SYMPOSIUM ON METHOD IN INTERNATIONAL LAW

Appraising the Methods of International Law: A Prospectus for Readers

In 1908 the second volume of the *American Journal of International Law* featured a piece by Lassa Oppenheim entitled *The Science of International Law: Its Tasks and Method.* Oppenheim began his article by noting, apparently with some approval, that the first volume of *AJIL,* stacked with articles only by Americans, had "shown to the world that America is able to foster the science of international law without being dependent upon the assistance of foreign contributors."[1] Concerned, however, that students were "at first frequently quite helpless for want of method [and] mostly plunge into their work without a proper knowledge of the task of our science, without knowing how to make use of the assertions of authorities, and without the proper views for the valuation and appreciation of the material at hand," Oppenheim sought to bring "the task and the method of this our science into discussion in this Journal."[2] What followed was a comprehensive exposition of his views on the purposes of international law and the methods available to lawyers and scholars for approaching the problems they face.

In the nine decades since that article appeared, the hundreds of articles published in the *Journal* have revealed the two fundamental transformations in our field: first, the susceptibility of new areas of international affairs to treatment through international norms and institutions; and second, theoretical innovations leading to new ways of thinking about each of these issue areas. Indeed, these two developments are inseparable. As Ronald St. J. Macdonald and Douglas M. Johnston wrote in their introduction to a significant and weighty volume of theoretical essays on international law fifteen years ago, a focus on theory is increasingly needed in a field such as ours that has been driven to great degrees of both specialization and fragmentation.[3] The need for an understanding of overarching constructs linking the various subdisciplines within international law seems even greater today, as we have moved, it seems, from the establishment of new international law journals by law schools around the world to a proliferation of specialized international law journals and very specialized international lawyers. For beneath the surface of much scholarship by our authors and those in other periodicals are a host of unanswered questions about presuppositions, conceptions and missions, all of which influence how they undertake their analyses of an issue and how they arrive at conclusions and recommendations for decision makers. Hence the timeliness of this symposium on method in international law.[4]

The term "method" as we use it here, however, requires a bit more refinement. Many authors have used the term, but with the assumption that the reader would know what was meant. For Oppenheim, "method" was intimately associated with his view that international law was a science that had its own unique and rigorous approach to

[1] Lassa Oppenheim, *The Science of International Law: Its Tasks and Method,* 2 AJIL 313, 313 (1908).

[2] *Id.* at 313, 314.

[3] *See* Ronald St. J. Macdonald & Douglas M. Johnston, *International Legal Theory: New Frontiers of the Discipline, in* The Structure and Process of International Law 1, 3 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983).

[4] The *AJIL* is not the first periodical of its kind to embrace the need for such an understanding. Our friends at the *European Journal of International Law* stated at the time of its founding a decade ago that they would devote pages to the intellectual legacies of the great European scholars, and their collections of essays on Friedmann, Verdross, Lauterpacht and Kelsen have been exemplary in this regard.

analyzing and solving questions—in the words of the *Oxford English Dictionary,* "a special form of procedure adopted in any branch of mental activity, whether for the purpose of teaching and exposition, or for that of investigation and inquiry."[5] This scientific link between method and international law can be found in the thinking of other great scholars of an earlier era. Hans Kelsen spoke in his 1932 Hague lectures and his 1940–1941 Oliver Wendell Holmes lectures of the "technique of international law," which would fulfill the purposes of the law but which could not itself be understood or undertaken without an underlying theory.[6] In a profoundly important attack on the positivist method in this *Journal* in 1940, Hans Morgenthau spoke of the need to "reëxamine the methodological assumptions with which the traditional science of international law starts" and to "reconcile the science of international law and its subject-matter."[7] For Philip Allott, the methods employed by various international lawyers refer to the structure of their argumentation, in particular its logical discourse.[8]

The scientific leanings of the earlier writers aside, most of these scholars seem to be speaking roughly of the same idea: the application of a conceptual apparatus or framework—a theory of international law—to the concrete problems faced in the international community. This idea of method, which we adopt for this symposium, is thus distinctly different from abstract theories of international law that explain the nature of international law but are devoid of application to particular problems.[9] We focus here not on the coherence of a particular theory for explaining the foundations or traits of international law, but on its relevance for lawyers and legal scholars facing contemporary issues. At the same time, method is far broader than a methodology of legal research in the sense of ways to identify and locate primary and secondary resources.[10]

The link between a legal theory and a legal method is thus one between the abstract and the applied.[11] By organizing a symposium on method, we seek to provide a greater grasp of the major theories of international law currently shared by scholars, but to view these theories in the most direct way—by seeing how they establish what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions. A method used by a writer on international law may correspond to one theory of international law or to more than one if an author chooses

[5] 9 OXFORD ENGLISH DICTIONARY 690 (2d ed. 1989).

