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THE USE OF SCHOLARSHIP BY THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract The relationship between scholarship and adjudication has attracted considerable attention in recent years, especially in those areas where significant academic expertise has been developed and academic scrutiny of decisions is common. Yet the role of scholars and scholarship in the context of the adjudicatory practices of the European Court of Human Rights (ECtHR) has remained palpably under-investigated. This article begins to fill this gap in the literature by carrying out the first large-scale empirical study of the use of scholarship by the ECtHR. The authors rely on a purpose-built dataset comprising all the citations made by the Grand Chamber of the Court in judgments and separate opinions appended to it. The study finds that the Court's majority uses scholarship for the purposes of reviewing facts and interpreting international and domestic law but does so rarely. The majority of the ECtHR does not use scholarship to interpret the European Convention on Human Rights or for persuasive purposes, unlike the individual Judges in their separate opinions. Indeed, individual Judges refer to scholarship more often, for more varied and arguably different purposes. This use, however, is inconsistent in terms of both frequency and the types of sources referred to.

Keywords: public international law, human rights law, legal scholarship, European Court of Human Rights, European Convention on Human Rights, legal reasoning, dissenting opinions.

I. INTRODUCTION

The European Court of Human Rights (ECtHR, the Court) does not operate in a vacuum. Its interpretation of the European Convention on Human Rights (ECHR, the Convention) reflects changing historical and societal conditions,

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so that the Convention may live and breathe together with European society. This interpretive practice is an important aspect of the Court's mandate, though it is not an exact science and involves a degree of judicial discretion. Despite this, the words of Judges in their judgments and opinions matter. The Court's findings are subject to constant and thorough scrutiny by several concerned stakeholders, and it is therefore not surprising that it should endeavour to elaborate the reasons underpinning them carefully. Reference to legal authorities is one of the most frequently employed methods to justify a particular argument.[1] It is well documented that the Court commonly refers to its previous case law, treaties and other international instruments, European consensus, and many other sources. This article instead focuses on the rarely studied approach of the Court to referencing scholarship. This practice has been scrutinised in relation to other national and international courts and tribunals, but, surprisingly, there has been no study of it in relation to the ECtHR.

The scope of this article is limited in two respects. First, while the authors consider some of the implications of citing scholarship in adjudication, it is not their intention to put forward a normative argument in relation to whether the ECtHR *must* necessarily engage with scholarship, acknowledging that the Court may legitimately decide whether it is appropriate for it to do so or not. Second, at the methodological level, the empirical analysis is restricted to instances where the Court expressly refers to scholarship, although the authors acknowledge and discuss anecdotal evidence confirming that the Court may sometimes be influenced by the existence of relevant scholarly writing and yet refrain from citing it.

The discussion of the use of scholarship by the ECtHR must necessarily start with a working definition of the term 'scholarship', given the heterogeneous nature of the material cited by the Court and its Judges. For the purposes of this article, scholarship is considered to be any published material which is not excessively removed from a common-sense definition of scholarship.[2] In other words, the definition errs on the side of inclusion, but nonetheless excludes sources such as governmental or non-governmental organisation (NGO) reports,[3] and news sources employed to provide evidence of specific factual circumstances.[4] The

[1] The expression 'authorities' is used here without implying that every citation of a scholarly work would necessarily be and share the features of an 'argument from authority' in argumentation theory. On this latter notion, see D Walton, *Appeal to Expert Opinion: Arguments from Authority* (Pennsylvania State University Press 1997).

[2] In particular, it is not considered here whether individual opinions of Judges of an international court may themselves amount to scholarship, which has been discussed elsewhere in the literature. On this point, see, eg, ST Helmersen, 'Scholarly–Judicial Dialogue in International Law' (2017) 16 LPICT 464.

[3] *Dubská and Krejzová v the Czech Republic* App Nos 28859/11 and 28473/12 (ECtHR, 11 December 2014) para 29.

[4] *Hutchinson v the United Kingdom* [GC] App No 57592/08 (ECtHR, 17 January 2017) Dissenting Opinion of Judge Pinto de Albuquerque, para 38.

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study does, however, include legal as well as non-legal scholarship,[5] works of fiction[6] and other knowledge-bases such as online encyclopaedias.[7] It should be clarified that the approach is not intended to either criticise or legitimise any citation practice, but rather to take stock of the range of sources employed by the Court.

This article is the result of a thorough analysis of the 484 judgments of the Grand Chamber of the Court issued from 1 January 1998 to 1 September 2021. These judgments contain 1,424 references to scholarship. The parsing of the references was carried out manually in order to identify them accurately given the lack of consistent citation styles used by the Court. On the basis of this large dataset, the authors set out to discern patterns in the use of scholarship, considering, inter alia, variables such as their geographic provenance, age and thematic area, as well as the distribution of these references in the separate opinions of different Judges of the ECtHR.

By parsing these citations, the authors identified previously unknown trends, or rather a lack thereof, in the Court's treatment of scholarship. In particular, they found that the Court's majority uses scholarship to establish facts and to determine the existence and scope of international and domestic legal rules. However, it does so rarely and unsystematically, and majority decisions do not use scholarship in relation to the interpretation of the ECHR itself. Such infrequent deployment may suggest that no explicit rules of engagement with scholarship have been established. It may also help to explain the very diverse use of scholarship by minority Judges in their separate opinions,[8] where recourse to it is more frequent than with the majority, for more varied purposes, and, arguably, for broader audiences.

These findings are significant not only because the article applies a rigorous methodology to a little-explored field of ECtHR research, but also because they explain the rationales behind using scholarly citations in the judgments of the Grand Chamber of the ECtHR. It is argued that in majority judgments the Court does not cite scholarship in interpreting the ECHR because the controversies that this might lead to seemingly outweigh the benefits. That said, scholarship is sometimes referred to by the majority to shed additional light on the facts of the case and domestic law of the respondent State. Individual

[5] *X, Y and Z v the United Kingdom* App No 21830/93 (ECtHR, 22 April 1997) para 38.

[6] *Hermi v Italy* [GC] App No 18114/02 (ECtHR, 18 October 2006) Dissenting Opinion of Judge Zupančič.

[7] *Lautsi v Italy* App No 30814/06 (ECtHR, 3 November 2009) Concurring Opinion of Judge Bonello, para 4.1.

[8] The term 'minority Judges' is used as a composite term, including Judges who voted against the outcome of the judgments and who submitted their dissenting opinion, as well as those who voted with the majority but submitted their concurring opinion. When the judgment of the majority is referred to, this specifically means the part of the judgment excluding the opinions of the minority Judges. When the judgment of the Court is referred to, this indicates the judgment in its entirety.

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Judges are more inclined to refer to scholarship because they seek to persuade broader audiences such as national judges and authorities, as well as the public at large, that their opinion in the particular case was preferable to that of the majority.

The argument is presented as follows. In Section II, the context of the research is explained, and it is established that in the past there has been very limited academic engagement with the question of the use of scholarship by the ECtHR. Section III explains the methodology of the case-law analysis. It justifies the choices made by the authors and describes the approach. Section IV provides the key statistical findings of the project and makes some preliminary conclusions. In Section V, certain instances of references to scholarship are used to illustrate why and how the majority and minority of the Court refer to scholarship. Section VI concludes.

II. THE USE OF SCHOLARSHIP IN INTERNATIONAL LAW

Before outlining the study, the existing analysis of the use of scholarship by the ECtHR within the literature must be recalled, noting briefly how courts use or have used scholarship in carrying out their adjudicatory mandate, and acknowledging widely diverging practices in this respect due, inter alia, to the formal status of scholarship in different legal systems, as well as the processes through which the legal systems themselves have developed.

Although the ECtHR is unique in many ways, it is still fundamentally an international court; it is therefore appropriate to recall the general approach to scholarship in international law. Here, the status of scholarship has traditionally been discussed as a matter relating to the doctrine of sources of international law.[9] Article 38 of the Statute of the International Court of Justice (ICJ), lists the 'teachings of the most highly qualified publicists', together with judicial decisions, after the three main accepted sources (treaties, customary international law and general principles of law) with the direction that the ICJ 'shall apply' them as 'subsidiary means for the determination of rules of law'.[10] The qualification of judicial decisions and scholarship as 'subsidiary means' has sometimes elicited doubts. A good summary of the orthodox approach is offered by Rosenne, who qualifies these 'subsidiary means' simply as 'the storehouse from which the rules of [customary and treaty law, as well as and general principles] can be extracted'.[11] While 'subsidiary' does not mean

[9] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 42; MN Shaw, *International Law* (CUP 2017) 83.

[10] Statute of the International Court of Justice (adopted 24 October 1945, entered into force 24 October 1945), annexed to the Charter of the United Nations (1945) art 38(1).

[11] S Rosenne, *The Law and Practice of the International Court, 1920–2005* (Martinus Nijhoff Publishers 2005) 1550–1.

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'optional',[12] in a study relying, inter alia, on interviews with the ICJ Judges and clerks, Helmersen concluded that, if any obligation was present at all, it certainly stopped short of the creation of a duty to cite the relevant authors.[13] That said, international tribunals refer to scholarship with a varying degree of regularity. Comparatively few empirical studies have tackled the use of scholarship by international adjudicators with the result that there is a concerning lack of data on the citation practices of a number of international courts. However, two recent studies have demonstrated that the individual opinions of ICJ Judges are replete with citations to scholarly writings, and that the weight of the latter is in fact significant.[14]

The ECHR does not have a clause similar to that in Article 38 of the ICJ Statute. As a result, there appears to be no statutory directive for the ECtHR directly relevant to the question of the use of scholarship. The closest the ECHR comes to regulating the matter is in Article 19, which points to the Court's mandate to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'.[15] The provision simply establishes that the ECHR is the key source of law to be applied by the Court when deciding on applications brought before it, and does not state that the Court cannot use other sources of law in its decision-making. The ECtHR does in fact use other sources, and its practice of relying on some of these has been examined.[16] For example, the Court's practice of citing decisions of other adjudicators and other sources of international law has attracted considerable attention and has been the object of thorough empirical investigation.[17] Limited scholarly engagement with the Court's practice of citing scholarly authorities can be at least partially explained by the fact that the ECtHR's engagement with academic writing is quite limited. This may appear surprising when considering that many of the Judges joined the bench from academia.[18] Yet, as already recalled, a

[12] See RY Jennings, 'The Progressive Development of International Law and Its Codification' (1947) 24 BYIL 301, 308 ('the International Court of Justice is required, as a subsidiary means for the ascertainment of the law, to consult the writings of the most eminent publicists').

[13] ST Helmersen, *The Application of Teachings by the International Court of Justice* (CUP 2021) 24–5.

[14] ST Helmersen, 'Finding "the Most Highly Qualified Publicists": Lessons from the International Court of Justice' (2019) 30 EJIL 509; Helmersen ibid.

[15] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, art 19.

[16] See K Dzehtsiarou, 'What is Law for the European Court of Human Rights?' (2018) 49 GeoJIntlL 89.

[17] See, inter alia, CPR Romano, 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2008) 41 NYUJIntlLaw&Pol 755; E Voeten, 'Borrowing and Nonborrowing Among International Courts' (2010) 39 JLS 547; R Garciandia, 'State Responsibility and Positive Obligations in the European Court of Human Rights: The Contribution of the ICJ in Advancing Towards More Judicial Integration' (2020) 33 LJIL 177.

[18] See K Dzehtsiarou and A Schwartz, 'Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why It Matters' (2020) 21(4) GermanLJ 621. See also, S

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comparatively low degree of engagement with scholars is typical of most international courts.

