They contribute to the *ratio decidendi*. Thus, dissenting opinions have often been the real drivers of legal discussion, preparing for further judicial developments by advancing innovative arguments. Minority opinions are more of a breakdown in numbers than a break in what is the essence of the vitality of the judicial debate. The richness of the legal and judicial debate is nourished by all of the issues in link with the prosecution, the protection of the witnesses, a fair and just trial for victims, the rights of the defence, etc.

As it has been indirectly indicated by some of the minority opinions quoted in this paper, the judges deal with all the judicial questions, such as the rights of the defence in the jurisdiction of the ICC. That shows that judges are free to make decisions based on the facts and the law in each case, and to exercise their role as protectors of the human rights, without any pressure or interference[61]. In furtherance of its objects, the system of the ICC (Satute, Rules of procedure and evidence, Regulation, etc.) guarantees the responsibility, transparency, freedom and independence of the judge.

Conclusion

When justice is done by a single judge, in that case, there is no issue. When there is more than one judge, the faculty for judges to express individual opinions can be considered irrelevant. This point of view is normatively unproblematic since judges are free to make impartial decisions based on the facts and the law in each case, and to exercise their role. They contextually interpret and apply each case in light of the Statute's objects. In our view, minority and specifically dissenting opinion are the sign of the internal independence of judges, that is, their autonomy from their peers, on the one hand. On the other hand, it is a way of preserving their intellectual integrity[62]. The practice of minority opinions signals the vitality of the ICC's judicial activity. The dynamism it reveals means that judges are particularly interested in the cases and legal questions they have to deal with. Ideas developed in these opinions may pave the way for future considerations for case law.

Yet, this vitality of the court is less perceptible with regard to its universality in the prosecution of serious crimes[63]. It is a crucial issue the ICC is currently facing. Actually, of the five permanent members of the Security Council, major non-member states exist: Russia, China and the United states of America[64]. *Prima facie*, the ICC therefore has no jurisdiction over them. This does not mean that the court is «forbidden» to prosecute the international crimes of genocide, crimes against humanity, war crimes, and aggression crimes committed by their nationals. Regarding the United States, they are facing off the ICC by announcing sanctions on its senior officials, after the permission of the ICC to open an investigation in Afghanistan[65].

As Carsten Stahn said, international criminal law has witnessed a rapid rise after the end of the Cold War. That progression was identified as the birth of a new "age of accountability". But certain historical objections, such as selectivity or victor's justice, have never fully gone away. Various critiques have emerged in socio-legal scholarship or globalisation discourse, "revealing that there is a stark discrepancy between reality and expectation. Today, the Court is being criticised for having a racist agenda, a flawed investigation process and a prosecutorial strategy, as well as suffering from unacceptable delays" [21]. Nonetheless, the ICC's commitment remains still useful as the United Nations even indicates an increase in war crimes and crimes against humanity (Libya, Syria, Yemen, North Korea, etc.).

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