[6] According to Kelsen:

> [U]ne analyse juridique rigoureuse est indispensable pour atteindre l'amélioration si désirable de la *technique du droit international.* C'est justement pour remplir cette tâche de la politique du droit qu'une *théorie pure* du droit est nécessaire, de même qu'il n'y a pas de médecine scientifique sans biologie, pas de technique sans physique.

Hans Kelsen, *Théorie Générale du Droit International Public: Problèmes Choisis,* 42 RECUEIL DES COURS 117, 122 (1932 IV). *See also* HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 82–122 (1942). For a trenchant analysis, see David Kennedy, *The International Style in Postwar Law and Policy,* 1994 UTAH L. REV. 7, 38–40.

[7] Hans J. Morgenthau, *Positivism, Functionalism, and International Law,* 34 AJIL 260, 261 (1940). *See also* Samuel J. Astorino, *The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience,* 34 DUQ. L. REV. 277 (1996).

[8] Philip Allott, *Language, Method and the Nature of International Law,* 45 BRIT. Y.B. INT'L L. 79 (1971).

[9] For one theory that nonetheless disguises itself as a method, see MARTIN BOS, A METHODOLOGY OF INTERNATIONAL LAW (1984); and *id.* at 2 ("methodology . . . in fact is a phenomenology").

[10] *See, e.g.,* SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW (1984).

[11] The distinction between a legal theory—the conceptual framework—and a legal method is not the same as the distinction between "theory" and "practice." At least one of the methods presented in this symposium rejects such a distinction on the ground that "theory is practice" and vice versa. Its point is rather that a method entails the *application* of more abstract concepts to more concrete problems.

to apply different theories. It is also possible to imagine that a theory of international law created or posited by a particular writer may yet have no methodological counterpart in that its creator or supporters have not yet developed, or never did develop, a construct for approaching concrete problems.

Discerning Methods to Appraise

To elucidate the theoretical underpinnings of contemporary scholarship through recourse to the methods employed by various theories, we decided upon seven methods for appraisal: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. In our view, they represent the major methods of international legal scholarship today. Our list does not include methods that may have been utilized by scholars in the past, or that dominated the scholarship of earlier eras—as the absence of Roman law, canon law, and socialist/Soviet law would indicate. It also excludes, owing to space constraints, other approaches that offer important insights, such as natural law, the comparative method[12] and functionalism.[13] Moreover, our identification of seven discrete methods does not preclude other useful ways of grouping international legal scholarship. Macdonald and Johnston, for instance, spoke of three orientations: philosophical (Kelsen, Verdross and Verzijl), humanistic (Brierly, Lauterpacht and Jenks) and scientific (Schwarzenberger, Friedmann and Stone).[14] More recently, various scholars, including two contributors to this symposium, have identified themselves as part of a "New Stream" of international legal scholarship, to be distinguished from the mainstream, itself composed of several approaches.[15]

As the contributors to this symposium will present their respective methods in some detail, here we simply identify their most basic characteristics. We confess that these are purely our own descriptions, informed by our own perspectives, with which the authors may differ.

Positivism. Positivism summarizes a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.[16] For positivists, international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent.[17] In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please. Positivism also tends to view states as the only subjects of international law, thereby discounting the role of nonstate actors. It remains the lingua franca of most international lawyers, especially in continental Europe.

New Haven School (policy-oriented jurisprudence). Established by Harold Lasswell and Myres McDougal of Yale Law School beginning in the mid-1940s, the New Haven School eschews positivism's formal method of searching for rules as well as the concept of law as

[12] *See* W. E. Butler, *Comparative Approaches to International Law,* 190 Recueil des Cours 9 (1985 I).

[13] *See* Douglas M. Johnston, *Functionalism in the Theory of International Law,* 26 Can. Y.B. Int'l L. 3 (1988).

