


ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON THE
EFFECTS OF INTERNATIONAL JUDGES' PERSONAL
CHARACTERISTICS ON THEIR JUDGING

Judicial Dissent at the International Criminal Court: A Theoretical and Empirical Analysis

Gregor Maučec^{1*} and Shai Dothan^{2**} 

¹New University Faculty of Government and European Studies, Žanova ulica 3, SI-4000 Kranj, Slovenia. Email: gregor.mauccec@gmail.com and ²Karen Blixens Plads 16, Room 6B-4-33, 2300, Copenhagen S, Denmark. Email: shai.dothan@jur.ku.dk

Abstract

This article explores the phenomenon of judicial dissents at the ICC. The main subject is the process of collective decision-making and judicial deliberations in cases where members of a particular ICC chamber cannot reach a consensus on factual, substantive or procedural issues and render a unanimous decision. The article examines why and when international criminal judges dissent according to the views expressed by ICC judges. Drawing heavily on field research in The Hague, the article presents a qualitative analysis of the ICC judges' perceptions and experiences of using dissenting opinions at the Court. Empirical findings derived from interviewing ICC judges support the hypothesis that international criminal judges' personality, that is, their character differences (such as self-discipline and other work habits), their previous career experience, and their field of expertise determine their likelihood of using judicial dissents. In case of disagreement within an ICC Chamber, judges with criminal law backgrounds who previously worked as professional judges are more likely to append their dissent to a majority ruling with which they do not agree than international judges, diplomats, and professors with public international law expertise who are more willing to discuss and negotiate in order for the Court to speak with one voice.

Keywords: in-depth interviews; International Criminal Court; judicial dissent; qualitative assessment; theories of judicial behaviour

*Assistant Professor of International and Criminal Law University Faculty of Government and European Studie;
**Associate Professor of International and Public Law, Jean Monnet Chair in EU Law & Politics, University of Copenhagen Faculty of Law affiliated with iCourts – the Centre of Excellence for International Courts and Study Hub for International Economic Law and Development (SHIELD). This research has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 746768. This research is funded by the Danish National Research Foundation Grant no. DNR105 and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts. An earlier version of this article was presented and discussed at the virtual conference 'How Personal Characteristics of International Judges Affect Their Rulings: Socio-Legal Perspectives' co-organized by the authors of this article and hosted by iCourts – the Centre of Excellence for International Courts at the University of Copenhagen Faculty of Law. We thank participants at this event for their thoughtful questions and comments. We also thank the international judges that Gregor Maučec interviewed, to whom he promised anonymity, and the anonymous reviewer for their thoughtful and constructive comments.

© The Author(s), 2022. Published by Cambridge University Press on behalf of The Foundation of the Leiden Journal of International Law in association with the Grotius Centre for International Law, Leiden University. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

1. Introduction

Some international courts do not allow judges to write dissents. The Court of Justice of the European Union is a good example.¹ This practice is often supposed to improve the legitimacy and authority of the court by indicating that it speaks with one voice on issues within its expertise.² On the face of it, it would seem like the International Criminal Court (ICC or Court) would be a perfect candidate for a similar rule. As noted by its critics, it is dealing with criminal law cases, which in many of the countries are subject to the decision of the jury that convicts by unanimous decision.³ The ICC is also under constant attack with claims of politicization, bias,⁴ overreaching,⁵ or ineffectiveness⁶ regularly raised against it from all sides. Nevertheless, at the ICC conviction is possible with a mere two-to-one majority.

This raises a serious question about the role that judicial dissent plays at the ICC. The present article addresses this issue from a specific and narrow angle: it tries to establish what judges on the ICC think about the propensity of judges to dissent and what explains it.

A judge's decision to dissent is never taken in splendid isolation. In fact, scholarship has indicated that, when the interests of various courts call for unity, dissent is effectively suppressed.⁷ Furthermore, the way judges decide as a group is not always easy to decipher from the judges' individual incentives. Given the possibility of strategic behaviour, the end result might be complicated to predict and prediction may require a detailed theory of the inter-subjective dynamic between the judges.⁸ Therefore, this article is just a first step to understanding the practice of judicial dissent at the ICC. This qualification has to be added to the caveat that what judges think their colleagues are thinking when they dissent may be quite far from the truth. Nevertheless, relying on the empirical data in this article does take research a step forward in understanding judicial dissent at the ICC.

Following earlier work theorizing judicial behaviour, the article uses the unique interview material to test the working hypothesis that the use of judicial dissent at the Court is significantly related to international criminal judges' personal character differences (such as self-discipline, co-operativeness, willingness to compromise, and other work habits), previous career experience, and field of expertise.⁹ The article accordingly investigates two underlying reasons that could

¹A. H. Zhang, 'The Faceless Court', (2016) 38 *JIL* 71, at 79.

²*Ibid.*, at 111.

³See L. A. Casey, 'The Case Against the International Criminal Court', (2002) 25 *Fordham International Law Journal* 840, at 861 (criticizing the ICC for not allowing a jury trial).

⁴See, for example, the discussion of the African bias at 'Invited Experts on Africa Question', *ICC Office of the Prosecutor*, available at iccforum.com/africa.

⁵A. Carcano, 'On the Exercise of the Judicial Function at the International Criminal Court: Issues of Credibility and Structural Design', (2020) 67 *QIL* 3.

⁶See S. Dothan, 'The ICC Is NOT a Slice of Cheese', (2021) 19 *Journal of International Criminal Justice* 877 (describing the possible counter-productive effects of the ICC's operation). On the issue of organizational (in)efficiency of the ICC, see also R. Clements, 'From Bureaucracy to Management: The International Criminal Court's Internal Progress Narrative', (2019) 32 *LJIL* 149.

⁷See N. Garoupa and T. Ginsburg, 'Reputation, Information and the Organization of the Judiciary', (2009) 4 *Journal of Comparative Law* 228, at 243; R. Post, 'The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court', (2001) 85 *Minnesota Law Review* 1267, at 1314–19.

⁸See S. Dothan, 'The Motivations of Individual Judges and How They Act as a Group', (2018) 19 *German Law Journal* 2165.

