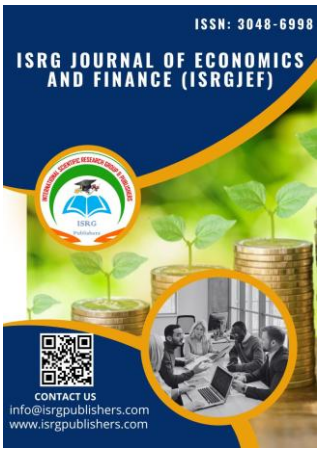
ISRG JOURNAL OF ECONOMICS AND FINANCE (ISRGJEF)

ISRG PUBLISHERS
Abbreviated Key Title: ISRG J Econ Fin.
ISSN: 3048-6998 (Online)
Journal homepage: https://isrgpublishers.com/isrgjef-2/
Volume – 2 Issue - VI (November-December) 2025
Frequency: Bimonthly



In International Law: The Teachings of Prominent Jurists

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| **Received:** 02.11.2025 | **Accepted:** 11.11.2025 | **Published:** 16.11.2025

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Abstract

While the doctrines of eminent international law scholars were historically regarded as a primary source of law in the formative centuries of international law, their authority gradually receded to a secondary role in the determination of legal norms due to evolving sovereign perspectives. In the first half of the twentieth century, international courts frequently exhibited limited engagement with such scholarly writings. However, the emergence of new international tribunals in recent decades has precipitated a marked shift: contemporary judicial practice increasingly references the works of distinguished jurists to delineate binding legal rules from non-binding principles.

Nonetheless, certain courts, notably the International Court of Justice, maintain a cautious stance toward relying on juristic writings, a position rooted in subtle yet persistent theoretical currents within international legal thought. Beyond mere reference, the teachings of prominent scholars perform a crucial function: they infuse the body of international law with innovation, foster progressive development, and, in certain instances, actively contribute to the formulation of legal norms.

Keywords: jurisprudential teachings, eminent international jurists, sources of international law, non-binding scholarly writings, non-international tribunals, primary sources of law, secondary sources of law.

Introduction:

The science of law is inherently inseparable from the contributions of legal scholars, as the advancement of any body of legal knowledge depends on experts who cultivate, refine, and expand its concepts. International law is no exception to this principle; indeed, compared to other branches of law, the role of jurists in international law has been particularly pronounced. Owing to its unique nature, international law has historically relied heavily on scholars for its foundation, development, and systematic elaboration. Nevertheless, the status of the doctrines of eminent jurists has fluctuated over time.

From the inception of modern international law to the present day, the esteem accorded to juristic scholarship has experienced considerable variation. At certain periods, the theories of leading scholars were revered as sacrosanct, serving as primary sources of legal norms. At other times, their writings were relegated to the status of secondary aids in the formation of rules. Some scholars have even considered their works a "secondary source after judicial practice," while others have viewed them as a declining source of non-binding legal norms.

In this context, the term *doctrine* can be understood narrowly as a widely accepted rule or legal principle (Garner, 2009, p. 128; Wild, 2006, p. 128) or more broadly as a body of reasoned legal thought that promotes consistency in the application of particular legal concepts or factual elements, often within a specific domain—such as the Estrada Doctrine of recognition (Johnson, 1988, pp. 9–10). For the purposes of this article, the concept of doctrine encompasses both the original propositions of scholars and their interpretations of existing rules.

The first section of this paper examines the historical fluctuations in the authority of international law scholars' doctrines, highlighting their evolving influence and the dynamic nature of their status. This analysis also explores how juristic thought has contributed to the infusion of innovation and development into the international legal system. The second section evaluates the approach of various international courts to the teachings of prominent jurists, adopting an objective and analytical perspective.

First Section – The Transformation of the Traditional Status of Jurists' Teachings and the Reemergence of Their Importance

As states expand their interactions on the international stage and assume a more prominent role in global affairs, the creative influence of the theories of international law scholars and codified treaties has not remained static. Despite fluctuations in their authority, these doctrines continue to enjoy a distinctive and enduring status in international law.

1. Jurists' Teachings: From Primary to Secondary Sources

Lachs (1976, p. 239) aptly questions whether international law is comprehensible without the teachings of jurists, observing that historical developments themselves provide the answer. Indeed, the evolution of this discipline is inseparable from scholarly contributions (Jennings, 1984, p. 122), and no field of law has relied so heavily on the writings of jurists as international law (Triggs, 2005, p. 20). As Shaw notes, "historically, the contributions of scholars to the development of international law have been significant."

