

Chapman University Dale E. Fowler School of Law

From the Selected Works of Donald J. Kochan

2016

The Progression and Evolution of International Law Scholarship over the Past 50 Years: Some Quantitative Observations

Donald J. Kochan



SELECTEDWORKS™

Available at: https://works.bepress.com/donald_kochan/48/



Buffalo Human Rights Law Review

VOLUME 22

2015-2016

THE PROGRESSION AND EVOLUTION OF INTERNATIONAL LAW SCHOLARSHIP OVER
THE PAST 50 YEARS: SOME QUANTITATIVE OBSERVATIONS

Donald J. Kochan

BACK TO POLITICS: LESSONS FROM THE CRISIS OF THE INTER-AMERICAN
COMMISSION ON HUMAN RIGHTS

Ignacio A. Boulin Victoria

THE GREAT SIOUX NATION V. THE "BLACK SNAKE": NATIVE AMERICAN RIGHTS
AND THE KEYSTONE XL PIPELINE

Cindy S. Woods

THE OBLIGATION TO ESTABLISH SENTENCES FOR TORTURE THAT ARE
COMMENSURATE WITH THE GRAVITY OF THE OFFENSE

Daniel O'Donnell, J.D.

THE NORTH KOREA HUMAN RIGHTS ACT: SOUTH KOREAN AND INTERNATIONAL
EFFORTS AND THE NECESSITY FOR THE LAW

Shinbum Han

JUSTICE IN DIRE STRAITS: UNLAWFUL PRETRIAL DETAINEES, FAMILY MEMBERS AND
LEGAL REMEDIES

Danushka S. Medawatte

TOWARDS "NEVER AGAIN": SEARCHING FOR A RIGHT TO REMEDIAL SECESSION
UNDER EXTANT INTERNATIONAL LAW

Steven R. Fisher

THE PROGRESSION AND EVOLUTION OF INTERNATIONAL LAW SCHOLARSHIP OVER THE PAST 50 YEARS: SOME QUANTITATIVE OBSERVATIONS

*Donald J. Kochan**

INTRODUCTION

International law as a field of scholarship has experienced some very substantial and interesting changes across the past fifty years. This brief Article provides some basic quantitative observations from which we can begin to visualize this evolution.

It is my hope that this numerical data can serve as a starting point for further research and more qualitative analyses on those changes. When one considers, for example, that in 1965 only thirty-eighty articles in law reviews or law journals mentioned the term “international law” in one way or another, while in 2013 (the latest full year of data) more than 4000 articles published in law reviews and law journals used that term, there can be no doubt that legal scholarship’s interaction with international law has dramatically changed in frequency across the past fifty years. With a more than 10,600 percent increase in the volume of articles mentioning that term in the past five decades, it is hard not to speculate that there have also been significant changes in the types of articles being produced in the field.

I. THE SPECIAL STATUS ACCORDED INTERNATIONAL LAW SCHOLARSHIP IN LEGAL INTERPRETATION

Debates have intensified in recent years about the utility of legal scholarship generally,¹ and international law scholarship has not been immune from some specific scrutiny.² Yet few fields of legal scholarship have a

* Associate Dean for Research & Faculty Development and Professor of Law, Chapman University’s Dale E. Fowler School of Law.

1. See, e.g., Brent Newton, *Scholar’s Highlight: Law Review Articles in the Eyes of the Justices*, SCOTUSBLOG, (Apr. 30, 2012), <http://www.scotusblog.com/2012/04/scholar%E2%80%99s-highlight-law-review-articles-in-the-eyes-of-the-justices/> (examining, *inter alia*, Chief Justice Roberts’ recent critique of legal scholarship as often being “not much help to the bar”).

2. Consider, for example, the comments of Professor Jack Goldsmith that “[t]he legal academy views international law scholarship, on average, as less successful than other legal scholarship by just about any measure, including clarity, insight, theoretical sophistication, persuasiveness, and depth.” Panel, *Scholars in the Construction and Cri-*

history like international law scholarship, where the courts and other authorities have identified scholars of international law as holding a special place in the interpretation of law.³

Over time, using the words “scholar”, “jurist”, “commentator”, “expert”, and “publicist” somewhat interchangeably, the courts and international law systems have come to regard international law “scholarship” as an important reference source for interpreting what constitutes international law. For example, Article 38 of the Statute of the International Court of Justice provides: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply. . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁴

Similarly, the U.S. Supreme Court has long acknowledged a special place for scholars in the interpretation of international law in U.S. courts. The leading cases in this regard include *United States v. Smith*⁵ and *The Paquete Habana*,⁶ together with *The Nereide*⁷ established the now supposedly “unexceptionable” proposition⁸ that the “law of nations” is included in the federal common law of the United States⁹ and began to explain the methods for interpreting the contours of this area of law and the role for scholars in that enterprise.

Smith involved a prosecution for piracy concerning the “plunder and robbery” of a Spanish vessel.¹⁰ Thomas Smith, having participated in the piracy of the Spanish vessel, was prosecuted under an 1819 Act of Congress which stated, “if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations. . . every such

tique of International Law, 94 AM. SOC’Y INT’L L. PROC. 317, 319 (2000) (remarks of panelist Jack Goldsmith) [hereinafter “Goldsmith”].

3. James Boeving, *Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT’L ENVTL. L. REV. 109, 140-142 (2005) (the special recognition that courts give to international law scholarship “places international legal scholars in a position not typically enjoyed by other academics.”).

4. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 (emphasis added); *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102-103 (1987) (discussing role of international law scholars in ascertaining international law).

5. *United States v. Smith*, 18 U.S. 153 (1820).

6. *The Paquete Habana*, 175 U.S. 677 (1900).

7. *The Nereide*, 13 U.S. 388 (1815).

8. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Edwards, J., concurring).

9. *The Nereide*, 13 U.S. (9 Cranch) at 423.

10. *Smith*, 18 U.S. (5 Wheat.) at 153-155.