⁹It bears noting that when examining the impact of any individual personal characteristic (in our case, professional background and personal character) borne by international judges on the use of dissenting opinions in international judicial practice, caution must be exercised, given that in reality each of such identities intersects/interacts with other attributes (such as nationality, gender, legal-philosophical culture, political and philosophical orientations, and ideological and cultural affinities). Therefore, their specific influence on dissenting judicial practice can never be completely individualized and isolated from that of those other intersecting variables. For a similar view, see the following analysis of the relationship between the judges' gender diversity and their additional opinions in the context of the ICJ: H. Mistry, 'Additional Opinions and Judicial Diversity at the International Court of Justice', in F. Baetens (ed.), *Identity and Diversity on the International Bench* (2020), 246, at 259, 262.

plausibly lead ICC judges to dissent or not to dissent: their personal character and their individual biography. It is worth noting that each of these metrics presents a different set of challenges.

First, regarding the character of judges, while no one would deny that character does affect judicial behaviour and would certainly prove important in explaining dissents, the argument may easily seem circular. After all, the character of judges is studied directly from their behaviour on the bench. Usually, this behaviour is exactly what other judges subject to their praise or their criticism. This means that the way judges describe the character of their colleagues is more a description of their entire behaviour on the bench than a variable that predicts their dissenting behaviour.

Second, while there is a long literature focusing on how the background of judges explains their behaviour, finding a causal connection here is rife with problems even in large-N empirical studies to say nothing of a qualitative study like this article. The descriptions of the past of judges are not scientifically accurate and neither is the description of their behaviour on the bench. This implies that any bias of the scholar or the judges interviewed in either the way they understand the biography of other judges, or their behaviour, or their own conjectures about the connections between the two, can easily influence the outcome.

Despite all these reservations, what international judges say about their peers is still worth listening to. It is against this backdrop that the article also aims to link the concrete views of ICC judges with theoretical perspectives on the purpose of judicial dissent. Section 2 presents theories on the use of judicial dissent and some information about ICC procedures. Section 3 discusses the methodology that was used in the interviews with ICC judges. Section 4 relates the results of interviews with respect to the parameters that explain dissenting judicial behaviour at the ICC. Section 5 concludes.

2. Theorizing judicial dissent at the ICC

2.1 *The right to dissent as a design choice of state parties to the Rome Statute*

Article 74(5) of the Rome Statute states: ‘The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber’s decision shall contain the views of the majority and the minority’. Moreover, the Rome Statute provides in Article 74(3): ‘The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.’

Article 83(4) of the Rome Statute further states:

The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

Allowing dissents in this way, albeit with some discouragement, is a peculiar design choice undertaken by the framers of the Rome Statute whose weaknesses were quickly noted by its critics: (i) many states under the Court’s jurisdiction do not allow dissents in criminal cases; (ii) dissent reveals the specific decision of judges and thus exposes them to political pressure or the suspicion of such; and (iii) dissents damage the authority and legitimacy of the Court.¹⁰

¹⁰L. N. Sadat and S. R. Carden, ‘The New International Criminal Court: An Uneasy Revolution’, (2000) 88 *Georgetown Law Journal* 381, at 398. Such authority-based arguments against judicial dissents are usually shored up by the general belief that the revealed lack of agreement between judges brings into question the substantive correctness of the Court’s majority decision. That then undermines the perceived output legitimacy of the Court’s judgment. For the same critique – that the use of judicial dissents offends an international criminal tribunal’s decisional and institutional authority – see G. Sluiter, ‘Unity and

While the historical reasons for this design choice may be the subject of fascinating research, this is not the project undertaken in this article. Instead, the article takes the fact of dissent as a given and seeks to establish why and when the judges of the ICC dissent and in particular what are the factors that make them view dissent in one way rather than another.

2.2 Contradicting purposes of judicial dissent

Studies of judges and judicial behaviour name a long list of very different goals that can lead to dissent. Some of these goals seem to cut in completely opposite directions. It is truly challenging to conduct an empirical study of the incentive of judges to dissent when the goals that dissent actually serves are the subject of plainly contradictory views by both judges and scholars.

For example, there are scholars who suggest dissent can be used to draw attention to problems with a judgment and thereby increase the chances that it would be overruled in the future.¹¹ There are other scholars who suggest dissent can make the judgment more salient and judges who

Division in Decision Making - The Law and Practice on Individual Opinions at the ICTY', in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011), 191, at 215–16; N. H.B. Jørgensen and A. Zahar, 'Deliberation, Dissent, Judgment', in G. Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (2013), 1151, at 1186–7, 1190–2. Elaborating on these orthodox critiques of dissenting opinions as posing a 'direct threat' to the successful project of international criminal justice, Hemi Mistry also concludes that 'certain instances of judicial dissent risk undermining the authority of international criminal courts and tribunals and their pronouncements'. H. Mistry, 'The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice', (2015) 13 JICJ 449, at 474. Daniel Naurin's and Øyvind Stiansen's empirical work moreover suggests that separate and dissenting opinions undermine the authority of human rights courts by reducing compliance with their judgments. D. Naurin and Ø. Stiansen, 'Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary', (2019) 53 *Comparative Political Studies* 959, 960–1. Because of significant differences between international human rights courts and international criminal tribunals, however, conducting a similar type of empirical study on the relationship between judicial dissents and authority at the ICC would not yield any fruitful results. As presented in our empirical analysis below, the authority-based arguments against judicial dissents are well known and widely accepted among ICC judges. The interviewed ICC judges all expressed their concern about the negative effects of judicial dissents for the perceived authority and credibility of the Court and its decisions.