During the height of the natural law tradition, legal analysis and theoretical discourse predominated, while state practice and judicial decisions were relatively secondary. The writings of jurists largely defined the scope, structure, and content of international law (Shaw, 2008, pp. 112–113). As Lawrence (1910, pp. 99–100) observes, for the first two centuries—from the emergence of natural law to the rise of the positivist school—the development of the law of nations rested primarily on the work of leading thinkers, whose special task was to establish legal norms. According to the natural law school, the law of nations is a necessary product of natural law rather than the will of states, discernible through juristic reasoning (Grant Cohen, 2007, p. 79). Consequently, reference to state practice or non-international treaties was of lesser significance.

Oppenheim (1905, p. 4) underscores that international law owes its emergence as an organized system of rules to the Dutch jurist Hugo Grotius, whose work on the law of war and peace laid the foundation for subsequent developments. Earlier figures such as Francisco de Vitoria also made seminal contributions, introducing principles such as *Jus Inter Homines* into *Jus Inter Gentes*, thereby shaping the modern concept of law between states (Vitoria, cited in Johnson, 1988, pp. 9–10).

This prominence persisted into the nineteenth century, even as new sources emerged, with juristic writings considered "the most influential of all" (Halleck, 1861, p. 58). As international law expanded to govern relations between Western and non-Western sovereignties, the works of jurists were, in effect, regarded as legislative instruments, shaping nineteenth-century international law (Lorca, 2010, p. 485). The clear and widespread influence of classical jurists remained until the mid-nineteenth century, at which point their status began to decline.

By the late nineteenth century, the rise of positivism and the increasing role of states in rule-making gradually relegated juristic works from the position of "primary" or "superior" sources to that of secondary sources. Davis (1887, pp. 22–23) cautiously observed that while jurists cannot create law in place of states, their works constitute the principal source of knowledge on international law. Similarly, Henry Wheaton (1866, pp. 22–29) prioritized the writings of authoritative authors when identifying customary norms and general opinions, followed by treaties and judicial decisions.

The codification of this secondary role was later reflected in the Statute of the Permanent Court of International Justice. Article

38(1)(d) of its Statute, and that of its successor, the International Court of Justice, specifies that the Court may consider "the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law" when deciding disputes. Accordingly, reference to juristic teachings as a secondary source requires that such works originate from the most eminent international law scholars (Cançado Trindade, 2010, p. 126). Criteria for identifying such eminence vary: some scholars emphasize academic credentials such as doctoral dissertations (Rosenne, 2004, p. 51), while others highlight the scholarly impact, impartiality, and principled critique of state practices (Menon, 1989, p. 130).

Moreover, the concept of doctrines is not confined to individual jurists; it extends to collective bodies, such as the Institute of International Law and the International Law Commission (Cançado Trindade, p. 126; Rosenne, 2006, pp. 1559–1560). As Judge Ammoun observed in the *Barcelona Traction* case (ICJ, 5 February 1970, Separate Opinion, para. 23), the influence of legal doctrines encompasses both individual and institutional contributions. Although the drafters of Article 38 did not explicitly recognize collective doctrines, subsequent jurisprudence has broadened the scope to include institutional views, particularly following the establishment of the International Law Commission.

Despite debates over the relative authority of scholarly works—especially with the increasing availability of state practice and legal documents—many scholars maintain that doctrines, together with judicial practice, remain indispensable for distinguishing rules from non-rules (Jennings, 1967, p. 341; Murphy, 2010, p. 26). In the absence of a compulsory international judicial system, the writings of jurists exert greater influence than in most domestic branches of law (Menon, 130p). While some continue to underestimate their significance (Clapham, 2010, p. 25), contemporary scholarship acknowledges that juristic teachings provide systematic criteria for rule identification (Aspremont, 2011, pp. 210–211). Indeed, the influence of jurists often extends well beyond their designation as subsidiary sources, shaping the development of international norms and, in certain cases, directly contributing to the creation of new legal rules.

2. Legal Doctrines Beyond Secondary Tools

Some scholars argue that the value of legal doctrines is primarily determined by their grounding in research on existing law (*de lege lata*) and in the elucidation of established rules, rather than in proposing what the law *should be* (*de lege ferenda*) (Aust, 2010, p. 9). This perspective, however, is unduly narrow and neglects the essential role of forward-looking doctrines in fostering the evolution of international law. The presentation of ideas and proposals concerning future rules is vital for the progressive development of the legal system and has historically produced significant advancements within international law.

