

ANNUAL ADDRESS

THE PRIMACY OF SECONDARY SOURCES OF LAW: CONTRIBUTIONS TO JUDICIAL DECISION-MAKING

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I INTRODUCTION

I thank the Editors of the Melbourne Journal of International Law (*MJIL*) for taking a chance on a greenfield judge. I received the invitation to speak tonight some weeks, barely months, into my appointment. But fortune favours the brave — their bravery, and mine, in suggesting a different topic for tonight's dessert. I have developed a keen interest in the sources of law under the tutelage of the late Professor James Crawford at Cambridge University, later a judge of the International Court of Justice ('ICJ'). In his memory and honour, I wish to continue that conversation tonight.

II THE PRIMARY BIAS

I must declare my prejudice at the outset. I have an undeniable bias towards primary sources.

To be fair, it is one most of us share. We are taught and trained to view primary sources as the starting point. This is reflected in any citation of authorities, in which the primary source is listed first, as its name suggests. And for good reason.

But do we really begin there?

We start at law school, or even earlier. We are taught by academics and scholars. We are taught how to read, understand, interpret and apply the law. This is done (initially) through the prism of textbooks, journals and annotated caselaw. These are our primary (pedagogical) sources. Similarly, in practice, the legislation or caselaw is rarely the starting point. The textbook or journal article is our introduction, our overview, our compass.

I have to admit that as a practitioner, I was loathe to cite a secondary source in my submissions. To my mind, I was simply substituting my opinion for that of another. Of course, that other opinion may come with a certain gravitas, which has persuasive value. Aside from the pure novelty of an idea, that is the reason for citing authority — it's authority. As a judicial officer, I associate authority with precedent. That may be a narrow view.

As a member of the High Court, Justice Kirby viewed the judicial role as invariably involving the making of ‘difficult policy choices ... the implications of ... [which] need to be fully canvassed’.¹

Her Excellency the Hon Margaret Beazley AC KC (current Governor of New South Wales and former President of the New South Wales Court of Appeal) writes of the importance in appellate courts of providing comprehensive reasons with citations to authority that allow the case to be presented ‘in its context — factual, legal and, in some circumstances, social and political — so that the basis of the reasoning and therefore the outcome is transparent’.²

On the other hand, Sir Garfield Barwick considered that excessive citation to authority makes the judge appear like a research student and undermines the authority of judgments.³

Chief Justice Susan Kiefel wrote that when she came to the Bar in 1975, the “living author” rule was still enforced by some of the older judges. This convention prevented counsel or judges citing living authors as authoritative.⁴ There is a cognate convention in international law.

Her Honour cited Professor Kötz, who said that ‘the weight to be given [to] a view expressed by a legal writer depends on the cogency of the argument, the reputation of the author and the honesty of [the] scholarship’.⁵

Chief Justice Kiefel suggested that we have moved on from the days where an academic had to have the status of Glanville Williams to qualify as persuasive.⁶ In terms of improving the relationship between the academy and the judiciary, this may be a good thing. However, it also has the tendency to mistake legitimacy (in having an opinion) for cogency. That phenomenon is well-demonstrated in the media, especially of the social kind.

Chief Justice Kiefel wrote:

It should be clear enough why judges value good legal scholarship. In the first place, judges carry out their work under the pressure of time. Even with the research assistance that judges have from their associates, they are not able to devote a lot of time to study a particular area relevant to the case at hand. Academic lawyers, to a larger extent, are able to refine their opinions and to delay their publication to that end. They tend to be specialists and have a fund of knowledge in their field which they may deploy. Judges, particularly at appellate level, are required to determine cases across a broad spectrum of the law.⁷

¹ Russell Smyth and Ingrid Nielsen, ‘The Citation Practices of the High Court of Australia, 1905–2015’ (2019) 47(4) *Federal Law Review* 655, 659 (‘Citation Practices of the High Court’), citing Michael Kirby, ‘On the Writing of Judgments’ (1990) 64(11) *Australian Law Journal* 691, 708.

² Margaret Beazley, ‘Judgment Writing in Final and Intermediate Courts of Appeal: “A Dalliance on a Curiosity”’ (2021) *Handbook for Judicial Officers* 270, 275.

³ Russell Smyth, ‘Other Than “Accepted Sources of Law”? A Quantitative Study of Secondary Source Citations in the High Court’ (1999) 22(1) *UNSW Law Journal* 19, 27 (‘Secondary Source Citations in the High Court’), quoting Garfield Barwick, *A Radical Tory* (Federation Press, 1995) 223–4.

⁴ The Hon Chief Justice Susan Kiefel, ‘The Academy and the Courts: What do They Mean to Each Other Today?’ (2020) 44(1) *Melbourne University Law Review* 447, 451.

⁵ *Ibid* 456.

⁶ *Ibid*.

⁷ *Ibid* 455.

The common law develops incrementally. Chief Justice Kiefel writes that no part of the judicial role allows for ambiguity by identifying especially fine distinctions or points of difference, let alone attempting new classifications. This kind of thinking may properly be deployed by academics in critical analysis, but rarely is it of real assistance to the resolution of a case (I am glad I read this *after* accepting my appointment).

Sir Owen Dixon spoke about the use by judges of academic writing being ‘very great indeed’, adding that ‘the Court has always administered the law as a living instrument and not as an abstract study’, identifying judicial aversion to pure theory.⁸

In that regard, Chief Justice French considered the potential to impair the judicial function. He wrote that:

[i]llegitimate use of academic work in judicial reasoning includes the purely ornamental and the thoughtless padding out of references without direct relevance to the proposition which they are said to support. Reliance upon academic opinions cannot be a substitute for direct consideration of the relevant authorities and statutory provisions. Second order or derivative reasoning through the use of academic work does not discharge the judicial function.⁹

Many would agree, but that raises the issue of *how* the source is used.

It also raises the spectre of artificial intelligence (‘AI’), to which I — and every human agent in the technological age — shall return.

Legal scholarship is often seen as fulfilling two main functions — theoretical and doctrinal — both of which have a role in judicial decision-making. Scholarship may clarify, guide and synthesise. But it may be a subtle influence, by the absorption of secondary sources into caselaw and the operation of the principle of *stare decisis*. Identifying the impact of a secondary source can involve a difficult tracing exercise, as the number of citations may not necessarily reflect its influence. For example, in unsettled areas of law, reference may be made by judges in their reasons to secondary sources as interpretive aids, then as that view becomes accepted, and the caselaw espousing the view becomes settled, it is the case itself that is followed and referred to, not the original aide. Counterintuitively, the more influential scholarship becomes a whisper as it is embraced by judicial wisdom.

