

The contribution of international courts and tribunals to the methodology of international law

OC - (ILA-14178) - SEPARATE OPINIONS AT THE ICJ AND THE METHODOLOGY OF INTERNATIONAL LAW

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Abstract

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Under Article 57 of the Statute of the International Court of Justice (ICJ), when 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’. Separate opinions encompass dissenting and concurrent opinions, expressing the personal view of individual judges as opposed to that of the majority of the Court.

This contribution explores the impact of separate opinions on the methodology of international law. First, I will address the Court’s deliberative process and the legitimacy issues raised by separate opinions both in the contentious and the advisory jurisdiction of the Court. Second, I will examine the impact of separate of opinions on the methodology of the work of the International Law Commission, with special regard to customary international law and *jus cogens*. Third, the actual and potential impact of separate opinions will be assessed with regard to the development of procedural and substantive rules of international law, such as the very existence of a legal dispute as a jurisdictional requirement, the law of state immunity and the principle *aut dedere aut judicare*.

As held by Judge Fitzmaurice in his Separate Opinion in the *Barcelona Traction* case, ‘judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development’. Along these lines, the argument will be made that separate opinions are a subsidiary means for the determination of rules of law under Article 38(1)(d). They

represent a key tool in the clarification of the Court's line of reasoning, as well as a legal device of immense potential in the development of international law.

Palavras-chave : separate opinions, development of international law, methodology of international law