¹¹See Post, *supra* note 7, at 1353–4; S. H. Fuld, 'The Voices of Dissent', (1962) 62 *Columbia Law Review* 923, at 927. Hemi Mistry similarly notes that the institutional checks and balances upon the exercise of judicial power that exist within hierarchically-structured international criminal tribunals provide for appellate review of the trial chamber decisions. According to her, judicial dissent, including the one that disagrees fundamentally with the Court's majority decision, 'might encourage disappointed parties to continue engagement with the judicial process by seeking appellate review', equipped with the dissenting opinions. H. Mistry, "'The different sets of ideas at the back of our heads': Dissent and authority at the International Court of Justice', (2019) 32 LJIL 293, at 301. Mistry moreover argues that especially 'fundamental' judicial dissents that express an individual judge's strong belief about certain legal or factual issues may as well be understood as working in the opposite direction. As she suggests, such dissents may play a useful role in enhancing the legitimacy of international criminal tribunals. This is particularly so when it comes to judicial dissents that explicitly challenge 'the lawfulness of the exercise of judicial power by a court'. See Mistry, *supra* note 10, at 450. For a normative examination of the transformative potential of judicial dissents in international criminal adjudication – and more generally, in the discourse of international criminal law – designed to explain how they, through their creation of a civic space for public debate and contestation, paradoxically contribute to the legitimacy of international criminal trials, see N. Jain, 'Radical Dissents in International Criminal Trials', (2017) 28 EJIL 1163. Recent scholarship has also argued that judicial dissents at international courts promote the value of judicial transparency (in the sense of 'judicial identifiability') and that they not only have considerable systemic benefits, but also significantly influence the future law development in certain limited cases. See J. L. Dunoff and M. A. Pollack, 'The Judicial Trilemma', (2017) 111 AJIL 225, 274. Dunoff and Pollack moreover suggest that judicial dissents substantially assist the process of enhancing the authority and legitimacy of international tribunals and their decisions by 'contributing to the integrity and quality of the opinion-writing process', thus leading to well-reasoned judgments. Another empirical contribution to legal scholarship focusing on the impact of separate and dissenting opinions of international criminal judges on the development of international criminal law has been provided by Nancy Amoury Combs. Based on her fine-grained assessment of almost 300 separate opinions and using empirical methods such as citation counts and an in-depth content analysis of the separate opinions, she has been able to conclude that judicial dissents do not have any meaningful impact on 'the trajectory of international criminal justice': N. A. Combs, 'The Impact of Separate Opinions on International Criminal Law', (2021) 62 VJIL 1, at 61. As our empirical analysis in this article reveals, none of the respondents seemed to have been acquainted with these

disagree with the majority decision would therefore avoid dissenting to limit the damage caused from a judgment they do not approve of.¹²

There are scholars who argue that judges dissent in order to maintain a reputation of assertiveness among their colleagues. As the next sub-section explains, having a credible threat of willingness to dissent may increase the chances of judges getting their way in the endless power-battles that take place on the bench.¹³ In contrast, one of our respondents indicated that a judge who dissents publicly admits she was unable to convince the other judges and shape the final result.¹⁴ It can only be presumed that under this view dissents damage rather than improve the bargaining power of judges for the future.

There may be also an inverse connection between the need judges feel to dissent and their willingness to do so. The reason is simple: controversial judgments are likely to be controversial also among the judges on the court, increasing their incentive to dissent. At the same time, controversial judgments are exactly those that may be resisted by the public and political actors that are critical of the court. Against such criticism, the court should make the judgment appear as legitimate as possible and this requires suppressing dissent.¹⁵ In this case, as in many others, the interests of the judge in having her honest opinion heard conflict with the interest of the court. More importantly for our purpose, it means that it is not clear if no dissent indicates no controversy or a particularly intense controversy instead.

There are even scholars who suspect judges sometimes agree with the majority opinion, but would like to appear before an audience that is dear to them as if they resist it. Such judges dissent from judgments they secretly support, after making sure that their dissent would not change the final result. By doing so these judges build their own personal reputation vis-à-vis a certain audience, often at the expense of the court's authority and legitimacy.¹⁶

All in all, it seems that the way modern courts view dissent is not only unclear but is often contradictory. This contradiction should not come as a surprise. The final decision of any tribunal is supposed to set the law and because judges are supposed to simply apply existing law, judges who disagree with the final result would be branded by proponents of so-called 'mechanical jurisprudence' as making a mistake. Scholars have said directly that judges who claim they simply apply the law are lying,¹⁷ but at least facially accepting this lie is crucial for the authority of any court.

In the Mishna, the book of Jewish religious rules that precedes the Talmud, there is already a discussion of the purpose of dissent that shows a direct normative choice. In the discussion, the majority opinion says dissent is used so that a future tribunal can decide to follow the dissent and overrule the previous decision. The dissenting view by Rabi Yehuda says the opposite: the dissent indicates the unaccepted view was already considered and rejected.¹⁸ Of course, if you listen to Rabi Yehuda, you should not follow his dissenting opinion (as he surely appreciated himself), leaving the view that dissents are a tool to keep the law flexible for the future as the only acceptable view. Unfortunately, a modern legal system that has to make difficult decisions probably doesn't have the luxury of developing laws for a religious community without the pressures of sustaining sovereignty. The result is an ensuing tension between views about the purpose of dissent in any modern legal system.

scholarly arguments for using dissents as a crucial legal device capable of making positive contribution to the authority and legitimacy of the Court and its rulings.

¹²See R. A. Posner, *How Judges Think* (2008), 32.

¹³See W. F. Murphy, *Elements of Judicial Strategy* (1964), 90.

¹⁴See the text near note 42, *infra*.

¹⁵See P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions* (1987), 288.

¹⁶See S. Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015), 43–4.

¹⁷See M. Shapiro, 'Judges As Liars', (1994) 17 *Harvard Journal of Law and Public Policy* 155, at 156.

¹⁸משנה, מסכת עריות, פרק א, ה-ה¹⁸.

2.3 Dissent and theories of judicial behaviour

To resolve the tension about the purpose of judicial dissent it is useful to start with the different views scholars have advocated about the role judges play. These roles can generally be divided into four groups:

1. Legalist – judges simply apply the law as it is;
2. Attitudinal – judges follow their own policy preferences in their judgments;
3. Short-term strategy – judges are motivated to promote their policy preferences while taking the expected actions of other judges into account;¹⁹
4. Long-term strategy – judges are strategically interacting with other judges in ways that could determine not only the result of a specific case, but also their ability to shape the results of future cases.

For every one of these views on judging, there is at least one correlative view on judicial dissent. Legalist judges are expected to simply follow the law. As noted above, if the law truly dictates the outcome and the majority opinion is assumed to be correct, the only logical explanation of the dissent is an error by the dissenting judges. Fortunately, many legalists would not subscribe to such an absurd view.²⁰ So-called post-positivist legalists would maintain that judges really try to interpret and apply the law as accurately as possible but they may still hold conflicting views about the content of the law.²¹

It seems like judges who hold the first view, stipulating that judges apply the law mechanically, would be opposed to any form of dissent, since it presents at the very least a failure of the dissenting judge and potentially also the rest of the panel. In contrast, judges who hold the second view would probably be more willing to allow dissent and may even point to it as an indication that all judges are trying to interpret the law to the best of their professional conscience without surrendering to pressures from other judges. As Section 4 suggests, many ICC judges with prior judicial experience come from a system that is dedicated to presenting their view instead of imposing it on others by negotiation. These judges may subscribe to a postpositivist view of the law.²²

Attitudinal models would suggest that judges hold specific policy views and they are manifested without any strategy in their judgments. According to this view, personal opinion grounded in the character or background of judges is nothing to be particularly ashamed of. Judges do not try to manipulate each other but rather to promote what policy they believe in. ICC judges with prior judicial experience may also be proponents of this view with their willingness to present their opinions without feeling the need of matching them to others.

