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A new and improved explanatory account of international law

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Résumés

English Slovenščina
Miodrag Jovanović has written an important account of why international law must be considered law. In this short review, I argue that his account succeeds at the cost of weakening a central feature of law, namely, its distinct normative force. By contrast, I suggest that we have the conceptual and descriptive tools needed to defend a more robust understanding of international law as providing its subjects with weighty reasons for action.

Nova in izboljšana razlaga mednarodnega prava. Miodrag Jovanović je napisal pomembno razlago o tem, zakaj je mednarodno pravo treba šteti za pravo. Avtor te kratke recenzije trdi, da Jovanovićeva razlaga uspe za ceno šibitve osrednje značilnosti prava, to je njegove normativne moči. Sam nasprotno trdi, da posedujemo pojmovna in opisna orodja, potrebna za zagovor robustnejšega pojmovanja mednarodnega prava, kot takega, ki naslovnikom ponuja tehtnih razlogov za ravnanje.

Entrées d'index

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Ključne besede (sl): mednarodno pravo, pravna filozofija, avtoriteta, pravni sistem

Texte intégral

1 *The Nature of International Law* is, as Miodrag Jovanović explains in its Introduction, largely an attempt to show that international law is actually law. In his own words, it should be approached as a "new and improved explanatory account of international law".[1] This is an important issue. There has been at the very least some anxiety amongst lawyers, and skepticism from scholars in other related disciplines, notably international relations, regarding whether international law is law in more than just the name. These lawyers and scholars typically doubt that law can properly exist beyond the sovereign state, that is, in conditions lacking the institutional machinery to centrally enact new rules and enforce compliance with them. Most pertinently, until recently there has been a longstanding neglect of international law (many would say disbelief) amongst leading legal philosophers (with the notable, but isolated exception of Hans Kelsen).

2 Jovanović notes that the idea of international law as a universal or global project owes much to natural law thinking, going as far back as ancient Greece. Yet this conception was undermined by the rise of legal positivism. The consolidation of legal positivism in international legal scholarship not only entailed the exclusion of significant parts of the planet from the international legal system in the early 19th Century,[2] it

context. The book is carefully researched, and it delivers in defending its central argument. In this short review I will first reconstruct Jovanvić's explanatory account of international law and will argue that if its central thesis succeeds, it is partly at the cost of defending a concept of law that seems a bit too austere. Second, I will concentrate on the way his jurisprudential analysis illuminates legal practice more broadly. I see mixed results in this respect. On the one hand it sheds some interesting light on the issue of relative normativity in international law, particularly on the conceptualization of soft law. On the other hand, his neglect of the resort to international law by domestic authorities both fails to capture an important aspect of international law's practice, and ultimately undermines its capacity to grasp some of its normative pull.

4 Let us start with Jovanović's central argument. He advocates thinking of law as genre (i.e., “a type of human activity”), which is distinguishable from other social practices. The concept of law may be characterized as a group of features clustered around a prototype case (3): it consists of rules purporting to coordinate the behaviour of actors and settle their disputes (“normativity”); it possesses institutions empowered to adjudicate violations to those rules (“institutionality”); it provides some coercive mechanisms for rule violations (“guaranteeing”); and the rules are “apt for inspection and appraisal in light of justice” (“justice-aptness”).[5] The book is essentially about whether, and the extent to which, international law satisfies these required features.

5 International law, Jovanović argues, fares reasonably well in each of these domains. First, he suggests, international law is now an “institutionalized and (coercively) guaranteed order”.[6] Admittedly, it operates in a different empirical setting than domestic legal systems in that the main actors (states) are both lawmakers and law-subjects. In this context, he presents a *very* brief "genealogical" account of international institutions. He standardly situates the beginning of international law as a horizontal "law of coexistence" amongst formally equal political actors with the Peace of Westphalia in 1648. This model led, through a sinuous road and after "the horror of two world wars", into a "global institutional structure" embodied centrally by the United Nations system.[7] Jovanović thereby concentrates on the roles of the UN Security Council and General Assembly as law-making institutions and, perhaps more decisively for his thesis, that of the International Court of Justice (ICJ) as a law-applying institution. This rather rachitic framework is considered a sufficient form of institutionalization for the existence of a legal system.

