

2019

## Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?

Ranieri L. Resende

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njihr>

Part of the [Human Rights Law Commons](#), [International Law Commons](#), and the [Judges Commons](#)

---

### Recommended Citation

Ranieri L. Resende, *Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?*, 17 Nw. J. Hum. Rts. 25 (2019).

<https://scholarlycommons.law.northwestern.edu/njihr/vol17/iss1/2>

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Human Rights by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

## **Deliberation and Decision-Making Process in the Inter-American Court of Human Rights: Do Individual Opinions Matter?<sup>1\*</sup>**

**Ranieri Lima Resende<sup>2†</sup>**

*The work is focused on the adjudicatory nature of the Inter-American Court of Human Rights and investigates its model of deliberation, considering three basic schemes: per curiam, seriatim and hybrid. In order to identify an institutional pattern, the importance of individual opinions is analyzed through the quantitative performance of each category of judge (ad hoc and regular), as well as each type of adjudicative activity (judgments and advisory opinions). The quantitative data is also useful to better understand the explicit assimilation of separate opinions to the core reasoning of future cases. As a result, it has been possible to identify relevant aspects applicable to the main problem of whether individual opinions really matter to the Inter-American Court's decision-making process.*

---

<sup>1\*</sup> I thank Professors John Ferejohn and Lewis Kornhauser (NYU) for their valuable comments and Professor H el ene Tigroudja (Aix-Marseille), JSD Candidates and Researchers for their important suggestions during the *JSD/NYU Forum* (Spring 2018), as well as Professor Alexandra Huneeus (UW-Madison) for her gentle indications. In this opportunity, I also thank Professors Jos e Ribas Vieira, Carlos Bolonha and Cecilia Caballero Lois (UFRJ) for their supervision, encouragement and academic support. The responsibility for any mistakes remains with the author.

<sup>2†</sup> Visiting Doctoral Researcher, New York University (NYU, 2017-18); PhD. in Law Candidate, Federal University of Rio de Janeiro (UFRJ); Excellence Fellow, Rio de Janeiro Research Foundation (FAPERJ). E-mail: ranierilr@ufrj.br.

## TABLE OF CONTENTS

INTRODUCTION.....	26
I.    INTER-AMERICAN COURT: AN INTERNATIONAL ADJUDICATIVE INSTITUTION.....	28
II.   DELIBERATION AND DECISION .....	32
III.  GENERAL DELIBERATIVE MODELS: ELEMENTARY DISTINCTIONS.....	34
IV.  DELIBERATIVE OPTION OF THE INTER-AMERICAN COURT AND THE WEIGHT OF INDIVIDUAL OPINIONS.....	36
A. <i>Ad Hoc Judges: A Deviation?</i> .....	36
B. <i>Legal Tradition of Separate Opinions and the Inter-American Court's             Early Years</i> .....	39
C. <i>Quantitative Data: Parameters in Judgments and Advisory Opinion</i> .....	40
D. <i>Quantitative Data: Ad Hoc Judges</i> .....	43
E. <i>Quantitative Data: Regular Judges</i> .....	45
F. <i>Separate Opinions as Core Reasoning of Subsequent Cases</i> .....	47
CONCLUSION.....	49

## INTRODUCTION

The problem addressed in this article was born from some general issues connected to the institutional behavior of the Inter-American Court of Human Rights (Inter-American Court), such as the deliberative pattern adopted by the Court, the decision-making process developed throughout the Court's practice, and the repercussion of the judges' individual opinions regarding the reasoning of the Inter-American judgments.<sup>3</sup>

In summary, concurrent and divergent opinions have one essential characteristic centered in the reasoning that represents the individual views of their authors (judges or arbitrators) as distinct from those of the Court as a whole.<sup>4</sup>

Due to their profuse number, separate opinions have been used by actors of the Inter-American System and the Court itself, as demonstrated by the following situations:

- i) the request for interpretation of an individual opinion related to the *Quispialaya Vilcapoma* case by the Peruvian State, which was refused by the Court based on the argument that separate opinions shall not be the object of this remedy.<sup>5</sup> *Prima facie*, the logical conclusion would be the exclusion of the individual opinions from the Court's reasoning, in spite of the condemned State's contrary understanding;
- ii) the use of individual opinions as the Court's reasoning in several briefs by demanding States, e.g. the preliminary exception of

<sup>3</sup> For this paper, I have adopted the term "Separate Opinion" as synonym of "Individual Opinion" and, to differentiate the respective conclusion according to the collegiate body's position, I assumed the terms "Concurrent Opinion" and "Dissenting Opinion" (or "Divergent Opinion").

<sup>4</sup> See Farrokh Jhabvala, *The Scope of Individual Opinions in the World Court*, 13 NETH. Y.B. INT'L L. 33, 47 (1982).

<sup>5</sup> *Quispialaya Vilcapoma v. Peru*, Interpretation, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 320, ¶ 25 (Nov. 21, 2016).

competence presented by Guatemalan State in the *Members of the Village of Chichupac* case<sup>6</sup> (separate opinion of Judge García Sayán in the case of the *Massacres of El Mozote*), and the final arguments presented by the Venezuelan State in the *Ríos et al.* case<sup>7</sup> (separate opinion of Judge García Ramírez in the case of the *Miguel Castro Castro Prison*);

- iii) the explicit quotation of separate opinions in the quality of judicial reasoning by the Court itself, as shown by the judgment in the cases of *Baena Ricardo et al.*<sup>8</sup> (individual opinion of Judge Cançado Trindade in the *Advisory Opinion OC-18/03*), and *Castañeda Gutman*<sup>9</sup> (individual opinion of Judge Piza Escalante in the *Advisory Opinion OC-7/85*).

In principle, identifying such a large amount of individual opinions and their argumentative use could intuitively support the perception that the Inter-American Court's decision-making process is outlined by aggregating the content of separate opinions regarding past judgments. In order to confirm or refute this perception, a quantitative analysis may produce interesting results for gauging the impact of separate opinions of some judges in comparison to others.

In the first part of this paper, I analyze the adjudicative nature of the Inter-American Court's institutional activity in order to identify the theoretical models of deliberation and one in which the Court's deliberative pattern may fit in.

Next, I attempt to better understand the role of *ad hoc* judges in the Inter-American Court as a possible deviation from impartiality and independence in judgments, because of their direct national connection with the respondent States.

Based on these assumptions, I search for patterns of production of individual opinions in judgments (June 1987 – Aug. 2017) and advisory opinions (Sept. 1982 – Nov. 2017) as available at the Court's website, in order to identify whether or not the separate opinions were well-distributed among a large number of judges, as an institutional characteristic, or concentrated within a small group, which may reveal personal tendencies.

At last, I focus on the analysis of separate opinions quoted by the Inter-American Court at the core reasoning of its subsequent judgments and advisory opinions, which have generated some unexpected results.

---

<sup>6</sup> *Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala*, Main Briefs, "Preliminary Exception of Competence and Merits Arguments of the Guatemalan State", ¶¶ 87-102 (Inter-Am. Ct. H.R., Apr. 17, 2015), [http://www.corteidh.or.cr/docs/casos/aldea\\_chichupac\\_gt/contest.pdf](http://www.corteidh.or.cr/docs/casos/aldea_chichupac_gt/contest.pdf).

<sup>7</sup> *Ríos et al. v. Venezuela*, Main Briefs, "Final Arguments of the Venezuelan State", ¶ 3, & n.1 (Inter-Am. Ct. H.R., Sept. 8, 2008), <http://www.corteidh.or.cr/docs/casos/luisiana/alefest.pdf>.

<sup>8</sup> *Baena Ricardo et al. v. Panama*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104, ¶ 102 n.70 (Nov. 28, 2003).

<sup>9</sup> *Castañeda Gutman v. México*, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 159 n.55 (Aug. 6, 2008).

