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Doctrine as a source of international law

1. Introduction
2. The place and significance of doctrine in the light of Article 38 of the ICJ Statute
3. Opinions of scholars and their impact on the shaping of law
   a. The subsidiarity of doctrine
   b. Test of applicability of a norm
   c. The authority of doctrine in a legal system
   d. The significance of doctrine in formation of *de lege ferenda* opinions
4. References to doctrine in the practice of international courts
5. Conclusions

1. Introduction

The issue of sources of law in a given legal system is usually determined by a legal act ordering the essential legal issues, such as a constitution. Such a solution is typical of a national legal order. In the international space, due to the uniqueness of international law – both in the subjective and objective sphere, and particularly due to the specificity of the law-making process – the issue of sources of law may give rise to some doubts and uncertainties. Broad understanding has only been achieved with regard to international agreements and custom. However, regarding other forms, including general principles, as referenced by the doctrine of international law and by judicature, and sometimes directly by the interested entities, the determination of their legal nature, binding force, and basis of obligation, is not clear or obvious. A certain important indicator is, obviously, the generally accepted enumeration of sources included in the Statute of the International Court of Justice; therefore, it is rather commonly accepted to make reference to this catalogue[1].

The contents of Article 38 par. 1 item d of the ICJ Statute, determining the grounds for its adjudication in accordance with international law, imply that doctrine, along with judicial rulings, in the form of "teachings of the most qualified publicists of the various

[1] R. Wolfrum, *Sources of International Law*, [in:] *Max Planck Encyclopedia of Public International Law*, May 2011, accessed on 25 May 2016.

nations in the area of international law," is only a "subsidiary means for the determination of rules of law"[2]. From such wording, one may initially derive an essential conclusion that scholarship plays a subsidiary role in respect of the so-called classical sources of international law, as included in items a, b, and c of Article 38(1) of the ICJ Statute (convention, custom, general principles of law recognized by civilized nations), helping in interpretation, explanation, clarification, and sometimes even *sui generis* extraction of existing legal norms the content or form of which is not absolutely certain. Therefore, the main task of representatives of doctrine is to clarify legal norms through proving their existence, deriving them from formal sources of law or from any other law-making behaviour of subjects of international law.

Simultaneously, it should be strongly stressed that the significance of doctrine for the evolution and functioning of the law of nations is of key importance. There can be no doubt that the teachings of the so-called fathers of international law – Hugo Grotius or Emmerik de Vattel, as well as by experts on the subject, including Byrkenshoek, Hersch Lauterpacht, Oppenheim or, in the Polish scholarship, Ludwik Ehrlich or Manfred Lachs, have significantly affected the process of formation of principles and norms of international law as well as the form thereof as a legal system. At the same time, however, it is impossible not to notice that the doctrine has a heterogonous character and contains opinions of writers of various categories, e.g. persons authorized by states, academics appointed ad hoc to give an opinion on a legal problem, people clustered in expert groups. The forms and places of publication are also different: monographies, articles, and, even internet blogs. Hence the power and significance of individual opinions can be evaluated and differentiated[3].

The preparatory work for the Statute of the International Court of Justice (ICJ), or actually the Permanent Court of International Justice (PCIJ), as quoted in the commentary to this document, implies that the intent of the authors was to attribute a role explaining the principles applied by the Court, rather than shaping these principles, to both case-law and doctrine[4]. The Supreme Court of the United States expressed itself in a similar vein in the *Paquete Habana* case (often referenced in the context of the issue of scholarship as a source of international law), clearly stressing that the works by international law specialists are not supposed to be construed as the authors' speculation

[2] The Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

[3] S. Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, "International and Comparative Law Quarterly", vol. 66, January 2017, p. 37, available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DFF12D4CB4E4A94377A02E3439C1523C/S0020589316000531a.pdf/influence_of_teachings_of_publicists_on_the_development_of_international_law.pdf, accessed on 4 January 2018.

[4] A. Pellet, *Commentary to the art. 38 of the Statute of ICJ* [in:] A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, Oxford 2006, pp. 783-792.

concerning what the law should be like, but rather as proving what the law is like. In a separate opinion to this ruling, Judge *Fuller* expressed this issue in a short but unequivocal statement: "Their elucubrations [of experts in international law] may be persuasive but not authoritative"[5]. The British court (King's Bench Division), contemporaneously with Habana case, expressed directly that: "any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence (…). The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient"[6]. That clearly means – every binding international law should be based on the will of states.

The representatives of doctrine themselves do not aspire to the role of lawmakers, only of law interpreters or *sui generis* catalysts of the law-making process. For instance, Professor Manfred Lachs, referencing the contents of Article 38 of IJC Statute, claims that: "It is obviously not a question of 'doctors' dictating the law, but of their influence on its understanding"[7]. The 9th edition of the textbook by *Oppenheim* states that "It is as evidence of the law and not as a law-creating factor that the usefulness of the teachings of writers has been occasionally admitted in judicial pronouncements".[8]

In connection with the treatment of doctrine as a subsidiary means of determination of legal norms and confirmation of this subsidiary formula in commentaries by international law scholars themselves, as well as in judicial practice, assumed as presented above in the Statute of the PCIJ and subsequently of the IJC, it is hard to argue that its function is not to create norms, but rather to postulate, explain, prove, or criticize them, as well as to encourage the law-making process through proper interpretation of its systemic conditions. However, bearing this in mind, one should not underestimate the role of doctrine, particularly in the form of works by international collectives and bodies established to inquire or codify the international law, such as the International Law Commission, the Institute of International Law, and the International Law Association, which contribute to a substantial and significant extent to the final shape of norms adopted by subjects of international law in the formula of consensus, traditional and typical of international law. Therefore, the basis of being bound by a norm of international law is the will and consent of states (or other subjects of international law), and the basis of their application is a formal source of law in the form of an agreement, custom, general prin-

[5] *Ibidem*, "*Their elucubrations may be persuasive, but not authoritative.*"

[6] West Rand Central Gold Mining Company, Ltd. v. The King [1905] 2 K.B. 391. K.J. Hynning, *Sources of International Law*, 34 Chi.-Kent. L. Rev. 116 (1956), available at: http://scholarship.kentlaw.iit.edu/cklawreview/vol34/iss2/2 .

[7] M. Lachs, *Teachings and Teaching of International Law*, (1976) 151 RdC, pp. 161-252.

[8] *Oppenheim's International Law* (9th edition), edited by Sir Robert Jennings QC, Sir Arthur Watts KCMG QC, Oxford 2008.

ciple, unilateral act, or a law-making resolution by an international organization. An important law-making factor is a substantive source, namely, the will of states, based, for instance, on certain common values, regulatory needs, political treaties, or ultimately derived from the views of international law scholars, especially when these views remain unanimous and uniform. Therefore, doctrine is unquestionably a significant law-making factor and a weighty element of the systemic understanding of international law, remaining an inspiring, indicating, documenting, evidential, persuasive, commenting, and interpreting element, but not directly a law-making one.

2. The place and significance of doctrine in light of Article 38 of the ICJ Statute

Article 38 of the ICJ Statute is traditionally and unanimously interpreted as a tool defining the function of the Court and an enumeration of sources of international law. In reference to the latter meaning, the imperfectness and incompleteness of the formula of Article 38 is obvious due to the lack of literally enumerated applicable sources of international law, other than the ones contained therein, such as resolutions by international organizations or unilateral acts. As for the issue of the functions of the court, the wording included in the quoted provision is rather clear (although it is subject to doctrinal analysis), meaning that the task of this court is to resolve disputes on the basis of international law. Hence the conclusion that Article 38, although discussed and criticized, nevertheless serves as a point of departure for a discussion on interpretation and application of international law with regard to the judicial functions of the International Court of Justice.

In the context of the wording of Article 38(1)(d), it is worth pointing out that it mentions judicature and doctrine in the same breath[9]. This peculiar alignment of the power (authority) of case-law and scholarship prompts commentators to pose questions about the reason why scholarship has been elevated to such a high level, and about the extent of awareness in this formation of role of both subsidiary means of determination of legal norms. It seems that certain explanations are provided by the preparatory work for the Statute.

The draft presented by the Advisory Committee of Jurists established by the League of Nations, as reported by chairman Baron Descamps, the original wording of Article 38 (numbered as Article 35) stated that, firstly, a judge would apply the rules mentioned therein in an established order (based on a sequence), and, secondly, he would rely on in-

[9] A. Z. Borda, *A Formal Approach to Article 38(1) (d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, EJIL (2013), vol. 24 No. 2, pp. 649-661 and the study quoted therein: R. Jenningis, *The Judiciary, International and National, and the Development of International Law*, ICLQ (1996), vol. 45, No. 1.

ternational case-law as a means of application and development of law[10]. Scholarship was not mentioned at all. However, the need to take account "simultaneously of the teachings by writers whose views have the authority (gravity)" was emphasized during further works[11]. Yet determination of whose views would have such a nature is general enough that it paves the way for considerations on who can be deemed to be a proper authority and why. Neither the Statute nor the preparatory work elaborates on the meaning of the phrase "most qualified"[12]. However, taking account of the internal orientation, typical of professional environments or occupational groups, concerning the qualifications of colleagues working in the same field, indicating who is bestowed with respect, esteem and authority based on their knowledge and skills, does not seem to be a difficult task. Therefore, it seems rather redundant to specify the meaning of the phrase "most qualified jurist" at the level of a legal act.

