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THE METHOD IS THE MESSAGE

We structured this symposium on the premise that comparison reveals critical differences. We asked our authors, as noted in the introduction, to describe their methodology, apply it to the concrete problem of accountability for atrocities in internal conflict, and discuss its merits and demerits relative to other approaches presented in the symposium. We threw out these questions as a means of structuring a debate in a way that would be most helpful to our readers and that would encourage our authors to engage with each other as self-consciously as possible. We did not seek competition as an end in itself, but as a spur to self-reflection.

We had two deeper goals. The first was explicitly educative: to bring together in one place a range of different theories or approaches or schools of international law in a way that would allow the readers of the *Journal* to understand them better. Insisting on an analysis of a common problem was a way of moving authors beyond the abstractions of exposition, to help pinpoint similarities and differences. The second, as outlined in the introduction, was to contrast a number of different theories in a way that is directly relevant to our collective goals and hopes as both an academic and a practical discipline. As this symposium goes to press, NATO bombs are falling in Kosovo while NATO planes are airlifting the refugee victims of ethnic cleansing. Augusto Pinochet has been stripped of immunity, but may still not be brought to justice. International lawyers cannot solve these problems, but we must have something to say about them. We thus defined "method" as "applied theory," in the hope that the symposium would illuminate many different ways to approach a particular problem.

To the extent that there is a method to this conclusion, it adopts the relatively straightforward approach of canvassing various authors' answers—insofar as they can be found—to the different questions posed and commenting on the resulting comparisons. The difficulty here, particularly as regards a symposium in which the idea or even the possibility of objectivity comes in for heated discussion, is denying our own preferences. Both of us, as scholars rather than co-editors, have aligned ourselves with particular methods: Ratner with policy-oriented jurisprudence (although not exclusively) and Slaughter with international law/international relations theory (IR/IL). Having disclosed this fact, we leave it to the reader to decide whether we unfairly tip the scale.

More generally, however, we make no effort to rank methods here, in terms of either intrinsic merit or their application to the question of liability for atrocities in internal conflict. Nor do we attempt to referee disputes between methods. "Better" or "worse" is not the issue; indeed, as the authors themselves reveal, different methods pursue different aims and are often complementary. Moreover, the choice between them is complex and often highly personal, reflecting not only relative utility in addressing a particular legal problem, but also a set of choices about what kinds of problems to address. In this context, the method chosen is the message—a message not only about who we are but about what our discipline should be.

I. THE NATURE OF INTERNATIONAL LAW

Our opening question asked the authors to consider what assumptions their method makes about the nature of international law. They answered directly and indirectly in the expository parts of their essays. The principal divide, not surprisingly, is between methods that conceptualize law primarily as a body of rules and those that see it as a more dynamic set of processes. Other ways of addressing this question include ontological versus purposive inquiries—what law *is* versus what it is *for*—and instrumentalist versus noninstrumentalist—whether it can usefully be *for* anything.

According to Bruno Simma and Andreas Paulus, classical positivism assumes that international law is a unified system of rules created deliberately and explicitly by states. But they advocate a modern, modified positivism that takes a broader view of the ways and fora in which states can express their will. In addressing the problem, they worry repeatedly over the absence of state practice concerning the criminalization of crimes against humanity and particularly ordinary war crimes in internal conflict. In both cases they end up looking to the practice of international tribunals, and of states in accepting the jurisprudence of those tribunals. It thus appears that international law can now result from collective state action through international institutions, notwithstanding the power and politics that so often dominate institutional life and obscure and suppress the will of individual states.

Writing from a feminist perspective, Hilary Charlesworth sees international law as a set of rules that reflect the preoccupations of their creators—all of whom have traditionally been men. Thus, in the context of the problem, international humanitarian law protects what men know and care about: primarily the defense of warriors' honor and the sanctity and chastity of their mothers and wives. Conversely, Charlesworth credits women's organizations with successfully lobbying for crimes against women to be included in the jurisdiction of the Bosnia and Rwanda Tribunals. The rules of international law, however, are not purely instrumental. The law as a whole, including texts, institutional practices (ranging from trial practices before international tribunals to the distribution of humanitarian relief by international organizations) and decisions by individual government officials, takes on a life of its own. It *constructs* concepts such as rape and sexual assault in ways that create particular images and evoke particular values, and that eventually define what is known and what is deemed even to exist.