I. INTER-AMERICAN COURT: AN INTERNATIONAL ADJUDICATIVE INSTITUTION

According to Jeremy Waldron,<sup>10</sup> within a constitutional system based on the separation of powers, the distribution of State functions among different political structures (or institutions) seems to be the keystone of the constitutional theory itself. As a result, the dignity of legislation, the independence of courts and the authority of the executive, exercised by fundamentally distinct entities and persons, tend to generate, in principle, a political environment that is refractory to tyranny and abuse of power.<sup>11</sup>

In my previous work, which analyzed the structure of the World Trade Organization (WTO),<sup>12</sup> I adopted the Armin von Bogdandy's model of division of functions within that international institution.<sup>13</sup> This model postulates:<sup>14</sup>

- i) an executive function, centered on the attributions of application, management and operation of multilateral and plurilateral agreements;
- ii) a legislative function, focused on the members' negotiation forum; and
- iii) an adjudicative function, centered on the dispute resolution system.

One point deserves special attention regarding the executive function: the absence of a central organ within the Inter-American System, which is similar to the structure of the WTO. Unlike the model adopted by some international organizations (e.g.: International Monetary Fund, World Bank), the WTO does not have an executive collegiate body formed by a strict group of Members to expedite deliberative and decision-making processes.<sup>15</sup> The level of decentralization of the System seems even higher when analyzed the role of the Organization of American States (OAS) and its organs, especially the Inter-American Commission on Human Rights,<sup>16</sup> and the diffuse participation of the Member States.

---

<sup>10</sup> JEREMY WALDRON, *Separation of Power and the Rule of Law*, in *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* 45, 46-50 (2016).

<sup>11</sup> See generally M. DE MONTESQUIEU, *Of the Constitution of England*, in *THE COMPLETE WORKS OF M. DE MONTESQUIEU, THE SPIRIT OF LAWS* 198 (1777) (discussing the dangers of legislative and executive powers vested in one person or one group of people); *THE FEDERALIST* NO. 47 (James Madison) (elucidating the tyrannical dangers of accumulated power in one person or one group of people).

<sup>12</sup> RANIERI LIMA RESENDE, *A Estrutura Orgânica e Funcional da OMC*, in *O REGIME JURÍDICO DA RESPONSABILIDADE DAS ORGANIZAÇÕES INTERNACIONAIS: CONTRIBUIÇÕES À ANÁLISE DE SUA APLICABILIDADE À ORGANIZAÇÃO MUNDIAL DO COMÉRCIO* 87 (2010).

<sup>13</sup> *Id.* at 88-89.

<sup>14</sup> Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 *MAX PLANCK Y.B. U.N. L.* 609, 614-17 (2001).

<sup>15</sup> See PETER VAN DEN BOSSCHE AND WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 132-34 (4th ed. 2017); MARY E. FOOTER, *AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION* 38 (2006).

<sup>16</sup> Organization of American States, Charter (A-41), [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp) (“Article 106. There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance

On the other hand, the legislative function is exercised by the *fora* of the States Parties to the American Convention on Human Rights and the Member States of the OAS, who negotiate treaties and produce international normative acts applicable to the whole Inter-American System.

Inspired by this paradigm and considering the institutional design of the Inter-American System of Human Rights, it is possible to see that the Inter-American Court has developed an adjudicative function *per excellence*.<sup>17</sup> Through its jurisdiction over litigant matters, the Court produces international rulings to resolve disputes based on obligations mandated by the American Convention on Human Rights (Pact of San José, Costa Rica, 1969) in cases of violation of human rights.<sup>18</sup> In this sense, the Court only judges the behavior of States Parties which have expressly accepted its jurisdiction.

As well criticized by José E. Alvarez,<sup>19</sup> the classic, old-fashioned prototype of adjudication in international law involved strict elements: independent judges, relatively precise and pre-existing legal norms, adversary proceedings, and a dichotomous decision in which one of the parties should prevail. According to this formal perspective, the production of advisory opinions would not be part of the adjudicatory activity.

Nevertheless, inspired by Henry J. Steiner's work,<sup>20</sup> Alvarez understands that it is possible to include the human rights regional court's consultative function within the sphere of adjudication,<sup>21</sup> based on the legal effects of advisory opinions beyond the boundaries of a single dispute, in order to promote dialogues on human rights norms between international and national

---

and protection of human rights and to serve as a consultative organ of the Organization in these matters.”).

<sup>17</sup> See ANTÔNIO AUGUSTO CANÇADO TRINDADE, *EL EJERCICIO DE LA FUNCIÓN JUDICIAL INTERNACIONAL: MEMORIAS DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 57-72* (2011); see also Thomas Buergenthal, *Implementation of the Judgments of the Court*, in MEMORIA DEL SEMINARIO “EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI” 185, 186-91 (2d ed. 2003).

<sup>18</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm) (“Article 63. 1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission”).

<sup>19</sup> JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 521-26 (2005).

<sup>20</sup> Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 15 (Philip Alston & James Crawford eds., 2000).

<sup>21</sup> See ALVAREZ, *supra* note 19, at 540, 545, 558; see also José E. Alvarez, *What are International Judges for? The Main Function of International Adjudication*, in *OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 159, 168-70 (Cesare P. R. Romano et al. eds., 2014).

branches and, simultaneously, to decide in advance a number of future probable cases.<sup>22</sup>

A good example of this phenomenon may be identified in the advisory opinion of *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (1985),<sup>23</sup> whose reasoning was adopted by some national constitutional and supreme courts in Latin America.<sup>24</sup> This advisory opinion forbade internationally illicit prerequisites applicable to journalists and safeguarded the freedom of expression. As a consequence of the adoption of this opinion by some national courts, several cases were not submitted before the Inter-American System.

In this sense, the adjudicatory activity of the Inter-American Court seems to encompass the resolution of cases as well as the production of advisory opinions.

Although the Pact of San José is the fundamental treaty of the Inter-American System, its substantive and procedural norms have undergone an evident process of expansion. From a formal perspective, the American Convention and the OAS Charter are the strong core of the protective mechanism, but, from a material point of view, the system's normative base shows highly dynamic characteristics.

As registered in specialized legal literature,<sup>25</sup> examples of such expansion can be found in the express references by the Inter-American Court to the Protocol of San Salvador (1988)<sup>26</sup> and the Inter-American Convention on Forced Disappearance of Persons (1994)<sup>27</sup>, and likewise other regional treaties in which the Court assumes its implicit interpretive capacity, such as the Inter-

---

<sup>22</sup> Hélène Tigroudja, *La Compétence Consultative de la Cour Interaméricaine des Droits de L'Homme*, in LA FONCTION CONSULTATIVE DES JURIDICTIONS INTERNATIONALES 1, 16-21 (Alain Ondoua & David Szymczak eds., 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1720423](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720423).

<sup>23</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5 (Nov. 13, 1985).

<sup>24</sup> See, e.g., Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 351-52 (1995); Jaime Córdoba Triviño, *Aplicación de la Jurisprudencia de la Corte Interamericana de Derechos Humanos al Derecho Constitucional Colombiano*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 667, 670-71, 680 (2007); André de Carvalho Ramos, *Supremo Tribunal Federal Brasileiro e o Controle de Convencionalidade: Levando a Sério os Tratados de Direitos Humanos*, 104 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO 241, 261-64 (2009).

<sup>25</sup> *Accord*, e.g., CECILIA MEDINA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: CRUCIAL RIGHTS AND THEIR THEORY AND PRACTICE 3-4 (2d ed. 2016); Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 107-08 (2008).

<sup>26</sup> Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69, <http://www.oas.org/juridico/english/treaties/a-52.html>.

<sup>27</sup> Organization of American States, Inter-American Convention on Forced Disappearance of Persons, Jun. 9, 1994, O.A.S.T.S. No. 80, <http://www.oas.org/juridico/english/treaties/a-60.html>.

American Convention to Prevent and Punish Torture (1985)<sup>28</sup> and the Convention of Belém do Pará (1994)<sup>29</sup>. There are also international legal standards which cannot be classified as treaties but they are part of the named *Inter-American Corpus Juris*, such as the Inter-American Democratic Charter approved by the OAS General Assembly (2001)<sup>30</sup> and the OAS Resolution on Access to Public Information (2006).<sup>31</sup>

Considering this, we should pay special attention to Article 64 of the American Convention,<sup>32</sup> according to which the Inter-American Court may exercise its consultative jurisdiction for the institutional interpretation of any global or regional human rights treaty applicable to the American Continent, if the treaty has been ratified by at least one OAS Member.<sup>33</sup>

Another important aspect is the Court's competence for monitoring the compliance with its own judgments and, in the hypothesis of persistent non-implementation by the recalcitrant State, the Tribunal may report the situation before the OAS General Assembly<sup>34</sup> for collective deliberation and application of institutional measures. In spite of this abstract design, the Court's institutional practice in compliance procedure has revealed a more diffuse,

---

<sup>28</sup> Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, <http://www.oas.org/juridico/english/treaties/a-51.html>.

