DISSENT AND LEGITIMACY IN INTERNATIONAL CRIMINAL LAW

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Throughout history, dissenting opinions have been subject to soaring praise as well as vitriolic criticism. Although some commentators nominally acknowledge that the normative value of dissenting opinions necessarily varies depending on the unique context in which the relevant court operates, in fact, we see the same arguments advanced to support or oppose dissenting opinions, regardless of the court in which those opinions appear. Dissents are particularly prevalent in international criminal courts—those courts established to prosecute the worst crimes known to humankind: genocide, war crimes, and crimes against humanity. Although dissents in these courts have garnered little scholarly attention, the few normative arguments that have been made track those that have been advanced for decades in the United States and other judicial systems. In a previous work, I launched a comprehensive empirical and normative analysis of separate opinions in international criminal law. Whereas my earlier scholarship laid the groundwork and evaluated certain alleged benefits of separate opinions, this Article begins by empirically assessing their costs. The Article then evaluates the primary normative claim made in support of separate opinions both domestically and internationally: that they enhance the legitimacy of the court and its opinions. These examinations reveal that previous commentators have employed one-size-fits-all analyses that fail to take account of the unique features of international criminal courts and mass atrocity trials. These features complicate the relationship between separate opinions and legitimacy, but the quantitative and qualitative

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evidence combined strongly suggest that separate opinions are likely to delegitimize an already fragile, vulnerable criminal justice system.

TABLE OF CONTENTS

INTRODUCTION 1062
I. THE COSTS OF SEPARATE OPINIONS 1071
A. Separate Opinions and their Capacity to Encourage Litigation 1071
1. Do Separate Opinions Increase Litigation in International Criminal Proceedings? 1071
2. The Normative Implications of Increased Litigation Based on Separate Opinions 1078
B. Separate Opinions and their Capacity to Delay Proceedings 1081
C. A Summary of Costs 1091
II. SEPARATE OPINIONS AND LEGITIMACY 1094
A. Dissents as a Reassurance Mechanism 1101
B. Legitimacy and the Content of Separate Opinions 1103
C. The Delegitimizing Impact of Delay 1106
D. Dissents as Fuel for Political Theater 1107
CONCLUSION 1111
APPENDIX A 1119
APPENDIX B 1122
APPENDIX C 1124
APPENDIX D 1126

INTRODUCTION

United States Supreme Court commentators go into overdrive in June of every year when the Court issues its most controversial decisions—the decisions that are not decided until the end of the term. These commentators dissect not only the opinion for the Court but also the ever-present dissents and concurrences.[1] About two-thirds of United States Supreme Court decisions are accompanied by

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1. *See, e.g.*, Alexa Bradley, *Bostock v. Clayton County: An Unexpected Victory*, MARQ. UNIV. L. SCH. FAC. BLOG (July 17, 2020), https://law.marquette.edu/facultyblog/2020/07/bostock-v-clayton-county-an-unexpected-victory/; Stephanie C. Generotti, *Supreme Court Justices Dissent: The Opposition to Extending Title VII's Protections to Gay and Transgender Employees*, NAT'L L. REV. (June 19, 2020), https://www.natlawreview.com/article/supreme-court-justices-dissent-opposition-to-extending-title-vii-s-protections-to; Colin Kalmbacher, *'Pirate Ship' Alito Scores Own Goal, Points Civil Rights Lawyers Right to Buried Treasure*, LAW & CRIME (June 15, 2020, 6:43 PM), https://lawandcrime.com/awkward/pirate-ship-alito-scores-own-goal-points-civil-rights-lawyers-right-to-buried-treasure/.

at least one dissent or concurrence,[2] and these separate opinions are particularly prevalent in the most publicized and controversial Supreme Court cases.[3]

Separate opinions, now a common feature of the American legal system, were once highly controversial; for many decades, scholars and commentators criticized separate opinions in the strongest possible terms,[4] primarily for undermining the authority and legitimacy of the judicial system but also for a plethora of other perceived sins.[5] In the end, separate opinion proponents[6] carried the day both in the United States[7] and throughout the world. Indeed, whereas separate opinions originated in the courts in common-law

2. *See* Adam Feldman, *Empirical SCOTUS: Amid Record-Breaking Consensus, the Justices' Divisions Still Run Deep*, SCOTUSBLOG (Feb. 25, 2019, 1:28 PM), https://www.scotusblog.com/2019/02/empirical-scotus-amid-record-breaking-consensus-the-justices-divisions-still-run-deep/; *see also* Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 186 (2009).

3. Louis Gentilucci, *Looking Back: Famous Supreme Court Dissents*, CONST. DAILY (July 29, 2015), https://constitutioncenter.org/blog/looking-back-famous-supreme-court-dissents (noting that many cases involving "hot-button issues" have featured dissents); Matthew P. Bergman, *Dissent in the Judicial Process: Discord in Service of Harmony*, 68 DENV. U. L. REV. 79, 79 (1991).

4. *See, e.g.*, Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 507 (2012) ("Around the turn of the last century, many American lawyers wanted to ban dissenting opinions in all courts of last resort.").

5. *See, e.g.*, *id.* (noting that critics "derided dissenting opinions as a pernicious waste of time, one that caused uncertainty in the law, shook the public's faith in the courts and was fundamentally inconsistent with the nature of judicial authority"); *see also* C.A. Hereshoff Bartlett, *Dissenting Opinions*, 32 LAW MAG. & REV. 54, 62 (1906); William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690, 690 (1905); Henry Wollman, The Stability of the Law – The Income Tax Case, *in* 57 ALB. L.J. 74, 74 (1898); *Should Dissenting Opinions Be Reported*, 1 UPPER CAN. L.J. (n.s.) 177 (1865).

6. *See* Richard B. Stephens, *The Function of Concurring and Dissenting Opinions in Courts of Last Resort*, 5 U. FLA. L. REV. 394, 398 (1952) (noting that a separate opinion stands as an "affirmative showing of [judicial] vitality and interest, and sometimes serves as a yardstick for ability"); *see also* Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118, 118 (1953) ("Judicial history shows that the dissenting opinion has exercised a corrective and reforming influence upon the law."); Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 927 (1962); R. Dean Moorhead, *The 1952 Ross Prize Essay: Concurring and Dissenting Opinions*, 38 A.B.A. J. 821, 822 (1952); Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 35; Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 655 (1992).

7. Smith, *supra* note 4, at 508 ("As anyone familiar with contemporary American courts could say, dissents' would-be abolishers failed spectacularly.").

countries, such as Australia, Canada, and the United States,[8] now they routinely appear in the judgments of courts across the globe.

Civil law countries that historically prohibited separate opinions[9] began authorizing them a few decades ago, first in their newly minted constitutional courts[10] and later in their general jurisdiction courts.[11] Likewise, international courts, created to adjudicate a wide range of international law issues, almost uniformly permit their judges to issue separate opinions. The trend began with the first "World Court"—the Permanent Court of International Justice ("PCIJ") in the 1920s[12]— and it has since been followed by the International Court of Justice ("ICJ"),[13] the Tribunal for the Law of the Sea,[14] and a wide range of Human Rights courts.[15] Although the European Court of Justice stands as a notable exception,[16] in general, judges on international courts are permitted to dissent, concur, or otherwise

8. 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); Peter W. Hogg & Ravi Amarnath, *Why Judges Should Dissent*, 67 U. TORONTO L.J. 126, 128 (2017) (describing history of separate opinions in Canada); Andrew Lynch, *'The Intelligence of a Future Day': The Vindication of Constitutional Dissent in the High Court Australia—1981-2003*, 29 SYDNEY L. REV. 195, 202 (2007) (describing separate opinions in Australia).

9. Hogg & Amarnath, *supra* note 8, at 129.

10. KATALIN KELEMEN, JUDICIAL DISSENT IN EUROPEAN CONSTITUTIONAL COURTS: A COMPARATIVE AND LEGAL PERSPECTIVE 10 (2018).

11. ROSA RAFFAELLI, DISSENTING OPINIONS IN THE SUPREME COURTS OF MEMBER STATES 20 (Eur. Parliament ed., 2012), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_EN.pdf (dissenting practices are permitted in twenty European Union member states).

12. *See* IJAZ HUSSAIN, DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT 18–22 (1984).

13. Statute of the International Court of Justice, art. 57, Nov. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 ("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.").

14. Statute of the International Tribunal for the Law of the Sea, art. 30, ¶ 3, Dec. 10, 1982, 1833 U.N.T.S. 561.

15. *See* Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 15, art. 45, ¶ 2, *opened for signature* Nov. 4, 1950, E.T.S. No. 5 (entered into force Aug. 1, 2021); Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 MAX PLANCK Y.B. U.N. L. 341, 371 (2001); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 28, ¶ 7, *adopted* June 10, 1998 (entered into force Jan. 25, 2004).

16 *See* Josef Azizi, *Unveiling the EU Courts' Internal Decision-Making Process: A Case for Dissenting Opinions?*, 12 ACAD. EUR. L. F. 49, 50 (2011).

express views independent of, and in opposition to, majority opinions.[17]

Given this historical trajectory, it should come as no surprise that the creators of the first modern international criminal courts likewise authorized judges to issue separate opinions. These courts were created to prosecute humankind's most heinous offenses, including genocide, war crimes, crimes against humanity, and aggression. They include tribunals charged with prosecuting crimes in the former Yugoslavia[18] and Rwanda,[19] as well as the permanent International Criminal Court ("ICC").[20] The very establishment of these courts was highly controversial,[21] as were many of their features.[22] What was not controversial, however, was the authority that judges on these international criminal courts were provided to issue separate

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17. *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Road Not Taken: Comparative International Judicial Dissent*, 166 AM. J. INT'L L. 340, 340–41 (2022).

18. Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 3–5 (as amended), enacted by S.C. Res. 827, U.N. S/827 (May 25, 1993) [hereinafter Former Yugoslavia Tribunal Statute].

19. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, arts. 2–4 (as amended), enacted by S.C. Res. 955, U.N. S/955 (Nov. 8, 1994) [hereinafter Rwanda Tribunal Statute].

20. Rome Statute of the International Criminal Court, arts. 6–8 bis, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

21. *See, e.g.*, MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 10 (2007); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 476 (1999); Max Frankel, *Word & Image: The War and the Law*, N.Y. TIMES, May 7, 1995 (§ 6), at 48; *see also* Barrie Sander, *International Criminal Justice as Progress: From Faith to Critique*, *in* 4 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 749, 775 & n.138 (Morten Bergsmo et al. eds., 2015) (describing the realist literature).

22. The jurisdictional provisions of the international criminal tribunals often provoke tremendous controversy, *see, e.g.*, Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1210 (2010) (describing the controversy surrounding the inclusion of the crime of aggression in the ICC's jurisdiction); Frankel, *supra* note 21. Their penalty provisions also provoke substantial controversy, *see, e.g.*, Aimé Muyoboke Kalimunda, *The Death Penalty in Rwanda: Surrounding Politics and the ICTR's Battle for Abolition*, *in* THE POLITICS OF THE DEATH PENALTY IN COUNTRIES IN TRANSITION 128, 144–45 (Madoka Futamura & Nadia Bernaz eds., 2014) (highlighting the controversy over excluding the death penalty from the ICTR); Harry M. Rhea, *An International Criminal Tribunal for Iraq After the First Gulf War: What Should Have Been*, 19 INT'L CRIM. JUST. REV. 308, 316–17 (2009) (explaining that international opposition to the death penalty resulted in a national, as opposed to international, establishment of the Iraqi High Tribunal).

opinions. Indeed, whereas seventy years before, the creators of the PCIJ debated literally for years over whether to permit separate opinions in that court,[23] the creators of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") authorized separate opinions seemingly without any discussion whatsoever.[24]

Judges on these international criminal courts have made robust use of their right to issue separate opinions, and that too is unsurprising. When these courts were first established in the 1990s, there existed virtually no substantive, procedural, or evidentiary law governing the prosecutions.[25] Thus, early judges who hailed from around the world had to develop, largely from scratch, the elements of the crimes and defenses and the relevant procedural and evidentiary rules.[26] Given the scarcity of precedent and the diverse judicial backgrounds, disagreements were to be expected; indeed, my research has revealed that only a minority of international criminal law final judgments are unanimous.[27] Not only do international criminal judges frequently file dissents disagreeing with majority opinions, they also routinely issue concurrences,[28] declarations,[29] and separate opinions bearing other names[30] that expand on and/or explicate every conceivable aspect of international criminal substantive law and procedure. Notably, in an earlier work, I ascertained that at the four most prominent international criminal

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23. *See, e.g.*, HUSSAIN, *supra* note 12, at 18–26; Edward Dumbauld, *Dissenting Opinions in International Adjudication*, 90 U. PA. L. REV. 929, 937–40 (1942).

24. *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 (reporting that the ICC's provisions on separate opinions apparently "received little attention during the drafting exercise").

25. Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 15, 18 & n.9 (1997); Nancy Amoury Combs, *International Criminal Justice After Atrocities*, *in* THE OXFORD HANDBOOK OF MASS ATROCITIES 621 (Barbora Hola et al. eds., 2022) ("The statutes of the first two modern international tribunals—the ICTY and ICTR—defined the crimes over which the tribunals had jurisdiction in relatively vague and undetailed terms.").

26. *See* Schrag, *supra* note 25, at 17–18, 18 n.9.

27. *See* Nancy Amoury Combs, *The Impact of Separate Opinions in International Criminal Law*, 62 VA. J. INT'L L. 1, 24 (2021).

28. *See, e.g.*, Prosecutor v. Ngudjolo, ICC-01/04-02/12, Concurring Opinion of Judge Van den Wyngaert (Dec. 18, 2012).

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

30. *See, e.g.*, Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Separate Opinion of Judge Steiner (Mar. 21, 2016).

tribunals,[31] more than three-quarters of Appeals Chambers' final judgments feature a separate opinion,[32] and more than half of all final judgments do so.[33]

Although the prevalence of separate opinions to international criminal judgments could have been predicted, what has been surprising is the meager attention those opinions have garnered. In the United States, once the debate over the propriety of separate opinions was settled in their favor, scholars and commentators began scrutinizing their every feature.[34] To this day, separate opinions command considerable attention, and scholarly journals are replete with studies that explore, among other things, their ostensible

31. Namely, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court. Combs, *supra* note 27, at 7.

32. *Id.* at 22 (showing that 78 percent of Appeals Chambers' final judgments are accompanied by a separate opinion).

33. *Id.* (showing that 52 percent of all Trial and Appeals Chambers' final judgments are accompanied by a separate opinion).

34. *Id.* at 6.

causes[35] and consequences.[36] Robust scholarly and popular attention has also been devoted to the separate opinions of long-standing international courts. For instance, from the mid-twentieth century onwards, scholars have dissected the separate opinions of the International Court of Justice,[37] and more recently, the Human

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35. For instance, scholars have examined, among other things, the impact of judges' gender, race, background, political affiliation, and ideological divergence from the majority on their proclivity to dissent. *See* David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 165 (1993) (gender); Madhavi McCall, *Gender, Judicial Dissent, and Issue Salience: The Voting Behavior of State Supreme Court Justices in Sexual Harassment Cases, 1980-1998*, 40 SOC. SCI. J. 79, 81 (2003) (gender); John Szmer et al., *Gender, Race, and Dissensus on State Supreme Courts*, 96 SOC. SCI. Q. 553, 553 (2015) (gender and race); S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580, 597 (1970) (finding that "humble and regional backgrounds correlate with the propensity to dissent in the Supreme Court"); Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 416 (1981) (finding that although many background variables do not relate to dissent, some do influence conflicting viewpoints, and thus, dissent); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 56–57 (1990) (political affiliation); 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, 123 (2004) (ideological diversity). Scholars have also examined the relationship between separate opinions and a court's geographic location, Bradley C. Canon & Dean Jaros, *External Variables, Institutional Structure & Dissent on State Supreme Courts*, 3 POLITY 175, 188 (1970), and its institutional size and organization, Dean Jaros & Bradley C. Canon, *Dissent on State Supreme Courts: The Differential Significance of Characteristics of Judges*, 15 MIDWEST J. POL. SCI. 322, 324 (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 273, 302–03 (Herbert Jacob & Kenneth N. Vines eds., 2d ed. 1971) (finding relationship between number of judges and dissent rates); Kenneth N. Vines & Herbert Jacob, *State Courts and Public Policy*, *in* POLITICS IN THE AMERICAN STATES 242, 264 (Herbert Jacob and Kenneth N. Vines eds., 3d ed. 1976) (noting that number of judges and number of cases heard might affect dissent rates).

36. Peterson, *supra* note 35, at 412. When considering the consequences of separate opinions, researchers have explored their impact on collegiality, compliance, and future litigation, Joel B. Grossman, *Dissenting Blocs on the Warren Court: A Study in Judicial Role Behavior*, 30 J. POL. 1068, 1074–75 (1968) (collegiality); Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 793 (1979) (compliance); Baird & Jacobi, *supra* note 2 (examining whether separate opinions influence the subsequent framing of legal issues); Peterson, *supra* note 35, at 425 ("If lawyers see division among judges in a particular case, they may decide subsequently to take similar cases to court, since there is less certainty about the court's judgment."), among other effects, *id.* (finding that dissent impacts legal culture, court as organization, the socio-political system, and individual judges).

37. *See, e.g.*, HUSSAIN, *supra* note 12, at 43–69; R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L &

Rights courts, commenting on their prevalence,[38] their content,[39] their impact,[40] and their relationship to various characteristics of the judges who issue them.[41]

By contrast, the separate opinions of the international criminal courts have been largely ignored[42] despite their high prevalence, long

COMPAR. L.Q. 788 (1965); Dumbauld, *supra* note 23; 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); *see also* Edvard Hambro, *Dissenting and Individual Opinions in the International Court of Justice*, 17 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 229, 240 (1956) (Ger.) (discussing separate opinions in PCIJ).

38. *See, e.g.*, Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the "Black Box" of International Courts*, 40 MICH. J. INT'L L. 47, 51 (2018) (comparing the frequency of separate opinions at different international courts); Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37, 47–55 (2009) (highlighting the prevalence of separate opinions in the European Court of Human Rights); Cosette D. Creamer & Neha Jain, *Separate Judicial Speech*, 61 VA. J. INT'L L. 1, 27–29 (2020) (observing that individual opinions have remained prevalent since the earliest days of the courts, including those at the European Commission of Human Rights (ECtHR), "with estimates ranging from between sixty to eighty percent of ECtHR cases including at least one separate opinion").

39. For example, Hemi Mistry once observed that separate opinions are "used to address any matter of law, fact or policy that the authoring judge(s) deem(s) to have been raised by the case or decision at hand and pertinent to addressing and resolving the issues raised by the dispute as understood by the authoring judge." Mistry, *supra* note 37, at 296.

40. *See, e.g.*, Daniel Naurin & Øyvind Stiansen, *The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary*, 53 COMPAR. POL. STUD. 959, 960 (2020) (finding that at the Inter-American Court of Human Rights (IACtHR) and the ECtHR, "rulings affected by judicial dissent are significantly less likely to be complied with than unanimous rulings."); Mistry, *supra* note 37, at 309 (noting that separate opinions can "serve as a potential check on the use or abuse of judicial authority by other political actors.").

41. *See, e.g.*, Ranieri Lima Resende, *Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?*, 17 NW. J. HUM. RTS. 25, 43–46 (2019) (concluding that "the large majority of the separate opinions were made by regular, not *ad hoc* judges."); White & Boussiakou, *supra* note 38, at 53, 56–57 (analyzing levels of judicial activism and restraint among judges in ECtHR); Fred J. Bruinsma & Matthijs de Blois, *Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights*, 15 NETH. Q. HUM. RTS. 175, 182–83 (1997) (concluding that there are strong implications of national bias in the separate opinions of *ad hoc* judges compared with those of regular judges).

42. Hemi Mistry, *The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice*, 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"); Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUR. J. INT'L L. 1163, 1163 (2018)

length, and substantial potential to influence a developing field. In response to this lacuna, I have launched a large-scale study evaluating separate opinions in international criminal law both normatively and empirically. The first article in this study, "The Impact of Separate Opinions on International Criminal Law," empirically assessed one of the most common claims advanced by proponents of separate opinions—namely, that they positively influence the development of the law.[43] My study revealed little evidence to support that claim in the context of international criminal law cases.[44] Although the four, core international criminal tribunals have issued nearly 300 separate opinions to their final judgments, and these separate opinions span nearly 4,500 pages, we can find them exerting little if any influence on the jurisprudence of international criminal courts and tribunals.[45] Subsequent judgments almost never cite separate opinions,[46] and it is even rarer for a subsequent judgment to adopt a position advanced in a separate opinion.[47]

This Article completes my comprehensive normative evaluation of international criminal law's separate opinions. It begins by empirically assessing the costs that separate opinions impose on international criminal law. Part I, therefore, commences by evaluating the claim, commonly advanced by critics of separate opinions, that they increase unnecessary litigation.[48] My empirical analyses, described in Subpart A of Part I, validate this criticism: separate opinions appear unquestionably to encourage unnecessary litigation at the international criminal courts. Subpart B, then, turns to a potentially more substantial cost: it assesses the impact of separate opinions on the length of international criminal proceedings. Using statistical analyses, I conclude that the presence of separate opinions increases the length of international criminal proceedings in a highly statistically significant way. This is no small cost. From their very inceptions, the modern international criminal tribunals have been roundly excoriated for the length of their proceedings.[49] Procedural mechanisms that extend that much-criticized length must produce offsetting benefits.

