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# THE ROLE OF LEGAL RESEARCH IN THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

**INTRODUCTION.** *The UN Charter entrusts the General Assembly with the obligation to "initiate studies and make recommendations" to promote the progressive development of international law and its codification. This mandate is primarily implemented through cooperation of States within the UN International Law Commission (ILC). Beyond the ILC's work, the significance of scholarly research in international law – whether individual or collective – remains debated, including the very validity of the term "unofficial codification of international law". This article explores the practical impact of legal scholarship on the evolution of contemporary international law, particularly in light of the UN Charter's reference to the "teachings of the most highly qualified publicists".*
**MATERIALS AND METHODS.** *The article calls attention to the relevant provisions of the UN Charter (including such its integral component as the Statute of the International Court of Justice), and to the ILC documents, and to scholarly works on general international law, which cover its codification, progressive development and historical dimensions–by both domestic and foreign experts. Methodologically, it employs general scientific approaches (analysis, synthesis) and specialized legal methods, notably comparative legal analysis.*
**RESEARCH RESULTS.** *The UN Charter notion "the teachings of the most highly qualified publicists" means a special part of the broader concept – "the science of international law". Merely addressing a particular topic of international law is not enough for qualifying its results as one of the "teachings" in the sense of article 38 of the Statute of the International Court of justice; a sort of key characteristics of such a "teaching" are suggested: the scholarly (academic) nature of a publication on the results of such international law research; taking into account the system of international law (that is, results of the research are not to be a fragmented presentation of a position regarding a specific issue of international law in isolation from its overall system); the professional achievements of the author of a publication in the area of international law, their recognition within the international scholarly community. The notion "the teachings of the most highly qualified publicists", as it is used in the UN Charter and in its Commentaries, refers first of all to theoretical contributions on issues of international law that are produced by scholars, either individually or collectively; the term does not mean a document of a State.*
**DICUSSION AND CONCLUSIONS.** *The literature on international law demonstrates a variety of opinions relating to the role of legal research in the*

*development of international law and its systematization, including different opinions as to the relation between the term "the science of international law" and the "teachings of the most highly qualified publicists", as provided in Art. 38 of the ICJ Statute. What is suggested in foreign legal publications is, in particular, a positive description of the list of international lawyers whose works were already cited by the ICJ. The authors of this paper take a more critical approach, identifying that in this list the majority are scholars from the USA and Western Europe. In contrast, no doctrinal contributions of scholars from Russia or China, or from Africa or Latin America were cited by the ICJ. Such underrepresentation of legal research done in countries and regions noted above does not mean that international laws scholarship is less developed in these regions that in the USA and Western Europe. Rather the dominance of Anglo-Saxon legal scholarship in the ICJ practice is facilitated by other factors, including political ones, as indicated in this paper.*

**KEYWORDS:** *International legal research, codification of international law, progressive development of international law, teachings of the most highly qualified publicists, UN Charter, ICJ Statute, subsidiary means for determining international legal norms*

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# РОЛЬ НАУЧНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ В КОДИФИКАЦИИ И ПРОГРЕССИВНОМ РАЗВИТИИ МЕЖДУНАРОДНОГО ПРАВА

**ВВЕДЕНИЕ.** *Предусмотренная Уставом Организации Объединенных Наций (далее – ООН) обязанность Генеральной Ассамблеи организовывать исследования и делать рекомендации в целях «поощрения прогрессивного развития международного права и его кодификации» выполняется в настоящее время прежде всего посредством сотрудничества государств в формате Комиссии международного права ООН. Вне работы этой Комиссии роль исследований международного пра-*

*ва (индивидуальных и коллективных) по-разному оценивается, начиная с вопроса о том, корректно ли вообще употреблять термин «неофициальная кодификация международного права». В настоящей статье исследуется, каково практическое влияние научных трудов на совершенствование современного международного права, особенно в контексте положений Устава ООН о «доктринах наиболее квалифицированных специалистов по публичному праву».*

**МАТЕРИАЛЫ И МЕТОДЫ.** *Исходными материалами при подготовке настоящей статьи выбраны комментарии к Уставу ООН, в том числе к такой его неотъемлемой части, как Статут Международного суда ООН, документы Комиссии международного права ООН, научные публикации по общему международному праву, включая исследования о его кодификации и развитии, его истории, как подготовленными отечественными, так и зарубежными правоведами-международниками. Использованы такие общенаучные методы познания, как анализ и синтез, а также специальные юридические методы, включая сравнительно-правовой.*

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** *Предусмотренное Уставом ООН понятие «доктрины наиболее квалифицированных специалистов по публичному праву» обозначает особый компонент более широкого понятия – «науки международного права». Только лишь проведения исследования конкретного вопроса международного права недостаточно для того, чтобы его результаты можно было отнести к «доктринам» в смысле ст. 38 Статута Международного суда ООН; предложены некоторые базовые характеристики таких «доктрин»: научный (академический) характер публикации результатов такого международно-правового исследования; учет при исследовании системности международного права (т.е. результаты исследования не должны сводиться к фрагментарной презентации конкретного вопроса международного права, вырванной из общего контекста его системы); профессиональные достижения автора публикации по международному праву, их признание в международном научном сообществе. Понятие «доктрины наиболее квалифицированных специалистов по публичному праву», используемое в Уставе ООН и в его комментариях, обозначает, прежде всего, теоретические разработки вопросов международного права, которые выполнены правоведами, индивидуально или в коллективе; это понятие не означает документ, изданный каким-либо государством.*

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** *В международно-правовой литературе отражены различные мнения о роли юридических исследований в развитии международного права и его систематизации, в том числе различные мнения о соотношении терминов «наука международного права» и «доктрины наиболее квалифицированных специалистов по публичному праву» (последний термин предусмотрен ст. 38 Статута Международного суда ООН). В зарубежной международно-правовой литературе предложено, в частности, позитивное описание списка юристов-международников, чьи труды цитировались Международным судом ООН. Авторы настоящей статьи придерживаются более критической оценки, выявив, что в этом списке большинство составляют правоведы из США и Западной Европы. Напротив, Международный суд ООН не процитировал ни одного правового исследования ученых из России, Китайской Народной Республики или Африки и Латинской Америки. Такая дискриминация в отношении названных стран и регионов не означает, что международно-правовая наука в них менее развита, чем в США и странах Западной Европы. Доминирование англо-саксонских международно-правовых исследований в практике Международного суда ООН обусловлено, скорее всего, другими причинами, в том числе политическими, как показано в настоящей статье.*

**КЛЮЧЕВЫЕ СЛОВА:** *международно-правовая наука, кодификация международного права, прогрессивное развитие международного права, доктрины наиболее квалифицированных специалистов по публичному праву, Устав ООН, Статут Международного суда ООН, вспомогательные средства для определения правовых норм*

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## 1. Introduction

The UN Charter provides that the General Assembly shall initiate studies and make recommendations, *inter alia,* for the purpose of "encouraging the progressive development of international law and its codification" (art. 13). Accordingly, the UN General Assembly established in 1946 *the Committee on the Progressive Development of International Law and its Codification.* In 1947, a subcommittee of the Sixth (Legal) Committee of the General Assembly prepared a draft *Statute of the International Law Commission (ILC).* The Statute was approved by Resolution 174 (II) of the UN General Assembly the same year [The work of International Law Commission … 2007:4-6]. Members of the ILC, while being drawn from various segments of legal community (not only from universities and academia, but also from the governmental structures), nevertheless sit in their individual capacities, thus not representing a government or a specific university [The work of International Law Commission … 2007:8-9].