<sup>29</sup> Inter-American Convention on Prevention, Punishment and Eradication of Violence against Women, Jun. 9, 1994, 33 I.L.M. 1534, <http://www.oas.org/juridico/english/treaties/a-61.html>.

<sup>30</sup> Organization of American States, General Assembly Res., *Inter-American Democratic Charter*, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (Sept. 11, 2001), [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm).

<sup>31</sup> Organization of American States, General Assembly Res. 2252, *Access to Public Information: Strengthening Democracy*, OAS Doc. OEA/Ser.P/AG/RES.2252 (XXXVI-O/06) (June 6, 2006), <http://www.oas.org/en/sla/docs/AG03341E09.pdf>.

<sup>32</sup> American Convention, *supra* note 18 (“Article 64. 1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments”).

<sup>33</sup> See, e.g., Tigroudja, *supra* note 22, at 4-7; JORGE ERNESTO ROA ROA, LA FUNCIÓN CONSULTIVA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 34-39 (2015). Cf. “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶¶ 35-42 (Sept. 24, 1982).

<sup>34</sup> American Convention, *supra* note 18 (“Article 65. To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations”).

symbolic role<sup>35</sup> which reinforces the conclusion that the political balance applicable to non-compliance issues has not produced effective results overall.<sup>36</sup>

In this sense, the structural characteristic of diffusion permeates the Inter-American System through the complex interactions between institutional, procedural and normative aspects, far from the simplistic perspective of solely two participating organs (namely, Inter-American Commission and Court).<sup>37</sup>

Based on the specific adjudicatory function exercised by the Inter-American Court in the production of international rulings, it is important to identify the deliberative model adopted and, in connection, investigate the weight of the judges' individual opinions within the Court's practice.

## II. DELIBERATION AND DECISION

After rich academic debate on this article's initial draft, the best option has been to concentrate the analysis on the formation of the Inter-American Court's judgments, especially through the verification of its deliberative practice, which includes the identification of the *ratio decidendi* in the Court's reasoning. A quantitative analysis option aims to map relevant decisional patterns in the judicial practice, particularly regarding the explicit importance of individual opinions for future cases.<sup>38</sup>

These aspects, which appear simple at first sight, expose relevant typologies of the judicial deliberative process that are clearly distinct from the final decision-making moment and result.

Despite the fact that the two categories reflect a wider spectrum of the decision-making process (*lato sensu*), it is fundamental to distinguish "deliberation" from "decision" (*stricto sensu*). Seen from a temporal perspective, deliberation is a prerequisite to the conclusive moment, and it can be understood as a necessary interstice within the democratic decision-making process, in which an exchange of arguments, communicating discourse and rational persuasion take place.<sup>39</sup>

The distinctive schemes of deliberation and decision have their roots in the example extracted from the Homeric tradition and quoted by Aristotle. According to his *Nicomachean Ethics*,<sup>40</sup> the kings announced their choices to

<sup>35</sup> See Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 518-19 (2011). Cf. James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 824-25 (2008).

<sup>36</sup> Alexandra Huneus, *Compliance with Judgments and Decisions*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 438, 449-51 (Cesare P. R. Romano et al. eds., 2014).

<sup>37</sup> Cf. Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 382-87 (2008); but cf. Dinah Shelton, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 208-19 (2d ed. 2005).

<sup>38</sup> It is important to register that this specific research does not aim to analyze the external repercussions of separate opinions, for instance, before constitutional or supreme courts of the States Parties to the American Convention on Human Rights, neither focus on their implicit influence on subsequent judgments of the Inter-American Court itself.

<sup>39</sup> Cícero Araújo, *Razão Pública, Bem Comum e Decisão Democrática*, in PARTICIPAÇÃO E DELIBERAÇÃO: TEORIA DEMOCRÁTICA E EXPERIÊNCIAS INSTITUCIONAIS NO BRASIL CONTEMPORÂNEO 157 (Marcos Nobre & Vera Schattan P. Coelho eds., 2004).

<sup>40</sup> ARISTOTLE, *THE NICOMACHEAN ETHICS* 43-45 (David Ross transl., 2009).

the people after prior deliberation. This reveals the judgment to be a direct result of the deliberative interstice and centered in the definition not of ends, but of means.

The capacity to engage in rational action might originate in the foundations of the deliberative process,<sup>41</sup> in order to allow effective communication among persons involved in the decision-making process.

In a democratic environment, the primordial commitment is to adopt decisions in the public sphere after effective public deliberations, during which access to the deliberative forum should be free for all. This would mean every citizen must have the capacity to convince and be convinced by good reasons. On the other hand, all citizens have an obligation to accept the deliberative choice about a public action adopted by the majority.<sup>42</sup>

Obviously, the typical deliberative process before judicial organs does not allow the same open participation to all citizens or their Parliamentary representatives, as part of deciding each case under judgment. However, given that the courts are collegiate institutions, where reasons are generated through an internal process of deliberation and guided by applicable norms and based on democratic premises, the underlying reasons must become public.<sup>43</sup>

Some difficulties seem to arise from the applicability of the democratic concept to non-state institutions, such as international organizations and courts, due to the strong limitations to a broad implementation of the majoritarian premise in international arena. Nevertheless, the idea of cosmopolitan citizenship derived from the Kantian perspective may provide an interesting theoretical support,<sup>44</sup> especially when visualized the main role of the European and Inter-American Courts of Human Rights in protecting individuals and minorities against violations performed by public authorities.

Through an interesting criticism against the Robert A. Dahl's conception of bureaucratic bargaining system applicable to international organizations, which are characterized as non-democratic institutions,<sup>45</sup> James Tobin points out that the unrestricted majority rule could be disastrous for minorities, for equality of citizens (or members) before the law, and for the democratic continuity itself.<sup>46</sup>

Even if the democratic nature of international organizations cannot be unequivocally assumed, as may demonstrate the role and practice of the UN

---

<sup>41</sup> See JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 139-40 (2009).

<sup>42</sup> John Ferejohn, *Instituting Deliberative Democracy*, 42 *NOMOS* 75, 79 (2000).

<sup>43</sup> John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, in *CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* 21, 22-25 (Wojciech Sadurski ed., 2003).

<sup>44</sup> Armin von Bogdandy, *The Democratic Legitimacy of International Courts: A Conceptual Framework*, 14 *THEOR. INQ. L.* 361, 364-67 (2013).

<sup>45</sup> Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, in *CONTEMPORARY POLITICAL THEORY* 19, 34 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

<sup>46</sup> James Tobin, *A Comment on Dahl's Skepticism*, in *CONTEMPORARY POLITICAL THEORY* 37, 38 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

Security Council, for instance,<sup>47</sup> there are undeniable, structural elements of democratic deliberation within international courts' decision-making and procedure, such as formal, objective justifications for the adjudicatory activity, and the compliance with due process standards based on the rules of the court.<sup>48</sup>

Given the fundamental distinction between deliberation and decision also applicable to international courts, it is important to identify which deliberative model seems more adequate to describe the dynamics of the Inter-American Court.

### III. GENERAL DELIBERATIVE MODELS: ELEMENTARY DISTINCTIONS

Meanwhile, there is an interesting variable relevant to legal research on the types of deliberative performances within the decision-making process, i.e. the dynamic distance between *per curiam* and *seriatim* models.

According to the long-established English and American judicial tradition, there are three basic schemes of collegiate court deliberation:<sup>49</sup>

- i) *per curiam* model: characterized by externalization of the unified opinion of the court without publicity of the judges' individual opinions;
- ii) *seriatim* model: when each judge's judgment is publicly presented one at a time, as an individual opinion, to be used in composing a possible myriad of reasonings that might contain the opinion of the court;
- iii) hybrid model: centered on externalization of the court's majority opinion, which has synthesized the institutional position, but at the same time, the judges may express their concurrent or divergent individual opinions.