("[I]nternational law scholarship has largely ignored the role of the dissenting opinion in shaping the discourse of international criminal law."); Sluiter, *supra* note 24, at 191 (observing that at that time, the author knew of "no publications or research exclusively devoted to the use of individual opinions" in international criminal law).

43. Combs, *supra* note 27.

44. *Id.* at 38–39, 61.

45. *See id.* at 7, 30, 39–42, 61.

46. And their failure to do so is particularly noteworthy when compared to their citations of majority judgments. *Id.* at 42–44.

47. *Id.* at 26–29, 50–53.

48. *See infra* Part I.

49. *See* sources cited *infra* notes 122–34.

My previous work shows that international criminal law separate opinions do not produce many of the benefits ascribed to them;[50] however, it is only here—in Part II—that I consider the most common claim advanced in favor of separate opinions: that they enhance the authority and legitimacy of the court that issues them.[51] That argument has particular salience for international criminal courts because legitimacy concerns have dogged the entire field of international criminal law since its inception.[52] Although my empirical findings inform some of Part II's analyses, legitimacy impacts are hard to measure quantitatively. Thus, Part II explores a variety of considerations relevant to the relationship between separate opinions and the perceived legitimacy of the international criminal courts. This exploration reveals that, although proponents of separate opinions advance the same legitimacy claims that have been propounded for decades in the context of American courts prosecuting ordinary crimes, their application to international courts and mass atrocity cases is questionable. In particular, the unique features of the international criminal justice system suggest that separate opinions are far more likely to delegitimize than to legitimize what has lately become a teetering and vulnerable judicial system.

I. THE COSTS OF SEPARATE OPINIONS

Throughout their history, separate opinions have been accused of a multitude of sins. This Part empirically assesses the validity of two of the most important. The first maintains that separate opinions lead to unnecessary litigation. The second concerns the potential for separate opinions to increase the length and cost of judicial proceedings. This Part reveals that separate opinions to international criminal judgments impose both costs, but the second has been particularly detrimental to the international criminal justice project.

A. Separate Opinions and their Capacity to Encourage Litigation

1. Do Separate Opinions Increase Litigation in International Criminal Proceedings?

Over the years, critics of separate opinions have often claimed that they encourage continued litigation over issues that should have been settled once and for all.[53] Two versions of this argument have

50. Combs, *supra* note 27.
51. *See infra* Part II.
52. *See* sources cited *infra* notes 165–68.
53. *See, e.g.*, *Reporting Dissenting Opinions*, 18 ALB. L.J. 284, 284 (1878); V.H. Roberts, *Dissenting Opinions*, 39 AM. L. REV. 23, 23 (1905); Wollman, *supra*

been advanced. First, some commentators contend that dissents encourage litigants to appeal dispositions that they otherwise would have accepted. As California Supreme Court Justice Jesse Carter put it: "If a dissenting opinion points out the errors in the majority opinion, the attorney on the losing side is given encouragement to petition for a rehearing, a review by a higher court, and in some instances, to petition for certiorari in the United States Supreme Court."[54] The second version of this claim focuses not on the behavior of the litigants in the case in which the dissent appears but rather on subsequent litigants. According to this argument, "if lawyers see division among judges in a particular case, they may decide subsequently to take similar cases to court, since there is less certainty about the court's judgment."[55]

American scholarship has provided some support for the first claim, finding, for instance, that lawyers' decisions to lodge an appeal with the Supreme Court are based in part on (1) the degree of dissent among judges who decided the case at the Court of Appeals and (2) the amount of dissent among members of the Supreme Court over issues similar to the issues in lawyers' cases.[56] Recent American scholarship has sought also to empirically test the second claim through the notion that judges send signals to future litigants through their dissents. For instance, Baird and Jacobi show that Supreme Court Justices provide signals to litigants about the sorts of cases the Justices would like to decide.[57] Signals can come in many forms, but separate opinions constitute one particularly common and

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note 5, at 74 (criticizing dissents because "[i]t is a maxim of the law that it is to the interest of the public that there should be an end to litigation"); Evan A. Evans, *The Dissenting Opinion—Its Use and Abuse*, 3 MO. L. REV. 120, 128 (1938) (noting one objection that dissents "open up for future litigation questions which the court's decree should have settled"); M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 291, 331; Smith, *supra* note 4, at 517–18. As Justice Brandeis once put it: "[I]t is more important that the applicable rule of law be settled than it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932). Not everyone views this potential consequence of separate opinions negatively. Discussing separate opinions in international criminal law, Hemi Mistry notes that they not only stimulate debate on what the law should be, but they also constitute "a source of arguments that may be pursued by litigants in appellate proceedings in the same case or subsequent cases." Mistry, *supra* note 42, at 457.

54. Carter, *supra* note 6, at 118.

55. Peterson, *supra* note 35, at 425.

56. *See* Gregory J. Rathjen, *Lawyers and the Appellate Choice: An Analysis of Factors Affecting the Decision to Appeal*, 6 AM. POL. Q. 387, 398 tbl.2 (1978) (summarizing results from questionnaire of lawyers).

57. Vanessa Baird & Tonja Jacobi, *Judicial Agenda Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. U. J.L. & POL'Y 215, 217 (2009).

effective signaling device.[58] Whereas earlier scholars merely assumed that litigants brought cases in response to such signals,[59] Baird and Jacobi have confirmed statistically that litigants respond to separate opinions (among other signaling devices) by increasing litigation in the policy areas covered by the separate opinions.[60] In a piece considering one particular policy area—federalism—and one particular signaling device—dissenting opinions—Baird and Jacobi show that by continuing to argue a point in a dissent, "a judge may be attempting to summon litigation with new case facts amenable to an alternative legal argument, enabling the court to reach an alternative conclusion."[61]

Although this scholarship strongly suggests that separate opinions increase litigation in the United States, the results do not map particularly well onto an international criminal justice system. Certainly, the claim that dissents encourage subsequent litigants to bring certain kinds of cases can be relevant only in the context of civil litigation featuring private parties who can decide whether to launch lawsuits. That claim, therefore, has no application in a criminal justice system. The first claim—that dissents encourage losing litigants to appeal or to seek other forms of review—could be valid for international criminal proceedings. However, my data reveals that virtually every international criminal defendant appeals his conviction and sentence, whether or not the judgment against him was unanimous;[62] for that reason, there is no appreciable difference in the rate of appeal from defendants whose trial judgments featured a dissent compared with defendants whose trial judgments did not.[63] Thus, there is no basis for believing that separate opinions themselves encourage international criminal defendants to lodge appeals. However, unlike most domestic appeals, which might feature one or two claims, international criminal appellants often bring a dozen or more grounds for appeal, and they advance numerous arguments in support of each ground.[64] It is possible, therefore, that

58. *See id.* at 225; *cf.* Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1, 4 (2008).

59. *See, e.g.*, Jacobi, *supra* note 58, at 16–17.

60. Baird & Jacobi, *supra* note 57, at 226–29.

61. Baird & Jacobi, *supra* note 2, at 186.

62. 82.7 percent of convicted defendants at the ICTY, ICTR, SCSL, and ICC appealed their convictions and sentences. *See* Appeals Data (on file with author).

63. 81.5 percent of ICTY, ICTR, SCSL, and ICC defendants whose convictions or sentences featured a dissent appealed whereas the percentage of appealing defendants whose convictions or sentences did not feature a dissent was 83.3. *See* Appeals Data (on file with author).

64. *See, e.g.*, Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf; Prosecutor v. Martić, Case No. IT-95-11-A, Judgement (Int'l Crim. Trib. for the Former

separate opinions encourage litigants to advance certain grounds of appeal that they would not otherwise propound or to support those grounds with additional arguments derived from separate opinions.

To empirically assess this claim, I reviewed appellate briefs and appeals judgments at three core international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the Special Court for Sierra Leone ("SCSL"), and the permanent International Criminal Court ("ICC").[65] My dataset includes every final trial judgment in an atrocity case that was appealed[66] and features 132 litigants and 63 appeals judgments.[67] In order to assess whether separate opinions encourage litigation, I considered the rate at which appellants invoked separate opinions in making their claims.[68] In order to ascertain whether separate opinions encourage

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Yugoslavia Oct. 8, 2008), https://www.icty.org/x/cases/martic/acjug/en/mar-aj081008e.pdf; Prosecutor v. Fofana, SCSL-04-14-A, Judgment (May 28, 2008), http://hrlibrary.umn.edu/instree/SCSL/SCSL-04-14_files/SCSL-04-14-A-829.htm.

65. I would have liked also to include data from the ICTR, but that tribunal has not made available a sufficient quantity of its briefs. Indeed, I was not able to obtain information for every case or litigant even at the ICTY, SCSL, and ICC, but I did obtain the vast majority of them.

66. I excluded from my dataset final judgments in the very small number of cases featuring prosecutions of contempt or other offenses against the administration of justice because the attributes of these cases differed too substantially from the atrocity cases that constitute the core work of the tribunals. I also excluded the first two ICTY cases. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). I excluded *Erdemović* because the *Erdemović* Trial Judgment featured no separate opinions, and the only other international criminal law precedent at the time *Erdemović* was decided was several decades old. Thus, the *Erdemović* litigants were highly unlikely to cite a separate opinion. I excluded *Tadić* because I was unable to obtain the appellate briefs. Finally, my dataset did not include interlocutory appellate decisions largely because 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.

67. *See* Appeals Data (on file with author).

68. Of course, the fact that an appellant invokes a separate opinion in making a claim does not necessarily mean that the separate opinion "caused" the claim because we cannot be sure that the appellant would not have raised the same claim even if the separate opinion did not exist. However, I think it is reasonable to infer a causal relationship between the claim and the cited separate opinion in a substantial proportion of instances. Specifically, it is reasonable to assume in most cases that the separate opinion was itself the genesis of the claim (i.e., the appellant would not himself have thought of the legal argument appearing in the separate opinion so that the claim would not have been made absent the separate opinion). In addition, even if we assume that some litigants would have themselves identified some claims, the existence of a separate opinion to cite for support almost certainly provided important encouragement.

unnecessary litigation, I considered first the frequency with which the Appeals Chambers addressed those separate-opinion-based arguments in their judgments and second the frequency with which the Appeals Chambers accepted claims based on separate opinions. In sum, I sought to answer three questions: (1) how common is it for appellants to base their arguments on separate opinions?; (2) how common is it for Appeals Chambers to expressly address arguments based on separate opinions in their written judgments?; and finally (3) how common is it for arguments based on separate opinions to prevail? The results of these three empirical analyses strongly suggest that separate opinions do in fact encourage unnecessary litigation.

Turning to the first question, the data shows that in nearly three-quarters (71%) of ICTY, SCSL, and ICC appeals, an appellant invoked a separate opinion when advancing his or her arguments.[69] This statistic arguably understates the incidence of invocations, however, because a large proportion of appeals in which litigants did not invoke a separate opinion were appeals to convictions procured through guilty pleas.[70] Appeals following guilty pleas typically concern only one, relatively straightforward issue—sentencing—and for that reason, appellate judgments in guilty plea cases are dramatically shorter than appellate judgments of convictions following a trial.[71] Similarly, because guilty plea appeals address only sentencing, it is not surprising that they are less likely to cite separate opinions. When we eliminate guilty plea appeals and consider only appeals of dispositions following trials, we find that in 80% of appeals, an appellant invoked a separate opinion when advancing his arguments.[72]

69. *See* Appeals Data (on file with author).

70. Only the ICTY featured guilty plea convictions that were appealed; no SCSL defendants pled guilty. One ICC defendant pled guilty, Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgement and Sentence (Sept. 27, 2016), but he did not appeal his conviction or sentence, *see id.* ¶ 30; *Case Information Sheet: Situation in the Republic of Mali:* The Prosecutor v. Ahmad Al Faqi Al Mahdi, INT'L CRIM. CT. (Jan. 2022), https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf.

71. The average length of an ICTY appeals judgment of a guilty plea conviction is forty-eight pages whereas the average length of an ICTY appeals judgment for a conviction after trial is 229 pages. *See* Appeals Data (on file with author).

72. Of the fifty-one ICTY appeals that I reviewed, eight were appeals from a guilty-plea conviction. Prosecutor v. Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2005); Prosecutor v. Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2005); Prosecutor v. Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia Mar. 8, 2006); Prosecutor v. Nikolić, Case No. IT-94-2-A,

For the set of calculations just described, I treated appellate cases as the relevant unit and considered the frequency with which any appellant in the case invoked a separate opinion. However, some cases feature multiple appellants (either because the prosecution and defendant both appealed the Trial Chamber's judgment and/or because the case featured multiple defendants, more than one of whom appealed). If we instead treat the individual appellant as the relevant unit, we find that 58% of all appellants invoke a separate opinion,[73] and that percentage rises to 61% if we exclude appeals from guilty pleas.[74] These two sets of statistics appear in Table 1.

Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 2005); Prosecutor v. Zelenović, Case No. IT-96-23/2-A, Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia Oct. 31, 2007); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001); Prosecutor v. Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia Aug. 30, 2005); Prosecutor v. Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal (Int'l Crim. Trib. for the Former Yugoslavia Apr. 2, 2007). In only one of these eight cases—*Deronjić*—did a litigant invoke a separate opinion. *See* Prosecutor v. Deronjić, Case No. IT-02-61-A, Appellant's Brief Pursuant to Rule 111, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2005).

73. *See infra* Appendix A.

74. I was able to gain information from the briefs of 101 appellants who appealed dispositions following trial and learned that sixty of them invoked separate opinions when making their arguments. *See* Appeals Data (on file with author).

Table 1

Tribunal	**Number and percentage of appeals decisions in which an appellant invoked a separate opinion**	**Number and percentage of appeals decisions in non-guilty plea cases in which an appellant invoked a separate opinion**	**Number and percentage of all appellants who invoked a separate opinion**	**Number and percentage of appellants in non-guilty plea cases who invoked a separate opinion**
ICTY	67% (35/52 appeals)	77% (34/44 appeals)	52% (58/111 appellants)	55% (57/103 appellants)
SCSL	100% (4/4 appeals)	100% (4/4 appeals)	92% (11/12 appellants)	92% (11/12 appellants)
ICC	86% (6/7 appeals)	86% (6/7 appeals)	89% (8/9 appellants)	89% (8/9 appellants)
Total	**71%**	**80%**	**58%**	**61%**

Finally, however we calculate, we find that the relevant percentages increase dramatically if we focus solely on appeals of Trial Chamber judgments that themselves have dissents. This is unsurprising, as we should expect appellants to be particularly likely to invoke a dissent to support their claims when one of the judges in their very own trial issued a dissent that supports their appellate position. As predictable as this phenomenon might be, the extent of the increase might be surprising. In particular, every single appeal of a Trial Chamber judgment with a dissent featured an appellant who invoked a separate opinion to support their claims.[75] That is, the percentage of invocations increased to 100%, and, not surprisingly, the vast majority of appellants in these cases invoked the dissent to their own Trial Chamber conviction.[76]

My findings, therefore, support the claim, made in the context of domestic courts, that separate opinions encourage litigation. In the vast majority of international criminal law cases, at least one appellant bases or supports an appellate claim on a separate opinion, and the prevalence increases to a full 100% of appeals cases where the Trial Chamber judgment in the instant case featured a dissent. My findings thus suggest that the existence of a separate opinion

75. *See infra* Appendix B.
76. *See infra* Appendix C.

increases the number of issues that international criminal Appeals Chambers must address.

That separate opinions increase international criminal law litigation is an important finding, but by itself, it tells us nothing normative. That is, those who lambasted dissents for increasing litigation assumed the desirability of settling legal questions once and for all.[77] However, increased litigation generated by separate opinions could positively impact the appellate processes if that litigation provided Appeals Chambers with meritorious claims. The following Subpart seeks to learn whether it does.

2. The Normative Implications of Increased Litigation Based on Separate Opinions

As noted, separate opinions appear to increase litigation at international criminal tribunals; this Subpart considers the Appeals Chambers' treatment of that additional litigation in order to ascertain its normative impact on the appellate process. First, in order to determine whether arguments based on separate opinions have any appreciable impact on appellate proceedings at all, this Subpart begins by considering the frequency with which Appeals Chambers bother even to address those arguments. If we were to find, for instance, that Appeals Chambers largely ignore arguments based on separate opinions, then we might conclude that separate opinions encourage additional litigation but have little practical impact on appellate proceedings.

My data reveals, however, that Appeals Chambers by no means ignore arguments based on separate opinions; to the contrary, they are particularly likely to address them in their judgments. Specifically, ICTY, SCSL, and ICC appellants brought a total of 187 claims/arguments based on separate opinions, and the Appeals Chambers expressly addressed 117 in their judgments.[78] Thus, a

77. *See, e.g.*, Bowen, *supra* note 5, at 693–94; Roberts, *supra* note 53, at 23–24; Wollman, *supra* note 5, at 74–75.

78. In a few cases, the Appeals Chamber was not able to address the claim based on the separate opinion either because the appellant withdrew the claim or because the Appeals Chamber disposed of the case in a way that mooted the claim. Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Limaj, Case No. IT-03-66-A, Judgement, ¶ 275 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007) (Appeals Chamber upheld Limaj's acquittal, so the Appeals Chamber did not need to address the prosecution's argument regarding its authority to enter a conviction); Prosecutor v. Orić, Case No. IT-03-68-A, Judgement, ¶ 160 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Judgement, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010); Prosecutor v. Gotovina, Case No. IT-06-90-A, Judgement, ¶ 136 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); *see* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶ 357 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) ("The test is clear, and the Appeals

healthy 63% of arguments supported by separate opinions received express treatment in Appeals Chamber judgments.[79] Cumulative and tribunal-specific statistics appear in Table 2.

Table 2

Tribunal	**Total number of arguments based on a separate opinion**	**Number of arguments based on a separate opinion addressed in the Appeals Chamber Judgment**	**Percentage of arguments based on separate opinions addressed in the Appeals Chamber Judgement**
ICTY	146	94	64%
SCSL	26	17	65%
ICC	15	6	40%
Total	**187**	**117**	**63%**

That nearly two-thirds of arguments that are based on separate opinions receive express treatment in Appeals Chamber judgments seems a noteworthy finding in and of itself, but I confirmed its significance by comparing it with the Appeals Chambers' treatment of a random sampling of appellate brief citations to majority opinions.[80] This data reveals that Appeals Chambers are significantly more likely to expressly address an argument based on a separate opinion than a comparable argument based on a majority opinion.[81] Specifically, as Table 3 shows, my random sampling suggests that Appeals Chambers address only 44% of arguments

Chamber considers it unnecessary to deal with the peripheral submissions of the parties concerning tests in domestic jurisdictions or the underlying social values and interests reflected in particular crimes."). I also eliminated *Bala* from this calculation because I could not gain access to his appeals brief. We know that he did invoke a separate opinion because citations to various separate opinions appeared in *Bala*'s Table of Authorities for his Appeals Brief. *See* Prosecutor v. Limaj, Case No. IT-03-66-A, Table of Authorities (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2006).

79. *See infra* Appendix D.

80. For my database for the random sample, I included only the cases in which an appellant cited a separate opinion. In this way, I was able to ensure that I was comparing the Appeals Chambers' treatment of the same body of cases. I used a random number generator to select eighty appeals briefs from these cases, and I subsequently used a random number generator to select a page within the selected brief. If the selected page did not have a citation to a majority opinion on it, I went forward or backward (alternating) from the selected page until I found a page that did contain a majority citation.

81. *See supra* Table 2.

supported by majority opinions compared to 63% of arguments supported by separate opinions. The difference between these two percentages is strongly statistically significant.[82]

Table 3

Tribunal	**Sample number of arguments based on a majority opinion**	**Number of sample arguments based on a majority opinion addressed in the Appeals Chamber Judgment**	**Percentage of arguments based on separate opinions addressed in the Appeals Chamber Judgment**
ICTY	52	25	48%
SCSL	19	6	32%
ICC	9	4	44%
Total	**80**	**35**	**44%**

Thus far, my analyses show that separate opinions do increase litigation and that this increased litigation has a measurable impact on appellate proceedings. Whereas Appeals Chambers could largely ignore arguments based on separate opinions, they do not; instead, they consider, decide, and expressly address nearly two-thirds of those arguments in their written judgments.[83] To ascertain whether this impact is positive or negative, however, we must consider the treatment these arguments typically receive. For instance, if Appeals Chambers accept a sizable proportion of arguments based on separate opinions, we might conclude that the increased litigation resulting from separate opinions added value to the appellate process. That is, although separate opinions would serve to increase litigation, they would be doing so to a good end by supporting claims deemed meritorious on appeal.