The feminist view of the nature of law is conditioned by its focus on one very large problem: advancing the rights, status and dignity of women worldwide. Policy-oriented jurisprudence, on the other hand, considers law from the perspective of a range of decision makers who have to address an actual policy problem. The law itself is not a body of rules, but a stream of authoritative decisions. This approach to law and lawyering is nicely illustrated by Siegfried Wiessner and Andrew Willard's treatment of the problem. They begin by cataloguing international prescriptions reflecting community responses to the question of how to protect individuals from human rights violations. They list virtually all the instruments that the positivists turn to: the Charters of the Nuremberg and Tokyo Tribunals, the Genocide Convention, the Geneva Conventions, the Statutes of the Bosnia and Rwanda Tribunals, and the newly negotiated statute of the international criminal court. They also add the actions and decisions of national courts, such as those involved in the *Pinochet* case and various cases brought in the United States under the Alien Tort Statute, as well as national institutions such as truth commissions and lustration bodies. Wiessner and Willard's point, however, is that these instruments are only tools for policy makers to use in the service of minimum public order. They have no significance in and of themselves; they are simply the carapace that the international community constructs in trying to address a problem. Thus, in applying their method, Wiessner and Willard never seek to answer the question whether "international law" does or does not hold individuals accountable for atrocities in internal conflict. They instead offer a script for addressing the problem: defining human rights, contextualizing them, identifying the violators and the victims, and developing policy alternatives.

Traditional international legal process (ILP) takes a less radical view of law, but similarly focuses less on the exposition of rules and their content and more on how international rules are actually *used* by foreign-policy makers. The context varies widely; Mary Ellen O'Connell examines the question of prohibiting atrocities in internal conflict by looking not only to treaties and customary law norms, but also to decisions by national

and international courts, truth commissions, and government officials. She thus cites decisions by Turkish officials not to prosecute human rights violations by Turkish troops, the conviction of a Croatian war criminal by a Danish court, and the findings of the Guatemalan Historical Clarification Commission as evidence for whether individuals are or are not being held accountable. New ILP assumes the same range of possible sites for locating the law in practice, but each one, such as the *Tadić* decision analyzed by O'Connell, can be critiqued from the perspective of global community values.

For Jeffrey Dunoff and Joel Trachtman, writing from a law and economics (L&E) perspective, international law is partly a set of norms expressing individual, rather than state, values. This conclusion flows from their commitment to methodological individualism, leading them to focus on the state only as a mediating institution rather than as an autonomous entity with its own normative value. At the same time, L&E takes no position on the content of individual values, either singly or as aggregated by the state. Its method thus focuses on the functionalist dimension of international law, rules designed to achieve whatever norms are adopted.

Given this starting point, Dunoff and Trachtman can only approach the problem by assuming that the overarching goal is to stop the commission of atrocities in internal conflict. To achieve this goal, they pose a set of questions that ask "what the proscription should be, to whom it should apply, by whom it should be enforced, and what the penalties should be."¹ The lawyer's task is to identify the right incentive structure to motivate the desired behavior, through either prohibition or inducement, and then to design rules and institutions that will maximize compliance.

IR/IL assumes that "law" is a discrete and identifiable entity that can be studied as either an independent or a dependent variable. Different schools of IR theory make different assumptions about what this entity is, from realist positivism to the constructivist view of law as a constitutive global practice. For Kenneth Abbott, the "atrocities regime" includes formal instruments such as the Geneva Conventions and the charters of international tribunals, customary law norms and soft law of various types, and legal and quasi-legal institutions ranging from international tribunals to national courts to truth commissions. But what he seeks to study is not the rules themselves but, rather, the political struggle attendant on their creation and design, the complex process of giving them meaning, and their actual impact on human and state behavior. His method may be as functionalist as L&E, but, true to the discipline it seeks to incorporate, it assumes that all dimensions of international law are embedded in a deeply political context.