The initial phase of judicial reasoning in a *per curiam* deliberative environment would be quite imperceptible to the general public, as the final, explicit product of the deliberation appears as the unified court's opinion. Based on this model, the problem of the topographic location of a precedent, for instance, is easily solved by the concentrated factual and legal reasoning adopted unanimously or by the majority.<sup>50</sup>

A historic demonstration of the *per curiam* scheme can be identified in the arbitral deliberative model promoted by the Hague system of dispute resolution, based on the Hague Conferences of 1899 and 1907. According to the

<sup>47</sup> See Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 518-27 (1995).

<sup>48</sup> See MAX GOUNELLE, *LA MOTIVATION DES ACTES JURIDIQUES EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION A UNE THEORIE DE L'ACTE JURIDIQUE EN DROIT INTERNATIONAL PUBLIC* 28, 97 (1979).

<sup>49</sup> M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 1, 8 (363 JOHN M. OLIN PROGRAM IN LAW & ECON. WORKING PAPER, 2007), [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1217&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1217&context=law_and_economics). See also Virgílio Afonso da Silva, *Beyond Europe and the United States: The Wide World of Judicial Review*, in *COMPARATIVE JUDICIAL REVIEW* 318, 330-34 (Erin F. Delaney & Rosalind Dixon eds., 2018).

<sup>50</sup> José Ribas Vieira & Margarida Lacombe Camargo, *A Dificuldade de se Criar Precedentes*, *JOTA* (Sept. 21, 2015), <https://jota.info/artigos/a-dificuldade-de-se-criar-precedentes-21092015>.

first conference, arbitrators had the right to register their dissent in the award, but without any reasoning, while the last one completely suppressed the dissenting rule, under the belief that public divergent positions would reveal national biases of the arbitrators, which could generate difficulties for the implementation of decisions by national States.<sup>51</sup>

In an interesting comparative study, Rufino do Vale asserts that secret deliberation is highly consolidated in the Spanish legal order, especially regarding constitutional jurisdiction, in order to emphasize the Court's collegiality in generating a unique decision for the general public, even when individual opinions are available (hybrid model).<sup>52</sup>

To provide another example of the hybrid scheme, Robert S. Summers analyzes the New York State Court of Appeals, where a typical decision is preceded by a concentrated majoritarian opinion, followed by diffuse concurrent opinions and, if any, divergent opinions. In the hypothesis of unanimity, the unified opinion of the Collegiate is published as one sole document (if there were no concurrent opinions). In both cases, only the majoritarian or the unanimous reasoning has sufficient power to generate a binding precedent.<sup>53</sup> Based on this judicial practice, other documents of the decision cannot attract the *ratio decidendi*.

On the other hand, one clear example of the *seriatim* model can be found in the Brazilian Supreme Court's decision-making process. Its deliberative option was reinforced by the creation of Justice TV (*TV Justiça*) in 2002 and Justice Radio (*Rádio Justiça*) in 2004, which simultaneously broadcast plenary judgments.<sup>54</sup> This means that the general public can watch entire live judgments, displaying an overly public type of deliberation. The formalistic sequence of the judges' individual opinions, presented one by one according to the Rules of the Court, immediately publicizes the judges' legal reasoning and, after the publication of the decision, their written considerations become fully available for all.<sup>55</sup>

A relevant uncertainty risk permeates precedent formation in courts that adopt the *seriatim* model. This is based on judges' individual autonomy in presenting their separate opinions and publicly sustaining their persuasive arguments, as the judgment itself carries nothing more than a sum of monocratic, isolated decisions. Because of the accumulation of diffuse opinions, sometimes in a completely inharmonic way, the synthesized opinion of the court

---

<sup>51</sup> See Jhabvala, *supra* note 4, at 35-38.

<sup>52</sup> ANDRÉ RUFINO DO VALE, LA DELIBERACIÓN EN LOS TRIBUNALES CONSTITUCIONALES: UN ESTUDIO EMPÍRICO DE LAS PRÁCTICAS DELIBERATIVAS DEL TRIBUNAL CONSTITUCIONAL DE ESPAÑA Y DEL SUPREMO TRIBUNAL FEDERAL DE BRASIL 35, 79-80, 95-96 (Laura Criado Sánchez transl., 2017).

<sup>53</sup> Robert S. Summers, *Precedent in the United States (New York State)*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 355, 360-61 (D. Neil MacCormick & Robert S. Summers eds., 1997).

<sup>54</sup> See Thiago Luis Sombra, *Why Should Public Hearings in the Brazilian Supreme Court Be Understood as an Innovative Democratic Tool in Constitutional Adjudication?*, 17 GERMAN L.J. 657, 668-69 (2016).

<sup>55</sup> See VALE, *supra* note 52, at 134, 174-75; see also Diego Werneck Arguelhes, *The Open Court and its Enemies: Publicity in Judicial Deliberations Reconsidered* 24 (Feb. 2018) (unpublished manuscript, on file with author).

might not appear as clear and precise. In this case, the prospective precedent would generate similar obscurities and imprecisions.<sup>56</sup>

Based on the inherently structural nature of the precedent for public authorities,<sup>57</sup> this kind of risk will be detrimental to both external assimilation of the judicial reasoning and its internal legal repercussion on future cases.

#### IV. DELIBERATIVE OPTION OF THE INTER-AMERICAN COURT AND THE WEIGHT OF INDIVIDUAL OPINIONS

##### A. *Ad Hoc Judges: A Deviation?*

Before the analysis the deliberative scheme adopted by the Inter-American Court, it is necessary to distinguish the categories of ordinary judges from *ad hoc* judges according to the rules applicable to international courts.

It is interesting to notice that the Statute of the Permanent Court of International Justice (PCIJ, 1922-1946) had a specific provision on *ad hoc* judges,<sup>58</sup> which had caused intense debate in the Advisory Committee of Jurists responsible for drafting the Statute. After the great powers had refused the proposal which forbade individuals to judge cases connected to their original national States,<sup>59</sup> the solution found by the Committee in its famous meetings of 1920<sup>60</sup> was the extension of the prerogative for all litigant States, through the faculty of *ad hoc* judge nomination for cases under the Court's appreciation.

During these meetings, the members of the Advisory Committee tackled important issues regarding *ad hoc* judges, such as the problem of the variable number of judges in proportion to the number of parties (Loder),<sup>61</sup> the *ad hoc* judges' tendency to express individual opinions dissenting from the majority (Lapradelle),<sup>62</sup> the prohibition of recording dissent opinions applied to the *ad hoc* judges as a measure of independence with regard to national pressure (Lapradelle & Fernandes),<sup>63</sup> and the low likelihood of ordinary judges from

---

<sup>56</sup> Lewis A. Kornhauser, *Deciding Together*, 1 REVISTA ESTUDOS INSTITUCIONAIS 38, 51-52 (2015).

<sup>57</sup> NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 6-7 (2008). See MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 157-62 (2008); see also Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577-78 (2001).

<sup>58</sup> Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 379, 450 ("Article 31. Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court. If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge").

<sup>59</sup> Gustavo Luiz von Bahten, *The Role of Judges ad hoc on International Permanent Courts: A Critical Analysis*, 8 ARS BONI ET AEQUI 25, 30 (2012).

<sup>60</sup> P.C.I.J. Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th - July 24th, with Annexes* (1920), [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_proceedings\\_of\\_committee\\_annexes\\_16june\\_24july\\_1920.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf).

<sup>61</sup> *Id.* at 534.

<sup>62</sup> *Id.* at 535.

<sup>63</sup> *Id.* at 591-92.

Asiatic, South-American or “smaller” States which would be compensated by the *ad hoc* judges’ nominations (Phillimore)<sup>64</sup>.

Notwithstanding the prevailing position in the Committee synthesized in the final text of Article 31 of the PCIJ Statute,<sup>65</sup> the consensus on these issues has not always been achieved by Jurists, and defensible divergences remain.

