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*Miodrag Jovanović**

THE NATURE OF INTERNATIONAL LAW AND BEYOND: A REPLY TO COMMENTATORS

1. Introduction

A book symposium often resembles a simultaneous chess exhibition (a.k.a. 'simul'), in which one player plays multiple games at a time with a number of other players. Unlike in a typical simul, in which a grandmaster plays with lower ranked players or even amateurs, the book author is in the exchange of argumentative moves usually faced with academic players of the similar, if not even higher, scholarly ranking and prestige. And yet, the organized book symposium is, akin the simul, "an excellent opportunity to flatter a master's vanity". In words of Dutch grandmaster Jan Hein Donner, "[l]ike a surgeon, he strides along the boards, where terminally ill positions are spread out for his inspection."[1]

Although I was deeply and truly flattered by the joint initiative of my colleagues and friends – Bojan Spaić, President of the IVR Serbia, and Violeta Beširević, Editor in Chief of *Pravni zapisi* journal – to organize a symposium for my last book *The Nature of International Law* (hereinafter *NoIL*), I did not think for a minute that in having the chance to respond to the raised comments and criticisms I will eventually assume the status of an inspecting surgeon, dealing with terminally ill (argumentative) positions. To the contrary, knowing the academic credentials of the invited Symposium's discussants – Goran Dajović, Tatjana Papić, Jernej Letnar Černič, Miloš Hrnjaz and Ana Zdravković – I knew that what I was about to encounter were very alive and kicking arguments, coming from both international legal theory and general jurisprudence. In fact, all the participants approached their task as if they were inspired by Donner's advices to the simul-giver's challengers – to "play something [they] know

* Full Professor, Faculty of Law, University of Belgrade; e-mail: miodrag@ius.bg.ac.rs

1 Donner, J. H., 2006, *The King: Chess Pieces*, Alkmaar, New In Chess, p. 250.

well" and to play it "aggressively" that is, self-confidently.[2] As a result, their commentaries at times go well beyond what I said or intended to say in *NoIL*. While the author's vanity is fed whenever his book becomes the source of inspiration for other scholars to further develop some ideas and concepts, I will, nonetheless, refrain from commenting such novel argumentative positions. Sticking to the traditional idea of book symposium, in the remainder of the paper I will tackle only those criticisms that are directly or indirectly related to my very own positions from *NoIL*. Although they are all concerned with different issues, the connecting, overarching theme is that of normativity of international law. Therefore, I will integrate my observations in a single response to all the reviewers.

2. Many Faces of International Law's Normativity

I will proceed from Dajović's contribution,[3] which entirely focuses on the concept of international law's normativity. In generally holding that I "erred less in what I said, and more in what I missed to say"[4], he is trying to offer a more suitable conceptual framework within which international law's normativity can be better comprehended.[5] More precisely, Dajović argues that the steps I undertook in *NoIL* in elucidating normativity of international law is misplaced and, to a large extent, wrong and that the alternative he proposes would better fit my own methodological approach – prototype theory of concepts.[6] To begin with, my insistence on criticizing Raz's influential theory of legal norms as exclusionary reasons for action was, according to Dajović, mostly unnecessary. This is so due to the fact "international law's specificities are such that they cannot be satisfactorily incorporated into the Razian conceptual framework." Namely, since Raz's starting point is that law necessarily claims legitimate authority, justificatory reasons with which law provides its subjects are profoundly moral in nature. Dajović suggests that I share this idea that only moral reasons are right reasons for action. But the problem is this – unlike the municipal

2 *Ibid.*, p. 251.

3 Dajović, G., 2021, Normativnost međunarodnog prava (Normativity of International Law), *Pravni zapisi,* 2, str. 488–522.

4 *Ibid.*, str. 519.

5 *Ibid.*, str. 491.