2015–2016]

International Law Scholarship

3

offender or offenders shall, upon conviction thereof. . . be punished with death.”¹¹ The jury returned a special verdict finding Smith was involved in the plunder and robbery, and if these actions constituted “piracy” under the 1819 Act, a question of law, he would be in violation of the Act.¹² Addressing the legal question, Justice Joseph Story, writing for the Supreme Court, found that Smith’s acts constituted piracy “as defined by the law of nations.”¹³

Finding that Congress could allow the judiciary to determine the meaning of statutory terms by reference to the “law of nations,” Story set forth the now oft-quoted method for ascertaining the “law of nations.” Courts may ascertain the law of nations “by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”¹⁴ From examining a variety of sources in each category, Story concluded that Smith’s actions fell within those universally treated as piracy in violation of the law of nations.¹⁵

A similar approach to ascertaining the law of nations was adopted in *The Paquete Habana*.¹⁶ The *Paquete Habana*, a fishing vessel sailing under the Spanish flag, was captured off the coast of Cuba by a U.S. gunboat.¹⁷ The vessel and her cargo were condemned as prizes of war and later sold at auction.¹⁸ The owner and the master, on behalf of the other crew members who were entitled to shares of the *Habana*’s catch, brought a suit challenging the seizure as unlawful.¹⁹ The Supreme Court, in order to determine whether fishing vessels were legally subject to capture during the war with Spain, looked to the law of nations and found that “coast fishing vessels. . . have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”²⁰

After tracing a significant amount of history on the international treatment of fishing vessels as prizes of war, the Court set forth perhaps the most relied upon statement relating to scope of the justiciability of the “law of nations,” explaining that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate juris-

11. *Id.* at 154 n. a.

12. *Id.* at 154-55.

13. *Id.* at 163.

14. *Id.* at 160-61 (emphasis added).

15. *See id.* at 161-63.

16. *See generally, Paquete Habana*, 175 U.S. at 700.

17. *See id.* at 678-79.

18. *See id.* at 679.

19. *See id.*

20. *Id.* at 686.



diction, as often as questions of right depending upon it are duly presented for their determination.”²¹

The *Paquete Habana* Court continued to explain that scholars can be consulted as part of the court’s task in determining the existence and meaning of international law. The Court explained that:

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.²²

Of course, the Court cautioned that it was not asking for the views of scholars to shape the law but instead to report it. In other words, “[s]uch [scholarly] works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”²³ In support of its optimistic view that jurists (i.e., scholars) can accomplish the neutral task of reporting international law rather than trying to create it, the Court cites Wheaton’s assurance that jurists and commentators are “generally impartial in their judgment.”²⁴ It is this trust and belief in international law scholars that orig-

21. *Id.* at 700.

22. *Id.* at 700-01 (emphasis added).

23. *Id.* at 700 (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215 (1895)). A similar approach to defining international law is adopted by the Statute of the International Court of Justice, *supra* note 4, arts. 38 & 59, 59 Stat. 1055, 1060, 1062. *See also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 265 (2d Cir. 2003) (“judicial tribunals may only ‘resort[] to’ the works of ‘jurists and commentators’ insofar as such works set forth the current law as it ‘really is.’ . . . [C]ourts may not entertain as evidence of customary international law ‘speculations’ by ‘jurists and commentators’ about ‘what the law ought to be.’”).

24. *The Paquete Habana*, 175 U.S. at 700 (citing WHEATON’S INTERNATIONAL LAW § 15 (8th ed.)). *But see* C. Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT’L & COMP. L. 335, 336-37 (1981) (explaining that the difficulty in defining international law is compounded “by the wide variance among academic specialists in the field in approaching the sources of international law,” and describing the subject matter of the practice of nations as “often nebulous”); Goldsmith, *supra* note 2, at 319 (“As a general matter, international law scholarship is characterized by normative rather than positive argument, and by idealism and advocacy rather than skepticism and detachment.”); Jörg Kammerhofer, *Law-making by Scholars*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW-MAKING, 1, 11 (Catherine Brölmann & Yannick Radi eds., 2013), <http://ssrn.com/abstract=2182547> (“Many

2015–2016]

International Law Scholarship

5

inally gave their work special status in the legal interpretation of international law by the courts and other authorities.

II. DEBATES OVER THE LEGITIMACY OF INTERNATIONAL LAW'S SPECIAL STATUS IN LEGAL INTERPRETATION

Over time and especially in more recent decades, serious debates have ensued over whether international law scholars and scholarship deserve this kind of special recognition and status. On one side, some claim that scholars have been reliable guides as experts in the field of international law and “instrumental” in the identification of practices rising to the level of international law.²⁵ Others, like Judge Robb of the U.S. Court of Appeals for the D.C. Circuit, have lamented that “[c]ourts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations.”²⁶ These critics have been worried that inviting the opinions of scholars into judicial interpretation of international law would lead to litigation with “citations to various distinguished journals of international legal studies,” yet leaving the court with “little more than a numbing sense of how varied is the world of public international ‘law.’”²⁷

Examples of these competing views of international law scholarship abound. Some, like Professor Beth Stephens for example, contend that courts have a “need for expert assistance in deciphering the content of international rules, which develop through the complex interaction of judicial

scholars working on international human rights and humanitarian law today incorporate a strain of political activism into their legal scholarship.”)

25. See, e.g., Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1401-1402 (1999) (“In accordance with the words of *The Paquete Habana*, . . . experts have been instrumental in determining the status of various practices; however, their role is not to steer the law in a specific direction. Rather, they work with existing definitions and examples of practices that already have become customary international law in making their assessments.”).

26. *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring). See also Goldsmith, *supra* note 2, at 318 (claiming that “[i]nternational law scholars have no special claim to insight . . . lack a democratic pedigree [and] are among the most biased when it comes to the content of the customary international law of human rights, and thus deserve little, if any, deference on these issues.”); Jörg Kammerhofer, *Orthodox Generalists and Political Activists in International Legal Scholarship*, in INTERNATIONAL LAW IN A MULTIPOLAR WORLD (Matthew Happold ed. 2010), <http://ssrn.com/abstract=1551343> (“It seems that scholars working on international law are tempted too much by factors beyond the sum total of the positive law to be able to restrict themselves to it.”).