Short-term strategic judges are willing to compromise on their preferred strategic position in return for an outcome that is more favourable to them than the result that the majority would reach if they insisted on their original view and wrote a dissent.²³ The result of this practice is referred to in the literature as ‘ideological dampening’: judges who are grouped with other judges with different opinions tend to centre around compromise solutions.²⁴

¹⁹See J. A. Segal and H. J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002), 44–114.

²⁰See B. Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010), 4–5 (arguing that the traditional view of mechanical jurisprudence criticized by the American Legal Realists does not sit well with the real views of many judges as far back as the nineteenth century. Judges often realize they have discretion in interpreting the law).

²¹See H. Gillman, ‘What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making’, (2001) 26 LSI 465, at 485–6.

²²See the text near note 60, *infra*.

²³See L. Epstein and J. Knight, ‘Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead’, (2000) 53 *Political Research Quarterly* 625, at 632; L. Epstein and J. Knight, *The Choices Justices Make* (1998), 1–9 (demonstrating such practice in the case of *Craig v. Boren*, 429 U.S. 190 (1976)).

²⁴See C. R. Sunstein et al., *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (2006), 45.

A judge who disagrees with the pre-negotiated views of the majority has the option to write a dissent, but she may also decide to merely use the threat of the dissent to convince the other judges to compromise. The majority judges may compromise on their most preferred position because they are honestly convinced by the legal arguments of the opposing judge or because they are afraid the legitimacy of the judgment would suffer from the threatened dissent. In these cases, the judge who disagrees with the majority and threatens to dissent is known in the literature as a ‘whistleblower’.²⁵

Long-term strategic judges are the most complicated of all. They are willing to forgo a dissent not only in the hope of maintaining a compromise they find favourable for the case at hand but also in order to trade their concession for future concessions by their colleagues. The behaviour of such judges is unpredictable. Sometimes they will dissent in order to show a commitment to resist pressures of other judges on a point they believe in.²⁶ They may even dissent on points they don’t believe in to establish their intransigence vis-à-vis other judges or to build their reputation in audiences they care about.²⁷

These long-term strategies leave out one factor that may be important in explaining judges’ propensity to dissent: the preference of judges to avoid unnecessary effort. Judges who write a dissent create extra work for themselves. They also create extra work for the other judges on the Chamber and may suffer their ire as a result.²⁸ Any benefit judges gain from dissenting, such as changing the law or building a reputation of whatever kind, must be balanced against the cost judges are likely to incur to their personal interest. Just as the benefits judges gain in the realm of policy and bargaining power may fluctuate in the importance judges ascribe to them based on the judges’ personal characteristics, so can the value judges assign to their leisure.

Every reasonable form of judicial behaviour recognized in the literature does not unequivocally support either the total suppression of dissent or using it every time. Nevertheless, it seems like judges who self-identify as postpositivist legalist or attitudinalist – even if they never heard of the scientific terms themselves – are generally more tolerant towards dissent. Judges who believe in strategy are going to use this strategy to reach compromises. Compromises can bridge over differences in the views of judges prior to negotiation and minimize the occurrence of dissents. Sometimes, however, strategic behaviour calls for establishing a reputation for stubbornness which is built by actually publishing a dissent. Therefore, a judge who publishes a dissent once in a while does not thereby reveal her type conclusively. That judge might just be a strategist that tries to build her personal reputation. A judge that dissents very frequently, however, gives a strong indication of a legalist or attitudinal mindset.

3. Methodology

The heart of the research leading to this article was a series of extended interviews with ICC judges. The individual judge’s consent to participate in the interview was entirely voluntary and non-binding. In that sense, the empirical research was very much dependent on the willingness of judges to co-operate and share their experience and views on the use of judicial dissents. Thus, the present qualitative study does not claim to present a comprehensive picture of the perceptions of the judicial dissents by the judges of the Court. However, Gregor Maučec did manage to interview, in our view, a sufficiently large and representative number of subjects – 14 ICC

²⁵See F. B. Cross and E. H. Tiller, ‘Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals’, (1998) 107 *Yale Law Journal* 2155, at 2173–4.

²⁶See W. F. Murphy, *supra* note 13.

²⁷See S. Dothan, *supra* note 16.

²⁸See L. Epstein, W. M. Landes and R. A. Posner, ‘Why (and When) Judges Dissent: A Theoretical and Empirical Analysis’, (2011) 3 *Journal of Legal Analysis* 101, at 103–4.

judges in total – to provide an analysis of general trends and common patterns in using judicial dissents at the Court.

As such, data from the interviews can help identify major tendencies and allow for general inferences in how, for example, different professional backgrounds, personal characteristics, legal training, and previous experience of individual ICC judges may affect their use of dissenting opinions.

Out of 14 respondents, ten were former judges and four were sitting judges, six were female and eight were male. There was some distribution between judges trained in different legal traditions (three from common law systems, seven from civil law systems, and four from other or mixed legal traditions). There was also some diversity as to their geographical representation (three from Eastern Europe, six from Western European and other states, three from African states, one from Asia-Pacific states, and one from Latin American and Caribbean states), prevailing professional background (five academics or law professors, six national judges or prosecutors, and three diplomats) and principal field of expertise (three public international lawyers, two human rights lawyers, and nine criminal lawyers). While interviews with only a few sitting judges made it possible to get a better look at the Court's most recent work and latest practices from the trenches, it also had the obvious disadvantage that judges are sometimes reluctant to talk openly about their lives and experiences at international courts while they are still serving on them. To compensate for that, the interviewees included some recently retired ICC judges.

The in-depth qualitative study was conducted using open-ended interview methods. While current judges in this study are outnumbered by former judges, we ensured that the interviews with the judges who currently serve on the Court and with those who have recently retired from their office at the Court are very well represented in the empirical analysis below. Hence, we are confident that the findings presented below are reflective of general trends and common patterns of ICC judges' perceptions of the use of dissenting opinions; that is, we do not expect any significant variation in the findings if more judges were included.