6 This theory and its relevance for the conceptualization of (international) law is elaborated in Ch. 2 of *NoIL*, and is further developed in Jovanović, M., 2021, On *The Nature of International Law*: Rejoinder, *Revus – Journal for Constitutional Theory and Philosophy of Law*, 43, pp. 193–215 and On The Nature of International Law: Rejoinder (openedition.org), Jovanović, M., 2021, On Law and Coercion – Once Again, *Jurisprudence*, Vol. 12, No. 3, pp. 417–425.

level, at which authority implies relations of hierarchy and subordination, the international level is largely horizontal in nature, and, hence, not apt for Razian conception.[7] This has, in Dajović's opinion, led me to a second erroneous move of "'diluting' and 'gradating' Razian normativity of municipal law in order to adapt it to the empirical reality of international law."[8]

Dajović's alternative proposal concerns the employment of Hart's conceptual framework of "internal point of view", which refers to the practical attitude of rule acceptance. In Hart's own words, "it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view'."[9] Dajović provides a brief survey of several theoretical attempts which try to show that "internal point of view towards certain standard of behavior can turn it into a normative standard, that is, a reason for the justification of our behavior."[10] In the last step, Dajović argues that, having acceptance at its core, Hart's framework is well equipped to highlight normativity of various international legal rules, such as customary rules or *jus cogens* norms.[11]

Let me start my response by reminding of what Dajović noticed as well, that this discussion is taken within the second 'how' question of normativity, which endorses the perspective of practical rationality. It asks how (legal) norms provide us with reasons for action.[12] In that respect, it is important to emphasize that all prescriptive statements, be they favors, advices, requests or any type of rules (of morality, religion, etiquette, fashion, custom or law) are normative in nature. That is, in prescribing what ought to be, these statements purport to guide our behavior, by providing us with specific reasons for action. In light of this insight, it is not clear how to understand Dajović's claim that "the primary question" in our discussion about international law's normativity is "how at all and under what conditions would be possible for international legal norms to be reasons for action".[13] Irrespective of whether international rules of conduct are classified as 'legal' or not, they are indisputably normative in the aforementioned sense, insofar as they purport to regulate behavior of actors at

7 Dajović, G., 2021, str. 502.

8 *Ibid*., str. 501.

9 Hart, H., 2012, *The Concept of Law (with an Introduction by Leslie Green, 3rd ed.)*, Oxford, Clarendon Press, p. 91.

10 Dajović, G., 2021, str. 508.

11 *Ibid*., str. 515.

12 The first 'how' question calls for the epistemological perspective. It is concerned with finding out how to ascertain a norm, and more specifically a legal norm.

13 Dajović, G., 2021, str. 500.

the international plane. Whether they succeed in that or not is completely different question. What, thus, emerges as a potentially relevant issue is: what type of reasons is provided by international rules of conduct? The answer to this question might be of crucial importance for solving the puzzle of legality of international rules of conduct, particularly if one concedes to a widespread thesis that legal rules provide us with some special type of reasons for action.

However, this was not my intention. In fact, I take the belief that the domain of legal is successfully elucidated once its, allegedly exceptional, normativity is clarified as one of the most common jurisprudential errors, which I wanted to expose in *NoIL*.[14] Since Raz developed the most influential theory of that sort, claiming that what distinguishes legal from other rules (and prescriptive statements) is that it provides its subjects with "exclusionary reasons for action", this theory seemed to be the natural target of my critique. Now, Dajović's disapproval might be justified if a) Raz is clear that his theory is deliberately devised to elucidate only the nature of municipal law; and/or b) specific legal raw data at the municipal and international level are so different that they warrant distinctive conceptualizations of normativity of relevant rules of conduct.

Neither of the two is defensible. True, in the early stage of his career, Raz argued that what mattered was that "the theory will successfully illuminate the nature of municipal systems".[15] Some four decades later, the global legal landscape, shaped by the relation between municipal and international law, has changed so dramatically that Raz was forced to admit that "exclusive concentration on state law was, it now turns out, never justified, and is even less justified today".[16] Moreover, in discussing some

14 The other four most common mistakes are the following: the normativity of law is exhausted in the discussion about the nature of legal obligation; there is a direct link between the concepts of 'normativity', 'validity' and 'bindingness'; normativity *qua* bindingness of law is taken for granted; *How* questions of normativity and the *why* question, *i.e.* the problem of source(s) of law's normativity, are not clearly distinguished.

15 He adds that it may turn out that they "are not unique, that all their essential features are shared by, say, international law [...] If this is indeed so, well and good." Raz, J., The Identity of Legal Systems, in: Raz, J., 1979, *The Authority of Law – Essays on Law and Morality*, Oxford, Oxford University Press, p. 105.