27. *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

and legislative decisions, diplomacy—and scholarship.”²⁸ Stephens stresses that this need for scholarly insight when interpreting international law is “as evident as ever”²⁹ in today’s legal landscape. Furthermore, Stephens contends that the diversity in international law scholarship that has evolved and exists today should not disqualify the field from maintaining its special status with courts; she believes that we can trust courts to filter and “distinguish between good scholarship and bad, between wishful thinking and well-founded analysis.”³⁰ Meanwhile, others like Judge Cabranes of the U.S. Court of Appeals for the Second Circuit have cautioned that such filtering is especially important and difficult. In *Flores v. Southern Peru Copper Corp.*, Judge Cabranes stressed that international law is uniquely difficult for judges, explaining “[t]he acknowledgment in *Paquete Habana* and Article 38 of the works of scholars as subsidiary or secondary sources of customary international law stems from the fact that, as noted above, the primary evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges.”³¹ But Judge Cabranes cautioned:

neither *Paquete Habana* nor Article 38 recognizes as a source of customary international law the policy-driven or theoretical work of advocates that comprises a substantial amount of contemporary international law scholarship. Nor do these authorities permit us to consider personal viewpoints expressed in the affidavits of international law scholars.³²

He concluded that, “[i]n sum, although scholars may provide accurate descriptions of the actual customs and practices and legal obligations of States, only the courts may determine whether these customs and practices give rise to a rule of customary international law.”³³ The rise of this type of cautionary concern about the need for evaluating the substance and purposes behind particular works of international law scholars has coincided with the general increase in the number of international law “scholars” in

28. Beth Stephens, Panelist, Rutgers-Camden School of Law, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC’Y INT’L L. PROC. 317, 317-18 (Apr. 8, 2000).

29. *Id.* at 318.

30. *Id.*

31. *Flores*, 414 F.3d at 265 (2d Cir. 2003).

32. *Id.*

33. *Id.*; *See also U.S. v. Yousef*, 327 F.3d 56, 93-103 (2d Cir. 2003) (stressing that “[i]n a system governed by the rule of law, no private person—or group of men and women such as comprise the body of international law scholars—creates the law. . . . we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.”).

2015–2016]

International Law Scholarship

7

the field, the number of works of scholarship being produced, and the greater diversity of motivations underlying scholarship, including moving beyond simply reporting what the law is.

There is certainly an increased debate over whether yesterday's scholarship which received special status is sufficiently similar to the field of international law scholarship today. As stated above, Professor Stephens has made a case that the field has indeed changed but in ways that only enhance its utility generally including to the courts.³⁴ Furthermore, some like Professor Bruno Simma claim that scholars are still often relied on in the operations of international law and "[s]cholars of international law typically have an unjustified modesty about their own influence."³⁵ Nonetheless, others like Professor Jack Goldsmith contend that using the writings of scholars as a source of international law "made sense during the nineteenth century positivist heyday of international law, when scholars did the hard work of collecting international practices. But it makes little sense today."³⁶

This Article does not aim to resolve these disputes. My scope here is more limited. But, the existence of this debate over the relative importance of international law scholarship to the actual interpretation and application of international law makes the quantitative observations in this Article's final section relevant and consequential to any comprehensive discussion of those substantive issues.

34. Stephens, *supra* note 28, at 318.

35. Bruno Simma, Panelist, Rutgers-Camden School of Law *Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317, 319 (2000); *see also id.* (remarks of Harold G. Maier) (reflecting accepting on "a wide role for the scholar in the identification, if not the formation, of international legal norms.").

36. Goldsmith, *supra* note 2, at 318. *See also* VED P. NANDA & DAVID K. PANISIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 9:2 (2d ed. 2012) ("Whereas in the past, scholars may have been instrumental in gathering and analyzing international practices, in today's information age, scholars are more apt to be engaged in advocacy or otherwise making normative judgments."); Boevig, *supra* note 3, at 142 ("In the late nineteenth century scholars were relied upon because they were viewed as fair and impartial, without a political or scholarly agenda," but "the concern today is that international legal scholars are all too often more like biased advocates, seeking to expand international law to fit a particular agenda, rather than impartial guides."); Jörg Kammerhofer, *Law-making by scholarship? The dark side of 21st century international legal 'methodology'*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 115-26 (James Crawford et al. ed. 2012), <http://ssrn.com/abstract=1631510> ("we must return to, or, rather, explore a concept of legal scholarship that focuses on the analysis of the law in force, rather than the law we wish to see.").

III. INTERNATIONAL LAW'S EVOLVING STATUS AND QUANTITATIVE OBSERVATIONS ON INTERNATIONAL LAW SCHOLARSHIP OVER TIME

Whichever side one takes in the debate over the appropriate role for scholarship in the identification of international law – or even if one falls into some middle ground – it is certain that history has given at least some forms of international law scholarship special status. That fact alone warrants particular attention to this scholarly field and necessarily affects the assessment of the field's influence. It also seems beyond doubt that this field of scholarship has changed over time – particularly after observing the quantitative data in the remainder of this Article. The totality of international law scholarship as it existed in the 18th, 19th, and early-20th centuries is far different from its 1965 iteration, which was still quite different from the totality of international law scholarship produced today in 2015.

If international law is an evolving concept, then so too must international law scholarship be an evolving one. The phrase “law of nations,” after all, was the original term for expressing early international law, a concept understood to be much more limited than what we consider “international law” today. In most contemporary literature, however, the “law of nations” is considered coterminous with “international law.” Furthermore, in *Filartiga v. Pena-Irala*, for example, the U.S. Court of Appeals for the Second Circuit in 1980 solidified the notion that “international law,” used by the court as synonymous with the “law of nations,” is an evolving concept to be ascertained by the courts. The Second Circuit held that courts ascertaining the law of nations “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” And while the term “law of nations” has given way to “international law,” so too has the concept of “human rights” come to dominate much of the contemporary debate over what constitutes international law.

It is for these reasons that the data compiled here focuses principally on those three terms – “the law of nations,” “international law,” and “human rights.” To appreciate the evolution of concepts in international law generally, the graphs in Figures 1 through 13 will look at three separate types of data. First, term usage in books will be examined. Second, term usage in cases will be compiled and graphed. Then, we will turn to the usage of these terms in law reviews and law journals specifically to get a glimpse of the quantitative rise in attention given to international law in legal scholarship across the past fifty years.

We begin with some observations then on the usage of these terms in books – which may be a relatively accurate proxy for cultural usage generally. Some informative results are generated by Google's N-gram function.