To ensure coherence, Maučec developed and used an interview template outlining the key questions to be addressed in all interviews. This interview protocol was shared in advance with the interviewees, and Maučec used it as a roadmap during the interviews, although he did not ask everyone interviewed exactly the same questions and in the same order. In order to investigate the judges' own perceptions of the use of judicial dissents, he instead allowed them to speak freely, while steering them towards certain areas and themes that he thought might yield useful insights for the subject and objectives of our research. In general, the interviews lasted between half an hour and just over an hour, which in each case produced six to 14 pages of written text when transcribing the interviews. Five of the interviews were conducted by telephone and two by Skype. Ten interviews were audio recorded, with the understanding that we would quote directly but without attribution to any individual, and transcribed as soon as possible afterwards. Four judges did not give their consent to be tape-recorded. During those interviews extensive notes were made. The interviewees were assured of their anonymity.

All interviews were subject to systematic analysis, seeking to identify general themes and over-riding categories. Particularly note-worthy statements of the interviewed judges are quoted directly as part of an overview of the study's findings below. In our analysis below, we thus only provide excerpts from the interviews which most directly respond to the key issues and topics being explored. To facilitate the reading and assessment of this very rich and unique empirical material, we comment on the observations in between the quotes. In attempting to paint the insider's view of the experience of international judicial dissent, we have tried, as far as possible, to be fair to the perspectives and opinions of the interviewed judges and transparent about our own ideas and conclusions.

As part of a more general discussion, interviewees were asked about their experience with and their attitudes towards the use of dissenting opinions at the Court. The interview questions focused on three main lines of inquiry that we thought might elicit key information for our study: (i) the judges' personal background and their career development, including legal training and

professional experiences before their appointment to the ICC; (ii) the judges' approaches to collective decision-making and judicial deliberations; and (iii) the judges' personal views of the nature, function, and implications of judicial dissents for the uniform interpretation of law, certainty of law, as well as the authority and credibility of the Court. The interviewed judges were also asked about specific challenges and problems they experience in using dissenting opinions, and their recommendations as to why, when, and how to use them.

4. Judicial dissent as seen by ICC judges: An interview survey

This section provides a qualitative assessment of the judicial views on the role and use of judicial dissents, as well as judicial experience and attitudes towards dissenting practice at the Court, as derived from interviewing ICC judges. It explores how this set of judicial decision-makers view and accordingly exercise their right to write and append a dissenting opinion. Our main subject of inquiry is the process of collective decision-making and judicial deliberations in cases where members of a particular ICC chamber are unable to reach a consensus on certain factual, substantive, and procedural issues so as to deliver a unanimous decision. We hypothesize that ICC judges' personal character differences (such as self-discipline, co-operativeness, willingness to compromise, etc.), their previous career experience, and their distinctive field of expertise determine their probability of using judicial dissents at the Court. Accordingly, our working hypothesis is two-fold: (i) ICC judges with a good sense of teamwork, collaboration, and negotiation who prefer co-operative thinking and discussions are much more likely to avoid/suppress dissent than those ICC judges who favour an individual approach; and (ii) ICC judges who previously worked as diplomats, international judges, and academics tend to behave more strategically and thus be much less supportive of dissents than those ICC judges who spent the whole or most of their prior career as professional judges in criminal justice systems of their respective countries. We test this hypothesis in our empirical analysis below by focusing on two legally irrelevant judicial incentives (socio-cultural factors) that seem to have meaningful bearing on why, when, and how frequently individual ICC judges dissent:

1. the judges' personality – that is, the difference in their character and related work habits (such as self-discipline, open-mindedness, co-operativeness, sense of judicial collegiality and esprit de corps, accommodating attitude during judicial discussions, and willingness to compromise); and
2. the judges' previous career experience and field of expertise.

4.1 Personal character of ICC judges

To contextualize the question of judicial dissent in judicial practices at the Court, all respondents were first asked about their general views on the use of judicial dissent at the ICC. While agreeing that the ICC cannot afford to have such an extraordinary amount of separate and dissenting opinions as it has been issuing until the present, some of the interviewees also suggested that different judges' personalities, in particular, can be seen as playing an important role in deciding on whether or not to dissent when they disagree with the majority.

One interviewee thus observed that 'much depends on personality', as some ICC judges are readily co-operative, while others are much more individualistic.²⁹ The same respondent further explained that 'some ICC judges feel compelled to dissent or issue a separate opinion' as soon as they realize the difference – however minor – in their legal interpretation.³⁰ According to this

²⁹Interview with ICC judge, 31 May 2019, phone interview.

³⁰*Ibid.*

interviewee, ‘all judges tried to reach a common text, but some were simply not interested’³¹ since ‘dissenters normally had strong views and would not depart from those views’.³² In the words of the same respondent, ‘it’s all the question of self-discipline . . . I found that ICC judges don’t have much self-discipline’,³³ and at the ICC ‘I found [professional] judges much more difficult to deal with [than academics and civil servants or diplomats], as they had incredibly inflated egos . . .’.³⁴ Another interviewee similarly noted the lack of self-discipline of ICC judges, stating that ‘the majority of the judges feel [the] need to express also their personal views related to all the problems decided in the case’.³⁵ Yet another respondent remarked that judges, in approaching their job at the ICC, ‘differ to a very large extent depending on the individual personalities and outlooks’.³⁶ The same respondent added more in the same vein: ‘You are bound to get differences, it’s the nature of the process . . . And sometimes judges sitting on intention are going to disagree with each other. But that’s the nature of the business of being a judge’.³⁷

Two interviewees had more general but similar observations as to how the judges’ personal character (such as, being intransigent or conceited) is an important factor in judging at the Court, considerably increasing the likelihood of dissent:

The ICC judges are strongly proud of themselves. Indeed, each one of them is a top-notch lawyer of his or her own country . . . So, there is a tendency that each judge just sticks to his or her own opinion and is not willing to ease or compromise their views at all.³⁸

‘The ICC judges have a very high opinion of themselves . . . And that is a very important thing – about how to go about deliberations and how to assess the evidence’.³⁹

A similar view was echoed by another respondent:

When a judge arrives at the Court thinking this is the culmination of their career, sometimes they do not work well with others, they do not work well in a team . . . It’s not a culmination of your career, it’s a new job. That means you have to start everything over. So, if you get there when you are 60 you have to put yourself in the mind of someone who is 40 in case of the work . . . That’s why the judges need to be modest, humble and they really need to take their mandate/mission seriously.⁴⁰

Yet another interviewee made the same point, emphasizing the importance of the judge’s co-operative attitude towards judicial decision-making:

We work in the small group of colleagues . . . and we have enough time just to know each other which makes cooperation easier, and we always try to cooperate friendly, of course, there is difference of views, but it is the nature of our job. The most important thing is whether we are able or not just to look for the compromise. And I think we are. If not then, of course, we express our views in the opinions, but basically we can cooperate very friendly and in accordance with the judicial ethics.⁴¹

³¹Ibid.

