THE APPLICATION OF TEACHINGS BY THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Abstract:

Scholars have examined the role of 'teachings' (or 'literature', 'doctrine', or 'scholarship') in various international courts and tribunals, but never the International Tribunal for the Law of the Sea ('ITLOS'). This article analyses the general weight ITLOS judges assign to teachings, how the judges distinguish between more and less significant teachings, and how and why different judges use teachings differently. ITLOS judges generally seem to assign teachings low weight, albeit with some exceptions. Some teachings are seen as more important, on the basis of their quality and on the fact that multiple writers agree. Judges treat teachings somewhat different, with Judge Laing being a significant outlier, responsible for roughly half of all citations.

I. INTRODUCTION

How international judges use academic texts is a topic that attracts a small but steady degree of attention from the international legal academy. Past articles include Stappert on international criminal courts and tribunals,[1] Manley on the International Criminal Court (ICC),[2] Helmersen on the World Trade Organization (WTO) Appellate Body,[3] Peil on the International Court of Justice (ICJ),[4] and Bohlander on the International Criminal Tribunal for the former Yugoslavia (ICTY).[5] This article looks at the International Tribunal for the Law of the Sea (ITLOS), an institution that has not yet been the subject of such analysis.

Teachings are mentioned in the ICJ Statute[6] Article 38(1). They should, according to a common view, be applied by anyone dealing with international law. This means that knowledge about how teachings are applied in practice should be interesting and valuable. Teachings themselves offer limited guidance on the matter. As Kammerhofer puts it, 'some platitudes are repeated over and over despite being of no help in elucidating the legal function

[1] N Stappert, 'A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals' (2018) 31 Leiden Journal of International Law 963.

[2] S Manley, 'Citation Practices of the International Criminal Court: The Situation in Darfur, Sudan' (2017) 30 Leiden Journal of International Law 1003.

[3] S T Helmersen, 'The Use of Scholarship by the WTO Appellate Body' (2016) 7 Goettingen Journal of International Law 309.

[4] M Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 Cambridge Journal of International and Comparative Law 136.

[5] M Bohlander, 'The Influence of Academic Research on the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia—A First Overview' (2003) 3 The Global Community Yearbook of International Law & Jurisprudence 195.

[6] Statute of the International Court of Justice, 26 June 1945, 1 UNTS 993.

of article 38(1)(d)'.[7] This article features a comprehensive analysis of the practice of an in international court, which means that Kammerhofer's 'platitudes' can be backed up or refuted with data. Examining judicial decisions in general is easy because decisions are publicly available and lend themselves to systematic research. It is interesting because judges are authoritative actors in the international legal system.[8]

Studying the ITLOS' use of teachings says something about the ITLOS as an institution. It gives a measure of the ITLOS' openness to and recognition of scholarly ideas and influences. An international court is an actor in the practice of international law, which can choose how much it wishes to connect with academia.

Additionally, any study of judges' use of scholarly opinion may indirectly reveal something about the nature of international law more generally. An interesting feature of the international legal system is that its development is shaped through interaction between practitioners and scholars.[9] Judges citing teachings is one part of that interaction,[10] and, unlike many other parts, it can be studied empirically.

This article focuses on the role of teachings in answering specific legal questions that come before an international tribunal. Teachings also have other functions in international

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[7] Jörg Kammerhofer, 'Lawmaking by scholars' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 305, 307.

[8] E.g. Gleider Hernández, 'Interpretative Authority and the International Judiciary', in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds) *Interpretation in International Law* (Oxford University Press 2015) 166, 166.

[9] E.g. J von bernstorff, 'The Relationship Between Theory and Practice in International Law: Affirmation Versus Reflexive Distance' in J d'Aspremont et al (eds), International Law as a Profession (Cambridge University Press 2017) 222, at 224.

[10] S T Helmersen, 'Scholarly-Judicial Dialogue in International Law' (2017) 16 The Law & Practice of International Courts and Tribunals 464; Sandesh Sivakumaran, 'The Influence of Teachings of Publicists on the Development of International Law' (2017) 66 *International and Comparative Law Quarterly* 1, 26-27.

law, and their 'informal importance is […] considerable'.[11] They help systematise the law and can present broader criticisms and reflections on the law's history and future development. Examining these functions of teachings would require a different methodology than that used here.

The article explains its methodology in Section II. Section III examines the overall weight of teachings in the ITLOS. The main finding is that teachings generally have low weight. Section IV discusses the weight that specific teachings seem to have in ITLOS opinions. The first subsection aims to identify the most important teachings. Rosenne is the most-cited author, while the Virginia Commentary seems to the most significant work. The second subsection shows that ITLOS judges seem to assess the weight of teachings according to the quality of the work and whether there is agreement between multiple writers. Section V outlines differences between judges. Judge Laing is an outlier, by citing and engaging with teachings far more often than his colleagues. The section also attempts to explain the differences between judges, and finds that former academics cite teachings more often than former practitioners. Section VI is a conclusion.

II. METHODOLOGY

This article covers the 27 cases that were listed on the ITLOS' website as of March 2019: 25 contentious cases and 2 advisory proceedings. Those 27 cases include 14 judgements, 2 advisory opinions, and 79 orders. This gives a total of 95 majority opinions. None of them cites teachings.

[11] K Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff 1993) 156.

The limited number of cases means that the article is based on a small sample size. That is a general caveat that applies to all numbers, results, and conclusions, since these can be heavily influenced by specific judges or cases. Some attempts have been to control for this. For example, most of the citations numbers are presented both with and without Judge Laing, who heavily influences the data by having made a large share of all citations.

Individual opinions are included in the study. This is because, as Crawford writes, individual opinions may actually better 'reflect the Court's actual methods'.[12] The 27 cases include 149 individual opinions, where 89 are attached to judgments, 5 to advisory opinions, and 55 to orders.

Some judges cite their own works.[13] Such self-citations are included in this study. Some citations are 'indirect', in the sense that a judge refers to the fact that another decision or pleadings refer to teachings.[14] Such references are also included in this study.[15]

This article uses two methodologies: a quantitative and a qualitative. The quantitative element is a counting of teachings citations in ITLOS opinions. The qualitative element is analysis of the context of those citations, including the statements made and approaches used by the judges. The opinions were downloaded as pdf files, and all references to teachings were copied into a separate document and counted and analysed manually. A conventional legal methodology, which would focus on cases where judges explicitly decide or comment

[12] J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press 2012) 43.

[13] E.g. *"Juno Trader" (Saint Vincent and the Grenadines v.Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, Separate Opinion of Judge Chandrasekhara Rao 4.

[14] E.g. *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, Dissenting Opinion of Judge Ndiaye 258.

[15] As in e.g. Stappert (n 1) 969.

on legal questions, would be unhelpful here, since ITLOS judges have never said anything explicit about how they view teachings.

