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Finding ‘the most highly qualified publicists’: Lessons from the International Court of Justice

Abstract:

The ICJ Statute Article 38(1) instructs the International Court of Justice to ‘apply […] the teachings of the most highly qualified publicists’. This raises the question of how to decide who these ‘publicists’ are, and how to rank them. This article suggests four factors that the Court’s judges apparently use when assessing the weight of ‘teachings’: the quality of the work, the expertise and official positions of the author(s), and agreement between multiple authors. Judges may invoke these factors because it can make their opinions more authoritative and saves time, and in order to conform with the ICJ Statute Article 38. Counting the authors and teachings that judges have highlighted as having high quality, being experts, and holding prestigious official positions gives a list that is different from the lists of writers who are cited most often and by the most judges. While this gives a rough idea of who ‘the most highly qualified publicists’ may be, it also shows that a final, conclusive ranking cannot be given.

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1. INTRODUCTION

This article explores 'factors' that determine the weight of teachings in international law. 'Teachings', which are mentioned in the ICJ Statute Article 38(1)(d),[1] are here defined as 'books and articles, purporting to answer legal questions, being used when ascertaining the content of international law'.[2] Works produced by the International Law Commission (ILC) are excluded, because of the significant role of States in their production.

The article uses the practice of the International Court of Justice (ICJ) as a case study.[3] The ICJ is the most authoritative international court,[4] and has a publicly available record of case law that stretches over 70 years, yet without being unmanageably large. Individual opinions are included in the study. Only a few ICJ majority opinions have cited teachings:[5] The Court's decision in *Land, Island and Maritime Frontier Dispute* made reference to 'the successive editors of Oppenheim's *International Law*' and to 'G. Gidel, *Le droit international de la mer* (1934), Vol. 3', and a work by Sir Cecil Hurst.[6] The *Namibia* opinion cited a work by Jan Smuts.[7] In *Kasikili/Sedudu Island* one finds a reference to a document produced by the Institut de droit international.[8] Works produced by the ICRC have been cited in the *Wall* opinion[9] and the *Nicaragua* judgment.[10] The reference in *Bosnia Genocide* to Raphael

[1] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 933 (ICJ Statute).

[2] Sondre Torp Helmersen, 'The Use of Scholarship by the WTO Appellate Body' (2016) 7 *Goettingen Journal of International Law* 309, 314.

[3] Between *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 57 and *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833.

[4] Eg D J Harris, *Cases and Materials on International Law* (8th edn, Sweet & Maxwell 2015) 42.

[5] Eg Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (9th edn, Longman 1992) 42-43.

[6] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992*, p. 351, 592 and 594.

[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, 48.

[8] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Report 1999*, p. 1045, 1062.

[9] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, 176. (The reference at 175 is excluded because the works was apparently produced by governments rather than the ICRC.)

[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, 124-125.

Lemkin's book *Axis Rule in Occupied Europe* (1944) is not counted,[11] since it concerned only the 'etymology of the word […] genocide', rather than a legal question. Some ICJ majority opinions contain general references without naming specific works.[12] In short, the Court has cited specific works of teachings on a point of law only seven times, in five cases. Teachings are cited far more in individual opinions, where the Court's '"workings" are set out in more detail', and they may therefore (better) 'reflect the Court's actual methods'.[13] Individual opinions should 'be regarded as throwing light upon the Court's deliberations in preparing its judgment'.[14] This is true regardless of the fact that as sources of law, individual opinions are generally seen as less important than majority opinions.[15]

The ICJ Statute Article 38(1) mentions 'the teachings of the most highly qualified publicists' as a 'subsidiary means' to be apply by the Court when it 'decide[s] in accordance with international law such disputes as are submitted to it'. Thus, the Court is expressly directed to 'apply' teachings. The provision formally only applies to the ICJ,[16] but is generally assumed to reflect customary international law.[17] This, combined with the authoritative status of the ICJ, and the resulting desire for other actors to follow its practice, means that a study of the Court's citation practice is significant for international law in general. The conclusions in this article are thus not limited to showing the Court's practice, they also say something about the status of teachings in international law as such.

Section 2 discusses a fundamental premise for the subsequent sections, which is that the weight of teachings varies between different works. Section 3 identifies the

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[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, 125.

[12] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, 22-23; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, 259; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, 35; *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, 501 and 508.

[13] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 43.

[14] D W Greig, *International Law* (2nd edn, Butterworths 1976) 48. Similarly Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff 2004) 44.

[15] Eg Michel Virally, 'The Sources of International Law', in Max Sørensen (ed), *Manual of Public International Law* (St. Martin's Press 1968) 116, 153-154.

[16] Eg Gerald G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000) 57, 77.

[17] Eg G M Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 33-36.

‘factors’ that seem to determine the weight of specific works. The following Section (4) shows how the ICJ judges’ practice also indicates that authority in international law is established and maintained through a collective process, that is largely implicit instead of being conducted openly. Section 5 then discusses incentives that could motivate judges to distinguish between more and less authoritative works, and to prefer to cite the former. Section 6 uses the ‘factors’ presented in Section 3 as part of a methodology for identifying the writers who, apparently according to the ICJ, are ‘the most highly qualified’. Section 7 is a conclusion.

2. DIFFERENT WORKS HAVE DIFFERENT WEIGHT

The notion that there are ‘factors’ that determine the weight of teachings necessarily means that different works have different weight. The varying weight of teachings can to some extent be inferred from the wording of the ICJ Statute Article 38(1)(d), which mentions ‘the teachings of *the most highly qualified* publicists’ (emphasis added). This wording assumes that some writers are more qualified than others, and that only the ‘most qualified’ are relevant to the ICJ. The wording of the Statute suggests an either/or distinction between ‘the most highly qualified’ and the rest, where the ICJ can only apply the teachings of the former. However, it is ‘difficult to decide who “the most highly qualified publicists”’ are.[18] The standard is to some extent ‘subjective’,[19] and ‘cannot be conclusively proved’.[20] The concept of ‘qualification’ should be seen as a gradual progression from the least to the most qualified, where the more highly qualified are assigned more weight.[21] That is what ICJ judges seem to do, by citing some writers more than others (as discussed in this section) and by emphasising various ‘factors’ that seem to affect the weight of teachings (as discussed in Section 3).

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[18] Clive Parry, *The Sources and Evidence of International Law* (Manchester University Press 1965) 108.

[19] Eg Tim Hillier, *Sourcebook on Public International Law* (Cavendish 1998) 94.

[20] Eg Rebecca M M Wallace and Olga Martin-Ortega, *International Law* (7th edn, Sweet & Maxwell 2013) 30.

[21] Fuad Zarbiyev, ‘Saying Credibly What the Law Is: On Marks of Authority in International Law’ (2018) 9 *Journal of International Dispute Settlement* 291, 309 generally notes that ‘authority […] is something of which one can have more or less’.

A rejected proposal in the PCIJ's Advisory Committee of Jurists was to establish a formal ranking of teachings.[22] While the proposal itself was unrealistic, it reveals an underlying view that the weight of teachings varies between different works. This variation is noted in the ILC's *Customary International Law Conclusions*,[23] and by writers.[24]

ICJ judges have cited some writers more often than others. The following table shows the 10 most-cited writers, and how many times they have been cited.[25] The count does not include self-citations.[26] A list of the 40 most-cited writers is included in the Annex.

Table 1: The 10 most-cited writers

Rank	Writer	Citations
1	Rosenne, Shabtai	233
2	Lauterpacht, Hersch	119
3	Fitzmaurice, Gerald	67
4	Hudson, Manley O.	55
5	Oppenheim, Lassa	53
6	Jennings, Robert	52
7	de Visscher, Charles	51
8	Brownlie, Ian	42
9	Watts, Arthur	32
9	Stone, Julius	32

The results can be illustrated with the following figure, which lists the 10 most-cited writers along the horizontal x axis, and the number of times each has been cited along the vertical y axis.

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[22] Permanent Court of International Justice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16th–July 24th 1920 with Annexes* (Van Langenhyusen Brothers 1920) 336.

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

[24] Eg The American Law Institute, *Restatement of the Law of Foreign Relations of the United States*, vol 1 (American Law Institute Publishers, 1987) 38.

[25] Jennings, Watts, Oppenheim, Jiménez de Aréchaga, and Brownlie are also among the most-cited writers in the WTO Appellate Body: Helmersen, *supra* note 2, at 333-334.

[26] Antônio Augusto Cançado Trindade has been cited 297 times, but only by himself.