³²Ibid.

³³Ibid.

³⁴Ibid.

³⁵Interview with ICC judge, 3 July 2019, The Hague.

³⁶Interview with ICC judge, 26 April 2019, phone interview.

³⁷Ibid.

³⁸Interview with ICC judge, 13 May 2019, Skype interview.

³⁹Interview with ICC judge, 28 May 2019, The Hague.

⁴⁰Interview with ICC judge, 2 May 2019, phone interview.

⁴¹Interview with ICC judge, 3 July 2019, The Hague, *supra* note 35.

On the other hand, one respondent believed that the exercise of the right to dissent also requires a kind of judicial caution on the part of ICC judges in the sense that an individual judge should not be too proud to write too many dissenting opinions because this shows that she was unable to convince the others on her own position. As this respondent further noted, such a judicial practice may eventually become a one-man show and thus be perceived as rather strange by the public.⁴²

The same interviewee also found that working in a team with other judges and pursuing a collective approach to judicial decision-making at the Court requires a kind of patience, as well as a sort of common wisdom,⁴³ while another respondent pointed out that international judges should not be egoistic.⁴⁴ A further two interviewees emphasized the importance of the judges' sense of collegiality for strengthening judicial dialogue, consensus building, eliminating differences, and overcoming disagreements in collective judicial decision-making at the Court.⁴⁵ According to them, all of this would enable ICC judges to synchronize different legal interpretations and to come up with a common position, thus rendering more cohesive decisions of the Court and reducing dissenting opinions. As they both concluded, such an enhanced judicial dialogue could be a potent game-changer for judging at the Court with respect to its current dissenting practice:

You need to have this dialogue and to try to understand where your colleagues are coming from and to have the same vision as to where all of you are going to decide the case. Unless you really have a good dialogue on how you should proceed you might never get anything done.⁴⁶

One of the interviewees also observed that the fact that ICC judges sit in chambers of three professional judges – which is uncommon in most national judicial systems – makes a huge difference as to the manner in which judicial decisions are made at the ICC:

In common law systems judges sit alone, in civil law systems they sometimes sit in chambers, but with lay persons, for example, in [the] German system. So, I think the way in which the chambers function is very different at international level – it is much more about the collegiality and taking decision collegially.⁴⁷

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴Interview with ICC judge, 28 May 2019, The Hague, *supra* note 39.

⁴⁵In the context of judicial decision-making at the ICC, Hemi Mistry distinguishes between (i) formal collegiality – 'which is evident in the structure of judicial decision-making authority as established by the Rome Statute' and 'in which there is dominant orientation to a consensus achieved between members of a body of experts who are theoretically equal in their levels of expertise but who are specialised by areas of expertise', and (ii) behavioural collegiality – that is, judges having a common interest in getting the law right and therefore 'willing to listen, persuade and be persuaded, all in an atmosphere of civility and respect'. See H. Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals', (2017) 17 *International Criminal Law Review* 703, at 706, 708, 710. For the purposes of this article, 'judicial collegiality' can be defined as a synergetic force that brings together judges on a multi-member court to allow 'all points of view to be aired and considered' and to render – through principled agreement – a common decision that is of 'greater value' than any one of their individual preferences in making decisions. H. Edwards, 'The Effects of Collegiality on Judicial Decision-Making', (2003) 151 *University of Pennsylvania Law Review* 1639, at 1639–40, 1645. With this definition of judicial collegiality in mind and considering the above conceptual distinction made by Mistry, our analysis is mostly concerned with behavioural aspects of judicial collegiality, thus advancing our understanding of the substantive quality of the relationship between ICC judges and its impact on dissenting practice at the Court. Based on the interviewees' responses, this article finds that ICC judges are generally critical of low levels of the culture of collegiality within the ICC bench and most of the respondents also agree that more effort needs to be made to enhance collegial decision-making of ICC judges.

⁴⁶Interview with ICC judge, 2 July 2019, The Hague.

⁴⁷*Ibid.*

4.2 The ICC judges' professional experience and field of expertise

The judiciary at the Court is very diverse also in terms of its professional and expert make-up. In the following subsection, we focus on our second central question of the intricate relationship between different professional backgrounds and areas of expertise of ICC judges and the actual dissenting practice at the Court. In other words, we are interested in the relative interdependence of the international criminal judges' expertise and previous career experience and their inclination to dissent. What is inferable from the quotes below is a clear indication of different judicial attitudes towards dissenting opinions predicated on both their prior professional experience as well as their field of expertise.

Our first major observation in this regard is that some ICC judges coming from national judicial practice seem to be far more agreeable to judicial dissents at the Court than their fellow judges recruited from other legal professions, such as diplomats, international judges, and international law professors. The interviewees with professional judicial experience from their respective domestic jurisdictions quoted below can be seen as having taken such an attitude. According to one of them, 'Separate or dissenting opinions are very, very healthy elements in the judicial development. So, nobody among us, among the colleagues thought of these minority opinions as an obstacle to the judicial work or the judicial development.'⁴⁸

With regard to the same issue, another interviewee specifically noted:

Many jurisdictions permit judges when they're sitting in a bench of a number of judges together to express themselves if they wish using their own voice. And those individual national systems are recognised as being extremely effective. And one only has to look at the Supreme Court in the country to which I belong, where judges very often write their own opinions or their own judgment . . . So, I don't see this as a phenomenon which is in any way something peculiar to the ICC, but far more a reflection of what judges do in different jurisdictions across the world, and extremely effectively. And so, I do not see this as constituting any kind of necessary problems.⁴⁹

Yet another respondent with national judicial background similarly underlined the usefulness of judicial dissents, but added that they should be meaningful in their message and moderate by their character:

I am completely in favour of dissenting opinions, because as I mentioned they can be constructive, but the Court should work towards an anthology of dissenting opinions that makes them set in a more measured and serene tone.⁵⁰

Another interviewee from the group of ICC judges with previous national judicial experience argued, 'Dissenting opinions may affect certain aspects of the majority decision, but I would say they contribute to positive development of international jurisprudence, rather than amounting to the problem of its fragmentation.'⁵¹

Another ICC judge who used to work as a national judge further explained the usefulness of separate and dissenting opinions:

The separate opinions have their uses, emphasizing certain points which were not emphasized in the main judgment, but also if they are dissenting, they can be perceived as watering down the majority judgment. But at the same time we are dealing with lawyers, and in law it

⁴⁸Interview with ICC judge, 13 May 2019, Skype interview, *supra* note 38.