This also demonstrates the elision of primary and secondary sources in analysis or evaluation. That is, in respect of opinion. In that regard, it may not be correct or useful to say that academic writing has no precedential value and is not a source of law.

III THE ROLE OF SECONDARY SOURCES IN INTERNATIONAL LAW

I have lost count of the number of times I have had to admonish a student or practitioner regarding their use of the so-called “subsidiary sources” of international law. I have stopped. It is exhausting.

⁸ Ibid 451–2, citing Sir Owen Dixon, ‘Address on First Presiding as Chief Justice at Melbourne’ in Susan Crennan and William Gummow (eds), *Jesting Pilate: And Other Papers and Addresses* (Federation Press, 3rd ed, 2019) 292, 293.

⁹ Robert French, ‘Judges and Academics: Dialogue of the Hard of Hearing’ (2013) 87(2) *Australian Law Journal* 96, 104.

You may recall that judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the determination of rules of law, as per art 38(1)(d) of the *Statute of the International Court of Justice* ('*Statute of the ICJ*').¹⁰

It is said that the list is not explicitly hierarchical.¹¹ That may be the case in relation to treaty, custom and the general principles of law, but one is left in no doubt that judicial decisions and teachings serve an assistive function.¹² As such, they can only be confirmatory, and not declaratory, of law.

However, as one of the 'most highly qualified publicists', Sir Hersch Lauterpacht, observed in 1958, the words of the statute are mandatory, in that the Court 'shall apply' the teachings of publicists as a subsidiary means for the determination of law.¹³ There is no such (or cognate) mandate in domestic law. That being said, it is notable that at the time of Lauterpacht's observation in 1958, of the 28 opinions delivered by the Court, only two cited publicists.¹⁴ That might signify a glut of primary sources on relevantly non-controversial subjects, which is unlikely; or perhaps reticence on the part of members of the Court to rely explicitly on the subsidiary means, which seems more likely.

It is also worth noting that there is no discernible distinction between the value of "judicial decisions", on the one hand, and "teachings" on the other, although Gerald Fitzmaurice argued that it is not so much that judicial decisions necessarily intrinsically carry more weight than scholarship, but that they have 'a more direct and immediate impact on the realities of international life'.¹⁵ And yet, as is evident from the citation practices of international courts, it is quite clear which of these are preferred by judges. But not tonight. The object of my focus this evening are the 'teachings of the most highly qualified publicists of the various nations'.¹⁶

The *travaux préparatoires* of the *Statute of the ICJ* make clear that the language of art 38(1)(d) is deliberately vague, being the product of a compromise between members of the 1920 Advisory Committee of Jurists, who had disagreed as to the

¹⁰ James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 20.

¹¹ *Ibid.*

¹² Charles Chernor Jalloh, Special Rapporteur, *Third Report on Subsidiary Means for the Determination of Rules of International Law*, UN GAOR, 76th sess, UN Doc A/CN.4/781 (29 January 2025) 72–9 [301]–[320], 103–4 annex II ('*Draft Conclusions Proposed in the Third Report of the Special Rapporteur*') draft conclusion 13 ('*Jalloh's Third Report*'); International Law Commission, *Report of the International Law Commission on the work of Its Seventy-Sixth Session*, UN GAOR, 80th sess, Supp No 10, UN Doc A/80/10 (28 April–30 May 2025) 83–5 ('*ILC Report 76th Session*').

¹³ Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (Research Paper No 12/07/03, Washington University School of Law, July 2012) 7, citing Hersch Lauterpacht, *The Development of International Law by the International Court* (Steven & Sons, 1958) 24–5.

¹⁴ Peil (n 13) 8, referring to *Fisheries (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116, 129 and *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 22.

¹⁵ Charles Chernor Jalloh, Special Rapporteur, *First Report on Subsidiary Means for the Determination of Rules of International Law*, UN GAOR, 74th sess, UN Doc A/CN.4/760 (13 February 2023) 112 [336] ('*Jalloh's First Report*'), quoting Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in Jill Barrett and Jean-Pierre Gauci (eds) *British Contributions to International Law, 1915–2015* (Brill Nijhoff, 2021) 493.

¹⁶ *Statute of the International Court of Justice* art 38(1)(d).

classification and acceptable use of ‘doctrine’ in international law.¹⁷ In the years since its drafting, the term “publicist” has been interpreted broadly to include, inter alia, writers, scholars, experts and jurists.¹⁸ As to what makes a publicist “most highly qualified”, while reasonable minds may differ on this point, Professor Crawford writes that the phrase is ‘not given a restrictive effect, but authority naturally affects weight’.¹⁹ While this may be so — and as will shortly be seen — if one were to look to the citations of international courts, one would be forgiven for thinking that the assessment of authority reflects certain prejudices, notably for the male voice, for certain parts of England and, at least historically, for the dead.

A 2023 study on the application of “teachings” by the ICJ found that between 2016 and 2022, there were no citations of teachings in the majority opinions of the Court (excluding works produced by the International Law Commission (‘ILC’)).²⁰ An earlier study found that, prior to 2016, only five decisions²¹ cited specific works of teachings on a point of law.²² As such, this did not include a reference in the 2007 *Bosnian Genocide Case* to the lawyer and jurist Raphael Lemkin, reputed to have coined the term “genocide”, on the basis that the reference

¹⁷ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16–July 24, 1920, with Annexes* (Van Langenhuyzen Brothers, 1920) 584.

¹⁸ Sandesh Sivakumaran, ‘The Influence of Teachings of Publicists on the Development of International Law’ (2017) 66(1) *International and Comparative Law Quarterly* 1, 4; Jalloh’s *First Report*, UN Doc A/CN.4/760 (n 15) 20–1.

¹⁹ Crawford (n 10) 40.

²⁰ Sondre Torp Helmersen, ‘The Application of Teachings by the International Court of Justice, 2016–2022’ (2023) 26(1) *Max Planck Yearbook of United Nations Law Online* 203, 203 (‘Application of Teachings by ICJ’).