On the other hand, an important issue is to determine what the actual intent was of authors of the Statute as regards qualification of doctrine as a source of law. Interesting research materials are provided by the preparatory work, reflecting the dispute concerning the role of scholarship. It implies there were several versions of item d of Article 38(1). The final version was adopted as a sign of compromise between the views of Descamps, Root, Lord Philimore, Ricci-Bussati, and de Lapradell. As a point of departure, Descamps saw doctrine as a *sui generis* factor enabling avoidance of a *non liquet* situation in case of lack of general principles, or if such principles were unrelated to the dispute being heard. However, this version was too "loose" to be accepted. Therefore, there were attempts to define the meaning of doctrine as a tool useful in the application and development of law. Such formulae, however, were not precise enough. Discussions were thus held concerning treatment of scholarship as a subsidiary source, simultaneously limiting its extent to "widely recognized authors." However, it seems that the breakthrough and most significant part of the discussion was the argument raised by Ricci-Busatti, of whether states are able to accept rules derived from doctrine rather than resulting from their own will. In the context of the voluntarist theory of international law and the principle of sovereignty of states, this issue is indeed justified and understandable. Following suit, it was stressed that "doctrine and jurisprudence no doubt do not create law; but they assist in determining rules that exist"[13]. This was not far from adopting the final version, according to which the ICJ should take account of "teachings of the

[10] M. Fitzmaurice, *History of Article 38 of the Statute of the International Court of Justice*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 232/2016, pp. 1-31.

[11] M. Peil, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, "Cambridge Journal of International and Comparative Law" (2012), vol. 1(3), p. 138.

[12] *Ibidem*.

[13] *Ibidem*, pp. 138-140.

most qualified publicists of the various nations in the area of international law, as subsidiary means for the determination of rules of law."

The literature referencing Article 38 of the ICJ Statute also features a thread concerning a peculiar intent of the authors of the draft of this document. Namely, it is a kind of tribute to the role of scholarly opinions in the process of formation of the law of nations in the past, especially that for centuries it had been based on customary law, intrinsically quite difficult to clearly identify and interpret. This is why the function of determination, classification, explanation and systematization of international law, including extraction of its essence through ordering of the corpus of judicial decisions, is hard to overestimate[14].

Although Article 38 is indeed subject to a lively and still relevant discussion in the doctrine[15], no one can deny that it can and should be interpreted as a peculiar centre, middle, main point, midpoint between mechanical application of rules of law and the threat of "judiciary legislation"[16]. Following such a statement, one should point out its significant advantage, *i. e.* openness to the process of thinking, deduction, interpretation made by judges, without neglecting the aspect of overzealous, unordered, or haphazard interpretation of international law, performed by a human mind which is imperfect by definition. However, it should be simultaneously pointed out that the latter mechanism is secured, at least to a certain extent, by the structure of the ICJ as a collegial body making decisions by a majority vote, which should guarantee preservation of rules of law, objectivity, reason, reliability, a high level of knowledge of international law, as well as orderly thinking and decision-making.

As a result of adoption of a solution foreseeing a judge including both case-law and doctrine during settlement of a dispute – both forms serving as subsidiary means for determination of a norm of international law – account was taken, at least to a certain extent, of the significance of these two inspiring substantive sources of international law, without making a serious distinction between them, especially that international judges and international law scholars are often, in practice, the same people.

It is also worth emphasizing the significance of Article 38 for the practice of international law, since the authority of this provision translates directly to the position of the sources of law it mentions. In its beginnings, the article was not designed nor perceived as an authoritative enumeration of sources. However, over time and, above all, through

[14] M. Sourang, *Jurisprudence and Teachings*, [in:] M. Bedjaoui (ed.) *International Law: Achievements and Prospects*, Dordrecht/Boston/London 1991, pp. 286-287.

[15] See e.g. H. C. Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*, Transactions of the Grotius Society, vol. 38, Problems of Public and Private International Law, Transactions for the Year 1952 (1952), pp. 125-134; M. Fitzmaurice, *op. cit.*, pp. 1-31.

[16] A. Pellet, *op. cit.*, p. 680.

inclusion of the ICJ Statute to the United Nations Charter, it gained greater significance than just a 'practical catalogue'. Certainly, Article 38 should be interpreted as a point of reference with the essential authority in the process of identifying sources of international law. Therefore, in spite of all deficiencies, shortcomings or uncertainties of Article 38, as an incomplete and imperfect catalogue of sources, especially in the context of evolution of international law, it is important to conclude that since its very beginning it has been intended to introduce order into the system of international law[17].

3. Opinions of scholars and their impact on the shaping of law in the views of international law scholarship

a. The subsidiarity of doctrine

Despite reaching a compromise, or maybe precisely because of it, the wording of item d of Article 38(1) of the ICJ Statute is subject to deliberations in the doctrine and of judges themselves. A remark formulated by Manley Hudson, a judge of the Permanent Court of International Justice, seems to be interesting. He points out that the meaning of the word 'subsidiary' (*auxiliary* in the French version, which is authentic on par with the English one) is not clear, since it may lead to a deduction according to which subsidiarity means inferiority towards other sources mentioned in items a-c, *i. e.* a possibility to only reference doctrine or case-law when it is not possible to identify sufficient guidance in conventions, customs and general principles of law. This may also give rise to deduction implying (in reference to the French-language version) that subsidiarity should be construed as indication that the confirmation of rules whose existence has been stated may result from reference to case-law or doctrine[18]. However, the final conclusion in Hudson's deliberations conforms with the direction assumed during the preparatory works, *i.e.* with the concept of doctrine and case-law as materials facilitating the search for the rules to be applied, rather than as the rules themselves.

The subsidiary role of doctrine has been emphasized very clearly by Judge Professor Manfred Lachs in The Hague Lectures, stating that even if he invoked his heroes among scholars, he could not conclude that these people create the law. Scholars are not legislators, they do not create the law in international relations. The importance of their opinions is limited to a subsidiary role in determination of the rules of law, which is the formula adopted in Article 38[19]. Another well-known judge of the ICJ and simultaneously an au-

[17] M. Fitzmaurice, *op. cit.*

[18] M. Hudson, *The Permanent Court of International Justice 1920-1942, 1943*, p. 612. Quotation from: M. Peil, *op. cit.*, p. 141.

[19] M. Lachs, (1976/III) 151 Hague Recueil 161, p. 169. Quotation from: M. Peil, *op. cit.*, p. 141.

thor of studies on the international judiciary, Professor Shabtai Rosenne, made a similar statement. He stressed that neither doctrine nor case-law is positive international law, as it is neither a product (effect) of direct nor indirect action of states. Therefore, doctrine may only serve determination of legal norms, rather than creation thereof[20].

A contemporary scholar of international law, Professor Jan Klabbers, only points out a certain kind of hierarchy among them, emphasizing the subsidiary nature of judicature and doctrine without discussing the significance of legal scholarship as a source of law at all[21].

The issue of subsidiarity of doctrine and judicature is perceived by authors from different perspectives. Some simply claim that both sources are of a subsidiary nature, without going into any possible details. Some scholars, however, pay attention to certain intricacies. For instance, Prof. Julian Makowski speaks of both sources as ancillary ones, but simultaneously notices how strict the relation between case-law and international custom is, indicating that judicature is a part of the formation and a form of expression of custom, and the activity of the PCIJ is most significant in this regard, since, in view of the permanent nature and breadth of rules on which the Statute based its competence, it was particularly predisposed to play the role of an ancillary norm-making body. To substantiate such a view, the cited author explains that "even in the internal practice, at highly developed legal systems, a judge cannot evade creative activity in many cases. The application of law itself, beside decisions on applicability of a general norm to a specific case, always implies a certain creative moment"[22]. Similarly, referencing national law as a background for his deliberations, he emphasizes the role of scholarship, although not as strongly as in the strict relation between judicature and custom as referenced above. Excluding even the obvious example of Roman law, he also invokes the gravity of invoking of scholarly views in England or, in the international perspective, before arbitration tribunals or the PCIJ. The summary he draws in the form of a conclusion is based on an *a fortiori* inference: "If taking account of doctrine is acceptable in such a perfect legal system as internal law, it is *a fortiori* not just advisable but outright necessary in such an imperfect legal system of nations"[23]. It is hard to deny that the assumed concept is logical, but such automatic referencing of the output of national law is not justified in itself. Admittedly, international law takes account, *inter alia*, of the arrangements of internal legal solutions of states regarding, for instance, human rights, but its dissimilarity is so distinct that a simple analogy may not be entirely accurate. Therefore, one

[20] S. Rosenne, *Practice and Methods of International Law*, Oceana 1984, p. 119. Quotation from: M. Peil, *op. cit.*, p. 141.

[21] J. Klabbers, *International Law*, Cambridge 2013, p. 25.

[22] J. Makowski, *Podręcznik prawa międzynarodowego*, Warszawa 1948, pp. 12-13.

[23] *Ibidem*.

should rather confine oneself to the statement that references to doctrine are a natural part of the process of creation and interpretation of law, in the sense of focusing of any and all factors which may affect the shape of a norm, but do not have a decisive or law-making nature in the strict sense of the word. The attribute and competence of creation of a binding norm of international law is reserved for states, either acting individually or associated in international organizations.