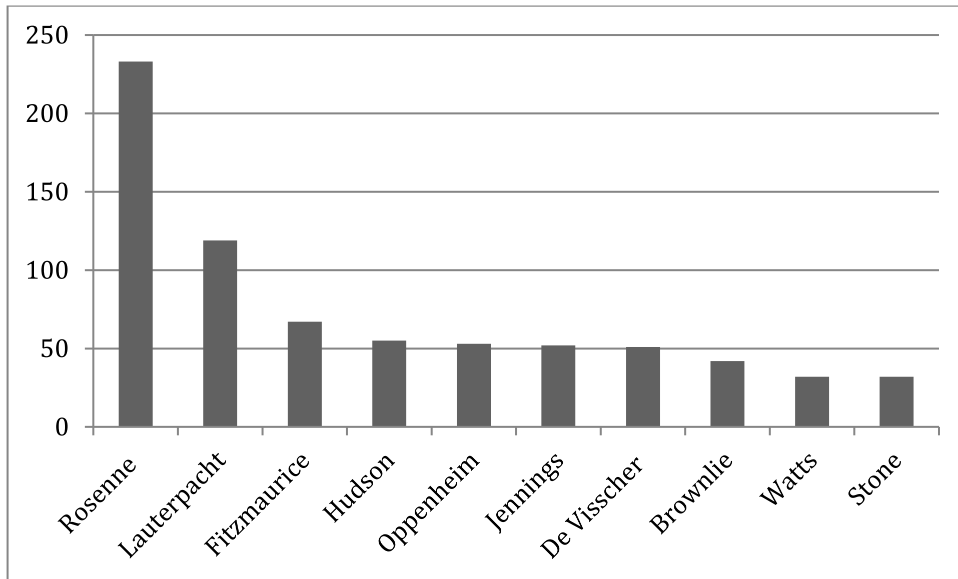

Figure 1: The 10 most-cited writers

Citations of teachings are ‘a useful measure of influence’, even though it ‘is not the same as influence’, and ‘only one measure of influence’.[27] Under that assumption, those most-cited writers are, at least *prima facie*, the ones whose works have the most weight and influence.

A related finding is that a small number of writers have been cited many times. The top ten most-cited writers have been cited a total of 726 times. This represents 17.9 % of a total 4050 citations (again excluding self-citations). While a total of 1280 writers have been cited in ICJ opinions, more than half of them (694) were cited only once. In other words, the top 0.8 % writers have more citations (726) citations than the bottom 50 % (640). Another significant figure is that the top 10 % most-cited writers have 2077 citations, which is just over 50 % of the total. By contrast the 10 % least-cited writers have 128 citations, which is 3 % of the total.

The results are illustrated in the pie chart below. The largest slice represents the top 10 % most-cited writers, the second largest represents the 10 to 20 % most-cited writers, and so on, until the last slice which represents the bottom 10 %.

[27] Sandesh Sivakumaran, ‘The Influence of Teachings of Publicists on the Development of International Law’ (2017) 66 *International and Comparative Law Quarterly* 1, 3.

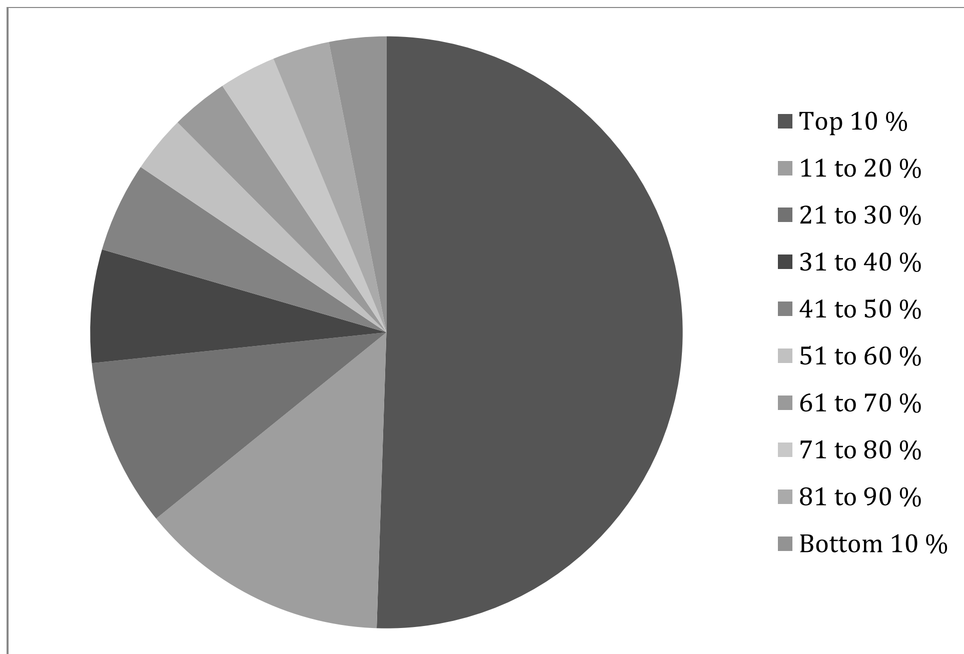

Figure 2: Writers' shares of all citations

3. THE FACTORS

A. Introduction

This section identifies factors that seem to influence the weight of teachings among ICJ judges.[28] The factors are mainly based on apparent attempts by judges to 'justify' references to teachings, by highlighting the quality of a work, the expertise of a writer, the official authority of a writer, and agreement among multiple writers.

Some judges do not 'justify' any of their references to teachings. Those who do, do not justify *all* of their references. There are examples of opinions where some references are justified while others are not, and even footnotes where only some references are justified. One reason for this is that a single justification may apply to multiple references. For example, in *Bosnia Genocide,* Judge ad hoc Kreća referred to teachings by William A. Schabas multiple times, but called Schabas 'the learned author' only once.[29] A judge could also justify one reference because the judge perceives the work in question to have less weight than other works that are cited

[28] This terminology is found eg in Stephen Hall, *International Law* (2nd edn, LexisNexis Butterworths 2006) 59.

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 11, Separate Opinion of Judge ad hoc Kreća 542.

(without being justified). For example, it is interesting that Judge ad hoc Pirzada in the *Aerial Incident of 10 August 1999 (Pakistan v. India)* case justified his reference to R. P. Anand by calling him a 'well-known Indian writer',[30] but did not justify references to Ian Brownlie or Shabtai Rosenne. The latter two are among the Court's most-cited writers, and Judge ad hoc Pirzada may have felt that it was necessary to justify including Anand in the same context. On the other hand, a judge may justify one reference to show that it has a greater significance than other references. An example could be Judge ad hoc Van den Wyngaert in the *Arrest Warrant* case, who referred to one work as 'very thorough', and the rest as 'other'.[31] In any of these cases, the implication seems to be that different teachings have different weight.

It is possible to compare how often each type of justification is made. This gives a rough indication of the relative importance of each factor. The quality of works and expertise of writers are the most common types of justifications, with 198 mentions of quality, and 190 of expertise. The official positions of writers were mentioned 107 times, while agreement between writers was mentioned 32 times. The ILC, in the *Customary International Law Conclusions*, argues that 'it is the quality of the particular writing that matters rather than the reputation of the author',[32] and Sivakumaran seems to agree.[33] While the purely quantitative analysis done in this paragraph suggests that expertise and quality are equally important in practice, that does not finally settle the matter. It is not possible to know precisely how important each judge considers the two factors (to the extent they even have a clear view on the matter). The most plausible view is that this varies from judge to judge (and more generally from lawyer to lawyer).

B. Expertise

This section argues that judges give more weight to writers whom they consider experts. This is indicated by judges' practice of justifying references to teachings by

[30] *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 12, Dissenting Opinion of Judge ad hoc Pirzada 95-96.
[31] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, Dissenting Opinion of Judge ad hoc Van den Wyngaert 166.
[32] ILC, *supra* note 23, at 111.
[33] Sivakumaran, *supra* note 27, at 12.

emphasising the expertise of the writer.[34] For example, judges have used terms that reflect the general expertise of writers, calling them 'expert',[35] 'learned',[36] 'distinguished',[37] and a variety of similar terms. Judges have also used terms that apparently focus on other actors' perceptions of the writers, such as 'well-known',[38] 'famous',[39] and 'influential',[40] and other such terms. Some statements highlight the consistent quality of an author's works, such as 'characteristically thoughtful',[41] 'characteristically thorough',[42] and 'characteristic cogency'.[43] That is another way of saying that the author is an expert. Yet another writer was praised for having 'so often and so brilliantly contributed to the cause of international law and justice'.[44] Some statements draw more historical lines. Judge Trindade often discusses the 'founding fathers' of international law.[45] Among them are 'Grotius himself',[46] as referred to by Judge Weeramantry. Weeramantry has also (and similarly) referred to 'fountainheads of international law'.[47] Some judges have designated writers, works, or institutions as

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[34] *Ibid*., at 11.