Supplementing the quantitative analysis with a qualitative one gives a more complete picture of the role on teachings in the ITLOS, since they will reveal both *how often* and *how* teachings are used in opinions.[16] A potential weakness of the approach is it does not necessarily reveal entirely how judges think.[17] There are two reasons why citations do not necessarily reflect what is going in a judge's mind: Judges can read and be influenced by something without citing it,[18] and judges can cite something without having read or been influenced by it.[19] Former ICJ President Robert Jennings acknowledges that teachings play a greater role in the ICJ than the absence of citations in majority opinions suggests,[20] and Stappert's interviews with international criminal judges and staff indicate a similar pattern.[21]

Scholars tend to disagree on the usefulness of counting citations, ranging from the claim that it 'is an unfit gauge of […] influence',[22] to the view that '[t]here are strong grounds for making a connection between citation and influence'.[23] The truth probably lies somewhere in between: Citations are 'a useful measure of influence', but 'not the same as

[16] E.g. J d'Aspremont in 'EJIL Editors' Choice of Books' (2015) 26 *European Journal of International Law* 1027, 1041.

[17] Max Sørensen, *Les sources du droit international: étude sur la jurisprudence de la cour permanente de justice internationale* (E. Munksgaard 1946) 188.

[18] E.g. Wolfke (n 11) 156.

[19] E.g. J Goldsmith, 'Remarks by Jack Goldsmith' (2000) 94 ASIL Proceedings 318, 318.

[20] Jennings Robert Y Jennings, 'Reflections on the Subsidiary Means for the Determination of Rules of Law', in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, vol 1 (Editoriale Scientifica 2004) 319, 328.

[21] Stappert (n 1) 974 and 979.

[22] Kammerhofer (n 7) 323.

[23] N Duxbury, *Judges and Jurists: An Essay on Influence* (Hart 2001) 12-13.

influence'.[24] That the approach does not necessarily give a completely accurate picture of judges' thought processes is not a problem in itself. It simply means that the article can reveal something interesting (how judges argue), but not always something else that would also be interesting (what judges think).[25]

This article compares its results with those from other international courts and tribunals. The institutions have different structures, procedures, and roles, and this may affect how they approach teachings. A broader comparative study of how they differ and how this affects their legal methodology is beyond the scope of this article, but it could be an interesting topic for future research. The data from different courts and tribunals is not always comparable, and some studies do not reveal their full numbers or methodologies. For example, WTO Appellate Body reports mostly do not include individual opinions, while ITLOS judges only cite teachings in individual opinions. Comparing how often ITLOS judges cite teachings in individual opinions with how often the WTO Appellate Body cites teachings in reports is an imperfect comparison, but it is all that the data will permit.

The ICJ Statute Article 38 does not apply to the ITLOS. The ITLOS has its own applicable law clause, in the UNCLOS[26] Article 293 and the ITLOS Statute[27] Article 23, which do not mention teachings. Article 74(1) and 83(1) do mention 'international law, as referred to in Article 38 of the [ICJ Statute]', which seems to build on an assumption that Article 38 reflects general international law. It is commonly assumed that the enumeration of

[24] Sivakumaran (n 10) 3.

[25] Lawrence Friedman and others, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 *Stanford Law Review* 773, 794.

[26] United Nations Convention on the Law of the Sea, 10 October 1982, 1833 UNTS 3.

[27] Statute of the International Tribunal for the Law of the Sea, Annex VI to the UNCLOS (n 26).

sources in Article 38(1) reflects customary international law,[28] which means that all international lawyers, including judges at the ITLOS,[29] 'shall apply' the 'teachings of the most highly qualified publicists of the various nations' as 'subsidiary means'. That is also what most other international courts and tribunals seem to do.[30]

That teachings are designated a 'subsidiary means' means that they do not create international law.[31] A 'subsidiary means' cannot be the basis of a legal conclusion, it only can affect how a judge views and decides a legal question.[32] This article uses the term 'weight' to denote this effect. The more teachings affect how judges view and decide legal questions, the more 'weight' they have.

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[28] E.g. ILC, *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (A/CN.4/1/Rev.1) (United Nations 1949) 22.

[29] As assumed by J E Noyes, 'The International Tribunal for the Law of the Sea' (1999) 32 *Cornell International Law Journal* 109, 124

[30] E.g. H Thirlway, *The Sources of International Law* (Oxford University Press 2014) 9; Stappert (n 1) 965, A Z Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals' (2013) 24 European Journal of International Law 649, 651 and F Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008) 73 about international criminal courts and tribunals; A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press 2007) 299 (the 'ECHR and ACHR'); W Zdouc and P Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013) 59 (WTO tribunals). However T Cole, 'Non-Binding Documents and Literature', in T Gazzini and E De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 289, 292 disagrees regarding international investment arbitration tribunals.

[31] E.g. G Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 *Harvard Law Review* 539, 551.

[32] E.g. J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press 2003) 51.

That different lawyers are subject to the same law does not necessarily mean that they use teachings the same way. The ICJ Statute does not say what weight teachings are entitled to. The weight accorded to teachings can vary between different groups of lawyers, between different international courts, and between individual judges at the same international court. Because Article 38 does not determine the weight of teachings, it contains a significant degree of discretion. This article aims to elucidate how the ITLOS' judges have used that discretion. The aim of the article is therefore to be descriptive, by describing how judges *use* teachings, rather than normative, for example by proposing how judges *should use* teachings.

'Teachings' are texts that are suited to answer legal questions. Works that instead document facts, or merely reproduce a primary source, fall outside this definition. Dictionaries are not teachings, since they explain how language is used, which is a matter of fact and not law.[33]

Works produced by the ILC fall somewhere in between 'teachings' and official documents. The ILC is an official body, as a subsidiary organ of the United Nations (UN) General Assembly, whose members are elected by States. It is composed partly of lawyers representing governments and partly of independent academics. Its members serve in a personal capacity, and operate relatively independently, although their texts are produced with input from States.[34] The ILC's own *Third report on identification of customary international law* includes ILC texts under 'writings'.[35] However this is not done in the later

[33] But see Stappert (n 1) 971.

[34] E.g. Mark E Villiger, *Customary International Law and Treaties* (Martinus Nijhoff 1985) 79.

[35] ILC, *Third report on identification of customary international law by Michael Wood, Special Rapporteur (A/CN.4/682)* (United Nations 2015) 55.

Customary International Law Conclusions,[36] apparently due to scepticism from States.[37] Writers are divided on how ILC texts should be classified.[38] For the purposes of this article, ILC works are not considered teachings, primarily because of their official status and the involvement of states in their creation.[39] By contrast, works by purely private bodies, such as the Institute de Droit International (IDI) and the International Law Association (ILA), are teachings.[40] Questions can also be raised over the classification of other entities, for example the International Committee of the Red Cross. However, only the IDI, ILA, and ILC have been cited in ITLOS opinions, and thus require classification in the present article.