6 Second, to assess whether international law provides for any form of coercive “guarantees”, he suggests that we should concentrate on whether norm violators are exposed to some form of “inconvenience” against their will for having violated the norm.[8] He rejects classical conceptions of sanctions (e.g., *à la* Kelsen) as accounting for what prevails in the international legal system. By contrast, he follows Hathaway and Shapiro in claiming that international law significantly relies on “outcasting” - i.e. denying the violator the benefits of social cooperation and membership - as the central form of coercion, and that this suffices to confer international law the character of law.[9] Again, this is deemed enough to talk of international law as law.

7 Third, he argues that international law, through its performing functions of coordination and dispute settlement, is able to bring about and can be assessed by reference to justice (in his terminology, it is "justice-apt"). Although this includes both substantive and procedural justice, the key distinction in his account is between distributive and corrective or rectificatory justice. With regards to the former, he claims that given that states assume the double role of subjects in charge of the allocation of goods and of recipients of said goods, the most important primary rule to be distributed is sovereign statehood.[10] In particular, he claims that through the principle of self-determination (and of *uti possidetis juris*), international law has moved away from a system of distribution based on "discretion and sheer power politics", though he readily admits that it has not yet crystalized and institutionalized the principles of allocation so that it can sort out existing conflicts.[11] To be clear, the point is not that these rules are not shaped by power dynamics, but rather that they exist and can be appraised in light of demands of justice. With regards to corrective or rectificatory justice, the aptness of international law depends on there being secondary rules providing for responsibility as well as consequences for violating primary rules (sanctions). On the basis of the ILC's draft Articles on the Responsibility of States of Internationally Wrongful Acts (2001) and the "rapid judicialization of international law", he concludes that "all the necessary elements for the appraisal of international law in terms of rectificatory justice are gradually coming into place".[12]

8 The last feature that a prototype legal system must fulfil is normativity. Jovanović distinguishes between two aspects of this question, namely, how to ascertain the existence of a norm (the "epistemological perspective"), and how international norms (law) provide actors with reasons for action (the "perspective of practical rationality").[13] In terms of the former, he examines the way in which international legal rules may be ascertained, but he also examines the specific determination of customary rules, peremptory norms (*jus cogens*), *erga omnes* rules, and even accounts for the principle of desuetude. To illustrate, he uses NATO's bombing in Serbia in the context of the war in Kosovo to argue in favour of keeping the formal determination of international rules separate from their moral legitimacy, and *lege lata* from *lege ferenda* claims. Citing Judge Cançado Trindade, Jovanović defends formalism’s contribution to setting limits to discretionary unilateral acts that would "pave the way to uncertainties and unpredictability, to the possibility of creation of *faits accomplis* to one's advantage and to the other party's disadvantage".[14]

9 The key then is to show the distinctiveness of international law's rules against claims of competing normative systems, notably moral legitimacy, in technical and political discourse, and this much can be

11 It is often argued that law is distinctive in that its norms are binding (non-optional) for its addressees.[18] This endows the law with a special normative force to guide its subjects' behaviour. Raz has influentially indicated that authoritative legal rules work as exclusionary reasons, that is, as second order reasons to disregard other reasons against them.[19] This makes, Jovanović notes, legal normativity dependent on solving the problem of legitimate authority.[20] Accordingly, authority for Raz is based largely on his influential normal justification thesis (NJT), which claims that authorities help their subjects act in accordance with reasons that already apply to them (other than the authoritative directives) by following their directives rather than by acting directly on reasons that objectively apply to them.[21] The service view of the law has been adopted by legal philosophers in a number of different areas and for a number of different purposes.[22] But there is a problem with this account.

12 Many have argued for the implausibility of the idea that the law is owed blind obedience (Raz readily concedes this point). But it seems hard to accommodate this insight if authoritative directives are conceived not as reasons to be added to other reasons an agent has for performing (or not performing) a particular action, but rather as reasons that exclude and take the place of some of them.[23] If there are circumstances in which individuals ought, all things considered, not to comply with a legal rule but rather transgress it intentionally, then these rules cannot be content-independent, exclusionary reasons for action.[24] We can all think of situations in which this would obtain, such as when the law requires someone not to rescue migrants whose lives are at risk.[25] In this type of context, we standardly assess our obligation to obey the law vis-à-vis other competing obligations thereby admitting that authoritative legal directives do not exclude competing reasons.