[35] Eg *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand), Judgment, I.C.J. Reports 2013*, p. 281, Separate Opinion of Judge Cançado Trindade 339-340.

[36] Eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, Separate Opinion of Judge Owada 169.

[37] Eg *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, Dissenting Opinion of Sir Arnold McNair 182.

[38] Eg *North Sea Continental Shelf*, *supra* note 12, Dissenting Opinion of Vice-President Koretsky 157.

[39] *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, Dissenting Opinion by Judge Krylov 72.

[40] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, Separate Opinion of Vice-President Weeramantry 378.

[41] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra* note 7, Separate Opinion of Judge Dillard 168.

[42] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, Separate Opinion of Judge Dillard 68.

[43] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 169, Dissenting Opinion of Judge Schwebel 197-198.

[44] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, Dissenting Opinion of Judge Jessup 325-326 (also cited by *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10, Dissenting Opinion of Judge Schwebel 267-268).

[45] Eg *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, Separate Opinion of Judge Cançado Trindade 552-553.

[46] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, Dissenting Opinion of Vice-President Weeramantry 372-373.

[47] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, Separate Opinion of Judge Weeramantry 239.

being or having ‘authority’,[48] ‘authoritative’,[49] and similar terms. Further praise has focused on more specific competence. Writers have been called ‘one of the forerunners of the international protection of human rights’,[50] ‘the first writer on intervention before the PCIJ’,[51] ‘the leading author on genocide’,[52] and many similar designations.

A single reference to a writer being ‘most qualified’[53] is the only one that mirrors the wording of the ICJ Statute Article 38(1)(d). However, the terms mentioned here all generally seem to express the same sentiment that was inferred from the ICJ Statute in Section 2 above, that some writers are more ‘highly qualified’ than others and that this affects the weight of their teachings.

Writers have also been singled out for being ‘one of the directors of’ the ‘Revista peruana de Derecho internacional’[54] and ‘Secretary of the Institute of International Law’.[55] The point seems to be that these positions imply and require a certain expertise. Along with the reference the ‘Secretary of the Institute of International Law’, the Institute was said to have ‘had a substantial share in the preparation of the first drafts of the Convention’ that was discussed.[56] This means that the expertise was not just on a general level, but related specifically to the legal instrument that was at issue in the case.

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[48] Eg *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958: I.C.J. Reports 1958*, p. 55, Separate Opinion of Judge Sir Hersch Lauterpacht 96.

[49] *Eg Arrest Warrant of 11 April 2000*, *supra* note 31, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal 72.

[50] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, Dissenting Opinion of Judge Cançado Trindade 306.

[51] *Sovereignty over Pulau Ligitan und Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575, Separate Opinion of Judge ad hoc Weeramantry 647.

[52] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 11, Separate Opinion of Judge Tomka 347.

[53] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, Dissenting Opinion of Judge de Castro 381.

[54] *Colombian-Peruvian asylum case, Judgment of November 20th 1950: I.C.J. Reports 1950*, p. 266, Dissenting Opinion by Judge Azevedo 344.

[55] *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants*, *supra* note 48, Separate Opinion of Judge Sir Hersch Lauterpacht 84.

[56] *Ibid*.

The Institut de Droit International (IDI) as such has also been the subject of praise.[57] It has been called 'authoritative'[58] and 'learned'[59] (alongside the International Law Association, or ILA). Judge Weeramantry in *Nuclear Weapons* noted that an IDI resolution was supported by 'an illustrious list of the most eminent international lawyers of the time'.[60] The implication may be that even though the IDI as an institution has a certain authority, the expertise of the specific individuals who are at any time involved in its work affects the weight of that work.

The assumption that the weight of teachings varies by the writer's expertise is also found in teachings themselves,[61] and in the ILC.[62] D'Aspremont suggests that the reputation of the institution where a writer is employed can be used as a proxy for expertise,[63] which is plausible.

C. Quality

Judges justify some citations of teachings by saying something about the quality of the specific work. Various terms have been used.

Some terms relate to qualities of the text itself, such as 'clearly',[64] 'objective',[65] 'comprehensive',[66] and various others. Other terms focus specifically on the judges'

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[57] Eg *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, Dissenting Opinion of Judge Weeramantry 500 and 518-519.

[58] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra* note 7, Separate Opinion of Judge Dillard 162-163.

[59] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, Dissenting Opinion of Judge Cançado Trindade 194 and 197.

[60] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, Dissenting Opinion of Judge Weeramantry 508.

[61] Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons 1958) 24; L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *American Journal of International Law* 313, 345; Karol Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff 1993) 156.

[62] ILC, *supra* note 23, at 111.

[63] Jean d'Aspremont, 'Wording in International Law' (2012) 25 *Leiden Journal of International Law* 575, 582.

[64] Eg *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, Separate Opinion of Judge Jessup 192.

[65] *Fisheries Jurisdiction*, *supra* note 42, Separate Opinion of Judge de Castro 80.

[66] Eg *North Sea Continental Shelf*, *supra* note 12, at Dissenting Opinion of Judge Sorensen 242.

use of the teachings, such as ‘useful’,[67] ‘valuable’,[68] ‘helpful’,[69] and the like. Yet other terms are about other actors’ perceptions of the teachings. These include, among others, ‘generally accepted’,[70] ‘celebrated’,[71] and ‘influential’.[72] The terms ‘standard’[73], ‘classic’,[74] and ‘leading’[75] may also be taken as attributes that are shaped by the perceptions of other actors: What is a or the standard, leading, or classic work in a field depends on the views of the actors in that field. The adjective ‘well’ is also used in various contexts, as in ‘well described’ and the like.[76]

The IDI has been said to have been ‘preside[d] [over] with such distinction’,[77] which presumably leads to a high-quality result. One writer’s observations were ‘useful to note’.[78] Another writer was part of a ‘predominant legal theory’,[79] while yet another’s work contained some of ‘the insights of modern analytical jurisprudence’.[80] One judge referred to ‘*De Jure Belli ac Pacis* itself’,[81] apparently implying that this work has a special status. One work had ‘never been surpassed’.[82] Other writings were

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[67] Eg *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, Declaration of Judge Keith 743.

[68] *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 7, Separate Opinion of Judge ad hoc Mahiou 70.

[69] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Order of 13 December 1989, I.C.J. Reports 1989*, p. 132, Separate Opinion by Judge Shahabuddeen 157.

[70] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, Dissenting Opinion of Judge de Castro 69.

[71] Eg *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151, Dissenting Opinion of President Winiarski 229.

[72] Eg *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, Dissenting Opinion of Judge Oda 199.

[73] Eg *Barcelona Traction, Light and Power Company, Limited*, *supra* note 64, Separate Opinion of Judge Sir Gerald Fitzmaurice 85.

[74] Eg *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10, Separate Opinion of Judge Sir Robert Jennings 546.

[75] Eg *Land, Island and Maritime Frontier Dispute*, *supra* note 6, Dissenting Opinion of Judge Oda 737.

[76] Eg *Continental Shelf*, *supra* note 72, Separate Opinion of Judge Ago 97.

[77] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, Dissenting Opinion of Judge Weeramantry 518-519.

[78] *Ibid*., at 543.

[79] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, Dissenting Opinion of Vice-President Schwebel 322-323.

[80] *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53, Dissenting Opinion of Judge Weeramantry 163.

[81] *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 46, Dissenting Opinion of Vice-President Weeramantry 372-373.

[82] *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10, Dissenting Opinion of Judge Schwebel 285-286.