The issue of importance of the opinion of legal scholars has also been raised in the popular English-language publication for students, *Public International Law. Revision Workbook*[24]. According to the views presented therein, the role of jurists in international law is clearer than in national law, and this fact is reflected in Article 38, where views of respected international law experts constitute a subsidiary source of law. In the context of the aforementioned views regarding the weight of the authority of scholars in shaping national law, the shift of the point of gravity towards international law seems quite surprising. However, the authors of the quoted study reference leading international law theorists, including Grotius, de Vattel, Oppenheim, and Lauterpacht, pointing out their significant and profound influence on the development of international law, and even describing them with the label "institutional writers", which is explained by the adoption of a view that scholarly opinions actually enjoy a recognized position in international law. In this spirit, they even conclude that, in view of their authority, the invoked persons evade simple classification indicating their scholarly output as a subsidiary source of law. Simultaneously, however, taking account of contemporary practice, the subjective nature of opinions of recognized international law scholars, and judges' reluctance to reference the doctrine's views as a source of law resulting from this characteristic were clearly emphasized. In the modern understanding, scholarship is therefore regarded more as evidence of practice of states, e.g. in the custom-shaping process, rather than a self-contained source of law.

In the Oxford Encyclopedia of International Law, beside an indication that doctrine is a subsidiary source of law, the explanations for the entry *Subsidiary sources of law* are supported by a meaningful quote from a study on sources of law by d'Aspremont. It implies that scholars, despite not practicing law, unquestionably participate in the final shaping of the formal criteria which are further applied by international community members creating and applying the law. Thus, the function of scholars is to play a role consisting in organizing, systematizing, and indicating the distinction between what is law and what is not[25]. The entry *Opinions of respected jurists* shows this function of doctrine even more

[24] K. Vickneswaren (ed*.), Public International Law. Revision Workbook*, 2nd ed., London 2002, p. 20.

[25] H. Thirlway, *The Subsidiary Sources, The Sources of International Law*, Oxford Public International Law, Oxford 2014, accessed on 18 January 2016.

distinctly and emphatically: "International law owes its structure and explanation of its rules precisely to writers, and not only to the past ones. In this meaning, the opinions of respected jurists are essential for the system of international law"[26].

In the context of the statement above, it is interesting to note that the first ordered enumeration of sources of international law was, in fact, proposed by the scholarship. In 1863, *Wheaton* enumerated the following as such sources: views of writers enjoying authority, agreements, norms issued by individual states, decisions of international courts, written official and law opinions, the history of wars, negotiations, and peace treaties[27]. This enumeration largely overlaps with a listing of sources included in Article 38 of the ICJ Statute. Admittedly, norms issued by individual states as well as historical aspects of the law of war and peace were left outside the original catalogue, but this solution logically results from the evolution and the essence of international law as a system created by will of states and on a common international forum, rather than within the framework of national solutions, and based on the consent of states for observation of specific norms, rather than on a precedent or on views expressed at the stage of negotiations. The latter may only support and supplement the process of interpretation of norms accepted by subjects of international law, being repeatedly of key importance for determination of the actual intent of parties and the extent of respect for the principle of good faith or *pacta sunt servanda*. States have indeed given it a distinct form in the provisions of the 1969 Vienna Convention on the Law of Treaties, indicating the described elements as one of the significant aspects of the process of interpretation of commitments assumed by way of agreements.

With all openness to the profound importance of doctrine as a source of law, and even in the face of the argument about its gravity for shaping not just individual norms but the system of international law as a whole, it would seem honest and accurate to recognize the subsidiary nature of scholarship, emphasizing that, depending on the strength of the authority of a scholar or an entire scientific body, the influence of their opinions may be either stronger or less distinct. Additionally, in a situation when the opinions of doctrine overlap with judicial reasoning and decisions, the significance of doctrine is on the rise. However, it does not transcend the subsidiary importance attributed to it in Article 38 of the ICJ Statute. If this were the case, it would be necessary to deny the voluntarist theory of international law, predominant in scholarship, and to violate the resulting consequence according to which the basis of obligation of international law is the will of states.

[26] M. Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute*), Oxford Public International Law, Oxford 2014, accessed on 18 January 2016.

[27] Quotation from: L. Ehrlich, *Prawo międzynarodowe*, 4th edition, Warszawa 1958, p. 64.

Therefore, one can imply from the referenced stances that there is agreement concerning the subsidiary nature of doctrine as a source of international law in such a perspective that it can be drawn upon in order to determine the existence of a norm of international law and the meaning thereof. On the other hand, one may discuss the problem of potential subordination of doctrine to other sources in the hierarchical sense. On the other hand, it should be simultaneously assumed that doubts are raised concerning the meaning of the phrase "most qualified publicists." The essence of this uncertainty is well reflected, for instance, by Rosenne who points out that granting of such an attribute is based on the individual potential of a given author, verified on the basis of skills, knowledge, and recognition[28].

b. Test of applicability of a norm

In the context of the subject matter of sources of law, it is worth referencing an important remark by Prof. Ehrlich, according to which international law is a positive law, which means that it consists of norms that can be ascertained using objective criteria; namely, the existence of these norms may be proven through study of sources of international law[29]. Although literature may also exhibit different opinions, or at least a discussion on the functioning of two theories in international law: positive law and simultaneously natural law, the adoption, after the quoted author, of the positivist concept with regard to the subject matter of sources surely facilitates their identification and organization.

It would be good to determine the nature of a given norm using clear criteria. Therefore, Ehrlich rightly states that "in order to determine whether a given norm is a legal norm, one should determine a test that would allow practical distinction between legal and other norms"[30]. He is not isolated in this view, invoking a similar stance of both doctrine (A.V. Dicey, G. Jellinek) and judicature (a 1929 judgment of the PCIJ concerning Brazilian loans). A proper test to determine whether a given norm is a norm of international law is to verify whether it is used as a norm of international law by international courts[31]. Yet in further discussions, Ehrlich allows invocations of doctrine, albeit only in the subsidiary approach. Namely, in the absence of such bases of reasoning as, for instance, an international agreement, determination whether a given norm is a norm of international law may consist in asking the question of whether in a given case an international court would probably deem it to be a norm of international law, and the basis of reasoning in this direction may often be found, *inter alia*, in studies by outstanding scholars[32].

[28] S. Rosenne, *op. cit.*, pp. 119-142
[29] L. Ehrlich, *op. cit.*, p. 10.
[30] *Ibidem*, p. 9.
[31] *Ibidem*, pp. 9-10.
[32] *Ibidem*.

In the catalogue of norms of international law, Ehrlich distinguishes norms derived from the basic principles of international law through precedents and through doctrine. In the latter case, he explains that he means views of "scholars enjoying such respect that their deductions may be practically assumed as a sufficient base of legal resolution of an issue unable to be resolved on the basis of the hitherto recognized norms"[33]. Although he only mentions several authors in the category of sufficiently respected scholars, such as Grotius, Vattel, Hall, Oppenheim, and only provided that the given view is relevant and has remained in practice[34].

A significant conclusion for the key considerations of this study is one formulated in the textbook by Prof. Ehrlich, according to which no principles of taking account of views of authors have been established in the international practice so far[35]. Hence the reflection that, as a rule, Ehrlich accepts the systematics of sources as adopted in the ICJ Statute, with the reservation that it requires clarification, such as through indication of clear criteria to evaluate which and whose views may be counted among the sources set out in par. 1 item d. There is no such formal classification, and it seems that one can hardly be expected. As has already been emphasized, the authority of scholars is based on general acceptance of their competencies, and gives rise to quite few serious doubts.

An interesting conclusion in the context of legal positivism and doctrine as a source of law is that the scholars' findings promote formation of positive law, in the sense of support to this process through preparatory analyses, elaborations, and systematizing works. The influence of doctrine is very clear in such fields or issues of international law as military law, territorial sovereignty, freedom of navigation, freedom of seas, diplomatic and consular immunity, theory of polar zones, and theory of the contiguous zone[36].

In the discussions by Professor Manfred Lachs in his meaningfully-titled study "On the Science of International Law", we may observe far-reaching acceptance of the importance of the science of law in legal practice. Admittedly, Lachs perfidiously quotes the words of a judge investigating a disputed case before the Admiralty Court, stating that "Some pedant locked in his study dictates the law of nations; everyone quotes him but no one cares about it (…) so if doctors argue, who is to decide?"[37]; however, he simultaneously appends to this thought a comment that challenging the importance of doctrine results from the original sin consisting in assigning an excessive role to it. Through such a reflection he builds a view that seems to be natural and close to the truth. Namely, he ascertains that, in fact, this is not about dictating the law by teachers, but rather about

[33] *Ibidem*, p. 14.
[34] *Ibidem*, p. 29.
[35] *Ibidem*, p. 30.
[36] M. Sourang, *op. cit.*, p. 284.
[37] Quotation from: M. Lachs, *Rzecz o nauce prawa międzynarodowego*, Wrocław 1986, p. 205.

their influence on their students who, holding responsible and honourable functions or offices in their professional life, such as judges, members of government, and officials of international organizations, follow the knowledge, skills, and ideas conveyed to them by teachers/scholars. Thus, the indirect influence of the views of scholars on the practice of creating and applying of law is put into practice[38]. Therefore, it is important to pay attention to the authority of doctrine.

c. The authority of doctrine in a legal system

The issue of the authority of doctrine in the process of shaping international law, including sources thereof, may be examined from at least two viewpoints. Above all, as a certain entirety of views formed by leading authors, but also as individual scholarly opinions initiating the development of so-called schools of international law. In the literature we may come across examples of references to such schools. For instance, the Scots international jurist Iain Scobbie emphasized the particular position of Hersch Lauterpacht. He even claimed that "For British international jurists, Hersch Lauterpacht is still predominant. His works are a model, an intellectual paradigm summarizing the approach to international law"[39]. Moreover, the quoted author indicated that his lecturer at Cambridge was Iain McGibbon – a student of Lauterpacht, whose lectures reveal perceptible admiration of his master as a kind of *sui generis* manifesto. Sir Hersch Lauterpacht's thought was also continued by his son Elihu Lauterpacht[40]. Therefore, one may encounter a certain phenomenon of formation of a specific scholarly trend around a given authority. If a given person is able to convince a significant number of followers to their views, such an occurrence evidences the influence of scholarship on the development of the theory of international law. In respect of Sir Hersch Lauterpacht, there can be little doubt that not only he has developed a group of followers of his views, but also, as an ICJ judge, he used his knowledge and views in practice. Moreover, continuation and development of the thought of his predecessors and scholarly colleagues, especially of Kelsen, can be inferred from his writings[41], which also constitutes a sort of confirmation of the continuity of scholarship and its role in organizing systemic issues.

