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Jan Kolasa (ed.)

THE NATURE OF SOURCE IN INTERNATIONAL LEGAL ORDER

Wrocław 2017

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Preface

Fairly uniform in its mainstream, the position of science regarding sources of international law has been undergoing erosion for decades. This is largely due to the rapidly expanding scope of international relations governed by completely new branches of contemporary international law. This expansion is not limited to subject matter – such as the cosmos or the bottom of the seas and oceans. Contemporary international law is also enriching itself in its subjective sphere, creating new entities such as international organizations or empowering in many respects in its legal order the human being. Only the most general and obvious examples of transformations that inevitably lead to major change in today's international law are discussed.

Therefore, it is not surprising that from the observation of modern international law practice, a whole series of more or less convincingly argued new sources of law, not even mentioned in Art. 38 of the Statute of the ICJ, is emerging. The manifestations of such new sources of contemporary international law seem to largely distance the law itself from direct activity of the states in that regard, namely treaty and custom. The very essence of the traditional source of international law, the consent of states, is being questioned more and more boldly. Thus, a very complicated and entangled view of the philosophical-legal problem concerning the essence of the source of modern international law has emerged. However, my young research team has managed to convince me to focus attention to this complex and sensitive problem.

The title given to our research in this matter may rightly seem to many internationalists too serious and too brave. Especially when the proper nature of the subject matter and the nature of the research team of internationalist lawyers themselves is taken into consideration. And the issue presented in the title of this publication has aspects of a philosophical and legal nature. Well aware of this, we did not delude ourselves when taking up research on this multifaceted issue, or even more as we concluded it that we would be able to fully explain and convincingly justify the proper nature of the source of contemporary international law. It was rather about paying close attention to this serious problem, penetrating it from a few different grass-roots points selected from contemporary international practice.

On a few selected examples we have tried to investigate and show when, where, under what circumstances and, above all, under what conditions the actions or behaviour of the subjects, courts or opinions of scholars, and in particular their respective bodies, can and should be reflected in the sources of law in a certain binding form. It should be remembered that all this must be done within the established binding framework of the legal system, which on the one hand diminishes the permissible limits of action, but on the other hand results in new legislative possibilities.

Jan Kolasa

This study has conducted a closer analysis of several “supposed” sources indicated in the literature, apart from the unquestioned classical sources in the form of international agreements and customary law. These include unilateral acts of international organizations, unilateral acts of states, general principles of (international) law and judicial precedents, internal law of states, as well as scholarship of international law. The study made an attempt at determining the characteristics of the new sources, and how they contribute to our knowledge of the sources of contemporary international law. Where is the core of such a source?

Jan Kolasa

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