The authors are aware of just one volume solely focused on the role of scholarship in the context of ECtHR adjudication.[19] The contributions in that edited collection are restricted to reiterating that the influence of scholarship in the jurisprudence of the ECtHR is somewhat elusive, but still palpable in separate opinions; that the relevance of doctrine is unquestionable, though its significance may not transpire from the arguments submitted by the parties before the Court;[20] and that references to scholarly authorities abound in third-party interventions submitted to the Court but with varying degrees of engagement depending on the identity of the intervener.[21] A final contribution to the volume, authored by a Judge, goes further in acknowledging scholarship as essential in guiding the work of the Court's staff as a reflection of the rich diversity of the *espace juridique* in question, and as a proxy for the revealing of legal ideologies in the context of deliberations.[22]

This short overview provides a sense of the current awareness of the role of scholarship in ECtHR adjudication, confirming that the question of the impact of academic writings on the Court's decision making and how the Court engages with them remains under-investigated. The few studies that are available mainly describe the perception of insiders regarding the role of scholarship at the ECtHR. To the authors' knowledge, no studies have tried to offer any substantiated support or challenge to this perception based on the documented usages of such scholarship. This article aims to be a starting point in addressing this gap.

Touzé, 'Propos introductifs' in S Touzé (ed), *La Cour européenne des droits de l'homme et la doctrine: Actes du colloque des 10 et 11 mai 2012: Palais des droits de l'homme, Strasbourg* (Editions A. Pedone 2013) 25: 'A ce titre, il est possible de constater, en prenant connaissance des *curriculum vitae* présentés par les juges que leur production scientifique peut être antérieure à leur élection (permettant de la sorte de valider *a priori* le critère de la compétence disciplinaire du candidat) et peut porter sur le droit de la Convention. Ainsi, la très grande majorité des juges, en activité ou non, ont développé, avant leur élection, une production scientifique parfois dense (surtout lorsque le juge était universitaire ou exerçait ces activités académiques) qui s'est poursuivie, pour certains, après.' ('In this respect, it can be seen from the *curriculum vitae* submitted by the judges that their scientific output may be prior to their election (thus allowing the criterion of the candidate's disciplinary competence to be validated *a priori* and may relate to Convention law. Thus, the vast majority of judges, whether active or not, have developed a sometimes dense scientific output before their election (especially when the judge was an academic or engaged in other academic activities) which continued, for some, after their election.') (authors' translation).

[19] Touzé, *La Cour européenne des droits de l'homme et la doctrine*, ibid.

[20] C-L Popescu, 'La place de la doctrine dans les argumentaires des réquerants' in Touzé ibid 40.

[21] D Szymczak, 'La place de la doctrine dans les argumentaires des tiers intervenants' in Touzé ibid 67.

[22] A Kovler, 'La doctrine dans les délibérations (éléments de réflexion)' in Touzé ibid 105.

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III. METHODOLOGY

A. The Case for an Empirical Analysis

Accounts of the use of scholarship by international courts tend to be anecdotal and limited to specific fora. Although the usefulness of in-depth qualitative studies cannot be doubted, such an approach generally provides no useful insights into overall patterns or trends. Accordingly, the authors of this study chose to rely on a large-scale empirical analysis of *all* citations to scholarly sources in the judgments adopted by the Grand Chamber of the ECtHR.

There is, of course, an obvious difficulty, which should be addressed at the outset and may be enunciated as follows: scholarship can be used in many ways, but not all of them are overt and visible. It is acknowledged that it is entirely possible—and, in some cases, even likely—that Judges may rely on a scholarly source without ever acknowledging having done so. But, it is also possible—and, as the authors found, relatively common—for some Judges to decide to rely on scholarly authorities *and* cite the source, thereby acknowledging their importance for their reasoning and embedding them in the flow of their arguments in order to provide support, interpret or persuade. For this to occur, the authority needs to be mentioned overtly, and the citations themselves can generate rich data.

Inquiries based on this type of data, known as citation analyses, have a long history. Citation analysis has been employed successfully in a variety of fields, including law, with some pioneering studies dating back to the 1950s. In one such study on the sources and authorities cited by the California Supreme Court, Merryman highlighted the promises and perils of the approach, recognising that while the citation of authority 'is often an uncritical unreflective process',[23] '[p]resumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader'.[24] Yet, as Posner has suggested, while it is possible for a citation to be meaningless in principle, it is unlikely in practice, 'if only because citing is not costless—there is the bother of finding the citation, and the possibility of criticism for misciting or failing to cite'.[25] To be sure, absence of evidence does not amount to evidence of absence, for international adjudicators tend to err on the side of caution when it comes to including specific references to scholarship.[26]

[23] JH Merryman, 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1953) 6 StanLRev 613, 613.

[24] ibid 613.

[25] RA Posner, 'An Economic Analysis of the Use of Citations in the Law' (2000) 2 ALER 381, 383.

[26] Commenting on the ICJ, Pellet writes that '[t]he literature on doctrine in international law is inversely proportional to the use made of it in the Court's decisions—a means for scholars to take their revenge: they speak for themselves since the judges do not speak of them'. See A Pellet, 'Article 38' in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012). Yet former ICJ Judges have provided less sensational explanations for the phenomenon, justifying the practice by reference to the need 'to avoid invidious distinctions between publicists cited and publicists not cited': see RY Jennings, 'The Judiciary,

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Sometimes a connection may be drawn between a particular argument or turn of phrase and a prominent piece of scholarly writing. Yet, an approach of this kind would only be suited to the identification of the influence of works which have been known to be influential, either because they have been acknowledged by relevant actors to be so, or because they provided an unmistakable approach to a given issue. In all other cases, an approach of this kind would require a significant expenditure of resources, and would not be guaranteed to yield better outcomes in light of the several other challenges that might be faced in tracing arguments back to their unsourced antecedents.

This study embraces citation analysis as the most robust approach, operating on the assumption that the inclusion of a citation represents an overt acknowledgement of the relevance of scholarship by the Court or by the Judge or Judges authoring a separate opinion. The authors acknowledged and mitigated the possible shortcomings of this technique by building as large and feature-rich a dataset of citations of Grand Chamber judgments as possible, thereby avoiding reliance merely on the fact of a citation being included, but also incorporating context and additional metadata, as discussed in the following sections.

B. The Sample

1. Grand Chamber judgments

The study uses the judgments of the Grand Chamber of the ECtHR as the sample of judicial decisions from which the citations are drawn.[27] Naturally, the focus on the Grand Chamber is an obvious limitation of this study and the specificities of the Grand Chamber's operation restrict the applicability of the findings of this study to other formations of the Court. Thus, it is acknowledged that further insights may be gained by looking at the Chamber judgments which are often informed by different contextual pressures, compositional dynamics and day-to-day docket management needs. That said, the authors have assumed that academic citations in the Grand Chamber are both more likely (per judgment) and more important at the systemic level than those in judgments and decisions of other formations of the Court.

International and National, and the Development of International Law' (1996) 45 ICLQ 1, 9. Moreover, insiders have often gone on record to say that the final text of the judgment does not provide conclusive evidence of the process by which the decision was arrived at. See, inter alia, M Bedjaoui, 'The Manufacture of Judgments at the International Court of Justice' (1991) 3 PaceYBIntlL 29; H Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations' (2006) 5 ChineseJIL 15; J Pauwelyn and K Pelc, 'WTO Rulings and the Veil of Anonymity' (2022) 33 EJIL 527; J Pauwelyn and K Pelc, 'Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement' (2022) 116 AJIL 534.

[27] The Court sits in 4 formations depending on the complexity of the case: Single Judge, Committee of 3 Judges, Chamber of 7 Judges and Grand Chamber of 17 Judges.

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These assumptions stem from the very nature of Grand Chamber adjudication. It is the largest formation of the Court, comprising 17 Judges including the President and Vice-Presidents of the Court and Presidents of the Sections. Since the Grand Chamber is the largest and most diverse formation of the Court, it may be hypothesised that scholarship is more likely to be raised in the deliberations[28] by at least one of the Judges. By the same token, the size and diversity of the bench will enable more Judges to oppose the inclusion of a reference, thereby making such inclusion—in the context of the judgments of the majority—all the more significant. Moreover, the context of Grand Chamber adjudication must be considered: the Grand Chamber enjoys a very selective jurisdiction, which allows it to focus on what the Court sees as the most complex and novel human rights challenges. These challenges are unlikely to be covered by many Court precedents, potentially making scholarship a more attractive source of insight to be drawn upon.

As to the latter point, the authors posit that the greater importance of citations included in Grand Chamber judgments follows from the limited number of cases (around 12 per year) heard in this formation. By way of summary, a case can reach the Grand Chamber through two routes, either by relinquishment to the Grand Chamber under Article 30 of the ECHR or by a referral following a decision in a Chamber under Article 43 of the ECHR. The Chamber of the Court might decide that the case should be relinquished to the Grand Chamber if the case is deemed important for the protection of human rights or if it reveals inconsistency in the Court's case law. Referral to the Grand Chamber may also occur after the Chamber delivers its judgment: specifically, a party to the case can request the panel of the Court[29] to consider whether the case should be heard again by the Grand Chamber. The success rate of such requests is low: since 1998, the panel has accepted only 290 requests out of 5,816 (a success rate of roughly 5 per cent).[30] Taking into account the broadly defined criteria for referral and the very low success rate despite a significant number of requests, and the Chamber's power to decide on relinquishment, it can be argued that the Court ultimately controls the Grand Chamber docket by selecting only exceptionally important cases for consideration. The selection of cases for the Grand Chamber therefore seems to reflect the opinion of the Judges on the truly important human rights issues in Europe at the time.

[28] For more information on deliberating and drafting judgments at the ECtHR, see H Keller and C Heri, 'Deliberation and Drafting: European Court of Human Rights (ECtHR)' in R Wolfrum (ed), *Max Planck Encyclopaedia of International Procedural Law* (OUP 2018).

[29] Pursuant to Rule 24 of the Rules of Court, the Panel consists of the President of the Court, two Presidents of Sections designated by rotation, and two Judges designated by rotation from among the Judges elected by the remaining. Sections are to serve on the panel for a period of six months.

[30] ECtHR, 'Practice Followed by The Panel of The Grand Chamber When Deciding on Requests for Referral Under Article 43 of the Convention' (ECtHR, 2 June 2021) 4–5 <https://www.echr.coe.int/Documents/Note_GC_ENG.pdf>.

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Thus the analysis considered the judgments of the Grand Chamber because they carry a particular weight within the ECHR system: they are the Court's final word on the issue, with the case not being subject to any further appeal.[31] With this in mind, it must be acknowledged that the results of the study are only valid in relation to Grand Chamber judgments and cannot be directly applied to the entire body of the Court's case law. However, because of their status within the case law of the Court, Grand Chamber judgments are influential and routinely cited in the Court's adjudication. These judgments shape the case law of the ECtHR and therefore a greater understanding of the Court's practices in Grand Chamber cases improves an appreciation of the Court's approach as a whole.

2. *Judgments and separate opinions*

Decision-making at the ECtHR is divided into two stages: admissibility and merits. The Court first decides whether the case is admissible pursuant to Articles 34 and 35 of the ECHR. Admissibility is a preliminary stage verifying whether the application complies with certain criteria,[32] such as being submitted by a victim of the violation or having exhausted domestic remedies. While it does so rarely,[33] the Grand Chamber also issues decisions of admissibility in complex cases. These statistically insignificant admissibility decisions were excluded from the sample, despite some featuring notable references to scholarship,[34] for reasons of consistency and the avoidance of duplication, as most such decisions are followed by a corresponding judgment on the merits.[35] 'New' advisory opinions, which the Grand Chamber can adopt pursuant to Protocol 16 to the Convention, were also excluded despite some containing references to scholarship,[36] because of

[31] In accordance with Rule 80 of the Rules of Court, the party can request a revision of a judgment if a decisive fact is discovered after the delivery of the judgment. This is, however, a rare case. See, eg, *Ireland v the United Kingdom (Revision)* App No 5310/71 (ECtHR, 20 March 2018).

[32] Although the criteria are positioned as formal, they require a good deal of decision-making in their application. See A Tickell, 'Dismantling the Iron-Cage: The Discursive Persistence and Legal Failure of a "Bureaucratic Rational" Construction of the Admissibility Decision-Making of the European Court of Human Rights' (2011) 12 GermanLJ 1786; F de Londras and K Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 61–6.

[33] The Grand Chamber delivered only 27 admissibility decisions between 2020 and 2022. In the majority of cases, the Grand Chamber looks at the admissibility and merits in one unified judgment.