In connection with the search for the authority of legal scholarship, one may also invoke the view of Professors Remigiusz Bierzanek and Janusz Symonides, who stated in their international law textbook that the ICJ Statute "aptly describes the role of judicature and doctrine as subsidiary means for determination of legal provisions"[42]. Sub-

[38] M. Lachs, *Rzecz o nauce…*, p. 206.

[39] I.G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, EJIL (1997), vol. 2, pp. 264-298.

[40] *Ibidem*.

[41] *Ibidem*, p. 265.

[42] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, 2nd ed., Warszawa 1992, p. 106.

stantiating the validity of the assumed formula, they claimed that although scholarly authority may serve as a guarantee of proper interpretation of a provision, it has no competence to imbue a rule of proceeding with the nature of a legal norm. Such a possibility, as pointed out by the quoted authors, found application historically at a certain point of development of Roman law. By emperor's decree, courts were obliged to adjudicate in accordance with unanimous opinion of a group of jurists having the *ius publice respondendi*[43]. This certain analogy between international law and Roman law is also emphasized by other authors, indicating that there is probably no other legal system (except international law – *author's note*) where scholars have such a significant impact on the shaping of the contents of rules or even principles of law[44]. However, it is still and consistently "contents" which would confirm the potential substantive nature of doctrine as a source and exclude the norm-making (decisive) one.

The text by Gaius implies that legal scholars in the 2nd century AD directly participated in the law-making process: "Responses of legal scholars are views and opinions of those who have been allowed to create laws. If the views of all of them are unanimous, this unanimous view achieves the power of law. If they do not agree, the judge is allowed to follow any view he wishes. This is stated in the rescript of divine Hadrian"[45]. However, it seems that the essence of such a solution is the reflection concerning the results of this law-making method. In the textbook by Professor Kolańczyk, a specialist in Roman law, he concludes that "under the influence of the jurists' activity, Roman law quickly became a 'scholarly law', rich in content, precise in its terminology and its conceptual structures"[46]. These characteristics determine the unquestionable value of the significant contribution of scholars to the law-making process. Who else besides theoretically and substantively prepared scholars would develop legal norms? Therefore, the influence of legal scholarship on the shape and reality of law, particularly in its systemic approach, to preserve the coherence and logic of the assumed legal solutions, seems natural.

Here, referencing the position of views of scholars in the Roman legal order, one should point out that an interesting approach to doctrine is present in the Swiss Civil

[43] *Ibidem*, p. 105. *Ius publice respondendi* – a right, privilege granted to certain Roman lawyers by the emperor. It was granted for the first time by Augustus. This right, according to the *ex aequo et bono* („according to what is fair and good") principle, allowed jurists to correct severe and unjust rules of law. Jurists gave opinions „under the emperor's authority" (*ex auctoritate principii*). These opinions were known as *responsa prudentium* („responses by scholars"). This led to development of a category of jurists with an authority officially recognized by the emperor. These „authorized" jurists determinedly impacted the direction of judicature, and their consensus – according to the rescript of Hadrian – gained a power of law; in case of difference of opinions, opting for a view of any of these authorities was left to the court's discretion.

[44] R. Jennings, *International Lawyers and the Progressive Development of International Law*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, The Hague, London, Boston 1996, p. 413.

[45] K. Kolańczyk, *Prawo rzymskie*, Warszawa 2001, pp. 48-49.

[46] *Ibidem*.

Code. Article 1(3) in conjunction with Article 1(2) of this legal act stipulates that "in the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance the rule that it would make as a legislator. In doing so, the court shall follow the established doctrine and judicature"[47]. Such approach to the competencies of a judge is a corollary of ideas assumed by the so-called Free Law School. The followers of the Free Law School, positing the existence of significant decision-making freedom of bodies applying the law (such as courts), recommended the open and conscious exercise of this freedom, or even exceeding the boundaries of the applicable law if it would result in making fair and just decisions. The element of equity is typical of international law, although it does not have the nature of a formal source in this legal system. There is even a serious discussion taking place in the doctrine of international law concerning the significance and impact of judicial decisions on the shape of it[48]. Indeed, a process known as "judge law-making" can be observed, and it is surely much more visible and clear than the influence of scholarship. However, if one consistently remembers the double competence of most international judges hailing from the scholarly environment, one may easily observe that, as the law-making nature of the judicature is increasing, the penetration of scholarly opinions into the process of formation and shaping of law is also taking place in parallel.

The interpenetration of the functions of judge and scholar is actually discussed by many writers. Anthony Aust, for instance, in his 2005 international law textbook, describes doctrine as a subsidiary source of law. He characterizes its significance as admittedly "influential", but rather in the formative days of international law than today[49]. Although it is hard to ignore that this area exhibits a dynamic quality, which means it is constantly undergoing development, and consequently formation (e.g. through the process of fragmentation or response to the development of technology, biology, medicine). Ultimately, however, if he attributes any practical importance to legal scholarship at all, he does it in the context of its influence on judges[50].

M.D. Evans says that the distinction made between the sources mentioned in items a-c of Article 38(1) of the ICJ Statute and those included in item d is clear. Judicature and doctrine as subsidiary sources serve determination of a norm resulting from a treaty, cus-

[47] Text available on: https://www.admin.ch/opc/en/classified-compilation/19070042/201801010000/210.pdf, access: 25.12.2017

[48] See e.g. N. Boschiero, T. Scovazzi, C. Pitea, Ch. Ragni (ed.), *International Courts and the Development of International Law. Essays in Honour of Tulio Treves*, The Hague 2013; G.I. Hernandez, *The International Court of Justice and the Judicial Function*, Oxford 2014; R.A. Posner, *How Judges Think*, Harvard 2010; I. Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists*, Oxford 2012.

[49] A. Aust, *Handbook of International Law*, Cambridge 2005, p. 10.

[50] *Ibidem*.

tom, or general principles. This implies that the first three sources mentioned in Article 38 are formal sources, and the fourth one is rather a material one (but emphasizing that it has a special degree of authority)[51]. As do other writers, Evans also supports the view that the significance of doctrine was much greater at the onset of development of international law. Among those eminent scholars, he traditionally mentions de Vittoria, de Vattel, Grotius, and Bynkershoek. He also points out that the cited theorists based their views more on natural law rather than the practice of states or judicial decisions. However, with regard to modern times, he presents general principles of law as a source and expression of natural law to a much greater extent than scholarly or judicial opinions. The most meaningful part of the argument presented in the quoted textbook is the statement that judges and arbitrators are often outstanding scholars and practitioners, which blurs the distinction between judicial precedence and teachings[52].

Ian Brownlie, as regards judicature, admits that doctrine as a source "only constitutes evidence of the law" rather than law as such[53]. However, this does not minimise the significant formative influence of such authors as Gidel on certain areas of international law, such as the law of the sea. This is not an isolated opinion, as it has also been expressed by such scholars as Malcolm Shaw. Moreover, Brownlie observes regularity in the practice of arbitration and national courts which, not being characterized by excessive knowledge of international law, eagerly reach for the views of scholarship[54]. As analogies to doctrine, Brownlie mentions works performed by collective bodies responsible for organization, codification, and development of norms of international law (such as the International Law Commission, the Institute of International Law, Harvard Research Drafts)[55].

Whereas decisions of international courts are of greater persuasive importance, the opinions of writers are important in describing and analyzing the norms being created. In particular, they are useful in distinguishing and identifying general principles of law[56]. Unquestionably, the historical impact of doctrine on the development of international law cannot be overstated. Particularly because the output of judicature is not very abundant, but also because states have been quite reluctant to subject themselves to the jurisdiction of the PCIJ or, currently, the ICJ.

[51] M.D. Evans, *International Law*, 2nd ed., Oxford 2006, p. 129.

[52] *Ibidem*.

[53] I. Brownlie, *op. cit.*, 23-24.

[54] One should agree with this opinion, confirmed e.g. by rulings of the Supreme Court of Republic of Poland, where the international element is reflected, at best, in referencing of international conventions with indication of a specific article, but without going into the essence of its contents. See e.g. the Decision of the Supreme Court of 10 April 2015, III KK 14/15; Decision of the Supreme Court of 27 October 2005, III CK 155/05

[55] I. Brownlie, *op. cit*., pp.23-24.

[56] G.D. Triggs, *International Law Contemporary Principles and Practices*, LexisNexis Butterworths 2006, p. 93.