16 In particular, "we need to rethink the relations of state-law to other legal systems, as the scope both of the authority and of the sovereignty of states has diminished and is likely to diminish still further, and the ways states integrate within the emerging international law is going to confront us with practical and theoretical problems." Raz, J., Why the State?, in: Roughan, N., Halpin, A. (eds.), 2017, *In Pursuit of Pluralist Jurisprudence*, Cambridge, Cambridge University Press, p. 161. Some of these ideas are further developed in, Raz, J., The Future of State Sovereignty, in: Sadurski, W.,

of the aspects of the aforementioned relation, Raz explicitly states that his theory of authority, and concomitantly of legal rules as exclusionary reasons for action, applies to international bodies as well.[17]

He may arguably be wrong about that. Specificities of the *international* realm may indeed be of such a nature that they warrant different approach towards the problem of normativity of international rules of conduct, as argued by Dajović. While the premise of this reasoning is correct, the concluding inference is, however, not. And for the reasons I already mentioned – normativity is one and the same across the entire normative world. As put by Spaak: "[T]here is only one sense of normativity, only one sense of 'ought,' so that although we may with good sense speak of the normativity of law or the normativity of morality, etc., there is no specifically moral or legal or prudential type of normativity, but only normativity plain and simple."[18] Therefore, while one may try to argue, along with Austin, that international rules of conduct should be classified as "positive morality" rather than "positive law",[19] one may not challenge the normativity of those rules.

This, furthermore, implies that my idea in *NoIL* was not to somehow dilute the normativity of municipal law in order to apply it at the international level, as claimed by Dajović. By criticizing Raz's conception of legal rules as exclusionary reasons for action, I tried to show that, when primarily understood as the capacity to give rise to obligations,[20] legal normativity can clearly be endowed with relative weight. In that respect, there is nothing special about the normativity of law. Law's normative force competes with the normative force of other normative orders (and at times, with the normative force of certain prescriptive statements). What, then, might appear puzzling is law's overall capacity to be authoritative for its norm-subjects, that is, to generate the sense of obligation. My argument is that the authoritativeness (*i.e.* bindingness) of law cannot be attributed

Sevel, M., Walton, K. (eds.), 2019, *Legitimacy: The State and Beyond*, Oxford, Oxford University Press, pp. 69–81.

17 Raz, J., 2017, p. 161. Finally, taking Raz's theory to the international level was by no means my invention. For an attempt to adapt Raz's theory for the international sphere, see, Besson, S., 2009, The Authority of International Law – Lifting the State Veil, *Sydney Law Review*, Vol. 3, No. 3, pp. 343–380. For a critical appraisal of Raz's theory in light of international law's specificities, see, Çali, B., 2015, *The Authority of International Law – Obedience, Respect, and Rebuttal,* Oxford, Oxford University Press.

18 Spaak, T., 2018, Legal Positivism, Conventionalism, and the Normativity of Law, *Jurisprudence*, Vol. 9, No. 2, p. 323.

19 Austin, J., 1995, *The Province of Jurisprudence Determined (edited by Wilfrid E. Rumble)*, Cambridge: Cambridge University Press, p. 219.

20 This is a morally more problematic aspect of law's normativity than the one that refers to the law's capacity to guide norm-subjects' behavior by granting them rights.

to some special sort of normativity, but to combined effects of its typical features – institutionality, (coercive) guaranteeing, and justice-aptness.

To say this is to point out that in most legal orders, most of the time, norm-subjects treat legal norms as conclusive reasons for action, just as sometimes they disregard them altogether or give preference to the rules of other normative orders. Exactly at this point, Hart's "internal point of view" may be of critical assistance, particularly if it is, along with Shapiro, treated as "synonymous with the 'internalized,' rather than the 'insider's,' perspective". This view is "the practical attitude of rule acceptance", taken whenever one "accepts or endorses a convergent pattern of behavior as a standard of conduct".[21] Thus, if this concept in Hart's own words depicts "the way in which the rules function as rules in the lives of those who normally are the majority of society",[22] it is less an explanation of law's normativity,[23] at least understood in the aforementioned sense, and it is more an elucidation of what it means to say that law is authoritative, *i.e.* binding for its norm-subjects. For instance, when talking about the one who assumes the "external point of view", Hart notices that his description of rule-following behavior "cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty".[24]