[14] Macdonald & Johnston, *supra* note 3, at 4.

[15] *See* Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law,* 65 Nordic J. Int'l L. 341 & n.3 (1996) (components of mainstream scholarship are "realist (Schwarzenberger, Weil, Watson), classicist (Fitzmaurice), and liberal-humanitarian (Henkin, McDougall [*sic*], Falk)"); Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 131–91 (1989) (four schools are the "rule-approach position" (Schwarzenberger as paradigm), the "policy-approach position" (McDougal), the "skeptical position" (Morgenthau), and the "idealistic position" (Alvarez)).

[16] *See* Hilaire McCoubrey & Nigel D. White, Textbook on Jurisprudence 11 (2d ed. 1996).

[17] *See* Hans Kelsen, Principles of International Law 438–39 (Robert W. Tucker ed., 2d. rev. ed. 1966).

based on rules alone. It describes itself as a policy-oriented perspective, viewing international law as a process of decision making by which various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate processes and of effectiveness in controlling behavior.[18] Perhaps the New Haven School's greatest contribution has been its emphasis on both what actors say and what they do.

International legal process. International legal process (ILP) refers to the approach first developed by Abram Chayes, Thomas Ehrlich and Andreas Lowenfeld at Harvard Law School in the 1960s. Building on the American legal process school, it has seen the key locus of inquiry of international law as the role of law in constraining decision makers and affecting the course of international affairs.[19] Legal process theory has recently enjoyed a domestic revival, which seeks to underpin precepts about process with a set of normative values. Some ILP scholars are following suit.

Critical legal studies. Critical legal studies (CLS) scholars have sought to move beyond what constitutes law, or the relevance of law to policy, to focus on the contradictions, hypocrisies and failings of international legal discourse. The diverse group of scholars who often identify themselves as part of the "New Stream" have emphasized the importance of culture to legal development and offered a critical view of the progress of the law in its confrontations with state sovereignty. Like the deconstruction movement, which is the intellectual font of many of its ideas, critical legal studies has focused on the importance of language.

International law and international relations. IR/IL is a purposefully interdisciplinary approach that seeks to incorporate into international law the insights of international relations theory regarding the behavior of international actors. The most recent round of IR/IL scholarship seeks to draw on contemporary developments and strands in international relations theory, which is itself a relatively young discipline. The results are diverse, ranging from studies of compliance, to analyses of the stability and effectiveness of international institutions, to the ways that models of state conduct affect the content and subject of international rules.

Feminist jurisprudence. Feminist scholars of international law seek to examine how both legal norms and processes reflect the domination of men, and to reexamine and reform these norms and processes so as to take account of women.[20] Feminist jurisprudence has devoted particular attention to the shortcomings in the international protection of women's rights, but it has also asserted deeper structural challenges to international law, criticizing the way law is made and applied as insufficiently attentive to the role of women. Feminist jurisprudence has also taken an active advocacy role.

Law and economics. In its domestic incarnation, which has proved highly significant and enduring, law and economics has both a descriptive component that seeks to explain existing rules as reflecting the most economically efficient outcome, and a normative component that evaluates proposed changes in the law and urges adoption of those that maximize wealth. Game theory and public choice theory are often considered part of law and economics. In the international area, it has begun to address commercial and environmental issues.

[18] *See, e.g.,* Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made, in* INTERNATIONAL LAW ESSAYS 355, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981).

[19] ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS at xi (1968).

[20] *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law,* 85 AJIL 613, 621 (1991).

Although, as will be clear from the essays that follow, each of these methods has its own defining characteristics, it is equally apparent that each is a *living* method, employed by a diverse community of scholars who help ensure its continual evolution. If positivism is simplistically termed the most conservative of the methods, it is safe to say that the positivist method of today might well have been unrecognizable to a lawyer one hundred years ago; if critical legal studies is in some sense the most radical of the methods in the questions it poses about the nature of international law, it too has undergone transformations since its arrival in scholarly circles in the 1980s. The essays can thus present only a snapshot of their method, with perhaps some sense of its path to date and future trajectory. Moreover, although many of the methods have a distinctly American origin, the community of scholars for nearly all of them is now global.