From the viewpoint of structure and form of a source of law, doctrine is sometimes criticized as overly diverse, heterogeneous, and uncertain. For example, in the Congo vs. Belgium case (par. 44), the judges argued that the views of scholarship are mixed. Therefore, admitting that opinions of outstanding international law experts are important and stimulating, they nevertheless cannot prove the existence of a legal norm in their own right, without reference to other sources of law.

An argument against the law-making force of doctrine is the relation between scholarship and politics. In the 1925 case of Great Britain vs. Spain, the PCIJ adopted the stance that "A large majority of writers point out a clear trend to limit the responsibility of states. However, their views are often politically inspired and constitute a natural reaction against unjustified intervention in matters of some nations"[57].

The view of G.D. Triggs seems interesting, implying that the lack of quotations of scholarly views in decisions of international courts is caused by an inability to reference them in the final decision of a court[58]. Such a thesis implies a formalist approach to sources of international law, requiring a strict definition of what is a source of law and what is not, through naming these sources and providing them with an attribute of a source in the sense of a form which could be referenced by a judge. Simultaneously, such an approach does not deny the significance of doctrine as a factor influencing the formation of legal norms. Therefore, the knowledge of views of leading international lawyers and opinions of both national and international courts is an important part of the practice of an international judge, as well as in the process of shaping norms of international law.

If we take the view that "Sources of law are all facts or events leading to creation, modification and invalidation of binding legal norms" as a point of departure, the law-making role of doctrine will be unquestionable in this broad approach (especially in its substantive dimension)[59]. However, at the same time, a constant issue raised in the subject literature in the context of creation and applicability of law is the undisputed role of consent of a state for being bound with a given norm.

If we were to treat judicature and doctrine as equal sources of law, in the sense of subsidiary means for determination of law, then, to quote G. Schwarzenberger, who claims that "The ICJ is a law-determining rather than law-making agency", we should attribute similar importance to doctrine[60]. Thus we will recognize that the function of legal scholarship is indeed of a subsidiary nature within the meaning of Article 38 of the

[57] *Ibidem*, p. 94.

[58] *Ibidem*, p. 95.

[59] S. Besson, *Sources of International Law* [in:] S. Besson, J. Tasioulas, *The Philosophy of International Law*, Oxford 2010, p. 169.

[60] G. Schwarzenberger, *International Law*, 3rd ed, London 1957, p. 30.

ICJ Statute, but simultaneously that judicature does not exceed the form of a subsidiary source of law either.

In the subject literature one may encounter studies that directly indicate the authority of doctrine. For instance, Oscar Schachter, law professor, member of the Institute of International Law, editor of the *American Journal of International Law* and a former president of the American Society of International Law, proposed a distinct thesis in his article *The Invisible College of International Lawyers*, that the community of international lawyers dispersed around the world and performing different professions and different functions, constitutes a kind of an "invisible college" dedicated to common intellectual work. This process of communication and cooperation between eminent experts on the subject is evidenced by journals and annuals dedicated to international law, as well as participation of professors and students in numerous conferences, seminars, and colloquia in different parts of the world. Moreover, he also emphasizes the participation of these lawyers in official bodies and institutions, which facilitates the spread of this peculiar invisible college into the sphere of governments and the work of non-governmental organizations[61]. Following the thinking of de Visscher, Schachter rightly observes that international law is not a scholarly discipline in the same sense as physics or chemistry, since it is based not only on objective findings but, above all, on values drawn from national interests and attitudes deeply rooted in social and cultural differences. However, a certain canon of arrangements common for all states may be identified among these values: *pacta sunt servanda*, *bona fide*, state sovereignty, equality of rights, territorial integrity, prohibition of intervention in internal affairs, and obligation of peaceful settlement of disputes. These general and fundamental principles, repeated and expressly emphasized in the Charter of the United Nations, constitute the foundations of the modern international community. Thus, through reference to common and universally accepted principles, the concept of the invisible college implicitly assumes that international law, in spite of its wide material scope, is a uniform discipline. This assumption seems to be accepted by the community of international law experts, as evidenced by the will and capability of most members of this intellectual community to address each other and conduct dialogue[62]. In the thus-assumed systemic understanding of international law, the role of scholarship is significant and true. Opinions, analyses, conclusions of individual scholars and such bodies as the International Law Commission, the International Law Association, and the Institute of International Law, significantly affect the shape of the law of treaties and customary law, as well as understanding and application of general principles

[61] O. Schachter, *The Invisible College of International Lawyers*, "Northwestern University Law Review" (1977), vol. 72, pp. 217-226.

[62] *Ibidem*, p. 221.

of law. Therefore, one should fully agree with the conclusion of the author of the concept of invisible college of international lawyers that, since state governments have a rather ambivalent attitude to the issue of "legal conscience" as an important law-making element, the role played by the unofficial community of jurists in providing a specific meaning to this concept may also be the noblest function of this invisible college.

The concept of the "invisible college" found its adherents. In 2013, Santiago Villalpando, under the auspices of the European Society of International Law, published the study *The Invisible College of International Lawyers Forty Years Later.* He elaborated his predecessor's thesis, taking a bold step forward by formulating a conclusion that the value of the metaphor proposed by Schachter, concerning the existence of the "invisible college of scholars", exceeds the concept of a professional community of intellectuals, heading towards direct influence on state governments. Therefore, the main message running through Villalpando's study is the thought that the community of international scholars – experts in international law – is not locked in ivory towers, but exerts a decisive influence on the matters of the world. The image ultimately obtained is highly exciting. These members of an intellectual elite become members of a peculiar community that, coming out from under the shadow of scholarly work, directs international affairs in pursuit of such noble goals as the peace and welfare of mankind[63]. One should admit that, although this concept has the attributes of a highly exalted and quite immodest view regarding the position of experts on international law in the system of this law, it is nevertheless not unfounded, and brings the prospect, pleasant to the researchers, of recognition of their contribution in the development of the international community and of the canon of rules and norms adopted thereby. It is also worth mentioning that the role of scholarship reveals itself most prominently in how it ensures the coherence, transparency and order of the system of international law as a unified branch of law, in jurisdiction in disputes and in codification.

The impact of the opinion of doctrine has been made very clear in international criminal law. In his 2014 study *Towards a Truly Universal Invisible College of International Criminal Lawyers*, Claus Kreß, referencing the concept of the "invisible college", proved the strong and clear impact of scholarly views on the development of international law[64]. Beginning from the results of the Nuremberg and Tokyo Trials, proceeding through the Cold War up to modern-day issues of international criminal law, he pointed out the specific intellectual contribution to the development of this branch of law. As

[63] S. Villalpando, "*The Invisible College of International Lawyers" Forty Years Later*, ESIL Conference Paper Series, vol. 3, no 1, pp. 1-15, available under: http://ssrn.com/abstract=2363640, accessed on 1 January 2016.

[64] C. Kreβ, *Towards a Truly Universal Invisible College of International Criminal Lawyers*, Torkel Opsahl Academic EPublisher, Brussels 2014, pp. 1-45.

in other branches of international law, he emphasized the conceptual and clarifying role of the scholarship. He also stressed the impact of the views of eminent lawyers on the systemic understanding of law, emphasizing their advisory or even control functions. In his conclusion, he evaluated the influence of the invisible college of specialist criminal and international lawyers on the formation of international criminal law. As the most important issue, he singled out the fact that true universalization of international criminal law may constitute a significant and necessary step to universal application of the principles of this system. This vision, which had already been the hope of the inter-war pioneers, still remains an important aspiration. Therefore, from these deliberations one can infer the idea that scholarship not only inspires the law-making process, but, which is of key significance in the international community, is the source of the universalization of adopted principles and norms which become universal and uniform; this also significantly reinforces the systemic nature of international law.

It seems that the essence of doctrine in international law is reflected most accurately in the view arrived at by M. Wood, according to which: "The reasoning (argumentation) of particular writers may be convincing and influential in a specific matter, without a need of granting it with the authority of a source of law"[65]. Thus doctrine gains practical meaning as a significant factor in the formation, development, and interpretation of international law, without aspiring to a norm-making role in the strict sense of the word. Therefore, it can definitely be considered a substantive source. It is rather formal by virtue of name and classification in the formula of Article 38 of the ICJ Statute, simultaneously being limited to a source of subsidiary importance in the process of determination of a legal norm. Therefore, the essence of international law scholarship is its profound and significant impact on the formation of legal norms from a supplementary and informal position. Paradoxically, such an approach does not weaken the strength of the influence of doctrine on legal reality. Quite the contrary, it opens up the possibility of unlimited inspiration by the output of scholarship to states and other international actors, but always with the reservation of the ultimate, prevalent and decisive role of the will of these entities in relation to findings of the brightest and most prominent specialists. The function of doctrine, formed and understood as described above, seems optimal, since it is difficult to assume that under conditions of the law-making process typical of the international community, where the position of states is predominant, norms applicable in this system would be dictated by individual – even if most eminent – natural persons. The final conclusion, therefore, is that doctrine, as expressed in the formula and contents of Article 38 of the ICJ Statute, plays a subsidiary role in the process of determining norms of international law, as an inspiring and evaluating, suggesting, determining, confirming or eliminating, sup-

[65] M. Wood, *op. cit.*

porting, argumenting, convincing element, whereas it has no law-making nature in its own right in the sense of creation of a legal norm with a nature that is binding on subjects of international law. The direct creative force in this matter belongs to subjects of international law, as confirmed by the currently predominant positivist theory, according to which the creation and applicability of a norm is determined by the will of states (or more widely, of the relevant subjects of international law).

d. The significance of doctrine in formation of *de lege ferenda* opinions

The textbook by Professor Wojciech Góralczyk openly states that "judicature and case-law are not sources of international law"[66]. This view is substantiated by the simple and already referenced ascertainment that "judicature and doctrine cannot be regarded as sources of international law since they are not forms of expressing of will of states"[67]. The quoted author, on the other hand, recognizes the subsidiary function of legal scholarship, strongly emphasizing its practical importance and influence on the law-making process, in particular through formulation of *de lege ferenda* opinions. He even strongly emphasises this causative factor of doctrine, invoking the views of his own and his co-authors, Profs. Berezowski and Libera, in stating that: "The creative role of scholarship consists (…) in inspiring and affecting the action of states, and thus, directly, in creation of specific legal norms and development of international law, as well as, furthermore, in facilitation of determination whether a given norm exists, what is its specific content, what is its scope of application and what legal consequences this causes"[68].