[34] See *Banković and others v Belgium and Others* [GC] App No 52207/99 (ECtHR, 12 December 2001) para 59.

[35] eg, the Grand Chamber first delivered a decision in *Stec and others v the United Kingdom* [GC] App Nos 65731/01 and 65900/01 (ECtHR, 6 July 2005), which was followed by the judgment in *Stec and others v the United Kingdom* [GC] App Nos 65731/01 and 65900/01 (ECtHR, 12 April 2006).

[36] See, eg, *Advisory Opinion Concerning the Use of the 'Blanket Reference' or 'Legislation by Reference' Technique in the Definition of an Offence and the Standards of Comparison Between the Criminal Law in Force at the Time of the Commission of the Offence and the Amended Criminal Law*

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the rarity of such opinions during the period covered by the study[37] but also to preserve the focus on the contentious jurisdiction of the Court.

The judgments in the Chamber and Grand Chamber of the ECtHR are adopted by voting. Judges cannot abstain and must vote either in favour of a particular outcome of a claim or against it. Pursuant to Article 45 of the ECHR, if a judgment does not represent the unanimous opinion of the Judges, any Judge can attach a separate opinion to the judgment.[38] They can be of different types, depending on the view of the particular Judge, including: dissenting; partially dissenting; partially dissenting and partially concurring; or concurring opinions. In addition, separate opinions can be individually or jointly authored. In the former case, opinions may be authored by one Judge and then others may join them if their views coincide. The analysis of the substance of separate opinions has generated some important scholarship,[39] but there has been no analysis of the patterns of citation of legal scholarship in separate opinions.

Analysis of separate opinions often yields more interesting results than the close reading of majority judgments, which are ultimately a compromise between Judges and do not leave much scope for controversial ideas. Moreover, the text of the judgment itself is usually prepared by the Registry lawyers,[40] thereby adding an additional layer of separation between the decision and its embodiment in text. The resulting document tends to be more balanced, impersonal and polished—befitting its status as a binding legal pronouncement.[41] In turn, separate opinions are usually drafted by the Judges themselves and, while they undergo editing and proofing for consistency and linguistic accuracy, the text essentially embodies the unabridged opinion of a particular Judge, unaffected by any attempt to seek

[GC] Request No P16-2019-001 (ECtHR, 29 May 2020) Concurring Opinion of Judge Sarvarian, para 2.

[37] The ECtHR had only delivered two such opinions before the end of the period under analysis.

[38] ECHR (n 15) art 45. Rule 74(2) of the Rules of Court states that any Judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber is entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.

[39] See, eg, RCA White and IK Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9 HRLRev 37; E Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 APSR 417; FJ Bruinsma and M De Blois, 'Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights' (1997) 15(2) NQHR 175.

[40] Compare this with the findings of Pauwelyn and Pelc in the World Trade Organization context: Pauwelyn and Pelc, 'WTO Rulings and the Veil of Anonymity'(n 26); Pauwelyn and Pelc, 'Who Guards the "Guardians of the System"?'(n 26). For a reflection on the importance of this contribution, see T Soave, 'The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?' in F Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019).

[41] ECHR (n 15) art 46. For similar conclusions in the ICJ context, see Thirlway (n 26) 27: 'So far as possible, the language used should be timeless, neither too archaic nor too "modern".'

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compromise. Finally, a high number of dissents can also be read as a proxy for the level of controversy surrounding the adoption of the decision, which in turn may serve as an indication that the Court may change its approach in the future. As the Court's jurisprudence is dynamic, with its content and approaches evolving over the years, so too have separate opinions transformed. It has been argued that '[s]eparate opinions have become sharper and more common in recent periods'.[42] It is therefore unsurprising that the number of citations in separate opinions has increased.

C. The Data Collection

The methodology for coding the judgments of the ECtHR involved the identification of all the citations to scholarship (broadly construed) in all of the 486 judgments adopted by the Grand Chamber up to September 2021. Four research assistants[43] were provided with a list of variables to include in the data, including the name of the case as it appears on the ECtHR's HUDOC database,[44] the year and date of the judgment, the application number, the date and year of the authority being cited, the age of the citation as determined by the difference between the year of the judgment and the year of publication of the source, the simplified name of the authority being cited, the number of the paragraph where the citation appears, the text of the citing paragraph, and various topics and issues related to the case. The research assistants were asked to indicate whether the citation appeared in the majority judgment or a separate opinion, the respondent State, the type of authority being cited, and whether the paragraph where the citation appears also cited Strasbourg case law or domestic law. Finally, the research assistants were asked to provide the names and nationalities of the Judges authoring the minority opinion, if applicable. This coding was complemented by creating a Boolean variable for each Judge involved in any decision,[45] and for each ECHR Article that could potentially be dealt with by the judgment so as to be able to map the data more accurately. As discussed in Section IV, by leveraging the text of the paragraphs including citations extracted by the research assistants, a topic model was also created to classify the citations further.

The work of the research assistants was checked and complemented by the authors who moderated samples of the judgments, and a few missing citations

[42] A Stone Sweet, W Sandholtz and M Andenas, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten' (2021) 32 EJIL 897, 904; L Helfer and E Voeten, 'Walking Back Human Rights to Europe?' (2020) 31 EJIL 797.

[43] The work was undertaken by Chandani Trivedi, Ewan Anthony, Wajih Jaroudi and Ben Robinson, to whom the authors are extremely grateful.

[44] HUDOC is the comprehensive case-law database of the ECtHR <https://hudoc.echr.coe.int/eng>.

[45] Boolean data type is commonly defined as data that can have only two possible values, namely 'true' and 'false'.

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were added to the database through this process. Some judgments were analysed by two different research assistants to ensure consistency in coding. Despite this approach, the possibility of human error cannot be ruled out. It is conceivable that some citations were missed or misrepresented. Moreover, it was not possible to check the accuracy via automated searches given the lack of a consistent format for quoting scholarship, as discussed in Section IV. These potential issues do not, however, undermine the findings as the number of possible missed citations is minimal and statistically insignificant. In total, 1,427 instances of citation of scholarship were counted across 592 paragraphs in 122 cases.

IV. FINDINGS

This section presents a comprehensive analysis of the ECtHR's use of scholarship based on the data collected. The investigation follows a structured approach to provide a clear picture of citation practices. It begins by examining the overall use of scholarship, including the number of citations, their distribution across cases, and the quantity of unique scholarly works referenced. This broad view sets the stage for more detailed analyses. Next, it explores the citation practices of minority Judges, identifying those who most frequently reference scholarly works and any patterns in their usage. Then the analysis turns to the age of cited scholarship to assess the Court's engagement with contemporary academic discourse. Finally, the most frequently cited sources in both majority and minority judgments are analysed, revealing key authorities and subject areas that have particularly influenced the Court's reasoning.

A. Overall Use of Scholarship

The data shows that the ECtHR has regularly cited scholarship in its majority judgments and separate opinions. It is possible to appreciate an overall increase across time, with some fluctuation in the number of judgments citing scholarship each year. In general, citations are far more frequent in separate opinions than in majority judgments. For example, in 2014, there were 99 scholarship citations in separate opinions compared to just 8 instances in majority judgments, while in 2017, there were 362 citations in separate opinions, but none in majority judgments.[46] Overall, the rate at which the ECtHR cites scholarship in its judgments and opinions seems to vary from year to year, but with a clear preference for references to scholarship in separate opinions, as is shown clearly in Figure 1.

[46] It must be noted here that a single judgment can be accompanied by multiple separate opinions, but even with this in mind the approach is quite clear.

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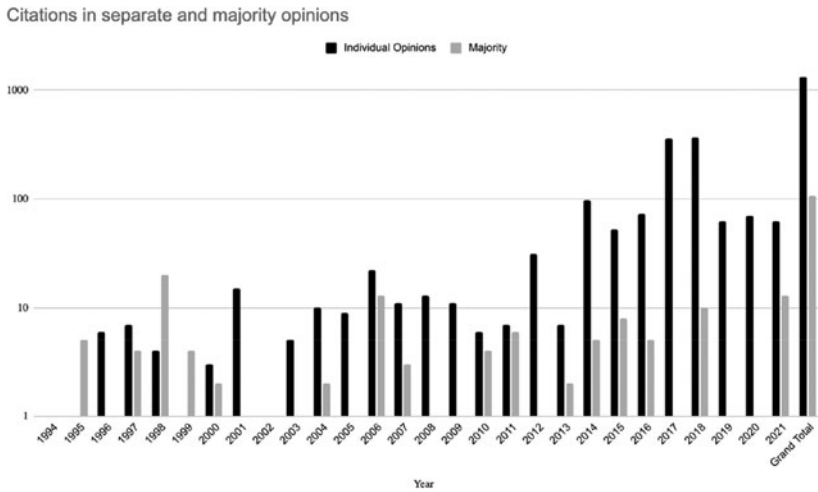

FIGURE 1: Increase in the number of citations (logarithmic scale)

In terms of distribution, the average number per year of *unique* scholarly works referenced in a judgment citing scholarship (irrespective of whether the citation is included by the majority or in a separate opinion) is 10.4, though the median number is only 3. This pattern reveals that some judgments have been clear outliers in terms of including a large number of references. For example, *G.I.E.M. S.r.l. and others v Italy* cites 148 unique scholarly authorities, with 139 being cited by Judge Pinto de Albuquerque and 11 by Judge Motoc (with two authorities cited by both).[47] A similar pattern may be observed in *Ilnseher v Germany*, which includes references to 100 unique scholarly authorities in the opinion of Judge Pinto de Albuquerque, joined by Judge Dedov.[48] These anomalies reveal that the practice of including abundant references to scholarly authorities is far from widespread, and indeed these two instances represent almost 20 per cent of the authorities included in our dataset.[49] The presence of these exceptions also explains why there appears to be little correlation between the number of citations included in a judgment and the number (rather than the presence) of separate opinions.

Only 30 cases contain citations of scholarship by the majority, with a grand total of 80 unique authorities cited. Here, the distribution of citations is not as uneven, but it remains difficult to interpret in light of the type of works cited. For

[47] *G.I.E.M. S.r.l. and others v Italy* [GC] App Nos 1828/06 and two others (ECtHR, 28 June 2018).
[48] *Ilnseher v Germany* [GC] App Nos 10211/12 and 27505/14 (ECtHR, 4 December 2018).
[49] More precisely, 19.69 per cent.

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example, the majority judgment in *Jalloh v Germany* contains the highest number of citations, but only if it is accepted that 'case notes discussing domestic case law' should be counted as scholarship.[50] Other judgments, however, cite sources that may be unequivocally qualified as scholarly. This was the case, for example, in *Georgia v Russia (II)*,[51] where several works concerning the international law of military occupation were cited, and in *Naït-Liman v Switzerland*, which cited several works on torture and universal jurisdiction.[52]

Despite some examples, the citation of scholarship by the majority remains a comparatively rare practice, with less than 7 per cent of all majority judgments containing any references to it. Thus, beyond a slight increase over time in the number of works cited annually, it is difficult to discern any other trends.

B. Judges

As noted in the previous section, there is a significant variation between Judges in the number of citations that they tend to include in their separate opinions. An accurate calculation of these citations was not entirely devoid of difficulties, as the attribution of individual opinions to a specific Judge was complicated by the conventions applying to the titling of the opinion itself in the Court's practice—contrasting, for example, the citations made in sole-authored opinions with those in joint ones, or those ostensibly authored by just one Judge to which others joined. Thus, to calculate the number of references attributable to a Judge accurately, two different metrics were considered. First, all of the references made in an opinion where the Judge was *named* in the title of the opinion were counted, irrespective of whether they were leading or simply joining the minority. Second, all of the instances were counted in the opinions in which a Judge was leading, on the basis of the first name listed in the opinion.[53]

Overall, the average number of references to scholarship per individual Judge is just over 20, but the median number is in fact 4. The inconsistency between the figures may be explained by the fact that some Judges appear to have cited far more than others, with four in particular accounting for over half of the total number of passages containing references. Thus, as Figure 2 shows, Judge Pinto de Albuquerque leads with 704 citations, whereas Judges Serghides, Dedov and Vehabović made 158, 145 and 138 references, respectively. This is particularly interesting as Judge Vehabović was not listed as first drafter in any opinion

[50] *Jalloh v Germany* [GC] App No 54810/00 (ECtHR, 11 July 2006).
[51] *Georgia v Russia (II)* [GC] App No 38263/08 (ECtHR, 21 January 2021).
[52] *Naït-Liman v Switzerland* [GC] App No 51357/07 (ECtHR, 15 March 2018).
[53] The authors are cognisant of the fact that in some cases the first-named Judge is not the leading author but the longest-serving Judge on the bench; however, this simplification had to be accepted as it is often difficult to discern who the main contributor to the separate opinion was.