⁴⁹Interview with ICC judge, 26 April 2019, phone interview, *supra* note 36.

⁵⁰Interview with ICC judge, 2 May 2019, phone interview, *supra* note 40.

⁵¹Interview with ICC judge, 18 April 2019, phone interview.

is not like in mathematics where you can say two plus two is four, people can see things differently and disagreement is tolerated amongst lawyers more easily . . . They [separate and dissenting opinions] can be useful, as I have said, for emphasizing, they might dwell on a subject more broadly than the judgment did, and therefore give more knowledge to a person who wants to acquire that knowledge (researchers, students, scholars). Even dissenting opinions can be useful because courts can depart from their previous position and adopt a new position. So, if that is the case, they can be useful, but also they can be useful in giving different perspectives to a matter. I think they are useful, depending on what you want to use them for.⁵²

On the other hand, ICC judges who, before coming to the Court, worked as diplomats, academics, international lawyers, and international judges expressed much more reserved, if not hostile, attitudes towards using judicial dissents. Asked about the purpose and practical value of dissenting opinions, one of them responded:

To tell the truth, I am not a big fan of the separate and dissenting opinions . . . According to our rules it is the obligation of the presiding judge to do everything that is possible to achieve the unanimity. But this is not always possible. But there is still a question whether it is necessary to tell to the outside world that we disagree, that there are different views and that we have a necessity to express ourselves to say what we think about the case. I really don't think it is the way in which we can achieve, maybe not the effectiveness, but perhaps image of the Court . . . Therefore, I think it is really something which does not serve a good picture of the Court. But it is the practice here that the majority of the judges feel need to express also their personal views related to all the problems decided in the case . . . But at the same time, I think, we are not the academic society, we are the Court, we need to decide, and in every instance to be very clear what is the Court's final decision.⁵³

Another respondent who had previously served as an international judge was also highly critical of the use of separate and especially dissenting opinions at the Court:

I believe that a criminal court cannot afford to have such fractured decisions as we have. By fractured I mean exactly that more than one concurring opinion, even any concurring opinion, or separate opinions, dissenting opinions. They all have a role, and you will not eliminate them, nor should you. But we have an extraordinary amount of them here . . . and we have to find the way to reduce them and to deliver more cohesive judgments, because you've got to have some consistency and clarity in the law, and we are not providing that.⁵⁴

Two ICC judges coming from the group of diplomats and public international lawyers highlighted these dimensions as well:

There is no question that dissenting opinions enhance greater transparency, but they also can create the impression that any decision is purely dependent on the composition of chambers, not as a uniform interpretation of the law and therefore that can weaken the Court, since there are lots of doubts . . . One consistency in my mind is that there has to be some element of continuity in jurisprudence . . . Separate opinions and dissenting opinions have an educational tool, but, in my view, it's less important than consistent jurisprudence.⁵⁵

⁵²Interview with ICC judge, 2 July 2019, The Hague.

⁵³Interview with ICC judge, 3 July 2019, The Hague, *supra* note 35.

⁵⁴Interview with ICC judge, 2 July 2019, The Hague, *supra* note 52.

⁵⁵Interview with ICC judge, 31 May 2019, phone interview, *supra* note 29.

I don't think it is good for the Court that you have decisions with lots of dissenting and separate opinions, and in particular, when dealing with very important decisions – confirmation of charges, convictions, acquittals and few others. Those important decisions should really be unanimous – that would be ideal, or if you have a dissenting or separate opinion, it should be on a very discreet issue. But to have an acquittal, and then you have judges writing and writing pages and pages of different views, I think, is not good for any court, and is particularly not good for the ICC . . . You need to try to avoid so many dissenting and separate opinions. Judges need to have a conscience that this is not great for the credibility of the Court and for the certainty of the proceedings.⁵⁶

It is, moreover, worth noting that one of the respondents clearly pointed to the link between the ICC judges' professional experience and separate and dissenting opinions:

Amongst judges they are used to a system where they don't necessarily discuss and negotiate. They are not diplomats. They come, in many cases you see they express their views – 'This is my view.' – and that's it. Since you need to find a majority, you do need to discuss, and many times you do need to negotiate, not necessarily negotiate in the sense of leading principles, but sometimes is just a matter of drafting, or is a matter of dropping something that is particularly divisive and go for something that is sufficient for the decision.⁵⁷

The same interviewee went on to admit that a high number of dissents at the Court is, in many cases, a product of the divide of ICC judges 'seeing the law in various ways, and not reaching very easily a unanimous decision'.⁵⁸ Different approaches of ICC judges with different professional backgrounds to certain legal, factual, and procedural issues more often than not cause disagreements between them, thus enhancing the likelihood of dissents. Two interviewed judges spoke about a stark difference in legal reasoning of national judges and diplomats turned ICC judges:

National judges were, to me, those who tended most to replicate what they have known in their national system. But that was a bit of a problem, because sometimes they would move away from interpreting the Rome Statute to mentioning the rules they were familiar with. But diplomats had another problem which was also difficult, namely that diplomats by nature tend to find pragmatic solutions . . . The approach is not at all the same, because as a diplomat dealing with legal issues, the context is intertwined with politics, and you have to find the way to combine the rigour of the law with the fluidity of politics. You have to be faithful to your legal responsibilities within this kind of context, while a judge does not deal in the same way at all. The context is much more strict. You have these regulations, rules that apply to you and you have to be much more, I won't say rigorous, but it's much more narrow approach.⁵⁹

There was [the name of an ICC judge] who is a diplomat and judge, basically a public international law lawyer and their input, their view is pretty necessary one for the entire conclusion, although their view may not sometimes be strictly judicial.⁶⁰

⁵⁶Interview with ICC judge, 25 April 2019, Skype interview.

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹Interview with ICC judge, 31 May 2019, phone interview, *supra* note 29.

⁶⁰Interview with ICC judge, 13 May 2019, Skype interview, *supra* note 38.