Adhering exclusively to a *de lege lata* approach risks stagnation, limiting the dynamism and adaptability of the international legal order. Jennings (1984, p. 127) emphasizes that legal scholars should see themselves as advocates for a better world in which international law assumes a more effective and comprehensive role. Despite the historical contributions of classical jurists and changes in the hierarchy of legal sources, modern eminent jurists continue to serve as agents of progressive development, maintaining substantial influence in shaping the law (Malanczuk, 2002, p. 52). Political obstacles may impede their work, but the power of scholarly ideas to guide normative evolution remains considerable (Okafor, 2004, p. 434).

Progressive development must be understood broadly, encompassing the diverse ways jurists can influence the trajectory of international law, propose new norms, and shape its content (Jennings, 1996, p. 413). Unlike domestic legal systems, where legislative authority is concentrated in political institutions, international law affords scholars unparalleled latitude to participate in rule-making (Ibid, p. 414). The absence of centralized legislative structures has historically allowed jurists extraordinary access to the creation and refinement of norms (Ibid, p. 413).

Dugard (2007, p. 731) notes that, in contrast to domestic law, the number of international law theorists often exceeds the number of legal practitioners involved in administrative governance, amplifying their influence. Scholarly publications, including the *American Journal of International Law* and the *Revue Générale de Droit International Public*, have historically guided practice and shaped norms. Furthermore, jurists frequently anticipate and analyze emerging issues, such as cyberspace conflicts, offering solutions and proposals that precede formal rule-making. This unique role grants individual jurists exceptional influence in the formulation of legal rules and principles (Jennings, 1996, p. 414; Dugard et al., 2008, p. 11). Even where doctrines are officially categorized as subsidiary tools, their formative impact is undeniable. Brownlie (1998, p. 24) asserts that while scholarly works often provide evidence of legal rules, they have, in certain domains, exerted a "formative influence," citing Gidel's creation of the contiguous zone as an example (Malanczuk, p. 52). Judge Ammoun, in his separate opinion in *Barcelona Traction*, similarly observes that doctrinal writings occasionally serve as auxiliary instruments in rule formation (ICJ, para. 23).

Modern instances of juristic influence include Bouchard and Parry's contributions to diplomatic protection (Trindade, p. 125), Wilfred Jenks' pre-Sputnik work on the legal regime of outer space (Jenks, 1956, p. 113), Eagleton's scholarship on state responsibility informing the Trail Smelter arbitration and the Stockholm Declaration (Ellis, 2006, p. 58), Raphael Lemkin's conceptualization of genocide leading to the 1948 Genocide Convention, and Lauterpacht's pioneering work on human rights embedded in the UN Charter, the 1948 Universal Declaration, and subsequent human rights instruments (Jennings, 1991, p. 10).

Beyond codifying law, certain jurists challenge entrenched principles, questioning, for example, the sufficiency of state consent and traditional sovereignty as foundations for effective international law (Guzman, 2012, pp. 748–790). Through innovative scholarship and advocacy, they influence normative evolution and encourage states to reconsider conventional legal foundations.

Collective institutions further enhance this progressive function. The Institute of International Law was established, in part, to compensate for the waning influence of individual jurists and has historically contributed to norm development, particularly prior to the UN's creation (Scott, 1927, pp. 716–717; Rigaux, 2011, p. 182). Its collective theories have significantly influenced international environmental law, including regulation of air and water pollution and international waterways (Brownlie, 1998, p. 25; Sands, 2003, p. 154; Louka, 2006, pp. 188–189).

The International Law Commission (ILC) occupies a unique position as the first permanent body tasked with both codifying and progressively developing international law (Morton, 2000, p. 102). Established under Article 13 of the UN Charter and General Assembly Resolution 174 (II) of 1947, the ILC distinguishes codification—addressing areas where law is insufficiently developed in state practice—from development, which addresses gaps in both practice and doctrine (Yifeng, 2010, p. 483). In carrying out its mandate, the Commission relies heavily on the teachings of eminent jurists, especially where governmental or judicial practice is absent. While the theoretical distinction between codification and development is clear, in practice it is often blurred, with the ILC prioritizing innovation and progressive initiative over mere compilation (Lauterpacht, 1955, pp. 29–31; McRae, 1987, p. 362; Yifeng, p. 745).