A Heuristic for Understanding and Appraising Methods

In light of our approach to evaluating the impact of theories on the analysis of concrete problems in international law, we asked authors writing from each perspective to approach one contemporary issue—the same one for all of the authors—and apply their method to it. Many of these authors might normally draw on multiple theories and hence methods in analyzing a legal issue, but we asked them to stick as close as possible to one method. The results may seem a bit artificial or stylized in some cases, but readers should at least get a clear picture of each method. As for the issue that could demonstrate the power of seven different methods, we believed it needed to be one that was topical, but not so technical as to require special expertise by our readers.

Our choice—accepted by all our authors (though in the same sense that the Versailles Treaty was accepted by the Central Powers)—is the question of individual accountability for violations of human dignity committed in internal conflict, with respect to both the substantive law and the mechanisms for accountability. The issue is at the forefront of current debates within international human rights law, international humanitarian law, and international criminal law, with implications for the role of international organizations, principles of criminal jurisdiction, and incorporation of international law into domestic law. It is also central, in a very concrete way, to political transitions around the globe in which new governments are variously attempting to come to grips with their past. We offer the following sketch of the issue with the recognition that it is itself influenced, if not determined, by different methods.

Although international humanitarian law provides some basic protections for individuals during civil conflicts, most notably through common Article 3 of the four 1949 Geneva Conventions and Additional Protocol II of 1977,[21] none of these treaty provisions holds individuals, as opposed to states, accountable for violations. This position contrasts

[21] *See, e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 3, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 UNTS 609 [hereinafter Protocol II]. For instance, common Article 3 includes the following provision:

> [T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [persons taking no active part in the hostilities]:
>
> (*a*) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (*b*) taking of hostages;
> (*c*) outrages upon personal dignity, in particular humiliating and degrading treatment;

with the provisions on interstate war in the Geneva Conventions (that is, all of the articles except for common Article 3) and Additional Protocol I of 1977; they not only contain more detailed protections for persons not involved in hostilities, but also list certain violations as "grave breaches" for which individuals are responsible and with respect to which states must extradite or prosecute all suspected offenders.[22] As for human rights law, the International Covenant on Civil and Political Rights[23] nowhere explicitly calls for punishment of individuals for violations of human rights. Other conventions—notably the 1948 Genocide Convention, the 1956 Slavery Convention, the 1973 Apartheid Convention and the 1984 Torture Convention[24]—do require states to prosecute, or extradite or prosecute, persons who have allegedly committed those offenses, but those treaties are limited only to those offenses, some of which, like genocide, are quite narrowly defined. Beyond treaty law, customary law has developed the notion of crimes against humanity. Under the principles first set forth in the Charter of the Nuremberg Tribunal,[25] individuals could be held accountable for—though states were not obligated to prosecute—large-scale or systematic attacks (murder, torture, extermination, deportation, forced labor, inhuman acts, and persecution) on civilian populations.

Prosecutions for these offenses were rare until recently; domestic cases mostly involved government prosecution of insurgents for sedition or other acts under domestic law, but both governments and insurgencies were generally unwilling to prosecute or punish their own personnel. Authority to exercise universal jurisdiction to prosecute these crimes was also uncertain; and states other than the territorial state generally abstained from undertaking any such prosecutions. The absence of a community desire to criminalize these acts also contributed to the opposition among states to an international criminal court that would undertake such prosecutions.

Developments in the last five or six years have focused renewed attention on these issues. In 1993 the Security Council gave the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisdiction over various crimes committed in civil wars—notably genocide, crimes against humanity, and "violations of the laws or customs of war."[26] When the ICTY began to consider indictments that included as crimes certain violations of the laws or customs of war, it had to address the extent to which such violations were, in fact, crimes in internal conflicts so that the law would not apply

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(*d*) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

[22] See, e.g., the list in Geneva Convention IV, *supra* note 21, Art. 147:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[23] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

[24] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 UST 3201, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 UNTS 243; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

[25] Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279.