'without any exaggeration whatever'.[83] Yet another work 'better described' the law.[84] Other works have been called 'the most exhaustive treatise on the subject'[85] and 'respectable authority'.[86] One work was said to have 'persuasive force'.[87] In another case there was 'not better' writing on a subject than the teachings that were cited.[88] Another opinion cited 'a unique systematic work'.[89] One judge argued that 'a court of law need not look beyond the words of Charles de Visscher'.[90]

Some justifications straddle the line between referring to the author (as described in section 3.B above) and the work itself (as described in this section). For example Judge Schwebel in the *Nicaragua* case referred to an 'authoritative' interpretation (which is about the work), but did so in connection with mentioning that the author was a former legal director of the Organization of American States (which is about the author).[91] The joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case referred to 'the authoritative Pictet commentary'.[92] This is a reference to the work, but its author was employed by the ICRC, which also published the text, and which has a significant role in the field on international humanitarian law. These references should be seen as belonging to both categories, which illustrates that both quality and expertise are important to the weight of teachings.

That works of high quality have more weight means that works of low quality have less. An example of a judge pointing to the low quality of specific teachings is found

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[83] *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952*, p. 93, Dissenting Opinion of Judge Levi Carneiro 167.

[84] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *supra* note 47, Separate Opinion of Judge Ajibola 287.

[85] *South-West Africa–Voting Procedure, Advisory Opinion of June 7th, 1955: I.C.J. Reports 1955*, p. 67, Separate Opinion of Judge Lauterpacht 104.

[86] *Barcelona Traction, Light and Power Company, Limited*, *supra* note 64, Separate Opinion of Judge Jessup 183.

[87] *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants*, *supra* note 48, Separate Opinion of Sir Percy Spender 124-125.

[88] *Colombian-Peruvian asylum case*, *supra* note 54, Dissenting Opinion by M. Caicedo Castilla 364.

[89] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 36, Separate Opinion of Judge ad hoc Kreća 495.

[90] *Arbitral Award of 31 July 1989*, *supra* note 80, Separate Opinion of Judge Shahabuddeen 119.

[91] *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10, Dissenting Opinion of Judge Schwebel 388.

[92] *Arrest Warrant of 11 April 2000*, *supra* note 31, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal 72.

in the opinion by Judge Oda in *Land, Island and Maritime Frontier Dispute*. He noted that while scholars were unanimous, this had 'little […] value' because their conclusions were based on a single decision of the Permanent Court of Arbitration, which they according to Oda had read too much into.[93]

The assumption that the weight of teachings depends on their quality is shared by writers,[94] and by the ILC in the *Customary International Law Conclusions*.[95] Writers mention various aspects of such quality.

For example, Rosenne argues that 'non-governmental scientific organizations' have 'a special place' because their works are produced through 'a Socratic dialog, cut and thrust coupled with a great deal of give and take'.[96] Sivakumaran similarly claims that '[t]he process through which the teaching is created is also of relevance'.[97] Quality may therefore also be a matter of procedure, as opposed to merely substance, as long as that procedure can be presumed to produce good substance.

Hall mentions 'relevance' and 'age' among 'factors which are relevant in determining the relative persuasive weight attached to different' teachings.[98] Oraison also mentions age.[99] However 'age' in this sense is already covered by 'relevance', since older works will grow less relevant as the law changes. Age alone should not therefore have any independent effect on the weight of a work. Moreover, relevance is a not an appropriate factor for determining the weight of teachings, it is instead significant when deciding whether it is useful to consult and cite them in the first place. This is why, even though the 'relevance' of teachings has been emphasised by judges,[100] it is not mentioned in the above list of the ways in which judges emphasise the quality of teachings.

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[93] *Land, Island and Maritime Frontier Dispute*, *supra* note 6, Dissenting Opinion of Judge Oda 748.
[94] Eg Oppenheim, *supra* note 61, at 345.
[95] ILC, *supra* note 23, at 111.
[96] Shabtai Rosenne, *Practice and Methods of International Law* (Oceana 1984) 121.
[97] Sivakumaran, *supra* note 27, at 10.
[98] Hall, *supra* note 28, at 59-60.
[99] André 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.
[100] Eg *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisiona1 Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 219, Declaration by Judge Elaraby 262.

Another aspect of 'quality' that is emphasised by various writers is whether the work is objective, including whether it sticks to *lex lata* discussions, as opposed to straying into *lex ferenda* territory.[101] Similar assumptions about weight and objectivity can also be found in the ILC's work on customary international law.[102] They are also reflected in national judicial decisions such as the United States Supreme Court's *Paquete Habana* decision[103] and *West Rand Central Gold Mining Co. v. The King* from the English High Court of Justice.[104] This point of view finds support in the use of 'objective' as a term to justify references to teachings in individual opinions, as noted at the beginning of this subsection. L*ex lata* works may be more relevant than *lex ferenda* works to most judges because they prefer to find the law rather than to create it.

D'Aspremont mentions 'place of publication […] among the parameters that determine whether an argument gains authority'.[105] That is plausible, but the ICJ judges' opinions do not reveal whether they consider it.

D. Official Positions

According to the ICJ opinions that are studied here, the official position of a writer seems to affect the weight of their teachings. Many of the most-cited writers in the ICJ have themselves been ICJ judges or have held other official positions, for example as government legal advisers or counsel. For example, among the ten most-cited writers mentioned in Section 2, five were judges of the PCIJ and ICJ (Lauterpacht, Fitzmaurice, Hudson, Jennings, and de Visscher). Watts was a government legal adviser, and Rosenne was an ambassador. This is an indication that the official position of the writer affects the weight accorded their teachings.

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[101] Eg Anthony D'Amato, 'What Does It Mean to be an Internationalist?' (1989) 10 *Michigan Journal of International Law* 102, 104. However, Robert Y Jennings, 'What is International Law and How Do We Know It When We See It' in Martti Koskenniemi (ed), *Sources of International Law* (Ashgate 2000) 27, 46-47 questions whether 'such a distinction can readily be made'.

[102] International Law Commission, *Third report on identification of customary international law by Michael Wood, Special Rapporteur (A/CN.4/682)* (United Nations 2015) 45; ILC, *supra* note 23, at 111.

[103] United States Supreme Court, *The Paquete Habana* (1900) 175 U.S. 677, 700.

[104] English High Court of Justice, *West Rand Central Gold Mining Co. v. The King* [1905] 2 KB 391, 402.

[105] D'Aspremont, *supra* note 63, at 582.

Judges have, moreover, justified their references to teachings by mentioning some official position held by the author.[106] In ICJ opinions there are many references to a writer being either a 'Judge'[107] or 'President'[108] of the ICJ itself. Having been a 'Judge'[109] or 'President'[110] of the PCIJ has also been mentioned, as has as membership of 'both courts'.[111] A 'President of the Arbitral Tribunal of Upper Silesia' has been cited,[112] and one writer was described generally as an 'international judge'.[113] Some opinions have referred to judges 'writing extra-judicially',[114] 'out of court',[115] and 'in another context'[116] (than as a judge). A plausible interpretation of this is that the writer also being a judge gave the teachings added weight.

These references may have had varying motivations. The argument here is that the primary motivations are the writer's special insights, general expertise, and acceptability to States: Having an official position of the kind discussed here usually means being involved in the creation and application of international law, which gives a special insight into the rules in question. Those who are appointed to such positions must generally possess significant expertise in international law in order to be considered in the first place. Appointments and elections are often decided by States, and being appointed will therefore usually imply that one's views on and approach to international law is found acceptable by at least one State.

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[106] The use of 'Judge' or 'President' (or for that matter 'Professor') as part of the name of a writer is not counted here. Such usage is excluded on the assumption that this is a formality similar to the use of 'Mr.' or 'Ms.', and more about courtesy and correctness than about praising the person referred to. However, Sivakumaran, *supra* note 27, at 11 includes judges referring to titles such as Dr. and Professor in his discussion.

[107] Eg *North Sea Continental Shelf*, *supra* note 12, at Dissenting Opinion of Vice-President Koretsky 160.

[108] Eg *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, Joint Dissenting Opinion Judges Al-Khasawneh and Simma 114.

[109] Eg *Admission*, *supra* note 3, Dissenting Opinion by M. Krylov 109.

[110] Eg *Corfu Channel case*, *supra* note 39, at Dissenting Opinion by Judge Winiarski 53.

[111] *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, Dissenting Opinion by Judge ad hoc Rigaux 229.

[112] *South West Africa*, *supra* note 44, Dissenting Opinion of Judge Jessup 434-435.

[113] *Nuclear Disarmament*, *supra* note 3, Separate Opinion of Judge Tomka 897.

[114] Eg *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, Dissenting Opinion of Vice-President Weeramantry 504.

[115] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Order of 28 February 1990, I.C.J. Reports 1990*, p. 3, Dissenting Opinion of Judge Shahabuddeen 21.

[116] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, Dissenting Opinion of Judge Koroma 563.