²¹ First, *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351, 592–3 [392]–[394], referring to ‘the successive editors of Oppenheim’s *International Law*’, including G Gidel, *Le droit international de la mer [International Law of the Sea]* (Recueil Sirey, 1934) vol 3 and Sir Cecil Hurst, ‘The Territoriality of Bays’ (1922–3) 3 *British Year Book of International Law* 42, 43. Second, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 48, referring to Jan Christiaan Smuts, *The League of Nations: A Practical Suggestion* (Hodder and Stoughton, 1918) 21–2. Third, *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045, 1062, referring to ‘Projet de règlement international de navigation fluviale adopté par l’Institut à heidelberg’ [‘Draft Concerning the International Regulation of Fluvial Navigation Adopted by the Institute in Heidelberg’] (1887–88) 9 *Annuaire de l’Institut de droit international [Year Book of the Institute of International Law]* 182, 182. Fourth, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 175–6, referring to works produced by the International Committee of the Red Cross: International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Report, 14–26 April 1947) 8. Fifth, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 106, 125, referring to the 20th International Conference of the Red Cross: International Committee of the Red Cross, *XXth International Conference of the Red Cross: Report* (Report, 2–9 October 1965) (Proclamation of the Fundamental Principles of the Red Cross). Note also that some decisions of the Court contain general references without naming specific works, eg, *Nottebohm* (n 14) 22–3, 35, 259, 501, 508, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, *North Sea Continental Shelf Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep 3, and *LaGrand (Germany v United States of America) (Provisional Measures)* [1999] ICJ Rep 9.

²² Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice* (Cambridge University Press, 2021) 45.

to his book concerned only the etymology of the word, rather than a legal question.²³

Similarly, the Permanent Court of International Justice only referred to teachings in five cases: the *Lotus* case,²⁴ *Certain German Interests in Polish Upper Silesia*,²⁵ the *Jaworzina* case,²⁶ the *Wimbledon* case (in the dissenting opinion of Schücking)²⁷ and the advisory opinion on the Austro-German Customs Union (in the dissenting opinion of Adatci, Kellogg, Rolin-Jaequemyns, Hurst, Schücking, Van Eysinga and Wang).²⁸

However, judges of the ICJ are seen to cite teachings in their separate opinions with far greater frequency.²⁹ Some judges are more likely to cite teachings than others. Judge Trindade, in particular, is known for his very high citation rate — and is himself the most cited writer in individual opinions, having been cited 300 times between 2016 and 2022 — although notably only by himself.³⁰

Teachings serve a number of functions for judges, including clarifying the context of legal rules, providing interpretative assistance and ascertaining the existence of custom and general principles of law. However, this is notably absent from majority judgments and opinions, which may in part reflect the “compromise” that is sometimes entailed in reaching consensus, where judges may agree with the outcome but not its legal basis or the reasoning that led to that result.³¹

Of the citations in separate opinions between 2016 and 2022, only eight writers have been cited more than three times and by at least two judges.³² The most cited writer is Shabtai Rosenne, which is also true of the period before 2016.³³

Prior to 2016, Hersch Lauterpacht was the second most cited writer in individual opinions. This position was taken over by James Crawford after 2016.³⁴ The others are Simma, Nandan, Higgins, Denza, Kolb and Jiménez de Aréchaga.³⁵ After 2016, half of the top eight writers cited in individual opinions are affiliated with the United Kingdom, and only two are from non-Western countries (Nandan

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 125; Sondre Helmersen, ‘Finding “the Most Highly Qualified Publicists”: Lessons from the International Court of Justice’ (2019) 30(2) *European Journal of International Law* 509, 510.

²⁴ *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 25–6.

²⁵ *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Judgment)* [1925] PCIJ (ser A) No 6, 20.

²⁶ *Jaworzina (Advisory Opinion)* [1923] PCIJ (ser B) No 8, 15–16.

²⁷ *SS Wimbledon (Britain v Germany) (Judgment)* [1923] PCIJ (ser A) No 1, 26–9 (Judge Schücking).

²⁸ *Customs Régime between Germany and Austria (Advisory Opinion)* [1931] PCIJ (ser A/B) No 41, [160] (Judges Adatci, Kellogg, Rolin-Jaequemyns, Hurts, Schucking, Eysinga and Wang).

²⁹ See Crawford (n 10) 40; Jalloh’s *First Report*, UN Doc A/CN.4/760 (n 15) 100; Helmersen (n 20) 204, 207; Helmersen (n 23) 510.

³⁰ Helmersen, *Application of Teachings by ICJ* (n 20) 207, 219.

³¹ Crawford (n 10) 40; Peil (n 13) 9.

³² Helmersen, *Application of Teachings by ICJ* (n 20) 219.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

is Fijian and Jiménez de Aréchaga is Uruguayan).³⁶ Only two are women.³⁷ Before 2016, 13 of the top 20 writers were UK-affiliated, only one of the top 20 was from a non-Western country and only two of the top 20 were women.³⁸ Strangely, the authority of women writers (on this barometer) appears to have diminished.

It is worth noting that these patterns are also evident in the citation practices of the International Tribunal for the Law of the Sea, where Rosenne is also the most cited author in individual opinions.³⁹

There appears to be a greater willingness to cite teachings in the Appellate Body of the World Trade Organisation ('WTO'),⁴⁰ the European Court of Human Rights ('ECtHR') (in which the number of citations has been steadily increasing),⁴¹ and international criminal courts and tribunals.⁴² This is demonstrated by a 2019 case before the ECtHR, *Güzelyurtlu v Cyprus*,⁴³ in which the Court cited an article by Roslyn Moloney in *MJIL* on the subject of the prohibition of broad reservations under art 19 of the *Vienna Convention on the Law of Treaties*,⁴⁴ quoting her observations verbatim.⁴⁵

Notwithstanding these statistics, "teachings" are widely used as background materials by judges and may carry greater influence than is suggested by the number of citations.⁴⁶ After all, judges do not cite everything they read. The use of "teachings" in separate opinions supports this view, as do the many references to teachings in the parties' submissions,⁴⁷ which suggests an expectation of influence.⁴⁸

Some writers argue that legal academics are 'law-makers' at the international level.⁴⁹ While this may overstate the position, it emanates from the otherwise understated influence of teachings on the development of international law. For

³⁶ Ibid 220.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Helmersen, Application of Teachings by ICJ (n 20) 220; Sondre Torp Helmersen, 'The Application of Teachings by the International Tribunal for the Law of the Sea' (2020) 11(1) *Journal of International Dispute Settlement* 20, 21 ('Application of Teachings by ITLOS').

⁴⁰ Helmersen, 'Application of Teachings by ITLOS' (n 39) 25; Sondre Torp Helmersen, 'The Use of Scholarship by the WTO Appellate Body' (2016) 7(2) *Goettingen Journal of International Law* 309, 324 ('Use of Scholarship by WTO').

⁴¹ Kanstantsin Dzehtsiarou and Niccolò Ridi, 'The Use of Scholarship by the European Court of Human Rights' (2024) 73(3) *International and Comparative Law Quarterly* 707, 719.