The data, however, tells a different story. Of the 117 arguments-based-on-separate-opinions that Appeals Chambers addressed, they accepted only 21, or 18%.[84] That the Appeals Chambers accepted fewer than one in five propositions supported by separate opinions seems itself noteworthy, but again I confirmed the significance of this result by comparing it to Appeals Chambers' treatment of citations to majority opinions. Thus, using the same random sample described above, I determined that Appeals Chambers accept 43% of arguments based on majority opinions.[85] The difference between these two

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82. P-value of 0.01; 95% confidence interval 3.7% to 31.4%.
83. *See supra* Table 2.
84. *See infra* Table 4.
85. *Id.*

percentages, about 25%, again is strongly statistically significant[86] and thus suggests that Appeals Chambers are considerably more likely to accept arguments supported by majority opinions than separate opinions.[87] Cumulative and tribunal-specific data for these calculations appear in Table 4.

Table 4

Tribunal	**Percentage of addressed arguments based on separate opinions that the Appeals Chamber accepted**	**Percentage of addressed arguments based on majority opinions that the Appeals Chamber accepted**
ICTY	21% (20/94)	44% (11/25)
SCSL	6% (1/17)	17% (1/6)
ICC	0% (0/6)	75% (3/4)
Total	**18% (21/117)**	**43% (15/35)**

To summarize, the foregoing analyses show the following: First, in the vast majority of appeals, appellants base some of their arguments on separate opinions.[88] Second, Appeals Chambers are particularly likely to expressly address claims based on separate opinions in their written judgments.[89] Finally, Appeals Chambers are particularly unlikely to accept arguments supported by separate opinions. Only one in five arguments based on separate opinions are accepted, which is dramatically lower than the nearly one-half acceptance rate for arguments based on majority opinions.[90] Together, these analyses indicate that international criminal law separate opinions generate additional litigation, that this litigation creates additional work for Appeals Chambers, and that the additional work is largely for naught, as arguments based on separate opinions are rarely deemed meritorious.

B. Separate Opinions and Their Capacity to Delay Proceedings

This Part, addressing the costs of separate opinions to international criminal law, began by considering their proclivity to increase unnecessary litigation. Using empirical methods, Subpart A confirmed that international criminal law's separate opinions do cause additional and unnecessary litigation, consistent with the

86. P-value of 0.005; 95% confidence interval -44.6% to -5.2%.

87. This finding is unsurprising. Majority opinions are the law, and separate opinions are not. Hence, we should expect courts to be more inclined to accept arguments based on current law over arguments based on opinions that did not gain majority support.

88. *See supra* Table 1.

89. *See supra* Table 2.

90. *See supra* Table 4.

critiques of domestic opponents of separate opinions. This Subpart addresses another potential cost of separate opinions: delay. To begin, it considers whether the first cost—unnecessary litigation—leads to delay. Next, this Subpart assesses whether international criminal law separate opinions delay proceedings in ways unrelated to the unnecessary litigation that they generate.

The first inquiry is straightforward: Because my data shows that separate opinions lead appellants to raise more issues in their appeals, [91] we can assume that separate opinions lengthen international criminal law appellate processes and increase their cost. The more claims an appellant raises, the more time the appellant must spend drafting briefs and preparing oral arguments and the more time that the Appeals Chamber must spend considering and deciding those claims. We can be particularly confident that international criminal tribunals are incurring these costs because my data shows that Appeals Chambers decide and expressly discuss the majority of arguments supported by separate opinions.[92]

That said, although it is impossible to quantify the delay costs of additional litigation based on separate opinions, my review of the data indicates that it is not considerable. On the one hand, the vast majority of appeals feature at least one additional claim or argument premised on a separate opinion, with some containing many such claims.[93] In addition, Appeals Chambers address in writing the lion's share of those claims.[94] On the other hand, the vast bulk of international criminal law appeals concern issues that are not premised on separate opinions. Indeed, although most appellants invoke one or more separate opinions when advancing their claims,[95] in most cases the additional litigation does not appear substantial. To be sure, a few Trial Chamber judgments feature lengthy or all-encompassing dissents,[96] and some appellants in those cases base a substantial swath of their appeals on those comprehensive dissents.[97]

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91. *See supra* Table 1.

92. *See supra* Tables 2, 3.

93. *See supra* note 74.

94. *See supra* Table 2.

95. *See supra* Table 1.

96. *See, e.g.*, Prosecutor v. Prlić, Case No. IT-04-74-T, Separate and Partially Dissenting Opinion of Presiding Judge Antonetti (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013), https://www.icty.org/x/cases/prlic/tjug/en/130529-6.pdf; Prosecutor v. Šešelj, Case No. IT-03-67-T, Partially Dissenting Opinion of Judge Lattanzi – Amended Version (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2016), https://www.icty.org/x/cases/seselj/tjug/en/160331_1.pdf.

97. *See, e.g.*, Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 276 n.825, 362 n.1111, 584 & n.1971, 602 nn.2021 & 2023, 634 n.2086, 668 n.2147, 677 nn.2165 & 2168, 687 & nn.2194–97, 777 n.2430, 976 nn.3116 & 3120, 2114 n.7247, 2785 & n.9107, 2795, 2798 & n.9141, 2813 & nn.9184 & 9186, 2819 n.9205, 3242 n.10749 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/x/cases/prlic/acjug/en/171129-judgement-vol-1.pdf,

But most international criminal tribunal appellants bring large numbers of claims and support them with an even larger number of arguments, and the vast majority of these claims and arguments are not based on separate opinions.[98] Thus, although unnecessary claims based on separate opinions do increase the size and scope of international criminal law appeals by some margin, and therefore delay proceedings to some degree, I suspect that the delay generated by separate opinions is not substantial.

However, additional claims based on separate opinions are not the only way in which separate opinions can increase the length and cost of international criminal proceedings. To evaluate another measure of delay, I examined whether the existence of a separate opinion to a trial or appellate judgment increases the time between the end of the trial or appeals hearing, on the one hand, and the issuance of the judgment in that case, on the other. I hypothesized that it would. For one thing, international criminal tribunal rules require majority opinions and separate opinions to be published simultaneously.[99] Thus, it is reasonable to assume that in some cases the majority is forced to delay the issuance of its judgment while it awaits the completion of one or more separate opinions. Insiders report that legal advisors begin drafting Trial Chamber majority opinions while the trial is underway,[100] so we might expect that the majority often has a drafting head start on the author of a separate opinion, who may realize only relatively late in the process that she disagrees with the majority's reasoning or resolution or feels the need to elaborate a relevant point. Moreover, although the average

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https://www.icty.org/x/cases/prlic/acjug/en/171129-judgement-vol-2.pdf, https://www.icty.org/x/cases/prlic/acjug/en/171129-judgement-vol-3.pdf;, Prosecutor v. Šešelj, Case No. MICT-16-99-A, Prosecution Appeal Brief, ¶¶ 14 n.11, 16, 46 n.126, 78 n.240, 122 n.334, 130 n.348, 135 n.358, 198 n.550 (Apr. 11, 2018), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Brief/NotIndexable/MICT-16-99-A/BRF321R0000484782.pdf.

98. I have not tried to quantify any statistics, but my informed opinion from perusing approximately 100 briefs is that a substantial proportion of appeals arguments pertain to the facts of the case, so appellants are far more inclined to cite trial record evidence rather than judicial opinions (either majority or minority).

99. Former Yugoslavia Tribunal Statute, *supra* note 18, art. 23(2) (as amended) (noting that separate opinions should be appended to the relevant judgment); Rwanda Tribunal Statute, *supra* note 19, art. 22(2) (as amended) (same); Statute of the Special Court for Sierra Leone, art. 18, Jan. 16, 2002, 2178 U.N.T.S. 145 (same); Rome Statute, *supra* note 20, art. 74(5) (requiring printing of dissenting opinions).

100. Thomas Wayde Pittman & Marko Divac Öberg, *Judgments and Judgment Drafting*, *in* LEGACIES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A MULTI-DISCIPLINARY APPROACH 282, 297 (Carsten Stahn et al. eds., 2020).

separate opinion runs about sixteen pages,[101] some span hundreds of pages[102] and are drafted to be full-length alternative judgments to that of the majority.[103] These lengthier separate opinions necessarily take considerable time to prepare. Finally, we can be sure that separate opinions sometimes delay the issuance of majority opinions because, in a few cases, the majority tired of waiting for the separate opinion and issued its judgment, which was only later followed by publication of the separate opinion.[104] Sharply criticizing this phenomenon as contrary to Tribunal rules and damaging to collegiality,[105] SCSL Judge Geoffrey Robertson reaffirmed the need for simultaneous publication of majority and separate opinions and suggested that Trial Chamber Presiding Judges impose deadlines on the production of separate opinions.[106] His remarks thus strongly suggest that, at times, separate opinions delay the publication of majority judgments.

My hypothesis that separate opinions delay the issuance of international criminal law judgments did not stem only from tribunal rules that require their simultaneous publication. In addition, it is expected that the majority will engage with the merits of separate opinions during the decision-making process.[107] Indeed, domestic proponents of separate opinions frequently credit them with improving majority opinions by highlighting the majority's vulnerable positions and questionable reasoning *before* the majority

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101. The dataset for my first article in this series included 289 separate opinions spanning nearly 4500 pages. Combs, *supra* note 27, at 61.

102. *See, e.g.*, Prosecutor v. Prlić, Case No. IT-04-74-T, Separate and Partially Dissenting Opinion of Presiding Judge Antonetti (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013), https://www.icty.org/x/cases/prlic/tjug/en/130529-6.pdf; Prosecutor v. Šešelj, Case No. IT-03-67-T, Concurring Opinion of Presiding Judge Antonetti Attached to the Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2016), https://www.icty.org/x/cases/seselj/tjug/en/160331_2.pdf.

103. *See, e.g.*, Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, Dissenting Opinion of Judge Arrey (Dec. 30, 2011).

104. Sluiter, *supra* note 24, at 200 & n.51.

105. Prosecutor v. Brima, Case No. SCSL-2004-16-AR73, Separate and Concurring Opinion of Justice Robertson on the Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, ¶ 4 (Dec. 8, 2005) (also reporting "a systemic procedural aberration in both Trial Chambers," in which separate opinions "appear weeks and even months after publication of the court's decision").

106. *See id.* ¶¶ 5–9.

107. *Id.* ¶ 6 ("[T]he public and the parties are entitled to expect judges to discuss each other's opinions with open minds, and to consider points made in each other's drafts.").

publishes its opinion.[108] As Justice Ruth Bader Ginsburg put it: "[T]here is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation."[109] In addition, supporters maintain that a particularly compelling dissent can motivate judges previously in the majority to switch positions.[110] We have no way of knowing if separate opinions do in fact improve or replace international criminal majority opinions, but if we assume that they even occasionally do, we must also assume that that process of improvement increases the time it takes to produce those majority opinions.

To test my hypothesis, I examined the length of time between the end of trials (for Trial Chamber cases) and appellate hearings (for Appeals Chamber cases), on the one hand, and the issuance of the relevant judgment, on the other. This examination revealed that the number of separate opinions significantly increases the time needed to issue judgments—both in practical and statistical terms. The first clue is that the number of days in this span averages 135 days in cases without any separate opinions compared to 216 days in cases with at least one dissent or concurrence.[111] This comparison is merely indicative, however, as it does not control for other variables that likely affect the time it takes for Trial and Appeals Chambers to issue their judgments. To control for these variables, I assumed that guilty pleas shorten the time needed to issue judgments (because guilty pleas dramatically reduce the number of issues that need to be decided so thereby dramatically reduce the length of the Trial Chamber judgment). Conversely, I assumed that the complexity of the case lengthens the time to judgment. Guilty pleas are easily identified, and I used the length of the judgment (in paragraphs) as a proxy for case complexity.[112]

108. Roberts, *supra* note 53, at 26; Peterson, *supra* note 35, at 427; William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429–30 (1986); Scalia, *supra* note 6, at 41; Claire L'Heureux-Dubé, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L.J. 495, 515 (2000); Mistry, *supra* note 42, at 464.

109. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

110. Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), *in* 69 S. CT. v, x (1949).

111. *See* Appeals Data (on file with author).

112. I recognize that other authors have employed more elaborate models of international criminal law case complexity. See Gabriele Chlevickaite et al., *Thousands on the Stand: Exploring Trends and Patterns of International Witnesses*, 32 LEIDEN J. INT'L L. 819, 826–27 (2019), but I considered the length of the judgment to be superior because it more closely relates to the question at hand. Specifically, we can assume that longer judgments take longer to prepare.

In a linear regression,[113] to measure the effect of separate opinions on the time it takes to issue a judgment that controls for guilty pleas and complexity, I found that the existence of at least one separate opinion increased the time needed to issue a judgment by 33%—a result that is highly statistically significant.[114] An alternative specification that replaces the existence of any separate opinion with the number of separate opinions suggests that each separate opinion increases the time to judgment by about 9.4%, and again this result is highly statistically significant.[115] The effects of the control variables are very consistent across specifications, providing some evidence that our model is robust. A guilty plea reduces the time to judgment by about 57%, and a 1% increase in complexity (as captured by the number of paragraphs in a judgment) increases the time to judgment by about 0.3%.[116] In addition to the large practical size of these results, they are also highly statistically significant.[117]

This finding could hardly be more important. In recent years, international criminal tribunals have been subjected to comprehensive critiques, charging them with a plethora of real and perceived shortcomings: International criminal courts are criticized, for instance, when they are unable to arrest powerful indictees,[118]

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113. I am grateful to Eric Kades for running the regressions described in this paragraph.

114. The estimated coefficient is 0.33 and its standard error is .09, yielding a t-statistic of 3.66. Note that we must exercise some care in the application of statistical inference and significance tests. This study includes all atrocity cases tried and appealed before the four included tribunals. Thus, our data can be viewed as population data (a 'census'), in which case there is no statistical inference to do — we have the "true" measure of everything, and so there is no need to infer from a sample to the entire population. That said, we choose to view our data as a sample that includes other past tribunals and future tribunals. Under admittedly somewhat strong assumptions that other past and future tribunals will resemble the four courts analyzed here, we infer from the data that separate opinions are very likely to increase the time to judgment by about a third.

115. Estimate coefficient 0.094, standard error of 0.03, yielding a t-statistic of 3.1, and so significant at a 0.01 level.

116. *See* Appeals Data (on file with author).

117. Both coefficients are significant at the 0.001 level.

118. The ICC has not been able to obtain custody over a substantial proportion of its indictees, including former Sudanese President al-Bashir, Dire Tladi, *The Duty on South Africa to Arrest and Surrender President Al-Bashir Under South African and International Law: A Perspective from International Law*, 13 J. INT'L CRIM. JUST. 1027, 1028–29 (2015); Edith M. Lederer, *ICC Prosecutor Urges Sudan to Hand Over Darfur Suspects*, AP NEWS (June 9, 2021), https://apnews.com/article/donald-trump-united-nations-africa-sudan-middle-east-1707781e0b09f6b1bf449dbf864efb90; Ahmed Soliman, *Sending Bashir to The Hague Would Aid Sudan's Progress*, CHATHAM HOUSE (Mar. 15, 2021), https://www.chathamhouse.org/2021/03/sending-bashir-hague-would-aid-

when they fail to confront powerful states,[119] and when their prosecutions are foiled by witness intimidation and other forms of obstruction of justice.[120] Yet, even amidst these numerous and wide-ranging complaints,[121] arguably the most common critique of international criminal justice is that it takes too long and costs too much.[122] This charge was brought against the first modern

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sudans-progress?gclid=CjwKCAjwuvmHBhAxEiwAWAYj-L8DTOvJwXr6LGenCH3EGJ20v7gD2rRjfp6-xq1F06ezNB1Gd4vfkRoCmiIQAvD_BwE, and the son of former Libyan President Muammar Ghaddafi, *Libya: Surrender Saif al-Islam Gaddafi to ICC*, HUM. RTS WATCH (June 15, 2017, 12:00 AM), https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc.

119. Israel and the United States are two states, among others, that have sought to frustrate the ICC's investigations. Boutros Imad, *Israel Rejects Authority of ICC to Investigate Possible War Crimes*, JURIST (Apr. 10, 2021, 1:02:40 PM), www.jurist.org/news/2021/04/israel-rejects-authority-of-icc-to-investigate-possible-war-crimes. During the Trump Administration, the United States acted to impede ICC investigations, among other ways, by imposing wide-ranging sanctions on ICC officials. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

120. *See, e.g.*, Prosecutor v. Haradinaj, Case No. IT-04-84-A, Judgment, ¶¶ 34–40 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010); President of the Int'l Tribunal for the Prosecution of Perss. Responsible for Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia since 1991, Letter dated Nov. 23, 2004 from the President of the Int'l Tribunal for the Prosecution of Perss. Responsible for Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia Since 1991 Addressed to the President of the S.C., U.N. Doc. S/2004/897, annex ii, ¶¶ 28–29 (Nov. 23, 2004); Prosecutor v. Ruto, ICC-01/09-01/11, Public Redacted Version of "Prosecution's Request for the Admission of Prior Recorded Testimony of [REDACTED] Witnesses," ¶ 2 (May 21, 2015); Press Release, Kenya Hum. Rts. Comm'n, Kenya: Termination of Ruto and Sang Case at the ICC: Witness Tampering Means Impunity Prevails over Justice Again (Apr. 7, 2016), https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/528-kenya-termination-of-ruto-and-sang-case-at-the%20icc-witness-tampering-means-impunity-prevkenya-termination-of-ruto-and-sang-case-at-the-icc-witnesstampering-means-impunity-prevails-over-justic.

121. See Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT'L L. 323 (2015), for a further discussion of controversies surrounding the ICC.

122. *See, e.g.*, Gillian Higgins, *Fair and Expeditious Pre-Trial Proceedings: The Future of International Criminal Trials*, 5 J. INT'L CRIM. JUST. 394, 394 (2007) ("In the past decade, the length of time taken by international tribunals to try those accused of war crimes has been the subject of fierce criticism."); Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 5 (2014) ("[O]ne of the most persistent criticisms of the ICTY–that it has taken too long and cost too much."); Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 80–82 (2009) (describing the intense criticism); K.J. Zeegers, International Criminal Tribunals and Human Rights Law: Adherence and Contextualization (May 28, 2015) (Ph.D.

international tribunal—the ICTY—very soon after it was created[123] and has repeatedly resurfaced since then.[124] This criticism also has been leveled at every subsequent international criminal tribunal,

thesis, Amsterdam Center for International Law) (on file with University of Amsterdam) ("[T]he length of international criminal proceedings has been one of the most criticized aspects of the practice of the ICTs."); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 92 (2002) ("The considerable length and cost of Tribunal trials has generated much criticism.").

123. Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759, 759 (2000) (noting that despite additional resources provided to the ICTY and ICTR, the tribunals "have rendered judgments in only fifteen cases and conducted inordinately long trials—a fault for which, perhaps more than any other, they can be justly criticized"); Daryl A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367, 368 (2001) (describing "the perception that trials at the ICTY are too lengthy"); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 368–69 (2000); Rep. of the Int'l Tribunal for the Prosecution of Perss. Responsible for Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia Since 1991, ¶ 7, U.N. Doc. A/55/273-S/2000/777 (Aug. 7, 2000) ("[T]he Tribunal must find new ways of working that will enable it to try all the accused within a reasonable time-frame"); Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 329 (2001) ("One of the most frequent objections to the ICTY was the slow pace of its operation and proceedings.").

124. Throughout the ICTY's lifespan, the tribunal continued to generate intense criticism for the length of its proceedings. *See, e.g.*, Chlevickaite et al., *supra* note 112, at 821 ("At the time of its most intense operations the ICTY . . . faced harsh criticism from academics for being too slow. . . ."); O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT'L CRIM. JUST. 360, 360 (2007) (observing that Slobodan Milošević's death made clear that "the central challenge" facing the ICTY judges is "the length and complexity of trials"); Jeremy Rabkin, *Global Criminal Justice: An Idea Whose Time Has Passed*, 38 CORNELL INT'L L.J. 753, 768 (2005) (criticizing the ICTY for proceeding at a "glacial pace"); Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 545 (2004); Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, HUM. RTS. WATCH WORLD REP. (Jan. 2004), https://www.hrw.org/legacy/wr2k4/10.htm (describing the tribunal's "slow pace"); Stéphane Bourgon, *Procedural Problems Hindering Expeditious and Fair Justice*, 2 J. INT'L CRIM. JUST. 526, 527 (2004); Mark B. Harmon, *The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials: A Potential Unrealized*, 5 J. INT'L CRIM. JUST. 377, 377–78 (2007) ("[Alt a time when the Tribunal is most able to realize the aspirations of those who created it, frustration about the length of its trials and impatience with its progress has resulted in efforts to finish the Tribunal's trial work by 2008 and appellate work by 2010.").

from the ICTR,[125] to the SCSL,[126] to the Extraordinary Chambers in the Courts of Cambodia,[127] to the Special Tribunal for Lebanon,[128]

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125. *See, e.g.*, Mark A. Drumbl, *Rule of Law amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 622–23 (1998); INT'L CRISIS GRP., INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: JUSTICE DELAYED ii (June 7, 2001); Binaifer Nowrojee, *"Your Justice Is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, U.N. RSCH. INST. FOR SOC. DEV. OCCASIONAL PAPER 10, at 4, 5, 20 (2005); Rabkin, *supra*, note 124, at 768; Dicker & Keppler, *supra* note 124 ("After approximately seven years of work, the ICTR has completed only fifteen trials . . . . The slow pace of trials has resulted in unusually long pre-trial detentions that raise human rights concerns."); Patrick Rowanda & Susanne Buckley-Zistel, *Changing Patterns of Acceptance: International Criminal Justice After the Rwandan Genocide*, *in* AFTER NUREMBERG: EXPLORING MULTIPLE DIMENSIONS OF THE ACCEPTANCE OF INTERNATIONAL CRIMINAL JUSTICE 1, 7 (Suzanne Buckley-Zistel et al. eds., 2017) (reporting on the "critical remarks" leveled at ICTR proceedings).