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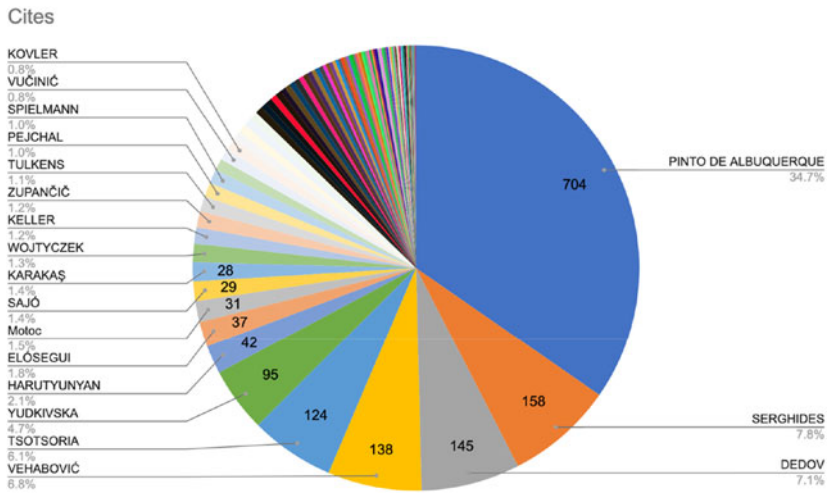

FIGURE 2: Number of paragraphs containing citations to scholarship by individual Judge, however listed in the opinion

citing scholarship.[54] Ranking by leading Judges, there is again evidence that some Judges are far more inclined to cite scholarship than others. Thus, as Figure 3 shows, Judge Pinto de Albuquerque accounts for over half of the citations (with 704 authorities cited in 25 opinions) and is followed, at some distance, by Serghides (158 in 10), Yudkivska (95 in 6), Tsotsoria (43 in 1), Motoc (31 in 5) and Zupančič (20 in 9).

C. *Age of Cited Scholarship*

Another important question concerns the average age of the cited sources. The question is significant insofar as it may provide evidence of the level of engagement of the Court with scholarly authorities. In other words, it shows how up to date the Court and its Judges and lawyers might be at any given time. Figure 4 shows the average and median age of scholarship throughout the years.

The results reveal that, despite some exceptions, the Court has tended to cite comparatively recent scholarship, with an average age of 18.8 years and a median age of 7 years—the latter measure being more indicative, considering that more dated works such as those of Grotius and Shakespeare feature among

[54] For example, Judge Dedov was only involved in opinions citing scholarship in four cases: *Baka v Hungary* [GC] App No 20261/12 (ECtHR, 23 June 2016); *Fernández Martínez v Spain* [GC] App No 56030/07 (ECtHR, 12 June 2014); *Ilnseher v Germany* (n 48); *Naït-Liman v Switzerland* (n 52).

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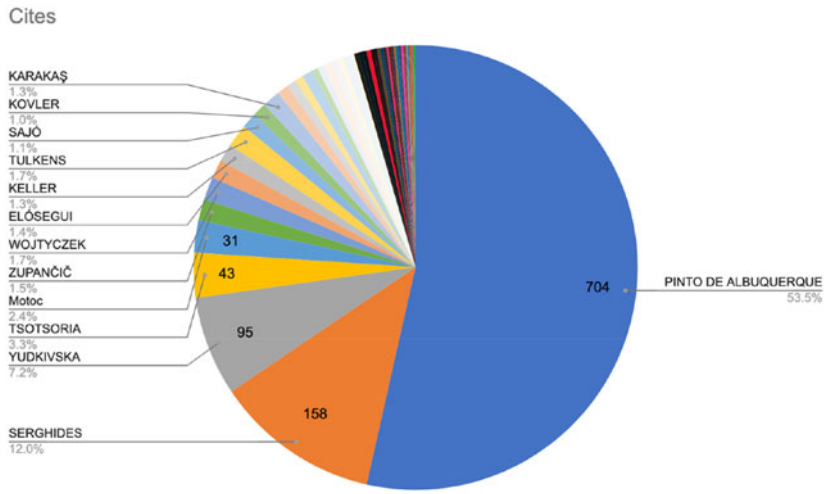

FIGURE 3: Number of paragraphs containing citations to scholarship by 'lead' individual Judge

the cited sources, thereby skewing the averages significantly. The findings appear to support the idea that the Court will generally seek to consult and cite up-to-date writings, as opposed to following the informal rule whereby the authority of deceased authors is to be preferred to that of the Judges' own

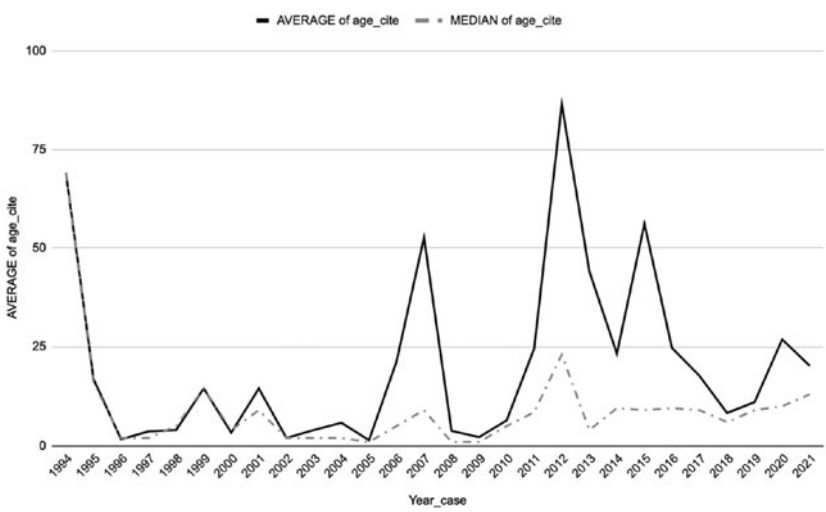

FIGURE 4: Average and median age of cited scholarship over the years

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contemporaries.[55] There is no difference between the majority and the minority as to the median age of the cited works, but, unsurprisingly, the average age of the authorities cited by the majority is lower (12.5 years, against 19.44 years for the minority), pointing towards a tendency to cite more recent works.

D. Highly Cited Sources

When analysing the jurisprudence of the Grand Chamber of the ECtHR, it is useful to look at the most cited scholarly authorities. Most international courts have certain most cited works,[56] and the ECtHR is no exception. However, there is less consistency in the most cited works in the ECtHR than in other international courts.

Table 1 lists the authorities that have been cited the most by the majority. An interesting pattern that emerges is that the most cited works are on international humanitarian law, specifically Henckaerts and Doswald-Beck's *Customary International Humanitarian Law* (three citations), Roberts' 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (two citations) and Dinstein's *The International Law of Belligerent Occupation* (two citations). Other sources on occupation are also cited in two cases.[57] Other commonly cited authorities belong to the field of public international law.

It is also worth noting that there are sources cited in the ECtHR's case law concerning topics not specifically related to law, such as Zhou, Hofman, Gooren and Swaab's landmark study on transsexuality, which was 'the first to show … a female brain structure in genetically male transsexuals and [to support] the hypothesis that gender identity develops as a result of an interaction between the developing brain and sex hormones'.[58]

Thus, it appears reasonable to conclude that highly cited authorities tend to target matters that fall outside the area of expertise of the ECtHR, and on which the Court might feel uncomfortable to contribute without buttressing its arguments.

The patterns emerging from analysis of the minority opinions are rather different (Table 2). Here, too, public international law scholarship features heavily, including some classics[59] and well-known reference

[55] Helmersen (n 13) 160.

[56] Helmersen (n 13); Helmersen (n 14); N Ridi and T Schultz, 'Empirically Mapping Investment Arbitration Scholarship: Networks, Authorities, and the Research Front' in K Fach Gómez (ed), *Private Actors in International Investment Law* (Springer International Publishing 2021) 229–30.

[57] See E Benvenisti, *The International Law of Occupation* (OUP 2012); Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill Nijhoff 2009).

[58] J-N Zhou et al, 'A Sex Difference in the Human Brain and Its Relation to Transsexuality' (1995) 378 Nature 68.

[59] See, eg, H Lauterpacht, 'Restrictive Interpretation and Effectiveness in the Interpretation of Treaties' (1949) BYIL 48.

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TABLE 1:
Most cited authorities by the majority

Rank	Authority	Number of citing cases	Number of citing paragraphs
1	Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005) Rule 158.	3	3
2	Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 585.	2	2
3	Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009) 42-45, §§ 96-102.	2	2
4	Eyal Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012) 43.	2	2
5	Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden: Martinus Nijhoff Publishers, 2009) 5-8.	2	2
6	Jiang-Ning Zhou and others, 'A Sex Difference in the Human Brain and Its Relation to Transsexuality' (1995) 378 *Nature* 68.	1	1
7	Marjorie M. Whiteman, *Digest of International Law vol 8* (Washington D.C.: US Government Printing Office, 1967).	1	1
8	Vieira de Andrade, *A justiça Administrativa* (Lições) (Livraria: Almedina, 1999) 95.	1	1
9	Vetter (Problemschwerpunkte des § 81a StPO – Eine Untersuchung am Beispiel der Brechmittelvergabe im strafrechtlichen Ermittlungsverfahren, Neuried 2000)	1	1
10	JHW Verzijl, *International Law in Historical Perspective*, vol. IV, 1973	1	1

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TABLE 2:
Most cited authorities by the minority

Rank	Authority	Number of citing cases	Number of citing paragraphs
1	Daniel Rietiker, 'The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis' (2010) 79 NordicJIL 245.	5	5
2	David Harris and others, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 3rd ed, 2014).	4	4
3	G.A. Serghides, 'The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights (its Nature, Mechanism and Significance)' in Iulia Motoc, Paulo Pinto de Albuquerque, and Krzysztof Wojtyczek (eds), *New Developments in Constitutional Law – Essays in Honour of András Sajó* (The Hague: Eleven International Publishing, 2018) 389 *et seq*.	4	4
4	Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008).	3	4
5	Hersch Lauterpacht, 'Restrictive Interpretation and Effectiveness in the Interpretation of Treaties' (1949) BYIL 48.	3	3
6	Gerhard van der Schyff, 'The Concept of Democracy as an Element of the European Convention' (2005) 38(3) *Comparative and International Law Journal of Southern Africa* 355, 362.	2	5
7	William A. Schabas, *The European Convention on Human Rights – A Commentary* (Oxford: Oxford University Press, 2015) 84.	2	4
8	J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge, Cambridge University Press 2002)	2	3

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9	J.J.S. Wharton, *Wharton's Law Lexicon.*	2	2
10	Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden-Boston: Martinus Nijhoff Publishers, 2009) 425-426.	2	2
11	Lord Hoffmann, 'Human Rights and the House of Lords' (1999) MLR 159, 166.	2	2
12	Adhemar Esmein and Henry Nezard, *Éléments de droit constitutionnel français et comparé* (Paris: Librairie de la société du Recueil Sirey, 6th ed, 1914).	2	2
13	J.F. O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth Publishing Company, 1991) 42, 110, and 124.	2	2
14	J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 2nd ed, 1993) 72 *et seq*.	2	2
15	Bostjan M. Zupančič, 'The Crown and the Criminal: The Privilege against Self-Incrimination -- Towards the General Principles of Criminal Procedure' (1996) 5 Nottingham Law Journal 32.	2	1

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works.[60] In minority opinions, however, citation of scholarly authorities discussing the ECHR itself are frequent. Thus, among the most heavily cited sources are Harris, O'Boyle and Warbrick's textbook on the ECHR,[61] and Rietiker's study on the principle of effectiveness.[62] The most cited items also reveal other dynamics. For example, Judge Serghides's article 'The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights' is cited in four cases, and by Judge Serghides himself in three of them.[63] Similarly, Zupančič's study on the privilege against self-incrimination and adjudication and on the rule of law are also cited, in two cases and one case, respectively, by Judge Zupančič himself.[64] More generally, it is important to note that most highly cited sources do not appear to have enjoyed broad support. On the contrary, more often than not, such sources have been favoured by one or two Judges, who have repeatedly referred to them.