⁴² Nora Stappert, 'A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals' (2018) 31(4) *Leiden Journal of International Law* 963, 963.

⁴³ *Güzelyurtlu v Cyprus* (European Court of Human Rights, Grand Chamber, Application No 36925/07, 29 January 2019).

⁴⁴ Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2004) 5(1) *Melbourne Journal of International Law* 155, 156–7 discussing *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 19.

⁴⁵ *Güzelyurtlu v Cyprus* (n 43) 87 [35].

⁴⁶ *Jalloh's Third Report*, UN Doc A/CN.4/781 (n 12) 24 [100].

⁴⁷ Crawford (n 10) 40; Sivakumaran (n 18) 25, 27; *Jalloh's Third Report*, UN Doc A/CN.4/781 (n 12) 24 [100].

⁴⁸ Sivakumaran (n 18) 27, quoting Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 2014) 127.

⁴⁹ Mark Tushnet, 'Academics as Law-Makers?' (2010) 29(1) *University of Queensland Law Journal* 19, 19.

example, academic writing often informs the work of the ILC, which codifies international law, and which is in turn used by judges to interpret and apply the law. Consider, too, the work of Lauterpacht and Lemkin, and their individual contributions to the recognition of crimes against humanity and genocide, respectively.⁵⁰ Assessing the value and influence of teachings is more nuanced and opaque than simply tallying the numbers.

The use of scholarship by international courts is also relatively understudied. This was recognised by the ILC at its 73rd session in 2022 when it decided to include the topic ‘Subsidiary Means for the Determination of Rules of International Law’ in its current programme of work, appointing Mr Charles Chernor Jalloh as Special Rapporteur.⁵¹ There was broad support by states for the inclusion of this topic, as this would round out the ILC’s prior work on the sources of international law, clarify the origins, terminology and scope of art 38(1)(d), and aid in the development and codification of international law.⁵²

The Special Rapporteur has since produced three reports on the topic,⁵³ which will inform the draft conclusions and commentaries that are to be produced by the ILC. In their current iteration, those conclusions confirm that subsidiary means are not a source of international law, and outline general criteria to which regard is to be had when assessing the weight of subsidiary means. These criteria include: their degree of representativeness; the quality of the reasoning; the expertise of those involved; the level of agreement among those involved; the reception by States and other entities; and where applicable, the mandate conferred on the body producing the authority.⁵⁴

Draft conclusion 5, as it presently stands, states that teachings,

especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law.⁵⁵

It provides that, in assessing ‘representativeness’, ‘due regard should also be had to, inter alia, gender and linguistic diversity’.⁵⁶ This addition appears to recognise the historical homogeneity of teachings referenced to date, and may serve to address the hitherto neglected “various nations” component of art 38(1)(d).

⁵⁰ See Ana Filipa Vrdoljak, ‘Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law’ (2010) 20(4) *European Journal of International Law* 1163, 1163–4.

⁵¹ *ILC Report 76th Session*, UN Doc A/80/10 (n 12) 81.

⁵² *Ibid*; Jalloh’s *Third Report*, UN Doc A/CN.4/781 (n 12) 4 [2].

⁵³ Jalloh’s *First Report*, UN Doc A/CN.4/760 (n 15); Charles Chernor Jalloh, Special Rapporteur, *Second Report on Subsidiary Means for the Determination of Rules of International Law*, UN GAOR, 75th sess, UN Doc A/CN.4/769 (30 January 2024) (‘Jalloh’s *Second Report*’); Jalloh’s *Third Report*, UN Doc A/CN.4/781 (n 12).

⁵⁴ Jalloh’s *Second Report*, UN Doc A/CN.4/769 (n 53) annex I (‘*Draft Conclusions Provisionally Adopted by the Commission during Its Seventy-Fourth Session*’) 68 (conclusion 3).

⁵⁵ *Ibid* 16.

⁵⁶ Jalloh’s *Third Report*, UN Doc A/CN.4/781 (n 13) 19 [82].

In 2025, the adoption of draft conclusions one to 13 by the ILC was postponed to the 77th session in 2026, to allow time for the translation and consideration of the commentaries prepared by the Special Rapporteur.⁵⁷

IV THE ROLE OF SECONDARY SOURCES IN DOMESTIC LAW

There is a dearth of available data pertaining to the role of secondary sources in Australian domestic law that focuses specifically on international law.⁵⁸ This presents a challenge in assessing the influence of academic writing and secondary sources on judicial reasoning in this area.

Some research exists that looks at the citation practices of the High Court of Australia. One can see from these studies that generally citation of secondary sources (and law review articles particularly in the period 1995–2015) has increased over time.⁵⁹ In the 1990s, this was particularly evident.⁶⁰ It may reflect the changing complexion of the Court from the legalistic Dixon Court to (what has been described as) the ‘judicial activism’⁶¹ of the Mason and Brennan Courts.⁶²

It has been observed that the extensive citation practices of the Mason and Brennan Courts and the early years of the Gleeson Court have since reverted to ‘a minimalist, largely propositional style of reasons’ in the latter years of the French Court (possibly reflecting critiques that judgments in the 1990s and 2000s became too long and dense).⁶³ Professors Russell Smyth and Ingrid Nielsen of Monash University found that the so-called conservative Gleeson and French Courts actually cited more authorities, including secondary sources, than the Mason Court.

Theories have been proffered for this increased citation: technological advances; access to information (the first High Court librarian was only appointed in 1967); and even employment practices, with High Court judges from the 1980s mostly choosing to hire two associates, rather than one tipstaff and one associate.⁶⁴ Judges also differ in their citation practices, with Justices Kirby and Gummow being two of the most prolific. To illustrate the point, Justice Kirby was responsible for 276 of the 1007 citations to secondary authorities in 2005.⁶⁵

⁵⁷ International Law Commission, ‘Subsidiary Means for the Determination of Rules of International Law’, *Summaries of the Work of the International Law Commission* (Web Page, 16 June 2025) <https://legal.un.org/ilc/summaries/1_16.shtml>, archived at <<https://perma.cc/9KJ3-FXBZ>> (*ILC Work on Subsidiary Means*).

⁵⁸ Smyth and Nielsen, ‘Citation Practices of the High Court (n 1) 656–7; Russell Smyth, ‘The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court’ (2000) 9(1) *Griffith Law Review* 25, 26 (‘Secondary Source Citations in the Federal Court’); Smyth, ‘Secondary Source Citations in the High Court (n 3) 19.