In any case, the definition of 'teachings' does not determine the weight of an instrument.[41] The definition of 'teachings' is more of a terminological than a substantive question.

III. THE OVERALL WEIGHT OF TEACHINGS

[36] ILC, *Report of the International Law Commission Sixty-eighth session (2 May-10 June and 4 July-12 August 2016) (A/71/10)* (United Nations 2016) 111-112.

[37] ILC, *Fourth report on identification of customary international law by Michael Wood, Special Rapporteur (A/CN.4/695)* (United Nations 2016) 10.

[38] Contrast e.g. Sir Michael Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)', *Max Planck Encyclopedia of Public International Law* (article last updated October 2010) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1480>, accessed 14 September 2017, para 11 with Sir Arthur Watts, *The International Law Commission 1949-1998*, vol 1 (Oxford University Press 1999) 14-15.

[39] As in Helmersen (n 10) 509-510 but not in Helmersen (n 3) 314.

[40] E.g. Jennings (n 21) 329.

[41] A Watts, *The International Law Commission 1949-1998* (Oxford University Press 1999) vol 1, 15. Watts (n 39) 15.

A. Majority Opinions: No Citations

The most striking fact about teachings in the ITLOS is that no majority opinion has ever cited teachings. The complete absence of teachings from majority opinions is an indication that teachings play at best a minor role in the ITLOS' decision-making. Teachings could play a bigger role in practice, but that is not reflected in the ITLOS' written opinions.

This absence of citations stands in contrast with the practices of other international courts and tribunals. The ICTY cited 'academic sources' on average 7.2 times in majority opinions and 4 in individual opinions up to 2003.[42] Stappert reports 675 citations across 91 opinions in 'international criminal courts and tribunals (7.4 on average).[43] The WTO Appellate Body cited teachings a total of 112 times, in 21 of its 110 reports up to 2014 (1 time per report).[44] As for ICSID tribunals, in '98 decisions from the period between 1 January 1998 and 31 December 2006',[45] 'doctrine was used […] in 73'.[46] For the European Court of Human Rights, Wood notes that it 'referred extensively to writers to support its

[42] Bohlander (n 5) 198-202.

[43] Stappert (n 1) 964 and 973.

[44] Helmersen (n 3) 317. The article includes ILC works, but numbers cited here exclude them.

[45] O K Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 European Journal of International Law 301, 359.

[46] Fauchald (n 45) 351.

conclusions on jurisdiction in *Banković v. Belgium*'.[47] Various '[a]rbitral tribunals' also 'make sometimes copious reference to jurists' writing'.[48]

In terms of the numbers of citations in majority, the ITLOS is most similar to the ICJ. The ICJ has cited teachings seven times in majority opinions across 155 cases. This gives an average of 0.04 times per case,[49] which is not far from the ITLOS' 0.

While ITLOS majority opinions do not cite teachings, they have cited ILC works. Such works have been cited in three opinions, a total of 16 times.[50] This too is similar to the ICJ, whose tradition of not citing teachings in majority opinions has not stopped it from citing and engaging with works of the ILC.[51]

B. Explaining the Absence of Citations in ITLOS Majority Opinions

As to *why* the ITLOS does not cite teachings in its majority opinions, this has not yet been the subject of scholarly attention. Various reasons have been proposed for why the *ICJ* mostly

[47] Wood (n 38) para 14, contradicting W Twining and others, 'The Role of Academics in the Legal System' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005) 920, 945.

[48] A Kaczorowska, *Public International Law* (4th edn, Routledge 2010) 59; Crawford (n 12) 43.

[49] S T Helmersen, *The Application of Teachings by the International Court of Justice* (University of Oslo 2018).

[50] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p. 24, Separate Opinion of Judge Laing* 65; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, 31, 41-43, 56, 58-60, 62-63, 66; *M/V "Virginia G"* (n 14) 47, 53, 117.

[51] Judge Schwebel in United Nations Generally Assembly, *Fifty-second Session, 36th plenary meeting* (27 October 1997) <http://www.icj-cij.org/files/press-releases/9/3009.pdf> accessed 4 October 2017, 2.

does not cite teachings in its majority opinions. Many of the reasons that have been proposed for the ICJ can also be relevant to the ITLOS, and they are therefore explored below.

Teachings may have variable 'scientific value'.[52] There is also a potential for jealousy and envy between authors.[53] They may also be biased.[54] Another problem is that writers tend to stem from a limited number of States, a fact that the Court may not wish to emphasise through by citing them.[55] The Court's own eminence is another proposed factor.[56] However, these concerns should apply equally to all courts and tribunals, and to ICJ and ITLOS individual opinions, which do cite teachings (see Section III.A and III.C below).

The 'collegiate drafting' of judgments has also been proposed as a reason for the lack of citations of teachings in ICJ majority opinions.[57] When a large number of judges must sign off on an opinion, it may be easier to get agreement on a text when unnecessary or debatable

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[52] E.g. A Pellet, 'Article 38' in AndreasAndreasA Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 731, 869. Similarly M Mendelson, 'The International Court of Justice and the Sources of International Law' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 63, 84.

[53] E.g. former ICJ President Tomka, Quoted in A Keene (ed), 'Outcome Paper for the Seminar on the International Court of Justice at 70' (2016) 7 Journal of International Dispute Settlement 238, 260.

[54] E.g. *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v. United States of America), Judgment No. 15, 12 July 1929, P.C.I.J Reports Series A No. 21* p. 93, Dissenting Opinion by M. de Bustamante 133.

[55] E.g. former ICJ judge Buergenthal in D Terris, C P R Romano, and LeLigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press 2007) 98.

[56] E.g. M Mendelson, 'The International Court of Justice and the Sources of International Law' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 63, 84.

[57] E.g. S Hall, *International Law* (2nd edn, LexisNexis Butterworths 2006) 59.

elements, such as citations of teachings, are removed. That could also apply to the ITLOS, but it is difficult to test empirically.

Judges' preferences and drafting styles probably matter. For example, Stappert reports that 'an ICC judge expressed dissatisfaction with what they perceived as an overly academic drafting style'.[58] Such differences may be systematic and entrenched on an institutional level. They may be passed on between judges, and kept alive by registries. This could be called an 'institutional culture'.[59] It is difficult to test empirically for the existence and content of such cultures, but some indications are available. Judge Buergenthal explains that '[t]he ICJ is much more formal and to some extent formalistic in its judicial approach' than the Inter-American Court of Human Rights.[60] An anonymous ICJ judge has said that not citing teachings 'is part of the [Court's] institutional culture'.[61]

C. Individual Opinions: Some Citation

In individual ITLOS opinions, teachings have been cited 250 times 149 opinions. That gives an average of 1.7 citations per individual opinion. A general caveat to this statistic is that the sample size is small, with only 27 cases in total. The numbers are heavily influenced by individual judges and cases.

An important judge in that respect is Judge Laing, who is responsible for 127 of the citations (divided among his 6 individual opinions). The average without Judge Laing is 0.9 citations per opinion.