2015–2016]

International Law Scholarship

9

This Google function has been described as “the first tool of its kind, capable of precisely and rapidly quantifying cultural trends based on massive quantities of data.” This tool enables users “to examine the frequency of words. . . or phrases. . . in books over time.” The database accesses “over 5.2 million books: ~4% of all books ever published” when conducting a search and producing an N-gram. Even if this tool is a bit raw and elementary, through it one can get a sense of some patterns in the relative frequency of usage for particular words and phrases.

Figure 1 presents the N-gram results for the terms “law of nations,” “international law,” and “human rights” from 1800 to 2008 (the last available date in the program). I began with this date range because it tellingly shows the dominance of the term “law of nations” early on, only to be overtaken by the term “international law” in the later part of the 19th century; it shows the gradual, continuous decline in usage for the “law of nations” through today. Figure 1 also shows the spiking in frequency for “international law” in the 1920s as one might expect given history and the geopolitical climate of that time, and it shows the increased usage of the term “human rights” around World War II and the dramatic ascendance in frequency of “human rights” as a term of discussion in books in the late-1980s and beyond.

FIGURE 1: GOOGLE LABS BOOKS N-GRAM VIEWER GRAPH
“INTERNATIONAL LAW”, “LAW OF NATIONS,” AND “HUMAN
RIGHTS” FROM 1800 TO 2008 FROM THE CORPUS OF
ENGLISH WITH A SMOOTHING OF 3



Figure 1. Source: GOOGLE BOOKS N-GRAM VIEWER, <http://books.google.com/ngrams> (last visited December 31, 2014) (based on the model and database developed by Jean-Baptiste Michel*, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden*. *Quantitative Analysis of Culture Using Millions of Digitized Books*. *SCIENCE*, Jan. 14, 2011, at 176).

Each of these terms have only appeared in a relatively small percentage of the overall books in Google’s digitized collection, but Figure 1 at

least shows interesting trends in usage and helps provide some context for the international law “story” over time. Each line in this N-gram represents what is called a “unigram” for each term. The y-axis shows what percentage of all the unigrams contained in Google’s sample of books written in English include the phrase or term tested. “Usage frequency is computed by dividing the number of instances of the N-gram in a given year by the total number of words in the corpus in that year.”³⁷ Smoothing is adjustable and simply permits a consideration of the trends as a moving average.³⁸

Figure 2 simply condenses the years graphed so that one can get a closer look at the past fifty years of term frequency (in books at least). Figure 2 looks at the terms across the years 1965-2008 (again, the last available year in the program):

For the remainder of the data presented in this Article, including Figures 3 through 13, searches were done in WestlawNext to identify the frequency of the terms in two databases: (1) Federal and State Court Opinions combined; and (2) Journals and Law Reviews. The compilation falls short of providing a full fifty years’ worth of data. Given that there is often a lag time between publication date and date of actual printing in the production process of many law reviews and law journals – so that an article with a 2014 date might actually be printed in mid-2015 – I made the decision to collect data only through 2013 (the last year that presumably has been almost completely populated in the Journals and Law Review database).

37. See Michel et al., *supra* note 42, at 176. The Google Ngram data is “normal-ize[d] by the number of books published in each year.” *What’s All This Do?*, GOOGLE BOOKS, <http://books.google.com/ngrams/info> (last visited Dec. 31, 2014).

38. Google Books describes “smoothing” as follows:

Often trends become more apparent when data is viewed as a moving average. A smoothing of 1 means that the data shown for 1950 will be an average of the raw count for 1950 plus 1 value on either side: (“count for 1949” + “count for 1950” + “count for 1951”), divided by 3. So a smoothing of 10 means that 21 values will be averaged: 10 on either side, plus the target value in the center of them. At the left and right edges of the graph, fewer values are averaged. With a smoothing of 3, the leftmost value (pretend it’s the year 1950) will be calculated as (“count for 1950” + “count for 1951” + “count for 1952” + “count for 1953”), divided by 4.

What’s All This Do?, *supra* note 47. In addition to providing the graphed results, searches for terms and phrases also produce hyperlinks appearing below the graph, allowing one to browse through the books available that contributed to the data set. *Id.* (“Below the graph, we show ‘interesting’ year ranges for your query terms. Clicking on those will submit your query directly to Google Books.”).

FIGURE 2: GOOGLE LABS BOOKS N-GRAM VIEWER GRAPH
 “INTERNATIONAL LAW”, “LAW OF NATIONS,” AND “HUMAN RIGHTS” FROM 1965 TO 2008 FROM THE CORPUS OF ENGLISH WITH A SMOOTHING OF 3

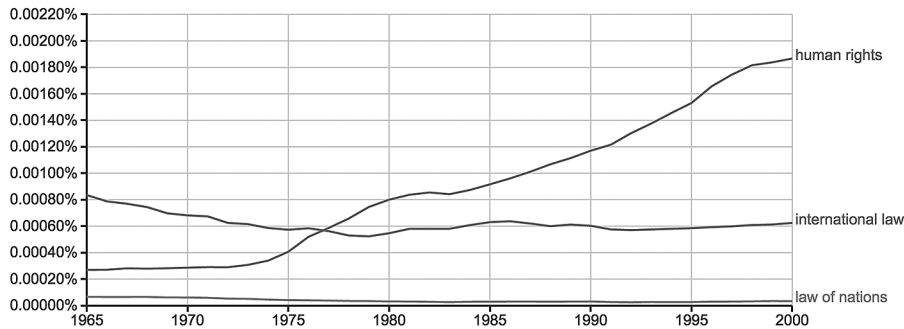


Figure 2. Source: *GOOGLE BOOKS N-GRAM VIEWER*, <http://books.google.com/ngrams> (last visited December 31, 2014) (based on the model and database developed by Jean-Baptiste Michel*, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden*. *Quantitative Analysis of Culture Using Millions of Digitized Books*. *SCIENCE*, Jan. 14, 2011, at 176).