⁵⁹ Smyth and Nielsen, ‘Citation Practices of the High Court’ (n 1) 675–6, 679; Ingrid Nielsen and Russell Smyth, ‘One Hundred Years of Citation of Authority on the Supreme Court of New South Wales’ (2008) 31(1) *UNSW Law Journal* 189, 213.

⁶⁰ Smyth and Nielsen, ‘Citation Practices of the High Court (n 1) 675–9; Kiefel (n 4) 452; John Gava, ‘Law Reviews: Good for Judges, Bad for Law Schools?’ (2002) 26(3) *Melbourne University Law Review* 560, 562–3.

⁶¹ Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2003) 47(1) *Quadrant* 9, 10.

⁶² Smyth and Nielsen, ‘Citation Practices of the High Court (n 1) 657–8.

⁶³ Beazley (n 2) 270; but see Smyth and Nielsen, ‘Citation Practices of the High Court (n 1) 664.

⁶⁴ Smyth and Nielsen, ‘Citation Practices of the High Court (n 1) 667–8, 680.

⁶⁵ *Ibid* 679.

In 2020, Chief Justice Kiefel wrote that judges appreciate academic literature which is on point and useful, but that citations of secondary materials are often excluded from judgments even if they were considered.⁶⁶ In that regard, her Honour referred to a limited review done by the High Court library comparing three years of High Court decisions in 1963, 2016 and 2018, which found that '[o]f the 67 cases decided in 1963, there were 88 citations of books and articles; of the 50 cases in 2016, there were 277 citations; and of the 60 cases in 2018, there were 399 citations'.⁶⁷ Chief Justice Kiefel noted that the citation of commentary on constitutional law is more extensive than most other areas.⁶⁸ To my knowledge, there is no data currently available that is specific to international law.

Judicial use of secondary sources increases when the law is not settled. Lord Denning and Justice Kirby have both argued that one key advantage of academic writing is that its authors have time for considered reflection and research, which judges do not.⁶⁹ Again, I am glad I read this after my appointment. Sir Frank Kitto contended that judges are obliged to refer to secondary authorities.⁷⁰ I am yet to see a rule or practice note that suggests so.

The influence of secondary sources is uniquely important in Australian courts when dealing with international law, including treaty interpretation and whether and how customary international law is applicable.⁷¹ While international law may be incorporated into Australian domestic law, a degree of unfamiliarity with this corpus of law lends itself to greater recourse to academic opinion for assistance. Similarly, judges will often turn to journal articles and textbooks for summaries of the law in other jurisdictions, as this is seen as preferable to using foreign precedent,⁷² or at least more accessible.

In a case note in *MJIL*, Patrick Wall compared the High Court's approach to treaty interpretation and acceptance of extrinsic materials in *Maloney* (decided in 2013) with *Macoun* (decided in 2015).⁷³ Wall noted that in the latter case, the Court was 'vastly more receptive of extrinsic legal materials and devoid of the hostility to treaty interpretation detectable in many of the judgments in *Maloney*'.⁷⁴ Wall posited four reasons for the change: the nature of the treaties being interpreted; the nature of the extrinsic materials the Court was asked to use; the composition of the bench (with only three judges common to both cases); and the

⁶⁶ Kiefel (n 4) 448–9.

⁶⁷ Ibid 452.

⁶⁸ Ibid 454.

⁶⁹ Smyth, 'Secondary Source Citations in the High Court' (n 3) 25; Michael Kirby, 'Welcome to Law Reviews' (2002) 26(1) *Melbourne University Law Review* 1, 7.

⁷⁰ Smyth, 'Secondary Source Citations in the High Court' (n 3) 26, citing Frank Kitto 'Why Write Judgments?' (1992) 66(12) *Australian Law Journal* 787, 793.

⁷¹ Chief Justice Robert French, 'International Law and Australian Domestic Law' (Speech, Supreme Court of New South Wales Annual Conference, 21 August 2009) 19.

⁷² Smyth, 'Secondary Source Citations in the High Court' (n 3) 23.

⁷³ Patrick Wall, 'A Marked Improvement: The High Court of Australia's Approach to Treaty Interpretation in *Macoun v Commissioner of Taxation* [2015] HCA 44' (2016) 17(1) *Melbourne Journal of International Law* 170, discussing *Maloney v The Queen* (2013) 252 CLR 168 (French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ) and *Macoun v Commissioner of Taxation* (2015) 257 CLR 519 (French CJ, Bell, Gageler, Nettle and Gordon JJ).

⁷⁴ Wall (n 73) 171–2.

submissions of the parties being of higher quality.⁷⁵ All of these factors seem idiosyncratic, which makes it difficult to deduce a general proposition.

A search of High Court decisions involving international law that expressly cite secondary sources (in particular, journal articles or reviews) generates some interesting results. Whether casting a wider net, or using Boolean operators to run a more targeted search, the graphs produced in either case show essentially the same trend. That is, there is a gradual increase in citations from about the 1970s, a sharp spike from around 1998, and a more gradual decline from about 2005, which then seems to plateau (although it is still higher than it was in the 1970s, and is now more or less where things were in the 1980s). It may be pure coincidence, but the “spike” of which I speak coincides with Justice Kirby’s time on the bench, from 1996 to 2009.

It may appear that the use of secondary sources has since waned. However, this may be misleading. There are a number of possible reasons for this ostensible rise and fall: the composition of the Court; absorption of citations through *stare decisis*; and changes in approaches to judgment writing. It is also relevant to note the gradual establishment of international law journals:

- (a) *American Journal of International Law* (published quarterly since 1907);
- (b) *International and Comparative Law Quarterly* (founded in 1952);
- (c) *Virginia Journal of International Law* (established in 1960);
- (d) *Columbia Journal of Transnational Law* (started in 1961, under another name);
- (e) *Harvard International Law Journal* (officially began publishing in 1967);
- (f) *Yale Journal of International Law* (founded in 1974);
- (g) *Australian International Law Journal* (Australia’s entry into the market, commencing in 1983);
- (h) *Leiden Journal of International Law* (established in 1988);
- (i) *European Journal of International Law* (started in 1990);
- (j) *Melbourne Journal of International Law* (established in 2000); and
- (k) *Cambridge International Law Journal* (launched in 2011).

The ostensible spike may also reflect the nature of the cases being heard in the context of world events occurring at the time, including: 9/11; the Tampa Affair; the invasion of Afghanistan and Iraq; the conclusion of bilateral free trade agreements, notably with the United States of America; the establishment of the International Criminal Court; and the Global Financial Crisis. But I am less convinced by this. Times of crisis and novelty are ubiquitous.