[58] Stappert (n 1) 974

[59] E.g. Sivakumaran (n 10) 28; Kammerhofer (n 7) 323.

[60] Quoted in Terris, Romano, and Swigart (n 55) 97-98.

[61] Helmersen (n 49).

The rate of citations in individual opinions has varied over time. This is illustrated in the graph below, which lists average citations per opinion per year on the vertical axis and years on the horizontal axis.

[Figure 1]

The graph shows a major spike in the early years of the Tribunal (1998-199), and another one in 2013-2014. The early spike is heavily influenced by the presence of Judge Laing. The numbers without Judge Laing is shown in the graph below.

[Figure 2]

There is still an early spike, but it is less extreme, and it is now smaller than the 2013-2014 spike. The 2013-2014 spike is caused by two cases decided in that period, *Louisa* and *Virginia G*. Most of the citations in those cases were made by four judges: Judge Jesus (6 citations, in *Louisa*), Judge Cot (11 citations, in *Louisa*), Judge ad hoc Sérvulo Correia (12 citations, in *Virginia G*), and Judge Ndiaye (8 citations, in *Virginia G*). It is notable that most of these judges wrote several individual opinions, but cited teachings primarily in *Louisa* and *Virginia*. Judge Jesus has written nine individual opinions, but cited teachings only in *Louisa*. Judge Cot wrote 13 individual opinions, but made 11 of his 15 citations in *Louisa*. Judge Ndiaye wrote ten individual opinions, and made eight of his 18 citations in *Virginia G*. Judge ad hoc Correia only served in *Virginia G*. This means that the two spikes in citation rates seem to have different causes. The early spike is caused by a specific judge, who cited large amounts of teachings in most of his opinions. The late spike is caused by specific cases,

where judges who otherwise cited little or no teachings, decided to cite unusually large numbers of teachings.

D. Limited Engagement

Even the individual opinions that do cite teachings, often simply cite them in a footnote without any further comment. In other words, there is a lack of engagement with teachings. The term 'engagement' is in this context taken to mean to neither 'adopt [an] argument wholesale' nor 'merely ignore it',[62] but rather to discuss its merits in some depth. This, in turn, indicates that ITLOS judges assign teachings limited weight.[63] If judges generally assigned significant weight to teachings, they should quote, interpret, debate with, and contrast the words used in teachings, akin to what one might do with a treaty text or an important judicial decision. A lack of engagement is not definite proof of low weight, however, as judges' written opinions may not fully reflect how their thought processes. As noted in the introduction of this article, what is documented here is how judges *argue*, but not necessarily how they *think*.

There are some examples of ITLOS judges engaging with teachings.

Judge Laing provides many of the examples. In an opinion in the *Saiga (no. 2)* case he noted that an individual ICJ opinion (by Judge Weeramantry) cites teachings. Judge Laing then spun further on the ICJ reference, by noting that the 'author also notes that in view of the

[62] A Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation' in H Philipp Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts* (Oxford University Press 2016) 72, 89.

[63] E.g. S M Schwebel, 'The Inter-active Influence of the International Law Court of Justice and the International Law Commission' in C A Armas Barea and others (eds) *Liber Amicorum in Memoriam of Judge José María Ruda* (Kluwer 2000) 479, 486.

summary nature of the proceeding the rules of evidence should be relaxed'.[64] He thus engaged closely with both Weeramantry's opinion and the teachings. In the same case, Judge Laing observed that the writer he cited was 'not appearing to reach as far as implied in the text'.[65] That reveals a close reading of the teachings. Similarly, a few pages later, he is surprised that Thirlway's discussion of an '(apparently substantive) urgency requirement' in regards to provisional measures 'discusses mainly procedural requirements'.[66] In the same opinion he gave a carefully nuanced exposition of teachings, noting that they 'generally accepted' the same view, but that it was 'described variously', and he explained what the writers (in his view) would 'often imply'.[67] In another place, Judge Laing cited a list of writers in order to find a 'generally accepted' rule, and noted that one of the writers was 'exhibiting a more guarded attitude towards such exercise of jurisdiction' than the others.[68]

Also in *Saiga (no. 2)*, Judge Laing cited a writer, and specifically urged the reader to '[n]ote his argument'.[69] This phrasing implies that the teachings were given some weight.

An interesting example comes from Judge Laing in *Saiga (no. 2)*, where he apparently disagreed with the teachings he cited. He wrote that 'since "freedom" is a broader species than "right," freedom of navigation might logically be said to trump some coastal State rights', and this connection cited 'Oppenheim 1992'.[70] He added that '[h]owever, I do not so propose'. When Judge Laing disagreed with Oppenheim, he could simply refrained from

[64] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 52.

[65] Ibid 55.

[66] Ibid 61.

[67] Ibid 62.

[68] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, Separate opinion of Judge Laing 161.

[69] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 61.

[70] *M/V "SAIGA" (No. 2)* (n 68), Separate opinion of Judge Laing 178.

citing. That he does include the citation in his opinion is a sign that he is willing to cite and engage with teachings not only when he agrees with them, but also when he disagrees. Teachings thereby seem to be given a role that go beyond simply confirming or supporting the judge's own view.[71]

Previously in the same opinion, Judge Laing cited an ICJ decision, but added in a footnote that '[h]owever, in my view, it is unhelpful to define exclusive economic zone status in terms of national jurisdiction or resemblance to the high seas', and quoted a passage from teachings in support of this. Judge Laing apparently felt more comfortable with correcting the ICJ when he had the backing of teachings.

There are also examples of judges who cite teachings that disagree with *each other*. Judge Laing did so in *Saiga (no. 2)*, where he cited some writers, but added '[h]owever, note Arias'.[72] An opinion by Judge Nelson in the same case cited some teachings, and others prefaced by 'on the other hand'.[73] Judge Cot in *Louisa* referred to teachings that he labelled 'provocative' and subject to 'debate',[74] which is different from referring to teachings that have proved uncontroversial.

Another example of engagement by ITLOS judges comes from Judge Shearer's opinion in *Southern Bluefin Tuna*. He engaged with teachings on the precautionary principle. He noted '[t]he difficulties of applying the precautionary principle to fisheries management', which have been 'well explained' by teachings. He cited teachings on the point that 'whether that principle can of itself be a mandate for action, or provide definitive answers to all

[71] E.g. Kammerhofer (n 7) 322; Duxbury (n 24) 15.

[72] *M/V "SAIGA" (No. 2)* (n 68), Separate opinion of Judge Laing 180.

[73] *M/V "SAIGA" (No. 2)* (n 68), Separate opinion of Judge Nelson 122.