V. DEPLOYMENT OF SCHOLARSHIP IN THE CASE LAW OF THE ECTHR

A. (Lack of) Scholarship in the Majority Judgments

References to scholarship in majority judgments tend to follow certain patterns. First, references to academic writings sometimes appear in a judgment because they were referred to in the parties' submissions, and the Court simply summarises their arguments, occasionally including the references used by the applicants[65] or respondents.[66] These references, arguably, are less relevant for the present analysis as they are largely incorporated by the Court in the text of the judgment, rather than carefully researched and selected. Second, when the majority cites scholarship, it almost invariably does so in

[60] See eg, ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 425–6.

[61] DJ Harris et al, *Law of the European Convention on Human Rights* (various editions, OUP).

[62] D Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*' (2010) 79 NordicJIL 245.

[63] GA Serghides, 'The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights (Its Nature, Mechanism and Significance)' in I Motoc, P Pinto de Albuquerque and K Wojtyczek (eds), *New Developments in Constitutional Law – Essays in Honour of András Sajó* (Eleven International Publishing 2018) 389 *et seq*. Cited in *Georgia v Russia (II)* (n 51); *Muhammad and Muhammad v Romania* [GC] App No 80982/12 (ECtHR, 15 October 2020); *S.M. v Croatia* [GC] App No 60561/14 (ECtHR, 25 June 2020).

[64] BM Zupančič, 'The Crown and the Criminal: The Privilege Against Self-Incrimination – Towards the General Principles of Criminal Procedure' (1996) 5 NottinghamLJ 32, cited in *Fitt v the United Kingdom* [GC] App No 29777/96 (ECtHR, 16 February 2000); and *Jasper v the United Kingdom* [GC] App No 27052/95 (ECtHR, 16 February 2000); BM Zupančič, 'Adjudication and the Rule of Law' (2003) 5 EJLR 23, cited in *Roche v the United Kingdom* [GC] App No 32555/96 (ECtHR, 19 October 2005).

[65] See, eg, *Loizidou v Turkey* (preliminary objections) [GC] App No 1531/89 (ECtHR, 23 March 1995) para 57.

[66] See, eg, *X, Y and Z v the United Kingdom* (n 5) para 39.

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the descriptive parts of its judgment, where the Court sets out and explains the relevant international, comparative and domestic legal frameworks, rather than in the analytical part, where the Court interprets and applies the law of the ECHR. This method of referencing scholarship is preferable if the Court wishes to avoid the impression that its majority decision-making is unduly influenced by scholarship.

While it is true that the majority of the Court almost never deploys academic writing in its reasoning for the purposes of persuasion, academic sources are used for other purposes. First, the Court can establish a fact by referring to scholarship. These sources are usually unrelated to law and provide some clarification of the context of the case. An example is offered by *Gorzelik and others v Poland,* which dealt with protection of national minorities. In this judgment, the ECtHR stated: 'According to some linguists, although the Polish language is relatively unaffected by regional variations, it is possible to identify at least two regional varieties: Kashubian and Silesian.'[67] The Court then referred to John A. Dunn's 'The Slavonic Languages in the Post-Modern Era'. A reference like this explains the factual background of the case but adds little to the Court's reasoning directly.

Second, the ECtHR can clarify and elaborate on the rules of international law by reference to relevant scholarship, a practice that is, as already explained, entirely absent when ECHR provisions are at stake. Examples may be found in cases such as *Sargsyan v Azerbaijan*, where the Court considered the definition of occupation[68] and referred to a number of academic works, including monographs by Benvenisti,[69] Arai-Takahashi[70] and Dinstein,[71] as well as an article by Roberts.[72] Similar references were made in *Chiragov v Armenia*,[73] and later repeated in *Georgia v Russia (II)*.[74] These sources were not used in the Court's reasoning for the purpose of persuasion. Having said that, in *Sargsyan v Azerbaijan*, dissenting Judge Pinto de Albuquerque relied on Hersch Lauterpacht's works for the purpose of persuasion in relation to arguments similar to the ones made by the majority in that case.[75]

Third, and finally, the Court uses legal scholarship to explain and evaluate the domestic law of the respondent State. In the case of *Reinhardt and Slimane-Kaïd v France*, the ECtHR referred to scholarship in many instances in order to identify the duties of the State Counsel at the Court of Cassation

[67] *Gorzelik and others v Poland* [GC] App No 44158/98 (ECtHR, 17 February 2004) para 14.
[68] *Sargsyan v Azerbaijan* [GC] App No 40167/06 (ECtHR, 16 June 2015) para 94.
[69] Benvenisti (n 57).
[70] Arai-Takahashi (n 57).
[71] Y Dinstein, *The International Law of Belligerent Occupation* (CUP 2009).
[72] A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580.
[73] *Chiragov and others v Armenia* [GC] App No 13216/05 (ECtHR, 16 June 2015) para 96.
[74] *Georgia v Russia (II)* (n 51) para 195.
[75] *Sargsyan v Azerbaijan* (n 68) Dissenting Opinion of Judge Pinto de Albuquerque, para 27.

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in France.[76] In *Jalloh v Germany*, which concerned administration of emetics to suspected drug dealers, the Court stated the following: 'A considerable number of legal writers, however, take the view that the Code of Criminal Procedure, Article 81a in particular, does not permit the administration of emetics',[77] and proceeded to list some academic authorities to substantiate this reading. In *Bladet Tromsø and Stensaas v Norway*, the Court referenced scholarship to explain the legal debate that existed at the national level in relation to the burden of proof in defamation cases.[78]

The analysis of the use of scholarship by the majority clearly reveals that it avoids using academic commentaries to interpret the ECHR. Moreover, the approach of the majority of the Grand Chamber to the selection and representation of citations is also inconsistent. Although the Court is not always very consistent in referring to other sources such as soft-law instruments, international treaties and its own precedents, it does so more frequently and explicitly relies on them in its reasoning, and has an accepted method of citation and other formal criteria. The same cannot be said in relation to academic writing: there is no uniform citation style and the approach of the Court to this type of citation is very difficult to discern.

B. Patterns in Separate Opinions

ECtHR Judges commonly follow the terminology and approach of the majority in their separate opinions. This is true both in terms of formal structure[79] and substantive analysis.[80] Minority Judges apply similar tests used by the majority, but will ordinarily emphasise different aspects. In other words, the majority and minority of the Court speak the same legal language and usually follow the same formal rules of citing and referring to sources. However, as established in the previous section, the majority of the Court rarely cites scholarship. Perhaps, as a result of this, there are no clearly established and accepted drafting conventions for citing scholarship in the ECtHR judgments.[81] This may partially explain why Judges, in their separate opinions, demonstrate very little consistency in the deployment of academic sources. In other words, as the majority has not conclusively established conventions concerning the correct way to employ scholarship, the work of individual Judges remains without guidance.

[76] *Reinhardt and Slimane-Kaïd v France* App Nos 23043/93 and others (ECtHR, 31 March 1998) para 75.
[77] *Jalloh v Germany* (n 50) para 40.
[78] *Bladet Tromsø and Stensaas v Norway* [GC] App No 21980/93 (ECtHR, 20 May 1999) para 44.
[79] The Judges usually follow the same style the Court uses for quoting its own precedents.
[80] The Judges argue points using the tools of interpretation that are adopted in the Court such as the margin of appreciation or the test of proportionality.
[81] There might be some basic rules of citing of scholarship, but they are not openly available or consistently followed.

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In this section two related points are addressed. First, it is demonstrated that dissenting Judges do not restrict themselves to using scholarship in the three ways in which the majority does. While, like the majority, individual Judges also use scholarship for the purposes of establishing the facts[82] or the interpretation of international[83] and domestic[84] law, they also employ it for the purpose of persuasion and, accordingly rely on academic writing for arguments directly related to the interpretation of the ECHR. Second, the degree of variety and lack of consistency in the Judges' use of scholarship in separate opinions are noted. Both formal aspects, such as formatting, language, and source selection, and substantive aspects, such as the role of these sources in the arguments of the Judges and the supposed audiences that they try to persuade, are considered.

1. Use of scholarship for persuasive purposes

Minority Judges use scholarship for persuasion. More specifically, they do so to persuade their audience that in the particular case, their interpretation of the ECHR is the correct one, and they often cite scholarship to this end. An example is offered by the concurring opinions of Judges Pinto de Albuquerque and Dedov in *Baka v Hungary*,[85] where the Judges made the point that the ECtHR should consider the effectiveness of its pronouncements. To enhance this argument, the Judges stated that 'the European Convention on Human Rights … has direct, supra-constitutional effect on the domestic legal orders of the member States of the Council of Europe',[86] strengthening their argument by reference to various works of scholarship, including Greer and Wildhaber,[87] de Londras[88] and Schokkenbroek,[89] among others. Unlike the majority, the concurring Judges relied on scholarship not only to interpret domestic and international law or facts, but they also referred to it to substantiate their interpretation of the ECHR. Similarly, in *Merabishvili v Georgia*, the concurring Judges

[82] See *Maktouf and Damjanović v Bosnia and Herzegovina* [GC] App Nos 2312/08 and 34179/08 (ECtHR, 18 July 2013) Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vučinić, para 12; *D.H. and others v the Czech Republic* [GC] App No 57325/00 (ECtHR, 13 November 2007) Dissenting Opinion of Judge Jungwiert, para 4.

[83] See *Georgia v Russia (II)* (n 51) Concurring Opinion of Judge Keller, para 6.

[84] See *Ramos Nunes de Carvalho e Sá v Portugal* [GC] App Nos 55391/13 and others (ECtHR, 6 November 2018) Concurring Opinion of Judge Pinto de Albuquerque, para 11.

[85] *Baka v Hungary* (n 54).

[86] ibid, Joint Concurring Opinion of Judges Pinto de Albuquerque and Dedov, para 23.

[87] S Greer and L Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2013) 12 HRLRev 655.

[88] F de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) EHRLR 38.

[89] J Schokkenbroek, 'Judicial Review by the European Court of Human Rights: Constitutionalism at European Level' in R Bakker, AW Heringa and FAM Stroink (eds), *Judicial Control: Comparative Essays on Judicial Review* (Maklu 1995) 153–65.

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Yudkivska, Tsotsoria and Vehabović argued that the ECtHR should not hesitate to consider sensitive political cases.[90] They supported this point by referring to works by Keller and Heri[91] and Satzger.[92] In *Van Der Heijden v the Netherlands*, dissenting Judges Tulkens, Vajić, Spielmann, Zupančič and Laffranque argued that the scope of the margin of appreciation should be disconnected from European consensus[93] in certain circumstances, supporting this argument by reference to an article by Rozakis.[94] Several other examples could be listed where minority Judges have used scholarship for persuasive purposes relating to the interpretation of the ECHR, sometimes hinting at issues that were discussed in the Court's deliberation and references to academic writings that the majority could have made, but which were ultimately not included in their reasoning.

Another notable feature, which the following section will expand upon, is that the Judges appear to prefer citing scholarship that originates from or has some direct connection to the ECtHR. These sources include books and articles produced by Judges writing extrajudicially or after their retirement from the Court, as well as writings authored by the lawyers of the Registry of the Court and the Secretariat of the Council of Europe. From the limited examples listed above, Wildhaber, Rozakis and Keller were Judges at the Court, while Schokkenbroek held various functions in the Council of Europe Secretariat.

