Justice-aptness and international law

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We need more books like *The Nature of International Law*. That is, books that make a careful and nuanced effort to understand the defining characteristics of normative orders we christen with the name ‘law,’ and assess the extent to which international law exhibits those characteristics. These are also books that question the usefulness of thinking about law through the model of domestic law, that is, of identifying and ultimately granting legitimacy only to legal systems that look like the top-down legal system of existing states, with legislatures, centralized enforcement, and strict legal hierarchies. International law, by contrast, is mostly contractual, made up of treaties among states, with little enforcement, an important body of customary rules, a smattering of courts and arbitration tribunals, and few settled hierarchies among its legal norms. The salutary conclusion of *The Nature of International Law* book is twofold: 1) we must rethink the defining features of category of concept we call law, and 2) we must include international law as a member of that category. This way of rethinking the boundaries of law broadens our understanding of the nature of law and loosens the grip of those features, which are artifacts of the evolution of the state system itself, but which could be divorced from law proper.

Miodrag A. Jovanović provides an exciting and intriguing rethinking of the nature of law. Jovanović, who has written extensively on minority rights, constitutionalism, secession, human rights, and the challenges of multiethnic societies, is well aware of the role international law can play in shaping, spearheading, and obstructing changes in domestic law and public policy. In this new work, he provides an empirically informed conceptual understanding of international law, in line with and inspired by ground-breaking developments in analytical jurisprudence over the last century. He believes that one important resource for reflecting on the nature of law comes from careful conceptual analysis. Borrowing from Robert Summers, Jovanović describes conceptual analysis as not one activity, but “a family of related activities” which includes ‘breaking down concepts, differentiating concepts, corelating and/or unifying
related concepts, classifying them charting their implications”. Conceptual analysis provides some of the tools to understand the distinct contribution law makes to social and political life. It compares and contrasts law with other systems of social rules, such as the rules of etiquette, the rules of sports, or religious rules.

The conception of international law in this book is also empirically informed because it takes certain social facts to be essential to our understanding of the concept of law. Two types of social facts are particularly relevant. The first is that “international law talk is impossible without a world of multiple political communities, each conscious of the idea that it should be ruled from the inside rather than outside, and of the choice between rule-based and rule-less relations among them”. The second is that concepts cannot be understood without reflecting on their conventional functions and attributes, and law as a complex social practice is no different. The existence of states, the patterns and possibilities of their interactions, and the ability to affect each other negatively or positively are surely relevant facts, as are the conventional uses we make of law to generate social order.

Yet, Jovanović rejects the kind of conceptual analysis that relies on identifying necessary and sufficient conditions for categorizing the social world. Analytical jurisprudence (in line with much of analytical philosophy) has proceeded on the view that one identifies the essence of law by identifying its jointly necessary and sufficient characteristics. However, many attempts to do so have run into the problem of cases that do not meet all the necessary and sufficient conditions, but that we would be remiss not to consider as part of the same concept.

Jovanović’s solution to this problem involves working with a different ideal of conceptual analysis of law, one that seeks to identify its typical features. Flying is a typical feature of birds, but not all birds fly. We might learn something about the nature of birds from birds that fly even if not all of them do. So too with law. Borrowing from Frederick Shauer, he calls this the prototypical theory of law. Prototypical features teach us about the characteristics of law, but dispense with the notion that they must be jointly present in all instances we categorize as law. Such features can have different weights and degrees of salience.

Four features are prototypical of the law as a social practice in Jovanović’s view: 1) its function to provide rules of behavior and dispute settlement, 2) institutionality, 3) coercive guaranteeing, and 4) justice-aptness. The first refers to the idea that law is one normative system of a large class of normative systems, which purport to guide behavior via rules. The second, called institutionality, is one of the features distinguishing law from other systems of rules that also regulate human behavior, such as rules of etiquette. Many normative orders are predicated on judgments about one’s own and other’s compliance with the rules. In legal systems, those judgments are institutionalized. Thus, institutionality refers to norm creating and norm applying institutions. The third feature, coercive guaranteeing, further distinguishes law from other social rules by the fact that violence or the threat of violence can be used to enforce it. This is also what gives law a hierarchically superior, dominant status among systems of social rules. The fourth, justice-aptness, is meant to distinguish law from positive normative orders by identifying justice as “the key value law is supposed to bring about”.