For Koskenniemi, the only way to give international law any concrete existence or coherence is to understand it as a "linguistic reality." "The world out there" is a mirage, a projection of an infinite number of personal perspectives—many of which can be projected by the same individual playing different roles. But international lawyers exist, advancing, attacking and defending whatever positions their clients require or they desire. The corpus of international law is a limited set of argumentative rules that allow them to pursue these projects through highly ritualized and formal sets of arguments.

II. THE DECISION MAKERS

"Who are the decision makers?" we queried. We meant not only the decision makers relevant to lawmaking, but also those interpreting, applying, implementing and even violating the law. In other words, whose actions matter in each method's universe? Three issues emerge. First is whether the identity of different decision makers makes any

¹ Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AJIL 394, 399–400 (1999).

difference to international legal analysis directed at those decision makers. Second is the statist/nonstatist divide: between those methods that envision the international system as populated primarily by states—or at least by various state institutions—and those that attempt to systematize a much more pluralist vision encompassing a range of state and nonstate actors. And third is the conceptualization of “the state” itself as a decision maker—as a fictional unitary entity or as an aggregation of institutions and individuals.

One Law or Many?

For policy-oriented jurisprudence, critical legal studies (CLS) and feminism, who the decision makers are in international law is critical to any analysis of what the law is and/or what it should be. As Wiessner and Willard explain, a core premise of policy-oriented jurisprudence is the way perceptions of “the law” shift depending on identity and institutional role. As a result, they find that Koskenniemi’s range of experiences and attendant conceptions of law as a scholar and a Finnish government official are predictable and understandable. But they are no obstacle to either a positive or a normative assessment of “the law” in different contexts; it is simply a critical part of that assessment to be aware of the identity of both the observer and the audience.

CLS, on the other hand, denies the possibility of even this limited objectivity. Koskenniemi inverts international law to the multiple practices of its participants: the full academic, official and activist panoply of international lawyers. The relevant decision makers are these individuals; moreover, their decisions are highly personal. They choose different methods and modes of argument as “styles,” ways of being that reflect choices ranging from types of friends to the most effective means of taking pragmatic action. The “law” does not exist to be perceived differently by these different decision makers; they instead constitute the law for multiple purposes and from multiple perspectives. CLS overlaps here with some antipositivist strands of constructivist IR theory in insisting that each decision maker constructs her own reality.

Feminist jurisprudence offers the clearest answer to the question of who the decision makers are: men. International law has been almost exclusively made by, for and about men. Charlesworth also draws the clearest implications from the differential identity of decision makers for international legal analysis. If women’s identities and interests were properly considered in all the processes of international law, she argues, international criminal law might also penalize the deprivation of women’s economic, cultural and social rights, “private” rape and domestic violence. The complete isolation and submission of women by the Taliban might merit as much attention as the systematic rape/genocide policies of the Bosnian Serbs. The very notion of “conflict,” whether internal or international, as a trigger for international legal regulation, might disappear. As it stands, however, the overwhelming predominance of men in the halls of New York, Geneva and foreign ministries around the world means that international criminal law combines “the gendered blind spots” of both international humanitarian law and human rights law.

A Wider World of Law

If international law is a body of rules that apply equally to all, then although anyone can make decisions, only the lawmakers are of any consequence. And the lawmakers in the positivist world are states, personified by their representatives. It is a drab world of endless official corridors, but the identity of most decision makers for most purposes is beside the point. For the New Haven School, by contrast, the definition of law as a process of authoritative decision means that the identity of the decision makers is crucial. In practice, they can include nation-states, intergovernmental organizations, non-self-governing territories, auton-

omous regions, indigenous peoples, and a host of private actors such as the media, nongovernmental organizations (NGOs), corporations, private armies and individuals. Which of these actors are actually important varies according to the specific question posed; on issues of individual accountability for atrocities, for instance, victims, NGOs and now governmental elites have had a particularly influential voice.