[74] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, Separate Opinion of Judge Cot 105.

questions of environmental policy, must be doubted'.[75] The status of that principle in international law is a difficult issue, and it is the same issue that brought out a rare example of substantive engagement with teachings in the WTO Appellate Body.[76] The opinion of Judges Wolfrum and Cot in *ARA Libertad* cited a work by the IDI, and found it 'noticable that the Institut refrained from using the term "immunity"', and claimed that '[a]t no moment did the Institut suggest the item be addressed by the forthcoming 1930 Codification Conference of The Hague'.[77] They thus looked not only at what the IDI *says*, but also what it does *not say*. That too is a way of implicitly assigning weight to the views of teachings.

In *Lousia*, Judge Jesus interpreted Article 58 of the Rules of the Tribunal, and held that his interpretation was 'confirmed by the ICJ's jurisprudence', with a footnote reference to teachings. Judge Jesus seems to have used teachings to interpret a judicial decision, which was in turn used to interpret a treaty.[78] If that reading is correct, the teachings were authoritative enough to say what the ICJ was saying, even though the legal conclusion was ultimately based on the Rules. A more confusing example comes from Judge Nelson in *Virginia G*. He quoted the ICJ's *Aegean Sea* case, and noted that the case was '[c]ited by Judge Mohamed Shahabuddeen in his *Precedent in the World Court*'.[79] It is not clear whether Judge Nelson thought that the decision had more weight since it was cited in Shahabuddeen's teachings. The situation is further complicated by the fact that Judge Shahabuddeen was a

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[75] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, Separate opinion of Judge ad hoc Shearer 326.

[76] Reports of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, 45.

[77] *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, Joint separate opinion of Judges Wolfrum and Cot 371.

[78] *M/V "Louisa"* (n 74), Dissenting Opinion of Judge Jesus 152.

[79] *M/V "Virginia G"* (n 14), Declaration of Judge Nelson 131.

judge at the ICJ when he published the book in question (but not when *Aegean Sea* was decided).

Judicial decisions are generally assumed to have more weight than teachings.[80] That is reflected in the opinions of ITLOS judges, but there are some interesting examples that nuance the picture. In *Virginia G*, the opinion by Judge Ndiaye cited judicial decisions, but noted that these 'have been criticized by various legal scholars'.[81] A similar example is found in an opinion by Judge Laing in *Saiga (no. 2)*, where he cited a writer interpreting an ICJ case, and 'criticisms thereof' by other writers.[82] Both of these judges used teachings to critise judicial decisions. This was presumably meant to reduce the weight of the decisions. Such an approach may be taken to imply that teachings had at least some weight.

ILC works are also commonly assumed to have more weight than teachings.[83] This is illustrated in the opinion of Judge Akl in *Virginia G*. He argued primarily that the majority opinion in the case 'runs counter to well-established rules of international law reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the [ILC]'.[84] He added that it 'also departs from the case law of international courts and tribunals, including that of this Tribunal'.[85] Judge Akl seemed to treat the ILC's work as more significant than the ITLOS' own jurisprudence, a status that he and most other judges would presumably be reluctant to assign to teachings.

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[80] E.g. R Jennings, 'General Course on Principles of International Law' (1967) 121 Recueil des cours 323, 341.

[81] *M/V "Virginia G"* (n 14), Dissenting Opinion of Judge Ndiaye 309-310.

[82] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 64.

[83] E.g. F L Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles In International Law (2014) 63 *International and Comparative Law Quarterly* 535, 546.

[84] *M/V "Virginia G"* (n 14), Separate opinion of Judge Akl 156-157.

[85] Ibid 156-157.

A more ambiguous example comes from Judge Laing in *Saiga (no. 2)*. He put forth what the law was 'in [his] view', and cited teachings to back this up.[86] This gives the impression that Judge Laing reached his conclusion without being influenced by the teachings he cited. An opinion by Judge Cot in *Louisa* provides a general illustration of the limits of teachings. Judge Cot wrote that the teachings he cited were 'useful', but not 'compulsory'.[87]

E. Conclusion

No ITLOS majority opinion has cited teachings. That is significant, and it is unlike all other international courts and tribunals that have so far been examined. Explaining this absence is difficult, but it may largely be down to the judges' preferences and drafting styles, which may have calcified into an 'institutional culture'. It may also be caused by the need to make a large number of judges agree on a single judicial decision. Teachings are cited in individual opinions, where citations rates vary over time. There are two notable spikes, one caused by the presence of Judge Laing, and another caused by the *Louisa* and *Virginia G* cases.

Individual opinions contain examples of ITLOS judges appearing to assign some weight to teachings, by engaging with them in various ways. They are not conclusive examples of such weight, since what judges write in their opinions do not necessarily reflect fully how they think. In any case, the examples mentioned above constitute only a small minority of all citations, and are only found in the opinions a minority of judges. Combined with the fact that teachings are completely absent from majority opinions, the overall

[86] *M/V "SAIGA" (No. 2)* (n 68), Separate opinion of Judge Laing 177.

[87] *M/V "SAIGA" (No. 2)* (n 68), Separate Opinion of Judge Cot 115.

impression given by the text of the ITLOS' opinions is that teachings are assigned low weight.

This finding can be compared with those from other institutions. In the ICJ, teachings 'have low weight'.[88] In the WTO Appellate Body, teachings are used with 'an apparent tendency to be careful'.[89] In the ICTY, their 'influence [is] rather marginal',[90] but another writer holds that international criminal tribunals used teachings as 'essentially primary sources of international law'.[91] In ICSID tribunals between 1998 and 2006 teachings were 'an essential interpretive argument'.[92]

Writers have varied views on the role of teachings in international law, ranging from teachings beings 'influential in the process of determining what the law is',[93] to them 'seldom [being] the decisive factor'.[94] The ITLOS' practice, at least based on its published opinions, seems to adhere closest the latter view.

IV. THE WEIGHT OF SPECIFIC TEACHINGS

A. The most important teachings

[88] Helmersen (n 49).

[89] Helmersen (n 3) 332.

[90] Bohlander (n 5) 195.

[91] I. Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', (2006) 6 International Criminal Law Review 121, at 129

[92] Fauchald (n 45) 352.

[93] Pauwelyn (n 32) 51.

[94] Kammerhofer (n 7) 324.

When attempting to assess the weight accorded to specific teachings in the ITLOS, a simple measurement is to count which writers are cited most often. That is shown in the table below.

[Table 1]

Shabtai Rosenne is the most cited writer, with twice as many citations as the second-most cited. Rosenne is also the most cited writer in ICJ individual opinions,[95] but not in the WTO Appellate Body.[96]

Another way to count citations is to look at how *many judges* who have cited each writer. This gives a more complete picture than a pure citation count, especially since the overall numbers are quite small.[97] That is shown in the table below. The table is limited to the top 19 writers. There are fifteen writers sharing the 20th spot, and including all of them would have made the table too large.