126. *See, e.g.*, ANTONIO CASSESE, REPORT ON THE SPECIAL COURT FOR SIERRA LEONE, ¶¶ 45, 63 (2006); Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 436, 436–37 (2011); TOM PERRIELLO & MARIEKE WIERDA, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 1, 29–30 (2006).

127. *See, e.g.*, *Cambodia: Khmer Rouge Convictions 'Too Little, Too Late,'* HUM. RTS WATCH (Aug. 8, 2014, 12:00 AM), https://www.hrw.org/news/2014/08/08/cambodia-khmer-rouge-convictions-too-little-too-late#; OPEN SOC'Y FOUNDS., *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia*, 25, 80 (2016), https://www.justiceinitiative.org/uploads/106d6a5a-c109-4952-a4e8-7097f8e0b452/performance-perception-eccc-20160211.pdf.

128. Faten Ghosn & Joanna Jandali, *The Price of Prosecution: The Reality for Syrian Transitional Justice*, 8 PA. ST. J.L. & INT'L AFFS. 1, 25 (2020) ("With a decade under its belt and half a billion[] dollars spent, all the STL has to show is nine indictments, four of which were indictments on charges of contempt for unauthorized release of confidential information related to ongoing STL cases"); Michael Lysander Fremuth et al., *The Special Tribunal for Lebanon: After the Judgment in Ayyash et Al., Justice at Last?*, OPINIO JURIS (Oct. 26, 2020), http://opiniojuris.org/2020/10/26/the-special-tribunal-for-lebanon-after-the-judgment-in-ayyash-et-al-justice-at-last/ ("The Tribunal delivered its long-awaited judgment in the *Ayyash* case after 11 years of proceedings and expenses amounting to almost one billion dollars. Nonetheless, as the concerns in this article have showcased, the Tribunal's added value for international criminal justice is, at least, debatable."); Peter Cluskey, *Lebanon Trial Is a Cautionary Tale for Future of International Justice*, IRISH TIMES (Aug. 27, 2020, 01:00 AM), https://www.irishtimes.com/opinion/lebanon-trial-is-a-cautionary-tale-for-future-of-international-justice-1.4339336 ("The case was expected to take three years; instead it's 11 and counting. The UN put its estimated cost at $120 million; instead it has cost more than $800 million and may yet become 'the world's first billion-dollar court case.'"); Tone Hafnor, The Special Tribunal for Lebanon: Local Perceptions and Legitimacy Challenges at the Start of the Trial Proceedings 70 (May 5, 2012) (Master's Thesis, University of Oslo), https://www.duo.uio.no/bitstream/handle/10852/13421/1/Hafnor_STL.pdf

and especially to the ICC.[129] Indeed, it seems commentators can barely say anything about the ICC without mentioning the court's slow pace and tremendous cost.

Commentators, including this author, have identified a host of factors that help explain *why* international trials take so long (and consequently cost so much). These factors include the enormous breadth of many indictments,[130] the need for language translation,[131] the logistics of holding trials far from the crime sites,[132] and the

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(describing Lebanese impatience with the length of STL proceedings); CHATHAM HOUSE, THE SPECIAL TRIBUNAL FOR LEBANON AND THE QUEST FOR TRUTH, JUSTICE AND STABILITY 8 (2010) (noting that the "investigations have been proceeding for more than five years without an indictment. The delays have caused concern and have not helped the way in which the Tribunal is regarded in Lebanon").

129. Elizabeth Wilmshurst, *Strengthen the International Criminal Court*, CHATHAM HOUSE (June 12, 2019), https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court (noting that the ICC had not fulfilled its founders' expectations in part because its proceedings have been "cumbersome and lengthy"); Jan Lhotský, *Interview with Robert Fremr, Judge of the International Criminal Court: The Court Needs to Accelerate Its Proceedings (2017 Interview)*, CZECH CTR. FOR HUM. RTS. AND DEMOCRACY (Sept. 7, 2022), https://www.humanrightscentre.org/blog/interview-robert-fremr-judge-international-criminal-court-court-needs-accelerate-its (ICC judge agreeing that despite previous acceleration; ICC proceedings "still take too long to reach a final decision"); Jon Silverman, *Ten Years, $900M, One Verdict: Does the ICC Cost Too Much?*, BBC: NEWS (Mar. 14, 2012), https://www.bbc.com/news/magazine-17351946; INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM: FINAL REPORT, ¶¶ 183, 475, 483, 490–492, 534, 879 (Sept. 30, 2020) [hereinafter ROME STATUTE REPORT]; Benjamin Gumpert & Yulia Nuzban, *Part I: What Can Be Done About the Length of Proceedings in the ICC?*, EJIL:TALK! (Nov. 15, 2019) [hereinafter Gumpert & Nuzban, *Part I*], https://www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/; Benjamin Gumpert & Yulia Nuzban, *Part II: What Can Be Done About the Length of Proceedings in the ICC?*, EJIL:TALK! (Nov. 18, 2019), https://www.ejiltalk.org/part-ii-what-can-be-done-about-the-length-of-proceedings-at-the-icc/.

130. O-Gon Kwon, *supra* note 124, at 372–74; Dicker & Keppler, *supra* note 124 at 208 ("[C]ases at the ICTY have also progressed slowly, in some part due to indictments overloaded with numerous counts."); ROME STATUTE REPORT, *supra* note 129, ¶ 671.

131. Rep. of the Int'l Crim. Tribunal for the Prosecution of Perss. Responsible for Genocide and Other Serious Violations of Int'l Humanitarian L. Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, ¶ 40, U.N. Doc. A/56/351-S/2001/863 (Sept. 14, 2001); ROME STATUTE REPORT, *supra* note 129, ¶ 183.

132. Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgement, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001) (describing the challenges involved in finding and gathering "all relevant witnesses and documentary evidence from distant countries"); Rep. of the Int'l Crim. Tribunal for the Prosecution of Perss. Responsible for Genocide and Other Serious Violations of Int'l Humanitarian L. Committed in the Territory of Rwanda and

complexity of international crimes,[133] among others.[134] All of these factors unquestionably lengthen international criminal proceedings, but one factor that also contributes to this critical problem—but that only now has been identified—is the presence of separate opinions.

C. *A Summary of Costs*

This Part has shown that separate opinions impose nontrivial costs on international criminal proceedings. On the one hand, this finding should come as no surprise as critics of separate opinions have never been in short supply. However, this Part has also shown that the nature and size of these costs vary dramatically between domestic criminal justice systems prosecuting ordinary crimes and international criminal courts prosecuting mass atrocities.

For instance, consider the increased unnecessary litigation that separate opinions generate. Domestic critics of separate opinions have invoked this cost for decades and consider it significant.[135] And it may well be significant in the context of domestic appeals of cases involving ordinary crime. Such appeals are often narrowly drawn and concern only a few claims, so any additional claims have the potential to substantially increase the court's workload. By contrast, the increased litigation that separate opinions generate for international criminal courts is trivial, in my opinion. Unlike their domestic counterparts, international criminal law appeals are usually voluminous and feature large numbers of primarily factual claims. My research has conclusively shown that separate opinions add a few claims to most appeals, but this additional litigation does not appear to constitute a significant increase in light of the overall time and effort necessary to resolve the appeal.

Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, ¶ 78, U.N. Doc. A/55/435-S/2000/927 (Oct. 2, 2000) (describing how, in the *Bagilishema* case, fifteen defense witnesses were brought from twelve different countries).

133. MICHAEL P. SCHARF, BALKAN JUSTICE 137 (1997) (reporting that during the *Tadić* trial, it took five weeks just for the prosecution to prove "that the conflict was international and that the abuses were widespread and systematic," thereby establishing the ICTY had jurisdiction); Gabrielle Kirk McDonald, Speech at the Inauguration of New Judges (Nov. 16, 1998), *quoted in* Richard May & Marieke Wierda, *Evidence Before the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 249, 250 (Richard May et al. eds., 2001) ("It is time-consuming to prove, or to respond to, a charge that offences have been committed as part of a widespread or systematic campaign, as is required for establishing crimes against humanity.").

134. *See, e.g.*, Gumpert & Nuzban, *Part I*, *supra* note 129 (highlighting challenging security situations, delays between indictment and arrest, and massive discovery as additional factors).

135. *See* sources cited *supra* notes 53–55 and accompanying text.

The impact of delay likewise differs dramatically between the domestic and international contexts, but, here, our analysis is reversed. American critics of separate opinions have rarely complained about their potential to delay proceedings[136] despite critics' proclivity to denounce those opinions for every other reason imaginable. Presumably, that is because any delay caused by American separate opinions is not apt to be significant or particularly detrimental. For one thing, separate opinions cannot lengthen American criminal trial dispositions because no separate opinions are possible: most American defendants avoid trial entirely by pleading guilty[137] and those who do not have their cases decided either by juries (which do not issue written opinions) or a single trial judge. American courts of appeal decisions do feature separate opinions, but at a very low rate compared to international criminal law appellate judgments.[138] Thus, although separate opinions almost certainly cause some delay in every legal system in which they are permitted, in many systems that delay will have only a marginally negative effect.

The same cannot be said about the impact of delay on the international criminal courts. As reported in Subpart B, the long length and high cost of international criminal prosecutions have been a constant source of concern and critique.[139] Indeed, numerous reforms have been undertaken in an effort to shorten international criminal law trials and reduce their expense. Some of these reforms

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136. *Cf.* Evans, *supra* note 53, at 131 ("The charge that dissenting opinions tend to lengthen judicial pronouncements and therefore add to the burdens of the practicing attorneys must be conceded.").

137. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1016 (2000).

138. Only about 10% of the published federal court of appeals opinions feature a separate opinion, and the percentage is lower if we include unpublished decisions. Virginia A. Hettinger et al., *Separate Opinion Writing on the United States Courts of Appeals*, 31 AM. POL. RSCH. 215, 215 (2003). This compares with a whopping 78% of international criminal tribunal Appeals Chamber judgments, which feature a separate opinion. Combs, *supra* note 27, at 22. To be sure, United States Supreme Court cases do feature a large proportion of separate opinions, *see* sources cited *supra* note 2, but the Supreme Court decides few criminal law cases, and delay is not a serious concern at the Supreme Court because the Court's docket has declined substantially over the years, *see* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225–26 (2012); Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1419–23 (2020), and the Court virtually always issues all its opinions for a given term by June, *see Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Nov. 6, 2022).

139. *See supra* text accompanying notes 121–33.

have utterly failed to produce the intended results;[140] others have advanced their efficiency goals but have undermined other important values in the process.[141] And whatever improvements have been made have not been sufficient to substantially move the needle. The ICC, which celebrated its 20th anniversary in 2022, has been able to complete trials in fewer than ten cases.[142] Certainly, separate opinions cannot be blamed for even a small portion of the ICC's challenges; however, this study does indicate that separate opinions exacerbate what may be the most pressing problem plaguing international criminal law today: the excessive length and cost of proceedings.

Subpart I, then, starkly highlights an obvious truth: that the normative impact of separate opinions varies dramatically from

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140. *See, e.g.*, Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT'L L. 241, 252 (2011) (finding that ICTY reforms seeking to reduce the length of proceedings "significantly lengthened" them).

141. *See, e.g.*, Gabriele Chlevickaite et al., *supra* note 112, at 821–22 (describing critiques of Rule 92*bis* which permitted the admission of more documentary evidence); Eugene O'Sullivan & Deirdre Montgomery, *The Erosion of the Right to Confrontation Under the Cloak of Fairness at the ICTY*, 8 J. INT'L CRIM. JUST. 511, 517 (2010); Ari S. Bassin, Note, *"Dead Men Tell No Tales": Rule 92* BIS–*How the Ad Hoc International Criminal Tribunals Unnecessarily Silence the Dead*, 81 N.Y.U. L. REV. 1766, 1768–69 (2006) (arguing that Rule 92*bis* is overly restrictive because it prevents the admissibility of written affidavits made by deceased witnesses); *see also* Mia Swart, *Ad Hoc Rules for Ad Hoc Tribunals? The Rule-Making Power of the Judges of the ICTY and ICTR*, 18 S. AFR. J. ON HUM. RTS. 570, 587–88 (2002) (observing that trial expedition can impair defendants' rights); Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 698 n.56 (2007). *Contra* Gillian Higgins, *The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73*bis *Before the ICTY*, 7 NW. J. INT'L HUM. RTS. 239, 241 (2009).

142. The ICC completed trials in the following atrocity cases: Prosecutor v. Lubanga, ICC-01/04-01/06, Summary of the "Judgment Pursuant to Article 74 of the Statute" (Mar. 14, 2012); Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014); Prosecutor v. Ngudjolo, ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Dec. 18, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016); Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment (July 8, 2019); Prosecutor v. Ongwen, ICC-02/04-01/15, Public Redated Trial Judgment (Feb. 4, 2021). The ICC also completed a trial in *Gbagbo* and *Blé Goudé*, but issued its judgment acquitting the defendants after the prosecution had presented its case. Prosecutor v. Gbagbo, ICC-02/11-01/15, Reasons for Oral Decision of 15 January 2019 on the *Requête de la Défense 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 (July 16, 2019).

judicial system to judicial system.[143] Other scholars have advanced this insight. David Vitale, for instance, argues against a uniform normative assessment of separate opinions, emphasizing the "fundamental ways" in which courts differ and the need to assess separate opinions in the "unique context in which th[e relevant] court operates."[144] Katalin Kelemen concurs, observing that normative assessments of dissents in America and other common-law countries have limited applicability to European constitutional courts due to the "peculiarities of constitutional courts."[145] This Part, however, shows that vast extent of the divergence. Disadvantages that may be trivial to nonexistent when domestic courts prosecute ordinary crimes have the potential to impose extraordinary costs on the international criminal courts.[146] Part II, next, suggests that the same divergence can be seen when considering the primary advantage attributed to separate opinions.

II. SEPARATE OPINIONS AND LEGITIMACY

My first article in this project suggested that international criminal law separate opinions do not provide many of the benefits commonly ascribed to domestic court separate opinions.[147] However, thus far, my work has not engaged with the primary normative claim made in support of separate opinions both domestically and internationally: that they enhance the legitimacy of the court and its proceedings.[148]

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143. The normative impact of separate opinions also varies depending on the content of the separate opinion. I addressed this point at length in my first article on the topic. Suffice it to say that separate opinions concerning issues of fact almost certainly have dramatically less normative value than separate opinions concerning issues of law. *See* Combs, *supra* note 27, at 44–50.

144. David Vitale, *The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis*, 19 REV. CONST. STUD. 83, 84–85 (2014).

145. Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GERMAN L.J. 1345, 1346 (2013).

146. Combs, *supra* note 27, at 4.

147. *Id.* at 61.

148. A wide body of scholarship addresses the link between legitimacy and judicial proceedings, both domestically, *see, e.g.*, Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1011 (2007), and internationally, *see, e.g.*, Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 109–10 (2009); Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 LEIDEN J. INT'L L. 491, 491 (2012); Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479, 479 (2013); Theresa Squatrito, *International Courts and the Politics of Legitimation and De-Legitimation*, 33 TEMP. INT'L & COMPAR. L.J. 298, 298 (2019). Some scholars distinguish between different forms of legitimacy, including legal, moral, and sociological. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005). Although scholars addressing the potential

Ironically, the appeal to legitimacy was first made by those who wished to prohibit dissents, as they thought them to *undermine* the authority, legitimacy, and prestige of the courts. As R. Walton Moore put it for many early critics: 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 . . . ."[149] William Bowen offered a similar assessment when he opined that "the public respect for courts . . . must receive a sad shock when every court is divided against itself, and every cause reveals the amateurish uncertainty of the judicial mind."[150] David Vitale cloaked the argument in more modern terms when he summarized it thus: "Dissents signal to the public that the law is political – i.e., a creation of individual judges expressing their predilections. This in turn leads the public to question the authority of the judiciary and the law they are formulating."[151]

Responding to these arguments, other commentators turned them on their heads, contending that dissents in fact *augment* a court's authority and legitimacy. Acknowledging that truly unanimous opinions are more authoritative than opinions with

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legitimizing effects of separate opinions rarely draw such distinctions, I believe they primarily refer to sociological legitimacy; judicial judgments have sociological legitimacy when "the relevant public regards them as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." *Id.* at 1795. My responses to these discussions likewise refer primarily to sociological legitimacy.

149. R. Walton Moore, *The Habit of Dissent*, 8 VA. L. REG. (n.s.) 338, 341 (1922).

150. Bowen, *supra* note 5, at 693.

151. Vitale, *supra* note 144, at 92; *see also* John Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 242 (2000). For additional scholarship advancing these views, see *Should Dissenting Opinions Be Reported*, *supra* note 5; Wollman, *supra* note 5, at 75–76 (arguing dissents weaken the courts in "popular esteem" because those who read the dissent believe the court has "lent itself to injustice and inflicted wrong"); Bartlett, *supra* note 5, at 56; Moorhead, *supra* note 6, at 821 (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. BAR ASS'N Q. 256, 257 (1960) (opining that "the 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, alleged that dissents are

> 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 53, at 126.

dissents,[152] these commentators maintained that prohibiting dissents simply conceals judicial disagreement,[153] and that concealment undermines a court's authority and legitimacy far more than any good-faith disagreement about a case outcome.[154] A more effective means of enhancing the courts' prestige and legitimacy, these commentators assert, is to acknowledge and publicize the disagreement.[155] As Justice William O. Douglas put this view: "[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."[156]

152. *See* Bergman, *supra* note 3, at 88–89; Nina H.B. Jørgensen & Alexander Zahar, *Deliberation, Dissent, Judgment*, *in* INTERNATIONAL CRIMINAL PROCEDURE: RULES AND PRINCIPLES 1151, 1156 (Göran Sluiter et al. eds., 2013) ("Unanimity might be seen to add to the authoritativeness of judicial decisions."); Scalia, *supra* note 6, at 35 ("Now it may well be that the people will be more inclined to accept without complaint a unanimous opinion of a court."); CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 67–68 (Garden City Publ'g Co. 1936) (1928).

153. Scalia, *supra* note 6, at 35 ("Now it may well be that the people will be more inclined to accept without complaint a unanimous opinion of a court."); Dumbauld, *supra* note 23, at 938; Anand, *supra* note 37, at 792.

154. Michael A. Musmanno, *Dissenting Opinions*, 6 U. KAN. L. REV. 407, 416 (1958). Richard Stephens similarly noted that scholars will criticize judicial opinions even if dissenters do not; consequently, he 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 6, at 400; *see also* Bergman, *supra* note 3, 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.").

155. Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMPAR. L. 415, 430 (1959). Nadelmann claimed, among other things, that "[p]ublic control of the courts is weakened if dissents are hidden." *Id.*; *see* Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996); *see also* L'Heureux-Dubé, *supra* note 108, at 503; Bozzo et al., *supra* note 8, at 194.

156. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949). Modern-day jurists continue to promote dissents as legitimacy enhancing. Justice William Brennan extolled dissenting opinions for contributing to the integrity of the judicial process, Brennan, *supra* note 108, at 435, while Justice Scalia praised them for enhancing the prestige of the courts, Scalia, *supra* note 6, at 35, a point on which Justice Ginsburg agreed, Ginsburg, *supra* note 109, at 5. Some Canadian Justices espouse similar views, L'Heureux-Dubé, *supra* note 108, at 512–13, as do many American state court judges, Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases*, 68 ALB. L. REV. 337 (2005) (Chief Justice of the Indiana Supreme Court); Voss, *supra* note 6 (Arizona Court of Appeals Judge). For a more modern articulation of this position, see Scalia, *supra* note 6, 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.").

Although the debate about the relationship between separate opinions and legitimacy seemingly originated in common-law countries, it has lately influenced domestic and international legal systems across the globe. Historically, civil law countries prohibited their judges from issuing separate opinions, but now only seven Continental European countries ban them across their judicial systems.[157] Many factors contributed to this transformation, but a key driver was the legitimacy arguments just described, as European commentators also began espousing the view that true authority cannot rest on secrecy[158] and that democratic legitimacy is most likely to be attained in a transparent judicial system.[159] Concern for legitimacy has also animated normative debates surrounding separate opinions in such international courts as the International Court of Justice and the Human Rights courts. These debates also frequently feature commentators who believe separate opinions to undermine international courts' authority and legitimacy,[160] along with scholars who consider them to enhance those values.[161] Although most scholarship on this topic is qualitative, Daniel Naurin and Øyvind Stiansen recently conducted an empirical study that supports the critical voices who believe that separate opinions reduce the authority and legitimacy of Human Rights courts.[162] Analyzing judgments of the European Court of Human Rights and the Inter-American Court of Human Rights, Naurin and Stiansen found that

157. RAFFAELLI, *supra* note 11, § 2.

158. *Id.* § 1.3.3.