[26] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 3, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993).

retroactively to a defendant. The Tribunal's appellate chamber offered an answer in one of its most important decisions to date, the 1995 interlocutory appeal in the *Tadić* case.[27] In 1994 the Security Council gave the International Tribunal for Rwanda jurisdiction not only over genocide and crimes against humanity, but also over "serious violations" of common Article 3 and Protocol II, making such violations per se war crimes in the Rwanda context.[28]

In codification processes within the United Nations, the International Law Commission in 1996 completed its nearly half-decade-long project to draft a Code of Crimes against the Peace and Security of Mankind. The code designates as war crimes for internal conflicts a list of acts, taken principally from the Statute of the Rwanda Tribunal.[29] The states participating at Rome in July 1998 in the drafting of a statute for a permanent international criminal court included war crimes in internal conflicts in the court's jurisdiction.[30]

Outside the chambers and corridors of international organizations, accountability has assumed increased importance as a significant number of states have settled their civil wars and addressed the fate of those who committed atrocities during them. Moreover, authoritarian governments that committed the same type of abuses one finds in civil wars—often proclaiming that they were fighting a civil war against their opposition—have fallen in many states. The extent to which those governments hold individuals accountable for these abuses is of vital importance to the transition of these states to stable democracies. Some have chosen to prosecute; others have chosen pardon; others have established truth commissions or engaged in purges of those associated with the past regime. Many have not yet made a clear choice.[31] As a result, the scope of a duty to hold individuals accountable, criminally or otherwise, is now the object of significant attention by international bodies and domestic courts.[32] Academic debate on this issue is also rich.[33]

Lastly, the concept of universal jurisdiction to prosecute violations of human rights has lately received more attention from governments, victims and human rights advocates.

[27] Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT–94–1–AR72 (Oct. 2, 1995) (majority opinion), *reprinted in* 35 ILM 32 (1996).

[28] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, Art. 4, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994). Equally important, though less relevant for the symposium, the Statute of the Rwanda Tribunal defines crimes against humanity without any reference to armed conflict (interstate or internal) at all, thus confirming the severance of the nexus first included in the Charter of the International Military Tribunal at Nuremberg.

[29] Draft Code of Crimes against the Peace and Security of Mankind, Art. 20(f), *in* Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, at 14, 111–12, UN Doc. A/51/10 (1996). The future of the code remains quite uncertain in light of the codification of its key crimes in the statute of the international criminal court.

[30] Rome Statute of the International Criminal Court, July 17, 1998, Art. 8(c), (e), UN Doc. A/CONF.183/9*, *reprinted in* 37 ILM 999 (1998).

[31] The definitive compilation of state practice in this area is the three-volume TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995). For a superlative account of the Eastern European experience, see TINA ROSENBERG, THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM (1995).

[32] *See, e.g.,* Comments on Argentina, Report of the Human Rights Committee, UN GAOR, 50th Sess., Supp. No. 40, at 31, 32, paras. 153, 158, UN Doc. A/50/40 (1995); Velásquez-Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (July 29, 1988); Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC).

[33] Recent articles and books include Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law,* 87 GEO. L.J. 707 (1999); Juan E. Mendez, *Accountability for Past Abuses,* 19 HUM. RTS. Q. 255 (1997); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996); Symposium, *Accountability for International Crime and Serious Violations of Fundamental Human Rights,* 59 LAW & CONTEMP. PROBS. 1 (1996); IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L.J. 2537 (1991).

Courts in Switzerland and Germany have prosecuted war criminals from Bosnia; Spanish courts are attempting to prosecute Argentine generals for their acts in the "dirty war," as well as General Pinochet; and the United States sought (in vain) to find countries with universal-jurisdiction statutes willing to carry out domestic trials of members of Cambodia's former Khmer Rouge regime.[34]

The result of these recent trends in the law (if they are, indeed, trends) is, alas, hardly complete clarity. Many questions remain unanswered. A few of the more obvious ones are: To what extent does customary law now hold individuals accountable for atrocities in civil wars? Is the difference in accountability for atrocities in interstate wars and acts in civil wars justifiable? Should all serious violations of human rights and humanitarian law be crimes? What obligations do states have to prosecute? What limitations are there upon a state's ability to prosecute foreigners for crimes committed abroad against other foreigners? What are the advantages and disadvantages of international versus domestic tribunals, or of war crimes trials versus nonprosecutorial mechanisms like truth commissions, civil suits and removal from office? In choosing this subject for our contributors, we also very much realize that the subject can be quite vast, and can encompass numerous issues both procedural and substantive. Yet that variety of legal problems will also, we hope, enable our contributors to focus their lens on the appropriate targets of scrutiny. Some subissues will be less amenable to a method, while others will be central. The contributions will speak for themselves in this regard.