[Table 2]

Counting the number of citing judges yields a somewhat different ranking than the list of most-cited writers. Rosenne tops this list too, having been cited by seven judges (Laing, Ndiaye, Nelson, Vukas, Anderson, Rao, and Jesus). Behind Rosenne, though, the lists are different. Sztucki, Elkind, Merrills are ranked 2nd, 4th, and 5th by citations, but are cited by only one judge (Laing). Lowe and Oxman have, by contrast, the best citations-to-judges ratio,

[95] Helmersen (n 10) 513.

[96] Helmersen (n 3) 333-334.

[97] E.g. Peil (n 4) 160.

with four citations across four judges. They share second place in the rankings by the number of judges, despite being only joint 15th when ranked by citations.

The rankings are heavily influenced by Judge Laing, who is responsible for more than half of all citations. Three of the top five writers, and six of the top 19, are cited only by Laing. Laing has cited all but one of the top 19 writers, Andreas Zimmermann being the sole exception.

Many of the most-cited writers share common characteristics. All of the top 19 are men. US and the UK nationals are heavily overrepresented. Eight of writers were UK citizens (although Lauterpacht and Oppenheim were born abroad, and Rosenne left to become an Israeli citizen). Six writers were US citizens (although Sohn was born abroad), even though the US is not a party to the UNCLOS. The remaining five writers were Polish, Maltese, Chilean, Fijian, and German, respectively. The writers were mostly senior academics. Thirteen of the 19 were professors. The list also includes an associate professor (Elkind), and various practitioners: two ambassadors (Rosenne and Nandan), one Principal Legal Secretary at the International Court of Justice (Thirlway), and one national judge (Dumbauld). The writers mostly worked in or for their home States, although the Polish professor (Sztucki) worked in Sweden, and one British professor (Greig) worked in Australia. Some professors worked at world-leading universities, such as Lauterpacht and Oppenheim (Cambridge), Lowe (Oxford), and Sohn (Harvard). Five of the nineteen writers contributed to the Virginia Commentary. Eleven did not, while three were dead before the first volume was published. This demographic survey illustrates how judges interpret expertise and authority based on author characteristics. The preferred writer seems to be a male British professor, which may be said to be a narrow subset of the global pool of expertise in international law and the law of the sea.

It is not only interesting to know which *writers* are cited most often, but also which of their *works* that are most popular. The list below shows the most-cited works of the most-cited writers.

[Table 3]

Four of the top twelve writers have the Virginia Commentary as their most-cited work. To the extent that it is possible to identify the 'teachings of the most highly qualified publicists' according to this study, the Virginia Commentary is it.

Looking at the works that are cited, one sees a good mix of works on general international law and law of the sea-specific works. Excluding the works that have been cited only by Judge Laing, i.e. those of Sztucki, Elkind, Merrills, and Oppenheim, the top works of the seven most-cited writers are all law of the sea-specific works. The ITLOS judges thus cite teachings to inform their reasoning on law of the sea issues, an area where they are supposed to be experts.[98] This is in contrast to the WTO Appellate Body, which cites teachings primarily on points of general international law and not trade law.[99]

Another noticeable pattern is that several of the non-law of the sea works are specifically about the ICJ. That indicates that at least some ITLOS judges have looked in particular to the practice of the ICJ when establishing the ITLOS' practice.

B. Factors that may be used to assess teachings

[98] ITLOS Statute Article 2(1).

[99] Helmersen (n 3) 326.

The aim of this section is to identify factors that may influence the weight that ITLOS judges accord specific teachings. This is done by analysing how judges explicitly refer to teachings in their opinions, and how they indicate and justify citations. This is a different methodology from the previous section, which is based on a *counting* of citations.

The ICJ Statute Article 38, whose customary equivalent is relevant to the ITLOS, covers only the teachings 'of the most highly qualified publicists'. In other words, not all teachings are meant to be equal. The wording of Article 38 suggests that it first necessary to decide whether a 'publicist' is among 'the most highly qualified'. If so, their teachings can be used. However, in practice, international courts and tribunals rather seem to accord different teachings different weight.[100]

The quality of specific teachings seems to be important, since it has been emphasised by various ITLOS judges.

For example, judges have called teachings they cited 'leading'[101] and 'well-known'.[102] These adjectives refer to the status of the teachings, and suggest that the teachings have weight because of the status they hold among the 'invisible college' of international lawyers.[103]

[100] Helmersen (n 10) 511-512.

[101] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 49; *M/V "Louisa"* (n 74), Separate Opinion of Judge Cot 113.

[102] *M/V "Louisa"* (n 74), Dissenting Opinion of Judge Jesus 152.

[103] O Schachter, 'The Invisible College of International Lawyers' (1977) 72 Northwestern University Law Review 217.

Other judges have used phrases that focus more on the value of teachings to the specific judge, such as 'useful',[104] 'relevant',[105] 'valuable',[106] and 'worthwhile'.[107] This points to the intuitive conclusion that judges will assign more weight to teachings when those teachings hold a level of quality that makes them more helpful to the judges.

In some cases, judges have referred to the inherent qualities of the teachings, as opposed to their status in legal community or their helpfulness to the judge. Judges have called teachings 'comprehensive'[108] and 'persuasive authority'.[109] Judge Shearer wrote in *Southern Bluefin Tuna* that the teachings he cited 'well explained' the issue at hand.[110] Similarly, in *Grand Prince*, Judge Nelson noted that a statement from teachings 'holds good', i.e. that it was correct.[111] One the designations as 'comprehensive' was made by Judge Gao in *Bangladesh/Myanmar*, where he also added that the work in question was a 'study of state practice'.[112]

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[104] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 49 and 52; *M/V "Louisa"* (n 74), Separate Opinion of Judge Cot 115.

[105] *M/V "Louisa"* (n 74), Dissenting Opinion of Judge Lucky 167; *M/V "Louisa"* (n 74), Separate Opinion of Judge Cot 115.

[106] *M/V "Louisa"* (n 74), Separate Opinion of Judge Cot 113.

[107] *M/V "Virginia G"* (n 14) Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia 226.

[108] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, Separate opinion of Judge Gao 201; 20. *ARA Libertad* (n 77), Joint separate opinion of Judges Wolfrum and Cot 367.

[109] *Southern Bluefin Tuna* (n 75), Separate opinion of Judge ad hoc Shearer 326.

[110] Ibid.

[111] *"Grand Prince" (Belize v. France), Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, Declaration of Vice-President Nelson 47.

[112] *Delimitation of the maritime boundary in the Bay of Bengal* (n 108), Separate opinion of Judge Gao 201.