FIGURE 3: FEDERAL AND STATES CASE OPINIONS USING TERMS
 “HUMAN RIGHTS” (TOP LINE), “INTERNATIONAL LAW” (MIDDLE
 LINE) AND “LAW OF NATIONS” (BOTTOM LINE)

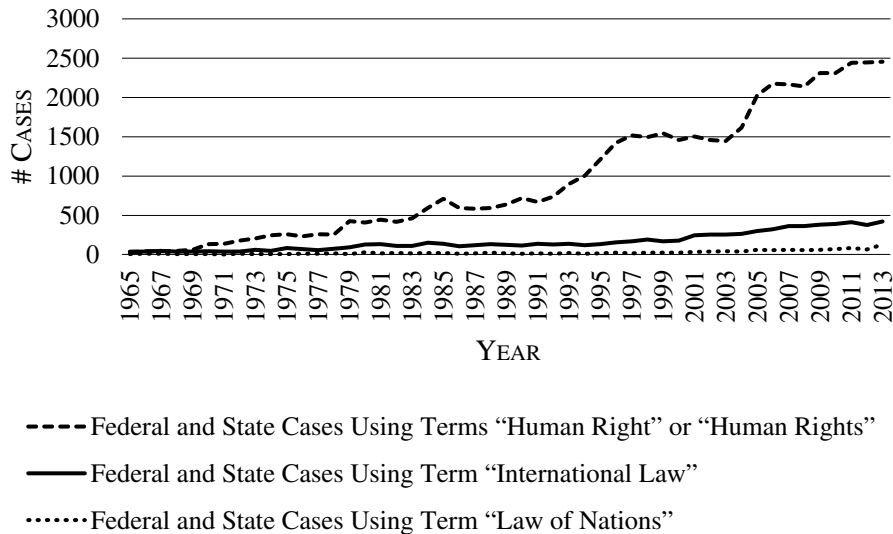


Figure 3. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

The frequency of these three terms – “law of nations,” “international law,” and “human rights” – in state and federal court opinions shows simi-



larly interesting trends. As depicted in Figure 3 and listed in the Appendix, between 1965 and 2013, 1,297 case opinions used the term “law of nations,” 8,025 case opinions used the term “international law,” and 47,178 case opinions used the terms “human rights” and/or “human right.” The Appendix breaks these numbers down by year.

Figures 4 through 6 provide a separate visual analysis for each term on its own so that one can better appreciate the frequency and to more starkly illustrate the progression associated with each term’s usage in federal and state case opinions.

FIGURE 4: FEDERAL AND STATE CASE OPINIONS USING TERM “LAW OF NATIONS”, 1965-2013

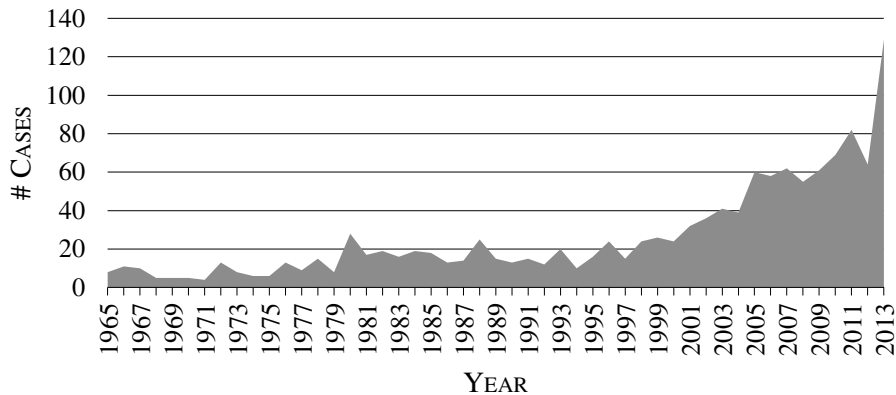


Figure 4. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

FIGURE 5: FEDERAL & STATE CASE OPINIONS USING TERM “INTERNATIONAL LAW”, 1965-2013

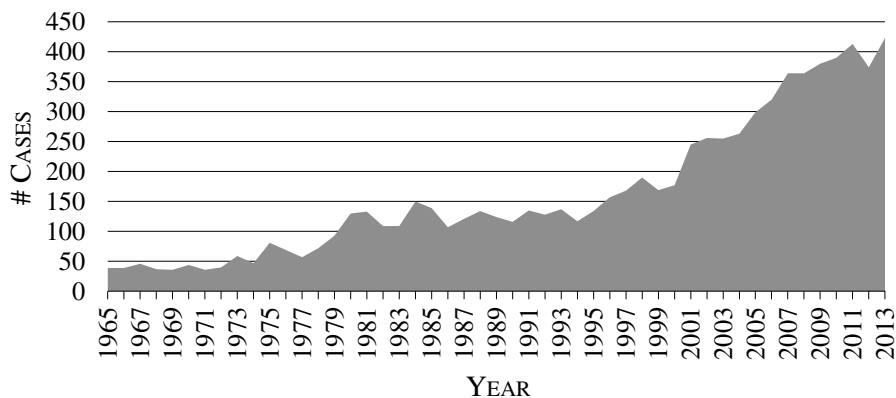


Figure 5. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.



2015–2016]

International Law Scholarship

13

FIGURE 6: FEDERAL AND STATE CASE OPINIONS USING TERM
“HUMAN RIGHT” OR “HUMAN RIGHTS”, 1965-2013

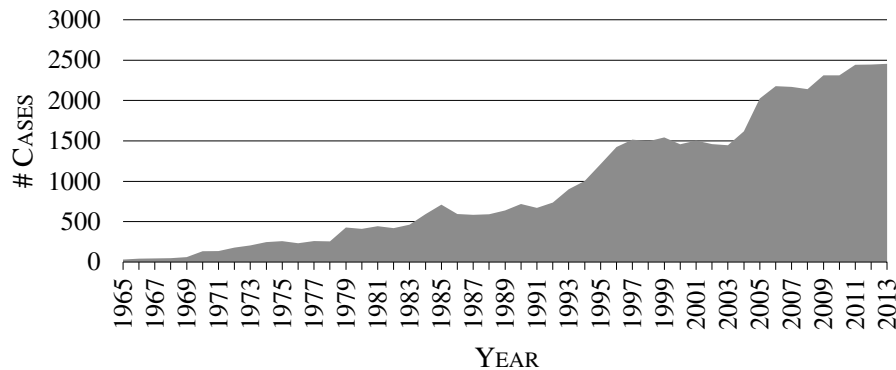


Figure 6. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

Figures 7 through 10 turn from usage in case opinions to usage of each term in scholarly articles. The usage of these terms in legal scholarship shows some of the same general patterns already seen in case opinions. This next set of graphs is designed to examine trends in the overall number of scholarly works that interact with the terms “law of nations,” “international law,” and “human rights” by examining the number of articles using each term in the WestlawNext Journals and Law Review database for each year between 1965 and 2013.