Classic ILP also paid much more attention to the identity of decision makers, but less for jurisprudential than for heuristic purposes. To trace the actual impact of law, lawyers and legal institutions on foreign-policy making, Chayes, Ehrlich and Lowenfeld had to pay much more attention to the processes of rule creation, interpretation, implementation and violation, and hence to the identity of the actors in that process. Part of classic ILP's intent was to move away from an exclusive focus on courts and judgments as quintessential legal institutions and instruments; thus, it is somewhat ironic that O'Connell reviews the activity of national courts, truth commissions and international tribunals in trying to assess the extent to which individuals have in fact been brought to account. But, true to ILP tradition, her analysis lays the foundation for a pragmatic assessment not only of the principal actors in this issue area, but also of the strengths and weaknesses of each one.

O'Connell's application of new ILP takes a further judicial turn by critiquing a decision rendered by the appeals chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), an entity that qualifies as a "duly established decision maker" empowered to fill gaps in positive law on the basis of distilled global values. She explains her choice on the ground that legal process generally emphasizes institutional settlement and that new American legal process, as developed by Eskridge and Frickey, has focused primarily on judicial decision making. But it may also prove true that adding a normative dimension to ILP will naturally refocus attention on national and international courts as the normative terrain on which lawyers feel most comfortable.

Who Decides for Whom?

Several of the methods "de-couple" the state and its representatives, acknowledging that the state can act only through individual officials but asking to what extent those officials are faithful agents for their principals. Dunoff and Trachtman apply public choice theory to international legal decision making, which suggests that "state" decisions are likely to reflect the interests of political elites more than of their constituents. In assessing the likelihood of state compliance with international rules criminalizing atrocities in internal conflict, it is thus necessary to ask whether state representatives will bear the full cost—be it politically, economically or socially—of penalties imposed on the state itself. If they will not, they are likely to lack incentives to create domestic systems designed to achieve compliance with particular international norms. In a word, Slobodan Milošević or Saddam Hussein might be more likely to direct his government to comply with Security Council resolutions if he himself bore the brunt of international sanctions imposed as a result of noncompliance. Alternatively, international conventions could incorporate specific enforcement measures and penalties to be imposed on individuals.

Much IR/IL literature takes a similar tack. Drawing on the work of James Morrow, Abbott demonstrates how distinguishing between "the state" and a specific government or individual government officials can help illuminate the grave breaches regime. Morrow sees the Geneva Conventions as based primarily on reciprocity, but with the grave breaches regime as a useful supplement to discipline high officials who would otherwise be inclined to violate the Conventions and then flee. Liberal IR theory also focuses on the relationship between governments and individuals and groups in domestic and transnational society, seeking to identify the conditions under which government

decision makers are most likely to respond to different constituencies and hence the opportunities for effective political action. Abbott cites work by Margaret Keck and Kathryn Sikkink that explains the criminalization of some atrocities but not others in terms of the political pressure generated by transnational advocacy networks and NGOs.

III. *LEX LATA V. LEX FERENDA*

Only four of the methods even purport to be able to determine *lex lata*: positivism, L&E, policy-oriented jurisprudence and classic ILP, in its own way. The other methods focus on a form of *lex ferenda*, but not necessarily in the way it is classically defined. Some prefer to raise questions more than to provide answers in either category, insisting on a conception of law in larger social, political and economic context. These methods unite in a call for more empirical research on the role of law in international life.

The Law As It Is . . .

Simma and Paulus apply their “modified positivist” method and conclude that international law establishes international criminal responsibility for genocide, crimes against humanity and war crimes in internal conflict (the law is apparently still being made on this point). Institutionally, they acknowledge universal jurisdiction for genocide and crimes against humanity, but no obligation to prosecute or extradite regarding crimes against humanity. Dunoff and Trachtman, on the other hand, claim that L&E is “more positivist than the positivists.” They argue for text-based interpretation to preserve the bargain actually struck by the parties to the treaty, explicitly rejecting the modified positivist search for strategies to overcome “gaps” in the law. Thus, Protocol II may be vague, but surely the ambiguity was deliberate; it should not be “fixed” by interpretation. Moreover, if the parties decided not to impose individual responsibility for violations of common Article 3 and Protocol II, it should not be imposed now.