The Establishing of the ILC did not mean its monopoly in progressive development of international law and its codification. Moreover, another provision of the UN Charter provides for the important role of the teachings of specialists in public international law. We refer to art. 38 of the Statute of the International Court of Justice, which forms "an integral part" of the UN Charter (art. 92). According to art. 38 of the ICJ Statute, "the teachings of the most highly qualified publicists of the various nations" are to be applied "as subsidiary means for the determination of rules of law".

In this context, this paper after the introduction addresses the origin of legal research (Section 2) and then focuses on the proper understanding of the term "the science of international law" and its conceptualization (Section 3). Then the authors of the paper consider the phenomenon of the so called "scientific codification" of international law (Section 4) and the different interpretations of the provisions of the UN Charter on "the teachings of the most highly qualified publicists", exposing the relations between this term and the term "international law literature" (Section 5), following with "Conclusion".

## 2. Brief Notes on the Origin of Legal Research in general and of the Science of International Law in particular

There were periods in the history of law when the works of the most qualified lawyers played not a subsidiary, but a dominant role in the determination of rules of law. Thus, introducing to the readers the Digests (extracts from the works of outstanding Roman lawyers), published under Emperor Justinian in 533 AD., Prof. I.S. Peretersky writes that "the Digests constituted the main subject of reception of Roman law and therefore were the current law in some countries of Western Europe for several centuries" [Peretersky 1956:3]; that in Roman law of that period the works of lawyers played a more significant role than the "imperial constitutions" and "edicta magistratuum" (mainly legal acts of the praetors); that in the Roman state, "during the period of the Republic and in the first two centuries of the Monarchy the works of lawyers had the main significance as a source of private law" [Peretersky 1956:13]. Prof. L.A. Kamarovsky and V.A. Ulyanitsky point out in their lectures on international law: "Perhaps in no other branch of law does the legal science have such a great significance as in the sphere of international law. It should be recognized as one of the main factors that created it. Its representatives have repeatedly influenced international relations and contributed to the formation of norms that govern these relations" [Kamarovsky 1908:19]. Prof. D.B. Levin writes in his monograph on the science of international law in Russia: "Due to the lesser codification of international law compared to domestic law and the greater proportion of general principles in it, the ideas put forward by international legal science, more often fertilize international law with new norms" [Levin 1982:5]. Prof. Levin, while citing the statements of a number of international legal scholars, notes the "unique features" of the theories put forward by Russian international lawyers at the crossroads of the 19th and 20th centuries: "the main interest of international communication is peace (Kapustin)"; "the importance of public opinion for the development of international law (Stoyanov, Korkunov)"; "the idea of international cooperation of states" in various forms, such as "the concept of the law of international governance (Martens, Kazansky)" or "the international protection of rights (Korkunov)" or the concept of "the rights of humanity (Kamarovsky)". Of special importance are the conclusions of the Russian publicists about the utopian idea of a "world state" and that "international law can only exist if there are many independent states" [Levin 1982:9-12]. Prof. Levin does not offer a definition of the term "the science of international law", but notes its steady development during the Soviet period: "Soviet science of international law, which was far ahead of pre-revolutionary Russian science of international law, is the heir to its best traditions: the ideals of international legality, interna-

tional peace and cooperation, which distinguished Russian science of international law from the contemporary science of international law in the West" [Levin 1982:196].

The Russian and foreign authors have continuously emphasized the particular cultural and civilizing role of the science of international law. It is noted, for example, even in the 17th century one of the pioneers of the international legal scholarship H. Grotius in his studies on the *Bellum Justum* argued, that while the winner in a just war was entitled to punish the vanquished, "he did not wish this right to overshadow all other considerations of justice and prudence" [Bull, Kingsbury, Roberts 1992:23].

Despite this, unlike numerous developments of early concepts of diplomatic law or concepts of the law of war and peace, or of the law of international treaties, well described in the world legal literature, the science of international law as an object of research is not that popular. This thesis, however, does not cloud the fact that the legacy of these epochs holds the most serious influence on the development of theories and concepts of contemporary science of international law. For example, the cosmopolitism of the late Roman stoicism can be found in the concepts of the French solidarist sociological school of international law. The political philosophy of D. Alighieri set out in his treaties "Monarchia" of 1312-1313 [See: Dante: Monarchy… 1992] had a certain influence on the formation of the monistic doctrine of the famous theorist of normativism in international law – H. Kelsen ("*Die Staatslehre des Dante Alighieri*", 1905) [See: Lepsius 2017; Marras 2017; Reut 2015]. A prominent French scholar of international law of the 20th century R-J. Dupuy, in his original work on the philosophy of international law and international community of 1989 ("*La clôture du système international. La Cité Terrestre*") refers to Augustine of Hippo [See: Dupuy 1989]. The contemporary scholar of the law of international treaties J. Klabbers creatively applies the tradition of Aristotelian ethics to the study of the legal basis of the "global governance" [See: Klabbers 2022]. Modern Chinese international legal scholars emphasize the epistemological value of the philosophical concepts of Laozi, Confucius, Mencius and Sun Tzu in terms of understanding of the sources of international law and the motivation for compliance with its norms in the practice of States [Zhipeng He, Lu Sun 2020:33].

Prof. G.I. Tunkin emphasizes that in the 19th and at the beginning of the 20th century many lawyers considered international law primarily as a "doctrinal law", "the law of scholars" [Tunkin 1970:211]. He notes the significant difficulties that often arise when establishing the existence of a particular norm of international law or its interpretation; in this regard, "the science of international law often provides significant service" in this area [Tunkin 1970:212].

According to the 19th century British legal scholar T. Twiss: "the true era from which we must date the foundation of the great science, which is conversant with questions of right that concern the fellowship of nations, is the latter portion of the fifteenth century, one of the most remarkable epochs in the annals of legal science" [Twiss 1856:2]. Such view, in general, seems to be generally widespread among the modern scholars of international law. In essence, contemporary Chinese international lawyers point to the similar thesis: "...it was in Europe, which had cast off the medieval monolithic political order, that the modern sense of transnational relationships and documents of international law emerged, which also gave birth to theories of international law in the modern sense. It can be said that modern international law had Western features from the beginning of its birth and waved a banner for Western hegemony. For example, starting from the contemporary recognized humanist who had major influence on international law, we can make a long list of international jurists: Vitoria (Spain), Grotius (the Netherlands), Vattel (Switzerland), Pufendorf and Bynkershoek (Germany), Wheaton (the United States), Westlake (the United Kingdom), or Oppenheim (Germany/UK), Lauterpacht (UK), Henkin (US). This list shows that the majority of the cornerstones of international law theory were laid by Western scholars of international law" [Zhipeng He, Lu Sun 2020:58]. With the emergence of the above-mentioned figures in the European political and legal thought, the foundations of modern science of international law were indeed laid *avant la lettre*. However, M. Koskenniemi notes that the complete formation of the science of international law occurred much later: "International law emerged as a specialized profession and a branch of law studies with a chair at universities only in the latter part of the 19th century. Before that, it was usually studied in connection with – and sometimes merged into – diplomatic history or political philosophy. From the outset, its self-understanding was historically informed. This undoubtedly reflected the sense among international lawyers that they were part of a cosmopolitan project that had a long pedigree sometimes derived from Enlightenment philosophy but increasingly from earlier times, from Hugo Grotius, 16th century Spanish humanists or even Stoic cosmopolitanism" [Koskenniemi 2004:61]. H. de Waele

also adheres to M. Koskenniemi's points in his study on the development of the Dutch international legal science at the beginning of the 20th century: "As is well known, international law occupied only a marginal place in academia across the world up until the second half of the 19th century. The very first dedicated professorship was established in 1851 at the University of Turin, predating the Chichele chair at Oxford (1859) and the Whewell chair in Cambridge (1867). Overall, the discipline is considered to have been slow in obtaining a slot in university curricula" [de Waele 2020:1009].