Dajović notifies that, when explicating "internal point of view", Hart makes an analogy between legal rules and rules of games. Although Dajović is probably right in claiming that there are important differences between the two,[25] I would like to stress one conceptual feature of games that might be helpful in understanding the role of "internal point of view" in Hart's account of law. Bernard Suits, a philosopher of games, in his 1978 book *The Grasshopper* tried to provide a more comprehensive conceptualization of this human activity. In doing so, he introduced the additional element – the so-called lusory attitude (from the Latin *ludus*, game) of game players. It can be defined as "the acceptance of constitutive rules just so the activity made possible by such acceptance can occur".[26] Lusory attitude is exactly the practical attitude of rule acceptance that Hart has in mind when elucidating the authoritativeness of legal rules. Simply put, in order for 'legal game' to be playable, its players – particularly legal

21 Shapiro, S. J., 2006, What Is the Internal Point of View?, *Fordham Law Review*, Vol. 75, No. 3, p. 1159.

22 Hart, H., 2012, p. 90.

23 Dajović, G., 2021, str. 514.

24 Hart, H., 2012, p. 89. At yet another place, Hart employs the phrase "the internal aspect of obligatory rules". *Ibid.*, p. 91.

25 Dajović, G., 2021, str. 511.

26 Suits, B., 1978, *The Grasshopper: Games, Life and Utopia*, Toronto, University of Toronto Press, p. 40.

officials – need to accept its constitutive rules (most notably, "rule of recognition").[27] There is not a uniform way for the requisite lusory attitude of 'legal game' to be developed. Schauer aptly points out that "patterns of internalization across numerous decision-makers may of course develop, or be inculcated by education, or be enforced by sanctions".[28] While, for instance, individuals tend to develop patterns of internalization of legal rules through the continuous processes of political socialization, which start already in kindergarten, most of legal officials are exposed to those patterns in the course of a specialized legal education. This, furthermore, implies that motivating reasons for accepting rules from the internal point of view may sharply differ.[29] Dajović reminds us that this was Hart's view.[30] But, this was also the view that I espoused in *NoIL*, when explicating why legal rules are commonly treated as "the signaler of last resort".[31]

To conclude. While I reject Dajović's argument that my debunking of Raz's conception was unnecessary and somehow misleading, I do accept his criticism that I could have more credibly relied on Hart's concept of "internal point of view" when discussing the nature of international law. However, not with the aim that Dajović has in mind – to demonstrate that "international law possesses 'normativity' and, in that respect, 'deserves' to

27 "[W]hilst Hart was keen to stress that we identify the rule of recognition by looking to the practices of officials he did not believe that the rule was *constituted* by their behaviour. The rule of recognition of a given society is the rule that its courts actually accept and take a 'critical reflective attitude' towards." Adams, T., Practice and Theory in the Concept of Law, in: Gardner, J., Green, L., Leiter, B. (eds.), 2021, *Oxford Studies in Philosophy of Law Volume 4*, Oxford, Oxford University Press, p. 19.

28 Schauer, F., 1991, *Playing By the Rules – A Philosophical Examination of Rule-Based Decision-Making in Law and in Life,* Oxford, Clarendon Press, p. 128.

29 "But the way in which and the extent to which, if at all, rules become a part of a decisional process is ultimately determined by the decision-maker alone." *Ibid*.

30 "[A]llegiance to the system may be based on many different considerations: calculations of long-term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do." Hart, H., 2012, p. 203.

31 Here is a longer quote, with omitted footnotes: "The treatment of law as 'the signaler of last resort' can be well explained with reference to the aforementioned 'respect' for law. This respect can be manifested differently and generated for various reasons. True, the overall belief in the legitimacy of political authorities has proven to be the strongest ground for treating legal rules as binding. However, legal rules might be at times treated by norm-subjects as 'binding' for prudential reasons associated with legal sanctions, just as 'some legal norms might sometimes trigger [...] general moral reasons' for action, even when they are issued by plainly illegitimate authorities. Finally, norm-subjects might find themselves with other members of the polity in different interconnected legal statuses (*e.g.*, students, employees, companies) in which treating obligation-installing norms as binding is connected to reciprocal benefits stemming from the concomitant right-conferring norms." Jovanović, M. A., 2019, *The Nature of International Law*, Cambridge, Cambridge University Press, pp. 142–143.

be treated as law",[32] but in order to explicate authoritativeness (*i.e.* bindingness) of international law. The overall conclusion, nonetheless, would be the same – bindingness of legal rules can be gradated, because their normative force is of relative weight. The concept of 'relative normativity' has been for quite some circulating in the international legal –normativity as such, and, thus, (international) legal normativity as well, that invites the talk of gradation and relativity. Hence, one should not take relative normativity *per se* as a badge of inferiority of a given normative order.