Themes and Variations

After considering how best to provide a clear demonstration of the various methods through use of the above problem, we asked our authors to explicitly or implicitly address several core questions that help get to the essence and uniqueness of each of their methods:

1. What assumptions does your method make about the nature of international law?
2. Who are the decision makers under your method?
3. How does your approach address the distinction between *lex lata* and *lex ferenda?* Is it concerned with only one, both, or neither?
4. How does it factor in the traditional "sources" of law, i.e., prescriptive processes?
5. Is your method better at tackling some subject areas than others, both as regards the issue noted above and as compared to other subjects?
6. Why is your method better than others?

We realized that some authors might find these to be the wrong questions and choose not to answer some or all of them. We thus invited them to challenge the questions themselves, if they preferred, with an explanation of why our questions were objectionable. We also recognize that not all of these methods can neatly answer these questions. Our conclusion aims at bringing together and comparing the responses provided by our authors.

These questions, in turn, highlight several major themes worth considering by the reader. The first is the distinctiveness and independence of international law as a discipline for approaching questions of international relations—what David Kennedy calls "law's claim to special knowledge."[35] More specifically, we need to ask whether international law has one method, one that presumably distinguishes it from other fields,

[34] *See, e.g.,* Andreas R. Ziegler, Case note, *In re G.,* 92 AJIL 78 (1998) (Mil. Trib. Division 1, Switz., Apr. 18, 1997); Christoph J. M. Safferling, Case note, *Public Prosecutor v. Djajić,* 92 AJIL 528 (1998) (Sup. Ct. Bavaria May 23, 1997); Anthony De Palma, *Canadians Surprised by Proposal to Extradite Pol Pot,* N.Y. Times, June 24, 1997, at A10.

[35] Kennedy, *supra* note 6, at 39.

as Oppenheim so confidently held in 1908,[36] whether there are multiple methods, or whether, perhaps, there is no method unique to our field. The first view may seem antiquated, and indeed in contradiction to the very idea of a symposium considering seven distinct methods. But in appraising the six methods other than positivism, it is worth reflecting upon whether they are, in fact, legal methods, or interdisciplinary methods of the "law and (sociology, international relations, economics, postmodern literary theory)" variety: that is, do our nonpositivist authors seek to provide an alternative that can be recognized as a legal method, or a new method that combines legal and nonlegal aspects? Is it possible, indeed, that the use of analytic approaches from disciplines outside the law serves to rob these methods of any distinctive legal quality?

The contribution by the positivists, and indeed their critique of the other methods, suggests that they regard their method as offering such a distinctive—or, in the words of Hans Kelsen, "pure"—quality. Readers may find that some papers—the overtly interdisciplinary methods of IR/IL and law and economics—come close to accepting positivism's claim in this regard, but assert that their methods nonetheless offer critical intellectual tools for the sophisticated practitioner or scholar. Other papers—in particular, those of the New Haven School and international legal process—suggest that they accept the idea of a legal method but find positivism's version too confining for real-world lawyers involved in decision making. Still others from the more critical perspective—CLS and feminist jurisprudence—seem to find embedded in these very questions objectionable assumptions about the nature of law and hence a distinctively "legal" method.

In addition, lawyers often seek what we call rigor in legal analysis.[37] Do these methods enlighten us as to what such rigor entails? Methods built on injecting the theoretical insights of outside disciplines, such as IR/IL and law and economics, the reader will note, claim to bring more rigor into the study of atrocities in internal conflicts by explicitly and systematically treating aspects of the behavior of international actors that other methods either ignore or treat only in an ad hoc manner. Policy-oriented jurisprudence also claims to have constructed a theoretical architecture that promises the practitioner or scholar a method to dissect and rigorously appraise numerous variables. But the critical approaches might label these as suffering from an incomplete or artificial rigor, one that does not delve deep enough to discover the biases of those applying them. This leads to the broader question of whether, as suggested by CLS, each method has its own unique view of what constitutes rigor: for each method that claims its sequence of intellectual operations or its core factors for analysis (ranging from economic efficiency to the gendered nature of law) enhance rigor, other methods will proclaim that reliance on those factors actually reduces it by bringing in extraneous, even diversionary, variables.