A peculiar aspect of the quality of teachings is the relevance of time. Judge Laing emphasised in *Saiga (no. 2)* that the teachings he cited were 'recent'.[113] When Judge Nelson in *Grand Prince* noted that a statement from teachings 'holds good', he also noted that this was despite the statement being 'made more than 60 years ago'.[114] That may imply that it would ordinarily be unusual for a 60 year old statement about international law to still be correct. All else being equal, that may be true, since more recent works may incorporate the newer sources. However, when past works are cited, judges tend to gravitate toward 'classics', i.e. works that have stood the test of time in a way that more recent works cannot. Time can thus work as a filtering mechanism for quality. When citing teachings, judges may have to choose between citing newer works or older and more authoritative but also more outdated 'classics'. The ITLOS' judges have cited both types of works. The oldest work was 84 years old,[115] while the newest one was not yet published when it was cited.[116] Overall, the average age of the works cited is 16 years. This reflects a mixture between works that are several decades old and works that were published only a few years before the opinion was written. There is no discernible development over time in the average age of citations, which ranges from a low of 4 years in 2010 to a high 28 years in 2012.

In sum, quality appears to be a factor that ITLOS judges consider when they assess the weight of teachings. The assumption that the weight of teachings depends on their quality

[113] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 52.

[114] *"Grand Prince"* (n 111) Declaration of Vice-President Nelson 47.

[115] *ARA Libertad* (n 77), Joint separate opinion of Judges Wolfrum and Cot 370.

[116] *M/V "Louisa"* (n 74), Separate Opinion of Judge Cot 113.

is also shared by writers,[117] and by the ILC.[118] It can also be inferred from the ICJ Statute Article 38(1)(d), which mentions only 'the *most highly qualified* publicists' (emphasis added). While that standard is to some extent 'subjective',[119] it may be taken to mean that those who apply teachings should assign them weight based on how good they are.

The weight of teachings may increase when multiple writers agree.[120] In the ITLOS, many judges have invoked such agreement. For example, Judge Nelson in *Saiga (no. 2)* cited teachings, and held that these were 'among others'.[121] In other words, there were an unstated number of other writers who agreed with the ones who were cited, which may increase their combined weight. Judges have referred to 'at least two jurists' agreeing on a point, to 'a considerable literature',[122] and to a 'generally recognised' view.[123] In Judge Gao's opinion in *Bangladesh/Myanmar*, he cited the introduction to an edited study, and emphasised the introduction's conclusions were 'reached after consideration of the global and regional papers and the individual boundary reports published in the study'.[124] The conclusions were thus based on the views and contributions of a number of writers, which apparently increased their

[117] E.g. L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 American Journal of International Law 313, 345.

[118] ILC (n 36) 111.

[119] T Hillier, *Sourcebook on Public International Law* (Cavendish 1998) 94; Sivakumaran (n 10) 12.

[120] E.g. A Oraison, 'L'Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J' (1999) 32 Revue Belge de Droit International 205, 228; Jennings (n 20) 323.

[121] *M/V "SAIGA" (No. 2)* (n 68), Separate opinion of Judge Nelson 121.

[122] *Southern Bluefin Tuna* (n 75), Separate opinion of Judge ad hoc Shearer 322 and 326.

[123] *M/V "Virginia G"* (n 14), Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia 219.

[124] *Delimitation of the maritime boundary in the Bay of Bengal* (n 108), Separate opinion of Judge Gao 202.

weight. Judges have also referred to 'works', 'views', 'the doctrine',[125] 'authors',[126] and 'scholarly opinion' in general.[127] It should also be added that the *Virginia Commentary*, which is the most-cited work of several of the most-cited writers by ITLOS judges (see Section IV.A), is a collective work. The judges' respect for that work may in part stem from its collective nature.

The importance of agreement between writers boils down to the intuitive assumption that multiple writers are more likely to be correct than a single writer, all else being equal. It also matters who the writers are. If the agreement is between high-quality teachings or expert writers, it may have exponentially more weight.[128] This can be illustrated by the opinion of Judge Shearer in *Southern Bluefin Tuna*. He cited 'at least two jurists' (i.e. more than one), who were also 'jurists of note' (i.e. experts).

This examination of the ITLOS can be compared with a study of the ICJ, which identified four factors that could affect the weight of teachings: the quality of the work, whether multiple writers agree, and the expertise and official positions held by the writers.[129] The first two factors are reflected in the ITLOS' practice, as this chapter has shown that the ITLOS' judges tend to mention quality and agreement between writers when justifying their citations of teachings. The other two factors identified in the ICJ's practice, expertise and official positions, are less noticeable in the ITLOS' practice. There are only two relevant examples of ITLOS judges highlighting expertise, where judges call writers 'jurists of

[125] *M/V "SAIGA" (No. 2)* (n 50), Separate Opinion of Judge Laing 49, 52, and 62.

[126] *M/V "Virginia G"* (n 14), Dissenting Opinion of Judge *ad hoc* Sérvulo Correia 383.

[127] *Delimitation of the maritime boundary in the Bay of Bengal* (n 108), Separate opinion of Judge Gao 225.

[128] Helmersen (n 10) 529.

[129] Ibid 513-526.

note'[130] and 'learned authors',[131] respectively. There is also a reference to a writer being 'a former judge of the Tribunal' itself.[132] Beyond this, there are no references to the official positions of writers, even where ITLOS judges cite teachings written by other ITLOS judges.[133] The ITLOS judges' stronger emphasis on quality than on expertise is in line with the view of the ILC.[134]

C. Conclusion

Counting the ITLOS' judges citations of teachings shows that the judges seem to appreciate works that comment specifically on law of the sea issues. The Virginia Commentary stands out as an apparently significant work, and Rosenne as a significant writer. Examining how the judges explicitly refer to teachings in their opinion suggests that the judges prefer works of high quality, and to rely on more than one writer at once.

V. THE APPROACHES OF INDIVIDUAL JUDGES

A. Differences in citation rates and engagement

[130] *Southern Bluefin Tuna* (n 75), Separate opinion of Judge ad hoc Shearer 322.

[131] *M/V "Virginia G"* (n 14), Dissenting Opinion of Judge *ad hoc* Sérvulo Correia 383.

[132] *Delimitation of the maritime boundary in the Bay of Bengal* (n 108), Separate opinion of Judge Gao 225.

[133] *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, Dissenting Opinion of Judge Heidar 287-289.

[134] ILC (n 36) 151; Sivakumaran (n 10) 12.

Judges vary by how often they cite teachings. The table below ranks the judges by their average number of citations per individual opinion.

[Table 4]

Judge Laing has cited the most teachings, by a significant margin. He has an average of 22 citations per individual opinion. The next three judges on the list (Sérvulo Correia, Heidar, and Hoffmann) average 12, 4, and 3 citations respectively, but have all written only a single individual opinion. The closest judge with more than one opinion is Gao, who has an average of 3.3 citations per individual opinion. Judge Laing is alone responsible for 127 of the total 250 citations, i.e. around half. Of the total 149 individual opinions, only 46 cite teachings. This is 31 %, roughly one third. Of the 42 judges who have written at least one individual opinion, 23 have cited teachings at least once, while the other 19 have not.

Judges also differ in how much they engage with teachings. Most judges cite teachings as appendages to their argument (often in footnotes), without further comment. Some rare examples of 'engagement' were discussed in Section III.D, but they mostly involve only a select few judges, with Judge Laing being heavily overrepresented.