There are, admittedly, several limitations in this methodology. For example, the following compilations do not account for volume of usage within an article or otherwise attempt to evaluate the quality of the usage of the term in any article. Second, the compilation has no controls for database coverage or scope limitations regarding what journals are included in Westlaw. I am accepting this as a limit but also working with an informed assumption that this database in Westlaw is fairly comprehensive of the available journals in existence across most of these years. A third type of limitation arises in the lack of several control variables, including the total number of scholarly articles published in all fields over time. There have undoubtedly been dramatic increases in the total number of articles of any kind published in law reviews and law journals across the past fifty years if for no other reason than there are a lot more law reviews and law journals. Thus, the increase in international law articles may not be unique. Yet, the fact that there are so many more articles discussing international law still is telling regarding its own increased attention, and the expansion has consequences for its influence.

As another example of a methodological disclaimer, the limited inquiry into scholarship that appears in law journals or law reviews obviously

omits a substantial amount of international law scholarship that exists in books, treatises, and other secondary materials. Were it to be useful, we could spend a great deal of time coming up with even more reasons why the following compilations have somewhat limited utility and methodological constraints. Suffice it to say, this is neither a perfect nor a comprehensive picture of all international legal scholarship. But, I do believe that it is nonetheless an informative and reliable glimpse at the overall volume of scholarship in the international law field and that the data actually compiled can be a sufficient proxy for associated scholarship trends.

FIGURE 7: LAW REVIEW AND LAW JOURNAL ARTICLES USING TERMS “INTERNATIONAL LAW” (INITIAL UPPER LINE), “HUMAN RIGHTS” (ENDING UPPER LINE) AND “LAW OF NATIONS” (LOWER LINE), 1965-2013

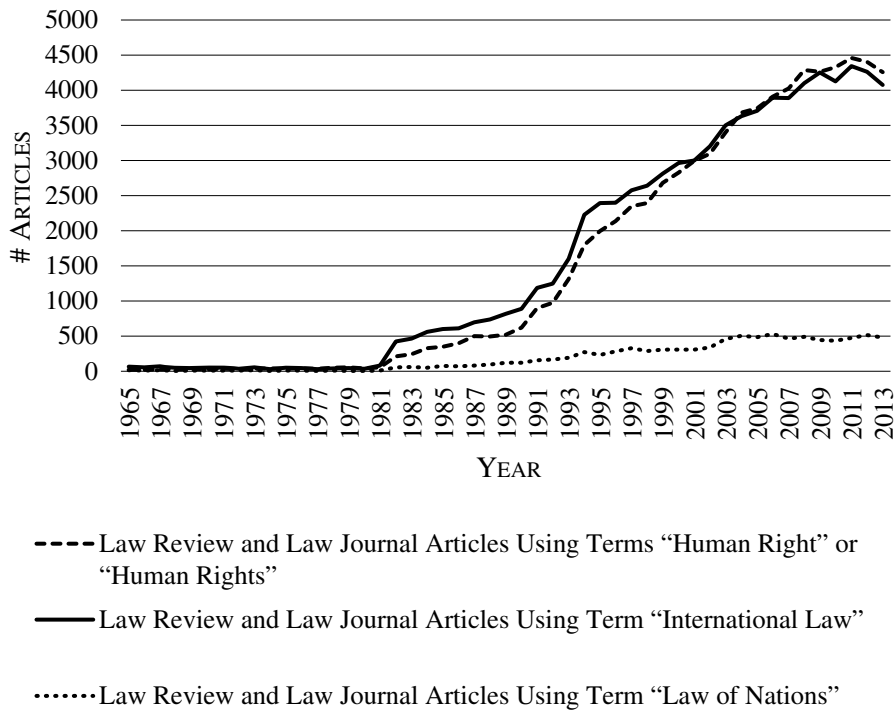


Figure 7. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

As depicted in Figure 7 and listed in the Appendix, between 1965 and 2013, 9,400 law review and law journal articles used the term “law of nations,” 78,641 law review and law journal articles used the term “international law,” and 74,470 law review and law journal articles used the terms

“human rights” and/or “human right”. The Appendix breaks these numbers down by year.

FIGURE 8: LAW REVIEW AND LAW JOURNAL ARTICLES USING THE TERM “INTERNATIONAL LAW”, 1965-2013

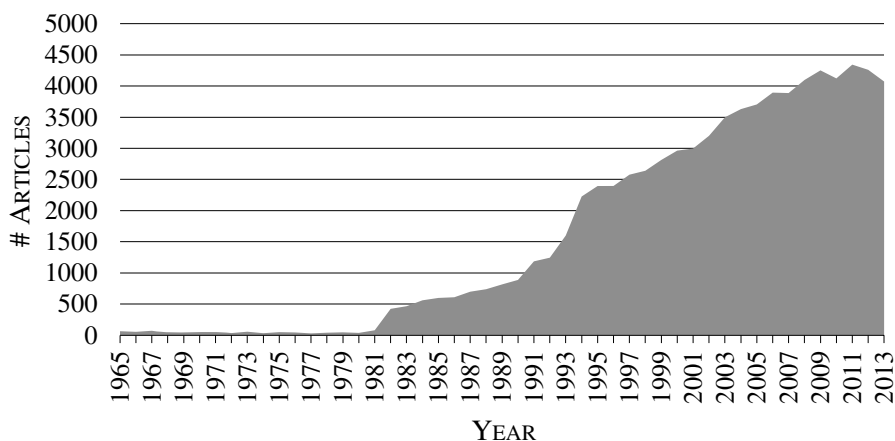


Figure 8. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

Figures 8 through 10 provide a separate visual analysis for each term on its own so that one can better appreciate the frequency, and to more starkly illustrate the progression associated with each term’s usage in law review and law journal articles.