These topics can be summed in three essential perspectives: the *raison d’être* of the *ad hoc* judge, its functional independence, and its distinction related to an ordinary (or regular) judge in international adjudicatory institutions.

First, it is urgent to recognize the immanent deviation from the principle of judicial independence (*nemo iudex in sua causa*)<sup>66</sup> generated by the participation of national judges in judgments involving their respective national States. This originally happened when they were in the position of regular judges. Therefore, the justifications for the procedural right to nominate *ad hoc* judges were centered in the equality argument, in order to compensate this unbalanced situation inside the international adjudicatory process.

Considering the continuity of the PCIJ Statute’s text after the new Statute of the International Court of Justice (ICJ, 1946-),<sup>67</sup> which absorbed the previous, consolidated rules, this issue focused on the judicial impartiality remained as a cogent argument, as pointed out by Fitzmaurice and Guerrero,<sup>68</sup> for whom the independence of the *ad hoc* judges may be affected by their tendency to voice the point of view defended by the government of their respective national States.

Despite these criticisms, part of the specialized legal literature sustains that there is sufficient support to *ad hoc* judges in the ICJ’s institutional practice, based on which the negative aspects apparently would not affect the credibility and independence of the Court.<sup>69</sup> On the other hand, even though the quantitative analysis of the ICJ’s judgments shows a few voting tendencies of national judges (regular and *ad hoc*), they are always a small minority, not more than two in the entire Court.<sup>70</sup> Additionally, the *ad hoc* judges “shall not be

---

<sup>64</sup> *Id.* at 537, 576.

<sup>65</sup> PCIJ Statute, *supra* note 58.

<sup>66</sup> Iain Scobbie, “*Une Heresie en Matiere Judiciaire*”? *The Role of the Judge ad hoc in the International Court*, 4 LAW & PRAC. OF INT’L CTS. & TRIBUNALS 421, 428 (2005).

<sup>67</sup> Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

<sup>68</sup> Institut du Droit International, *Annexe I: Observations des Membres de la Vingt-deuxième Commission en Réponse à la Circulaire de M. Max Huber du 18 Juillet 1952*, 45 ANNUAIRE DE L’INSTITUT DU DROIT INTERNATIONAL (TOME I) 435, 444-46, 458-59 (1954).

<sup>69</sup> *Accord, e.g.*, Pieter Hendrik Kooijmans, *Article 31*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1707, 1744-45 (Andreas Zimmermann et al. eds., 2d ed. 2012); Institut du Droit International, *Resolutions Adopted by the Institute at its Session at Aix-en-Provence, 22 April – 1 May 1954: Study of the Amendments to Be Made in the Statute of the International Court of Justice (22nd Committee)*, 45 ANNUAIRE DE L’INSTITUT DU DROIT INTERNATIONAL (TOME II) 296, 298 (1954).

<sup>70</sup> *See* Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 AM. J. INT’L L. 224, 233-34 (1969).

taken into account for the calculation of the quorum” based on the Rules of the Court (Article 20.3).<sup>71</sup>

Under the historical inspiration of the World Court’s model, the Inter-American System on Human Rights has accepted the *ad hoc* judges in the composition of the Court during judgments.<sup>72</sup>

Theoretically, the participation of *ad hoc* judges in the Inter-American Court could possibly explain a high number of separate opinions. According to the Pact of San José,<sup>73</sup> the respondent States have the option of appointing one *ad hoc* judge, when there is not a permanent judge of its own nationality in the collegiate body. In this sense, the natural conclusion would be the moral duty of the *ad hoc* judges to present individual opinions in the judgments, even if to publicly justify their appointments.

Nevertheless, there is no reasonable justification for the *ad hoc* judges to participate every case before human rights courts. These cases are based on the individual procedural initiative against the State, differently from the classic international adjudication State vis-à-vis State.<sup>74</sup>

In this sense, the Inter-American Court has changed its understanding on the subject in the Advisory Opinion OC-20/09 requested by Argentina, when the Tribunal concluded that the appointment of *ad hoc* judges is restricted to contentious cases originated by inter-state communications, but not by individual petitions.<sup>75</sup> Afterwards, the Rules of the Court were adapted to this new position, stating that the national judge of the respondent State shall not participate in the hearing and deliberation of individual cases,<sup>76</sup> in order to restore the original solution discussed during the Advisory Committee of Jurists’ meetings of 1920.<sup>77</sup>

Therefore, changes in the Court’s rules and practice on *ad hoc* judges have intensely impacted the quantitative analyses, including the complete cessation of occurrences of separate opinions by *ad hoc* judges after 2011.<sup>78</sup>

---

<sup>71</sup> Rules of the Court, 2007 I.C.J. Acts & Docs. 6, <https://www.icj-cij.org/files/publications/acts-and-documents-en.pdf>.

<sup>72</sup> HÉCTOR FAÚNDEZ LEDESMA, *EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES* 181 (3d ed. 2004).

<sup>73</sup> American Convention, *supra* note 18 (“Article 55. [...] 3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge”).

<sup>74</sup> LEDESMA, *supra* note 72, at 185.

<sup>75</sup> Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 87 (Sept. 29, 2009).

<sup>76</sup> Aida Torres Pérez, *La Independencia de la Corte Interamericana de Derechos Humanos desde una Perspectiva Institucional*, in *DERECHOS HUMANOS: POSIBILIDADES TEÓRICAS Y DESAFÍOS PRÁCTICOS* 66, 75 (Jorge Contesse et al. eds., 2013).

<sup>77</sup> Cf. Bahten, *supra* note 59.

<sup>78</sup> According to the Court’s Internet site, the last separate opinion was registered by *ad hoc* Judge Diego Rodríguez Pinzón in the case of *Salvador Chiriboga v. Ecuador*, Judgment of March 3, 2011, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_222\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_222_ing.pdf).

*B. Legal Tradition of Separate Opinions and the  
Inter-American Court's Early Years*

Another aspect that deserves our attention concerns the secrecy inherent in the deliberative process adopted by the Inter-American Court of Human Rights. According to its Statute, the Court “shall deliberate in private” and “its deliberations shall remain secret”, with exceptions decided by the Collegiate (Article 24.2).<sup>79</sup> Additionally, the Rules of the Court reinforce this procedural choice when they register that “only the Judges shall take part in the deliberations”, under the assistance of secretariat members (Article 15.2).<sup>80</sup> Nevertheless, the secret deliberative pattern does not mean enclosing the separate opinion’s content, based on the long-standing tradition of national and international judicial deliberation.<sup>81</sup>

Seen from a formal perspective, the legal support for the individual opinion manifestation is based on the American Convention on Human Rights,<sup>82</sup> the Court’s Statute<sup>83</sup> and Rules of Procedure<sup>84</sup>, which recognized this procedural right to all Inter-American judges.

Similarly to the legal basis for *ad hoc* judges, the tradition for the rules of Court on separate opinions can be found in the Statute of the Permanent Court of International Justice (1920)<sup>85</sup> and, subsequently, in the International Court of Justice’s Statute itself (1946)<sup>86</sup>. However, as mentioned above, it is important to note that a previous debate had taken place in the Advisory Committee of Jurists (1920), when a proposal for forbidding the publicity of national judges’ dissenting opinions was overthrown.<sup>87</sup>

---

<sup>79</sup> Organization of American States, General Assembly Res. 448, *Statute of the Inter-American Court of Human Rights*, O.A.S. Doc. OEA/Ser.P/IX.0.2/80 (IX-0/79) (Oct. 1979), <http://www.corteidh.or.cr/index.php/en/about-us/estatuto>.

<sup>80</sup> Rules of Procedure, Inter-Am. Ct. H.R., [http://www.corteidh.or.cr/sitios/reglamento/nov\\_2009\\_ing.pdf](http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf).

<sup>81</sup> See Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415 (1959).

<sup>82</sup> American Convention, *supra* note 18 (“Article 66. [...] 2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment”).

<sup>83</sup> Inter-Am. Ct. H.R. Statute, *supra* note 79 (“Article 24. [...] 3. The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges’ individual votes and opinions and with such other data or background information that the Court may deem appropriate”).

<sup>84</sup> Rules of Procedure, *supra* note 80 (“Article 65. [...] 2. Any judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurrent or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment”).