159. *Id.* §§ 1.3.3, 1.3.5; Caroline Elisabeth Wittig, The Occurrence of Separate Opinions at the Federal Constitutional Court: An Analysis with a Novel Database 63 (Oct. 27, 2016) (Dissertation, University of Mannheim); Elena Safaleru, *The Dissenting Opinion of Constitutional Court Judges – One of the Guarantors of the Court's Independence*, 4 CONST. L. REV. 120, 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.").

160. HUSSAIN, *supra* note 12, at 16 (referring to the ICJ); Anand, *supra* note 37, 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 16, at 67 (advocating for secrecy in deliberations to preserve legitimacy of EU courts).

161. Dumbauld, *supra* note 23, at 938 (maintaining that without dissents, the "prestige and authority" of the ICJ will suffer); Mistry, *supra* note 37, at 306; Creamer & Jain, *supra* note 38, at 53 ("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"); Bruinsma & de Blois, *supra* note 41, at 186 (arguing that separate opinions can be "indispensable for the Court's legitimation").

162. Naurin & Stiansen, *supra* note 40, at 960.

countries were significantly less likely to comply with rulings that featured dissents than with unanimous rulings.[163]

Unsurprisingly, the legitimacy debate has also made its way to the international criminal courts.[164] It is unsurprising, first, because the claim that separate opinions impact the legitimacy and authority of a judicial system is probably the most common contention appearing in normative discussions of separate opinions. Moreover, maintaining legitimacy is among the most pressing challenges for international criminal courts.[165] Charges of illegitimacy have dogged

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163. *Id.* at 960–61.

164. Leila Sadat was particularly prescient in invoking concerns about legitimacy in her 2002 discussion of international criminal law dissenting opinions. *See* LEILA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 88–90 (2002).

165. The vast literature addressing international criminal law's legitimacy challenges attests to the significance of this issue, at least in the minds of international criminal law practitioners, scholars, and commentators. *See, e.g.*, David Luban, *Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 569 (Samantha Besson & John Tasioulas eds., 2010); Cassese, *supra* note 148, at 491; Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT'L L. 321 (2012); Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400, 1435–39 (2009); Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court*, 4 J. INT'L CRIM. JUST. 765, 768–71 (2006); Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VAND. J. TRANSNAT'L L. 1133, 1147–52 (2017); Marieke Wierda, Habib Nassar, & Lynn Maaloud, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1065 (2007); Milena Sterio, *Women as Judges at International Criminal Tribunals*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 219, 232–41 (2020); Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT'L. L. 482, 482 (2016); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L. L. 7, 9 (2001); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L. L. 43, 43–44, 52 (2012); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 405 (2012); Marlies Glasius & Tim Meijers, *Constructions of Legitimacy: The Charles Taylor Trial*, 6 INT'L J. TRANSITIONAL JUST. 229, 229 (2012); 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. 591, 593–94, 605, 613 (2017); Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643, 643 (2011); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 63–64 (2013); Ralph Henham, *Some Reflections on the Legitimacy of International Trial Justice*, 35 INT'L J. SOCIO. L. 75, 75 (2007); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 540 (2003); Yvonne M. Dutton, *Bridging*

the field since its very inception[166] and even now routinely swirl about specific courts[167] and specific prosecutions.[168] For these reasons, it is not surprising that the few scholars who have explored the normative dimensions of international criminal law's separate opinions have invoked the value of legitimacy.

Nina Jørgensen and Alexander Zahar, for instance, consider the issue only passingly but assert that international criminal law separate opinions "help to reveal the deliberative process, thereby enhancing transparency and legitimacy."[169] Hemi Mistry, by contrast, engages the issue head-on, devoting a full-length article to exploring the "paradox of dissent."[170] This paradox, Mistry maintains, consists of the fact that "judicial dissent undermines and may even risk frustrating the legitimacy of international criminal courts and tribunals by prompting various constituencies of international justice to question the correctness of their decisions and judgments."[171] At the same time, Mistry maintains that "precisely by doing so, such dissents ultimately strengthen the legitimacy of those institutions and the aims that they seek to advance."[172] Neha Jain,

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the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge, 56 COLUM. J. TRANSNAT'L L. 71, 71 (2017); Margaret M. deGuzman & Timothy Lockwood Kelly, *The International Criminal Court Is Legitimate Enough to Deserve Support*, 33 TEMP. INT'L & COMPAR. L.J. 397, 397 (2019); Joanna Nicholson, *The Role Played by External Case Law in Promoting the Legitimacy of International Criminal Court Decisions*, 87 NORDIC J. INT'L. L. 189, 189 (2018); Allen Buchanan, *The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court*, 33 TEMP. INT'L & COMPAR. L.J. 323, 332–39 (2019); Caleb H. Wheeler, *In the Spotlight: The Legitimacy of the International Criminal Court*, INT'L L. BLOG (Oct. 22, 2018), https://internationallaw.blog/2018/10/22/in-the-spotlight-the-legitimacy-of-the-international-criminal-court/.

166. *See* Frankel, *supra* note 21; Glasius & Meijers, *supra* note 165, at 230 ("It could be argued without exaggeration that the courts themselves are as much on trial as the accused.").

167. Jain, *supra* note 42, at 1164–65; Mia Swart, *Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY*, 3 GOETTINGEN J. INT'L. L. 985, 997–99 (2011) (discussing the legitimacy concerns surrounding the ICTY and ICTR).

168. *See* Lansana Gberie, *Sierra Leone*, ZNET (July 6, 2004), https://zcomm.org/znetarticle/sierra-leone-by-lansana-gberie-1-2/; Glasius & Meijers, *supra* note 165, at 251 (discussing the legitimacy concerns raised in the Charles Taylor case at the SCSL); Jelena Subotić, *Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić*, 13 J. HUM. RTS. 170, 170–71 (2014) (discussing legitimacy concerns in the ICTY but focused on the cases of *Gotovina*, *Haradinaj*, and *Perišić*).

169. Jørgensen & Zahar, *supra* note 152, at 1156, 1191.

170. Mistry, *supra* note 42.

171. *Id.* at 451.

172. *Id.*

for her part, focuses more narrowly on "radical dissents," defined as dissents that "critique[] the authorized version of the historical, political and cultural portrait set up by the trial."[173] Like Mistry, Jain acknowledges that "the discordant narrative generated by the radical dissent comes at a price," the most obvious of which is the muddying of the central message sought to be conveyed by trials for mass atrocity: "that these were heinous acts that we cannot afford to see repeated and for which accountability is imperative."[174] Yet despite this price, Jain concludes that the radical dissent constitutes "a crucial legal device that can have a transformative potential in international criminal adjudication through its creation of a civic space for contestation that paradoxically shores up the legitimacy of the international criminal trial."[175]

Mistry and Jain's arguments are nuanced and acknowledge that dissents have the simultaneous capacity to enhance and impair the authority and legitimacy of international criminal courts. These scholars conclude that the legitimacy benefits outweigh their costs, but it is impossible to empirically test that conclusion or even provide substantial evidence in its favor.[176] Indeed, the non-quantifiable nature of this debate is starkly exposed in Jeffrey Dunoff's and Mark Pollack's recent study of international judges' views of separate opinions.[177] Dunoff and Pollack conducted a series of semi-formal interviews with judges from the European Court of Human Rights, which permits separate opinions, and the European Court of Justice, which does not.[178] These interviews revealed a widespread belief among European Court of Human Rights judges "that the practice of dissent increases the legitimacy of the court and the quality of its case law, without endangering judicial collegiality or independence."[179] By contrast, at the European Court of Justice, judges "nearly unanimously believe that their de facto ban on public dissent increases judicial collegiality, legitimacy, and, above all, independence."[180]

Studies such as these indicate that the relationship (positive or negative) between separate opinions and legitimacy in international

173. Jain, *supra* note 42, at 1170.

174. *Id.* at 1183.

175. *Id.* at 1163.

176. Consider, for instance, if the authors had reached the opposite conclusion: That although dissents enhance legitimacy through increased transparency, those benefits are outweighed by the undermining of judicial authority that results from uncertain precedent, divided courts, and general fragmentation. Just as it is hard to dispute, with any sort of hard evidence, the authors' actual conclusion, this hypothetical conclusion would also be difficult to dispute.

177. Dunoff & Pollack, *supra* note 38, at 90.

178. *Id.* at 89.

179. *Id.* at 90.

180. *Id.*

criminal courts is not apt to be proven by quantitative evidence, so this Part explores a series of issues relevant to the question in the specific context of international criminal justice. I begin by addressing two considerations that have the potential to support the pro-legitimacy hypothesis. First, I assess the claim that dissents reassure litigants that the judges hearing their cases are hardworking and have carefully considered their arguments. Second, I consider the content of international criminal law separate opinions—and, in particular, their pro-defendant or pro-prosecution stance—as a means of assessing their legitimizing effect. Thereafter, and by contrast, I consider two aspects of international criminal law prosecutions that have the potential to magnify the delegitimizing effects of separate opinions. First, I revisit the delay caused by separate opinions to international criminal proceedings; finally, I explore the unique political context surrounding international criminal trials. Taken together, these considerations suggest that commentators who tout the legitimizing potential of separate opinions have been overly optimistic.

A. Dissents as a Reassurance Mechanism

Domestic proponents of dissents frequently praise them for reassuring litigants that the judges carefully considered and debated their claims.[181] As Dean Morehead put it, a dissent "assures both counsel and the public that the writer has devoted thought and effort to the case. Such an opinion also reveals that the decision of the court has not been perfunctory, and that, although accompanied by disagreement, the decision resulted from deliberation and debate."[182] Presumably, such reassurance, if it exists, has a legitimizing effect. Indeed, social science studies of legal systems have repeatedly found that if "people view or personally experience the authorities as making decisions fairly, they increasingly view them as legitimate."[183] And, a core indicia of fair decision-making is the careful consideration of a litigant's claims.[184]

Although separate opinions in some criminal justice systems may well reassure litigants that their claims were fully and fairly considered, separate opinions to international criminal judgments are not apt to advance that end because the international criminal judgments perform that task themselves. Consider, for instance, that

181. *See, e.g.*, Vinson, *supra* note 110, at ix; Stephens, *supra* note 6, at 395; Bergman, *supra* note 3, at 87–88; Henderson, *supra* note 53, at 305.

182. Moorhead, *supra* note 6, at 822.

183. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 120 (2000); *see also* Tom R. Tyler, *Evaluating Consensual Models of Governance*, 61 NOMOS 257, 259–60 (2019).

184. Tyler, *Evaluating Consensual Models of Governance*, *supra* note 183, at 260.

the average American appellate opinion in a criminal law case might occupy a maximum of ten or twenty pages,[185] whereas the average international criminal law appellate judgment runs close to two hundred pages,[186] and some span more than a thousand.[187] On these many pages, international judges delineate and decide—in what some consider excruciating and unnecessary detail[188]—virtually every claim and every response of every litigant. To be sure, the voluminousness of international criminal law judgments is routinely criticized,[189] not least for rendering the judgments inaccessible to many of the constituencies that the international courts most desire to reach.[190] However, one benefit of the length, breadth, and detail of international criminal law judgments is their tendency to assure the litigants that their claims were appropriately considered.[191] Separate opinions, therefore, are unlikely to provide any additional or useful reassurance.

185. Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 16–17 n.69 (2004) ("Researchers found that the average length of a federal/state criminal appellate opinion is 5,257 words.").

186. *See* Appeals Data (on file with author). The combined Appeals Chamber judgments of the ICTY, ICTR, SCSL, and ICC—without including separate opinions—run an average of 189 pages. *See id.* SCSL Appeals Chamber judgments are the lengthiest, running an average of 291 pages, whereas ICTR and ICC Appeals Chamber judgments average 163 and 164 pages respectively. *See id.*

187. Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic; Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-A, Judgement (Dec. 14, 2015), https://ucr.irmct.org/scasedocs/case/ICTR-98-42#eng; *see also* Pittman & Öberg, *supra* note 100, at 293–97.

188. *See* Marko Milanović, *Establishing the Facts About Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*, 47 GEO. J. INT'L L. 1321, 1333, 1343 (2016).

189. *See* Milan Markovic, *International Criminal Trials and the Disqualification of Judges on the Basis of Nationality*, 13 WASH. U. GLOB. STUD. L. REV. 1, 31 (2014) (observing that international criminal judgments are "notoriously verbose and dense").

190. For example, referring to the 1,500-page Trial Chamber *Milutinović* judgment and the nearly 1,000-page Trial Chamber *Popović* judgment, Marko Milanović considers it "[L]ikely that the only people who have actually read the totality of these judgments were the lawyers involved in the two cases." Milanović, *supra* note 188, at 1333 n.34.

191. Pittman & Öberg, *supra* note 100, at 293–95 (Admittedly, legal advisors and not judges undertake the primary role of drafting international criminal tribunal judgments, but that is likely true also for separate opinions. That is, if the detailed and voluminous final judgments do not reassure litigants that the judges considered their claims because these judgments were drafted primarily by legal advisors, then neither would the dissents—which presumably are also drafted primarily by legal advisors—reassure the litigants).

B. Legitimacy and the Content of Separate Opinions

Another factor that might influence the legitimizing potential of separate opinions in international criminal law is the content of those opinions and in particular, their pro-defendant or pro-prosecution stance. On the one hand, commentators who tout the legitimizing effects of separate opinions typically do so in general terms that are unrelated to the position the separate opinions advance. They might acknowledge in passing, for instance, that the tone of a separate opinion or its author's choice of wording can bear upon its legitimizing impact;[192] however, in general, they maintain that dissents enhance legitimacy by shining a light on the workings of the judicial system. That is, judicial disagreements (i.e., non-unanimous decisions) are to be expected, but a judicial system that is transparent about these disagreements will be perceived as more legitimate than a judicial system that conceals them. This claim is in no way dependent on the content of the separate opinion. A dissent that urges the defendant's conviction enhances transparency and reveals the deliberative nature of judicial decision-making in just the same way as a dissent that urges the defendant's acquittal.

At the same time, commentators who praise domestic separate opinions as legitimizing seem particularly likely to invoke as examples dissents in which the dissenter advocated for the less powerful party.[193] Similarly, in the international criminal law context, we find separate-opinion advocates pointing to the legitimizing impact of Justice Pal's 1,235-page dissent to the Tokyo Tribunal judgment,[194] in which he called for the acquittal of all

192. Mistry, *supra* note 42, at 467–68; *see also* Sluiter, *supra* note 24, at 215–16 (maintaining that the harsh tone of some dissents undermines their effectiveness); J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201, 278 (2017).

193. *See, e.g.*, Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 442 (2013) (exemplifying Justice Ruth Bader Ginsburg's dissent in and subsequent public remarks about *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 644 (2007) as "reinforcing the relationship between public engagement and institutional legitimacy"); Ginsburg, *supra* note 109, at 4–5 (maintaining that Curtis's dissent in *Dred Scott*, Harlan's dissent in the *Civil Rights Cases*, and Breyer's dissent in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) "'augment rather than diminish the prestige of the Court'"); Vitale, *supra* note 144, at 90–91 (noting that "the existence of dissenting opinions in those rare-but-important cases where the court later reconsidered to side with the dissent help to preserve the legitimacy of the court after the majority renders a morally reprehensible decision (e.g. Justice Harlan's dissent in *Plessy*, Justice Curtis's dissent in *Dred Scott* and Justice Holmes's dissent in *Lochner*)."); L'Heureux-Dubé, *supra* note 108, at 503, 513 n.61 (citing the dissent in *Clark v. Arizona*).

194. Mistry, *supra* note 42, at 459–63; Jain, *supra* note 42, at 1172–76.

defendants,[195] along with more recent ICC dissents that urged acquittals.[196] I do not mean to suggest that dissents urging convictions have been entirely excluded from this narrative;[197] however, at an intuitive level, it would seem that dissents that champion the rights of the vulnerable (including criminal defendants) against the power of the state would have greater legitimizing potential, particularly in the international criminal law context. Such dissents are a clearer manifestation of judicial independence, as the dissenter urges her colleagues to rule against the very system of which they are a part. Dissents that call for the defendant's acquittal also more robustly reflect judicial commitment to the presumption of innocence and the preservation of a high standard of proof. Advancing these values may be particularly significant for the legitimacy of the international criminal justice system because that system has often been charged with a pro-conviction bias.[198] Indeed, perhaps as a result of the perceived pro-conviction bias, criminal law acquittals are themselves often hailed as enhancing the system's legitimacy;[199] and if acquittals do advance legitimacy, then dissents that call for acquittals likely have similar legitimizing effects. In fact, given this context, we might hypothesize international criminal law dissents to have a generally *delegitimizing* impact if a substantial proportion of those dissents objected to the majority's decision to acquit the defendant.

To inform this question, I classified each of the nearly 200 dissents in my dataset[200] by whether they called for the defendant's acquittal, the defendant's conviction, or advocated a position unrelated to conviction or acquittal. To begin, I ascertained that 20%

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195. Dissenting Judgment of Justice Radhabinod Pal, *reprinted in* 105–08 THE TOKYO MAJOR WAR CRIMES TRIAL (R. John Pritchard ed., 1998).

196. Mistry, *supra* note 42, at 450, 463–67; Jain, *supra* note 42, at 1166 (these include Judge Kaul's dissents in the Kenya cases and Judge Van den Wyngaert's dissent in *Katanga*).

197. *See* Mistry, *supra* note 42, at 467–68 (discussing the two dissents in the *Gotovina* Appeal); Jain, *supra* note 42, at 1,178–81 (discussing Judge Lattanzi's dissent in *Šešelj*).

198. NANCY AMOURY COMBS, FACTFINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 224–35 (2010); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 927 (2008); Markovic, *supra* note 189, at 31; *see also* Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C. J. INT'L L. & COM. REGUL. 287, 295–96 (2011).

199. *See, e.g.*, THEODOR MERON, STANDING UP FOR JUSTICE: THE CHALLENGES OF TRYING ATROCITY CRIMES 346–47 (2021); Mark Kersten, *Acquittals and the Battleground over the ICC's Legitimacy*, JUST. CONFLICT (Mar. 14, 2019), https://justiceinconflict.org/2019/03/14/acquittals-and-the-battleground-over-the-iccs-legitimacy/.

200. *See infra* Table 5 (these dissents comprise all of the dissents to final judgments at the ICTY, ICTR, SCSL, and (to date) the ICC).

of dissents fall into the final category; they concern sentencing or some other issue that does not directly relate to the defendant's conviction or acquittal.[201] The remaining dissents are slightly, but only slightly, skewed towards acquittals: 44% of dissents to final judgments urge acquittals compared to 37% which urge convictions.[202] The statistics vary to some degree by the court and the trial or appellate level of the proceeding, but overall they depict a judicial system in which dissenters are almost as likely to complain about the majority's decision to acquit a defendant as its decision to convict him. Table 5 details these statistics.

Table 5

Court	**Number and Percentage of Dissents Urging Acquittal**	**Number and Percentage of Dissents Urging Conviction**	**Number and Percentage of Dissents Unrelated to Acquittal or Conviction**
ICTY Trial Chamber	12 (52%)	7 (30%)	4 (17%)
ICTY Appeals Chamber	28 (46%)	22 (36%)	11 (18%)
ICTR Trial Chamber	8 (44%)	8 (44%)	2 (1%)
ICTR Appeals Chamber	17 (35%)	19 (40%)	12 (25%)
SCSL Trial Chamber	4 (50%)	2 (25%)	2 (25%)
SCSL Appeals Chamber	3 (50%)	2 (33%)	1 (17%)
ICC Trial Chamber	1 (20%)	2 (40%)	2 (40%)
ICC Appeals Chamber	3 (60%)	2 (40%)	0 (0%)
Total	76 (44%)	64 (37%)	34 (20%)

Although these results would be more informative if dissents skewed more heavily in favor of or against the defendant, they nonetheless undermine the pro-legitimacy hypothesis to some degree.

201. *See infra* Table 5.
202. *See infra* Table 5.

The nearly half of international criminal law dissents that object to the majority's decision to acquit a defendant enhance transparency, as all dissents do, but they also provide support for the alleged pro-conviction bias and other delegitimizing narratives that will be discussed *infra* in Subpart D.

C. The Delegitimizing Impact of Delay

Although previous international criminal law commentators found the legitimizing potential of separate opinions to outweigh their delegitimizing potential, these commentators were not aware of perhaps the single most significant tangible cost those opinions impose on international criminal proceedings—delay. Previous Subparts have emphasized the magnitude of this cost to international criminal courts; this Subpart will briefly consider the relationship between delay and legitimacy at the international criminal courts.