FIGURE 9: LAW REVIEWS AND LAW JOURNAL ARTICLES USING TERMS “LAW OF NATIONS”, 1965-2013

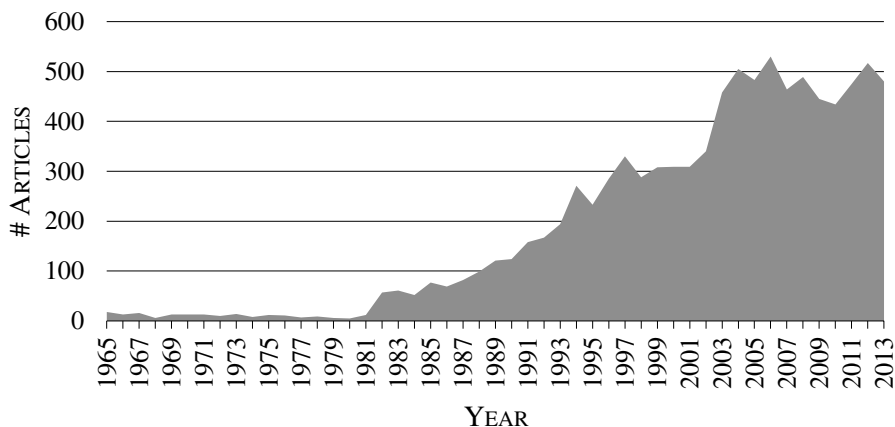


Figure 9. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

FIGURE 10: LAW REVIEW AND LAW JOURNAL ARTICLES USING TERM "HUMAN RIGHTS", 1965-2013

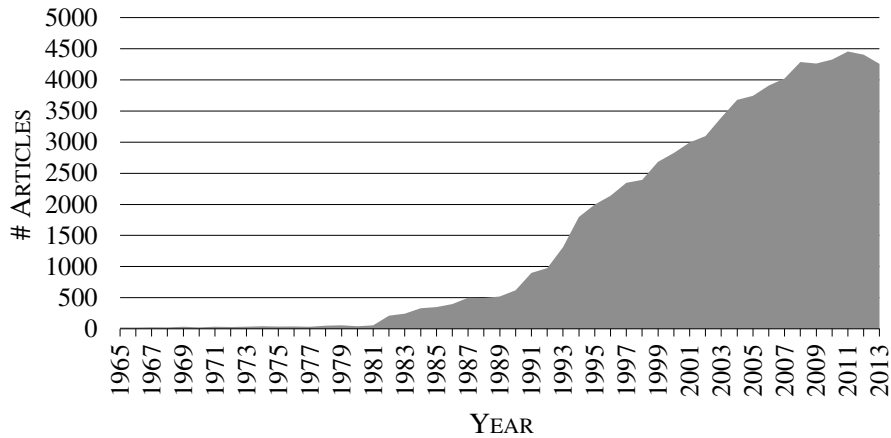


Figure 10. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

Finally, Figures 11 through 13 show the frequency of each term’s usage in both articles and cases in one graph. These are useful visuals primarily because they show a much more substantial increase in scholarships’ usage of the terms than seen in judicial opinions’ usage of the terms (at least for the terms “law of nations” and “international law”, and to a lesser extent “human rights”).