13 Accordingly, Jovanović notes that we should treat legal rules as content-dependent reasons that need to be weighed against conflicting reasons. This means, he claims, that they would not be authoritative in the Razian sense.[26] Alternatively, he argues that we should construe law as non-optional, i.e. binding, in the more limited sense that it triggers some form of law enforcement. Coercive guarantees, which in the case of international law could be limited to outcasting, work as auxiliary reasons for the subjects of legal norms.[27] The normative weight assigned to law under this argument is thereby explained by reference to "respect" for law. This means that it is less connected to the legitimacy of political institutions and more with prudential reasons associated with legal sanctions and other reciprocal benefits stemming from compliance with the legal stem. Crucially, perhaps, this understanding of the binding force of law, Jovanović claims, is much better suited to the empirical conditions of the international sphere. The reason for this is that in the context of international society there are no central law-making institutions. Rather, the actors who create the rules are the same as those subject to them. Also, the jurisdiction of adjudicative institutions depends on the consent of those charged with breaking the rules.[28]

14 Nevertheless, accepting this significantly more modest understanding of international law's normativity does not come without consequence. Something important is arguably lost. If the central claim of the book is to show skeptics (philosophical, legal, and political) that international law is law, it seems to do so at the cost of depriving it of part of its distinct force in practical reasoning. This is particularly important in a world in which powerful countries boldly state that self-interest trumps international law for practically any purposes, but also, and perhaps most urgently, in the face of the well-known backlash against international law and international institutions. Furthermore, his idea of respect for law grounded on prudential reasons to avoid sanctions and other reciprocal benefits hardly accounts for the main reasons people actually comply with the law, as well as why they ought to comply. To that extent, it also fails descriptively. There is increasing awareness among scholars and practitioners that international law's operation relies less in prohibitions and increasingly in regulating conduct through incentives, nudges, and other mechanisms of governance.

15 Moreover, one need not buy the full package of exclusionary reasons either. Massimo Renzo, for instance, has advocated the conception of presumptive, rather than exclusionary reasons for action in order to account for legitimate, authoritative directives.[29] This move may help rescue a Razian understanding of the authority of law even if it does not yet tackle the difficulty of accommodating this notion of authoritativeness to the institutional reality of the international sphere. Some are sceptical as to whether this is possible.[30] Others rely on deliberative conceptions of democracy, and a more inclusive, open, public international sphere to ground the authoritativeness of law even in this broader domain.[31] Admittedly, this is a difficult conceptual and normative issue. My point here is only that contenting oneself with the claim that the reasons for action the law provides have to do with the possibility of legal sanctions (particularly in a system where that possibility is particularly thin) may undermine what I believe was the central purpose of the book. It seems to me that in this important respect Jovanović throws in the towel too quickly.

16 Let me now turn to a different aspect of the book. Jovanović argues that his project should be assessed primarily by the yardstick of legal philosophy. Yet he suggests that this conceptual project must "cast some new light on the legal practice" and "offer to those working in this practice a fresh perspective on the issues with which they deal on a daily basis".[32] Again, international lawyers are generally skeptical of the relevance of philosophical inquiry for their discipline, at least of analytical jurisprudence. Jovanović opens his book with a quote from Ian Brownlie claiming that "[i]n spite of considerable exposure to theory, and some experience in teaching jurisprudence, [Brownlie's] ultimate position has been that ... theory produces no real benefits and frequently obscures the more interesting questions".[33] Jovanović takes the issue of illustrating his

helpful. What we need to examine is precisely what is gradable. Jovanović suggests it is useful to disentangle the concept of a norm's validity from its bindingness.[36]

18 He argues that whereas validity is not a gradable notion (a norm is either valid if it has been enacted in accordance with the relevant procedure and it is invalid if not), bindingness can be plausibly considered a matter of degree in terms of a rule's normative weight in practical reason. Accordingly, it is unhelpful to think about soft law in terms of whether it is more or less law, i.e., its "relative legality", and more appropriate to acknowledge that states have simply decided to regulate their behaviour by non-legal instruments.[37] This proposition is entirely compatible with the claim that law's normativity is neither peculiar, nor exclusive, of other non-legal normative requirements. When one rejects the claim that law provides its subjects with reasons of distinct normative weight, it becomes open for other types of norms to play a similar role in practical reasoning. The only relevant difference is simply that states do not want to subject violations to judicial enforcement.