Speaking for classic ILP, O’Connell underlines the deeply pragmatic nature of the ILP inquiry into *lex lata*. She wants to know to what extent individuals are in fact being held accountable for human rights abuses in internal conflicts. After reviewing the practice of national courts, truth commissions and international tribunals in over twenty largely civil conflicts since 1990, she finds that the answer is very few. However, the development of new rules and mechanisms for accountability, both formal and informal, is ongoing. Classic ILP seeks to understand why these mechanisms are emerging, how they are meant to function, and the reasons for their success or failure. The composite, in a broad sense, is the law as it exists, but classic ILP is less concerned with labeling or defining it than with exploring it.

Wiessner and Willard, by contrast, offer a specific and rigorously formulated definition of *lex lata*. Their method attempts to find out what the relevant actors in any given context want (their values) and how they pursue those values through legitimate (authoritative) and effective (controlling) means. This determination is highly context-dependent, leading them to offer a set of questions designed to function as “mapping procedures” to allow observers, advisers or decision makers to develop a detailed picture of a particular policy problem. They do not in the end offer an answer to the question whether individuals can be held accountable for atrocities in internal conflict, but recite different kinds of evidence supporting or opposing the proposition from a world order perspective.

The Law As It Should Be . . .

The remaining methods rely on positivism at least as their starting point to ascertain *lex lata*, even if their purpose is primarily to critique any such concept. The distinctive

features of these methods all emerge from their conception of *lex ferenda*. Each invokes a set of values to shape what the law should be. Equally important, when asked to address our problem, the authors applying these methods appear automatically to have assumed that the question posed was how to improve, reform or critique existing law. For many international lawyers, their methods will thus appear to be more specialized tools than the general notion of “legal methods” might imply.

Charlesworth takes the clearest stance. Feminist jurisprudence focuses on what the law is *not*, as a predicate for arguing what it should be. International law is not “objective” because it denies women all but the most marginal recognition—as participants, subjects, human beings. But feminist methodology not only uncovers the (male-oriented) subjectivity of international law by “searching for silences,” it simultaneously develops a deep normative critique. The law “as it should be” should be responsive to women, all women in all their differences around the world. It should hear their voices, reflect their experiences, and seek to improve their lives.

Policy-oriented jurisprudence also offers a clearly defined set of normative commitments: founding and maintaining “minimum public order,” defined as the elimination of unauthorized violence, and advancing toward “optimum public order,” defined as a steadily increasing enjoyment of specified human values. As O’Connell points out, many critics of the New Haven School have long argued that these goals are so vague as to be either meaningless or a front for U.S. interests. But, in the context of this problem, Wiessner and Willard elaborate a set of much more specific goals: not only the minimization of violence, but also the reestablishment of civil society, conflict prevention strategies tailored to specific contexts, and deterrence of actual and potential human rights atrocities by specific individuals.

A popular conception of L&E would place it alongside policy-oriented jurisprudence and feminist jurisprudence in terms of method, with the difference that the metric for defining *lex ferenda* would be “efficiency.” Dunoff and Trachtman reject this normative path, choosing instead to focus on the ways that “positive economics” can contribute to international law. Positive economics cannot be used to ascertain the status or content of any particular legal rule but, rather, to assess the causes or consequences of that rule once adopted.

This view of L&E aligns with IR/IL in staking out an intermediate instrumentalist ground on *lex ferenda*. Given a legal and policy decision that individual criminal responsibility should attach for human rights atrocities, L&E can assess the costs and benefits of different sanctions as perceived by individual criminals or compare the relative merits of domestic versus international mechanisms of accountability. Abbott strikes a similar note with his emphasis on the ways IR/IL can contribute to institutional design, helping international lawyers figure out incentive structures and organizational features to achieve a particular set of institutional goals. The final section of his essay reviews alternative measures for assessing the effectiveness of judicial implementation of rules proscribing atrocities in internal conflict.