Relative normative force of a legal rule may come from two different sources. While its capacity to give rise to obligation may be the upshot of norm-addressee's blatant disregard for the practical attitude of rule acceptance, it can also be the result of norm-giver's failure to provide precise directive as to which behavior its subjects are to follow. Drawing from the concluding chapter of *NoIL*, which deals with (un)certainty in international law, Papić, in her contribution,[33] discusses exactly those "indeterminate rules [that] make difficult to see what they require of their addressees."[34] She enlists other, accompanying features of these indeterminate rules of international law: a) that it "is hard to assess the extent of compliance with them"; b) that "some authors seem to cast doubt on the legal force of such rules"; c) that this type of indeterminacy, which comes in forms of vagueness and ambiguity,[35] "is usually not a result of the poor legal drafting, but a deliberate choice driven by either domestical or international considerations";[36] and d) that, being contextual and fluid, they allow "broader discretion in its interpretation by the affected state".[37] Finally, instead of merely repeating how indeterminacy of these instruments might endanger legitimacy and efficacy of international law, Papić argues that we should find value in them. The specific value in mind is that "indeterminate rules accommodate disagreement",[38] thereby highlighting the fact that international law is first and foremost argumentative practice.[39]

Since I committed myself to commenting only those aspects of the contributions that somehow tackle my own arguments in *NoIL*, I would

32 Dajović, G., 2021, str. 503.

33 Papić, T., 2021, In Defense of Uncertainty: Values behind Indeterminate Rules of International Law, *Pravni zapisi*, 2, pp. 523–549.

34 *Ibid.*, p. 529.

35 According to her, "[a] rule is vague when there is no pre-established answer to the issue it regulates." On the other hand, "a rule is ambiguous, if it has multiple meanings." *Ibid.*, p. 530.

36 *Ibid.,* p. 529.

37 *Ibid.,* p. 533.

38 *Ibid.,* p. 537.

39 *Ibid.,* p. 539.

like to stress that the aforedescribed features of indeterminate international rules make them ideal candidates for the classification under the controversial concept of 'soft law'. As explicated in *NoIL*, in order to count as "soft law", an instrument has to pass the requisite test of legal validity, *i.e.* that it stems from some of the recognized formal sources of law. On such a reading, everything hinges upon the "softness" of a given legal instrument. In that respect, I largely follow d'Aspremont's idea of "soft *negotium*," which is present whenever instruments "do not lay down any precise directive as to conduct and [...] are not cast in normative terms".[40] Both examples that Papić discusses – Art. VI of the Treaty on the Non-proliferation of Nuclear Weapons and the UN Security Council Resolution 2249 – clearly qualify for the status of legal instruments with soft *negotium*. One of the important jurisprudential findings of this analysis is that "[a]ccepting that there may be legal acts with a soft *negotium* means that the normative character of an act is not the prerequisite of its legal character."[41] This is a further vindication of one of the more general insights of *NoIL*, that the oft assumed overlapping between the concepts of "normativity", "validity", and "bindingness" is actually unsubstantiated.

That this is so, becomes also apparent from yet another Symposium's contribution, that by Letnar Černič.[42] In developing my argument that institutional non-state actors are capable of creating international legal rules, he focuses on the UN Human Rights Council's document – UN Guiding Principles on Business and Human Rights (UNGPs). The author emphasizes three important features of it. First, that although "from a point of view of formal sources of international law, the UNGPs do not formally create binding obligations", its principal author, the late professor John Ruggie, has always maintained that it a) reflects the existing international customary and treaty human rights law, and b) that it is an instance of soft law.[43] Second, "the domestic and regional courts have over the past decade judicialized the UNGPs", insofar as they have referred to the Guidelines "in their judgements and decisions as an authoritative source of international law thereby recognizing that the nature of UNGPs stretches beyond soft law."[44] And third, "the normative power of the UNGPs has propelled the calls for binding normative documents at international

40 Aspremont, J. d', 2008, Softness in International Law: A Self-Serving Quest for New Legal Materials, () *European Journal of International Law*, Vol. 19, No. 5, p. 1084.

41 *Ibid.*, 1084–1085.