In short, there are differences between ITLOS judges in how they use teachings. Judge Laing in particular sticks out, with a high citation rate and many examples of engagement.

A similar pattern can be seen in the ICJ. There, four judges, Judge Cançado Trindade, Judge Weeramantry, Judge Shahabuddeen, and Judge ad hoc Kreća, cite and engage with teachings significantly more than their colleagues.[135]

[135] Helmersen (n 49).

B. Possible explanations

Judges' approaches vary according to their professional backgrounds. While '[f]ew [judges] can be labeled as belonging clearly to a particular profession',[136] the ITLOS judges have been classified here under the profession that they spent the most time in. Put simply, academics cite more teachings than non-academics. Among the 41 ITLOS judges who have written at least one individual opinion, there are 18 who were primarily academics before their election or appointment to the Tribunal. The remaining 23 judges comprise 16 diplomats, 2 civil servants, 2 politicians, 2 international civil servants, and 1 judge. The academics cite teachings on average 2.4 times per opinion, while the corresponding figure for non-academics is 0.5. Judge Laing was an academic, and he contributes to a significant increase of the academics' citation numbers. Even without him, however, the academics cite teachings twice as often as non-academics (1.0 times per opinion on average).

[Table 5]

Former academics also cite teachings more often in the ICJ,[137] where all but one of four 'outlier' judges (Judge Cançado Trindade, Judge Weeramantry, Judge Shahabuddeen, and Judge ad hoc Kreća) were former academics (Judge Shahabuddeen is classified as a former politician). Fauchald suggests that 'many of the people serving on tribunals are professors of law' as a possible reason why 'legal doctrine in general was regarded by ICSID

[136] Terris, Romano, and Swigart (n 55) 102.

[137] Helmersen (n 49).

tribunals as one of the most important interpretive arguments' between 1998 and 2006.[138] By contrast, no difference between diplomats and academics is found in the reports of the WTO Appellate Body.[139] Stappert notes that in international criminal courts and tribunals, 'how judges assessed the use (and usefulness) of academic writings often seemed […] not necessarily linked to whether these judges themselves held tenured or associate academic positions in the past'.[140] The results from other international courts and tribunals must therefore be said to be equivocal on this point.

A higher citation rate for former academics may be a matter of habit, since they are used to citing teachings in their scholarly work. Academics may also be more familiar with the breadth and depth of available teachings,[141] and may moreover have more respect for them, since they and their colleagues have been involved in producing them. It is also possible that judges who were academics have a more 'academic' judicial style, where it is more appropriate and relevant to cite teachings.

Judges can also be compared by nationality, as is done in the table below. One basis of comparison is Western and non-Western judges. This article is not an appropriate place to discuss the definition and scope of the 'Western World'. For the sake of simplicity, membership of the Organisation for Economic Co-operation and Development (OECD) is used as a rough proxy.[142] The core of the OECD's membership is wealthy and democratic States in Western Europe and North America.

[138] Fauchald (n 45) 352.

[139] Helmersen (n 3) 341-342.

[140] Stappert (n 1) 975.

[141] Duxbury (n 23) 37.

[142] As in e.g. Helmersen (n 3) 341.

[Table 6]

There is an apparent difference, with non-OECD judges citing teachings on average 1.9 times per opinion, while the equivalent number for Western judges is 0.7 However, Judge Laing is from a non-OECD State (Belize), and heavily influences the citation count. Without Judge Laing, non-OECD judges also cite teachings 0.7 times per opinion on average, exactly like the Western judges. Any apparent difference between the two groups is therefore down to a single individual.

This is similar to the ICJ, where non-Western judges also cite teachings more often than do Western judges, but where the difference almost disappears when Judge Cançado Trindade, Judge Weeramantry, Judge Shahabuddeen, and Judge ad hoc Kreća are removed from the equation.[143] In the WTO Appellate Body, there is no significant difference between OECD and non-OECD nationals.[144]

Another way to divide the judges is between permanent judges and judges ad hoc. The two groups are compared in the table below. Judges ad hoc are marked with an asterix (*).

[Table 7]

The table shows that the two groups have similar numbers, with permanent judges citing teachings on average 1.4 times per opinion, and judges ad hoc doing so 1.3 times. However, here too it can be useful to look at the numbers without Judge Laing. He was a

[143] Helmersen (n 5049).

[144] Helmersen (n 3) 341.

permanent judge, and the other permanent judges cited teaching only 0.7 times per opinion on average. In the ICJ, judges ad hoc cite teachings more often than permanent judges.[145]

C. Conclusion

The use of teachings in ITLOS opinions shows not only differences between writers, but also between judges. Some judges cite and engage with teachings more than others. This may mean (but is not conclusive proof) that they also assign teachings more weight. Judge Laing is by far the greatest outlier. He fits into a broader pattern of outlier judges being nationals of non-OECD States and former academics, which is also seen in the ICJ. Even so, judges' approaches to teachings are ultimately down to their individual and personal philosophies and habits. This must necessarily to some extent be hidden from the kind of academic analysis undertaken in this article.

VI. CONCLUSION

Even though it is based on a limited sample of cases, this article has been revealed numerous aspects of how the ITLOS and its judge have applied teachings. Teachings seem to be used only as a 'subsidiary means' in the ITLOS, as directed by the ICJ Statute Article 38. Teachings moreover seem to have generally low weight in the ITLOS. This is indicated by the fact that no ITLOS majority opinion has ever cited teachings, which is in itself a significant finding. It is also indicated by the trend that even where teachings are cited in individual opinions, most judges rarely make an effort to 'engage' with them. While

[145] Helmersen (n 5049).

teachings generally seem to have low weight, different writers and works are treated differently. Some writers and works seem to have more weight, with the Virginia Commentary being the most significant work and Shabtai Rosenne the most significant writer. ITLOS judges often cite senior academics from the UK and the US. When assessing the weight of teachings, judges seem to primarily consider the quality of the text and whether multiple judges agree. The average age of the cited works is sixteen years. There are also differences between the judges. Some judges seem to assign teachings more weight, with Judge Laing being the most significant outlier. The judges' professional backgrounds correlates with how they use teachings, with academics citing teachings more often than non-academics.

The results presented in this article may be supplemented by future research, on other institutions and other subsidiary means, including judicial decisions. Different studies may interact, and provide novel insights. For example, Section III.C showed that the *Louisa* and *Virginia G* cases prompted several judges to cite unusually large amounts of teachings. Ridi has studied identified the most-cited cases in the WTO Appellate Body, the ICJ, and investment tribunals.[146] The ITLOS could be subjected to a similar examination. If *Louisa* and *Virginia G* appeared high up on such a list, that could mean that they are particularly significant or contested cases, which could in turn go some way towards explaining their unusual number of teachings citations.

[146] N Ridi, 'The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 Journal of International Dispute Settlement 200.