The legal maxim "justice delayed is justice denied" indicates a common understanding that delay undermines the legitimacy of judicial proceedings. But just how undermining will depend on a variety of circumstances. For instance, delay caused by separate opinions is apt to have a greater delegitimizing effect on criminal cases than on civil cases because the defendant's due process rights, including the right to a speedy trial, are paramount in criminal cases.[203] But even among criminal cases, the impact of delay can vary dramatically, as mentioned above. Because excessive length (and concomitant high cost) of proceedings has been and continues to be one of the most pressing problems plaguing international criminal courts,[204] we must assume that any procedural mechanisms that increase that length and cost have non-trivial delegitimizing effects. Indeed, funding shortfalls have challenged international criminal justice since its inception[205] and at times have forced certain courts and tribunals to close their doors without having completed their work.[206] Even the permanent, free-standing ICC, which should be the

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203. *See* Zacklin, *supra* note 124, at 543, 545. Particularly in the early years of the international criminal tribunals, the pre-trial delay—and the defendants' concomitant pretrial detention—was sufficiently long that some contended that the tribunals were violating the defendants' speedy trial right. Combs, *supra* note 122, at 91–92.

204. *See* Zacklin, *supra* note 124, at 543, 545.

205. *See* NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: A RESTORATIVE JUSTICE ACCOUNT 28 (2007).

206. *See* Lia Kent, *Interrogating the "Gap" Between Law and Justice: East Timor's Serious Crimes Process*, 34 HUM. RTS. Q. 1021, 1033 (2012) (the Special Panels for East Timor closed its doors in 2005, with dozens of cases outstanding, when the United Nations ended funding. "By the time of its conclusion, in May 2005, the fifty-five trials completed represented only a small number of the 650 or so indictees who had been investigated."); *see* Prosecutor v. Ayyash, Case No. STL-18-10/PT/TC, Order in Response to the Registrar's Notice of a Shortfall in Funding Impacting the Tribunal's Operations (June 2, 2021), https://www.stl-

crown jewel of the international criminal justice system, is perpetually begging for additional funding simply to carry out its core functions.[207] Separate opinions constitute only a small component of this intractable and multi-faceted challenge, but their proclivity to lengthen already-long international criminal proceedings unquestionably impairs legitimacy to some degree.

D. *Dissents as Fuel for Political Theater*

The nature of mass atrocity trials and the political context in which those trials are conducted are also relevant to the relationship between separate opinions and legitimacy in international criminal law. To understand this consideration, it is useful to contrast a dissent in a domestic court case involving an ordinary crime with a dissent in a mass atrocity case. The ordinary crime in question is apt to involve a discrete criminal act or a set of acts and one or a handful of defendants. The dissent in such a case might address a question of fact or law, but in either event, it is apt to be of interest only to the litigants in question or, at most, to the prosecution and defense bars, if the dissent concerns an issue of especially broad applicability. By contrast, mass atrocity trials, even those that ostensibly center on particularly narrow legal issues, engage a larger, more politically contested narrative. While prosecuting twenty-two Nazi leaders, for instance, the Nuremberg Tribunal told a story of German aggression,[208] a story that was well-received by Allied audiences[209] but highly disputed in Germany.[210] Likewise, many ICTY trials, while pronouncing judgment on particular Bosnian Serbs accused of

tsl.org/crs/assets/Uploads/20210602-F0333-PUBLIC-TCII-Order-re-Notice-Purs-48C-Shortfall-Funding-EN-Web.pdf (more recently, the Special Tribunal for Lebanon has effectively ceased functioning because—to put it plainly—it ran out of money).

207. *See, e.g.*, Elizabeth Evenson & Jonathan O'Donohue, *Still Falling Short—The ICC's Capacity Crisis*, OPENDEMOCRACY (Nov. 3, 2015), https://www.opendemocracy.net/en/openglobalrights-openpage/still-falling-short-icc-s-capacity-crisis/; Lilian Ochieng & Simon Jennings, *ICC Secures Budget Increase*, INST. FOR WAR & PEACE REPORTING (Jan. 20, 2014), https://iwpr.net/global-voices/icc-secures-budget-increase (quoting Phil Clark of the London School of African and Oriental Studies); *see also* U.N. GAOR, 73rd Sess., 27th & 28th mtgs., U.N. Doc. GA/12084 (Oct. 29, 2018); Alison Cole, *Justice Doesn't Come Cheap. Can the ICC Afford It?*, OPEN SOC'Y JUST. INITIATIVE (Aug. 7, 2013), https://www.justiceinitiative.org/voices/justice-doesn-t-come-cheap-can-icc-afford-it.

208. RONEN STEINKE, THE POLITICS OF INTERNATIONAL CRIMINAL JUSTICE: GERMAN PERSPECTIVES FROM NUREMBERG TO THE HAGUE 45 (2012).

209. *Id.* at 45–47.

210. *Id.* at 47–48.

performing particular criminal acts, situated those acts in the context of the quest for an ethnically pure "Greater Serbia."[211]

In this way, an individual mass atrocity trial that addresses only isolated and discrete crimes may nonetheless tap into—and adopt—a larger political and social narrative.[212] Martti Koskenniemi put it well when he observed that:

> When a trial concerns large political events, it will necessarily involve an interpretation of the context which is precisely what is disputed in the individual actions that are the object of the trial. To accept the terms in which the trial is conducted—what deeds are singled out, who is being accused—is to already accept one interpretation of the context among those between which the political struggle has been waged.[213]

Recognizing the centrality of this larger context,[214] Jain identifies "radical" dissents as those that challenge the "accepted interpretations" that Koskenniemi describes.[215] Because the larger political context is so disputed, Jain believes radical dissents to create a civic space for contestation that "shores up the legitimacy of the international criminal trial."[216] But Jain's optimism is counter-intuitive and does not address the vast majority of dissents that accept the dominant narrative but more prosaically dispute isolated issues of fact or law. The typical international criminal law dissent does not recharacterize the overall nature of the conflict but disputes, for instance, the definition of "protected persons" under the Geneva Conventions[217] or the permissibility of cumulatively convicting a

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211. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 53–126 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Stanišić, Case No. IT-08-91-T, Judgement, ¶ 311 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 262 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶ 82 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006).

212. *See, e.g.*, Subotić, *supra* note 168, at 170 (noting that although the ICTY Appeals Chamber determined only "that the specific charges against the specific defendants were not proven beyond a reasonable doubt . . . the immediate interpretation by almost all political actors in the region was that the ICTY de facto determined that the Croatian military operation was legal and no crimes against humanity ever took place").

213. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 16–17 (2002).

214. As Jain put the same point, the conduct prosecuted in a mass atrocity trial "is invariably collective in nature and intimately tied to broader social and political narratives of the imagined identity of a nation." Jain, *supra* note 42, at 1181.

215. *Id.*

216. *Id.* at 1166.

217. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability

defendant for two different crimes against humanity.[218] Or the dissent might, even more narrowly, disagree with the majority's factual conclusions, for instance, disputing whether there was sufficient evidence to prove the defendant was present during the massacres in Kibuye, Rwanda,[219] or that he enlisted as soldiers children under the age of fifteen.[220]

Although these "non-radical" international criminal law dissents read like dissents to ordinary crimes in their focus on discrete legal or factual issues, their reception looks radically different; and therein lies their differing impact on legitimacy. International criminal law dissents, despite their typically narrow and dry content, frequently become tools in the hands of those who oppose the particular prosecution in question or even the international criminal justice project more generally. To be sure, even majority judgments in a mass atrocity case are routinely co-opted and distorted.[221] However, dissents—because they constitute official critiques by co-members of the judiciary—provide international criminal law skeptics in general and mass atrocity revisionists in particular an especially powerful tool. Perhaps the most notorious example of this phenomenon is Justice Pal's dissent to the Tokyo Tribunal judgment, which was warmly embraced by Japanese nationalists who mischaracterized the dissent as entirely absolving Japan of culpability.[222] More recent examples include the 1995 massacre of thousands of men and boys in Srebrenica, Bosnia, which was the subject of the 2021 "Independent International Commission of Inquiry Concluding Report on

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of Article 2 of the Statute (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

218. Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgement, Partly Dissenting Opinion of Judge Güney, ¶¶ 2–4 (Nov. 28, 2007).

219. Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement, Separate and Dissenting Opinion of Judge Mehmet Güney, ¶¶ 1, 3 (June 7, 2001).

220. Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against His Conviction, Dissenting Opinion of Judge Ušacka, ¶ 26 (Dec. 1, 2014).

221. Acquittals are particularly susceptible to political manipulation. For examples, see Rachel Irwin, *Do Overturned Convictions Undermine Hague Tribunal?*, INST. FOR WAR & PEACE REPORTING (Mar. 23, 2013), https://iwpr.net/global-voices/do-overturned-convictions-undermine-hague-tribunal; Marko Attila Hoare, *Why Was Momcilo Perisic Acquitted*, GREATER SURBITON (Mar. 5, 2013), https://greatersurbiton.wordpress.com/tag/bakone-justice-moloto/.

222. *See* Mark A. Drumbl, *Memorializing Dissent: Justice Pal in Tokyo*, 114 AM. J. INT'L L. UNBOUND 111, 114 (2020); Jain, *supra* note 42, at 1174; Barrie Sander, *The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT'L L. 299, 321 (2018); Maria Hsia Chang & Robert P. Barker, *Victor's Justice and Japan's Amnesia: The Tokyo War Crimes Trial Reconsidered*, 19 E. ASIA 55, 78 (2001).

Sufferings of All People in the Srebrenica region between 1992 – 1995."[223] Described as an "elaborate regurgitation of the decades-long Srebrenica genocide denial by Republika Srpska and Serb nationalist politicians,"[224] the 1,106-page report "blatantly ignores" one ICTY judgment after another[225] but instead repeatedly invokes Judge Nyambe's dissent in the *Tolimir* case.[226] In a similar vein, the Kenyan government and its supporters have lauded Judge Kaul and his dissents in *Ruto* and *Kenyatta* cases in their effort to fight ICC jurisdiction and undermine the court more generally.[227] Other examples of this phenomenon abound.[228]

In this way, we see that international criminal dissents can have wholly different—and additional—delegitimizing effects. Domestic critics of separate opinions claimed them to impair legitimacy by, for

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223. INDEP. INT'L COMM'N OF INQUIRY ON SUFFERINGS OF ALL PEOPLE IN THE SREBRENICA REGION BETWEEN 1992 AND 1995, CONCLUDING REPORT 991, https://incomfis-srebrenica.org/report/ [hereinafter SREBRENICA REPORT].

224. Menachem Z. Rosensaft, *Deceptive Report Escalates Srebrenica Genocide Denial Campaign*, JUST SEC. (July 29, 2021), https://www.justsecurity.org/77628/deceptive-report-escalates-srebrenica-genocide-denial-campaign/. Rosensaft also described the report as a "legal and factual abomination." *See also* Nermina Kuloglija, *Bosnian Serb Report Claims Many Srebrenica Victims Weren't Civilians*, BALKAN TRANSITIONAL JUST. (July 21, 2021, 18:00), https://balkaninsight.com/2021/07/21/bosnian-serb-report-claims-many-srebrenica-victims-werent-civilians/ (noting that "experts in transitional justice have criticised the commissions as an attempt to revise history to whitewash crimes" and that thirty-one "international experts in conflicts in the former Yugoslavia signed an open letter saying that the establishment of the commissions by the Republika Srpska government 'looks more like revisionism than a genuine effort to determine the truth'").

225. Rosensaft, *supra* note 224; Haris Rovcanin, *Trial Evidence Contradicts Claims in Bosnian Serbs' Srebrenica Report*, BALKAN TRANSITIONAL JUST. (July 30, 2021, 12:15), https://balkaninsight.com/2021/07/30/trial-evidence-contradicts-claims-in-bosnian-serbs-srebrenica-report/ (reporting that some of the report's "controversial assertions are contradicted by evidence heard at trials at international courts").

226. Rosensaft, *supra* note 224 (asserting that, after ignoring the relevant ICTY judgments, "[t]he commission instead props its report heavily on one *dissenting* trial opinion in an early ICTY case"); SREBRENICA REPORT, *supra* note 223, at 624–31.

227. *See, e.g.*, James Macharia, *Kenya to Challenge ICC Right to Try Violence Cases*, REUTERS (Mar. 9, 2011, 9:56 AM), https://www.reuters.com/article/ozatp-kenya-icc-20110309-idAFJOE7280D920110309; Ally Jamah, *Curtain Falls for Former Dissenting ICC Judge*, STANDARD (July 23, 2014), https://www.standardmedia.co.ke/counties/article/2000129127/curtain-falls-for-former-dissenting-icc-judge; Martin Mutua, *Mutula, Orengo Chide Wako Over ICC Trials*, STANDARD (Mar. 25, 2011).

228. *See, e.g.*, *Šutanovac: Žao mi je zbog prevelike kazne*, BLIC (Sep. 6, 2011, 12:44), https://www.blic.rs/vesti/hronika/sutanovac-zao-mi-je-zbog-prevelike-kazne/r76fp4b (reporting that Serbian Minister of Labor appealed to Judge Moloto's dissent in *Perišić* when criticizing the judgment).

instance, inviting disrespect to judgments that should be seen as infallible[229] and by convincing losing litigants that the courts have perpetrated an injustice.[230] International criminal dissents may undermine legitimacy in these same discrete ways, but in addition, can delegitimize by calling into doubt the overall effort to impose criminal liability for the crimes in question and even the project of international criminal justice as a whole.[231]

CONCLUSION

This Article concludes a larger project addressing the normative implications of separate opinions in international criminal law. Part I of this Article contains a series of empirical analyses aimed at quantifying certain purported costs of separate opinions. First, Part I showed that international criminal law separate opinions do encourage unnecessary litigation, although that unnecessary litigation probably has only a minimal negative effect. However, Part I also revealed that separate opinions cause non-trivial delay to international criminal trials and appeals—trials and appeals that are already roundly excoriated for their excessive length. Part I, along with my previous scholarship, thus paints a somewhat bleak picture of separate opinions in international criminal law: my empirical analyses suggest that they impose worrisome costs without generating many of the benefits commonly credited to them.

Part II turned to legitimacy as an important value that is frequently invoked in discussions of separate opinions. Although many maintain that separate opinions impact legitimacy, there is little agreement on the nature of that impact. Indeed, sophisticated commentators recognize that separate opinions have concomitant potential to legitimize as well as delegitimize the proceedings of which they are a part.[232] The few international criminal law scholars who have directly addressed the issue believe the legitimizing effects of separate opinions to exceed their delegitimizing impacts, but these conclusions are contestable and are not subject to empirical verification. Consequently, Part II explored a number of qualitative considerations potentially relevant to the relationship between separate opinions and legitimacy at the international criminal courts. Subpart A found, for instance, that whereas dissents in some criminal

229. *Should Dissenting Opinions Be Reported*, *supra* note 5, at 178.

230. Wollman, *supra* note 5, at 74–75.

231. *See* Rosensaft, *supra* note 224 (noting that the Srebrenica report disparaged "as illegitimate and politically biased not just the ICTY but just about all war crimes trials beginning with the International Military Tribunal at Nuremberg").

232. *See supra* text accompanying notes 169–73. Sluiter notes that other values, such as judicial independence, also can be employed to support and to critique separate opinions. Sluiter, *supra* note 24, at 194.

justice systems may serve to reassure litigants that their claims were fully and fairly considered, international criminal dissents were not likely to serve that function. In Subpart B, I hypothesized that dissents calling for acquittals would have greater legitimizing potential than dissents calling for convictions, so I ascertained the proportion of each kind of international criminal law dissent and found them to be roughly equal. This finding could be seen as indeterminate, but the fact that nearly half of international criminal law dissents object to the majority's decision to acquit—in a criminal justice system often accused of having a pro-conviction bias—probably weighs against the notion that separate opinions enhance international criminal law legitimacy.

Part II then turned to two factors unique to mass atrocity prosecutions that might magnify the negative impact of separate opinions. The first is the delay caused by those separate opinions. Separate opinions almost certainly have a delaying effect in every justice system in which they are authorized, but Part II shows that the consequences of delay are particularly significant—and deleterious—to international criminal courts; mass atrocity trials are already so long and expensive, and that long length and high cost are already believed to undermine the international criminal courts and to impair their ability to advance their ends.[233] Under these circumstances, additional delay requires strong justification. Next, Part II explored the contested political context that constitutes a nearly invariable feature of every mass atrocity trial. That disputed context is noteworthy because it enables any critique of the majority opinion—even critiques appearing in narrow, legalistic dissents—to be misappropriated and misrepresented; a dissent is thereby more apt to gravely threaten the core work of an international criminal court than it would a court with more accepted and stable foundations.

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233. *See* Press Release, Fatou Bensouda, Prosecutor, International Criminal Court, Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine (Dec. 11, 2020), https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine (concluding the preliminary examination of a case and announcing intention to seek authorization to open investigations over six years after preliminary examinations were opened); Press Release, Karim A.A. Khan, Prosecutor, International Criminal Court, Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan (Sept. 27, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan (announcing a request for permission to reopen investigations into events occurring over nineteen years earlier); Bourgon, *supra* note 124, at 527 (noting that the length of ICTY proceedings has had a "permanent negative impact"); Galbraith, *supra* note 122, at 81.

These qualitative considerations are not determinative; nor are they the only considerations that we might wish to explore.[234] However, they do call into question optimistic (and perhaps reflexive) claims that separate opinions enhance international criminal law legitimacy. At the very least, they suggest that commentators who praise separate opinions for promoting legitimacy paint with too broad a brush. Although some scholars have nominally recognized that the normative impact of separate opinions varies across judicial systems,[235] until now we have seen little practical application of that insight. This Article, however, reveals that the unique features of mass atrocity trials and international criminal courts render separate opinions far more likely to delegitimize than to legitimize trial and appellate proceedings.

At the same time, any normative analysis captures only one moment in time, and that fact is particularly relevant here because history shows that the impact of separate opinions varies over time within a given legal system. The United States Supreme Court, for instance, has employed a variety of dissent practices during its existence: from *seriatim* opinions at the country's founding, to mostly unanimous opinions for the court beginning with the Marshall Court, to a robust dissent practice beginning in the 1940s and continuing to this day.[236] Todd Henderson has persuasively argued that each change to the Supreme Court's dissent practice served to strengthen and empower the Court over other potential decision-makers.[237] That is, Henderson shows that strongly *discouraging* dissent during the Supreme Court's early years empowered the Court[238] in the same way that strongly *encouraging* dissent did in the 1940s.[239] Other scholars concur that the impact of separate opinions in a given legal system can vary dramatically over time. Matthew Bergman, for instance—despite his ardent support for separate opinions—acknowledges that the benefits of unanimity likely outweigh the costs of stifling dissent during periods when the judiciary is being challenged by other

234. For instance, some commentators invoke a judge's "right to dissent" when advocating for separate opinions. *See, e.g.*, Sluiter, *supra* note 24, at 206; Brennan, *supra* note 108, at 438; Scalia, *supra* note 6, at 42.

235. *See supra* text accompanying notes 144–45.

236. *See* Henderson, *supra* note 53, at 286–87; Bergman, *supra* note 3, at 80–82; Scalia, *supra* note 6, at 33–35.

237. Henderson, *supra* note 53, at 287.

238. *Id.*; *see also* 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919).

239. Henderson, *supra* note 53, at 330. *See also* Meredith Kolsky, Note, *Justice William Johnson and the History of Supreme Court Dissent*, 83 GEO. L. J. 2069, 2069 (1995) ("Unanimity may have helped to bolster the credibility of the weak, fledgling Supreme Court, but it would have been detrimental to the legitimacy of the Court if that system had prevailed in the long run.").

political actors.[240] Likewise, John Alder observes that "arguments against dissent have been raised most strongly in settings where confidence . . . in the judicial process has been relatively low or uncertain."[241]

Extending this insight, some commentators advance a corollary that is especially relevant to the new field of international criminal law: namely, that separate opinions are apt to be particularly undermining during a judicial system's early years. Scholars Jeffrey Dunoff and Mark Pollack denominate this theory the "life-cycle" hypothesis and explain that the legitimacy benefits of judicial unity "are greatest early in the life of any court, when the new institution is struggling to establish its place in the constitutional order and its legitimacy."[242] By contrast, more mature courts are better able to "afford the public display of disunity occasioned by the use of dissent."[243] Other commentators have recognized the intuitive appeal of this theory, even U.S. Supreme Court Justice Antonin Scalia, a notoriously acidic and prolific dissenter.[244] Although robustly promoting the legitimacy-enhancing effects of dissenting opinions, Justice Scalia nonetheless acknowledged that the normative analysis might be "different when a newly established court is just starting out."[245]

The notion that the deleterious consequences of separate opinions are initially high but wane over time has not been confined to the scholarly realm but has also influenced policymakers. For instance, during their first years of existence, European constitutional courts "struggle[d] with asserting their own authority and legitimacy."[246] Consequently, countries such as Germany and Lithuania, recognizing the vulnerability of these new courts, prohibited dissents, fearing that they would compromise the courts' authority.[247] Two decades elapsed before policymakers in these countries believed their constitutional courts to be sufficiently stable and authoritative that they could withstand any harmful effects of dissenting opinions.[248]

The creators of the international criminal courts, by contrast, authorized separate opinions from the get-go with little thought and no opposition. Had they considered the life-cycle hypothesis and similar scholarly theories, they may have hesitated. Or they may not

240. Bergman, *supra* note 3, at 89.
241. Alder, *supra* note 151, at 244.
242. Jeffrey L. Dunoff & Mark A. Pollack, International Judicial Dissent: Causes and Consequences 21 (Mar. 5, 2015) (unpublished manuscript), http://aei.pitt.edu/78999/1/Dunoff.Pollack.pdf.
243. *Id.*
244. *See* Entrikin, *supra* note 192, at 278.
245. Scalia, *supra* note 6, at 35.
246. Kelemen, *supra* note 145, at 1356.
247. *Id.*
248. *Id.*

have. The first modern international criminal tribunals were established during a wave of triumphant idealism.[249] The Berlin Wall had fallen; the Cold War had ended; and the international community had united to visit criminal sanctions on the authors of mass atrocities. "Never Again" seemed finally realizable. Concerns about the delegitimizing impacts of separate opinions, if they had been raised, may well have seemed overblown—and tone-deaf.