In the latest and most wide-ranging Polish international law textbook by Professors Anna Wyrozumska and Władysław Czapliński, we read that: "The importance of doctrine to the development of international law exceeds the formula of a subsidiary source, especially in cases when the doctrine remains critical towards the existing state of law and formulates *de lege ferenda* conclusions, and, consequently, indirectly affects the shaping of law in certain cases"[69]. Here, the authors' thinking dovetails with the views of Professor Manfred Lachs, who places a very clear emphasis on the significance of both individual (in the sense of teachers/scholars) and collective (e.g. in the form of the International Law Commission) codifiers who "(…) whenever they convincingly removed doubts concerning norms or practice of their place in the system, they played a very useful role. They reinforced the authority of law and of government

[66] W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, ed. 7, Warszawa 2000, p. 69.

[67] *Ibidem*.

[68] C. Berezowski, W. Góralczyk, K. Libera, *Prawo międzynarodowe publiczne*, Warszawa 1970, pp. 22-23. Quotation from: W. Góralczyk, *op. cit.*, p. 70.

[69] Wł. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 3rd ed., Warszawa 2014, p. 54.

advisors who opposed 'latitude' and 'arbitrariness', which are often tempting and often lead governments astray"[70].

A sign of the clear impact of the International Law Commission on the application of international law is the simple relation between the composition of this body and the composition of the ICJ. It turns out that a significant number of judges had previously performed duties as members of the Commission. Data from 2000 show that 26 ICJ judges came from the composition of the Commission[71]. The significance of the opinions prepared by the Commission is also evidenced by numerous references to these findings in judgments by the ICJ (e.g. the case of the North Sea continental shelf, the *Gabcikovo-Nagymaros* case, the case of South Africa, the case of the Tunisian/Libyan continental shelf)[72]. It is worth stressing that cooperation of both bodies even shows a certain trend. In the first years of its activity, the court had a dominant role in the considerations on issues under its jurisdiction. However, since the *Gabcikovo* case (1997), an upward trend has been noticeable concerning invocation of the works of the Commission as an authority.

Besides emphasizing the role of law in the formation of law for the future, we should also recall the significance of the views of well-known authors, as *Malcolm Shaw* does. He recognizes the authority and influence of Gentilis, Grotius, Pufendorf, Bynkershoek and de Vattel as the highest-ranking authors in the 16th, 17th and 18th century on the formation of international law. At the same time, touching upon a similar thread to the quote from Evans above, he explains that the authority of representatives of doctrine was significant in the period of domination of natural law. In the positive approach to law, among sovereign subjects of international law or states, it had to give way to agreements and customs. Nowadays, Shaw understands the role of doctrine more as stimulating and organizing law-making entities. At the same time, he emphasizes the issue of responsibility of doctrine for the coherence and order of international law, which indeed seems to be hard to overestimate[73].

As for the formation of new branches of international law and regulation of issues which have been hitherto reserved for national law, doctrine has a very significant role to play. An example of a branch in which the law-making process is based very clearly on findings and conclusions of scholars is international environmental protection law, including the law of conservation of water resources or the law of protection of so-called environmentally disabled persons (also known less precisely as climate refugees). For

[70] M. Lachs, *Rzecz o nauce*..., p. 230.

[71] S.M. Schwebel, *The Inter-active Influence of the International Court of Justice and the International Law Commission* [in:] A. Armas Barea et all. (Board of Editors), Liber Amicorum in Memoriam of Judge Jose Maria Ruda, Kluwer 2000, p. 480.

[72] *Ibidem*, pp. 484-488.

[73] M.N. Shaw, *International Law*, 4th ed., Cambridge 1997, pp. 88-89.

instance, Professor Karol Wolfke admits that educated naturalists have been the driving force for the idea of environmental protection, but action towards regulation of this protection is, above all, a role for international lawyers[74]. As examples of such initiatives he cites the so-called Helsinki Rules, adopted in 1966 by the International Law Association, or the Madrid Declaration of the Institute of International Law, banning all changes harmful to water. However, what emphasizes the weight of doctrine most profoundly is the view of Uttonas quoted by Wolfke that "the Helsinki Rules are the most precise expression of the international river law"[75]. This sentence expresses the essence and strength of projects or findings by individual scholars and those associated in bodies, consisting in formulation of legal norms and principles in a clear, precise, logical, and coherent manner. These features are often scarce in law created directly by the interested entities.

An unquestionable advantage and strength of doctrine is determination of what may be classified as a consensus of the international community, or the point of departure for determination of a norm binding upon it. In the case of international environmental protection law, and in particular the law of water resources, the contents of the Helsinki Rules, already invoked in the study by Professor Wolfke, are clearly viewed as a foundation for later regulations[76].

4. References to doctrine in the practice of international courts

In his 2012 study on doctrine as a source of law, Michael Peil made important findings which should be taken into consideration in the context of deliberations regarding the significance of opinions of respected lawyers in the system of sources of international law. As a point of departure, the quoted author observed that the ICJ only invoked the aforementioned opinions in 22 of 139 judgments and advisory opinions (having adopted a methodology under which he had worked on English-language material comprising 112 judgments, 27 advisory opinions, 489 rulings, as well as roughly 1300 declarations, separate opinions and individual opinions issued through 1 May 2012)[77].

Simultaneously, the author under consideration, seeking the reason for such a low number of references to doctrine, developed certain theses based on views of scholars and international judges. Quoting Waldock in the context of the voluntarist theory of international law, he pointed out that the cause of the low number of references to schol-

[74] K. Wolfke, *Międzynarodowe prawo ochrony środowiska (tworzenie i egzekwowanie)*, Wrocław 1979, p. 97.

[75] *Ibidem*, p. 98.

[76] B.J. Wohlwend, *The Teachings of the Most Highly Qualified Publicists as a Subsidiary Source of International Water Resources*, materials of the conference *Legal Aspects of Sustainable Water Resources Management*, Serbia, 14-18 May 2001.

[77] M. Peil, *op. cit.*, p. 143 and 147.

arly findings is the fact that the court prefers, if possible, findings coming directly from a state or from courts granted by states with law-determining authority[78]. The second concept is subordination of doctrine to judicature as the preferred subsidiary source. As stated by Jennings and Watts, "with the growth of international judicial activity … it is natural that reliance on the authority of writers as evidence of international law should tend to diminish"[79]. The third path of reasoning leads to the conclusion that the cause of devaluation of doctrine may be technology, in the sense that direct access to sources is simpler and quicker than to commentary. That said, such reasoning is quite surprising and rather groundless in the age of the Internet – access to various sources is widely available and its forms are rather similar. Simultaneously, as stressed by McNair, it does not take account of the synthetic and organizing role of doctrine, which can show the line between actual law development and erroneous reasoning as well[80]. The fourth concept is based on analysis of separate opinions, implying that judges often agree concerning the conclusion of a court, while significantly differing on the issue of legal bases of an issued decision. As stressed by Rosenne, the practice of inclusion of views of individual writers into a court opinion is not well-suited to the concept of joint declaration what is law[81]. And finally, the last proposed thesis is the issue of etiquette, pointed out by an entire group of authors (including Rosenne, Pellet). It is an embarrassing difficulty to determine who belongs to the category of most highly qualified publicists, and who may be deemed less qualified. In the close-knit environment of international lawyers, making such a distinction is rather dangerous and undiplomatic, and the court (the ICJ) does not claim the right to judge scholars as good or bad[82].

Maybe it is indeed difficult or awkward to select members for the gallery of eminent lawyers responsible for shaping international legal scholarship. Nevertheless, practice shows that this pantheon is not very large, and there is rather a consensus concerning the authors it includes. Based on research performed by a team led by Michael Peil, one may assume a criterion based on the number of citations and order specific names according to this criterion. Thus, a number of citations exceeding 80 in more than 40 opinions characterises the International Law Commission, Shabtai Rosenne, Sir Hersch Lauterpacht, the Institute of International Law, *Sir Gerald Fitzmaurice*, the textbook by *Oppenheim* (all editions), Manley Hudson, Charles de Visscher. The group of authors

[78] *Ibidem*, p. 144. For more, see: H. Waldock, *General course on public international law*, (1962/II) 106 Hague *Recueil* 1, at. 96.

[79] *Ibidem*. For more, see: R. Jennings, A Watts (ed.), *Oppenheim's International Law*, Longman 1992, p. 42.

[80] *Ibidem*, p. 145. For more, see: A. McNair, *The Development of International Justice*, NYU Press, 1954, p. 17.

[81] *Ibidem*. For more, see: S. Rosenne, *The Law and Practice of International Court, 1920-2005*, Brill 2006, vol. III, p. 1551.