42 Černič, J. L., 2021, Institutional Actors as International Law-Makers in Business and Human Rights: The United Nations Guiding Principles on Business and Human Rights and Beyond, *Pravni zapisi*, 2, pp. 594–617.

43 *Ibid.*, p. 607.

44 *Ibid.*, p. 608.

level. The main proposal for the potential UN Treaty has been built on complementarity with the UNGPs."[45]

Although Letnar Černič approached the subject matter from the perspective of the role of non-state institutional actors in the process of international law-making, I would like to comment his analysis through the filter of international law's relative normativity. In discussing this concept in *NoIL*, I mention Besson's argument that international law-making processes can result in both "complete legal norms" and "intermediary legal products". Although the latter "are not yet valid legal norms, [they] may be vested with a certain evidentiary value in the next stages of the law-making process."[46] For instance, UN General Assembly resolutions were long ago recognized as some such products with "nascent legal force".[47] As I stated in *NoIL*, in other areas of law one can hardly find references to "intermediary legal products" or "emerging legal norms". A norm that is emerging is not yet existent, *i.e.*, valid, and, thus, Letnar Černič is right in claiming that, from a point of view of formal sources of international law, UNGPs is not a valid legal[48] instrument. However, once it is ascertained that it does not pass the recognized threshold of international legal validity, this instrument can no longer be classified as an instance of "soft *law*", as implied by Letnar Černič. And yet, as with a number of "products" of this sort in international law, UNGPs proved to have important legal bearing, insofar as it became a legitimate point of reference in an ongoing argumentative international legal practice. From Letnar Černič's contribution, it is obvious that this bearing is threefold: a) UNGPs has an evidentiary role for the argument that certain international human rights obligations of states enjoy the status of customary rules; b) its "intermediary legal" character is particularly strengthened by the said process of judicialization; and finally c) the undergoing work on the relevant UN treaty is based on complementarity with UNGPs.

In his seminal paper on the rising phenomenon of "relative normativity" of international law, which he portrayed as highly negative phenomenon, Weil discussed as one prominent example *erga omnes* obligations. This is the topic of Zdravković's contribution.[49] Although the subtitle of

45 *Ibid.,* p. 609.

46 Besson, S., Theorizing the Sources of International Law, in: Besson, S., Tasioulas, J. (eds.), 2010, *The Philosophy of International Law*, Oxford, Oxford University Press, p. 170.

47 Castaneda, for example, referred to them as "embryonic norms" and "quasilegal rules". Castaneda, J., 1969, *Legal Effects of United Nations Resolutions*, New York, Columbia University Press, p. 176.

48 He mistakenly uses "binding," thereby repeating the usual error of implying overlapping meanings of "validity" and "bindingness" of legal norms.

49 Zdravković, A., 2021, Obligatory *Erga Omnes – Jus Cogens* in Statu Nascendi? A Theory Inspired by "The Nature of International Law", *Pravni zapisi*, 2, pp. 577–593.

her paper suggests that it is "a theory inspired by *NoIL*", she concludes by saying "that most of [its] considerations regarding the *erga omnes* obligations were found to be untenable".[50] Zdravković's key argument is that these norms are hardly distinguishable from *jus cogens* rules, insofar as the list of candidates for both categories largely overlaps. The main distinction is that the letter norms are non-derogable, while the former norms do not possess that quality. Therefore, her conclusion is that "*erga omnes* obligations are *jus cogens in statu nascendi*."[51]

Zdravković's analysis is meticulous, and there is not much to be added. Two caveats, though. First is about the formal status of *erga omnes* obligations in the architectonics of the international legal world. At one point, she says: "Although it was already mentioned that there were some doubts as to whether *erga omnes* obligations were indeed of a higher status then others, not much support can be found for that sort of skepticism in either doctrine or case-law."[52] In *NoIL*, I pay attention to this doctrinary squabble regarding their formal status, and in doing so, I refer to the position taken by the International Law Commission's (ILC) in its *Fragmentation* report. ILC is clear on this point: "The *erga omnes* nature of an obligation [...] indicates no clear superiority of that obligation over other obligations." This is so, because unlike the norms of *jus cogens*, which "are distinguished by their normative power – their ability to override a conflicting norm – obligations *erga omnes* designate the scope of application of the relevant law, and the procedural consequences that follow from this."[53] The fact that, content-wise, *i.e.* substantively speaking, the candidate norms largely overlap can in no way affect their formal position within the gradually hierarchized international legal order.