The framing of the nature of international law in terms of its prototypical features is salutary and would benefit from a more extensive discussion of these features,
including why they were selected when there were other features that could have been emphasized. For example, institutionality must be spelled out more clearly as a distinguishing feature of law and how best to understand its properties through examples. Is institutionality connected to the rule of law, such that legal institutions must have the property of impartiality in order to qualify as a feature of law rather than of a different normative system? In addition, why leave out features such as systematality, validity, and widespread compliance when they have been considered central to our understanding of law by other legal scholars? Despite leaving some of these questions unanswered, the book offers an instructive and incisive application of the prototypical theory of law to international law. But, as I will show, the grounds for concluding that international law contains these prototypical features must be strengthened.

There are nonetheless some clear advantages to this framework compared to alternative accounts for understanding the nature of international law. Take H.L.A. Hart’s account of law, which is one of the most influential of the 20th century. Hart believed that we can identify law by its systemic qualities. In his view, legal rules are part of legal systems, and legal systems are characterized by the union of primary rules of behavior, which are habitually followed by individuals, and secondary rules, which explain how primary rules get created, changed, and adjudicated and which are applied by officials. The most important of the secondary rules is the rule of recognition, which establishes criteria of legal validity in the system, and which enables both subjects and outsiders to identify applicable law in that system.

One fundamental problem with this way of understanding legal systems is that we cannot distinguish them from other complex systems of rules, such as sports and religious practices, where we also have a union of primary rules of behavior and secondary rules for making and applying primary rules. Jovanović’s four prototypical features offer us a way out of this ambiguity. The addition of features such as institutionally and coercive guaranteeing distinguish law from other normative systems that also guide behavior. In particular, institutionality and coercive guaranteeing explains the special, higher status of law as a normative order, which provides the framework of rules and institutional backing for the existence of other normative orders.

To prove that international law provides rules of behavior and mechanisms for dispute resolution, Chapter 4 offers a discussion of the sources of legal validity in international law. The discussion of sources, although fairly conventional, offers new insights into the limits of assessing legal validity in international law. The chapter provides an overview of customary and treaty law, other secondary sources identified in Article 38 of the Statute of the International Court of Justice, (ICJ) and in addition of jus cogens, erga omnes obligations, and the decisions of international organizations. Some of these are omitted from Article 38 as formal sources, but function as such in practice. What Jovanović brings to light with his characteristic conciseness is the extent to which, outside of treaties, which typically involve written agreements, the valid norms of international law are difficult to identify, giving rise to significant disagreements about the content of rules and their implications for state behavior.

Take for instance customary rules, which according to the predominant understanding require two elements: first, settled and uniform state practice and second, opinion juris, namely a sense of legal obligation on the part of states related to the practice. The
The main problem with customary law is that neither the existence of the practice nor the sense of legal obligation on the part of state officials can be easily ascertained. Moreover, the ICJ, which has identified a number of customs in its decisions since it has been created, has failed to provide a methodology for recognizing valid international legal customs. Thus, some scholars have come to regard customary law with a large dose of skepticism: “almost anything goes in the ascertainment of custom”.

Although subject to less uncertainty compared to customary law, *jus cogens* norms and obligation *erga omnes* face similar difficulties. *Jus cogens* norms have evolved as a set of rules with a quasi-constitutional status in international law, from which derogation is not allowed. Obligation *erga omnes* are obligations of states towards the international community as a whole, regardless of whether they are the result of state consent or not. But while there is some agreement on both the former and the latter with respect to their content in practice, states have been reluctant to formally agree on a list of such norms, or come to a shared understanding regarding how they emerge or change.