[82] *Ibidem*, p. 146.

quoted between 20 and 40 times in more than 20 opinions includes: *Sir Ian Brownlie, Sir Humphrey Waldock, Sir Robert T. Jennings, and Emerich de Vattel*. And finally, among writers invoked between 20 and 30 times in 10 to 20 opinions, the following have been mentioned: Julius Stone, James L. Brierly, Georg Schwarzenberger, C. Wilfred Jenks, Sir Arnold McNair, Eduardo Jimenez de Arechaga, Georges Scelle, Philip C. Jessup, Dioniso Anzilotti, Roberto Ago, and Oscar Schachter. Moreover, those quoted incidentally or several times were: Joe Verhoeven, Nagendra Singh, William Schabas, Edvard Hambro, Grotius, the International Committee of the Red Cross, the International Law Association (ILA), Hans Kelsen, Paul Reuter, D.P. O'Connell, Quincy Wright, Malcolm Shaw, Bong Cheng, Dame Rosalyn Higgins, and Mohammed Bedjaoui[83].

Analysis of this list clearly shows that authority in the field of international law is attributed both individually and institutionally. The invoked persons and organizations/institutions are also mentioned in the category of the most recognized writers, as adopted in the formula of Article 38(1)(d) of the ICJ Statute by authors of leading textbooks on the subject. Therefore, in spite of certain doubts, the gallery of scholars is determined quite unanimously by scholarship itself, as well as by case-law and practice. The second important conclusion is the thought that most of the quoted scholars are also judges of the court of courts (ICJ). Hence the further conclusion, already presented in the earlier discussion, that scholarship is strictly connected with judicature, comprising one common bloodstream in the organism of international law. Moreover, it is easy to see the rule that the milieu of international judges is willing to place far-reaching trust in its members as regards competence, knowledge, skills, and proficiency in international law. Therefore, an evident cohesion is visible between the directive to rely on views of eminent lawyers as a subsidiary source to determine legal norms and the requirements for judge candidates of international courts and tribunals, as well as institutions treated with authority and respect by the international community. If we take a closer look, the formula indicating knowledge and competence as a requirement for candidates is repeated in most of the mentioned bodies. Persons aspiring for the role of an ICJ judge are required to have, apart from impeccable morals, qualifications to hold the highest judiciary offices in a given state or, alternatively, an attribute of "recognized competence in international law" (Article 2 of the ICJ Statute). In the International Criminal Court, it is specified that a judge candidate should have established competence in relevant areas of international law, such as international humanitarian law and the law of human rights, as well as broad legal knowledge and related professional experience (Article 35 of the Statute of the ICC). The European Convention on Human Rights foresees that judges of the European Court of Human Rights "shall be of high moral character and must ei-

[83] *Ibidem*, pp. 158-160.

ther possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence" (Article 21(1)). Similarly, to hold the function of a judge in the Court of Justice of the European Union, one should meet the requirement of possessing qualifications required for appointment to highest judicial offices in Member States or be a jurisconsult of recognized competence (Article 253 of the TFEU and Article 19 of the TEU). Assuming the requirement of knowledge and competence of highest recognized level as the criterion for judge candidates, the conclusion should be obvious that persons appointed to international judicial bodies should guarantee their views and legal reasoning are evidence of their broad, thorough, up-to-date and reliable knowledge of the branch of law on which they make pronouncements. Thus, the logic of reliance on opinions of international judges as representatives and/or experts in doctrine of this branch of law becomes clear as well.

As for the context in which citations from doctrine appear in the international case-law, then, following the qualification made by Michael Peile, we may assume the following categories: presentation of common (widespread) practice of states, interpretation of provisions of an agreement, presentation of a general principle of law, explanation of the practice of the ICJ, use of the general context for a specific issue in the case, direct presentation of existence of the rule of law, making the case for the need of a change in law. Therefore, it seems that, in line with the subsidiary nature of doctrine, as suggested in Article 38, the practice of its invocation/application falls within this concept. Thus, scholarship consistently plays the role of an evidencing, supporting, inspiring, clarifying, organizing, strengthening factor, or possibly (in the farthest-reaching interpretation) of a catalyst for the suggested changes.

The most emphatic and directly expressed view of an international court, coherently aligned with the thread of international law scholarship, is probably evaluation of the competence of the ruler of Abu Dhabi. Although in no way can this fragment be considered diplomatic or sublime, it indicates the power of the authority of scholarship as both a basic and ultimate argument concerning rules, principles and norms applicable in international law. Judges, referencing error as a potential premise for invalidity of a contract concerning a concession for search and drilling of oil in the area specified as "the entire area under the reign of the Sheikh of Abu Dhabi, together with its appurtenances as well as any and all islands and marine waters belonging to this area", clearly stated that: "Every state is an owner and sovereign in relation to its territorial waters, sea bed and marine underground underneath, whether or not the ruler has read the works by Bynkershoek"[84]. Such reasoning implies, on the one hand, that the knowledge of teachings does not matter in view of the norms in force, but it may contribute to the conscious

[84] ILR 1951, vol. 28, p. 144. Quotation from: Wł. Czapliński, A. Wyrozumska, *op. cit.*, p. 633.

application of law. Therefore, this case shows a kind of analogy with the established principle *Ignoranta iuris nocet*, transcribed to *Ignorantia doctrinae nocet*.

Therefore, no matter what form the significance of doctrine in the system of sources of international law assumes, either emphasizing its importance or minimizing its influence, it will not be possible to adopt a simple view that scholarship has a law-making nature. It will not have such power in isolation from actions of subjects of international law. A factor constituting a necessary law-making element in international law is always the will of its subjects, so even if it is possible to prove the significant impact of doctrine on formation of international law (especially in the historical context), views of most respected jurists, in their own right, cannot be deemed to be a source of international law in the full sense of the word. However, one cannot deprive them of substantive meaning as an element affecting the creation, interpretation and application of norms of international law, with emphasis on the sphere of influence on law-making entities, including, above all, obviously states.

The thought which seems the most relevant to reality is that the formal significance of doctrine is indeed limited to its subsidiary nature in the process of determining norms of international law, whereas its impact on the shape, content and understanding of these norms seems undisputed and significant. Even if the stance of scholarship is not emphasized outright or on a numerically or quantitatively imposing scale, it can unquestionably be proven that the practice of the application of law is reflected in its scholarship, both as a causative and commenting (assessing) factor. Therefore, it seems that the metaphor of doctrine and judicature as a *sui generis* system of connected vessels, and of international law with all parts thereof as a bloodstream linking all elements of causative, evaluating and applicating nature, is not misguided.

Looking at the case-law of international courts in search of references to doctrine, we may invoke and analyze several examples. In the case of the ship *Lotus*, for instance, the PCIJ indicated that the French party was pointing out that the rule of exclusive jurisdiction of a state towards a vessel flying its flag is confirmed in works of doctrine, decisions of national and international bodies, as well as in treaties. Finally, the court concluded that such a rule has not been proven finally (conclusively)[85], since existence of a custom in this sphere has not been proven. Hence the conclusion that even if an opinion of scholarship indicates existence of some form of a norm of international law in a manner conforming and coherent with case-law or even contractual obligations, this does not constitute a prevailing argument for recognition of such a norm as binding. To a court, the prevailing indicator is a source of universal and undoubted nature. Consequently, based on the cited example, one could build a theory of development of doc-

[85] *Lotus*, Judgment of 27 October 1927, PCIJ Series A, p. 26.

trine on the shaping of a legal norm, especially that today, ultimately, both custom and agreement (in the form of the Convention on the Law of the Sea from *Montego Bay*) confirm the rule of exclusive jurisdiction of the flag state. Nevertheless, the significance of opinions of experts on the subject will still have an inspiring and organizing nature, or even, in a stronger interpretation, an inductive one, but still not a causative one. Although, if we assume an indirect creative role, in the sense of causing a result in the form of a final law-making and executive initiative held by the interested parties, especially by states, proving and maintenance of the indirect causative function of doctrine would not be as difficult. One cannot fail to notice, as has already been raised in earlier parts of this study, the impact of scholarly views on the development of international law, not only in the theoretical sense but, after all, in the practical one as well. An example may be introduction into the legal circulation of the term of baselines, which evolved from a demonstrative structure to a normative one.

In the *Arrest Warrant* case, the motif of doctrine appeared in the separate opinions of Judges Higgins, Kooijmans, and Buergenthal. On the one hand, we may come across information that the issue of reservations, including reservations to treaties dedicated to human rights, is a subject of significant practice and extensive literature of the subject. Yet this reference at the same time has the nature of a general remark, without invoking specific examples. The opinion itself was deemed by its authors, which may be regarded as surprising but significant at the same time, to be the wrong place to reference and analyse doctrine.[86] Such distrust towards the validity of scholarly views is explained by the influence of political factors on scholars' opinions[87]. Therefore, one can conclude that the role of scholarship in this case was simultaneously emphasized and reduced to the subsidiary, supplementary, supportive functions. However, such a function of the opinions of doctrine should not be easily ruled out or neglected. It seems that every fully-formed legal theory, later translated into practical solutions, should be built with consideration for any and all possible factors of importance for the entirety of the reasoning. Hypothesis-based reasoning, in spite of the practical dimension it contains, should be supported by inquiry grounded in all available sources. Therefore, scholarly views are of unquestionable importance to the coherence of the adopted legal solutions. Structures created without solid support in the form of prior practice and explanation by scholars are rather devoid of the power to survive and take root in practice.