<sup>85</sup> PCIJ Statute, *supra* note 58 (“Article 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion”).

<sup>86</sup> ICJ Statute, *supra* note 67 (“Article 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion”).

<sup>87</sup> See Jhabvala, *supra* note 4, at 35-38; see also P.C.I.J. Advisory Committee of Jurists, *supra* note 60, at 591-92.

Historically, the Inter-American Court's first three official judgments, dated 1987, seem to take the *per curiam* model, which is shown by the total absence of individual opinions.<sup>88</sup> However, according to Thomas Buergenthal, the very first judgment of the Court, the *In the Matter of Viviana Gallardo et al.* case (1981), was a truly contentious case rather than a request for an advisory opinion,<sup>89</sup> whose inadmissibility by the Court revealed strong procedural failures of the parties. This case was also remarkable because of the first separate opinion originally presented in the history of the Court (Judge Piza Escalante).<sup>90</sup>

Therefore, the definitive option for the hybrid scheme became clear after the fourth judgment related to the *Velásquez Rodríguez* case (merits).<sup>91</sup> In this model, the Court generates a consolidated document which represents the opinion of the Court (unanimous or majority), while judges are allowed to present separate individual opinions, including joint opinions given by two or more judges.

Nevertheless, the individual opinions not only performed an exclusive adjudicatory behavior applicable to judgments, but also to advisory opinions given by the Court. In this sense, it is urgent to refer to the OC-3/83 (*Restrictions to the Death Penalty*),<sup>92</sup> which had separate opinions by Judges Carlos Roberto Reina and Piza Escalante, and OC-4/84 (*Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*),<sup>93</sup> which had individual opinions by Judges Piza Escalante and Thomas Buergenthal.

### C. Quantitative Data: Parameters in Judgments and Advisory Opinions

Through a recent search in the Court's website,<sup>94</sup> it was possible to identify a total of 338 judgments in litigant cases, consisting of preliminary objections, judgments of merits, joint judgments of preliminary objections and

<sup>88</sup> See, e.g., *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 (June 26, 1987); *Fairén Garbí and Solís Corrales v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 2 (June 26, 1987); *Godínez Cruz v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 3 (June 26, 1987).

<sup>89</sup> Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights*, 1 CTR. FOR HUM. RTS. & GLOBAL JUST. WORKING PAPER 4, 8 (2005), <https://chrgj.org/wp-content/uploads/2015/01/s05buergenthal.pdf>.

<sup>90</sup> *In the Matter of Viviana Gallardo et al.*, Decision, Judgment, Separate Opinion of Judge Rodolfo E. Piza Escalante, Inter-Am. Ct. H.R. (ser. A) No. 101 (Nov. 13, 1981).

<sup>91</sup> *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>92</sup> *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (Sept. 8, 1983).

<sup>93</sup> *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4 (Jan. 19, 1984).

<sup>94</sup> Advisory Opinions and Decisions and Judgments, Inter-American Court of Human Rights Jurisprudence Finder, <http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=es> (click separately on "Advisory Opinions" and "Decisions and Judgments" options in "Type" dropdown box, summation of queries result in 338). The Spanish version of this material was used during the search, as not all documents were available in English language.

merits, and requests for interpretation, including the advisory opinions as part of the adjudicatory activity.<sup>95</sup>

In this sense, I have followed these premises:

- i) when the same judge has presented more than one documented opinion on the same judgment or advisory opinion, only one opinion was counted;
- ii) when there were separate opinions shared by more than one judge, including permanent and *ad hoc* judges, each judge was counted as an independent individual opinion;
- iii) when the same judge simultaneously presented concurrent and divergent positions in an individual opinion for the same judgment, only one dissenting opinion was counted;
- iv) the first judgment analyzed was the Case of *Velásquez Rodríguez v. Honduras* (preliminary objections), dated June 26, 1987, and the last one was the Case of *Lagos del Campo v. Peru* (preliminary objections, merits, reparation and costs), dated August 31, 2017;
- v) the first advisory opinion analyzed was the OC-1/82 of September 24, 1982, and the last one was the OC-24/17 of November 24, 2017.

After counting all judgments individually, I identified 153 judgments which had no individual opinion attached, in contrast to 185 others which had individual opinions (concurrent or divergent), i.e. about 55% of the Court's contentious cases had separate opinions attached to them (Table 1).

TABLE 1  
Judgments  
With / Without Individual Opinions  
(Inter-Am. Ct. H.R.: June 1987 – Aug. 2017)

Without Individual Opinions	153 (45.3%)
With Individual Opinions	185 (54.7%)
Total	338

During this data search, I identified some extraordinary occurrences, such as 4 cases in which 6 individual opinions were attached to a single judgment.<sup>96</sup> This is very interesting as the Court consists of only 7 permanent judges and, when applicable, 1 *ad hoc* judge.

At this point, it is appropriate to register the Shabtai Rosenne's warning,<sup>97</sup> for whom the extensive use of separate opinions in international courts may fracture the final judicial statement and, eventually, weaken its external, legal force.

According to quantitative data, a significant difference was founded between concurrent and divergent separate opinions in both categories of judges

<sup>95</sup> See *supra* Part I.

<sup>96</sup> See, e.g., Granier et al. (Radio Caracas Television) v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 293 (June 22, 2015); Salvador Chiriboga v. Ecuador, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 222 (Mar. 3, 2011); Las Palmeras v. Colombia, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 90 (Dec. 6, 2001); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

<sup>97</sup> SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 72, 135 (2004).

(permanent and *ad hoc*). For a total of 359 separate opinions (documents), there were only 100 divergent individual opinions, i.e. for each divergent opinion 2.59 concurring separate opinions were identified in judgments (Table 2). Differently from the previous table, here I counted the number of individual opinions as the number of documents.<sup>98</sup>

TABLE 2  
Judgments  
Separate Opinions by Conclusion (per document)  
(Inter-Am. Ct. H.R.: June 1987 – Aug. 2017)

Concurrent Opinions	259 (72.1%)
Divergent Opinions	100 (27.9%)
Total	359

Analyzing the percentage of separate opinions related to the consultative activity of the Inter-American Court, the scenario was slightly different, when I found 24 advisory opinions in the Court's history until November 2017 and, among them, 50% had individual opinions:

TABLE 3  
Advisory Opinions  
With / Without Individual Opinions  
(Inter-Am. Ct. H.R.: Sept. 1982 – Nov. 2017)

Without Individual Opinions	12 (50%)
With Individual Opinions	12 (50%)
Total	24

On the other hand, the proportion of concurrent and dissenting individual opinions in connection with the Court's consultative function was resembling to the proportion in contentious cases:<sup>99</sup>

TABLE 4  
Advisory Opinions  
Separate Opinions by Conclusion (per document)  
(Inter-Am. Ct. H.R.: Sept. 1982 – Nov. 2017)

Concurrent Opinions	21 (67.7%)
Divergent Opinions	10 (32.3%)
Total	31

In spite of the quantitative difference between the numbers of judgments and advisory opinions produced throughout the history of the Court, some of

<sup>98</sup> For instance, a single divergent separate opinion document was counted as one occurrence, even when it had three joint individual opinions (e.g.: the joint partially dissenting opinion of Judges Ventura Robles, Vio Grossi and Eduardo Ferrer in the case of *Mémoli v. Argentina*, Judgment of Aug. 22, 2013, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_265\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_265_ing.pdf)).

<sup>99</sup> *Id.*

these data reveal interesting similarities, which can be used to analyze adjudicatory patterns. In this sense, the high percentage of concurrent opinions is a coincident aspect in both categories of adjudicatory manifestations (around 70%).

#### *D. Quantitative Data: Ad Hoc Judges*

Opportunely, based on the analysis of all concurrent and divergent individual opinions registered in 185 judgments (Table 1), one interesting fact has emerged: the large majority of the separate opinions were made by regular, not *ad hoc* judges.