This is hopefully changing now that the International Law Commission (ILC) led by special rapporteur Dire Tladi is reviewing the content and character of peremptory norms, and as of 2019 has issued a report proposing a non-exhaustive list of norms of *jus cogens*. The existence of this process at the ILC confirms Jovanović’s concern about the continued difficulty of identifying these important sources of international law. However, and more important for our ability to identify the nature of international law, it is not entirely clear what is supposed to follow from this concern. Is it sufficient that some legal norms, such as those created by treaties, are more easily identifiable such that the first criteria that international law is a normative order is met? Or is the fact that many of its officially recognized sources lack criteria of legal validity such that as a legal order international law becomes somewhat deficient? The subsequent and illuminating discussion of the sources of uncertainty in international law adds little to clarify this issue. This discussion reveals other sources of uncertainty in international law, including those arising due to conflicts between different areas of international law, or those related to the precedential weight of individual rulings of international courts. In a reassuring move, we are told that absolute legal certainty is not possible in either domestic or international law. This is the right thing to say to those who, consciously or unconsciously, hold international law to higher standards than municipal law. However, it still may be the case that international law is ‘categorically more uncertain’ than domestic law. In order to make the case that it is not, we need to be able to make relative judgments about the degree of uncertainty present in each legal system, and whether and at what point, if at all, uncertainty disqualifies a normative order as law.

The most important problem that Jovanović’s account faces is clarifying the place of the fourth feature, namely justice-aptness in elucidating the nature of law. The insistence that law has an important connection to justice rings true, but that connection remains elusive. For Jovanović, justice is not merely relevant to law but is a (proto)typical feature of law. We can unpack this claim in several ways. The first comes from the idea that justice is “the key value which law is supposed to bring about”. In other words, the most important function of law is to bring about justice. The function of law is supposed to play an important role in clarifying its nature. Therefore, identifying the function of law is supposed to reveal something important about its most important characteristics. Yet, it is difficult to see why law is supposed to bring about a sole key value or function rather than a range of values or functions. There are
other candidates, such as peace, prosperity, predictability, etc. If justice has a preferential, 'key' role to play, we need to hear more about why, and more specifically about the conception of justice that law is supposed to bring about.

14 The language of ‘justice-aptness’ suggests a second, weaker connection between law and justice. By justice-aptness, Jovanović captures the idea that law “is the kind of thing that is apt for inspection and appraisal in light of justice”. But normative orders can be justice-apt, that is, liable to be assessed according to standards of justice, without themselves aiming at justice. The hiring practices of a company could be justice apt even while aiming at hiring the best professionals for the available vacancies. The procedures of a city council decisions can be justice apt even while deciding the location to place a bridge over a river. We can thus determine whether a legal system is just without assuming that its main function is to bring about justice.

15 Notice that if this is true, accepting justice-aptness as a feature of law is less helpful in describing the nature of law. It does not provide the same descriptive role for justice as flying does for birds. It is instead like saying that we can evaluate birds on whether they are healthy or not. But health is neither a specific feature of birds nor a feature that helps us distinguish birds from other living things. So too, justice-aptness is not specific to law, nor does it help us in distinguishing law from other normative orders.

16 One could argue that justice-aptness is not supposed to help us individuate law by itself, but only in conjunction with all the other prototypical features. This is plausible because when we talk of flight as individuating birds, we consider it along with other features, such as feathers, beaks, etc. Flight by itself is not specific to birds alone, it characterizes insects as well. Yet notice that health does not offer the right kind of descriptor needed to make sense of the nature of birds even in conjunction with all the other features. This is true of justice-aptness too. As a property of normative orders, it is too broad and non-specific to identify a characteristic of law as a type.