A review of High Court caselaw demonstrates that the Court has been willing to use secondary sources to assist in the interpretation and application of international law, and to acknowledge that contribution. The following are examples.

⁷⁵ Ibid 172.

In *Polites*,⁷⁶ the judges relied on Oppenheim's *International Law*, Walker's *Manual of Public International Law*, Cobbett's *Cases on International Law*, Hall's *A Treatise on International Law*, Westlake's *International Law*, the *American Journal of International Law* and others, in support of a customary rule preventing the imposition upon resident aliens of serving in the armed forces of the country in which they resided without the consent of their state.⁷⁷

In *Koowarta*,⁷⁸ the judges cited scholarly opinion, including Brownlie, Lauterpacht, Schwelb and Sohn, on the question of whether the human rights provisions of the *Charter of the United Nations* impose legal obligations.⁷⁹

In the *Tasmanian Dam Case*,⁸⁰ Chief Justice Gibbs quoted directly from the writings of, inter alia, O'Connell;⁸¹ Greig, Fawcett;⁸² and Goy⁸³ on the question of treaty interpretation and the application of international law. His Honour acknowledged the controversy as to the accepted use of *travaux préparatoires* in the process of interpretation, citing McNair, Elias and Sinclair.⁸⁴ Justice Mason relied on Fawcett and Widdows as exemplifying 'the continuous debate and discussion as to the concept of obligation in International Law and as to the nature of obligations created by treaties'.⁸⁵ Justice Murphy cited several books, law reviews and journal articles in canvassing the practice of other states in relation to the presumption of validity in considering international concern about conservation and treaty obligations.⁸⁶

In *Polyukhovich*,⁸⁷ Justice Brennan considered whether there was a customary law obligation to try alleged war criminals in respect of extraterritorial war crimes.⁸⁸ His Honour extracted the text of art 38(1) of the *Statute of the International Court of Justice* directly from the Brownlie textbook, and adopted a position on international law posited in academic articles from Dr Akehurst, MacGibbon, Lauterpacht and Baxter, amongst others.⁸⁹ Justice Toohey also cited secondary sources extensively when dealing with universal jurisdiction.⁹⁰

⁷⁶ *Polites v Commonwealth* (1945) 70 CLR 60 (Latham CJ, Rich, Starke, Dixon, McTiernan and Williams JJ).

⁷⁷ *Ibid* 70, 75–7, 80.

⁷⁸ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

⁷⁹ *Ibid* 205–6, 219.

⁸⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1 (Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ) ('*Tasmanian Dam Case*').

⁸¹ *Ibid* 90 (Gibbs CJ), quoting DP O'Connell, *International Law* (Stevens, 2nd ed, 1970) vol 1, 246.

⁸² *Tasmanian Dam Case* (n 80) quoting DW Greig, *International Law* (Butterworths, 2nd ed, 1976) 460–1 and JES Fawcett, 'The Legal Character of International Agreements' (1953) 30 *British Year Book of International Law* 381, 390.

⁸³ *Tasmanian Dam Case* (n 80) 91, quoting RHM Goy, 'The International Protection of the Cultural and Natural Heritage' (1973) 4 *Netherlands Yearbook of International Law* 135, 135.

⁸⁴ *Tasmanian Dam Case* (n 80) 94.

⁸⁵ *Ibid* 132 (Mason J).

⁸⁶ See, eg, *ibid* 163–5.

⁸⁷ *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁸⁸ *Ibid* 575.

⁸⁹ *Ibid* 559, 560, 567, 569, 575, 578, 579–80, 583, 589–590, 592.

⁹⁰ *Ibid* 658–64.

In *Kingdom of Spain*,⁹¹ the Court, in considering whether Spain as the subject of a binding arbitral award, had waived its foreign state immunity under the *Foreign States Immunities Act 1985* (Cth), relied on journal articles and textbooks (including Oppenheim and Crawford) on the basis that these sources were cited frequently in international and domestic courts.⁹²

Something may be observed in these cases. In areas of controversy, the Court appears willing to rely on secondary sources, and particularly academic opinion, as a means of determining the scope of international law. For settled principles, such as treaty interpretation, the Court tends to rely on caselaw.

The Court has opined on the utility of academic opinion. In *Neilson*,⁹³ a conflict of laws case, Justices Gummow and Hayne observed that:

An immense amount of scholarly literature has been produced ... But the scholarly debate has focused more upon theoretical explanations for the method of solution than upon the principal and essentially practical concern of the courts, which is to decide the controversies that are tendered by the parties for decision.⁹⁴

This is to highlight a distinction in the academic and judicial roles, and harks back to the extra-curial observations of Chief Justice Kiefel.

As witnessed in the decisions of the ICJ, secondary sources appear to be most frequently cited in separate and dissenting opinions. Two well-known examples are the dissenting opinions of Justice Kirby in *Kartinyeri*⁹⁵ and *Al-Kateb*,⁹⁶ which are underpinned by his ‘interpretive principle’, namely that the *Constitution* should be interpreted consistently with principles of international law, and especially principles of international human rights law.⁹⁷ In *Kartinyeri*, Justice Kirby in dissent held that the “race power” in s 51 (xxvi) of the *Constitution* should be read in light of international standards of non-discrimination and, in that regard, his Honour drew considerably from secondary sources.⁹⁸ In *Al-Kateb*, Justice Kirby relied on multiple international law journal articles to demonstrate that the constitutional courts of many other countries had adopted the interpretive approach his Honour favoured.⁹⁹

It is notable that Klesch, Hill and Price of Charles Darwin University disagree with aspects of Chief Justice Kiefel’s paper and her characterisation of the symbiotic relationship between the academy and the courts. They write:

Citation data gathered in this paper does not reflect a mutually beneficial relationship in practice whereby the academy write for a judicial audience and are

⁹¹ *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2023) 275 CLR 292 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

⁹² *Ibid* 308–13.

⁹³ *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁹⁴ *Ibid* 362–3 [87].

⁹⁵ *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (Brennan CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*‘Kartinyeri’*).

⁹⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (*‘Al-Kateb’*).

⁹⁷ *Kartinyeri* (n 95) 390.

⁹⁸ *Ibid* 417–8.

⁹⁹ *Al-Kateb* (n 96) 626 [184]. Note *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 overruled *Al-Kateb*, although the Court did not rely on international law to do so.

cited in return. Academic work is rarely cited in Australian courts, except for the High Court.¹⁰⁰

I cannot agree. I question whether the *influence* of academic work is rare, even if less frequently cited in the lower courts. It must be remembered that the High Court's treatment of secondary sources is in part a consequence of its position at the apex of the judiciary, and that that wisdom is received as precedent. There is no need to cite again that which has been accepted as reflecting the law.