By the end of the 19th century a general transformation of the discourse on the legal foundations of the international community of States also takes place. International law begins to shed the skin of the "*jus publicum Europaeum*". The general paradigm shifts in emphasis from the religious and national characters of peoples to the "minimum standards of civilization", which opens the entry of non-Western states into the Family of Nations.

Ambassador E.R. Voronin, in his research dedicated to one of the luminaries of the Russian international legal science, prof. F.F. Martens, notes: "Martens and the followers of his teachings (M.A. Taube, B.E. Nolde and A.N. Mandelstam) laid the foundation for the understanding of international legal science as a real means capable of preventing the movement toward a war that became apparent in the late 19th – early 20th centuries "in the context of growing antagonisms and confrontation between two military coalitions – the Entente and the Triple Alliance" [Voronin 2015:26-27]. European researchers of the history of the science of international law point to the important role of the French lawyer and statesman E. Laboulaye and the Russian lawyer D.I. Kachenovsky in the institutionalization of international law in the period 1840-1870 of the XIX century, through their "deep involvement in the construction of extensive academic ties" with professional communities, associations of researches and law journals [Cahen, Allorant 2021:112].

One of the pioneers of the "Third World Approaches to International Law", R.P. Anand emphasizes that before the emergence of the international legal order based on the UN Charter, it was believed that modern international law is exclusively a product of Western European Christian States or States of European origin and, therefore, is applicable only between them [Anand 2004:25].

Yet, some contemporary international legal scholars also argue about the supposed «loss» of the civilizing and truly progressive significance of the teachings (doctrines) of international law. For example, prof. A. Carty notes: "Historically at least one strand of doctrine, the natural law as distinct from the positivist approach, was supposed to offer a transcendent standard against which the practice of States can actually be judged as nugatory. Whether one uses the contemporary technical terms 'null and void' to describe the effects of this doctrinal activity, it does definitely claim that there is a human responsibility to resist and disregard offending state practice" [Carty 2012:978]. This thesis contains an important remark regarding the "loss" of the doctrines of international lawyers of their connections with their historical philosophical and cultural foundations and, as a consequence, the functional reduction of their general significance.

While considering the historical role of H. Grotius, A. Carty points out that his continuing relevance lies in his reiteration of the classical ancient standard of the reasonable conduct: "Grotius distinguishes the openly presented so-called justifying reasons from real underlying motives of statesmen. Reason can appear to provide a coherent argument for war, but the underlying motive is still a desire for riches, glory, and empire. Right reason should be able to balance arguments and this is a matter of the exercise of a quality of judgment which should be free of ambition as from envy" [Carty 2012: 983-984]. A. Carty puts the essence of this provision in the beginning of his "Philosophy of International Law" as well: "In a sense the tradition was pre-democratic and pre-liberal, in that it is always assumed that somehow there will be present a group of erudite and morally serious people who are able to wrap up legally significant human actions in the texture or framework of reasonableness. It is also assumed that standards are universal and everywhere the same, not only in space but also in time. This favors an old-fashioned form of interdisciplinarity, which now appears as mere eclecticism. The doctrinal writer will look to history, philosophy, and even literature to support what appears to him just and reasonable in the circumstances" [Carty 2007:2]. Criticism of this kind, which we believe can be associated with the paradigm of the so-called "Critical Legal Studies" [See: Critical International Law … 2014], is called upon to "expose" the fundamental problem of the contemporary science of international law. The research of an international lawyers certainly is not limited by a function of interpretation and clarification of the political will of a concrete state or other subject of international law in the process of norm-compliance and rule-making.

### 3. The Science of International Law: the Conceptual Understanding

An American philosopher and legal scholar R.R. Foulke argues that "the science of international law is the systematic study of the conduct of independent states, which is nothing more than the philosophy of international law" [Foulke 1919:465]. Philosophy and international legal science indeed exist in a mutual influence. For example, prof. S.V. Chernichenko points out that in "the philosophical dimension of international law" it is impossible to completely avoid its "intersection" with the issues of international law theory [Chernichenko 2009:649, 653]. The philosophical study of international law is characterized by an approach that considers first of all its values, ideological content, including the fundamental ideas of maintaining international peace, harmonization of interests in the international community of States, such values as justice and equality in the relations of States and etc. While the science of international law predominantly studies the actual legal scope of the existing norms of international law, applying a concrete conceptual apparatus adopted by States. In this regard, prof. V.A. Vasilenko defines the science of international law as "a system of knowledge obtained by scholars about the nature of international law and the regularities of its emergence, development, formation and functioning" [Vasilenko 1988:203].

A somewhat different approach is proposed by the Chinese international lawyer prof. Huang Jin, based on the concept of "macro-science of international law". According to him, at the present stage of its development, the law governing relations between states is no longer the traditional "public international law" but constitutes "the sum total of the legal conduct rules with binding force which represent the harmony of state wills and governing all kinds of international relations (not the political relations between states only). The science of law, which studies, at a macroscopic angle, those international statutes systematically and scientifically, is the very macro-science of international law" [Huang Jin 1993:383].

Prof. R.A. Kalamkaryan offers his vision of the triad "theory, doctrine and philosophy" of international law: "The teachings in the field of the science of international jurisprudence logically show the immediate subject of study – the doctrine and the scholar's own vision of a separate area of science – theory. Being extremely abstract in their essential content, the teachings carry a certain philosophical conception and can well be designated in the aspect of philosophy. Thus, within the framework of the process of studying the subject of the teachings of international law, we distinguish theory, doctrine and philosophy" [Kalamkaryan 2006:101]. Prof. S.V. Chernichenko does not quite agree with this approach. Firstly, he does not designate such an "subject of a study" as "the teachings of international law". Secondly, S.V. Chernichenko writes that "when considering international law in a philosophical light", one should "avoid such terms as "subjects of international law", "international legal relations", "State sovereignty"; these terms "do not have a philosophical connotation", they "refer to the doctrine of international law or, more precisely, to the theory of international law". The scholar notes, that at the same time "the interweaving of philosophy and the theory of international law is here inevitable" [Chernichenko 2009:636-637].

In terms of judicial practice, the importance of legal research was well defined in a New York State Supreme Court decision, and was subsequently referred to by the Supreme Court of the United States in the Paquete Habana case (1900)[1]: "...the presumption will be very great in favor of the solidity of their [established writers] maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law" [Janis, Noyes 2006:71]. It is easy to see that a similar idea was expressed much earlier (in the 19th century) by the renowned Swiss international lawyer J.K. Bluntschli: "If at present Wheaton and Phillimore, Wilden and Kent, Heffter and Oppenheim agree among themselves on a certain theoretical position, we are naturally inclined to recognize it as the beginning of modern international law even it is not confirmed treatises and its application in practice is still doubtful" [Bluntschli 1876:74]. We note, however, that even for the 19th century, such a role of the results of international legal research as a source of international law is exaggerated.