2. *Lack of a single overarching pattern*

This section demonstrates the diversity of styles in which minority Judges refer to scholarship, and maps out the role that scholarship plays in their separate opinions. It will consider both formal aspects of referencing, such as types of sources, language and the formatting style, and substantive questions, such as the role of citations in the reasoning and possible audiences targeted with the inclusion of scholarly citations.

[90] *Merabishvili v Georgia* [GC] App No 72508/13 (ECtHR, 28 November 2017) Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović, para 11.

[91] H Keller and C Heri, 'Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights' Untapped Potential to Protect Democracy' (2016) 36 HRLJ 1.

[92] H Satzger, F Zimmermann and M Eibach, 'Does Art. 18 ECHR Grant Protection Against Politically Motivated Criminal Proceedings? (Part 1) – Rethinking the Interpretation of Art. 18 ECHR Against the Background of New Jurisprudence of the European Court of Human Rights' (2014) 4(2) EuCLR 91.

[93] *Van der Heijden v the Netherlands* [GC] App No 42857/05 (ECtHR, 3 April 2012) Joint Dissenting Opinion of Judges Tulkens, Vajić, Spielmann, Zupančič and Laffranque, para 5. For more information about the link between the margin of appreciation and European consensus, see K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

[94] CL Rozakis, 'Through the Looking Glass: An "Insider's View of the Margin of Appreciation"' in Collectif, *La conscience des droits: mélanges en l'honneur de Jean-Paul Costa* (Dalloz 2011) 536.

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a) Types of sources

The analysis demonstrates that minority Judges refer to various and sometimes quite unusual sources in their separate opinions. The spread of scholarship is much wider than the scholarship referred to by the majority.

In their separate opinions, Judges refer to academic writing authored by experts in the law of the ECHR. They have referred to works by Gerards,[95] Besson,[96] Tsakyrakis,[97] Greer,[98] de Londras,[99] Benoît-Rohmer, Klebes[100] and many others. Minority Judges have also referred to various textbooks and commentaries on the ECHR, such as those by Warbrick, Harris and O'Boyle,[101] Van Dijk, Van Hoof, Van Rijn and Zwaak,[102] Jacobs, White and Ovey,[103] Schabas[104] and Reid.[105] In addition to articles, books and textbooks written by academics, the minority Judges also refer to blogposts related to the subject matter in the case at hand. For example, blogposts by Leach and Donald[106] and by Føllesdal and Ulfstein[107] have been referred to. The appearance of these sources in separate opinions seems logical and appropriate as these sources discuss the issues arising in the cases at hand.

However, Judges also make far more unconventional references. For example, references to legal and general philosophers are not uncommon, and the diversity among them is quite striking. Thus, while references to classics such as Cicero[108] and Kant do appear,[109] references have also been made to authors such as Alexy[110] and Dworkin.[111] These references are generally made to illustrate the general context of the case or for rhetorical purposes. Consider, for example,

[95] *Georgia v Russia (I)* [GC] App No 13255/07 (ECtHR, 3 July 2014), Partly Dissenting Opinion of Judge Tsotsoria.

[96] *Jaloud v the Netherlands* [GC] App No 47708/08 (ECtHR, 20 November 2014) Concurring Opinion of Judge Motoc.

[97] *Pentikäinen v Finland* [GC] App No 11882/10 (ECtHR, 20 October 2015) Concurring Opinion of Judge Motoc.

[98] *Baka v Hungary* (n 54) Joint Concurring Opinion of Judges Pinto de Albuquerque and Dedov, para 23.

[99] ibid.

[100] *Muršić v Croatia* [GC] App No 7334/13 (ECtHR, 20 October 2016) Partly Dissenting Opinion of Judge Pinto de Albuquerque, para 22.

[101] *Georgia v Russia (I)* (n 95) Partly Dissenting Opinion of Judge Tsotsoria.

[102] *Muhammad and Muhammad v Romania* (n 63) Concurring Opinion of Judge Serghides, para 2.

[103] *Merabishvili v Georgia* (n 90) Concurring Opinion of Judge Serghides, para 29.

[104] *Georgia v Russia (II)* (n 51) Partially Concurring Opinion of Judge Serghides, para 5.

[105] *Nagmetov v Russia* [GC] App No 35589/08 (ECtHR, 30 March 2017) Joint Dissenting Opinion of Judges Raimondi, O'Leary and Ranzoni, para 6.

[106] *G.I.E.M. S.r.l. and others v Italy* (n 47) Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque, para 94.

[107] ibid.

[108] *De Souza Ribeiro v France* [GC] App No 22689/07 (ECtHR, 12 December 2012) Concurring Opinion of Judge Pinto de Albuquerque Joined by Judge Vučinić.

[109] *Mouvement Raëlien Suisse v Switzerland* [GC] App No 16354/06 (ECtHR, 13 July 2012) Dissenting Opinion of Judge Pinto de Albuquerque.

[110] *Muhammad and Muhammad v Romania* (n 63) Concurring Opinion of Judge Elósegui, para 12.

[111] *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [GC] App No 47848/08 (ECtHR, 17 July 2014) Concurring Opinion of Judge Pinto de Albuquerque, para 16.

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the reference made to Cicero by Judges Pinto de Albuquerque and Vučinić in *De Souza Ribeiro v France*, where it was stated that:

> In times of unemployment and fiscal constraints, States refrain from granting migrants equal access to civil and social rights and give preference to nationals over migrants. This policy not only challenges social cohesion in European countries, but goes to the heart of the principle of equality. By failing to acknowledge the civil and social rights of undocumented migrants, States become morally responsible for the commodification of those persons who live at the very bottom of the social ladder. This responsibility is not only moral, but also legal. As Cicero once put it, Meminerimus autem etiam adversus infimos iustitiam esse servandam [Let us not forget that justice should also be done to the most humble].[112]

Here, the reference to Cicero is not used for the purpose of persuasion, explanation or to analyse the factual background of the case, but to provide a rhetorical introduction to the core matter at issue. The same can be said about the references frequently made by certain Judges to works of fiction. Again, these sources are very diverse, including references to novels, plays and sonnets ranging from Shakespeare,[113] Dostoyevsky[114] and Kafka,[115] to Rushdie[116] and McCullough.[117] They might add rhetorical value, but they are ordinarily quite detached from the subject matter of the judgments. Only a few Judges refer to literature and the presence of these references in separate opinions is very much dependent on the style of writing of a particular Judge.

In the face of such variety, it is difficult to establish a clear approach of the minority Judges in the ECtHR to citing scholarship. The selection of sources appears to remain a highly personal choice and depends on the familiarity of a particular Judge with certain literature, as well as on their writing style. However, there are two trends which may be discerned. First, as already mentioned above, the Judges prefer quoting academic sources that originate from within the Court. There are plenty of examples of minority Judges referring to the writings of their colleagues[118] and lawyers of the Registry.[119]

[112] *De Souza Ribeiro v France* [GC] (n 108) Concurring Opinion of Judge Pinto de Albuquerque Joined by Judge Vučinić. The text in brackets appears in the footnote to the original concurring opinion; all other footnotes were omitted.

[113] *Blokhin v Russia* [GC] App No 47152/06 (ECtHR, 23 March 2016) Partly Dissenting Opinion of Judge Motoc.

[114] *Hermi v Italy* (n 6) Dissenting Opinion of Judge Zupančič.

[115] *Murray v the United Kingdom* [GC] App No 18731/91 (ECtHR, 28 October 1994) Partly Dissenting Opinion of Judge Mifsud Bonnici.

[116] *Saunders v the United Kingdom* [GC] App No 19187/91 (ECtHR, 17 December 1996) Dissenting Opinion of Judge Martens Joined by Judge Kūris, para 17.

[117] *Fernández Martínez v Spain* (n 54) Dissenting Opinion of Judge Dedov.

[118] See, eg, references to work by Judge Motoc in *Beuze v Belgium* [GC] App No 71409/10 (ECtHR, 9 November 2018); or to Judge Bratza in *Hutchinson v the United Kingdom* (n 4).

[119] See, eg, references to Daniel Rietiker, who is a senior member of the Registry, in *Georgia v Russia (II)* (n 51) Partly Concurring Opinion of Judge Serghides, para 15. Michael O'Boyle, Karen Reid and Clare Ovey, whose scholarship has been mentioned above, also worked at the Registry of the ECtHR.

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This may be due to familiarity and the accessibility of this scholarship, or to the fact that the ECtHR Judges consider it more authoritative than scholarship produced externally. Moreover, Judges sometimes refer to their own extra-judicial writing in their separate opinions. In many cases, Judges provide 'further reading' on the issue by referring to their own work,[120] but the purpose of these self-references might not always be clearly explained in the separate opinions. For instance, Judge Elósegui in her concurring opinion stated:

> In different publications I have referred to the main current positions that have been developed in academia, especially in Europe, on the principle of proportionality, concluding that it is a tool which assists judges in structuring an orderly reasoning for the resolution of a case. I have affirmed that Robert Alexy's theory is useful when studying the manner in which the courts really argue. I also agree with Carlos Bernal's thesis when he states that in the weighting exercise it is not possible to exclude the subjective assessments of the judge. But this is compatible with rationality if the judge applies and justifies each step of the proportionality test. Undoubtedly this idea can be inserted into a theoretical framework that starts from the theses of Robert Alexy and his disciples … among whom I have the honour of finding myself.[121]

This discussion does have some connection to the subject matter of the case, but the connection was never explicitly unpacked in the opinion. Moreover, this self-reference appears to be a statement of general relevance, which could be included in many judgments.

The second discernible trend is that Judges often use a particular source to establish a certain point and then continue to refer to that source from one separate opinion to the next. For instance, publications by Rietiker, a senior lawyer of the ECtHR, are routinely cited by Judge Serghides in his separate opinions, usually on a similar point. In the majority of cases, the Judge refers to the issue of interpretation of the ECHR from the perspective of the principle of effectiveness in the jurisprudence of the ECtHR.[122]

[120] See *Muhammad and Muhammad v Romania* (n 63) Concurring Opinion of Judge Serghides, para 15; or *Roche* (n 64) Dissenting Opinion of Judge Zupančič.

[121] *Muhammad and Muhammad v Romania* (n 63) Concurring Opinion of Judge Elósegui, para 12.

[122] The reference is made in *Georgia v Russia (II)* (n 51) Partly Concurring Opinion of Judge Serghides, para 21; *Muhammad and Muhammad v Romania* (n 63) Concurring Opinion of Judge Serghides, para 11; *S.M. v Croatia* (n 63) Concurring Opinion of Judge Serghides, para 3; *Mihalache v Romania* [GC] App No 54012/10 (ECtHR, 8 July 2019) Concurring Opinion of Judge Serghides, para 5; *Güzelyurtlu and others v Cyprus and Turkey* [GC] App No 36925/07 (ECtHR, 29 January 2019) Concurring Opinion of Judge Serghides, para 7; *Naït-Liman v Switzerland* (n 52) Dissenting Opinion of Judge Serghides, para 36.

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TABLE 3:
Language of cited authorities

Language	Authority	Number of cases	Number of respondents
English	782	105	32
Italian	143	6	3
German	131	17	9
French	107	41	19
Portuguese	9	1	1
Latin	9	5	5
Spanish	6	2	2
Norwegian	3	2	1
Russian	1	1	1
Greek	1	1	1
Czech	1	1	1

b) Languages of sources

Table 3 provides a breakdown of the languages of the cited authority against the number of respondents, showing that English and French sources are the most likely to be cited, irrespective of the national language of the respondent State, but are by no means the only languages of cited sources. The dominance of references to scholarship in English or French is likely because these are the Court's official languages, and most Judges can read them both. By all metrics, sources in English (either originally or in translation) tend to be cited the most. However, as Table 3 shows, French is second by number of cases citing sources in that language, but it is only fourth according to the absolute number of sources referred to, behind Italian and German.

The main factor in the citation of scholarship in languages other than English and French, however, appears to be the identity of the respondents and their official language. Thus, for example, Italian sources are cited against respondents other than Italy only twice. Judge Pinto de Albuquerque referred to a high number of sources in Italian, German and Portuguese in cases against Italy,[123] Germany[124] and Portugal,[125] respectively.