The importance of secondary sources in the interpretation of international law by the High Court is evident. It is edifying that this influence (specifically of Australian journals) extends to foreign courts. *MJIL* is referred to in foreign cases concerning international law. For example, an article written by Matthew Alderton on the act of state doctrine in 2011¹⁰¹ was cited by Justice Simon in a decision of the UK Supreme Court in *Belhaj v Straw*.¹⁰² In Malaysia, there are a number of references to *MJIL* in Federal Court cases. These include consideration of Andrew Godwin's 2017 article¹⁰³ regarding the establishment of the Singapore International Commercial Court;¹⁰⁴ and consideration of Danielle Ireland-Piper's 2012 article¹⁰⁵ regarding extraterritorial offences in relation to the question of whether to grant a request by the US government for extradition of an Iranian citizen in Malaysia on a tourist visa.¹⁰⁶

V THE NEXT 25 YEARS — A SECONDARY BIAS?

Of the draft conclusions produced by the ILC concerning subsidiary means for the determination of rules of international law,¹⁰⁷ draft conclusion 2(c) attracted the most comment from state delegates.¹⁰⁸ That draft conclusion provides:

Draft Conclusion 2

Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

...

¹⁰⁰ Rachel Klesch, Guzyal Hill and David Price, 'The Academy and the Courts: Citation Practices' (2023) 42(1) *University of Queensland Law Journal* 103, 104.

¹⁰¹ Matthew Alderton, 'The Act of State Doctrine: Questions of Validity and Abstention from *Underhill to Habib*' (2011) 12(1) *Melbourne Journal of International Law* 1.

¹⁰² *Belhaj v Straw* [2013] EWHC 4111 (QB).

¹⁰³ Andrew Godwin, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18(2) *Melbourne Journal of International Law* 219.

¹⁰⁴ *TR Sandah Ak Tabau v Director of Forest, Sarawak* (Unreported, Federal Court of Malaysia, Azahar Mohamed CJM, David Wong Dak Wah CJSS, Alizatul Khair Osman Khairuddin, Zawawi Salleh and Idrus Harun FCJJ, 11 September 2019) [116].

¹⁰⁵ Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13(1) *Melbourne Journal of International Law* 122.

¹⁰⁶ *Amin Ravan v Menteri Dalam Negeri* [2015] 5 MLJ 577, 617 [83].

¹⁰⁷ *Jalloh's Third Report*, UN Doc A/CN.4/781 (n 12) annex I ('Draft Conclusions Provisionally Adopted by the Commission during Its Seventy-Fourth Session').

¹⁰⁸ *Jalloh's Second Report*, UN Doc A/CN.4/769 (n 53) 13.

(c) *any other means* generally used to assist in determining rules of international law.¹⁰⁹

The scope of “teachings” under art 38(1)(d) is significantly expanded by draft conclusion 2, qualified by the requirement that such means be ‘generally used’.¹¹⁰ This begs the question as to the extent of usage necessary to qualify as ‘generally’ done. A similar exercise is undertaken in relation to the ascertainment of customary international law and general principles of law.

On its face, draft conclusion 2(c) would encompass emerging technologies, including generative AI, which appears now to be more “pervasive” than “general” in its adoption (though I am yet to find any reliable data as to its usage by the judiciary). If there is a reticence or caution about citing a human author, I wonder how one might feel about citing an AI chatbot.

Whatever one’s views are on the use of generative AI technology in legal scholarship, it is unavoidable. The so-called ‘invisible college of international lawyers’¹¹¹ will be — has already been — infiltrated by predictive algorithms, and while research on the impact of AI on international law is still in its infancy, its disruptive potential should not be ignored.¹¹² At this stage, I make no judgment as to the value of that disruption.

The use (and misuse) of AI in academia has escalated dramatically in recent years.¹¹³ A recent study by the American Association for Cancer Research found that 36% of abstracts in 7,177 manuscripts submitted contained at least some AI-generated text, yet only 9% of authors disclosed having used it.¹¹⁴ I wonder whether that count includes those who accredited “co-authorship” status to ChatGPT in recent years.¹¹⁵

A 2024 study from Stanford University found that chatbots ‘hallucinated’ between 58% and 88% of the time on legal queries.¹¹⁶ (I still don’t know what that

¹⁰⁹ *Draft Conclusions Provisionally Adopted by the Commission during Its Seventy-Fourth Session*, UN Doc A/CN.4/781 (n 12) 68 (conclusion 2) (emphasis added).

¹¹⁰ *Ibid.*

¹¹¹ *Jalloh’s First Report*, UN Doc A/CN.4/760 (n 15) [330], citing Oscar Schachter, ‘The Invisible College of International Lawyers’ (1977) 72(2) *Northwestern University Law Review* 217.

¹¹² Matthijs M Maas, ‘International Law Does Not Compute: Artificial Intelligence and the Development, Displacement or Destruction of the Global Legal Order’ (2019) 20(1) *Melbourne Journal of International Law* 29.

¹¹³ See, eg, Jutta Haider et al, ‘GPT-Fabricated Scientific Papers on Google Scholar: Key Features, Spread, and Implications for Preempting Evidence Manipulation’ (2024) 5(5) *Harvard Kennedy School Misinformation Review* 10.37016/mr-2020-156; Weixin Liang et al, ‘Mapping the Increasing Use of LLMs in Scientific Papers’ (Conference Paper, Conference on Language Modelling, 10 July 2024); Spencer Nayer and Michael I Cooper, ‘The “Why & How” of Artificial Intelligence in Legal Scholarship’ (2025) 11(4) *Texas A and M Journal of Property Law* 543.

¹¹⁴ Jeffrey Brainard, ‘Far More Authors Use AI to Write Science Papers Than Admit It, Publisher Reports’ *Science* (Web Page, 12 September 2025) <<https://www.science.org/content/article/far-more-authors-use-ai-write-science-papers-admit-it-publisher-reports>>, archived at <<https://perma.cc/T3WU-BQAC>>.

¹¹⁵ Chris Stokel-Walker, ‘ChatGPT Listed as Author on Research Papers: Many Scientists Disapprove’, *Nature* (Web Page, 18 January 2023) <<https://www.nature.com/articles/d41586-023-00107-z>>, archived at <<https://perma.cc/T4TQ-DF5W>>.