In some rulings, like in the case of the ship *Wimbledon*, the Permanent Court uses a highly enigmatic formula of "general opinions." This term may indirectly suggest that

[86] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v*. Belgium), Joint separate opinion (Higgins, Kooijmans, Buergenthal), ICJ Reports 2002, p. 71, par. 26 and p. 75, par. 44.1.

[87] G.D. Triggs, *op. cit.* (chapter 2. *Sources and Methodology of International Law*), p. 94.

what lies behind it is also a view represented in the doctrine. Nevertheless, it is quite a loose analogy, and it is difficult to use it as grounds for proving any special importance of scholarship in law formation[88]. On the other hand, reasoning may lead us to deduce a strict relation between *opinio iuris* and opinion of doctrine as an element of the universal conviction of the legal importance of a given kind of action by subjects of international law.

It is also worth paying attention to the stance of bodies other than courts with their judges. As rightly pointed out by Prof. Karol Wolfke, "similarly as the Hague Court in its rulings, the International Law Commission also seldom referenced the authority of scholars, especially in the draft law of the sea." Commentaries to this draft mention writers on only two occasions, in reference to the article on piracy (Article 39 of the draft, Article 15 of the Convention on the High Seas). Hence the reflection that, even if the contribution of scholars in codifying works is unquestionable and significant, "proving thereof in a specific way, indicating provisions, is not easy"[89]. Nevertheless, the quoted author stresses that important evidence of scholarly participation in the process of creation and codification of norms of international law is the composition of international bodies (such as the ICJ or the ILC). In particular, such scholars as Francois, Scelle, Spiropoulos, Yepes, Brierly, Lauterpacht, Fitzmaurice, and Gidel have both undisputed authority and actual influence on this process. Therefore, the difficulty lies not within the recognition of the contribution of scholars in the development of international law itself, but proving their activity using specific examples. A good illustration of this issue may be the fact that "for example, an essential document serving as a point of departure for work of the International Law Commission on the high seas regime – the Memorandum of the UN Secretariat, has been developed by Gidel, which, however, is not made apparent anywhere"[90]. However, at the same time a report by the Special Rapporteur of the ILC, Francois, made clear the role of scholars, including Gidel himself (which is hardly surprising, given the fact that more than one in four of the delegates in the Codification Conference concerning the law of the sea were university professors). In relation to the issue of police on the high seas, "[he] cites extensive quotes from works by Gidel, Higgins, Colombos, and Smith, claiming that **based on these views, one could propose a norm to the Commission** (emphasis by the author)"[91]. The function of doctrine has been expressed even stronger in the general commentary to Section I of the Convention on Diplomatic Relations, including the phrase that "the Commission followed the third

[88] *S.S. Wimbledon*, Judgment of 17 August 1923, PCIJ Series A, p. 28.

[89] K. Wolfke, *Rozwój i kodyfikacja prawa międzynarodowego. Wybrane zagadnienia z praktyki ONZ*, Wrocław 1972, p. 147.

[90] *Ibidem*, p. 149.

[91] *Ibidem*, p. 151.

theory (functional necessity) in resolving issues to which practice would give no clear answer, simultaneously keeping in mind the representative character of the Head of Mission and the mission itself"[92].

The final conclusion drawn by Professor Wolfke, despite reflections on the infrequency of invocation of views of specific scholars as direct inspiration in the process of formation of legal norms, emphasizes the significance of doctrine. In the quoted author's opinion, "the role of scholarship is by no means limited to assistance in codification of existing norms. It participates directly in creation of norms of international law"[93]. The role of scholarship, as presented above, is evidenced by scholarly views being taken into account in discussions at the level of preparatory works, as well as by critical remarks formulated in reference to the drafts of the ILC. The final conclusion adopted by Professor Wolfke boils down to the view that not only is the role of scholarship in international law not declining, but it is even increasing, undergoing a kind of renaissance. From the viewpoint of international law scholars this is an optimistic conclusion, although, in the context of the data on the quantity and scope of citations of scholarly views, as already mentioned in this study, it is not entirely clear. However, it seems it could be understood to the effect that the opinion of scholars is still being taken into account, especially in situations which are difficult and doubtful to determine or resolve. It may serve as a helpful and useful tool which could significantly impact both judicial reasoning and the shape and development of international law, as a whole and within its constituent parts.

5. Conclusions

When comparing the views of various writers, certain conclusions may be drawn. The primary one is the observation that doctrine has the nature of a subsidiary source, whose role is to aid in ascertaining the existence or lack of as well as form and content of a legal norm. The quoted authors, however, stress the impact of doctrine on the development and formation of international law; above all, its historical significance, but also through the master/apprentice mechanism in judicial practice. Thus an additional internal relation reveals itself between the two subsidiary sources: scholarship and judicature. It consists in the impact of doctrine on judicial reasoning to the effect that, firstly, judges are frequently professors of law as well, and secondly, they have been formed by specific scholarly centres and recognized scholars lecturing there, well-established in their views or open to factors impacting the development of law and new ideas in the international

[92] YILC, 1958, II, p. 95. Quotation from: K. Wolfke, *Rozwój…*, p. 156.
[93] K. Wolfke, *Rozwój…*, p. 162.

law. Going even further with this reasoning, one may conclude that the bond between judicature and doctrine as sources of law is tight. Just as the views of the doctrine and individual scholars may affect the reasoning of a particular judge or of a court as a whole, a test in the form of application of a given norm by a judge/court indicates whether or not the existence of a given norm in the system of international law may be ascertained. Therefore, it is possible that both sources indicated in Article 38(1)(d) of the ICJ Statute are, in a certain sense, connected vessels whose essence consists in interpenetration of their contents, provided that the form remains traditional as a subsidiary means of determination of a legal norm; however, the matter changes depending on the influence of external factors, such as the political situation, current problems facing the international community, individual views of a judge (from conservative to progressive), individual perspective of representatives of the doctrine, access to other formal sources of law (in the sense of their existence or absence in a given context and, consequently, the risk of a *non liquet* situation).

In conclusion, it is also worth stressing that Article 38(1)(d) of the ICJ Statute defines doctrine as "teachings of the most highly qualified publicists of the various nations", which is aptly interpreted by Prof. Genowefa Grabowska as "universally accepted, well-established, highest-class product of international scholarly thought." She adds in conclusion that "doctrine in international law does not have an impersonal character; on the contrary, there are always great names behind it (such as Grotius, Kelsen, Anzilotti, Jellinek, Hart, Bynkershoek)"[94]. Such a personalist understanding of international law scholarship allows one to assume that opinions in this area, developed by scholars but also by judges and scholars-members of collective bodies and organs responsible for researching, ordering and codification of international legal norms, reflect the research of particular individuals with verifiable scholarly output, publicly presenting their observations and theories, individually responsible for their propagated views.

Mention should also be made of the different weight of the two subsidiary sources mentioned in Article 38 of the ICJ Statute. This subtle distinction has been pointed out very aptly by Prof. Wolfke. Of course, he described both sources as subsidiary, yet, at the same time, he attributed a different role to judicature than to doctrine. Specifically, he pointed out that judicial decisions as law-making factors are legal, formal and self-sufficient only to the parties of a dispute; however, when stated *expressis verbis* in positive international law, they are legal, although due to the fact no law-making role has been attributed to them, they have an informal nature. However, doctrine does not determine

[94] G. Grabowska, Entry „Doktryna", [in:] B. Hołyst (editor-in-chief), J. Symonides, D. Pyć (scientific eds. of vol. IV), *Wielka Encyklopedia Prawa, tom IV – Prawo międzynarodowe publiczne*, Warszawa 2014, pp. 72-73.

the rules of international law in an unambiguous manner, but rather confronts them with a new practice by formulating and shaping them. And due to the fact that scholars sit in the International Law Commission and act in the capacity of experts appointed by this institution, one may even risk the statement that scholarly views are becoming a formal law-making factor as expressly foreseen in the procedures of the ILC[95]. A significant factor boosting arguments in favour of recognition of the peculiar formal significance of subsidiary sources is, therefore, a clear indication of these sources in acts of international law.

Simultaneously, it should be recalled that the overwhelming majority of scholars attribute a greater role to judicature than to doctrine (unlike Professor Wolfke), basing their view on the increasing quantity and role of judicature for the process of interpretation, application, and creation of norms of international law. However, given the already stressed mutual influence and interpenetration of legal scholarship doctrine and judicature, it is difficult to accept without reservation one of the quoted views. It rather seems as though the conclusion that both subsidiary sources mentioned in Article 38(1) (d) of the ICJ Statute are of equal weight is not incorrect.

Ultimately, we should agree with the view that "creation of international law is a highly complex and sophisticated process." The entire network of rules and principles, in turn, is a product of interactions between actors/entities/creators in the international community.[96] Thus, the influence of doctrine on the shaping and understanding of norms of international law, recognizing the leading role of the will of subjects of this legal system, seems rather obvious. The views of scholars constitute a significant factor in the development of law, yet they always remain in the background of actual decisions made by way of consensus. However, without scholarship, it would be hard to imagine the system of international law created by states and international organizations could remain coherent, logical and clear, and such effect should be an immanent characteristic of every law.

[95] K. Wolfke, *International Law-making Factors. An Attempt at Systematization*, PYIL, vol. XV, 1986, p. 246 and quoted M. Virally, *The Sources of International Law*, [in:] *Manual of Public International Law*, London 1968, p. 153.

[96] J. Detter, *The international legal order*, Cambridge 1994, p. 146.