Both interviewees also observed that the different nationalities and legal backgrounds of ICC judges had less impact on judging and legal decision-making at the Court than their professional experience.⁶¹ Noting a huge influence that the ICC judges' professional experiences have on their legal reasoning and decision-making, another respondent expressed a similar view as regards the ICC judges' different ways of thinking resulting from their different professional background:

'Sometimes professors reason more like professors than judges, that is, more academically than judges do. And it's the same for diplomats'.⁶²

Similarly, another respondent, a former academic, noted that it is much easier to write an academic article than a judgment, because:

Judgment is always a compromise, something that commentators don't see, because it's something you don't realize, something that you can say this is now a very strange wishy-washy formulation. That's because we are of different views, and so the only thing we can agree on is on a wishy-washy version of what each of us thinks differently in their mind.⁶³

Such a divergence in judicial thinking and reasoning at the Court, that leads to different views among judges on how to go about the interpretation and assessment of facts and evidence, and how to interpret and apply different legal sources and applicable norms, moreover results from the judges' immediate area of expertise. For example, ICC judges with strong public international law backgrounds (diplomats, international law professors) and judges with human rights law experience tend to use a more pragmatic approach to interpretation and seem to favour the rules of interpretation contained in the Vienna Convention on the Law of Treaties. One interviewee, who apparently belongs to this category of ICC judges, noted:

Everybody needs to be aware that the main source of law is the Rome Statute which is international treaty, and therefore for interpreting the international treaty we have to apply the Vienna Convention on International Treaties, and this is very obvious for everybody and it is not possible just to differ.⁶⁴

Another interviewee made the same point:

We are supposed to be applying – all of us – the rules of interpretation in the Vienna Convention. So, that is *mutatis mutandis* what we are supposed to be applying for criminal cases before the ICC as well. So, in principle that is the method – you go into the text, you go into the context, etc.⁶⁵

On the other hand, those judges recruited from the field of criminal justice (experienced national judges, prosecutors and other criminal law experts) usually stick to strict and narrow interpretations of legal norms. One respondent from this camp of ICC judges expressed a very different view from the two positions above:

The Rome Statute is an international treaty, so in theory you can say the Vienna Convention on the Law of Treaties is applicable. But if you look at it from the perspective of standard criminal norms, it is more like a criminal code and code of criminal procedure with the principle of legality in Articles 22, 23, and 24. So, for me this excludes a teleological

⁶¹Interview with ICC judge, 31 May 2019, phone interview, *supra* note 29.

⁶²Interview with ICC judge, 2 May 2019, phone interview, *supra* note 40.

⁶³Interview with ICC judge, 28 May 2019, The Hague, *supra* note 39.

⁶⁴Interview with ICC judge, 3 July 2019, The Hague, *supra* note 35.

⁶⁵Interview with ICC judge, 25 April 2019, Skype interview, *supra* note 56.

interpretation, which you can do under the Vienna Convention, but for me you can't do it, you can't have a broad interpretation, and so that's where we differ. You have some judges – judges coming from a human rights background who have this very broad view.⁶⁶

This divergence in how judges with different professional background and expertise in a particular legal field understand and approach interpretation and application of the law can sometimes create significant frictions within individual trial chambers, possibly leading to dissenting views.

Moreover, some ICC judges, especially those with predominantly human rights law experience, seem to be very much prosecution-oriented and tend to look at the evidence within the background that crime needs to be punished. They are of the view that an international criminal trial is more than just looking at the evidence; it is primarily about doing justice to the victims. As a consequence, they sometimes have a softer approach to the evidence. Such a judicial approach is strongly opposed by the judges specializing in criminal justice for whom a trial is about only one question – has the Prosecutor, who brought the charges, satisfied the evidentiary standard to the extent that judges are convinced beyond reasonable doubt that the evidence suffices? According to one interviewee:

It happened a few times that when I was with three judges, we would have three different opinions about how to go about the problem. And then yes, it's very difficult, you need to decide, so you must try and find a common ground between two of the three.⁶⁷

This divide in judicial views and legal interpretations contingent on the ICC judges' career experience and expertise thus seems to play an important role in dissenting practice at the Court.

5. Conclusion

The empirical insights presented in the previous section may lead to some provisional conclusions underpinning our hypotheses that ICC judges' incentives and decisions on whether or not to dissent in a particular case depend to a large extent on their personality, professional background, and previous career development, as well as area of expertise. Most notably, judges with criminal law practising backgrounds and those who, prior to their appointment to the ICC, used to work as professional judges in their respective jurisdictions, do not mind the frequent and abundant use of judicial dissents at the Court, whereas diplomats or law professors turned international judges do.

This may suggest that ICC judges with prior experience as national judges or criminal law practitioners have a different view of judging as designed to project their own views of the law or on policy rather than trying to champion these views in a political battle and make sure they carry the day. These judges are more likely to view themselves as postpositivist legalists or as attitudinal judges, even if they are not familiar with these scientific terms. Diplomats and international judges with strong public international law backgrounds, in contrast, are used to negotiating and negotiation not only comes easier to them, they also believe in its necessity as a means to a political end. They believe international judges should behave strategically to reach their own goals, but also the goals of the Court to which they belong, such as to enhance the authority and legitimacy of both their decisions and of the ICC itself. This implies, above all, two things: first, that they will think twice before expressing their disagreement with the majority decision in a dissent, and second, that they will be ready to work hard towards a compromise in order to prevent their colleagues' dissent, especially when the authority and credibility of the Court could be at stake. These ICC

⁶⁶Interview with ICC judge, 28 May 2019, The Hague, *supra* note 39.

⁶⁷*Ibid.*

judges will normally also forgo or try to suppress judicial dissent for reasons of clarity and consistency of the Court's jurisprudence.

The article, moreover, reveals that the personal character of judges varies greatly between judges who are prepared to collaborate in the effort to reach a common ground and judges who are more ready to voice their personal views in dissent. As some interviewees' responses suggest, personal differences are a constant cause of tension in the ICC and are therefore a fact that scholars have to contend with when they investigate the Court.

Unfortunately, the tools used in this article are not able to provide more accurate predictions about which judges are likely to be conciliatory and which judges are likely to insist on making their views published in dissent. Nevertheless, by highlighting both that there are consistent and significant differences between judges and that these differences correlate – according to the judges' own views – with the judges' personal history and character, the controversial practice of issuing dissents by the ICC can be better explained.