¹¹⁶ Matthew Dahl et al, ‘Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models’ (2024) 16(1) *Journal of Legal Analysis* 64, 66.

means). Even bespoke legal AI tools created by LexisNexis and Thomson Reuters were found to produce incorrect information more than 17% and 33% of the time, respectively, according to another 2025 study.¹¹⁷ While this is an emerging body of literature, other than confirming the rapid escalation of AI use in legal scholarship, there is presently no conclusive data as to its international prevalence.

There are of course legitimate reasons for using generative AI in academic research. Performing searches across large data sets, note-taking and formatting are all examples of such use. There are other questionably legitimate uses (and the ubiquity and inevitability of this technology should cause us to question rather than instantly condemn) such as providing in-depth analysis of legal issues, editing confidential documents and writing research papers.

In short, AI technologies are effective tools, but they are not brains, and they should not be seen as reliable *sources* of information, not least of all because they cannot be interrogated. In order to understand a response, one needs to understand — equally — why the response was given. This entails an understanding of the methodology undertaken to produce a response. There is, after all, a difference between a response and the answer.

Earlier this year, researchers studied the world's 10 leading generative AI tools, finding that chatbots spread false claims about 35% of the time when asked questions about controversial news topics.¹¹⁸ A separate group of researchers from the University of Technology Sydney found that chatbots could easily be manipulated into generating false information.¹¹⁹

That it is so easy to compromise the integrity of AI outputs should tell us to approach with caution. I need not canvas here the many examples of cases where lawyers have relied, to their detriment, on AI-generated case citations.¹²⁰ Academia and the courts alike face a similar conundrum. How can the officers of either institution say with certainty whether the information they receive and rely upon is tainted by unreliable datasets, bias, “hallucinations” or other inaccuracies?

Strangely, this does not give me pause. AI-generated or not, I will interrogate what you tell me. That is a conundrum for all ages or eras. I am not so sure that I am intimidated by the cyclical return to relativism or nihilism. It seems we are due. What I am concerned about, and this is a product of the clash of dimensions — time and space — is that the values of accuracy and transparency will ebb as the value of efficiency flows. I do not assume that a true or an accurate response will always be more valuable than a cheap, quick and efficient one. The onset and proliferation of AI technology has the potential to alter our values. Or is it the other way around?

¹¹⁷ Varun Magesh et al, ‘Hallucination-Free: Assessing the Reliability of Leading AI Legal Research Tools’ (2025) 22(2) *Journal of Empirical Legal Studies* 216, 224.

¹¹⁸ ‘AI False Information Rate Nearly Doubles in One Year’, *NewsGuard* (online, 4 September 2025) <<https://www.newsguardtech.com/ai-monitor/august-2025-ai-false-claim-monitor/>>, archived at <<https://perma.cc/YF5G-9UAZ>>.

¹¹⁹ Lin Tian and Marian-Andrei Rizoiu, ‘How We Tricked AI Chatbots Into Creating Misinformation, Despite “Safety” Measures’, *The Conversation* (online, 1 September 2025) <<https://theconversation.com/how-we-tricked-ai-chatbots-into-creating-misinformation-despite-safety-measures-264184>>, archived at <<https://perma.cc/RG49-ZL2P>>.

¹²⁰ See generally Chief Justice Andrew Bell, ‘Truth Decay and Its Implications For The Judiciary: An Australian Perspective’ (Speech, Durham University, 23–26 April 2024).

Generative AI tools are “black boxes” in the sense that their internal workings are a mystery. Even where they link to various sources, they do not show the whole picture. We do not know the data it has been trained on, nor the data it is pulling from when it provides a response. We do not know the *why*. Nor do its creators. Perhaps we can say the same thing about human intelligence, but the capacity for delusion does not, I think, put us on the same plane.

I am concerned about dissent. What is the value of it in the absence of reasoning?

I am also concerned about more practical matters. Will we remember how to conduct research? Do you recall the advent of Google, prior to which some of us were forced to locate physical copies of the dictionary or encyclopedia? I would bemoan the inability to spell, but that ship has sailed. In terms of my own flaws, I have no doubt that I would not be able to read a map with the same skill given years of reliance on (the misrepresentations of) interactive maps. This is the danger of overreliance on tools which are valuable when used properly, but erode the ability to think critically when not.

It is a great relief that I now turn to the question of whether generative AI qualifies as “teachings” of publicists under international law, and not whether they are or might one day be considered “judicial decisions” (although the appointment of the world’s first ‘AI Minister’ in Albania earlier this month does not bode well for me or my colleagues).¹²¹

Court guidelines exist that provide that judges are not to use generative AI in the formulation of reasons for judgment or the assessment or analysis of evidence.¹²² There are also practice notes for legal practitioners as to the acceptable use of generative AI. I note that they are not rules, yet.

Chief Justice Andrew Bell stated in his August Address to the Australian Bar Association that he is ‘unapologetic’ about New South Wales’ cautious approach to generative AI in the context of court proceedings.¹²³ I consider it a necessary caution in light of the difficulty in ascertaining the true impact or influence of generative AI on judicial decision-making, where judges are not always forthcoming about what they are reading and relying on, and pleadings may involve the use of AI technologies.

For the international lawyer, a different conundrum presents itself, borne of draft conclusion 2(c). Can a “highly qualified publicist” ever be an AI chatbot? It must be remembered that art 38(1)(d) is concerned with subsidiary *means* for the determination of rules of international law, and not sources of law. With that in mind, it may be only a matter of time before AI is acknowledged as such a means.

¹²¹ Alice Taylor, ‘Albania Appoints World’s First AI-Made Minister’, *Politico* (online, 11 September 2025) <<https://www.politico.eu/article/albania-appoints-worlds-first-virtual-minister-edi-rama-diella/>>, archived at <<https://perma.cc/38LK-ZDDV>>.

¹²² Chief Justice Andrew Bell, ‘Guidelines for New South Wales Judges in Respect of Use of Generative AI’ (21 November 2024). See also Justice Jane Needham, ‘AI and the Courts in 2025: Where Are We, and How Did We Get Here?’ (Speech, 2025 Judges Series, NSW State Library, 27 June 2025).

¹²³ Chief Justice Andrew Bell, ‘Change at the Bar and the Great Challenge of Gen AI’ (Speech, Australian Bar Association, 29 August 2025) [42].

VI CONCLUSION

In conclusion, I offer no predictions about the next 25 years — other than that they will not look or feel like the last 25.

I also offer one consolation, which is borne of the work that you have put into producing this journal and generating legal scholarship for the past 25 years, and that is an observation about the utility of that work in argument, debate and dissent, which will ensure an important place for *MJIL* in the 25 years to come.