A second and related question concerns the usefulness of these various methods to the practicing lawyer (whether in private, governmental or nongovernmental circles), as opposed to the academic analyst. To what extent are each of the methods helpful or necessary tools for actual decision makers, as opposed to those who have the luxury, as it were, to reflect on more comprehensively, and dissect, a particular issue? The proponents of most of the methods below will hasten to insist on their relevance—if not, indeed, indispensability—for the practitioner. But in what situations and arenas will and should practitioners use each method? Is one method better for the brief before the court, another for the internal memo (to a client or other decision maker), and still

[36] Oppenheim, *supra* note 1, at 333 ("the method to be applied by the science of international law can be no other than the positive method").

[37] For a classic explanation of legal reasoning in the domestic context, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

another for the lobbying document before the government or international organization? Some methods might be challenged by practitioners as substituting a focus on method for attention to substance. Is this a valid criticism?

In this context, the articles in this symposium force us to scrutinize not only the claims of relevance made by the authors, but also the readers' own prejudices regarding the methods, i.e., any certainties in our own minds of the irrelevance of certain methods to our work as lawyers. Can we accept the insights of these methods as shown by their treatment of the problem in this symposium, and yet reject their pertinence to and appropriateness for lawyering? For instance, lawyers may assume that law and economics arguments have no place before a court of law, but are best left for the legislature. Yet even the International Court of Justice has long considered economic efficiencies in its decision making in a key part of its caseload (the delimitation of the continental shelf),[38] so negative presuppositions about the "real world" use of certain methods may be unwarranted. In fact, the number and diversity of audiences and targets of legal claims and argumentation in the process of international law suggest, instead, the need to recognize that each method—however academic it may seem at first blush—can resonate in certain contexts.

A third major theme to consider for those who do not find themselves already attached to one particular method, and even for those who do, is how the methods relate to each other. Do they accept certain common premises? To what extent do they even apply the same lenses but simply use different terms for them? From one perspective, the brief introduction provided here already suggests that three pairs of the methods seem closely related: international law/international relations and law and economics (with their focus on rational behavior of actors); the New Haven School and international legal process (with their focus on the decision-making process itself); and critical legal studies and law and feminism (with their challenges to the identity of the decision makers and the logic of the process). But other linkages can be found, e.g., in the importance of unequal distribution of political power to the New Haven School, law and economics, and feminist jurisprudence. On the other hand, some of the methods seem to be speaking almost different languages from each other, with few shared assumptions about international law. The process that positivists see of states consenting to specific rules that determine the regime for accountability for civil war atrocities appears in many ways remote from the one that feminists see of men forcing through rules for their own benefit. Indeed, CLS challenges the notion of shared assumptions entirely, suggesting that they are merely the personal preferences of those employing the various methods.

This question of common features raises a second-order methodological question: namely, for the lawyer who is contemplating writing about a new subject—whether the legal issues associated with the space station, rights for indigenous peoples, or trends in the practice of recognition—is there some method by which she can decide which of the seven (or more) methods to employ? It may be enticing for the lawyer or scholar, seeing the insights offered by various methods, to pick and choose from each those aspects that sound most appealing. But such intellectual eclecticism may end up eating away at the core premises of each method, leaving a sort of bland gray instead. And again, the critical perspectives remind us of the need to ask whether a rational choice among the methods is even possible.[39]

Fourth, and finally, what do the existing methods and the directions in which they take legal inquiry suggest about the future of the field? Each of the methods we consider here (with the possible exception of international law and international relations) originated

[38] *See, e.g.*, North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 51–52 (Feb. 20).

[39] *Cf.* KOSKENNIEMI, *supra* note 15, at 189–90 (stating that four modernist approaches are both mutually exclusive and incapable of offering a rational choice among them).

in an approach to domestic law. This, of course, reinforces the conceptual connections between international law and domestic law. But the movement from the domestic to the international has not followed one trajectory; the differences between the two arenas make one model of transposition too facile. International legal process, for instance, has not incorporated certain normative components of the domestic legal process method. Feminism has taken into account numerous actors not involved in domestic feminist jurisprudential debates, e.g., international organizations. CLS emerged on the international scene within a decade of its arrival in domestic circles, while law and economics has taken many more years to make this move. Is there some mapping operation to understand or predict the receptivity of our field to innovations in domestic law, or is it a matter of ad hoc individual initiative by certain scholars?