Some references included the nationality of the author and judge, in cases where that country or region was involved in the case (one reference was to Canada,[117] another to Latin America[118]). This may be because those writers are seen as having a special relevance to the case. A similar example is the reference to writings by 'a former President of the Court himself',[119] when the legal question under discussion concerned the meaning of the ICJ statute. Most of the Presidents and Judges are designated as 'former'. Some references instead refer to the writings of someone who only later became a Judge at the Court: One writer was 'now' a Judge of the International Court of Justice',[120] two others were 'later' a member and Vice-President of the Court respectively,[121] while one was 'shortly to become' an ICJ judge.[122] In those cases, special insight gained from the position at the Court could not be the motivation for the reference. Rather their later appointment to the Court should be seen as a proxy for their expertise and their acceptability to States.

In the cases mentioned here, there are more references to Presidents (17) of the ICJ as there are to regular Judges (12). This despite there being fourteen times as many judges as presidents on the Court at any time. Regardless of the fact that all presidents have also been judges, and that the average tenure as president is shorter than that of a judge, there are more former judges than former presidents of the ICJ. The discrepancy in justifications may be caused by the assumption that the position of President requires more personal competence, gives a greater insight into the work of the Court, and represents a greater degree of trust from States.

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[117] *Fisheries Jurisdiction*, *supra* note 114, Dissenting Opinion of Judge Torres-Bernárdez, Judge ad hoc 656.

[118] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 592, Separate Opinion of Judge Cançado Trindade 6.

[119] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, Separate Opinion of Judge Cançado Trindade 80.

[120] *Aerial Incident of 10 August 1999*, *supra* note 30, at 105.

[121] Eg *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, Dissenting Opinion of Judge Schwebel 141.

[122] *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10, Dissenting Opinion of Judge Schwebel 394.

Judges citing teachings have also mentioned that writers have been 'Registrars' of the ICJ.[123] This position has some of the same features as that of judge, in that it may denote insight into the work of the Court, personal competence, and proximity to States. Furthermore, judges have mentioned that writers have been members of the ILC.[124] ILC membership is based on personal competence, gives insight into the development of specific areas of international law, and requires approval by States.

A different group of references to teachings has mentioned the writer's participation in the drafting of the rules that the judge was discussing. They include negotiators, delegates, and advisers in the negotiations of legal documents,[125] and (other) members of drafting or revision committees or conferences.[126] One writer had prepared a draft of a treaty provision,[127] another made a 'prominent contribution to the discussion leading to the drafting of' the ICJ's own rules.[128] Similar references are to writers who were 'Secretary of the Institute of International Law, which had a substantial share in the preparation of the first drafts of' a treaty (as mentioned in Section 3.B), a 'former Belgian delegate and jurisconsult whose knowledge of the United Nations dates from the San Francisco Conference',[129] and 'who was present on behalf of [the] Court both in the Committee of Jurists at Washington and in the relevant Committee of the Conference of San Francisco'.[130] The motivation behind these references seems to be the special insight that participation in negotiations may provide. This is in some sense similar to citing preparatory works. However, some citations cannot have been motivated by special insights: For example, one reference is to a writer who 'later

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[123] Eg *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Declaration of Intervention, Order of 4 October 1984, I.C.J. Reports 1984*, p. 215, Dissenting Opinion of Judge Schwebel 236.

[124] Eg *Jurisdictional Immunities of the State*, *supra* note 59, Separate Opinion of Judge Keith 169-170.

[125] Eg *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* note 45, Declaration of Judge Tomka, Vice President 464.

[126] Eg *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports 1959*, p. 127, Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender 174.

[127] *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *supra* note 47, Separate Opinion of Judge Weeramantry 237.

[128] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, Dissenting Opinion of Vice-President Weeramantry 290.

[129] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra* note 7, Dissenting Opinion of Judge Gerald Fitzmaurice 240.

[130] *Case concerning the Aerial Incident of July 27th, 1955*, *supra* note 126, Joint Dissenting Opinion by Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender 174.

became a member of the Committee which drafted the Statute of the Permanent Court'.[131] Since this author at the time the cited text was written had yet to participate in the negotiations, the reference cannot have been motivated by any special insight that the writer could have gained. Writers having participated in negotiations also says something about their personal competence more generally, and is a form of proximity to States.

Some references have concerned writers who have held official positions in intergovernmental organisations and the like: one 'Secretary-General of both the Stockholm and the Rio Conferences',[132] one 'Deputy Secretary of the United Nations Sea-Bed Committee',[133] one 'Vice-Chairman of the Permanent Mandates Commission' (and 'one of the most active members'),[134] and one 'former Director of the Department of Legal Affairs of the OAS'.[135] These references too may have been about expertise, insight gained from experience, and acceptability to States. Other opinions refer to writers' positions in State governments, such as a 'Legal Adviser of the United Kingdom's (UK) Permanent Mission to the United Nations between 1991-1994',[136] a US 'Assistant Secretary of State for International Organization Affairs',[137] and a 'President of the Supreme Court of Senegal',[138] and other similar positions. The posts of supreme court judge and legal adviser require some competence as a lawyer, and the references may in part be about the expertise of the writer. However, the position of Assistant Secretary of State is more of a political than a legal job, and does not to the same extent imply competence on legal questions. It rather implies proximity to State power. The position of legal adviser to the UN was brought up in

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[131] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, Dissenting Opinion of Judge Weeramantry 142.

[132] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, p. 288, Dissenting opinion by Judge ad hoc Sir Geoffrey Palmer 407-408.

[133] *Fisheries Jurisdiction*, *supra* note 42, Declaration by Judge Ignacio-Pinto 38.

[134] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Report: 1962*, p. 319, Dissenting Opinion of President Winiarski 451.

[135] *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 10, Dissenting Opinion of Judge Schwebel 384.

[136] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 11, Separate Opinion of Judge Tomka 320.

[137] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, Separate Opinion of Judge ad hoc Rigaux 387-388.

[138] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, Separate Opinion of Vice-President Weeramantry 91.

connection to a question of UN law, which shows that at least this reference can have also been about insight gained from the position.

Finally, some references do not fit any of the paragraphs above, but nonetheless seem to focus on the official authority of writer. A general reference to a writer being 'no less an insider than […]' is one example. [139] Another reference was to a writer who was a 'well-known [...] statesman',[140] and yet another was to writings by the 'counsel' in the present case.[141] One judge mentioned that a writer was 'cited in the Counter-Memorial of Peru as an authority in matters of American international law'.[142] The implication seems to be that when a State approves of teachings by incorporating arguments into their memorial, this gives the teachings a veneer of official authority.

A study of the WTO Appellate Body showed that 'many of the authors that have been cited the most […] have connections with governments'.[143] That finding is in line with the ICJ's emphasis on writers' official positions.

The assumption that a writer's official position affects the weight of writings is also shared by writers themselves. For example, teachings mention that the 'repute',[144] 'prestige',[145] or 'reputation'[146] of a writer is a factor when determining the weight of teachings. This should be read as a reference to (among other things) official positions held by the writer. According to Waibel, '[t]he influence of interpretive communities is inversely related to their openness'.[147] This should mean that official positions that are more difficult to obtain also give the office holder a greater influence on the law, including through teachings. Pellet holds that judges 'form a very special part of the

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[139] *Pulp Mills on the River Uruguay*, *supra* note 108, Joint Dissenting Opinion Judges Al-Khasawneh and Simma 114.

[140] *North Sea Continental Shelf*, *supra* note 12, Dissenting Opinion of Vice-President Koretsky 157.

[141] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, *supra* note 132, Dissenting opinion by Judge ad hoc Sir Geoffrey Palmer 386.

[142] *Colombian-Peruvian asylum case*, *supra* note 54, Dissenting Opinion by M. Caicedo Castilla 365.

[143] Helmersen, *supra* note 2, at 334.

[144] Hall, *supra* note 28, at 60.

[145] Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press 2012) 67.

[146] Wolfke, *supra* note 61, at 156.

[147] Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds) *Interpretation in International Law* (Oxford University Press 2015) 147, 156.

legal doctrine in that, sitting on the bench, their authors have had the benefit of listening to the contrary arguments of the parties'.[148] Thus, some of the increased weight of teachings written by judges is explained by the judges' immersion in specific cases. This cannot be a full explanation, however, since justifications of citations based on official authority are not limited to legal issues with which the writers dealt in an official capacity.