In evaluating the separate opinions presented by each permanent judge, whether isolated or joined by other judge(s), I found a total of 312 occurrences, in contrast to only 49 individual opinions presented by *ad hoc* judges (Table 5). This means that, throughout the history of the Inter-American Court, about 14% of the individual opinions were given by *ad hoc* judges, and about 86% were produced by permanent ones.<sup>100</sup>

TABLE 5  
Judgments  
Individual Opinions by Category of Judges  
(Inter-Am. Ct. H.R.: June 1987 – Aug. 2017)

Regular Judges	312 (86.4%)
<i>Ad Hoc</i> Judges	49 (13.6%)
Total	361

Based on these data, I considered it necessary to verify whether the enormous amount of separate opinions is connected to a historical institutional characteristic, definitive feature in the Inter-American Court, or whether it is just the result of the personal behavior by a small group of judges, which artificially increased this number.

Strictly considering the *ad hoc* category, it is possible to identify an aspect related to the unbalanced performance of some judges in comparison to others. Despite individual opinions given by 26 different authors, just 5 *ad hoc* judges have issued 20 separate opinions, which means that 20% of the judges produced about 40% of the occurrences (Table 6).<sup>101</sup>

<sup>100</sup> The counting was based on the “Decisions and Judgments” results presented by the Inter-American Court’s internet search tool, through individualized verification and reading of the dispositive sections of each 185 judgments with separate opinions. Here the individual opinion of each judge was counted as an independent manifestation, even when it was part of joint opinions (e.g. I counted three individual opinions in the joint dissenting opinion of permanent Judges Picado Sotela and Aguiar Aranguren, and *ad hoc* Judge Cançado Trindade, presented in the case of Gangaram Panday v. Suriname, Judgment of Jan. 21, 1994, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_16\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_16_ing.pdf)).

<sup>101</sup> *Ad hoc* Judges Vidal Ramírez (7), Montiel Argüello (5), Novales Aguirre (3), Roberto F. Caldas (3) and Cançado Trindade (2).

TABLE 6  
 Judgments  
 Individual Opinions by each *Ad Hoc* Judge  
 (Inter-Am. Ct. H.R.: June 1987 – Aug. 2017)

<i>Ad Hoc</i> Judges	Individual Opinions
Vidal Ramírez	7 (14.3%)
Montiel Argüello	5 (10.2%)
Novales Aguirre	3 (6.1%)
Roberto F. Caldas	3 (6.1%)
Cañado Trindade	2 (4.1%)
Orihuela Iberico	2 (4.1%)
Julio A. Barberis	2 (4.1%)
Martínez Gálvez	2 (4.1%)
Fogel Pedrozo	2 (4.1%)
Rodríguez Pinzón	2 (4.1%)
García Toma	2 (4.1%)
Pasceri Scaramuzza	2 (4.1%)
Alejandro Espinosa	2 (4.1%)
Larraondo Salguero	1 (2.0%)
Charles N. Brower	1 (2.0%)
Gil Lavedra	1 (2.0%)
Salgado Pesantes	1 (2.0%)
Camacho Paredes	1 (2.0%)
Santistevan de Noriega	1 (2.0%)
Zafra Roldán	1 (2.0%)
Herrador Sandoval	1 (2.0%)
Castellanos Howell	1 (2.0%)
López Medina	1 (2.0%)
Cadena Rámila	1 (2.0%)
Biel-Morales	1 (2.0%)
Mac-Gregor Poisot	1 (2.0%)
Total	49

On the other hand, it was not possible to identify a numerically extraordinary production of separate opinions by any specific *ad hoc* judge during the Inter-American Court's history, based on the peculiar nature of this jurisdictional performance designated to decide case by case. According to this characteristic, the most frequent occurrences were 7 individual opinions by *ad hoc* Judge Vidal Ramírez and 5 by Montiel Argüello.

Opportunely, as explained in Section IV.B, changes in the rules and practice of the Court has caused the complete absence of individual opinions produced by *ad hoc* judges in judgments after 2011, which affected their numbers even further.

*E. Quantitative Data: Regular Judges*

Continuing the comparison of judges in the same category, it is clear that a few permanent judges have produced a high number of separate opinions, as the following data elucidate.

Based on the Table 7, about 51% of the total number of individual opinions were given by only 3 regular judges. Therefore, considering 312 separate opinions, 159 individual manifestations were produced by Judges Cañado Trindade (69), García Ramírez (61) and Vio Grossi (29). Accordingly, one out of every two opinions presented in judgments during the Court's history came from one of these three permanent judges.

TABLE 7  
Judgments  
Individual Opinions by each Regular Judge  
(Inter-Am. Ct. H.R.: June 1987 – Aug. 2017)

<b>Regular Judges</b>	<b>Individual Opinions</b>
<i>Cañado Trindade</i>	69 (22.1%)
<i>García Ramírez</i>	61 (19.6%)
<i>Vio Grossi</i>	29 (9.3%)
Mac-Gregor Poisot	23 (7.4%)
Ventura Robles	18 (5.8%)
Medina Quiroga	13 (4.2%)
García-Sayán	13 (4.2%)
Pérez Pérez	13 (4.2%)
Roux Rengifo	12 (3.8%)
Sierra Porto	11 (3.5%)
Roberto F. Caldas	8 (2.6%)
Abreu Burelli	8 (2.6%)
Oliver Jackman	7 (2.2%)
Salgado Pesantes	7 (2.2%)
Pacheco Gómez	4 (1.3%)
Montiel Argüello	4 (1.3%)
Piza Escalante	3 (1.0%)
May Macaulay	3 (1.0%)
Abreu Blondet	2 (0.6%)
Picado Sotela	1 (0.3%)
Aguiar Aranguren	1 (0.3%)
Nieto Navia	1 (0.3%)
Leonardo Franco	1 (0.3%)
Total	312

Apparently, the disproportional distribution and concentration of individual opinions produced by a few permanent judges is a common phenomenon which I have also identified in the performance of the Inter-American Court's consultative jurisdiction.

Considering the universe of 17 judges, only 5 (about 30%) were responsible for about 50% of all individual opinions presented in advisory opinions (Table 8). These data demonstrate that the observed phenomenon in the Court's advisory opinions involved a high concentration of separate opinions by a small group of judges, even if it was not as high as the concentration observed in contentious cases.

TABLE 8  
Advisory Opinions  
Individual Opinions by each Regular Judge  
(Inter-Am. Ct. H.R.: Sept. 1982 – Nov. 2017)

Regular Judges	Individual Opinions
<i>Piza Escalante</i>	4 (12.5%)
<i>García Ramírez</i>	4 (12.5%)
<i>Cançado Trindade</i>	4 (12.5%)
<i>Thomas Buergenthal</i>	2 (6.3%)
<i>Vio Grossi</i>	2 (6.3%)
Pedro Nikken	2 (6.3%)
Oliver Jackman	2 (6.3%)
Rafael Navia	2 (6.3%)
Sierra Porto	2 (6.3%)
Carlos Roberto Reina	1 (3.1%)
Máximo Cisneros	1 (3.1%)
Pacheco Gómez	1 (3.1%)
Gros Espiell	1 (3.1%)
Salgado Pesantes	1 (3.1%)
Abreu Burelli	1 (3.1%)
Roberto Caldas	1 (3.1%)
Pérez Pérez	1 (3.1%)
Total	32

Another interesting aspect may be gleaned from a coincidence: most individual opinions both in judgments and advisory opinions were given by the same three judges, i.e. Judges Cançado Trindade and García Ramírez, followed by Vio Grossi.

Furthermore, it is important to register that these three judges were re-elected for a second term,<sup>102</sup> which means a double mandate of 12 years for each one in the Court. Notwithstanding this fact, there also are eight other regular judges who have exercised two terms in the Tribunal,<sup>103</sup> and these judges have not given such a disproportionate number of separate opinions.

Even considering the peculiar nature of the consultative function, the high number of individual opinions connected to the Court's adjudicatory activity in its entirety seems to demonstrate the prevalence of personal

<sup>102</sup> See Inter-Am. Ct. H.R., *Jueces que Han Integrado la Corte Interamericana de Derechos Humanos*, <http://www.corteidh.or.cr/sitios/compos16/juecesordenalfabetico.pdf>.