G.M. Danilenko emphasizes that the expert community of international lawyers traditionally plays a crucial role in clarifying and resolving contradictions in the application of customary norms

[1] The Paquete Habana, 175 U.S. 677 (1900). – *Justia U.S. Supreme Court.* URL: https://supreme.justia.com/cases/federal/us/175/677/ (accessed date: 03.08.2025).

of international law [Danilenko 1988:28]. Prof. S.V. Chernichenko notes that the means revealing the existence of customary rules of international law, although called "subsidiary sources of international law", "can be attributed to a greater or lesser extent to evidence of the existence of customary norms" [Chernichenko 2014:166]. Other international legal scholars, however, do not reduce the role of international legal research only to "evidence of the existence of customary norms" of international law. Prof. Yu.Ya. Baskin notes the positive role of the achievements of the science of international law in eliminating gaps in it "as a whole": both in treaty and customary international law [Methodology of research … 1986:115]. C.C. Jalloh, a member of the UN International Law Commission, notes: "Whereas the teachings of publicists are only somewhat present in the judgements of the ICJ, with a relatively small number of main judgments referring to them, scholarly works are quite prominent in the separate opinions of individual judges as well as in the rulings and judgments of numerous other international courts and tribunals. They are also common in decisions of regional and other international tribunals. These include, out of many possible examples, the African Court of Human and Peoples' Rights, the European Court of Human Rights, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights..." [Jalloh 2021:196].

Researchers also pay close attention to the mutual influence of one legal system on another, thanks to comparative legal studies carried out by international lawyers in different states, starting from the works of H. Grotius. Among the striking examples of such mutual influence, C.W. Jenks notes the fact that in Turkey the law of the Ottoman Empire was thoroughly modified by the adapted introduction of the Civil and Civil Procedure Codes of Switzerland, as well as the Criminal Code of Italy [Jenks 1958:110]; the pioneers in the study of this reception were the legal scholars represented in this case by the International Committee for Comparative Law [See: Hamson 1953]. Furthermore, Chinese law in the first half of the 20th century also underwent changes under the influence of Western legal experts, especially in the context of the work of the Commission on Extraterritoriality, created following the results of the Washington Conference of 1922 [Jenks 1958:111].

C.W. Jenks emphasizes the significance of comparison of international legal doctrines of scholars from different countries for the professional growth of any international lawyer, including legal practitioners: "...as international law has evolved towards universality, an appreciation of varied legal systems has become an increasingly important safeguard against the danger of approaching international legal problems on the basis of too limited outlook and too narrow experience" [Jenks 1958:417]

Prof. I. I. Lukashuk writes: "If a scholar deeply studies the actual real life and correctly expresses its needs, then his works are capable of exerting a very significant influence on international law. Let us recall Hugo Grotius, who reflected in his works the needs and ideas of the forming bourgeois society. Therefore, a significant number of the provisions he defended were subsequently embodied in the norms of international law… With the development of society, social relations become increasingly developed and complex. Successful legal regulation of them is completely impossible without the ever-wider use of science. This fully applies to such a particularly complex area of social relations as international relations. Undoubtedly, the role of scholars in the general process of international lawmaking will increase. The experience of the UN International Law Commission is of particular interest in this regard" [Lukashuk 1966:99-100].

In the most popular English-language textbook on international law prof. M. Shaw asserts: "Historically, of course, the influence of academic writers on the development of international law has been marked. In the heyday of Natural Law it was analyses and juristic opinions that were crucial, while the role of state practice and court decisions was of less value. Writers such as Gentili, Grotius, Pufendorf, Bynkershoek and Vattel were the supreme authorities of the sixteenth to eighteenth centuries and determined the scope, form and content of international law. There are still some writers who have had a formative impact upon the evolution of particular laws, for example Gidel on the law of the sea, and others whose general works on international law tend to be referred to virtually as classics" [Shaw 2017:84]. Thus, it is well known that the principle of Freedom of the Seas and the inadmissibility of subordinating its waters to the authority of individual States was put forward as early as 1609 by H. Grotius in his famous work "Mare liberum" [See: Grotius 1609] and this principle has received universal recognition by states, becoming one of the main principles of international law [Kozhevnikov 1947:136]. The name of K. von Bynkershoek is associated with the early experience of legally defining the outer limits of the territorial waters, which, taking into account the international practice of the 18th century, was determined by the scholar to be proportionate to a cannon shot from the

coast (about 3 nautical miles). I. Brownlie and some other legal scholars point to the constitutive role of the doctrine of the French legal scholar G. Gidel in defining the concept of the contiguous zone in international law of the sea [Brownlie 2008:34]. And probably the most striking example from the history of the Russian science of international law, one may assume, is the well-known "Martens Clause" in international humanitarian law, which, as V.S. Ivanenko notes: "...outlived the scholar himself, being successfully carried through the 20th century into the 21st century and continues to fulfill its noble mission of protecting victims of war in various unforeseen situations" [Ivanenko 2022].

Thus, the contemporary role of the science of international law is very broadly defined, including its important significance on scholarly (that is, unofficial) systematization of international law and as subsidiary means for the determination of rules of law. Not all international lawyers distinguish between the science of international law and its "doctrines" (the teachings) in the sense of Article 38 of the Statute of the International Court of Justice. Without making such a distinction, prof. A. Carty uses the term "doctrines" of international law when discussing the mechanism of its formation. A. Carty points out that the doctrines of international lawyers must be recognized as having a greater role to play; without them, according to the author, international law "cannot develop"; the doctrines of international lawyers play a "creative role" in international law [Carty 2019:50].

A similar assessment is reflected in the writings of another British legal scholar: "In the absence of a legislator and an enforcer, international law would become pure subjectivism if its validity depended only on the perception of the rules' of each individual State; to avoid such subjectivism, the author proposes to give an even greater role to 'the teachings of specialists in international law" [Allot 1971:79, 95-96; Carty 2019:52].

But should the notion of "the science of international law" (the content of this notion is not specified in the UN Charter) and the notion of "the teachings of the most qualified publicists in of various nations" – designated in this document as an "subsidiary means for the determination of rules of law" – be equated? M.V. Filimonova in her book on the sources of international law positively answers this question: "...when it comes to the science of international law, then it is permissible to include in this group of sources everything that can help in obtaining information about this subject – all evidence of cooperation between states regardless of their characteristics and legal force, decisions of international courts and arbitrations; various doctrines and concepts and other materials of the activities of non-governmental organizations" [Filimonova 1977:303].

Let us offer a different statement: the notion of "science of international law" is broader than the term "the teachings of the most qualified publicists" (as the latter is used in the UN Charter). Neither of these notions, however, includes judicial decisions, including judgements of the UN International Court of Justice or awards of interstate arbitrations; according to Article 38(d) of the Statute of the UN International Court of Justice (ICJ), "judicial decisions" and "teachings of the most qualified publicists" are *not the same*. Further, in deciding disputes submitted to it on the basis of international law, the ICJ does not apply a single body of views prevailing in the legal science of a particular State on a given question of international law; but rather the ICJ selects individual theoretical works, widely cited as "the teachings of the most highly qualified publicists of the various nations"[2]; but the ICJ does consider all results of legal research of all legal specialists in the world.

It is noteworthy that prof. Tunkin G.I. does not classify the opinions of all the existing "public and scientific organizations" as "the teachings of the most qualified" legal publicists in the meaning of art. 38 of the Statute of the International Court of Justice. Prof. Tunkin notes, however, that if we are talking about "special legal organizations" (such as, for example, the International Law Association), then their intellectual results occupy in the process of international norms-formation occupy "generally the same place" as the teachings of the most qualified publicists [Tunkin 1970:213-214].