19 At the same time, some provisions inserted into treaties or other legal instruments are often called 'soft-law' on the grounds that they do not make discernible demands on those to which they apply. That is, they are inserted in "fully fledged valid legal instruments/rules" but their "function of guiding human behavior is low".[38] In this type of case, Jovanović concludes, we are simply in the presence of legal provisions given that "it may transpire that some such allegedly potestative provisions actually enable third parties, including tribunals, to determine their content of the required behaviour".[39]

20 On the other hand, the book fails to address an increasingly central aspect of international law's enforceability, namely its complex relation with domestic courts (and domestic law). Similarly, the book fails to address international law's increasingly clear pluralism.[40] International norms are often enforced by domestic courts, both directly and indirectly, through domestication or implementation of international treaty provisions and the application of customary international rules. Treaty provisions are also increasingly being recognized as having privileged hierarchy vis-à-vis domestic legislation, and domestic parliaments are increasingly taking part in ratifying international treaties.[41] Domestic officials also apply international and transnational norms on a regular basis, even without the need of formal domestication.[42] Regional systems become far more influential than those at the global level, as has occurred in the area of international human rights law. Finally, global civil society is taking on an increasingly important role in international law-making, as illustrated by the (admittedly unusual) role and number of NGO's in the Rome Conference drafting the Statute of the International Criminal Court, the leading role of the ICRC in the field of the laws of armed conflict and the political contestation in places as diverse as Hong Kong, Brazil, and Geneva, to name a few. These phenomena paint a picture of international law being more robust, albeit also messier, and in need for further exploration than Jovanović seems to admit. This brings us again to the question of how we calibrate its normative weight, and whether focusing exclusively on prudential reasons does justice to international law's normative pull.

21 In sum, Jovanović presents a sophisticated, tightly argued account for considering international law, law. In doing so, he provides useful guidance on determining when a particular rule belongs to international law and when it would be better viewed as part of a competing normative system as exemplified in my brief discussion of soft law. Yet, he reaches this verdict perhaps at the cost of significantly weakening the normative force of international law (and law in general) in political/practical decision-making. He may legitimately retort that it is the best we can do, since jurisprudence is about capturing legal phenomena and the strengths or weaknesses of its conceptual analysis should be measured on whether it does so appropriately or not. True. We should not assess this type of enterprise on whether we (normatively) like the result. In this respect his project seems to stand on firmer ground than Dworkin's theory of international law, which was arguably built for a world very different from our own.[43] Yet I have also suggested that this thin view of law's bindingness is not fully explicative of the role that law plays both domestically and at the level of international law in terms of the reasons for relevant actors' behaviour. That such explanation hardly suffices to account for its role in practical reasoning is increasingly clear when looking at its role in decision-making by domestic courts and different regions/countries. I suspect this is a good thing after all. If we care about international law being law, it is precisely because of its capacity to impose distinctively weighty obligations on its subjects.

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Bibliographie

Becker Lorca, A. (2014). Mestizo International Law: A Global Intellectual History 1842-1933. Cambridge University Press.

Buchanan, A. (2010). The Legitimacy of International Law. In S. Besson & J. Tasioulas (Eds), The Philosophy of International Law (pp. 79-96). Oxford University Press.

Chehtman, A. (2010). The Philosophical Foundations of Extraterritorial Punishment. Oxford University Press. DOI : 10.1093/acprof:oso/9780199603404.001.0001

Christiano, T. (2004). The Authority of Democracy. The Journal of Political Philosophy, 12(3), 266-290.