<sup>103</sup> Judges Abreu Burelli, Fix-Zamudio, García Sayán, Oliver Jackman, Nieto Navia, Pacheco Gómez, Salgado Pesantes and Ventura Robles.

performances in detriment of a well-distributed institutional decision-making pattern.

#### *F. Separate Opinions as Core Reasoning of Subsequent Cases*

In order to check the explicit use of individual opinions by the Inter-American Court in its core reasoning, one last search was conducted in all 338 judgments and 24 advisory opinions available at the Court's institutional website.<sup>104</sup>

As a result, it was possible to identify only three express quotations of separate opinions in the Court's reasoning (judgments and advisory opinions):

TABLE 9  
Judgments and Advisory Opinions  
Individual Opinions Expressly Cited in Core Reasoning  
(Inter-Am. Ct. H.R.: June 1987 – Aug. 2017)

Case	Cited Individual Opinion	Quoted Original Thesis
<i>Baena Ricardo et al. v. Panama</i> , Judgment of November 28, 2003, n.70. <sup>105</sup>	Concurring Opinion of Judge Cançado Trindade In: Advisory Opinion OC-18/03 of September 17, 2003, ¶ 81.	“81. One ought to secure a follow-up to the endeavours of greater doctrinal and jurisprudencial development of the peremptory norms of international law ( <i>jus cogens</i> ) and of the corresponding obligations <i>erga omnes</i> of protection of the human being, moved above all by the <i>opinio juris</i> as a manifestation of the universal juridical conscience, to the benefit of all human beings. By means of this conceptual development one will advance in the overcoming of the obstacles of the dogmas of the past and in the creation of a true international <i>ordre public</i> based upon the respect for, and observance of, human rights (...).” <sup>106</sup>

<sup>104</sup> During the data search, we accessed each judgment and individually searched for the occurrences of the words “voto,” “votos,” “opinión” and “opiniones.” These are adopted by the Inter-American Court as the Spanish version of “individual opinion” and “separate opinion.” For each word found, I have read the respective paragraph and footnote looking for explicit citations of separate opinions used as part of the Court's fundamental reasoning: <http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=es>.

<sup>105</sup> *Baena Ricardo et al. v. Panama*, Competence, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 104, ¶ 102 & n.70 (Nov. 28, 2003).

<sup>106</sup> Juridical Condition and Rights of Undocumented Migrants, Separate Opinion of Judge Antônio A. Cançado Trindade, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 81 (Sept. 17, 2003).

<p><i>Castañeda Gutman v. México</i>, Judgment of August 6, 2008, n.55.<sup>107</sup></p>	<p>Concurring Opinion of Judge Piza Escalante In: Advisory Opinion OC-7/85 of August 29, 1986, ¶ 27.</p>	<p>“27. (...) Some rights, however, due to their nature or to the wording of the Convention, lack this immediate and full enforceability unless domestic norms or other complementary measures grant it, as is the case for example with political rights (...) or those of judicial protection (...). If there are no electoral codes or laws, voter rolls, political parties, means of publicity and transportation, voting centers, electoral boards, dates and time periods for the exercise of the right to vote, this right, by its very nature, simply can not be exercised; nor can the right to judicial protection be exercised unless there are courts to grant it and there are procedural standards that control and make it possible”.<sup>108</sup></p>
<p><i>Río Negro Massacres v. Guatemala</i>, Judgment of September 4, 2012, n.218.<sup>109</sup></p>	<p>Concurring Opinion of Judge Cançado Trindade In: Advisory Opinion OC-18/03 of September 17, 2003, ¶ 75.</p>	<p>“75. In a well-known <i>obiter dictum</i> in its Judgment in the case of the <i>Barcelona Traction</i> (...), the International Court of Justice determined that there are certain international obligations <i>erga omnes</i>, obligations of a State <i>vis-à-vis</i> the international community as a whole, which are of the interest of all the States (...). The prohibitions mentioned in this <i>obiter dictum</i> are not exhaustive: to them new prohibitions are added (...) precisely for not being the <i>jus cogens</i> a closed category (...)”.<sup>110</sup></p>

These data admit some preliminary interpretations, such as:

- i) in general, the Inter-American Court hardly ever quotes individual opinions in the core reasoning of its judgments and advisory opinions (about 0.83%);

<sup>107</sup> *Castañeda Gutman v. México*, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 159 & n.55 (Aug. 6, 2008).

<sup>108</sup> Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Separate Opinion of Judge Rodolfo E. Piza Escalante, Advisory Opinion OC-7/85, Inter-Am. Ct. H.R. (ser. A) No. 7, ¶ 27 (Aug. 29, 1986).

<sup>109</sup> *Río Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 141 & n.218 (Sept. 4, 2012).

<sup>110</sup> Juridical Condition and Rights of Undocumented Migrants, Separate Opinion of Judge Antônio A. Cançado Trindade, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 75 (Sept. 17, 2003).

- ii) the Court has strictly quoted separate opinions originated from its consultative jurisdiction, not from judgments;
- iii) no dissenting opinions were mentioned, only concurrent ones;
- iv) one specific individual opinion was cited in two of the three occurrences, but related to different original parts;
- v) the quoted theses were connected to notorious themes of the International Human Rights Law and the International Law, on which highly controversial debates in specialized legal literature had occurred:<sup>111</sup> the universal perspective of *jus cogens* norms, the effective granting of political rights, and the progressive nature of *erga omnes* obligations.

#### CONCLUSION

Based on this short analysis, it is possible to conclude that the hybrid deliberative model adopted by the Inter-American Court of Human Rights displays some structural tendencies related to the *seriatim* scheme. This is shown by the numerically relevant and inconstant production of individual opinions verifiable in the adjudicatory activity as a whole (judgments and advisory opinions).

Nevertheless, the accessible location of the core reasoning of collegiate deliberation, by majority or unanimity, makes it easy to find the *ratio decidendi* as the Court's institutional position, even when I found a disproportionately large number of individual opinions in judgments. On the other hand, the Court had a more balanced rate of separate opinions related to its consultative function (advisory opinions), but with some similarities with the judgments in regard to the high level of concurrent opinions.

According to the quantitative data searched, one possible explanation for the high number of separate opinions can be found in the personal behavior of a relatively small group of judges, rather than in a well-distributed deliberative institutional practice. Even when I verified the writing manifestations of *ad hoc* judges, a perceptible level of concentration of individual opinions could be noticed.

Setting aside the rare exceptions related to the incorporation of only two separate opinions originated from advisory opinions in three different judgments, the hybrid deliberative scheme in the Inter-American Court tends to isolate the *ratio decidendi* from the influence of past individual opinions. Cogitating the case law's premise in International Law, the separate opinions might be considered a relevant source of international legal doctrine, but not as an explicit part of the Inter-American precedent. In addition, the use of individual opinions by respondent States in their briefs before the Court may be understood according to this same doctrinal perspective.

---

<sup>111</sup> *Accord, e.g.*, Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1421-51 (2007); DAVID ALTMAN, DIRECT DEMOCRACY WORLDWIDE 32-44 (2011); MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 43-73 (1997); Dire Tladi (Special Rapporteur), Third Rep. on Peremptory Norms of General International Law (*jus cogens*), U.N. Doc. A/CN.4/714 (Feb. 12, 2018), <http://legal.un.org/docs/?symbol=A/CN.4/714>.

As it seems verifiable in the practice of the International Court of Justice,<sup>112</sup> the Inter-American Court resists to adopt expressly separate opinions (concurring or dissenting) as part of the core reasoning of its judgments. On the other hand, I must admit that those three exceptional quotations of past individual opinions identified during the research were an interesting surprise, especially because of the controversial themes involved (*jus cogens* norms, political rights, and *erga omnes* obligations).

Remembering Rosenne's concern about the immanent risks of extensive use of individual opinions in international adjudication,<sup>113</sup> perhaps it is time to evaluate whether or not the atomistic behavior of some judges within the collegiate body could debilitate the institutional position of the Inter-American Court, which can possibly affect its public authority before the States Parties to the American Convention on Human Rights.<sup>114</sup>

---

<sup>112</sup> See MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 191-95 (1996).

<sup>113</sup> Rosenne, *supra* note 97, at 135.

<sup>114</sup> See Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225, 274-75 (2017).