### 4. The Scientific Codification of International Law

It's a common knowledge (within the so-called "general theory of law") that the codification of law (along with the consolidation of law) is a type of systematization of law [Black's Law Dictionary… 2015:228; Legal Encyclopedia … 2001:426-427]. It's asserted that codification is «only official» within na-

[2] Statute of the International Court of Justice. – *International Court of Justice*. URL: https://www.icj-cij.org/statute (accessed date: 03.08.2025).

tional law [Legal Encyclopedia … 2001:427]. As for the codification of international law different opinions are suggested by such soviet prominent scholars, as professors F.I. Kozhevnikov and A.P. Movchan.

According to prof. F.I. Kozhevnikov, codification of international law is realized primarily within the United Nations – in such organs as the ILC, Disarmament Commission, the Committee of the Peaceful Uses of Outer Space etc. In addition to this, "unofficial codification of international law» also exists, which "is considered as being more flexible" and is carried out "by individual scholars and international research organizations and communities" [International Law 1982:42-43]. In line with this approach the literature on international law shows that early attempts on "unofficial (scientific) codification" of the norms of international law largely belong to legal scholars. For example, prof. R.A. Kalamkaryan points out that the term "codification" itself, as applied to international law, belongs to the British philosopher and legal scholar J. Bentham. The latter developed the fundamental theoretical provisions for creating a code of rules of international law in his work "Principles of International Law" (compiled in 1786-1789, published posthumously in 1843) [Kalamkaryan 2008:8-9]. It is also well known that it was J. Bentham who first coined the very term "International Law", as opposed to the "Law of Nations". Thus, Bentham wrote: "The word *international*, it must be acknowledged, is a new one; though it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations:* an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D'Aguesseau has already made... a similar remark: he says, that what is commonly called *droit des gens,* ought rather to be termed *droit entre les gens*" [Janis 1984:408]. Bentham considers of international law as a law applicable only in relations between sovereign states recognizing each other "as equals" [Philosophical Foundations … 2018:430]. In academic circles since the mid-nineteenth century, this approach can generally be considered as dominant, proceeding from the assumption that a State is an exclusive subject of international law.

Within this approach prof. V.P. Danevsky spoke positively about the early scientific systematization of international law referring to the work of J. Bluntschli as an example: "...his work, presented in the form of a code, combined a great deal of material and was written very vividly; it proves the viability of the idea of codifying international law..." [The Golden fund … Vol. V. 2021:123]. From the historiographical point of view, interestingly enough, an American legal scholar J.B. Scott adds, that even before the code of Bluntschli had appeared "David Dudley Field, whose name is inseparably connected with the codification of municipal law in the United States, had proposed, at the meeting of the British Association for the Promotion of Social Science, held at Manchester, in September, 1866, the appointment of a committee "to prepare and report to the Association the Outlines of an International Code, with the view of having a complete Code formed, after careful revision and amendment, and then presented to the attention of governments, in the hope of its receiving, at some time, their sanction" [Scott 1927:422]. Prof. V.I. Lisovsky also points out the important role of the early scientific codification of international law by G. Leibniz ("*Codex gentium diplomaticus*") and Abbé H. Grégoire ("*Déclaration du droit des gens*", which, following the lines of the Declaration of the Rights of Man of 1789, formulated the rights and duties of States according to international law) [Lisovsky 1970:9].

In contrast to this prevailing approach, according to prof. A.P. Movchan, the term "codification" (as it is used in the UN Charter) does not mean any participation of individual scholars. "Codification of international law is a process of creating law; it is one if the normative activity of States in their international relations". Thus, according to prof. Movchan, codification of international law "may have only official character" [Movchan 1972:65-67].

Some authors do not speak about official or "scientific" codification of international law; rather they focus on the question whether an international doctrine get "the assent" of States or not. J.W. Foster, for example, notes that "Grotius and the earlier publicists had done much to create a public sentiment in favor of a more rational and humane political system, but international doctrines only become laws when recognized and put in practice by the assent of sovereign States" [Foster 1909:153]. Yet, it seems unlikely that each teaching in the field of international law actually passes through a "filter of recognition" by each sovereign State. Moreover, we argue that there is no need for such a procedure: the legal science in the modern international legal order (as opposed to the agreed expression of wills of sovereign States) does not per se create international legal rules.

**5. The "teachings of the most highly qualified publicists of the various nations" (la doctrine des publicistes les plus qualifiés des différentes nations) as a special component of the science of international law**

The Russian and foreign academic publications widely employ the term "doctrines", often specifying its national (state) affiliation – such as "Soviet", "Russian", "American", or "French" doctrines of international law – as well as its ideological orientation – such as "socialist" or "bourgeois" international legal doctrines.

It was demonstrated above, that concept of "the science of international law" is broader in meaning than the concept of "the teachings of the most qualified publicists" in international law. But it is precisely the latter that is attributed in the UN Charter to those means that are applicable to settlement of international disputes.

In the 20th century, the dichotomous view of "bourgeois" ("imperialist") and "socialist" doctrines of international law was shaped by the global ideological confrontation between different States: a) with public ownership of the means of production (the USSR and other socialist countries) on the one hand; and, on the other, b) States whose economies were based on private ownership of such means. Accordingly, in the works of prof. Tunkin G.I., a clear distinction is drawn between "the two principal conceptual models of the international system: socialist and capitalist. The socialist conceptual model of the international system reflects the laws of socialist society" and the view of "the working class, its vanguard united within the ranks of the communist parties". The capitalist "conceptual model of the international system reflects the laws of capitalist society" and the view of its "ruling classes" [Tunkin 1983:86-133].

This approach was also reflected in the *Dictionary of International Law* published in the USSR in 1986, which explicitly referrers to "bourgeois" and "Soviet" doctrines of international law [Dictionary of International Law 1986:76-78]. However, these formulations were not repeated in the new (post-Soviet) edition of the same dictionary [See: Dictionary of International Law 2014]. Prof. R. Mullerson, nevertheless, emphasizes that contrary to the prevailing Western perception of the Soviet doctrine of international law "as monolithic", it in fact encompassed a "multitude of differing opinions and perspectives" [Mullerson 1989:494].

A concrete example supporting this view can be found in the work of prof. L.A. Modzhoryan on international legal personality: *"On the issue of the international legal personality of international bodies and organizations, there are disagreements among Soviet jurists. While S.B. Krylov recognizes only states and nations fighting for their independence–those in the process of forming their own national state–as subjects of international law, and F.I. Kozhevnikov argues that although the United Nations as such is not a subject of international law in the usual sense of the term, it nevertheless ... is endowed with a number of highly significant general and specific rights, D.B. Levin, when asked, 'Can international organizations be considered subjects of international law?' answers: 'Certainly, in cases where these organizations possess, under their charters, a certain sphere of independent rights and obligations vis-à-vis individual states, particularly the right to independently conduct foreign relations"* [Modzhoryan 1956:95].

Another example can be seen in the commentary by prof. G.V. Ignatenko and prof. D.I. Feldman on early Soviet conceptions of international law. While acknowledging the positive contributions of E.A. Korovin and E.B. Pashukanis in critiquing "bourgeois concepts of international law", the scholars characterize their attempts to develop "a Marxist-Leninist theory of international law" as unsuccessful, failing to reflect "the actual position of the Soviet State"[3].

It should also be noted that the "classics" of the Russian international legal scholarship were very careful in their use of the terms "international legal doctrines" and "the science of international law", avoiding their conflation. In the classic soviet "*Course of International Law*" edited by prof. V.N. Durdenevsky and prof. S.B. Krylov, the authors refer to "the main trends in the science of international law during the bourgeois era"[4] but do not classify these scholarly views as "doctrines" in the sense of the aforementioned provision of the UN Charter.