However, not all rationales for the language of scholarship are so easily explained. Sometimes, sources in languages other than the languages of the Court or the languages of the respondent State appear in separate opinions.

[123] *De Tommaso v Italy* App No 43395/09 (ECtHR, 23 February 2017) Partly Dissenting Opinion of Judge Pinto de Albuquerque.
[124] *Ilnseher v Germany* (n 48) Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Dedov.
[125] *Ramos Nunes de Carvalho e Sá v Portugal* (n 84) Concurring Opinion of Judge Pinto De Albuquerque.

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Thus, sources in German were used in cases against Romania[126] and the Czech Republic.[127] In *Bedat v Switzerland*, Judge Yudkivska referred to a book published in Russian, though the relevant quotation was translated into English in the text of the separate opinion.[128] In *Károly Nagy v Hungary*, Judge Pinto de Albuquerque referred to sources in Italian and German.[129]

To briefly conclude, the approach of minority Judges to the language of the source is not always obvious. Although the majority of sources referred to are published in English, there are some notable exceptions.

3. *Unclear formatting*

Perhaps one of the clearest signs of the lack of a coherent approach to citing academic scholarship is the format of these citations. Although the Court's approach to the citation of case law is (relatively) consistent and followed in both majority judgments and separate opinions,[130] the same is not true of the format for referencing scholarship. It is not overly surprising that Judges writing individually have paid little attention to formatting. It is more surprising, however, that the matter has not been addressed in the editorial process. For instance, in *Sheffield and Horsham v the UK* the majority judgment summarised the submission of the authorities and referred to 'S.M. Breedlove's article in Nature, vol. 378, p. 15, 2 November 1995. Para 46',[131] omitting the article title.

Like the majority, Judges in their minority opinions do not adhere to a particular formatting style. Since it appears that there is no substantive external oversight, the formatting in separate opinions depends on how much attention Judges pay to a consistent approach. This can be easily demonstrated by reviewing the formatting style in the separate opinions in *Svinarenko and Slyadnev v Russia*, wherein almost every citation follows its own pattern.[132] It seems Judges cite in whatever way they see fit, for example, in *Al-Adsani v the United Kingdom*, Judge Pellonpää referred only to a particular page in a journal, '93 American Journal of International

[126] *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* (n 111) Concurring Opinion of Judge Pinto de Albuquerque, para 14.
[127] *Rohlena v the Czech Republic* [GC] App No 59552/08 (ECtHR, 27 January 2015) Concurring Opinion of Judge Pinto de Albuquerque.
[128] *Bédat v Switzerland* [GC] App No 56925/08 (ECtHR, 29 March 2016) Dissenting Opinion of Judge Yudkivska.
[129] *Károly Nagy v Hungary* [GC] App No 56665/09 (ECtHR, 14 September 2017) Dissenting Opinion of Judge Pinto de Albuquerque, para 14.
[130] See ECtHR, 'Note Explaining the Mode of Citation of the Case-Law of the Court and the Commission' (October 2022) <https://www.echr.coe.int/Documents/Note_citation_ENG.pdf>.
[131] *Sheffield and Horsham v the United Kingdom* [GC] App Nos 22985/93 and 23390/94 (ECtHR, 30 July 1998) para 46.
[132] *Svinarenko and Slyadnev v Russia* [GC] App Nos 32541/08 and 43441/08 (ECtHR, 17 July 2014) Concurring Opinion of Judge Silvis.

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Law (AJIL) 181 (1999)', omitting the name of the author and the title of the article.[133]

Of course, the lack of consistency is unintentional and may be seen as a trivial matter. After all, as Posner has argued on the basis of his judicial experience, a system of citations should simply 'provide enough information about a reference to give the reader a general idea of its significance and whether it's worth looking up, and to enable the reader to find the reference if he decides that he does want to look it up'.[134] Yet, inconsistency has transparency implications, as it renders it difficult to reliably track citations included in the jurisprudence of the Court.

C. Role of References

Although the issue of the role of references to scholarship may well warrant its own study, this section will briefly show how references to scholarship are used for a variety of purposes by the minority Judges. It has already been established that, not unlike the majority, minority Judges deploy scholarship to establish facts and interpret national and international law, and that minority Judges uniquely also refer to scholarship for persuasive purposes. Three other purposes may be discerned which illustrate the utility of academic references.

First, minority Judges use academic sources to establish the context of a particular issue and provide further reading on the topic. Judge Pinto de Albuquerque has referred to academic sources for this purpose in many of his separate opinions.[135] Although this contextualisation might be helpful in some cases, a detailed list of possible sources might not be the most efficient use of separate opinions. Of course, there may be disagreements as to the purpose of separate opinions, but very few Judges use them to contextualise the matter at issue and to provide an extensive list of further reading.

Second, references to scholarship can be used as illustrative examples of a particular point. For instance, in *Fernández Martínez v Spain*, Judge Dedov simply referred to literary examples illustrating potential negative consequences of celibacy. Judge Dedov pointed out that:

> for centuries celibacy has been a well-known and serious problem for thousands of priests who have suffered for their whole lives while concealing the truth about their family life from the Catholic Church and fearing punishment. The adverse consequences of the outdated rule of celibacy have been portrayed by many writers from Victor Hugo (*The Hunchback of Notre-Dame*) to Colleen

[133] *Al-Adsani v the United Kingdom* [GC] App No 35763/97 (ECtHR, 21 November 2001) Concurring Opinion of Judge Pellonpää Joined by Judge Bratza.

[134] See, eg, RA Posner, 'The Bluebook Blues' (2011) 120 YaleLJ 850, 852.

[135] See, eg, *Ilnseher v Germany* (n 48) Dissenting Opinion of Judge Pinto de Albuquerque; or *G.I.E.M. S.r.l. and others v Italy* (n 47) Dissenting Opinion of Judge Pinto de Albuquerque.

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> McCullough (*The Thorn Birds*), as well as by numerous media reports, including those on clerical sex-abuse scandals in many countries.[136]

Third, some references are used for purely rhetorical purposes. It seems that there is no purpose for some references other than to improve the 'sound' of these opinions. For instance, in *Jaloud v the Netherlands*, Judge Motoc compared an essay by Camus dealing with self-estrangement with the lack of jurisprudential consistency by the Court.[137] Although interesting and creative, this reference's pragmatic utility might not be immediately obvious. The reference to Emma Lazarus's sonnet in *De Souza Ribeiro v France* is also used for rhetorical purposes.[138]

It is thus clear that Judges use references to scholarship in their minority opinions for purposes which vary significantly and often depend on the personality of the Judge and their approach to separate opinions. Undeniably, these purposes can overlap; moreover, some Judges use references to scholarship for a plethora of reasons while others do not use them at all. It is therefore not possible to discern a coherent approach of minority Judges to the role and purpose of their references to scholarship.

D. The Rationales for Citing Scholarship

This subsection examines the rationales for citing scholarship of the majority and minority of the ECtHR. Certain assumptions are necessary to discern the typical motivation for engaging with scholarship. The aim of this subsection is twofold. First, it seeks to explain the reluctance of the majority of the Court to cite academic sources for the purposes of persuasion, by reference to the practice of other courts and tribunals. This brief comparison is not exhaustive, as such an examination would warrant a separate study. Second, the related question of why some minority Judges are more willing to use legal scholarship in their judgments will be addressed. Aside from obvious practical reasons, such as that minority Judges need not collaborate or coordinate with other Judges in selecting sources and are able to follow their own style, it is hypothesised that when losing the argument in the Court the minority Judges are keen to persuade as broad an audience as possible, supported by authority such as scholarship, that their view, rather than that of the majority Judges, should have prevailed.

As noted above, the Court does not ordinarily cite scholarship in its majority opinions. If it does, it is by inclusion of a few references, and almost invariably in areas where the Court itself cannot claim unchallenged expertise. There are several reasons why the choice not to cite may be made—including, of course,

[136] *Fernández Martínez v Spain* (n 54) Dissenting Opinion of Judge Dedov.
[137] *Jaloud v the Netherlands* [GC] (n 96) Concurring Opinion of Judge Motoc, para 1.
[138] *De Souza Ribeiro v France* (n 108) Concurring Opinion of Judge Pinto de Albuquerque Joined by Judge Vučinić.

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the fact that citing is not 'costless', and that agreement may need to be reached not only on the proposition, but also on the authority itself.[139] Academic sources are thus deliberately avoided. Yet, the current approach does little to enhance the transparency of decision-making at the Court.

One of the reasons why academic sources are not cited by the majority is that the ECHR does not provide a similar standing directive to that found in Article 38 of the ICJ Statute expressly allowing reference to specific authorities. That said, this does not prevent the Court from casting a wide net in its selection of sources of persuasive authority. Indeed, the Court has referred to its jurisprudence, rules of international law, soft law and reports of various organisations as means of interpretation of the ECHR.[140] While the letter of the ECHR does not expressly allow reference to these materials, it does not forbid them either and, by the same logic, reference to scholarship should be subject to the same treatment. And yet, it is not. Materials of the type mentioned above are used by the majority much more frequently and extensively than legal scholarship. It follows that a lack of express regulation allowing reference to such external sources cannot alone explain the very limited number of such references in the judgments of majority.

Further explanations for legal scholarship rarely being used by the majority can be inferred from the cases where the majority has actually made reference to it. One of the problems here is the meaning and weight of a particular authority. To use the terminology pioneered by Henry Small[141] and successfully applied to international law scholarship by Lianne Boer,[142] the ECtHR's reference to scholarship amounts to converting a cited work into a 'concept symbol' representing a majoritarian 'consensus' on a particular point. Moreover, the citation by the majority means that a particular source is elevated from an academic source to effectively a source of law. The Court perhaps is reluctant to grant such 'power' to academic commentators. This might also explain why the Court does not refer to specific ECHR scholarship but prefers academic sources discussing broader international or domestic law. As the ultimate authority on the ECHR, a citation by the Court would significantly boost the value of a particular source or scholar working in the area of ECHR law, much more than in broader international law.

Other adjudicators have been less hesitant to rely on scholarly authority. Thus, for example, a study by Helmersen confirms that the Appellate Body of the World Trade Organization has cited writings regularly, although with decreasing frequency.[143] Similarly, looking at international investment

[139] See Posner (n 25).
[140] See Dzehtsiarou (n 16).
[141] HG Small, 'Cited Documents as Concept Symbols' (1978) 8 SocStudSci 327.
[142] See L Boer, '"The Greater Part of Jurisconsults": On Consensus Claims and their Footnotes in Legal Scholarship' (2016) 29 LJIL 1021.
[143] ST Helmersen, 'The Use of Scholarship by the WTO Appellate Body' (2016) 7 GoJIL 309.

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arbitration, Ridi and Schultz found that references to scholarship are as common as citations to previous awards and other decisions, although the latter increasingly outpace the former.[144]

Such studies generally show that citations tend to favour old works by established writers.[145] It was noted above that in contrast, the academic sources used by the ECtHR are not particularly old, with the vast majority of them having been published in the twenty-first century. The Court itself has never articulated its approach to citing legal scholarship, but a plausible explanation might be found in the distinctiveness of both human rights adjudication and the Court's own approach to legal interpretation. The ECtHR rarely uses an 'originalist' approach to interpretation of the ECHR to establish the historical pedigree of a particular provision. Harris, O'Boyle and Warbrick explained the rare use of *travaux preparatoires* by the Court in the following terms:

> In practice, the Court, and formerly the Commission, has only made occasional use of the *travaux preparatoires.* This is partly because the *travaux* are not always helpful and partly because of the emphasis upon a dynamic and generally teleological interpretation of the Convention that focuses, where relevant, upon current European standards rather than the particular intentions of the drafting states.[146]

Moreover, the hard cases that the ECtHR is dealing with are often generated by contemporary challenges that are impossible to resolve by reference to older and more established academic sources. This perhaps makes citing older scholarship less appealing for the Court due to its limited value, while the Court's unwillingness to turn scholarship into a 'concept symbol' can explain its reluctance to cite more recent and relevant scholarship.