E. Agreement Between Multiple Writers

Another factor that affects the weight of teachings is whether multiple works are in agreement. Various examples can be found in the ICJ's practice. First of all, among the seven references to teachings in the ICJ's majority opinions (as mentioned in Section 2), one is to multiple works ('the successive editors of Oppenheim's International Law'), while another three are to collective bodies (the IDI, and the ICRC twice). Thus, only a minority of the citations of specific works (three out of seven) are to individual works by individual writers. Other majority opinions have contained unspecific references to 'writers', 'writings', and the like, which should be read as a reference to multiple agreeing works. Thus, the ICJ's majority opinions have mostly invoked multiple writers at once, as opposed to individual writers.[149]

In individual opinions, some judges have referred to 'agreement' between teachings,[150] and to views that have been 'accepted'[151] or 'approved'[152] by other teachings, and various similar phrases. One judge ad hoc asked rhetorically whether 'the Court [should] not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes'.[153] Thus, the opinion of 'many', presumably writers, mattered.

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[148] Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 731, 869.

[149] Eg Wolfke, *supra* note 61, at 156.

[150] Eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 11, Dissenting Opinion of Judge ad hoc Mahiou 419.

[151] Eg *Aegean Sea Continental Shelf*, *supra* note 70, Dissenting Opinion of Judge de Castro 69.

[152] Eg *Barcelona Traction, Light and Power Company, Limited*, *supra* note 64, Separate Opinion of Judge Tanaka 144.

[153] *Arrest Warrant of 11 April 2000*, *supra* note 31, Dissenting Opinion of Judge ad hoc Van den Wyngaert 156.

Judges have also used lack of agreement among writers as an argument against giving weight to their views. One judge argued that 'some authorities seem to support' one view, but 'most authorities do not mention' it 'and even reject it'.[154] A judge ad hoc found it significant that a 'controversial interpretation' was 'not upheld by the greater part of scholarly opinion'.[155] Judge ad hoc Kreća in *Croatia Genocide* cited an ILC text which 'however, mentions only one article', implying that the failure to cite multiple works that agreed with each other reduced the weight of the ILC text.[156]

Works by collective institutions such as the IDI will by definition be backed by multiple concurring individuals. This should give them a default level of weight that is greater than that of 'regular' teachings. There are examples of judges apparently considering IDI texts to be authoritative.[157] A particularly interesting example is Judge Weeramantry's opinion in *Nuclear Weapons*, where he emphasised how an IDI resolution 'was adopted by 60 votes, with one against and two abstentions'.[158] Thus it was significant not just that the resolution came from the IDI, but that such a large number of people concurred. Judge (and former President) Tomka, sitting in an academic panel, similarly 'expressed his scepticism regarding the value of resolutions adopted by learned societies purporting to reflect customary international law when, for instance, few members of that society are present and the resolution is adopted by a thin majority'.[159] Individual ICJ opinions contain a total of 191 references to 'institutional' teachings: 85 to the IDI, 29 to the ICRC, 18 to the ILA, 15 to the American Law Institute, and 14 to Harvard Law School.

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[154] *Ibid*., at 157-158.

[155] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 11, Dissenting Opinion of Judge ad hoc Mahiou 404.

[156] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 36, Separate Opinion of Judge ad hoc Kreća 495.

[157] Eg *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: I.C.J. Reports 1960*, p. 192, Dissenting Opinion of Judge Urrutia Holguin 224.

[158] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, Dissenting Opinion of Judge Weeramantry 508.

[159] Judge Tomka quoted in Amelia Keene (ed), 'Outcome Paper for the Seminar on the International Court of Justice at 70' (2016) 7 *Journal of International Dispute Settlement* 238, 260.

It may also be significant that a single writer has held the same view consistently. For example, Judge Jessup in *South West Africa* noted that '[a]fter a decade had passed, Lord McNair evidently found no reason to change his view'.[160] As mentioned above, one of the two references to specific teachings in ICJ majority opinions was to 'the successive editors of Oppenheim's International Law'. The significance of this may have been not only that multiple editors agreed, but also that individual editors held on to their views throughout successive editions.

More generally, judges often cite multiple authors for the same point. One motivation for this is probably that citing multiple writers is seen as more authoritative than citing only one.

The idea that the weight of teachings in international law varies with the number of agreeing writers finds support in the *Renard* case from the English Court of Admiralty, which asked rhetorically 'who shall decide, when doctors disagree?'.[161] The *Franconia* case from the English Court for Crown Cases Reserved nonetheless reminds us of the limits of scholarly unanimity, by noting that 'no unanimity on the part of theoretical writers would warrant the judicial application of the law on sole authority of their views'.[162]

Scholars themselves assume that teachings have more weight if multiple writers agree,[163] as does the ILC.[164]

An interesting aspect of agreement between writers is whether the writers represent different regions of the world. Scholars argue that this is one reason why collective institutions (such as the IDI) 'have special authority',[165] and the ILC's *Customary International Law Conclusions* agrees.[166] However, it is not clear that this is something ICJ judges consider important.

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[160] *South West Africa Cases*, *supra* note 134, Separate Opinion of Judge Jessup 406.
[161] English Court of Admiralty, *The 'Renard'* [1778] 165 All ER 51, 51-52.
[162] English Court for Crown Cases Reserved, *The Queen v. Keyn* [1876] 2 Ex D 63, 202.
[163] Eg Lauterpacht, *supra* note 61, at 24.
[164] ILC, *supra* note 102, at 45.
[165] Eg Virally, *supra* note 15, at 153.
[166] ILC, *supra* note 23, at 112.

4. THE COLLECTIVE NATURE OF AUTHORITY IN INTERNATIONAL LAW

There are numerous examples of individual ICJ opinions that, when citing teachings, use terminology that implies that weight is determined through a collective process. As mentioned in Section 3, Judges have referred to works and authors as being, for example 'well-known', 'famous', 'influential', 'celebrated', and 'generally accepted'. The same point can be inferred from terminology that is used in teachings themselves. For example, 'repute',[167] 'prestige',[168] and '*recognised* competence, impartiality and authority'[169] (emphasis added) and similar terms have been mentioned as factors that affect the weight of teachings. These terms must necessarily refer to a collective process.

More generally, the concepts of quality, expertise, and the authority of an institution cannot be ascertained by a single individual in a vacuum. What one person finds to constitute quality, expertise, and authority depends, at least to some extent, on the judgement of others. There is thus a continuous collective process which produces a loose consensus about what constitutes 'quality' in writing about international law, who the greatest 'experts' on international law are, and which institutions are the most authoritative.[170] However, the process itself and its results are rarely explicitly discussed or written down. The process is, instead, informal and largely tacit.

An interesting aspect of this is what may be called the 'Matthew Effect', meaning that 'rewards tend to be skewed towards those who are already highly reputed'.[171] When a specific work is cited in a judicial decision, this may have been done because that work had more weight than others, but it may also give the cited work even more weight simply by the fact that it was cited in a judicial decision.[172]

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[167] Hall, *supra* note 28, at 60.
[168] J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sir Humphrey Waldock ed, 6th edn, Oxford University Press 1963) 66.
[169] Lauterpacht, *supra* note 61, at 24.
[170] In the words of Zarbiyev, *supra* note 21, 313, [a]uthority […] is a socially sanctioned deference entitlement'.
[171] Neil Duxbury, *Judges and Jurists: An Essay on Influence* (Hart 2001) 11, referring to Robert K Merton, 'The Matthew Effect in Science' (1968) 159 *Science* 56, 58.
[172] Eg Sivakumaran, *supra* note 27, at 28.

5. INCENTIVES FOR JUDGES

A. Introduction

Judges have incentives to use and cite authoritative teachings. Three such incentives are discussed here: increased the authority of the judges' opinion, saving time, and complying with the ICJ Statute Article 38(1)(d).

B. Increased Authority

Citing an authoritative work may make a judicial opinion look more authoritative. Lawyers aspire to have their work accepted by others. This holds true of academics who publish research and of lawyers pleading before judges, but also of judges themselves.[173] Therefore, one reason why judges cite teachings seems to be that they think it will improve how they are perceived by other actors.[174] Teachings can therefore be cited 'for strategic reasons'.[175] It is possible to distinguish between a 'defensive'[176] and an 'offensive' aspect of this 'strategic' function. The 'defensive' is about preventing criticism of an opinion, while the 'offensive' is about convincing others of its cogency. References to teachings can 'enhance […] credibility', 'create the impression of being thoroughly versed in the relevant literature', and associate the judge 'with greatness'.[177] This may in turn 'contribute to the overall persuasiveness of judicial opinions, helping to create a general impression that decisions are well supported'.[178] According to Cole, teachings citations 'can […] increase the persuasiveness of the award for the parties',[179] and can '[reduce] the likelihood that the tribunal's award will be controversial, as it can be seen to be based upon a

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[173] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma 151.