Moreover, one can ask if the origin of most of these methods in the domestic paradigm means that international lawyers must await new sources of thinking within domestic law before bringing new insights and methods to international law. Perhaps, instead, international legal scholarship can build upon the differences between international law and domestic law to create new methods of inquiry—methods that might, in a reversal of fortune, trickle down (or over) to our domestic law colleagues instead of the other way around. For example, can concepts of legitimacy or justice now advocated as lodestars for decision making in international law form the basis for a new method of international law?[40] (Such a method might inspire yet another take on the problem of accountability for civil war atrocities.)

But there may be limits here, too. The proliferation of new issues for consideration by international law does not in itself require new methods of international law, just methods sophisticated enough—or basic enough—to handle different subject areas. Critical legal studies, with its deconstructionist bent, may at times seem like the last method, if indeed its exponents are willing to regard it as a method. On the other hand, just as the predicted "end of history" has proved premature, so it may be that the end of new methods is not yet upon us. In that respect, some clarity in understanding the potentials and limitations of the principal methods currently employed may plant the seeds for new methodological projects that can invigorate our field.

Indeed, whether as regards the methods in this symposium or others that might develop, their uniquely international aspects point to the need for more overt appraisal of a new set of linkages between international law and domestic law. Specifically, the active debates throughout our field about incorporation of international norms in domestic law and decision making—whether regarding human rights, the environment, investment or intellectual property—seem to have a methodological analogue. Instead of just defensively asking why international law has not followed certain methodological paths taken in domestic jurisprudence, we can focus on how our own ways of thinking about the law might resonate more among domestic lawyers. This process of communication about method could convey important benefits to domestic lawyers in understanding the nature of international law and the content of its norms. For domestic law to appreciate and incorporate international law, it seems necessary for domestic lawyers to know how international lawyers think.

The essays that follow are presented in chronological order based on our sense of the sequence in which the methods were originally elaborated (with the recognition that dating a method of international law is no easier than dating the solidification of customary law): positivism, policy-oriented jurisprudence, international legal process,

[40] *See, e.g.*, THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. We believe this order should provide readers with a sense of how the various methods did or did not represent reactions or responses to those methods already in use. It will also allow for consideration of whether there are any overarching trends in the development of new methods of international law, perhaps related to the increase in international issues addressed by our field over time, as well as the range of new actors participating in the process of international law. Finally, this order offers an important vantage point for comparing the elaboration of international law theory and domestic law theory.

Nevertheless, we underline our point above, that each method itself has evolved significantly since its original formulation. Moreover, we do not wish to suggest that international law has witnessed an inevitable march of progress in the development of new theories and methods. Indeed, approaching the essays in a completely different order will likely yield additional insights. An alternative the editors considered for this symposium and offer our readers is the following: positivism, critical legal studies, policy-oriented jurisprudence, international legal process, international law and international relations, law and economics, and feminist jurisprudence. The first two might be said to define the spectrum of methods; the next two, to attempt to find an accommodation between them; the following two, to try to sidestep the old debates by bringing in the insights of other disciplines; and the last one, to admit to a range of methodologies while maintaining a strong normative commitment.

Whichever order our readers choose, it is our hope that the essays that follow will clarify and ultimately stimulate debate and innovation concerning the lenses through which international lawyers see concrete problems and the tools they use to approach them.

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THE RESPONSIBILITY OF INDIVIDUALS FOR HUMAN RIGHTS ABUSES IN INTERNAL CONFLICTS: A POSITIVIST VIEW

I. INTRODUCTION: POSITIVISM AND HUMAN RIGHTS

When we were invited to contribute a positivist perspective to the present symposium, we did not know whether to regard this invitation as flattering or as an insult: does positivism not represent old-fashioned, conservative, continental European nineteenth-century views—naive ideas of dead white males on the possibility of objectivity in law and morals? There is little we can do about being male and white, but we have certainly not seen ourselves as positivists of that kind. From the range of methodologies that the editors assembled, we could associate ourselves with several approaches just as much as with positivism. But in reflecting on our day-to-day legal work, we realized that, for better or for worse, we indeed employ the tools developed by the "positivist" tradition.

The applicability of humanitarian law to internal armed conflicts appears to us to be a good test case for the practical use of the methodologies chosen: On the one hand, the changing reality, in which international conflicts increasingly give way to internal violence, militates in favor of a concomitant change in the law. Our humanitarian instincts strongly demand that we treat the legal consequences of distinctions between interna-

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