FIGURE 11: ARTICLES (UPPER LINE) AND CASES (LOWER LINE) USING TERM "INTERNATIONAL LAW", 1965-2013

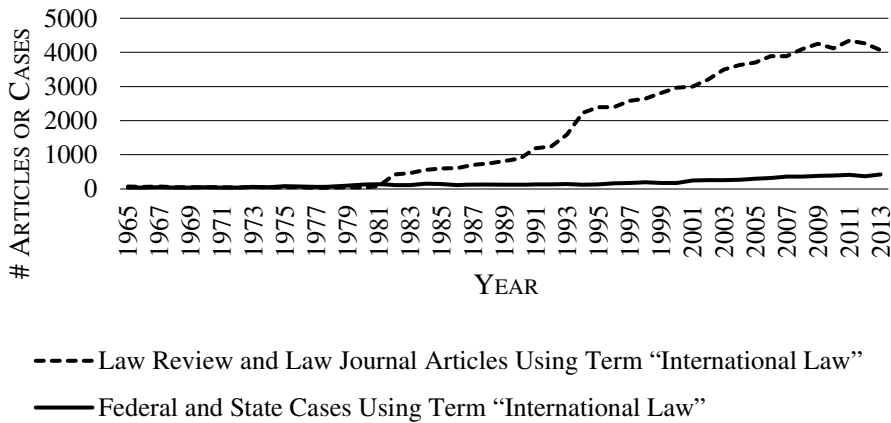


Figure 11. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

FIGURE 12: ARTICLES (UPPER LINE) AND CASES (LOWER LINE) USING THE TERM “LAW OF NATIONS”, 1965-2013

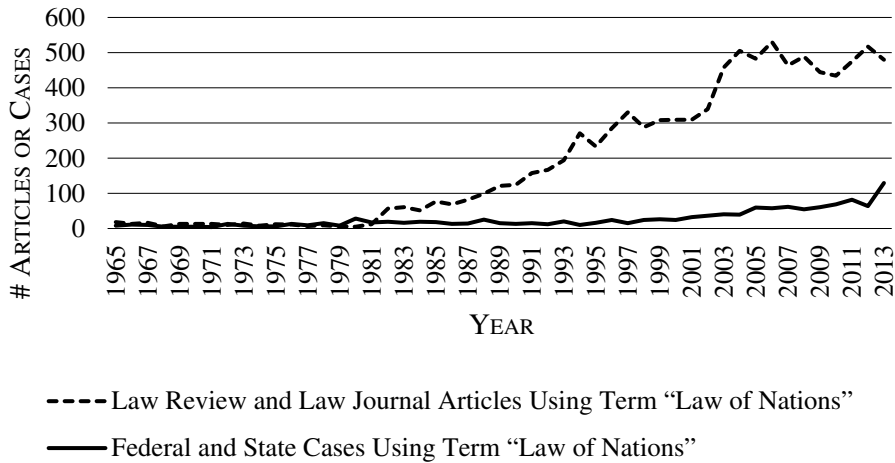


Figure 12. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

FIGURE 13: ARTICLES (ENDING UPPER LINE) AND CASES (ENDING LOWER LINE) USING TERM “HUMAN RIGHTS”, 1965-2013

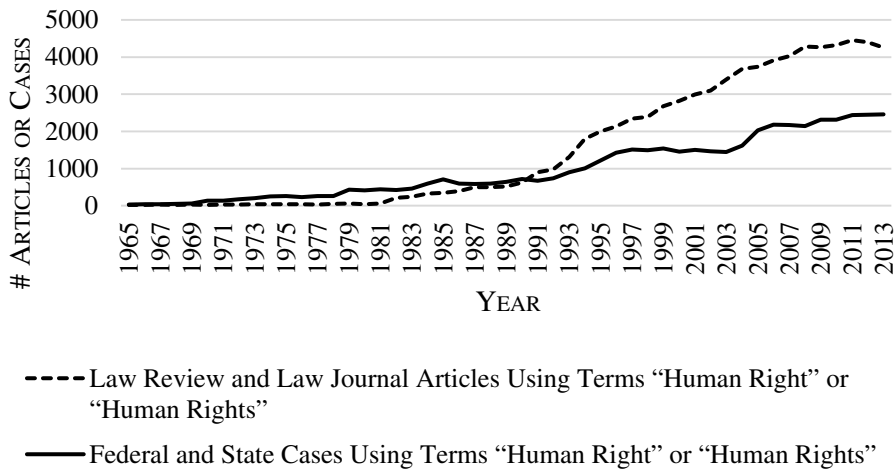


Figure 13. Data Compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

CONCLUSION

The data presented in this essay clearly shows a dramatic quantitative expansion of the amount of international law scholarship over the past few years. It is my hope that the data provided herein can serve useful to those wishing to further dissect the quantitative data and also to those that will



attempt to catalogue the qualitative changes in international law scholarship across time.

With quantitative differences across the years in international law scholarship, there have undoubtedly been qualitative differences as well in the scholarly products published. The fact that international law scholarship has evolved and expanded does not immediately lead to a conclusion that something has changed for the worse in the field. In fact, most fields of legal scholarship have a diversity of scholarship that spans reporting what the law is, analyzing how well the law operates, examining how the law can be improved, and advocating for what the law should be. The nature of international law scholarship has evolved to embrace each of these types of scholarship and along the way has even made room for those that do not take the importance or superiority of international law or international legal regimes for granted as well as room for those that challenge the idea that international law should or can legitimately expand its sphere of controlling influence together with those who believe in a robust system of international law.

However, because much of modern international law scholarship does not simply report what has emerged as international law according to accepted standards, it likely can no longer be said (assuming it ever could be) that all of international law scholarship as it exists today is worthy of some special status or recognition by judges or others attempting to identify international law. Courts and other authorities must more closely scrutinize international law scholarship as they do the scholarship in other fields to, as mentioned by Professor Stephens earlier, distinguish the good from the bad.³⁹ The high standards applied to determine what scholarship counts as informative to those charged with identifying international law must be deliberately and strictly applied with caution.

There has been tremendous growth in international law scholarship seen in the numbers reported in this essay. It has been an interesting, expanding, and important journey for international law scholars and the development of international law. There is no doubt that international law scholarship's relevance and influence will continue and evolve in the next 50 years too as the globalization international law becomes more and more evident and pervasive.

39. Stephens, *supra* note 28, at 318.

2015–2016]

International Law Scholarship

19

APPENDIX
 NUMBER OF LAW REVIEW OR LAW JOURNAL ARTICLES AND NUMBER OF FEDERAL AND STATE CASE OPINIONS
 USING THE TERMS “INTERNATIONAL LAW,” “LAW OF NATIONS,” AND “HUMAN RIGHTS” 1965-2014¹

Year	Law Review and Law Journal Articles Using Term “International Law”	Federal and State Cases Using Term “International Law”	Law Review and Law Journal Articles Using Term “Law of Nations”	Federal and State Cases Using Term “Law of Nations”	Law Review and Law Journal Articles Using Terms “Human Right” or “Human Rights”	Federal and State Cases Using Terms “Human Right” or “Human Rights”
1965	65	39	18	8	23	30
1966	55	39	13	11	22	41
1967	72	46	16	10	26	44
1968	45	37	6	5	24	47
1969	49	36	13	5	34	60
1970	51	44	13	5	24	133
1971	49	36	13	4	34	135
1972	35	40	10	13	30	178
1973	57	59	14	8	35	205
1974	33	47	8	6	42	246
1975	50	81	12	6	37	258
1976	45	69	11	13	39	232
1977	30	57	7	9	34	259
1978	41	72	9	15	51	255
1979	47	63	6	8	57	427
1980	38	130	5	28	42	410
1981	80	133	12	17	57	443
1982	424	109	57	19	212	419
1983	466	109	61	16	244	462
1984	561	150	52	19	331	592
1985	599	131	77	18	350	710
1986	610	107	69	13	398	594
1987	699	121	82	14	499	584



Year	Law Review and Law Journal Articles Using Term "International Law"	Federal and State Cases Using Term "International Law"	Law Review and Law Journal Articles Using Term "Law of Nations"	Federal and State Cases Using Term "Law of Nations"	Law Review and Law Journal Articles Using Terms "Human Right" or "Human Rights"	Federal and State Cases Using Terms "Human Right" or "Human Rights"
1988	739	134	99	25	496	591
1989	816	124	121	15	520	638
1990	888	116	124	13	620	718
1991	1186	135	158	15	899	670
1992	1245	128	167	12	975	736
1993	1600	137	194	20	1313	901
1994	2227	117	271	10	1797	1003
1995	2395	134	233	16	1996	1212
1996	2396	157	285	24	2138	1424
1997	2577	168	330	15	2346	1516
1998	2640	190	288	24	2393	1495
1999	2813	169	308	26	2683	1543
2000	2963	177	309	24	2825	1458
2001	2997	245	309	32	2994	1504
2002	3201	256	340	36	3096	1460
2003	3498	255	458	41	3395	1446
2004	3629	263	505	39	3678	1618
2005	3704	299	483	60	3743	2025
2006	3894	320	530	58	3908	2178
2007	3887	364	464	62	4022	2169
2008	4097	364	489	55	4286	2141
2009	4251	380	445	61	4262	2312
2010	4122	390	434	69	4325	2312
2011	4343	413	475	82	4455	2443
2012	4260	374	517	64	4404	2446
2013	4072	423	480	129	4256	2455
Total	78641	8025	9400	1297	74470	47178

¹ All data compiled by Donald J. Kochan from search of WestlawNext, Dec. 28, 2014.