Often, of course, this line between “intermediate” and “ultimate” goals and values is not so easy to draw. Abbott and Dunoff and Trachtman all recognize that normative implications, if not choices, are embedded in the assumptions that underlie any particular school of “positive” analysis. The disciplinary commitment to methodological individualism, for instance, means that “L&E methods will tend to favor more, rather than less, representative institutions.”² Nevertheless, it may reassure many readers that the two

² *Id.*, text at note 9.

explicitly interdisciplinary methods seek to harness their respective disciplines in the service of improving and implementing the law more than of making it.

Law in Context

The feminist view of *lex ferenda* asks more questions than it generates answers. As Charlesworth's description of "world traveling" emphasizes, many strands of feminism are deeply contextualist, seeking to investigate the conditions that oppress or harm women regardless of formal categories. For instance, she asks why "conflict" is defined solely in terms of military and paramilitary action, noting that many women experience persistent violence at home or in times of peace in their larger societies. This method most resembles the approach advocated by the New Haven School, which equally poses questions designed to ascertain how the law operates in very specific contexts and then evaluates the answers for their congruence with a set of predetermined goals and values.

Feminism and policy-oriented jurisprudence also champion the need for sound and thorough empirical research, an area in which they overlap both IR/IL and L&E. Dunoff and Trachtman sharply criticize L&E scholarship that offers theoretical prescriptions ungrounded in empirical research, emphasizing the need to move beyond purely theoretical debates. Abbott takes the next step, drawing on empirical research concerning the conditions under which states have been more and less willing to adopt and adhere to human rights regimes. The functionalist interest-based account emphasizing mutual state deterrence of undesirable behavior predicts that the distinction between accountability for atrocities in international and in internal conflict is quite stable and likely to endure; the "liberal-constructivist account" emphasizing private political action and social values predicts that it will disappear.

The IR/IL and L&E embrace of empiricism reflects yet another way of understanding the relationship between *lex lata* and *lex ferenda*. Both methods accept a basically positivist account of *lex lata*, but then ask whether the law as formulated will have an actual impact on the behavior of state or individual actors, and if so, whether it will be the intended or anticipated impact. This focus on whether and how law actually matters in international life paves the way for a more grounded *lex ferenda*, by giving international lawyers a better "understanding of what is politically likely, and politically possible."³

IV. PRESCRIPTIVE PROCESSES

We also asked the authors to address how their method factors in the traditional "sources" of law—the prescriptive processes by which it is made. In their accounts of what the law either could be or is becoming, they offer quite different pictures of how law comes to be. They also reveal different perspectives on the role and nature of the state as the principal actor in these processes, as well as the contribution of nonstate actors.

Visions of Prescription

The positivists find that the introduction of individual responsibility for war crimes affirms traditional methods of law formation—by treaty, custom and general principles. In particular, the evolution of the law governing war crimes underlines the "element of

³ Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361, 376 (1999).

innovation" that characterizes the creation of custom, innovation that is currently taking place in ICTY jurisprudence and the Rwanda Statute. There is a dynamic picture of purely state action, but of states acting in a variety of ways and through a range of forms and mechanisms.

Policy-oriented jurisprudence offers a picture of prescriptive processes that is more interactive and conflictual. Wiessner and Willard want to know how the world community has responded (authoritatively and effectively) to conflicting claims of individual rights versus sovereign autonomy in cases of large-scale human rights violations in internal conflict. They seek to assess past trends in decision, to determine to what extent the world community has in fact sanctioned misconduct in internal conflicts. States are the principal players in this vision, but not the only players. The decision makers in the world community respond to a series of concrete problems through a variety of formal and informal means. Whether their responses constitute "law" depends not only on their intent, but also on their effectiveness.

The feminist view of prescriptive processes is encapsulated in Charlesworth's rumination on the recognition of systematic rape as a war crime, in which she acknowledges the progressive impact of feminist activism on lawmaking but simultaneously worries that international criminal law remains "primarily a system based on men's lives."⁴ Law is made primarily by states and states are run by men. Feminist activists, operating through NGOs and national political processes, can raise public consciousness in ways that require governments to respond in some publicly visible manner but may do little to change the deeply gendered social structures that shape the law.