[3] *Mezhdunarodnoe pravo: uchebnik [International Law: A Textbook].* Ed. by G.I. Tunkin. Moscow: Yuridicheskaya literatura publ. 1982. P. 568. (In Russ.)

[4] *Mezhdunarodnoe pravo. Uchebnik [International Law. A Textbook].* Ed. by V.N. Durdenevsky, S.B. Krylov. Moscow: Legal Publishing House of the USSR Ministry of Justice. 1947. P. 64. (In Russ.)

Prof. F.I. Kozhevnikov, while examining issues related to the activities of the International Court of Justice, speaks of the negative stance of the Soviet international legal science toward various proposals by Western jurists aimed at expanding the ICJ's jurisdiction. At the same time, Judge Kozhevnikov does not conflate the UN Charter's term – "the teachings of the most highly qualified publicists" – with the term "science of international law", which is also widely used [Kozhevnikov 1965:2-3].

A similar approach is taken by prof. Tunkin G.I., who refers to "Soviet international legal science" and "the scholarly works of Soviet international lawyers" but not to the "Soviet doctrine" [See: Tunkin 1962:1-18] in the sense of Article 38 of the ICJ Statute.

In our view, the phrases such as "the Soviet doctrine" or "the Russian doctrine" of international law (and similar formulations) may be appropriate when an author seeks to denote the body of research by scholars of international law from a given State during a specific period – provided there is a genuine consensus among prevailing scholarly views in that state. However, interpreting the UN Charter's term – "the teachings of the most highly qualified publicists" – as encompassing all the publications within the Soviet international legal scholarship – seems to be incorrect. It would be more accurate to refer to such a collection of works as "the Soviet scholarly literature on international law".

Similarly, it would be incorrect to generalize the diverse publications of legal scholars from the USA or Great Britain or France under the umbrella terms "American", "British" or "French" international legal doctrines in the sense of Article 38 of the ICJ Statute.

In light of this, we assert again that the concept of "the science of international law" is broader in meaning than that of "the teachings of the most highly qualified publicists" within the area of international law. However, it is the latter that the UN Charter includes among the sources applicable to deciding international law disputes. But who are the "most highly qualified publicists"?

During the drafting of the Statute of the Permanent Court of International Justice (PCIJ), the members of the Advisory Committee of Jurists referred to various terms: "authors", "writers", "jurists", and "publicists". Initially, the mutually agreed term was "writers"[5], but the Drafting Committee replaced it in the authentic English text of the Statute with the word "*publicists*" (in the French text: "publicistes"). This formulation was retained in 1945 in the Statute of the International Court of Justice, where the authentic Russian text uses the term "*специалисты*" (in literal translation "specialists")[6].

According to prof. S. Sivakumaran of the University of Cambridge, the term "publicists" encompasses: a) Authors of textbooks, monographs, and other scholarly publications on international law; b) Collective expert bodies (such as the UN International Law Commission, the International Committee of the Red Cross, and the International Law Association) [Sivakumaran 2017:3]. Under this interpretation, the phrase "the most highly qualified publicists" in art. 38 of the ICJ Statute includes both individual scholars and groups of experts working collectively within international bodies and even non-governmental organizations. However, was this the actual intent of the States that negotiated the UN Charter?

Prof. Sivakumaran emphasizes the subjective nature of determining whether a scholar is qualified as "the most highly qualified publicist" under art. 38. He argues that the quality of legal research should take precedence over the author's reputation [Sivakumaran 2017:9]. A different approach is proposed by the French jurist C. Mouly, who asserts: *"If the term 'doctrines' covers academic research, it does not seem blasphemous to extend it to any legal writer who participates in the discussion of arguments and ideas that shape the law"*[7].

However, as previously demonstrated, not every legal writer is to be qualified as the "most highly qualified publicist" under Article 38 of the ICJ Statute. Moreover, whether a particular study "shapes" international law is not solely a matter of quality. While

[5] The term "writers of international law" was used by prof. F.F. Martens. See: [Martens 1996].

[6] Let us recall that the International Court of Justice operates on the basis of a new legal document – the UN Charter, including such an integral part of it as the Statute of the International Court of Justice. The Statute of the Permanent Court of International Justice is not part of the current international law. This court itself has been abolished. See: [Krylov 1958; Kozhevnikov, Sharmazanashvili 1971].

[7] "*Si la dénomination «doctrine» recouvre communément les universitaires, il ne semble pas sacrilège de l'étendre à tout auteur d'écrit juridique qui participe au débat d'arguments et d'idées qui alimente le droit*". See.: [Mouly 1986:352].

scholarly rigor is crucial in determining whether a work constitutes a "doctrine" in the ICJ Statute's sense, other factors – such as the author's professional reputation and academic contributions – cannot be ignored. For instance, in the practice of the ICJ and interstate arbitrations, one does not encounter references to student research compilations, even if they contain high-quality legal analyses. Instead, the Court and arbitral tribunals cite works by world-renowned international law experts with established reputations. This is partly due to the requirement that judicial and arbitral decisions in interstate disputes must be persuasive. Some examples of frequently cited authorities include: British scholars such as D.W. Bowett and E.D. Brown; prof. R. Kolb (University of Geneva); Judge D. Anderson (International Tribunal for the Law of the Sea); other international legal scholars with comparable professional recognition[8].

Further examples can be found in international investment arbitration. In the well-known Salini case, an ICSID tribunal, when defining the term "investment", referenced "legal authors", particularly highlighting the work of prof. E. Gaillard [See: Salini Costruttori … 2001; The Rules, practice … 2012:99].

In this regard, it seems more accurate to speak of an immanent connection between the quality of legal research and the scholarly authority of an international law expert. This thesis is supported by the drafting history of the Statute of Permanent Court of International Justice (PCIJ) – the judicial body of the League of Nations. As noted by the Polish legal historian M. Mazurkiewicz: "Article 38 of the PCIJ Statute does not diminish the role of the views of leading authorities in international law. Their work was intended to aid in the determination of legal norms. The relevance of this role increased in proportion to the authors scholarly standings, the long-term validation of their arguments in practice and the absence of subsequent doctrinal disputes" [Mazurkiewicz 2017:172]. Against this backdrop, Mazurkiewicz writes, "*a debate unfolded*" during the drafting of the Statute. American Judge Kent asserted that only someone "*who mocks justice*" could reject the presumption of correctness of a legal norm derived from the opinions of "jurists". British Judge Phillimore went even further, "*considering it possible for the United Kingdom to accept a judicial decision based solely on the provisions of legal doctrines*" [Mazurkiewicz 2017:172].

As for results of the research that may be qualified as the "teachings of the most highly qualified publicists" under international law, prof. S. Sivakumaran suggests the following, in particular: a) digests (compilations of materials on international law prepared by legal scholars); b) textbooks on international law; c) monographs on international law; d) scholarly commentaries on international treaties and other sources of international law; e) papers on international legal topics, published in academic journals; f) publications by international law scholars in ONLINE blogs [Sivakumaran 2017:10-19].

With the exception of the last category, we are ready to agree with this list, if the listed sources indeed constitute publicly available results of academic research, the preparation of which and the quality assessment thereof follow the established scientific and disciplinary methodologies, including double peer review. In contrast, ONLINE blogs, while they may (*de facto*) contain scholarly analyses of certain international legal issues, differ significantly from the other sources mentioned above: they do not undergo peer review by relevant experts; their preparation is not bound by formal academic requirements, such as the depth of research on the given issue, the author's awareness of existing scholarship, or the inclusion of proper citations.