Unfortunately, the heady optimism that characterized the early years of the international criminal justice project soon gave way and now is but a distant memory. Although international criminal law has always featured some critical voices, in recent years, their numbers increased, their tone became more strident,[250] and their content has expanded dramatically. As just one example, whereas early scholars deployed critiques in an effort to improve the efficacy and efficiency of international criminal processes,[251] recent critical scholars have launched more fundamental and all-encompassing critiques that target international criminal law's foundational assumptions[252] and the seemingly ineradicable role of politics in the field.[253] Though often theoretical, these scholarly critiques have tracked (and to some extent piled onto) a series of real-world setbacks that have destabilized the field. The ICC alone has been stymied by an inability to apprehend powerful indictees,[254] an inability to investigate certain crime sites,[255] and large-scale witness

249. *See* Sander, *supra* note 222, at 300 (describing the "unflinching enthusiasm" for international criminal courts during the 1990s).

250. *See, e.g.*, Sander, *supra* note 21, at 753 n.18 (pointing to Grietje Baars, *Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 196 (Christine Schwöbel ed., 2014)).

251. *See* Christine Schwöbel-Patel, *The Comfort of International Criminal Law*, 24 LAW AND CRITIQUE 1, 10 (2013).

252. *See, e.g.*, Sander, *supra* note 222, at 300; *see also* Christine Schwöbel, CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 1, 4 (Christine Schwöbel ed., 2014) (distinguishing an assumptions critique from an effectiveness critique and noting that the former "questions who benefits in the existing parameters, who loses through the given legal structures, and why").

253. Sander, *supra* note 21, at 777.

254. Although it indicted former Sudanese President al Bashir in 2005, the ICC has still not been able to obtain custody over him. While under an ICC indictment, Saif Gaddafi, son of Libyan dictator Muammar Gaddafi, was not only free but able to run for President of Libya. *Libyan Court Reinstates Saif Gaddafi as Presidential Candidate*, AL JAZEERA (Dec. 2, 2021), https://www.aljazeera.com/news/2021/12/2/libya-court-reinstates-gaddafis-son-as-presidential-candidate.

255. Former President al Bashir of Sudan prevented the ICC from conducting investigations in Darfur, Göran Sluiter, *Responding to Cooperation Problems at the STL*, *in* THE SPECIAL TRIBUNAL FOR LEBANON 134, 148–49 (Amal Alamuddin et al. eds., 2014), and even criminalized cooperation with the ICC. *See* Prosecutor

intimidation,[256] among many other impediments, that have led to a series of failed prosecutions. It has been accused of anti-African bias,[257] inefficiency,[258] and workplace harassment.[259] To be sure, the ICC has also seen successes, but its obstacles are massive; and neither it, nor any other international criminal body has been able to credibly threaten prosecution against such contemporary criminals as Syrian President Assad[260] or Russian President Putin.[261] As a result of these and other challenges, commentators agree that the international criminal justice system has been rendered "exceptionally vulnerable"[262] and enveloped by a "pervading, palpable sense of 'crisis.'"[263]

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v. Nourain, ICC-02/05-03/09, Defense Request for a Temporary Stay of Proceedings, ¶ 2 (Jan. 6, 2012). Currently, Israel is refusing to cooperate with ICC investigations. *Israel 'Will Not Co-Operate' with ICC War Crimes Investigation*, BBC NEWS (Apr. 9, 2021), https://www.bbc.com/news/world-middle-east-56687437.

256. *See, e.g.*, Press Release, *supra* note 120.

257. *See* Somini Sengupta, *As 3 African Nations Vow to Exit, International Court Faces Its Own Trial*, N.Y. TIMES (Oct. 26, 2016), https://www.nytimes.com/2016/10/27/world/africa/africa-international-criminal-court.html?_r=0 ("Three nations, all from Africa, have announced that they will no longer work with the tribunal, intensifying a longstanding debate over whether it is biased against the continent.").

258. Stef Blok, *The International Criminal Court Must Do Better. Reforms Are Urgently Needed*, WASH. POST (Dec. 2, 2019, 4:39 P.M.), https://www.washingtonpost.com/opinions/2019/12/02/international-criminal-court-must-do-better-reforms-are-urgently-needed/.

259. Final Rep. of the Assembly of States Parties to the Rome Statute of the Int'l Crim. Ct., Nineteenth Session, Dec. 7–17, 2020, ¶¶ 209–211, ICC-ASP/19/16 (Sep. 30, 2020).

260. *See* Mia Swart, *National Courts Lead the Way in Prosecuting Syrian War Crimes*, AL JAZEERA (Mar. 15, 2021), https://www.aljazeera.com/news/2021/3/15/national-courts-lead-the-way-in-prosecuting-syrian-war-crimes.

261. *See, e.g.*, Bill Chappell, *Charging Putin for Potential War Crimes Is Difficult, and Any Penalty Hard to Enforce*, NPR (Apr. 5, 2022, 7:08 AM), https://www.npr.org/2022/04/05/1090837686/putin-war-crimes-prosecution-bucha.

262. Joseph Powderly, *International Criminal Justice in an Age of Perpetual Crisis*, 32 LEIDEN J. INT'L L. 1, 5 (2019); *see also* Göran Sluiter, *Almost 25 Years After its Creation, the Russia-Ukraine Conflict Sadly Shows the Increasing Irrelevance of the International Criminal Court*, RETHINKING SLIC: CRIM. L. (Feb. 2, 2022), https://rethinkingslic.org/blog/criminal-law/105-almost-25-years-after-its-creation-the-russia-ukraine-conflict-sadly-shows-the-increasing-irrelevance-of-the-international-criminal-court#_ftnref28 (describing efforts needed "to win back some of the Court's authority and relevance").

263. Powderly, *supra* note 262, at 1; *see also* Sergey Vasiliev, *The Crises and Critiques of International Criminal Justice*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 626, 632 (Kevin Jon Heller ed., 2020).

Were we to apply Dunoff and Pollack's life-cycle hypothesis,[264] we would undoubtedly conclude that the international criminal justice system was still sufficiently new and unstable that it would garner significant benefits from judicial unanimity. That said, there is no guarantee that the authority and prestige of international criminal courts will improve in the short-term. Indeed, the ICJ has permitted separate opinions from its inception nearly eighty years ago, yet some commentators still fear their negative effects. Jörg Kammerhofer, for instance, observes that "domestic legal systems with a secure political organization, a separation of powers, and an effective enforcement of its judgements by the executive branch can afford to provide single participants in an authoritative decision with a quasi-authoritative platform from which to voice their dissent."[265] By contrast, because the ICJ depends for its authority "more on the persuasiveness of its pronouncements than on the binding nature of its judgements," Kammerhofer believes that it "cannot afford to have 'in-house,' 'official' critics."[266]

Kammerhofer's admonitions are even more compellingly applied to international criminal courts because the foundation supporting these courts has become so shaky.[267] But although the international criminal courts can likewise little afford "'in-house,' 'official' critics,"[268] they can even less afford their official silencing. Given the unmistakable historical trajectory in favor of separate opinions, banning those opinions at the international criminal courts would be perceived not only as an unwarranted retrenchment but also a whitewash that would confirm the suspicions of skeptics. Whether or not international criminal law separate opinions serve a legitimizing function, and even if they do not, they are sufficiently entrenched in the practice of international criminal law that their prohibition, at this point in time, would almost certainly undermine the courts' legitimacy.

So where does that leave us? About a dozen years ago, Göran Sluiter published a book chapter containing an empirical analysis of ICTY separate opinions issued until 2010.[269] Sluiter was firmly in favor of retaining the right to issue separate opinions at the ICTY, largely as a means of offering "valuable contributions" to the further development of the law.[270] Yet he also called for judges to exercise

264. Dunoff & Pollack, *supra* note 242, at 21.

265. Jörg Kammerhofer, *Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case*, 17 LEIDEN J. INT'L L. 695, 716 (2004).

266. *Id.*

267. Powderly, *supra* note 262.

268. Kammerhofer, *supra* note 265.

269. Sluiter, *supra* note 24, at 191–92.

270. *Id.* at 197, 216.

greater restraint in their usage.[271] My work calls into doubt Sluiter's primary basis for supporting separate opinions,[272] but his message of restraint could hardly be more timely. International criminal courts stand at a critical juncture. Commentators candidly acknowledge that the international criminal justice project is exceptionally vulnerable and may not persist even in the short run.[273] Procedural mechanisms that exacerbate the courts' already grave challenges thus must be thoroughly questioned and incontrovertibly justified. My empirical assessment of separate opinions in international criminal law suggests that their costs outweigh their benefits (and perhaps by a significant margin). International criminal judges, clearly aware of the field's current instability, should take care not to intensify the courts' existing difficulties. At a minimum, this might mean asking themselves whether it is necessary to dissent on a factual issue that can have no relevance to future cases[274] or thinking twice before issuing a concurrence addressing a minor point of reasoning.[275] And, surely, they should refrain from dissenting again and again on the same point when it is abundantly clear that they are succeeding in convincing no one.[276]

In future work, I will empirically assess a host of characteristics relating to the judges who issue separate opinions. Having not yet conducted the research, I cannot say how those characteristics impact judicial proclivity to write separately or the consequences of those separate opinions. However, the research that has been completed and the research in this paper strongly suggest that whatever their characteristics, the pool of judges who issue separate opinions should be smaller.

271. *Id.* at 217.

272. Combs, *supra* note 27, at 20 n.116.

273. Powderly, *supra* note 262, at 2, 5.

274. *See, e.g.*, Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Dissenting Opinion of Judge Masanche (Dec. 6, 2010).

275. *See, e.g.*, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Separate and Concurring Opinion of Judge Mindua (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012).

276. *See, e.g.*, Prosecutor v. Galić, Case No. IT-98-29-A, Partially Dissenting Opinion of Judge Pocar, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, 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 (May 26, 2003); Semanza v. Prosecutor, Case No. ICTR-97-20-A, Partially Dissenting Opinion of Judge Pocar, ¶¶ 1–4 (May 20, 2005); Setako v. Prosecutor, Case No. ICTR-04-81-A, Partially Dissenting Opinion of Judge Pocar, ¶¶ 1–6 (Sept. 28, 2011); Gatete v. Prosecutor, Case No. ICTR-00-61-A, Partially Dissenting Opinion of Judge Pocar, ¶¶1–5 (Oct. 9, 2012).

APPENDIX A

See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement in Sentencing Appeals, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Prosecution's Appeal Brief, ¶ 2.34 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 24, 1999); Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Defendant's Appellate Brief, nn.89, 90, 103 & 105 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999); Prosecutor v. Delalić, Case No. IT-96-21-A, Appellant-Cross Appellee Hazim Delić's Brief, ¶¶ 134, 198, 200(c), 210 (Int'l Crim. Trib. for the Former Yugoslavia July 2, 1999); Prosecutor v. Delalić, Case No. IT-96-21-A, Brief of Appellant, Esad Landžo, on Appeal Against Conviction and Sentence at 76 (Int'l Crim. Trib. for the Former Yugoslavia July 2, 1999); Prosecutor v. Delalić, Case No. IT-96-21-A, Prosecution's Appeal Brief, ¶¶ 3.112, n.187, 5.74 n.307 (Int'l Crim. Trib. for the Former Yugoslavia July 2, 1999); Prosecutor v. Kupreskić, Case No. IT-95-16-A, Prosecution's Appeal Brief, ¶¶ 2.13, 3.39, 3.40 n.74, 3.45 n.83, 3.46 n.84 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2000); Prosecutor v. Mucić, Case No. IT-96-21-Abis, Appellant Zdravko Mucić's Appeal Brief, ¶ 48 n.44 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 15, 2002); Prosecutor v. Mucić, Case No. IT-96-21-Abis, Brief of Esad Landžo in Reply to Prosecution Consolidated Response Brief, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 2, 2002); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Public Redacted Version of Prosecution Brief in Reply, ¶ 6.12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 2002); Prosecutor v. Krstić, Case No. IT-98-33-A, Defence Appeal Brief, ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 10, 2002); Prosecutor v. Krstić, Case No. IT-98-33-A, Prosecution Appeal Brief, ¶¶ 3.16 n.15, 3.58 n.53, 3.82 n.74, 3.83, 3.85 & n.76, 3.86 & n.77, 3.91 & n.80, 3.92 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 14, 2001); Prosecutor v. Kordić, Case No. IT-95-14/2-A, Prosecution's Appeal Brief, ¶ 3.44 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 9, 2001); Prosecutor v. Kordić, Case No. IT-95-14/2-A, Brief of Appellant Dario Kordić, § V(A)(1) (Int'l Crim. Trib. for the Former Yugoslavia Aug. 9, 2001); Prosecutor v. Deronjić, Case No. IT-02-61-A, Appellant's Brief Pursuant to Rule 111, ¶ 115 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2004); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶ 135 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Prosecutor v. Stakić, Case No. IT-97-24-A, The Prosecution's Appeal Brief, ¶¶ 5.23, 5.35 & n.440, 5.50 & n.456 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 17, 2003); Prosecutor v. Naletilić, Case No. IT-98-34-A, Appeal Brief of the Prosecution, ¶ 2.31 n.25 (Int'l Crim. Trib. for the Former Yugoslavia July 14, 2003); Prosecutor v. Simić, Case No. IT-95-9-A, Judgement, ¶¶ 90, 112, 232 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006); Prosecutor v. Galić, Case No. IT-98-29-A, Defence Appellant's Brief, ¶¶ 54 et seq. (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2004); Prosecutor v. Galić, Case No. IT-98-29-A, Prosecution Appeal Brief, ¶ 2.23 n.25 (Int'l Crim. Trib. for the Former Yugoslavia March 2, 2004); Prosecutor v. Brđanin, Judgement, Case No. IT-99-36-A, Prosecution's Brief on Appeal, ¶¶ 7.32, 7.8 n.300 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 28, 2005); Prosecutor v. Limaj, Case No. IT-03-66-A, Prosecution Brief in Reply, ¶ 1.7 & n.7 (Int'l Crim. Trib. for the Former Yugoslavia May 25, 2006); Prosecutor v. Limaj, Case No. IT-03-66-A, Table of Authorities at 4 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2006); Prosecutor v. Orić, Case No. IT-03-68-A, The Prosecution's Appeal Brief, ¶¶ 112, 173 & n.221 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 16, 2006); Prosecutor v. Martić, Case No. IT-95-11-A, Appellant's Brief, ¶ 31 (Int'l

Crim. Trib. for the Former Yugoslavia May 5, 2008); Prosecutor v. Martić, Case No. IT-95-11-A, Prosecution's Appeal Brief, ¶ 32 nn.44–45 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 25, 2007); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgement, ¶¶ 195 n.488, 201 n.502 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Prosecution's Appeal Brief, ¶ 33 n.62 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2008); Prosecutor v. Boškoski, Case No. IT-04-82-A, Boškoski Defence Respondent Brief, ¶¶ 27 n.22, 28 n.23, 29 n.24, 317 n.520 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 1, 2008); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Prosecution Appeal Brief, ¶¶ 50 n.134, 54 n.171 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2008); Prosecutor v. Gotovina, Case No. IT-06-90-A, Appellant's Brief of Ante Gotovina, ¶ 175 & n.327 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011); Prosecutor v. Gotovina, Case No. IT-06-90-A, Mladen Markač's Public Redacted Appeal Brief, ¶ 217 n.159 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 11, 2011); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Judgement, ¶ 431 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Prosecution Appeal Brief, ¶ 7 n.18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2009); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Milan Lukić's Appeal Brief, ¶¶ 33 & n.53, 34 n.54, 35 n.55, 182, 212 n.329, 265 n.451 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2010); Prosecutor v. Perišić, Case No. IT-04-81-A, Appeal Brief of Momčilo Perišić, ¶¶ 18 n.11, 19 n.12, 22 n.15, 33 n.30 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 10, 2012); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgement, ¶¶ 1160 n.3799, 1243 n.4123, 1254 n.4126, 1562 n.5097 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); Prosecutor v. Šainović, Case No. IT-05-87-A, Prosecution Appeal Brief, ¶ 74 n.174 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 21, 2009); Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Judgement, ¶¶ 61 n.196, 74 n.235, 827 n.2402, 836 n.2437, 928 n.2744 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014); Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Prosecution Appeal Brief, ¶ 44 n.150 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 15, 2011); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶¶ 99 n.292, 487 n.1339, 535 n.1503 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgement, ¶¶ 258 n.760, 275 n.807, 276 n.811, 416, 600 n.1818 & 1821, 603 n.1827 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Stanišić, Case No. IT-03-69-A, Prosecution Appeal Brief, ¶¶ 30 n.31, 39 n.59, 141 nn.360–61, 145 n.365, 148 n.371 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 25, 2013); Prosecutor v. Stanišić, Case No. IT-08-91-A, Judgement, ¶¶ 41 n.171, 589 n.2022, 901 n.3052, 963 n.3201, 1082 n.3583, (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2016); Prosecutor v. Stanišić, Case No. IT-08-91-A, Prosecution Appeal Brief, ¶¶ 55 n.193, 59 n.202 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 19, 2013); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 276 n.825, 362 n.1111, 584 nn.1971 & 1974, 602 nn.2021 & 2023, 634 n.2086, 668 n.2147, 677 nn.2165 & 2168, 687 nn.2195 & 2196, 688 n.2197, 777 n.2430, 976 nn.3116 & 3120, 2114 n.7247, 2785 n.9107, 2798 n.9141, 2804 n.9155, 2813 n.9184, 2813 n.9186, 2819 n.9205 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement, ¶¶ 22 n.60, 427 n.1117 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 20, 2019); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Prosecution Appeal Brief, ¶ 163 n.596 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2016); Prosecutor v. Šešelj, Case No. IT-03-67-A, Prosecution Appeal Brief, ¶¶ 14 n.11, 16 n.19, 46 n.126, 78 n.240, 122 n.334, 130 n.348, 135 n.358, 149 n.390, 198 n.550 (Int'l Crim. Trib. for the

Former Yugoslavia July 18, 2016); Prosecutor v. Mladić, Case No. MICT-13-56-A, Appeal Brief on Behalf of Ratko Mladić, ¶¶ 84 n.119, 341, 343, 345, 355, 364, 449 (Aug. 6, 2018). In all four SCSL cases and in five of six ICC cases, at least one litigant advanced an argument based on a separate opinion. *See* Prosecutor v. Fofana, Case No. SCSL-04-14-A, Prosecution Appeal Brief, ¶¶ 2.6 n.8, 4.28 n.326, 4.46 n.353, 4.47, 7.12 n.515 (Dec. 11, 2007); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Kondewa Appeal Brief, ¶ 169 n.140 (Dec. 11, 2007); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Kondewa Reply to Prosecution Response to the Kondewa Appeal Brief at 32 n.63 (Jan. 28, 2008); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, ¶¶ 173 nn.346–47, 174 n.348, 284 n.624, 387 n.952, 889 n.2309 (Oct. 26, 2009); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Prosecution Appeal Brief, ¶ 4.121 n.799 (June 2, 2009); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Kanu's Submissions to Ground of Appeal, ¶¶ 4.10 & n.90, 7.4 n.152, 7.10 n.163, 7.12 n.165, 8.2 n.171, 11.21 n.208 (Sept. 13, 2007); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Brima Appeal Brief, ¶¶ 72 n.74, 82 n.98, 115 n.144, 117 & n.146 (Sept. 13, 2007); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 72 n.174 (Feb. 22, 2008); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 255 n.589 (Sep. 26, 2013); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Public Prosecution Appellant's Submissions, ¶ 81 n.237 (Oct. 1, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Lubanga's Appellate Brief Against the 14 March 2012 Judgment Pursuant to Article 74 of the Statute (December 3, 2012), ¶¶ 23 n.40, 36 n.63, 92 n.137, 333 (Dec. 1, 2014); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Prosecution's Document in Support of Appeal Against the "Decision on Sentence Pursuant to Article 76 of the Statute," ¶¶ 26 & n.25, 70 & n.156 (Dec. 3, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Lubanga's Appellate Brief Against Trial Chamber I's 10 July 2012 Decision on Sentence Pursuant to Article 76 of the Statute, ¶¶ 44 n.38, 45 n.40 (December 3, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Appellant's Document in Support of the Appeal, ¶ 525 n.1046 (Sept. 28, 2016); Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Prosecution Appeal Brief, ¶ 143 n.232 (Oct. 7, 2019); Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Defence Appeal Brief – Part I, ¶¶ 19 n.38, 20 n.39 (Nov. 11, 2019); Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Defence Appeal Brief – Part II, ¶ 282 n.745 (June 30, 2020); Prosecutor v. Ntaganda, ICC-01/04-02/06 A3, Public Redacted Version of "Sentencing Appeal Brief," ¶ 116 n.153 (Apr. 9, 2020); Prosecutor v. Gbagbo, ICC-02/11-01/15 A, Judgement in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions, ¶¶ 117 n.385, 217 n.494, 230 n.534 (Mar. 31, 2021).