This brings me to the second caveat. It concerns Zdravković's ultimate conclusion regarding the nature of *erga omnes* obligation. According to her, these obligations do not stem from peremptory norms, quite the contrary, "they aspire to reach the highest normative status of *jus cogens*."[54] Hence, they are properly understood as "*jus cogens in statu nascendi*". If formulated this way, two types of norms would become permanently entangled, so that they would stand in one very precise temporal relation. That is, in the process formation of peremptory norms, *erga omnes*

50 *Ibid.,* p. 589.

51 *Ibid.*, p. 590.

52 *Ibid*., p. 587.

53 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi)* A/CN.4/L.682 of 13 April 2006, (2006), para. 380.

54 Zdravković, A., 2021, p. 588.

obligations would assume some pupa-like phase before the adult butterfly (*jus cogens*) is developed. Not only would this further complicate already complex process of *jus cogens* formation and its distinction from international customary rules,[55] but it would also raise the question whether some such pupa-like phase is mandatory in the emergence of peremptory norms. I am unsure whether there is enough doctrinary support for such far-reaching conclusion.

Hrnjaz's contribution[56] focuses on the most controversial formal source of international law – customary rules. In arguing that both jurisprudence of the ICJ and most of the international law doctrine fail to provide an appropriate explanation of the process of formation of customary international law, he argues that "practice of international law-makers is the only element" of customary rules.[57] In doing so, he explores Postema's alternative proposal, according to which this is a specific type of practice, the so-called "discursive normative practice". This proposal tries to integrate material and subjective element of customary rule,[58] albeit with a partial success.[59]

Since Hrnjaz does not directly debate with any of the points about customary international law that I raised in *NoIL*, I will just briefly comment why the suggested approach is implausible.[60] Simply put, with practice as the sole element no distinction would be possible between habitual behavior and customary rule. This was famously demonstrated by Hart.[61] He says that in order for a group "to have a habit it is enough that their behaviour in fact converges. Deviation from the regular course need not be a matter for any form of criticism." In contrast, in case of the existence of a customary rule, "not only is such criticism in fact made but deviation from the standard is generally accepted as a *good reason* for making it."[62] Finally, coming into existence of a customary rule requires that "some at

55 See, Jovanović, M., 2020, *Jus Cogens*: A Complex Case of Constitutional Reasoning in International Law, *Rechtsphilosophie*, Vol. 6, No. 3, pp. 249–262.

56 Hrnjaz, M., 2021, Nature of Customary International Law: All We Need Is Practice, *Pravni zapisi*, 2, pp. 550–576.

57 *Ibid.,* p. 550.

58 *Ibid.,* p. 566.

59 *Ibid.,* p. 570.

60 There are diametrically opposing proposals to eliminate the element of practice. See, *e.g.*, Lepard, B. D., 2010, *Customary International Law: A New Theory with Practical Applications*, Cambridge, Cambridge University Press. I criticize both of them in *NoIL*.

61 He is speaking of "social rule", but it is clear that what he primarily has in mind in making this comparison is customary rule.

62 Hart, H., 2012, p. 55.

least must look upon the behaviour in question as a general standard to be followed by the group as a whole."[63] To "look upon" is to assume the aforementioned "internal point of view", that is, "a critical reflective attitude to certain patterns of behaviour as a common standard".[64] Whether such attitude is taken by states is often not easy to ascertain and for this reason I stressed in *NoIL* importance of the ILC's questionnaire for states regarding ways and means for making the evidence of customary international law more readily available.[65]

3. A Concluding Note

In concluding her paper, Zdravković remarks that, among other things, it should "serve as an incentive for the author to further contemplate various unresolved international legal matters and to continue with his unique contribution to the philosophy of international law."[66] I can only confirm that all the contributions in the Symposium fully succeeded in producing such result. Anyone who has ever managed to finalize the work on a manuscript and to turn it into a published book knows how aggravating might be returning to the same topics and reflecting on them, over and over again. And yet, this is the only path for progress of both science in general, and an individual researcher. The Symposium has aptly demonstrated that *NoIL* is not the end, but the very beginning of an exciting journey into the philosophy of international law.

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63 *Ibid.*, p. 56.

64 "this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'." *Ibid.*, p. 57.

65 https://legal.un.org/ilc/guide/1_13.shtml

66 Zdravković, A., 2021, p. 590.