IR/IL offers several views of prescriptive processes, depending on the school of IR theory that is being used to inform the law. The two views of the evolution of international humanitarian law that Abbott summarizes rely respectively on state bargaining and symbolic politics in which individual activists play a critical role. In the realist account, war crimes tribunals are established when it is in the interests of great powers to do so—interests that are evident in the Balkans but not in Cambodia. Liberal and constructivist scholars, on the other hand, credit private political actors with shaping international norms and mobilizing public opinion behind them through skillful symbolic action. Abbott himself stresses the cumulative or complementary nature of these different approaches.

Dunoff and Trachtman begin by accepting that international law is strictly the product of governments and their constituents. And they certainly recognize the role of interstate bargaining, observing that each of the parties to the Geneva Conventions had a strong incentive to reach a reciprocal *ex ante* agreement to protect combatants. Elsewhere in their essay, however, they link the problem of transaction costs to the role of nonstate actors and international tribunals in clarifying and developing international humanitarian norms. They do not resolve this apparent contradiction, but in formulating their own prescriptions, they appear to imagine a much cleaner and simpler prescriptive process, one in which normative goals are already established and it is the job of technicians to see how best they might be achieved.

Finally, old ILP offers a kind of "thick description" of law in action: a stream of decisions by a range of state actors that bring legal regimes into being and determine their content and significance. New ILP, on the other hand, appears to envision a more discrete process whereby a "duly constituted decision maker," such as an

⁴ Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379, 386 (1999).

international tribunal, will interpret texts or custom in line with a range of values still to be distilled from many different participants in the international community, and will thus make new law.

Visions of the State

These different visions of prescriptive processes encapsulate quite different visions of the state as the primary prescriptive actor. The debate is not, as is increasingly suggested, between statist and nonstatist. All the methods surveyed here, with the possible exception of CLS, seem willing to grant the state a *primus inter pares* status in international lawmaking. The questions of the day are rather (1) the extent to which nonstate sources should be considered alongside or as a supplement to state sources; (2) the best way to conceptualize the state as representing other actors; and (3) the need to take account of different state institutions.

On the first question, classic positivism and probably classic ILP insisted on limiting the world of lawmakers to states alone; today Simma and Paulus explicitly accept that the formal view of sources will have to track the actual process of "norm perception" in the international sphere, which may be moving away from the will of states. Policy-oriented jurisprudence, feminism and probably new ILP explicitly accord a supplementary role to nonstate actors. L&E and IR/IL seem to allow for both positions.

On the second question, Dunoff and Trachtman distinguish L&E analysis from other methods precisely on the basis of its assumption that individuals are the ultimate source of norms. A further question is the extent to which states adequately represent nonstate actors in prescriptive processes, which raises the corollary question of the extent to which international law can require broader representation and response to citizen concerns. As discussed above, L&E and liberal international relations theory address this issue directly, arguing that IL can and should favor more over less representative institutions. The New Haven School would also find various circumstances in which the value of human dignity would be best served by enhancing the representativeness of domestic institutions.

Charlesworth raises an interesting corollary of this approach. Discussing a recent case in which the Inter-American Commission on Human Rights held Peru accountable for the rape of a woman, she emphasizes the importance of recognizing international responsibility for an inadequate national structure to respond to crimes against women. Holding states accountable for crimes of omission—failing to punish a perpetrator and/or to take adequate steps to prevent the crime in the first place—may prove more effective in the long run than holding individuals directly accountable for crimes of commission. Although direct criminal prosecutions of individual perpetrators of atrocities may be more visible and more satisfying professionally to the college of international lawyers, states still maintain a monopoly on coercive power and are most capable of affecting the lives of the individuals who live within them. Recognizing the state as still at least the primary actor in the international system, but conceiving of it in terms of its relationship with its citizens, thus means focusing rules and remedies at the national rather than the international level, or at the international level only as supplemental to the national level.