Moreover, actual international legal practice of applying art. 38 of the ICJ Statute does not indicate the use of blog publications as «means for the determination of rules of law». While acknowledging the growing influence of Internet in the modern world, we assert that, at present, it is incorrect to characterize ONLINE blog publications as the "teachings of the most highly qualified publicists" within the meaning of art. 38 of the ICJ Statute.

A separate assessment should be made regarding the role of international law research conducted by collective bodies of international legal scholars that maintain close ties with states and intergovernmental organizations. Such expert groups may be directly authorized by states or intergovernmental organizations to perform specific functions, including those that effectively contribute to international law-making. States typically possess legal mechanisms to influence the appointment of members to such collective law-developing bodies. Prominent examples of such entities include the United Nations International Law Commission (ILC), as noted above.

[8] See: PCA Case No. 2013-19. Award on Jurisdiction and Admissibility. – *Permanent Court of Arbitration.* URL: https://pcacases.com/web/sendAttach/2579 (accessed date: 03.08.2025)

International law scholars often emphasize its unique role in this context, as it is "an official UN body" and its opinions have been cited, not only in order to elucidate treaties it has helped to draft, but also as evidence of the general *opinio juris* [Lowe, Fitzmaurice 1996:84]. We would add that the quality of the ILC materials depends *inter alia* on the quality of sources which are chosen.

In this context it's correctly highlighted the significant role played by international law experts participating in State cooperation mechanisms in their personal capacity (such as special rapporteurs of the ILC; experts providing testimony before interstate arbitral tribunals). As prof. S.V. Chernichenko notes: "These individuals substantially influence both the implementation of international law and the development of its norms and specific determinations in concrete situations" [Chernichenko 2009:646]. While acknowledging the general trend of diminishing direct impacts of the legal teachings as means for identifying international legal norms, prof. G.I. Tunkin nevertheless emphasizes general growing importance of the legal teachings in the norm-creating process: "The enhanced role of preparatory processes and, consequently, of experts in the creation of international law norms signifies the increased importance of doctrines in this field" [Tunkin 1992:19].

Research produced by non-governmental associations of international lawyers (such as the International Law Association or the Institute of International Law) differs fundamentally from the aforementioned intergovernmental bodies as the latter lack formal legal connection between participating scholars and States of their nationality. Such groups may exert both positive and negative influence as subsidiary means for determining applicable legal norms. For instance, they may engage in politically motivated interpretations of applicable international law, as demonstrated by the Institute of International Law's resolution concerning the Special Military Operation to protect the Donetsk and Luhansk People's Republics (the population of which were against the coup d'Etat in Kyiv in 2014 [See: Vylegzhanin, Torkunova, Lobanov, Kritskiy 2021]. Western scholars further note that the ICJ judgments and separate opinions of its judges usually avoid specific references to reports and resolutions of the Institute of International Law or the International Law Association [Lowe, Fitzmaurice 1996:84]. A prominent Anglo-Australian jurist prof. J. Stone, representing mainly sociological jurisprudence in international law, cautioned about the potential negative consequences of imprecise legal formulations, either by individual publicists or by legal entities: *"The superficial virtues of clarity, certainty, and neatness of rules may, even when they fail of State acceptance, constitute a serious blow to international law as a means of social control"* [Stone 1957:18].

Despite these concerns, prevailing assessments of the teachings of international legal scholars remain largely positive. Prof. A. Carty observes, for example, that international legal scholars gradually developed theoretical perspectives on treaty law that ultimately found practical expression – in the 1969 Vienna Convention on the Law of Treaties [Carty 2016:47]. Another significant doctrinal contribution concerns the role of treaties as potential evidence of customary international law norms. As prof. Carty emphasizes, this function of international treaties was developed through 19th century by international legal teachings [Carty 2016:47].

In this context it's appropriate to ask who in concreto are the authors of such teachings? In his analytical study S.T. Helmerson indicates a list of authors of legal doctrines cited by the International Court of Justice (see Table 1).

*Table 1*

*International Court of Justice: the most cited international law experts*[9]

| № | Names of international lawyers cited by the Court[10] | Number of citations | Citizenship (nationality) of the cited international lawyer[11] |
|---|---|---|---|
| 1. | Sh. Rosenne (1917–2010) | 233 | UK/Israel |
| 2. | H. Lauterpacht (1897–1960) | 119 | Austria-Hungary/UK |
| 3. | G. Fitzmaurice (1901–1982) | 67 | UK |

[9] Based on: [Helmerson 2019:509-535, 534-535].

[10] This section has been supplemented by indications of the years of life of the authors under consideration.

[11] "UK" – for "United Kingdom of Great Britain and Northern Ireland". "USA" – for "United States of America". We have added this section to clarify the citizenship of the authors in question. In the original table, S. T. Helmerson does not touch on this issue, but it has, as we shall see later, a very serious significance for the interpretation of the statistics presented.

| | | | |
|---|---|---|---|
| 4. | M.O. Hudson (1886–1960) | 55 | USA |
| 5. | L. Oppenheim (1858–1919) | 53 | Germany/UK |
| 6. | R. Jennings (1913–2004) | 52 | UK |
| 7. | C. de Visscher (1884–1973) | 51 | Belgium |
| 8. | I. Brownlie (1932–2010) | 42 | UK |
| 9. | A. Watts (1931–2007) | 32 | UK |
| 9. | J. Stone (1907–1985) | 32 | Australia/UK |
| 11. | G. Schwarzenberger (1908–1991) | 31 | Germany/UK |
| 12. | R. Higgins (1937) | 30 | UK |
| 12. | O. Schachter (1915–2003) | 30 | USA |
| 14. | G. Guyomar (1899–1982) | 28 | France |
| 14. | E.J. de Aréchaga (1918–1994) | 28 | Uruguay |
| 16. | C. Wilfred Jenks (1909–1973) | 24 | UK |
| 16. | A. McNair (1885–1975) | 24 | UK |
| 16. | E. Hambro (1911–1977) | 24 | Norway |
| 19. | J.L. Brierly (1881–1955) | 23 | UK |
| 20. | G. Guillaume (1930) | 22 | France |
| 21. | D. Anzilotti (1867–1950) | 21 | Italy |
| 21. | M.S. McDougal (1906–1998) | 21 | USA |
| 21. | C.H.M. Waldock (1904–1981) | 21 | UK |
| 24. | H. Kelsen (1881–1973) | 20 | Austria-Hungary/USA |
| 24. | W. Schabas (1950) | 20 | Canada |
| 26. | B. Cheng (1921–2019) | 19 | UK |
| 26. | H. Thirlway (1937–2019) | 19 | UK |
| 28. | R. Kolb (1967) | 18 | Germany |
| 28. | D.P. O'Connell (1924–1979) | 18 | New Zealand |
| 29. | P. J.-M. Reuter (1911–1990) | 17 | France |
| 30. | H. Grotius (1583–1645) | 16 | Netherlands |
| 31. | P. Guggenheim (1899–1977) | 16 | Switzerland |
| 31. | C.J. Tams (1973) | 16 | UK |
| 31. | J. Verhoeven (1943–2024) | 16 | Belgium |
| 31. | T.O. Elias (1914–1991) | 16 | Nigeria |
| 34. | P.K. Jessup (1897–1986) | 14 | USA |
| 34. | N. Robinson (1898–1964) | 14 | Lithuania/Germany |
| 34. | N. Singh (1914–1988) | 14 | India |
| 34. | E. de Vattel (1714–1767) | 14 | Switzerland |
| 35. | T. Buergenthal (1934–2023) | 13 | USA |
| 35. | Ch. Rousseau (1902–1993) | 13 | France |
| 36. | D. Shelton (1944) | 13 | USA |
| 36. | Q. Wright (1890–1970) | 13 | USA |
| 36. | M. Bedjaoui (1929) | 13 | Algeria |
| 40. | B. Simma (1941) | 8 | Germany |
| 41. | Sh. Oda (1924) | 7 | Japan |

It must be recalled that the ICJ Statute – which is an integral part of the UN Charter – explicitly refers to the application of teachings from publicists of "various nations". As noted, within the context of the UN Charter, the term "nations" refers to those States that became parties to this universal international treaty [See: Vylegzhanin, Ivanov 2022]. Thus, in 1945, the collective will of the UN member States was to establish that the subsidiary means for determining international legal norms should be the teachings of specialists not from a single state (or from a selected group of states representing, for example, only one legal system), but rather, from various nations, representing various legal systems.