Consequently, the doctrines of jurists—both individual and collective—frequently form the final link in the chain of sources underpinning international law development. Nonetheless, this creative role should not be overstated: the realization of legal norms remains contingent upon the voluntary cooperation of states. The auxiliary function of legal doctrines is significant, but it does not replicate the authority enjoyed by jurists in the earliest centuries of international law.

Second Section – The Heterogeneity of the Approach of International Courts to the Teachings of Jurists

In practice, international courts do not require reliance on the teachings of prominent international law scholars to understand or interpret existing rules, whether or not their statute or founding document explicitly provides for such reference. Nevertheless, courts have exhibited a heterogeneous approach: while some frequently invoke doctrinal writings, others largely avoid explicit reference, and even when cited, the use of juristic theories varies in scope and depth.

1. The Reluctance of the International Court of Justice and the Tribunal for the Law of the Sea

Article 38(1)(d) of the Statute of the International Court of Justice (ICJ) obliges the Court to regard the teachings of the most eminent jurists as a subsidiary means for determining legal rules. However, as noted in discussions on the Statute's preamble, the Court's competence to rely on jurisprudential writings is not purely formal (Lauterpacht, 1996, p. 25). Both the Permanent Court of International Justice (PCIJ) and its successor, the ICJ, have historically referenced jurists' teachings sparingly and often in general terms.

For instance, in the *Lotus* case, the PCIJ examined the doctrines on flag-state jurisdiction in maritime collisions without naming any authors (PCIJ, *Lotus Case*, 1927, pp. 25–27). The ICJ's explicit references are also limited; in the *Nottebohm* case, it cited juristic opinions to elucidate the definition of nationality (ICJ, *Nottebohm Case*, 1955, p. 23). In the *North Sea Continental Shelf* cases, the Court analyzed competing sets of "contemporary legal ideas" when considering the median line principle (ICJ, 1969, para. 55). Similarly, in the *El Salvador/Honduras* maritime boundary dispute, the ICJ referred to Oppenheim and Gidel to assess whether the Gulf of Scadar constituted a historical gulf or an enclosed sea (ICJ, 1992, para. 394).

Other cases illustrate selective doctrinal use. The Advisory Opinion on the Legality of the Threat or Use of nuclear weapons briefly noted that both states and scholars agreed on the applicability of humanitarian law (ICJ, 1996, para. 85). In the *LaGrand* case, the Court only generically referred to "[legal] literature" (ICJ, 2001, paras. 116 & 99). In the *Nigeria/Cameroon* boundary dispute, it explicitly rejected claims based on some scholarly views regarding historical consolidation, holding that no such rule existed in international law (ICJ, 2002, para. 53).

These examples indicate that, historically, the Court has employed juristic writings instrumentally, as a subsidiary tool for rule determination, rather than as sources of independent authority (Lachs, p. 218). Some scholars suggest that this reluctance stems from the Court's self-perception of authority and dignity (O'Connell, 2011, p. 1050). Other factors include the codification of customary rules, the emergence of the International Law Commission (ILC), and improved access to state practice facilitated by modern technology, all of which have diminished the practical necessity of individual doctrinal input (Triggs, p. 202; Murphy, p. 16).

However, this view underestimates the ICJ's reliance on juristic teachings. Cançado Trindade emphasizes that Article 38's inclusion of scholarly doctrines retains significant weight (Cançado Trindade, p. 126). References in individual judges' opinions and deliberations suggest that juristic ideas are often discussed internally, even when not publicly cited (Pellet, 2006, pp. 791–792). Moreover, judges' selection from among eminent legal scholars (Pellet, 2000, p. 150) ensures that doctrinal reasoning is embedded in the Court's decision-making process. Brownlie (1998, p. 24) notes that even when the Court refrains from explicit citation, juristic teachings substantially influence both parties' arguments and the Court's reasoning.

The ICJ's hesitancy to cite collective doctrines appears even more pronounced. Explicit reference to the resolutions of the Institut de Droit International has occurred only once, in the *Kasikili/Sedudu Island* case regarding the interpretation of an international watercourse (ICJ, 1999, para. 25). Conversely, the Court increasingly relies on the ILC's work for treaty interpretation and evidence of customary rules (Pellet, 2006, p. 792). Today, ICJ decisions frequently reference the Commission, highlighting its growing role as a quasi-source of law, either directly or as a secondary source (Dugard et al., p. 42).