[174] Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2011) 42 *British Journal of Political Science* 413, 413 (about judges citing judicial decisions).

[175] David L Schwartz and Lee Petherbridge, 'The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study' (2011) 96 *Cornell Law Review* 1345, 1354.

[176] Tony Cole, 'Non-Binding Documents and Literature', in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 289, 314.

[177] Duxbury, *supra* note 171, at 9.

[178] Robert J Hume, 'Strategic-Instrument Theory and the Use of Non-Authoritative Sources by Federal Judges: Explaining References to Law Review Articles' (2010) 31 *Justice System Journal* 291, 295.

[179] Cole, *supra* note 176, at 303.

trustworthy source'.[180] In this context, more authoritative teachings will be a more 'trustworthy source'.

However, the opposite effect is also possible, in that an absence of references to teachings may make a judicial decision look more authoritative. The implication of not citing teachings may be that the judge considers their opinion to be authoritative enough on its own. This is a plausible reason why ICJ majority opinions almost never cite teaching (as noted in Section 1), while teachings are cited more frequently in individual opinions, which have a lower inherent authority.[181]

It is intuitive that higher-quality works are more authoritative. A work that is better written, more thorough, or more 'celebrated' (as per Section 3.C), will be more likely to espouse views that other lawyers agree with. This is significant when authority is seen as a collective process, as discussed in Section 4.

When judges cite works that their audiences are unfamiliar with, the judges must themselves be in a position to distinguish authoritatively between higher quality and lower quality teachings in order for the authority-by-association effect to apply. ICJ judges have this authority, but not all lawyers do. However, if audiences repeatedly disagree with a judge's designation of high-quality teachings, trust in the judge's assessments is undermined. Judges therefore have an incentive not to invoke quality too often, and to do so only when they actually believe that the work is good.

An additional effect of emphasising the quality of a cited work is that it shows that the judge has made an effort to assess the work and a conscious choice about citing it. Judges can cite works that they have not even read,[182] but by emphasising the quality of a cited work, the judge shows that the citation is 'genuine'. This makes the opinion look more thorough and informed, which contributes to its authority.

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[180] *Ibid*., at 309.
[181] Stewart Manley, 'Citation Practices of the International Criminal Court: The Situation in Darfur, Sudan' (2017) 30 *Leiden Journal of International Law* 1003, 1006
[182] E.g. Deborah J Merritt and Melanie Putnam, 'Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles' (1996) 71 *Chicago-Kent Law Review* 871, 873.

Much the same applies to expertise. The title of expert is generally extended to writers who have a history of espousing views that that others have agreed with, and writers who possess outstanding knowledge and insight about the law, which in turn makes them more likely to hold views that are shared by others. More expert writers therefore have more authority, and citing them contributes to the more to the authority of an opinion than citing less expert writers. ICJ judges are in a position to distinguish authoritatively between more and less expert writers.

According to the analysis presented in Section 3, references to a writer's official positions are used as proxies for their expertise and their acceptability to States. Citing a writer who is acceptable to States in an opinion increases the likelihood that States will have a favourable view of the opinion. This is particularly important to the ICJ, since it is States that bring the Court's cases, and compliance with the Court's decisions is dependant on States accepting them (since decisions are not enforced).

While judges rely on their own authority when they assess quality and expertise, such authority is less important when judges refer to writers' official positions. There is a rough but broad agreement about which official positions that confer what authority in international law, to a much greater extent than there is agreement on the precise quality and expertise of every specific writer and scholarly work.

Judges also tend to emphasise that multiple writers agree. All else being equal, when more writers agree on a point, it is more likely that they are correct. This point is nevertheless tightly bound up with expertise and quality. The opinion of one outstanding writer is worth more than the opinion of two poor ones (and probably even more than ten poor ones). The significance of agreement between writers as an authority-enhancing factor therefore increases exponentially when it is combined with other the other factors discussed here.

C. Saving Time

On a more practical level, citing authoritative writers can save time for judges. This is in part because authoritative writers are, at least presumably, more likely to be correct about the law. Raz argues that '[a]uthoritative utterances can be called "content - independent" reasons', meaning that they are 'not conditional on […] agreement on

the merits'.[183] Hernández uses similar terminology, and holds that 'content-independent' authority 'carries weight due to the probability of having merit'.[184] Applied to judges citing teachings, this means that judges can trust the views authoritative writers, and spend less time on independent research or prolonged deliberation. Similarly, Cole points out that consulting teachings 'allows [judges] to draw from expertise it might not itself possess' and 'can […] increase the likelihood that [their] understanding of international law is correct'.[185] Another way to phrase this is that teachings 'relive the judge',[186] since they allow a judge 'to invoke the authoritative writing and proceed without further analysis or argument'.[187] While this time-saving function of teachings can be significant, it also carries risks. Teachings are 'at one remove' from 'primary sources',[188] and reliance on them may discourage independent consultation of the sources that are cited. Teachings may, for example, be used 'as evidence of the existence and content of custom instead of thoroughly analyzing state practice'.[189]

Relying on a writer whose expertise is reputed, can undoubtedly save a judge time. If the judge knows that the writer is good, they can look at their work and trust that is likely to be correct. The same is true for a writer who holds or has held an important official position, since official positions can be seen as proxies for expertise, as discussed in Section 3 above. In addition to this, citing a writer who holds an official position may contribute to the persuasiveness of the opinion towards the institution in question. Citing the writings of a sitting ICJ judge could increase the likelihood that the opinion will be accepted by that judge, or even by the Court as a whole.

By contrast, reading (and citing) multiple writers who agree necessarily takes time, and is therefore not something that will save time for judges. A similar point can be

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[183] Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 35 and 40.
[184] Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 171.
[185] Cole, *supra* note 176, at 301 and 303.
[186] Wolfke, *supra* note 61, at 156.
[187] Cole, *supra* note 176, at 308-309.
[188] Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 63, 84.
[189] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757, 775.

made about citing high-quality works. A work must usually be read quite thoroughly in order to establish its quality, which also takes time. If a judge already knows that a work is good, they can consult it more quickly next time. If the second time around they consult a specific passage or chapter whose quality they have not yet assessed, they can build on a *presumption* of quality, which can save time. If the presumption is extended to *other works* by the same writer, it is more correct to say that what is invoked is the writer's expertise, rather than the quality of the work. Therefore, quality is not part of the 'content-independent' authority discussed above.

D. Compliance With the ICJ Statute Article 38

ICJ judges are bound by the ICJ Statute, including Article 38. They should therefore be interested in grounding their methodological approach in the wording of Article 38.

The first three of the factors discussed in Section 3, expertise, quality, and official positions, can be linked to the phrase 'the most highly qualified publicists' in the ICJ Statute Article 38(1)(d). The 'most highly qualified publicists' are those with the most expertise. In many cases they will also write the highest-quality teachings. Holding an important official position should also be seen as an aspect of being 'most highly qualified'. This is because appointment requires expertise, and because doing the work enhances expertise. Moreover, the official positions in question are ones that confer a certain authority merely by holding the office. As regards the fourth factor, unanimity, this too has a connection to the ICJ Statute Article 38(1)(d), which speaks about 'teachings' and 'publicists', in plural. That these writers should represent different regions is in line with the wording of the ICJ Statute Article 38(1)(d) and its focus on 'publicists of the various nations'. All of the factors that were identified in Section 3 can thus be traced back to the ICJ Statute Article 38(1)(d). The factors are part of the legal framework that governs the work of the ICJ and its judges.

That being said, the determination of what constitutes 'quality' and 'expertise' will to some extent be subjective. Judges can form their own opinion on what constitutes good legal writing, who is a good lawyer, and (to a lesser extent) which official positions that are the most authoritative. While the community of international

lawyers have developed certain shared guidelines, as discussed in Section 4, individual lawyers and judges are to some extent free to form their own views. Thus, while the factors are part of the Court's legal framework, they do not 'bind' or restrict the judges to any significant extent.