Whether this collective intent of States-parties to the UN Charter has been realized in practice or not remains questionable. Prof. A. D'Amato argues that international legal scholars who cannot overcome biases stemming from their national and state affiliations cannot be regarded as "the most highly qualified publicists of the various nations" [International Law Anthology 1994:104]. Moreover, prof. V. Epps

highlights a reputational deterrent for judges and arbitrators in international dispute settlement bodies when relying on only national doctrinal sources: "*If the American judge on the International Court of Justice started authoring opinions peppered with citations only to American scholars his brethren might not be willing to join his opinions and he would rapidly get the reputation of deciding cases according to American notions rather than international norms*" [Epps 2005:21].

Yet empirical data reveals that the majority of doctrinal authorities cited by the International Court of Justice originate from Europe and the United States of America. Notably: scholars from the UK and USA alone account for 25 citations, constituting over half of all referenced specialists purportedly representing "various nations" (*sic!*); by contrast, virtually no doctrinal contributions of scholars from Russia, from other post-Soviet states, from Africa, the Middle East, China, or Latin America are referenced.

This underrepresentation does not, however, indicate that international legal scholarship in these regions is underdeveloped. Rather, the dominance of Anglo-Saxon legal scholarship is facilitated by other factors, including: the tendency of non-western scholars to publish not in English, but rather in their native languages; barriers in accessing Western academic journals in relation to the Russian authors (often due to politicized gatekeeping), etc.

While it would be unreasonable to demand rigid "country-based quotas" in doctrinal citations under Article 38 of the ICJ Statute, the ICJ's overwhelming reliance on Western scholars (primarily from the USA, Canada, and Western Europe) undermines its institutional legitimacy. As the principal judicial organ of the United Nations (art. 1 of the ICJ Statute), the Court must ensure "representation of the main forms of civilization and the world's principal legal systems" (art. 9). Current citation practices fall short of this standard.

As the eminent 20th century international lawyer J. Kunz emphasizes: "*...international law theory cannot by itself ensure the progressive development of international law, but it can influence world events – not by developing pseudo-theories that merely rationalize political practice, but rather by strengthening practice through communis doctorum opinio*" [Kunz 1938:31]. Other famous scholars added some characteristics of research of international law to be in demand. In this regard, the British international lawyer and diplomat A. Aust emphasizes that the main value of an international lawyer's publication is determined by it being a result of "*rigorous scholarship*" and "*thorough research*" [Aust 2005:10]. The importance of a systemic approach to the study of international law, taking into account the interaction of its various branches, has been particularly emphasized by prof. D.I. Feldman and prof. I.I. Lukashuk; notably, the systematic research approach of prof. G.V. Ignatenko to examining the structure of international law has been positively evaluated [Feldman 1983:73]. The Polish legal scholar A. Wnukiewicz-Kozłowska has emphasized that, *depending on the authority of a scholar* (or collective scholarly body), the influence of their professional opinions may be either substantial or less significant. At the same time, the author notes that international practice has yet to establish specific principles according to which the opinions of particular authors should be taken into account [Wnukiewicz-Kozłowska 2017:258, 260]. The reputation of the author is in demand when the author criticizes the current state of international law. Prof. V.A. Ulyanitsky defined the role of the science of international law in relation to its sources in a very meaningful and clear way, referring the latter as belonging to "collateral sources" of international law: "... its task is to criticize the existing positive law and objectively clarify international consciousness in its progressive process of development" [The Golden Fund … Vol. III. 2021:37].

### 6. Conclusion

Based on the above, it seems possible to present some conclusions regarding the interpretation of paragraph 1 (d) of art. 38 of the Statute of the International Court of Justice.

It would appear that the science of international law has historically played primarily civilizing and systematizing, developing roles in international legal order. Its civilizing role contributes first and foremost to raising the level of general legal consciousness of the international community with regard to international law, while its systematizing and developing role targets competent interpretation of the existing rules of international law and the progressive development of such rules.

The teachings of the most highly qualified publicists in international law are parts of the science of international law. Both notions are not immutable static concepts. Amid rapid technological progress, developments in international economic relations, and evolving political and diplomatic practices, the international legal foundations themselves undergo transformation – and consequently, so do the scholarly positions of international legal scholars.

*First of all,* merely addressing a topic in international law does not automatically render a publication to be one of "the teachings of the most highly qualified publicists" under the UN Charter.

*Secondly*, the concept primarily encompasses individual scholarly works authored by international experts, published and widely cited. Thus, abstractly constructed notions such as "the U.S. doctrine of international law" or "the Soviet doctrine of international law" fall outside art. 38 of the ICJ Statute. The term "the teachings of the most highly qualified publicists" refers to theoretical contributions on issues of international law, that are produced individually or collectively by preeminent scholars; this concept does not mean a document of a State of their nationality.

*Thirdly*, the key characteristics of the study of international law that is used in practice as a "teaching of the most qualified specialists" in accordance with paragraph 1 (d) of art. 38 of the Statute of the Court are:

– *the scholarly nature of an international legal scholar's publication.* An oral statement obtained from an author or an interview given to mass media, or a private consultation does not constitute a "teaching" within the meaning of Article 38 of the ICJ Statute. International legal teachings are published (publicly disseminated), academic research conducted in accordance with the accepted formal requirements;

– *the system of international law is to be taken into account.* A fragmented presentation of a scholar's professional position on a specific issue of international law, considered in isolation from its overall system, without taking into account the practice of States in addressing such an issue, or that fails to consider different research perspectives or approaches within the community of international legal scholars – such presentations are not "teachings" provided by art. 38 of the ICJ Statute;

– *the reputation of the author(s) of an international legal study is recognized.* The qualification of a scholarly work as a "teaching" is undoubtedly linked to the author's personality, professional competencies, academic achievements, and their recognition within the scholarly community.

*In the most schematic formulation, the "teachings of the most qualified publicists" in the sense of paragraph 1 (d) of Article 38 of the Statute of the Court are theoretical comments on issues of international law, researched in its system, published as scientific works of recognized experts in international law, and in the designated historical conditions. The quality of such scientific works, the reputation of their authors are such that they are perceived by representatives of states and by international judicial and arbitral bodies as subsidiary means for determining the applicable law.*

In the current era of unprecedented competition in states' international legal policies, the teachings of the most qualified publicists, being a special part of a broader concept – the science of international law – plays a growing role in forming international legal awareness of the world community which is different in different countries. The science of international law in broad context is now (more than ever) in demand to facilitate rational and competent response to false interpretations of political events, while preventing the unacceptable perception of international law as merely an instrument of foreign policy.

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