The Tribunal for the Law of the Sea (ITLOS) presents a contrasting scenario. Its statute and Article 293 of the 1982 Convention do not mention juristic writings or judicial practice, focusing solely on enforceable rules. Nonetheless, juristic views still inform advisory opinions, individual judges' dissenting opinions, and the arguments presented by parties, many of whom are leading international law scholars. The Tribunal also consults the ILC's work where relevant, demonstrating that, even absent formal recognition, juristic teachings influence adjudication indirectly.

In sum, the approach of international courts to juristic teachings is heterogeneous. While formal reliance is often limited, doctrines—both individual and collective—play an essential, if sometimes invisible, role in shaping judicial reasoning, informing legal interpretation, and guiding the progressive development of international law.

Second Point – Other International Courts Fully Benefit from the Teachings of Jurists

Unlike the International Court of Justice and the Tribunal for the Law of the Sea, the explicit application of the works of

international law scholars by other international courts has become common practice. In fact, in addition to the growth of traditional arbitration courts, the emergence of new international courts has enhanced the recognition and appreciation of legal doctrines. Although these courts determine the content of international law through their decisions, they fully utilize scholarly works and do not hesitate to explicitly refer to the opinions of jurists (Sohn, 1995/1996, p. 401).

The practice of these courts clearly contradicts the predictions made in the 1960s that the authority of scholarly works would decline with the expansion of judicial decisions and international arbitration (Parry, 1965, p. 104). International criminal tribunals often consult the works of jurists regarding the rules of international human rights and humanitarian law they are tasked to uphold (Sohn, p. 339). For instance, the International Criminal Court, despite not mentioning legal doctrines in Article 21 of the Rome Statute as a means of establishing rules, relied on legal writings in its judgment of 14 March 2012 (ICC, *Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, paras. 994, 1000 & 1011).

Similarly, the Reconsideration Chamber of the International Criminal Tribunal for the Former Yugoslavia referred to legal writings in multiple judgments, such as the *Aleksovski* case, in interpreting the four Geneva Conventions and examining procedural matters, citing jurists including Pique, Rozen, and Shahab El-Din (ICTY, *Prosecutor v. Zlatko Aleksovski*, 24 March 2000, paras. 22, 27, 97). The Appellate Division of the Special Tribunal for Lebanon, in its decision of 16 February 2011 regarding the law applicable to the crime of terrorism, repeatedly drew upon juristic writings in interpreting various international law issues (STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, paras. 11, 19, 23, 26, 41, 56, 81, 83, 91, 99, 101, 254, 279, 295).

The Special Court for Sierra Leone, in the *Charles Taylor* case, cited the views of international criminal law expert Eve Lahey to define the concept of slavery, noting that "restriction of freedom" includes forced labor or degrading treatment even when physical confinement is absent (SCSL, *Prosecutor v. Charles G. Taylor*, 18 May 2012, para. 420). The International Criminal Tribunal for Rwanda similarly relied on Antonio Cassese for the definition of murder as a crime against humanity and on William Schabas to clarify the criteria for genocide (ICTR, *Prosecutor v. Emmanuel Ndindabahizi*, 15 July 2004, paras. 471, 487). The Extraordinary Chambers in the Courts of Cambodia, in its first substantive judgment, relied on general principles recognized by various national systems and customary international humanitarian law compiled under the supervision of eminent international jurists (ECCC, *Co-Prosecutors v. Kaing Guek Eav alias Duch*, 26 July 2010, para. 405).

Human rights courts follow a similar approach. For example, the European Court of Human Rights, in *Jorgic v. Germany* (12 July 2007, para. 47), considered juristic writings to assess whether ethnic cleansing in Bosnia and Herzegovina constituted genocide. The Inter-American Court of Human Rights examined James Crawford's legal opinion regarding Colombia's responsibility for human rights violations committed by paramilitary forces (IACHR, *Mapiripán Massacre v. Colombia*, 15 September 2005, paras. 88–89). However, some bodies, such as the African Court on Human and Peoples' Rights and quasi-judicial human rights committees, do not follow this practice.