APPENDIX B

See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement in Sentencing Appeals, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Prosecution's Appeal Brief, ¶ 2.34 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 24, 1999); Prosecutor v. Deronjić, Case No. IT-02-61-A, Appellant's Brief Pursuant to Rule 111, ¶ 115 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2004); Prosecutor v. Simić, Case No. IT-95-9-A, Judgement, ¶¶ 90, 112, 232, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006); Prosecutor v. Galić, Case No. IT-98-29-A, Defence Appellant's Brief, ¶¶ 125, 128, 166, 207, 215, 226, 247, 251, 371, 426, 555 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2004); Prosecutor v. Galić, Case No. IT-98-29-A, Prosecution Appeal Brief, n.25 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 2, 2004); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Prosecution Appeal Brief, ¶¶ 50 n.134, 54 n.171 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2008); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgement, nn.3799, 4123, 4126, 5097 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); Prosecutor v. Gotovina, Case No. IT-06-90-A, Appellant's Brief of Ante Gotovina, n.327 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011); Prosecutor v. Gotovina, Case No. IT-06-90-A, Mladen Markač's Public Redacted Appeal Brief, n.159 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 11, 2011); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Judgement, ¶ 431 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Prosecution Appeal Brief, n.18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2009); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Milan Lukić's Appeal Brief, ¶¶ 33, 182, 212, nn.53, 54, 55, 329, 451 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2010); Prosecutor v. Perišić, Case No. IT-04-81-A, Appeal Brief of Momčilo Perišić, nn.11, 12, 15, 30, 47, 48, 54, 56, 57, 65, 70, 90, 91, 119, 148, 168, 200, 247, 264, 266, 267, 272, 278, 282, 294, 309, 318, 320, 333, 336, 337, 339, 343, 344, 366, 370, 289, 295, 400, 412, 419, 432, 434, 444, 445, 454, 460, 467, 477, 478, 481, 481, 491, 502, 512, 514 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 10, 2012); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, nn.292, 1339, 1503 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgement, ¶ 416, nn.760, 807, 811, 1818, 1827 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Stanišić, Case No. IT-03-69-A, Prosecution Appeal Brief, nn.31, 59, 360, 361, 365, 371 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 25, 2013); Prosecutor v. Prlić., Case No. IT-04-74-A, Judgement, nn.825, 1111, 1971, 1974, 2021, 2023, 2086, 2147, 2165, 2168, 2194, 2195, 2196, 2197, 2430, 3116, 3120, 7247, 9107, 9132, 9141, 9155, 9184, 9186, 9205, 10749 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic; Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement, nn.60, 1117 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 20, 2019); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Prosecution Appeal Brief at 596 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2016); Prosecutor v. Šešelj, Case No. IT-03-67-A, Prosecution Appeal Brief, nn.11, 19, 126, 240, 334, 348, 358, 550 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2016); Prosecutor v. Mladić, Case No. MICT-13-56-A, Appeal Brief on Behalf of Ratko Mladić, ¶¶ 84 nn.119, 341, 343, 345, 355, 364, 449 (Aug. 6, 2018); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Mr. Thomas Lubanga's Appellate Brief Against the 14 March 2012 Judgment Pursuant to Article 74 of the Statute, ¶ 333, nn.63, 137 (Dec. 3, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Mr. Thomas Lubanga's Appellate Brief Against Trial Chamber I's 10

July 2012 Decision on Sentence Pursuant to Article 76 of the Statute, nn.38, 40 (December 3, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Prosecution's Document in Support of Appeal Against the "Decision on Sentence Pursuant to Article 76 of the Statute," ¶¶ 26 n.25, 70 n.156 (Dec. 3, 2012); Prosecutor v. Gbagbo, ICC-02/11-01/15 A, Judgement in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions, nn.385, 494, 534 (Mar. 31, 2021); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Kondewa Appeal Brief, n.140 (Dec. 11, 2007); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Prosecution Appeal Brief, ¶¶ 4.47 & nn.8, 261, 326, 344, 353, 506, 515 (Dec. 11, 2007); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, 346–48, 624, 952, 2309, 2502–04, 2555, 2643, 2871, 2872 (Oct. 26, 2009); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Prosecution Appeal Brief, n.799 (June 2, 2009); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Brima Appeal Brief, nn.74, 98, 144, 146 (Sept. 13, 2007); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Kanu's Submissions to Ground of Appeal, nn.90, 152, 163, 165, 171, 208 (Sept. 13, 2007); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, n.174 (Feb. 22, 2008). When we calculate by appellant, we learn that 86% of appellants appealing a Trial Chamber judgment with a dissent invoke a separate opinion. Often both the prosecution and dissent appeal the Trial Chamber's judgment, and because one of them almost certainly opposes the dissent in the case, it stands to reason that not all appellants in cases with dissents will invoke those dissents.

APPENDIX C

These cases are Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement in Sentencing Appeals, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Prosecution's Appeal Brief, ¶ 2.34 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 24, 1999); Prosecutor v. Simić, Case No. IT-95-9-A, Judgment, ¶¶ 90, 112, 232 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006); Prosecutor v. Galić, Case No. IT-98-29-A, Defence Appellant's Brief, ¶¶ 125, 128, 166, 207, 215, 226, 247, 251, 371, 426, 555 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2004); Prosecutor v. Galić, Case No. IT-98-29-A, Prosecution Appeal Brief, ¶ 2.23 n.25 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 2, 2004); Prosecutor v. Haradinaj, Case No. IT-04-84-A, Prosecution Appeal Brief, ¶¶ 50 n.134, 54 n.171 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2008); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Judgement, ¶ 431 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Prosecution Appeal Brief, ¶ 7 n.18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2009); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Milan Lukić's Appeal Brief, ¶¶ 182 n.291, 212 n.329, 451 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2010); Prosecutor v. Perišić, Case No. IT-04-81-A, Appeal Brief of Momčilo Perišić, ¶¶ 18 n.11, 19 n.12, 22 n.15, 36 n.30, 49 nn.47–48, 53 n.54, 54 nn.56–57, 60 n.65, 63 n.70, 83 n.90, 84 n.91, 113 n.119, 136 n.148, 146 n.168, 207 n.247, 221 nn.264 & 266–267, 223 n.272, 227 n.278, 231 n.282, 234 n.289, 238 n.294, 239 n.295, 253 n.309, 260 n.318, 261 n.320, 268 n.333, 270 n.336, 272 n.337, 274 n.339, 277 n.343, 279 n.344, 296 n.366, 297 n.370, 327 n.400, 337 n.412, 338 n.419, 349 n.432, 351 n.434, 358 n.444, 360 n.445, 364 n.454, 369 n.460, 375 n.467, 395 nn.477, 478 & 481, 398 n.491, 400 n.502, 410 n.512, 412 n.514 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 10, 2012); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 99 n.292 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015); Prosecutor v. Šainović, Case No. IT-05-87-A, Prosecution Appeal Brief, ¶ 74 n.174 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 21, 2009); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgement, ¶¶ 416, 275 n.807, 276 n.811 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Stanišić, Case No. IT-03-69-A, Prosecution Appeal Brief, ¶ 39 n.59 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 25, 2013); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 276 n.825, 362 n.1111, 584 n.1971, 602 nn.2021 & 2023, 634 n.2086, 668 n.2147, 677 nn.2165 & 2168, 687 nn.2194, 2195 & 2196, 688 n.2197, 777 n.2430, 976 nn.3116 & 3120, 2115 n.7247, 2785 n.9107, 2795 n.9132, 2798 n.9141, 2804 n.9155, 2813 nn.9184 & 9186, 2819 n.9205, 3242 n.10749 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic; Prosecutor v. Šešelj, Case No. IT-03-67-A, Public Redacted Version of Prosecution Appeal Brief, ¶¶ 14 n.11, 16 n.19, 46 n.126, 78 n.240, 122 n.334, 130 n.348, 135 n.358, 198 n.550 (Aug. 29, 2016 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2016) (filed confidentially); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Mr. Thomas Lubanga's Appellate Brief Against the 14 March 2012 Judgment Pursuant to Article 74 of the Statute, ¶¶ 36 n.63, 92 n.137, 333 (Dec. 3, 2012); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Prosecution's Document in Support of Appeal Against the "Decision on Sentence Pursuant to Article 76 of the Statute," ¶¶ 26 n.25, 70 n.156 (Dec. 3, 2012); Prosecutor v. Gbagbo, ICC-02/11-01/15 A, Judgement in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions, ¶¶ 217 n.494, 230 n.534 (Mar. 31, 2021); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Kondewa Appeal Brief, ¶ 169 n.140 (Dec. 11, 2007); Prosecutor v.

Fofana, Case No. SCSL-04-14-A, Prosecution Appeal Brief, ¶¶ 4.2 n.261, 4.28 n.326, 4.41 n.344, 4.46 n.353 (Dec. 11, 2007); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, ¶¶ 346–48, 624, 952, 2502–04, 2555, 2643, 2871, 2872 (Oct. 26, 2009); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Prosecution Appeal Brief, ¶ 4.121 n.799 (June 2, 2009); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 97 n.174 (Feb. 22, 2008).

APPENDIX D

See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement in Sentencing Appeals, ¶ 69 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000); Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgement, ¶ 241 (Int'l Crim. Trib for the Former Yugoslavia July 21, 2000) (addressing arguments raised in Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Defendant's Appellate Brief, nn.89, 90, 103 & 105 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999)); Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement, ¶¶ 284, 767–69 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (addressing arguments made in Prosecutor v. Delalić, Case No. IT-96-21-A, Prosecution's Appeal Brief, ¶¶ 3.112 n.187, 5.74 n.307 (Int'l Crim. Trib. for the Former Yugoslavia July 2, 1999)); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgement, ¶¶ 381–88 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001) (addressing arguments made in Prosecutor v. Kupreškić, Case No. IT-95-16-A, Prosecution's Appeal Brief, ¶¶ 3.39 to .40 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2000)); Prosecutor v. Mucić, Case No. IT-96-21-Abis, Judgment on Sentence Appeal, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2003) (addressing arguments made in Prosecutor v. Mucić, Case No. IT-96-21-Abis, Brief of Esad Landzo on Appeal, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 15, 2002)); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement, ¶¶ 216–33 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (addressing arguments made in Prosecutor v. Krstić, Case No. IT-98-33-A, Prosecution Appeal Brief, ¶¶ 316 n.15, 3.85 to .87 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 14, 2001)); Prosecutor v. Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, ¶ 135 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2005) (addressing arguments made in Prosecutor v. Deronjić, Case No. IT-02-61-A, Appellant's Brief Pursuant to Rule 111, ¶ 115 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2004)); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶¶ 409–11 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (addressing arguments made in Stakić's reply brief Prosecutor v. Stakić, Case No. IT-97-24-A, Milomir Stakić's Brief in Reply, ¶ 135 (Int'l Crim. Trib. for the Former Yugoslavia May 20, 2004)); Prosecutor v. Simić, Case No. IT-95-9-A, Judgement, ¶¶ 232, 236, 251 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 28, 2006); Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 81–85 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (addressing arguments made in Prosecutor v. Galić, Case No. IT-98-29-A, Defence Appellant's Brief, ¶¶ 54 et seq. (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2004)); Prosecutor v. Martić, Case No. IT-95-11-A, Judgement, ¶¶ 293–94 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) (addressing arguments made in Prosecutor v. Martić, Case No. IT-95-11-A, Prosecution's Appeal Brief, ¶ 32 nn.44–45 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 25, 2007)); Prosecutor v. Martić, Case No. IT-95-11-A, Judgement, ¶¶ 55–60 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) (addressing arguments made in Prosecutor v. Martić, Case No. IT-95-11-A, Appellant's Brief, ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2008)); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgement, ¶¶ 201–03 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Prosecutor v. Boškoski, Judgement, Case No. IT-04-82-A, ¶¶ 224–34 (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010) (addressing arguments made in Prosecutor v. Boškoski, Case No. IT-04-82-A, Boškoski Defence Respondent Brief, ¶¶ 27–29, nn.22–24 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 1, 2008)); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Judgement, ¶ 431 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012); Prosecutor v. Lukić, Case No. IT-98-32/1-A,

Judgement, ¶¶ 157–63, 255, 261, 510–14, 539 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012) (addressing arguments made in Prosecutor v. Lukić, Case No. IT-98-32/1-A, Milan Lukić's Appeal Brief, ¶¶ 33 & n.53, 34 n.54, 35 n.55, 182, 212 n.329, 265 n.451 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2010)); Prosecutor v. Lukić, Case No. IT-98-32/1-A, Judgement, ¶ 466 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012) (addressing arguments made in Prosecutor v. Lukić, Case No. IT-98-32/1-A, Prosecution Appeal Brief, ¶ 7 n.18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2009)); Prosecutor v. Perisić, Case No. IT-04-81-A, Judgement, ¶¶ 18, 27, 53, 55, 100–18, 100–01, 104, 105 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (addressing arguments made in Prosecutor v. Perisić, Case No. IT-04-81-A, Appeal Brief of Momcilo Perisić, ¶¶ 15, 30, 54, 148, 389, 434–45 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 10, 2012)); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgement, ¶¶ 1256–57, 1259 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (addressing Pavkovic's arguments made in Prosecutor v. Šainović, Case No. IT-05-87-A, Judgement, ¶¶ 1243 n.4123, 1254 n.4126 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); Prosecutor v. Šainović, Case No. IT-05-87-A, Judgement, ¶¶ 1581–82 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (addressing arguments made in Prosecutor v. Šainović, Case No. IT-05-87-A, Prosecution Appeal Brief, ¶ 74 n.174 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 21, 2009)); Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Judgement, ¶¶ 63, 79, 831, 839–41 & n.2744 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014) (addressing arguments described in ¶¶ 61 n.196, 74 n.235, 836 n.2437); Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Judgement, ¶ 915 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014) (addressing arguments made in Prosecutor v. Đorđević, Case No. IT-05-87/1-A, Prosecution Appeal Brief, ¶ 44 n.150 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 15, 2011)); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶¶ 103–04, 539 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (addressing Popović's arguments described in Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 99 n.292 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015)); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 490 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (addressing Beara's arguments described in Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 487 n.1339 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015)); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 539 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (addressing arguments made in Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 535 n.1503 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015)); Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 1069 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015) (addressing prosecutor's arguments described in Prosecutor v. Popović, Case No. IT-05-88-A, Judgement, ¶ 1060 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 30, 2015)); Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgement, ¶¶ 261, 282, 285, 418–25, 602, 605–06 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015) (addressing arguments described in Prosecutor v. Tolimir, Case No. IT-05-88/2-A, Judgement, ¶ 416, nn.760, 807, 811, 1821, 1827 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 8, 2015); Prosecutor v. Stanišić, Case No. IT-08-91-A, Judgement, ¶¶ 43, 898, 920, 966–67, 1092 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2016) (addressing Župljanin's arguments described in Prosecutor v. Stanišić, Case No. IT-08-91-A, Judgement, ¶¶ 41 n.171, 890 n.2981, 910 n.3052, 963 n.3201, 1082 n.3583 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2016));

Prosecutor v. Stanišić, Case No. IT-08-91-A, Judgement, ¶¶ 43, 441, 595–97, 1092 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2016) (addressing Stanišić's arguments described in Prosecutor v. Stanišić, Case No. IT-08-91-A, Judgement, ¶¶ 41 n.171, 438 n.1498, 589, 1082 n.3583 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2016)); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 584 n.1974, 589, 825 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic (addressing Corić's arguments made in Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 276 n.825, 584 nn.1971, 1974 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 364–68, 690–92, 780, 2795, 2801, 2806, 2817, 9187, 9821 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic (addressing arguments made by Pusić appearing in Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 362 n.1111, 687 nn.2194–95, 688 n.2197, 777 n.2430, 2785 n.9107, 2798 n.9141, 2804 n.9155, 2813 nn.9184, 9186, 2819 n.9205 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017)); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 604–06, 639, 670 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic (addressing Praljak's arguments in Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 602 nn.2021, 2023, 634 n.2086, 668 n.2147 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 681, 690, 9821 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic (addressing Stojić's arguments described in Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 677 nn.2165, 2168, 976 n.3116, 2820 n.9208 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic); Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶¶ 2116–18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic (addressing Petković's arguments described in Prosecutor v. Prlić, Case No. IT-04-74-A, Judgement, ¶ 2114 n.7247 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017), https://www.icty.org/en/case/prlic); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement, ¶¶ 25–30, 428–30 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 20, 2019) (addressing arguments described in Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement, ¶¶ 22 n.60, 427 n.1117 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 20, 2019)); Prosecutor v. Seselj, Case No. IT-03-67-A, Judgement, n.315, ¶¶ 61, 74, 84, 140–44, 168 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 11, 2018) (addressing arguments made in Prosecutor v. Šešelj, Case No. IT-03-67-A, Prosecution Appeal Brief, nn.11, 19, 126, 358, 390, 240, 550 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2016)); Prosecutor v. Mladić, Case No. MICT-13-56-A, Judgement, ¶¶ 280, 284, 286, 289 (June 8, 2021) (addressing claims made in Prosecutor v. Mladić, Case No. MICT-13-56-A, Public Redacted Appeal Brief on Behalf of Ratko Mladić, ¶¶ 341, 343, 345, 347, 355 (Sept. 11, 2018)); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Judgment, ¶¶ 128–32, 152–53 (May 28, 2008) (addressing prosecution's claim made in Prosecutor v. Fofana, Case No. SCSL-04-14-A, Prosecution Appeal Brief, ¶¶ 4.41 & n.344, 4.28 & n.326, 4.46 to .47 & n.353 (Dec. 11, 2007)); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 161–63, 296, 323–25 (Feb. 22, 2008) (addressing Kanu's claims appearing in Prosecutor v. Brima, Case No. SCSL-2004-16-A, Kanu's Submissions to Ground of Appeal, ¶¶ 4.10 & n.90, 7.10 n.163, 8.2 n.171 (Sept. 13, 2007)); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 220–22 (Feb. 22, 2008) (addressing Brima's claims appearing in Prosecutor v. Brima,

Case No. SCSL-2004-16-A, Brima Appeal Brief, ¶ 82 n.98 (Sept. 13, 2007)); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 97, 109–10 (Feb. 22, 2008) (addressing the prosecution's claim described in Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶ 72 n.174 (Feb. 22, 2008)); Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, ¶¶ 299, 389–90 (Oct. 26, 2009) (addressing Sesay's claim in Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, ¶¶ 284 n.624, 387 n.952 (Oct. 26, 2009)); *id.* ¶ 890 (addressing Kallon's claim in Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, ¶ 889 n.2309 (Oct. 26, 2009)); *id.* ¶¶ 179–80, 954–55, 962–64, 992, 1054–55 (addressing Gbao's claim in Prosecutor v. Sesay, Case No. SCSL-04-14-A, Judgment, ¶¶ 173 nn.346–47, 174 n.348, 950 nn.2502–04, 960 n.2555, 1046 nn.2871–72 (Oct. 26, 2009)); Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 259–302 (Sep. 26, 2013) (addressing Taylor's arguments appearing in Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 255 n.589 (Sep. 26, 2013)); Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction, ¶¶ 150, 469–70 (Dec. 1, 2014) (addressing Lubanga's arguments in Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Mr. Thomas Lubanga's Appellate Brief Against the 14 March 2012 Judgment Pursuant to Article 74 of the Statute, ¶¶ 36 n.63, 333 (Dec. 3, 2012)); Prosecutor v. Lubanga, ICC-01/04-01/06 A 4 A 6, Judgment on the Appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo Against the "Decision on Sentence Pursuant to Article 76 of the Statute," ¶¶ 51, 53, 66, 86–93 (Dec. 1, 2014) (addressing Prosecution's arguments in Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Prosecution's Document in Support of Appeal Against the "Decision on Sentence Pursuant to Article 76 of the Statute," ¶¶ 26 & n.25, 70 & n.156 (Dec. 3, 2012)); Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Judgment, ¶¶ 313, 325–327 (Mar. 30, 2021) (addressing Ntaganda's arguments appearing in Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Defence Appeal Brief – Part I, ¶¶ 19 n.38, 20 n.39 (Nov. 11, 2019)); Prosecutor v. Gbagbo, ICC-02/11-01/15 A, Judgement in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions, ¶¶ 177–78, 223–24 (Mar. 31, 2021) (addressing Prosecution's arguments described in Prosecutor v. Gbagbo, ICC-02/11-01/15 A, Judgement in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions, ¶¶ 117 n.385, 217 n.494 (Mar. 31, 2021)). Although I believe the most informative calculations are the ones described in the text, other calculations also provide useful insights. For instance, if we treat appeals as the relevant unit, we learn that in 78% of appeals featuring a claim based on a separate opinion, the Appeals Chamber expressly addressed the claim. Further, when we calculate by appellant rather than by case, we find a similarly robust 70% of appellants who invoked separate opinions in support of their claims had those particular claims addressed by the Appeals Chamber.