6. Who Are 'the most highly qualified publicists'?

The data presented in this article makes it possible to count which writers who are subject to the highest number of 'justifications' (ie where judges justify a reference to teachings by emphasising the quality of a work or the expertise or official position of the writer). The first nine are H. Lauterpacht, Rosenne, Jiménez de Aréchaga, G. Fitzmaurice, Hudson, Jennings, Oppenheim, Huber, and Jenks, while the tenth place is shared between Elias, Morelli, Pufendorf, Radbruch, Scelle, and Wolff. The data are illustrated in the figure below, which shows writers along the horizontal x-axis and the number of times judges have 'justified' citations of the writers along the vertical y-axis.

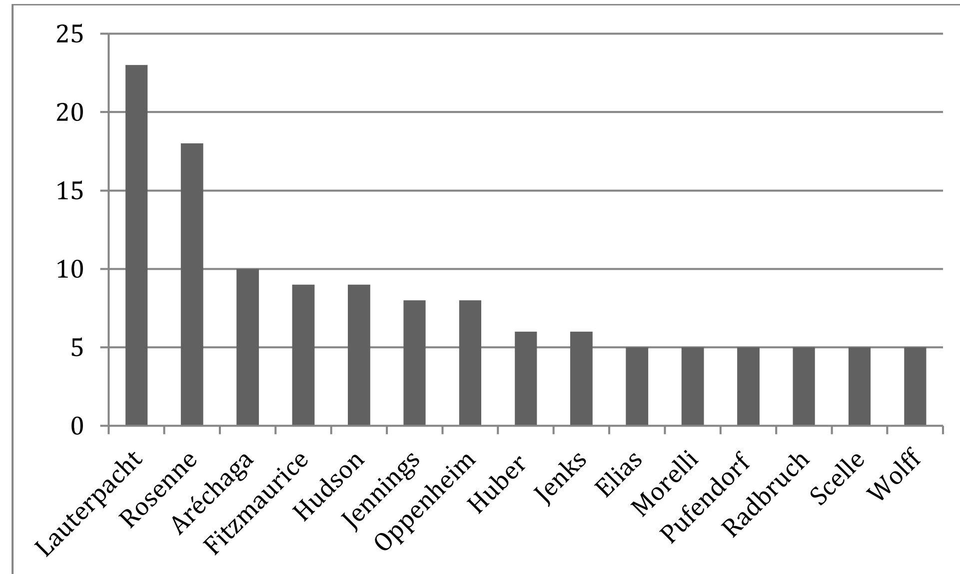

Figure 3: Writers by number of 'justifications' of citations

An alternative way to identify the 'most highly qualified publicists' is to count who is cited most often. The ten most-cited writers, as mentioned in Section 2: Rosenne, H. Lauterpacht, G. Fitzmaurice, Hudson, Oppenheim, Jennings, de Visscher, Brownlie, Watts, and Stone.

Counting the number of judges who cite a writer is thus a useful supplement to counting how many times each writer is cited, since 'individual judge's preferences skew the data'.[190]

The ten writers cited by the highest number of judges: Rosenne, H. Lauterpacht, Oppenheim, Jennings, Hudson, G. Fitzmaurice, de Visscher, Brownlie, Watts, and Waldock. The data are illustrated in the figure below, which shows the writers along the horizontal x-axis and the number of judges who have cited them along the vertical y-axis.

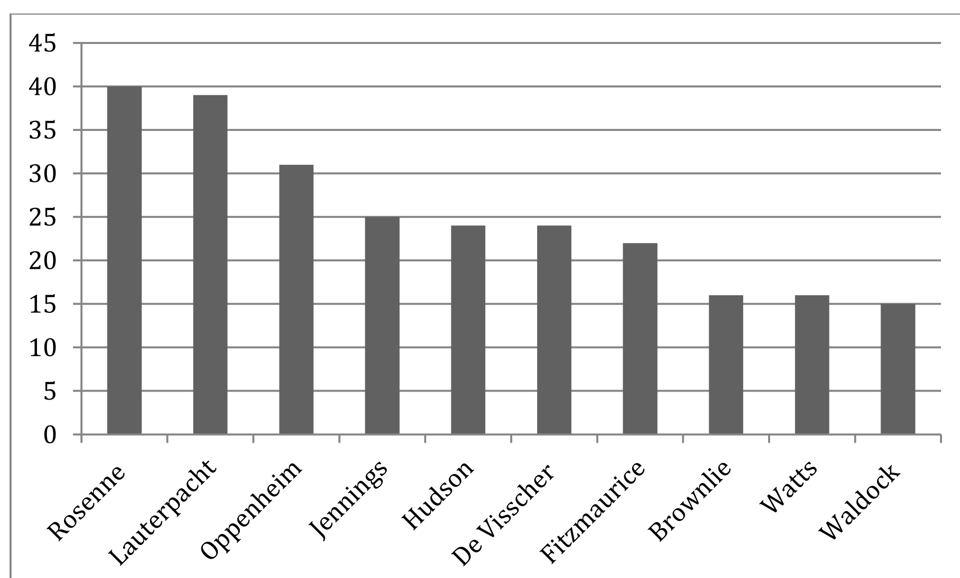

Figure 4: Writers by number of judges citing them

This shows that while the numerical analyses identify Shabtai Rosenne as the most-cited writer among ICJ judges, the most 'justified' writer is Hersch Lauterpacht. None of these statistics say anything final or decisive about who the 'most highly qualified publicists' are, but they do say something about which writers the judges think highly of and prefer to cite. It can also be mentioned that Lauterpacht is cited on, and wrote about, a wider variety of topics than Rosenne, who focused heavily on the procedural

[190] Michael 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, 160.

law of the ICJ itself. Who are ‘the most highly qualified publicists’ should depend on which area of international law one is talking about.

7. Conclusion

This article has argued that ICJ judges consider the following factors when assessing the weight of teachings: the quality of a work; the expertise of a writer; the official positions of a writer; and whether multiple writers agree. It seems that the process by which the weight of teachings is determined is collective, informal, and largely tacit. Judges’ incentives for distinguishing between teachings and citing the ones with more weight probably include a desire to make their opinions authoritative and to save time. Compliance with the Court’s legal framework may also play a role, but this framework leaves judges significant discretion. Determining exactly who ‘the most highly qualified publicists’ are is difficult, including because counting citations and counting citations with ‘justifications’ yield different results, and because the results may vary between fields of international law.

This article has explored one aspect of how teachings are used by one Court; many research questions remain, for example about other courts and tribunals, other sources and subsidiary means that courts and tribunals apply, all the other functions that teachings have in the international legal system, and whether current practices are normatively defensible. The methodology used in this article could provide a starting for such future inquires.

ANNEX: THE 40 MOST-CITED WRITERS

Rank	Writer	Citations	Including self-citations
	(Trindade, A. A. Cançado)	(0)	(297)
1	Rosenne, Shabtai	233	
2	Lauterpacht, Hersch	119	
3	Fitzmaurice, Gerald	67	(72)
4	Hudson, Manley O.	55	
5	Oppenheim, Lassa	53	
6	Jennings, Robert	52	
7	de Visscher, Charles	51	
8	Brownlie, Ian	42	
9	Watts, Arthur	32	
9	Stone, Julius	32	
11	Schwarzenberger, Georg	31	
12	Higgins, Rosalyn	30	(31)
12	Schachter, Oscar	30	
14	Guyomar, Geneviève	28	
14	Aréchaga, Eduardo Jiménez de	28	
16	Jenks, C. Wilfred	24	
16	McNair, Arnold	24	
16	Hambro, Edvard	24	
19	Brierly, James Leslie	23	
20	Guillaume, Gilbert	22	
21	Anzilotti, Dionisio	21	
21	McDougal, Myres S.	21	
21	Waldock, Humphrey	21	
24	Kelsen, Hans	20	
24	Schabas, William A.	20	
26	Cheng, Bin	19	
26	Thirlway, Hugh	19	
28	Kolb, Robert	18	
28	O’Connell, Daniel Patrick	18	

	(Simma, Bruno)	(8)	(18)
30	Reuter, Paul Jean-Marie	17	
31	Grotius, Hugo	16	
31	Guggenheim, Paul	16	
31	Tams, Christian	16	
31	Verhoeven, Joe	16	
31	Elias, Taslim O.	16	
	(Oda, Shigeru)	(7)	(16)
36	Jessup, Philip C.	14	(18)
36	Robinson, Nehemiah	14	
36	Singh, Nagendra	14	
36	Vattel, Emer de	14	
40	Buergenthal, Thomas	13	
40	Rousseau, Charles	13	
40	Shelton, Dinah L.	13	
40	Wright, Quincy	13	
40	Bedjaoui, Mohammed	13	