The Permanent Court of Arbitration, initially giving limited attention to legal treatises in the early twentieth century, has more recently aligned with international criminal and human rights courts. For example, the 2009 Abyei decision referred to juristic opinions in discussing procedural matters. The Eritrea-Ethiopia Claims Commission, the Eritrea-Yemen Maritime Delimitation Tribunal, and other arbitral bodies have relied extensively on the views of legal scholars (Arbitral Tribunal, *Maritime Delimitation between Eritrea and Yemen*, 17 December 1999, paras. 40, 53, 54, 55, 68, 84, 93, 145; Eritrea-Ethiopia Claims Commission, *Eritrea's Claim 17*, 1 July 2003, paras. 13, 39).

Regional and international commercial courts also consult juristic works. The Caribbean Court of Justice, for instance, examined the 2001 draft of the International Law Commission and the opinions of jurists when assessing punitive damages in international law (TCL Guyana & CCJ, *Trinidad Cement Limited v. State of the Co-Operative Republic of Guyana*, 20 & 39 August 2009, paras. 38). The ICSID Tribunal relied on Stefan Schäubel's writings to support the independence of arbitration clauses from main contracts (ICSID, *Trading Com. & ATA Construction v. Hashemite Kingdom of Jordan*, 18 May 2010, para. 119).

The NAFTA Dispute Settlement Body referenced juristic interpretations regarding WTO Dispute Settlement Body reports and their non-binding effect on the United States (NFTA Panel Review, *Investigating Authority, ThyssenKrupp Mexinox S.A. de C.V.*, 14 April 2010, pp. 70–72). The United States-Iran Arbitration Tribunal relied on juristic works in reconsidering prior awards (IUSCT, *United States of America v. Islamic Republic of Iran*, 1 July 2011, paras. 45, 54, 59). The UNCITRAL Commercial Arbitration Tribunal, in *Mytilineos Holdings SA v. Serbia & Montenegro* (8 September 2006, para. 223), cited the 1989 Institute of International Law resolution on arbitration to support state arbitration rights.

At the EU level, the Court of Justice of the European Union has referenced "legal writers" in cases involving international law, signaling attention to juristic teachings (ECJ, *Danske Slagterier v. Bundesrepublik Deutschland*, 24 March 2009, para. 30; *Kingdom of Spain v. Council of the European Union*, 30 January 2001, para. 29). In contrast, WTO Dispute Settlement Body decisions have not formally recognized the authority of legal doctrines.

Conclusion:

Although the status of the theories of authors of international law treatises was downgraded from a primary to a secondary source of rule-making due to changing attitudes, and although the case law of international courts—including the International Court of Justice and the Permanent Court of Arbitration—seemed to pay limited attention to them in the first half of the twentieth century, the emergence of new courts has significantly altered this approach.

The jurisprudence of these newer courts in recent decades contradicts the view of some legal scholars who claim that legal doctrines are not a source relied upon by international courts. Numerous pieces of evidence indicate that the reluctance of a small number of courts to cite juristic opinions does not imply that they do not benefit from them in drafting their decisions.

Moreover, despite the prevailing notion that the value of jurists' teachings is limited to their role as tools for establishing rules, their usefulness and specific function—particularly within academic societies—should be recognized as contributing to the

development of rules and injecting a spirit of innovation and initiative into the body of international law.

The evolving challenges of the international legal system, which is transitioning from its traditional stage to a modern phase, underscore the necessity of consulting legal scholars' opinions, especially regarding human-centered approaches, common values, and the public interest in shaping a new legal order. The complexity of international law, the absence of a supreme legislative authority, and the ambiguity in the creation and interpretation of many of its rules have created a unique space for jurists to participate.

Although the work of an individual author does not constitute rule-making in itself, lawyers—through their writings and with the cooperation and support of other actors, such as human rights organizations—have often succeeded in guiding and institutionalizing the behavior of states and international organizations according to their legal perspectives.

Finally, the universality of international law, in the sense that it entails rights and obligations for all nations regardless of culture, ideology, religion, or geography, the multicultural foundation of the international community, and the necessity of diverse perspectives in establishing norms governing our common destiny, underscore the importance of jurists from various nations presenting innovative and original theories consistent with the fundamental principles of the international legal order.

At the same time, objections raised by some Third World jurists regarding the Western character of contemporary international law should not justify their disengagement or limited participation. On the contrary, recognizing the existence and benefits of international law—and the potential loss from not engaging with it—should serve as a powerful incentive for greater effort and active participation in this vital field.

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