There is thus a very narrow window of opportunity for the Court to refer to legal scholarship. The use of scholarship by minority Judges may potentially make an impact on the approach of the majority over time and it is possible that their use of academic sources might increase. The capacity of the Court to control the content of separate opinions is limited and it seems that at least some Judges are (were) eager to refer to a wide array of scholarship.

What makes an individual Judge keen to cite academic sources in their judgments? One hypothesis would suggest a link between the frequency of scholarly citations of individual Judges with the approach of their national legal system of origin to such sources. This argument can be complemented

[144] Ridi and Schultz, (n 56) 232.

[145] See Helmersen (n 143) 333, showing how the most cited scholarly sources by the Appellate Body are by and large established works on topics of general international law, chiefly on treaty interpretation. In the same vein, see Ridi and Schultz ibid 232–3, noting the prevalence of insiders and practitioners among the most established authorities generally and among the most recent.

[146] DJ Harris et al, *Harris, O'Boyle and Warbrick Law of the European Convention on Human Rights* (4th edn, OUP 2018) 22.

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by reference to the specific educational and professional backgrounds of the Judges with high 'scholarship citation count'.

The argument that the country of origin can determine the Judge's inclination to cite scholarship is a challenging one. Some national courts accept no use of scholarship in judicial reasoning, while others use it more or less frequently. The weight of references, too, varies significantly. In Germany, for instance, references to domestic legal scholarship have heavy persuasive weight,[147] although no ECtHR Judges elected in respect of Germany are known for high number of references to academic scholarship. In the courts of many Eastern European States, academic commentary is almost never cited;[148] however, at least three Judges from the top-ten list (in Figure 3) are from Eastern Europe.

Moreover, the very suggestion that the inclination to cite depends on the Judge's country of origin is problematic because traditions can vary even within the judicial system in one given State. Within the same domestic system, there may of course be variations between lower and constitutional courts, for reasons such as the more academic composition of the bench.[149] Other studies claim that 'if ordinary courts do not refer to literature, constitutional ones will do the same'.[150] With reference to the United States,[151] it has been argued that '[t]he role of legal scholarship and its potential utility are greater for courts of last resort'.[152] Yet, the increase in referring to scholarship might be skewed by certain Judges who are more inclined to cite than others. Thus, Schwartz and Petherbridge report an increase to citations to scholarship in US Federal Circuit Courts over time,[153] but attribute the rise to just a small cohort of judges,[154] and point to how generous referencing correlates negatively with a busy docket[155] and political conservatism of the bench.[156] It can also be seen that only a few particular ECtHR Judges are responsible for three-quarters of all minority Judge citations. Although the data this study is based on is somewhat limited, it seems that the inclination to cite scholarship cannot be explained by the origins, education or professional background of particular Judges alone.[157]

[147] A Jakab, 'Judicial Reasoning in Constitutional Courts: A European Perspective' (2013) 14 GermanLJ 1215, 1252, arguing that academics and politicians are more likely to become constitutional court judges and they are more used to referring to scholarship.

[148] In post-Soviet States, the decisions are often concise and only quote relevant legal provisions, and references to external academic writing are extremely rare.

[149] Jakab (n 147) 1225.

[150] L Pegoraro, 'Judges and Professors: The Influence of Foreign Scholarship on Constitutional Courts' Decisions' in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015) 331.

[151] The United States is not a member of the Council of Europe but used here for illustration.

[152] DP Wood, 'Legal Scholarship for Judges' (2015) 124 YaleLJ 2592, 2606.

[153] DL Schwartz and L Petherbridge, 'The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study' (2011) 96 CornellLRev 1345, 1345.

[154] ibid.

[155] ibid 1366.

[156] ibid 1368.

[157] As Figure 3 suggests, the most frequent users of scholarship are Judges Pinto de Albuquerque, Serghides, Yudkivska, Tsotsoria, Motoc, Zupančič, Wojtyczek, Elósegui and Keller. They all represent different countries and have very diverse professional and academic backgrounds.

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Another rationale for citing scholarship might be the minority Judges' perception that it will make their arguments more persuasive to the various audiences to which the Court speaks. This explanation has been considered in legal scholarship. For example, building on the critical tradition of viewing international law as an argumentative practice,[158] Venzke discusses the notion of semantic authority as 'a specific form of power … generally sustained by a social expectation – an expectation that an actor at least refers to and deals with a specific claim in the international legal discourse'.[159] For most international courts, a claim to semantic authority is generally sustained by self-referentiality (for example, reliance on an adjudicator's own precedent), but other uses of authority may be important: as Venzke continues, 'an actor's semantic authority can be most effective if he takes himself out of the game and instead presents himself as a handmaiden of other authorities'.[160] In this regard, it is clear that minority Judges have the potential to shape not just the development of the law, but, more broadly, the discourse on it. Applied to the use of scholarship, this may result in different deployments of authority when speaking to different audiences, so a minority opinion is likely to be written with one or more target audiences in mind.[161]

The present empirical study provides further substantiation that at least some minority Judges might have specific audiences in mind when using academic sources in their separate opinions. First, this assumption can be supported by the fact that minority judges often use sources published in the language of the respondent State. Of course, scholarship written in the language of the respondent State may be most relevant in many cases, but it can also symbolise the familiarity of the minority Judge or Judges with the matter at issue. Second, the multiplicity of types of scholarship, from fiction to encyclopaedias, perhaps aims to show that minority Judges, or at least some of them, wish to speak to various groups and show their understanding of the local culture.

The idea of audiences of judicial decisions is not new and has been discussed in various contexts. It was argued in relation to the US Supreme Court that 'Justices work with (or around) their audiences instrumentally to achieve their broader goals',[162] meaning that the specific form of judicial reasoning

[158] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

[159] I Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law' in P Capps and H Palmer Olsen (eds), *Legal Authority beyond the State* (CUP 2018) 117. See also I Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' in A Von Bogdandy and I Venzke (eds), *International Judicial Lawmaking* (Springer 2012); and I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012).

[160] Venzke, 'Semantic Authority' ibid 121.

[161] See JB White, 'Law as Language: Reading Law and Reading Literature' (1981) 60 TexLRev 415. See also the discussion in A Bianchi, 'International Adjudication, Rhetoric and Storytelling' (2018) 9 JIDS 28.

[162] RC Black et al, 'Supreme Court Opinions and Audiences' (2017) 54 WashUJL&Poly 169, 170.

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can change depending on the audience that Judges are addressing.[163] Since minority Judges were unable to persuade their colleagues on the bench, they may resort to using scholarly references to persuade other audiences which might support their point of view in future.

This broader use of scholarship may be intended to influence several key audiences, which may overlap. These audiences include, first and foremost, other Judges of the ECtHR (who were not on the bench in a particular case) and the lawyers arguing before it. Separate opinions, at the ECtHR and elsewhere, exist because one Judge or group of Judges failed to persuade their colleagues on the preference of their interpretation of the ECHR and they want to provide further scrutiny and discussion.[164] The importance of airing these different interpretations lies in potentially influencing the Court in future cases, and references to scholarly writing can provide support for their argument.

The second key audience is national judges. It has been argued that national judges are the closest allies of the ECtHR at the national level and thus their acceptance of a particular position of the Court ensures that the ECHR is fully embedded at the national level.[165] This is one of the reasons why some Judges use an abundance of sources which would be familiar to the judges and lawyers in the respondent State. It might also demonstrate the minority Judge's understanding of the legal context in that State. It might be argued that national governments also form part of the audience, and the inclusion of references to scholarship—especially domestic—is a powerful tool for making the opinion more persuasive.

The third audience is the legal community as a whole, including academic lawyers and commentators on the Court. To this audience, not only is reference to scholarship a tenet of scholarly writing, with this familiar format inviting them to support the minority position, but it is also a way for Judges to engage with the work of academics, and perhaps call for them to exercise their function of 'vigilance' over the Court's activity.[166] This is particularly

[163] There are multiple studies which explore how the understanding of audiences makes an impact on the behaviour of Judges. See, eg, L Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006); N Garoupa and T Ginsburg, 'Judicial Audiences and Reputation: Perspectives from Comparative Law' (2009) 47 ColumJTransnatlL 451.

[164] See, inter alia, A Simpson, 'Dissenting Opinions' (1922) 71 UPaLRev&ALR 205; E Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90 UPaLRev&ALR 929; RP Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 ICLQ 788; A Scalia, 'The Dissenting Opinion' (1994) 19 JSupCtHist 33; R Bader Ginsburg, 'The Role of Dissenting Opinions Lecture' (2010) 95 MinnLRev 1; P Jimenez Kwast, 'Prohibitions on Dissenting Opinions in International Arbitration' in C Ryngaert, EJ Molenaar and SMH Nouwen (eds), *What's Wrong with International Law*? (Brill 2015) 128; H Mistry, '"The Different Sets of Ideas at the Back of Our Heads": Dissent and Authority at the International Court of Justice' (2019) 32 LJIL 293.

[165] LR Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 EJIL 125.

[166] See Helmersen (n 2).

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relevant in the context of those individual opinions which denounce a shift in a regressive direction, which have been fittingly termed by Helfer and Voeten as 'walking back dissents', which may well seek to rely on commentary which supports their assertion that the judgment represents a regression.[167]

The final key audience is the general public. The reference to literature, particularly for rhetorical purposes, may suggest that Judges are seeking to demonstrate their familiarity with the general cultural context of European society. Some Judges may include literary references to show that those people who make the judgments are not total strangers: they read similar books and sonnets, and can be trusted with the most complex matters.

Whilst these particular audiences are not unimportant for the majority, they are of greater significance for minority Judges, for at least two reasons. First, the judgments of the Court are legally binding in accordance with Article 46 of the ECHR and thus the majority Judges perhaps do not feel it necessary to use every persuasive tool to convince audiences as their writing becomes law regardless. Second, practically speaking, it is difficult to change the conservative drafting conventions of the judgments of the majority. Although there are some potential benefits in persuasive drafting, the Court perhaps does not see them as sufficient to warrant changing the established approach.

In conclusion, the majority of the Court only cites scholarship when it explains facts or law outside its primary domain, likely to avoid effectively elevating legal scholarship to the status of a source of ECHR law, or difficulties in agreeing on specific authorities being cited. For the majority the potential pitfalls of citing scholarship overweigh the potential benefits. The minority Judges have fewer such barriers to citing scholarship and are perhaps more concerned with persuading broader audiences, resulting in much wider use of legal scholarship in separate opinions.

VI. CONCLUSION

This article sheds light on the use of scholarship in the adjudication of the ECtHR, an area that has remained largely under-investigated, especially when compared to other sources and materials with which the Court has engaged. The premise of the study is that the citation of legal authorities is a matter of importance and worthy of analysis. References to legal scholarship are of consequence to the Court, its Judges and its readers, insofar as they are used to justify the arguments set out in the judgment and the separate opinions appended to it. Through the first large-scale empirical analysis of Grand Chamber judgments and separate opinions, it has been established that while the overall use of scholarship in ECtHR case law is relatively low, it is by no means insignificant, with a wide range of resources having made their way into the Court's judgments. Despite this there is a lack of a clear and uniform

[167] Helfer and Voeten (n 42); see also Stone Sweet, Sandholtz and Andenas (n 42).

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approach to the deployment of scholarship in the Court's case law, which is even more evident in separate opinions.

This lack of a specific approach need not necessarily be considered troubling. It does, however, raise additional questions concerning the use of scholarship and its importance in the adjudication of human rights cases by the Court. The present investigation has shed light on some such uses, such as establishing facts and interpreting national and international law, providing context and further reading on a particular issue, providing illustrative examples and for rhetorical purposes. However, for the reasons stated at the outset, the analysis was based only on uses of scholarship which were overt and tangible. The wide range of scholarship cited and the variety of its uses suggests that the results of this study, as comprehensive as it sought to be, might be just part of the story. The article has thus provided a first empirically grounded assessment of the extent and nature of this phenomenon, laying the foundations for more research that will further advance the understanding of the relationship between human rights adjudication and scholarship.

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