17 A third, and more promising claim about the connection of justice and law is that “law generates belief among its norm-subjects that in usefully performing its general function of coordination and dispute settlement it can bring about the value of justice”. In other words, law’s subjects believe that one of the main functions of the law is it to bring about justice. On the face of it, this looks like an empirical claim, which can be subject to empirical verification. Even assuming this empirical claim is true, we need to further evaluate whether law’s subjects are justified in holding that belief, and if we are indeed dealing with a justified belief, what specific characteristics of law could give rise to it. Assuming people are not deluded in their expectation that law delivers justice, some of the candidate features could be procedural justice, rights protection, and rule of law.

18 Procedural justice consists in rules being applied and interpreted impartially through a process that considers evidence appropriately and in which the final judgment reflects the facts and rules with integrity. We typically think about procedural justice in connection with dispute resolution, but of course procedural justice permeates law making and enforcement as well. Rules must be made by duly appointed representatives who decide in accordance with certain voting rules chosen for their fairness and who take the citizens’ interests and rights into account. And they must be applied evenly and without prejudice or bias. Another feature that could explain a belief in the connection between law and justice is that law often has substantive provisions for rights protection: rights of bodily integrity, political rights, property
rights, rights of non-discrimination, etc. By expecting law to deliver justice, people may be expressing a belief that law ought to be the guarantor of those rights. Finally, rule of law features could be connected to the expectation that law should deliver justice, insofar as rule of law ideals are moral ideals requiring equality before the law, prospectivity, access to courts, coherence between various legal obligations, proportional punishment, and an independent judiciary. Procedural justice, rights protection, and rule of law requirements overlap but they represent distinct ways of characterizing law’s function to reflect and generate justice. Moreover, each of them would individuate law as a distinctive social phenomenon.

19 These are just some of the ways we could work out the functional role law has in delivering justice, they are not the only ones. But where does this leave us with respect to international law? In Chapter 6 Jovanović refers to substantive and procedural justice as features of international law. Substantive and procedural rights for states stem from customary and treaty law as the main sources of justice in international law. 17 But he prefers the language of distributive and rectificatory justice to characterize international law, and the discussion that follows is rather brief. The point of distributive justice is the distribution of legal rights and responsibilities for states. States are both officials and subjects of international law, and in that dual role they both allocate rights and are subject to that allocation. 18 Distributive justice concerns the substance of the law, while rectificatory justice concerns dispute resolution, the latter of which is discussed in the context of the rapid judicialization of international law over the last three decades. Regardless of whether Jovanović decides to pursue the distributive/rectificatory dimensions of justice in law or the procedural/substantive/rule of law dimensions of law, in the end he will have to address the positivist concern that justice and validity are distinct, and that unjust laws can be and are broadly recognized, both in practice and jurisprudence, as valid laws. In the end, more is needed to persuade readers that justice or justice-aptness is a prototypical feature of law as opposed to a way of evaluating normative orders in general, unless they are connected with more specific, justice enhancing features of the law, such as procedural justice, rights protection, or the rule of law. Without these features, the idea that the function of law is to deliver justice does not offer additional insight into the nature of law as a system of social rules with a distinctive role to play in regulating behavior.

20 Despite these loose ends, the book opens up important and thought-provoking questions about the nature of law and the connection between law and justice. And it provides insightful new pathways for thinking about the character of international law. In this respect, it does what good books, do, which is to invite us to reflect on our own understanding of the nature of law. This alone is an excellent reason to read it.

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NOTES

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ABSTRACTS

In contrast to theories that seek to find necessary and sufficient conditions which individuate law as a system of rules, Miodrag A. Jovanović provides a fruitful rethinking of the nature of law. Building on Frederick Schauer’s work, Jovanović identifies prototypical features of law that teach us about law’s characteristics, but dispense with the notion that they must be jointly present in
all instances we categorize as law. This new approach opens up prolific new ways of thinking about the nature of international law. Jovanović proposes four such features: 1) its function to provide rules of behavior and dispute settlement, 2) institutionality, 3) coercive guaranteeing, and 4) justice-aptness. He argues that international law displays them to a sufficient degree for us to recognize its law-like character. I discuss some of the features of this account and propose three avenues of further developing the idea that international law is justice-apt.

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