Haque, A.A. (2017). Law and Morality at War. Oxford University Press.
DOI : 10.1007/s11572-012-9165-x

Jovanović, M. (2019). The Nature of International Law. Cambridge University Press.
DOI : 10.1017/9781108608060

Kingsbury, B. (2015). Three models of 'distributed administration': Canopy, baobab, and symbiote. ICON, 133(2), 478-481.
DOI : 10.1093/icon/mov026

Klabbers, J. (1996). The Redundancy of Soft Law. Nordic Journal of International Law, 65(2), 167–182.
DOI : 10.1163/15718109620294889

Maisley, N. (2017). The international right of rights? Article 25(a) of the ICCPR as a human right to take part in international law-making. The European Journal of International Law, 28(1), 89-113.
DOI : 10.1093/ejil/chx010

Pettit, P. (2010). Legitimate International Institutions: A Neo-Republican Perspective. In S. Besson & J. Tasioulas (Eds), The Philosophy of International Law (pp. 139-160). Oxford University Press.

Rackete, C. (2019). Captain who rescued 42 migrants: I'd do it again despite jail threat. The Guardian, available at https://www.theguardian.com/world/2019/jul/05/captain-who-rescued-42-migrants-id-do-it-again-despite-jail-threat (last visited on September 6, 2020).

Raz, J. (1975). Practical Reason and Norms. Oxford University Press.
DOI : 10.1093/acprof:oso/9780198268345.001.0001

Raz, J. (1979). The Authority of Law. Clarendon Press.

Raz, J. (1988). The Morality of Freedom. Oxford University Press.
DOI : 10.1093/0198248075.001.0001

Renzo, M. (2019). Political Authority and Unjust Wars. Philosophy and Phenomenological Research, 99(2), 336-357.

Roberts, A. (2017). Is International Law International? Oxford University Press.
DOI : 10.1093/oso/9780190696412.001.0001

Rodriguez-Blanco, V. (2014). Law and Authority under the Guise of the Good. Hart Publishing.

Tasioulas, J. (2010). The Legitimacy of International Law. In S. Besson, & J. Tasioulas (Eds), The Philosophy of International Law (pp. 97-116). Oxford University Press.

Verdier, P.-H. & Versteeg, M. (2015). International Law in National Legal Systems: An Empirical Investigation. American Journal of International Law, 109(3), 514-533.

Notes

1 Jovanović 2019: 7

2 Becker Lorca 2014.

3 Jovanović 2019: 21. Yet, see recent contributions by Buchanan 2010, Christiano 2010, Pettit 2010 and Tasioulas 2010, as well as Dworkin 2013 (posthumous).

4 Raz 1975: 150ff.

5 Jovanović 2019: 76.

6 Jovanović 2019: 157.

7 Jovanović 2019: 161.

8 Jovanović 2019: 185.

9 Jovanović 2019: 186.

10 Jovanović 2019: 195.

11 Jovanović 2019: 201.

12 Jovanović 2019: 207.

13 Jovanović 2019: 78.

14 Jovanović 2019: 97.

15 Jovanović 2019: 130.

16 Jovanović 2019: 84.

17 Jovanović 2019: 156.

18 Jovanović 2019: 130.

19 Raz 1979: 3.

20 Jovanović 2019: 133.

21 Raz 1988: 53. For criticism see, e.g., Christiano 2004, among many others.

22 See, e.g., Haque 2017. I have also endorsed it in Chehtman 2010.

23 Raz 1988: 46.

24 See, e.g., Rodriguez-Blanco 2014: 157 (cited at Jovanović 2019: 135).

25 See, eg, the courageous act of Carola Rackete, in The Guardian, "Captain who rescued 42 migrants: I'd do it again despite jail threat", available at

33 Jovanović 2019: 1.

34 Jovanović 2019: 153.

35 Klabbers 1996: 180 (cited at Jovanović 2019: 153).

36 Jovanović 2019: 150.

37 Jovanović 2019: 154.

38 Jovanović 2019: 154.

39 Jovanović 2019: 155. Cited from D'Aspremont 2008: 1087.

40 See, e.g., Roberts 2017.

41 See Verdier & Versteeg 2015.

42 See Kingsbury 2015.

43 Dworkin 2013: 1-30.

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