On the third question, even the methods that focus almost exclusively on states recognize a broader range of state representatives than the traditional phrase "States parties" seems to connote. Simma and Paulus acknowledge that different branches of government are increasingly acting on their own behalf instead of through foreign ministries. They cite both national laws and national judicial decisions as evidence of state practice helping to establish the international customary law norm holding indi-

viduals accountable for crimes against humanity committed in internal conflicts. On the other hand, they assert flatly that the Security Council cannot legislate individual accountability for war crimes in internal conflict. Domestic judges and national legislators thus count for more than Security Council representatives as decision makers in international law.

V. COMPARATIVE ADVANTAGE(S)

The fifth and sixth questions we posed asked authors to consider whether their method might be better at tackling some subject areas than others, both with regard to the problem posed and in general, and to explain why their method is better than others. Many authors collapsed their answers to these questions into one, offering a general assessment of the comparative advantages of their method. Relatively few were willing to restrict their method to specific issues or issue areas. On the other hand, many authors took care to describe the context in which they found their method useful, a context often shaped by a set of normative commitments.

Before reviewing the claims that the authors make for their methods, it is striking to observe what they do not claim. The majority of authors disclaim their method's ability to provide "one answer" in terms of either what the law is or what it should be, implicitly attributing such certainty to some other method. But in fact, *no method* actually claims this ability. Indeed, the positivists—to whom the other authors often attribute this position—explicitly deny it. Thus, it appears that absolute determinacy is a myth, or more accurately, a straw man. The debate should instead be recast in terms of *relative* indeterminacy: between methods insisting that because there is no *one* answer, any answer is possible, and those that contend that even in the absence of a single answer, some answers are manifestly better than others and that the lawyer's job is to narrow that range.

Methods and Issues

The links between specific methods and issues remain largely inferential. Dunoff and Trachtman recognize the "incommensurability" problem: that while price theory and cost-benefit analysis presuppose that costs and benefits of particular choices to particular actors can be readily calculated, "goods" such as national security and human rights may be relatively incommensurable. But they certainly do not regard this objection as an insuperable obstacle, pointing out that legal and political systems may be precisely set up to make incommensurable choices. It also seems likely that feminist methods would have less to say about some issues than others, depending on their relative impact on women's lives. The international postal and telecommunications regimes, for instance, are less likely to be candidates for feminist reshaping than rules governing the use of force, human rights or economic sanctions. New ILP is similarly likely to differentiate itself most clearly on issues with a strong normative valence.

Overall, however, the authors are much more prone to differentiate their methods in terms of relative ability to determine *lex lata* versus *lex ferenda*, or relative capacity to explain the conditions under which specific international legal regimes are likely to flourish and the directions in which they are likely to develop, than in terms of specific issues. Several authors, including Dunoff and Trachtman and Simma and Paulus, also specifically noted their method's ability to withstand a strong moral pull to expand the law on issues such as human rights atrocities.

Comparative Contexts

As discussed in the introduction, a second basis of comparison concerns the use of different methods in different contexts—from practicing lawyers of various types to

academics. Koskenniemi characterizes the symposium as a competition to determine “who is going to be the diplomat’s best helper.”⁵ The positivists readily accept this characterization, arguing that the principal function of an international lawyer is to identify concrete restraints on state representatives. However, adherents of many of the other methods see their function quite differently.

Wiessner and Willard offer an analytical construct that can be used for multiple purposes, from “scholarly appraisal” to “strategic intervention,” by scholars, advisers and decision makers. O’Connell also takes a broader perspective: new ILP appears to speak to the international community as a whole, although it might be most relevant to the specific institutions, such as international tribunals, that it empowers as duly established decision makers. Speaking for IR/IL and L&E respectively, Abbott and Dunoff and Trachtman would agree that their methods are of value to the diplomat, but to the diplomat who needs more than conventional legal services. Both methods focus more on opportunities than on constraints—opportunities to build a stronger and more effective international order. As Dunoff and Trachtman see it, L&E offers a wealth of “useful theory.”⁶

Charlesworth contends that feminist methods cannot be understood as alternatives to the other methods; they are intended to start a conversation rather than yield a “single, triumphant truth.” While the “diplomat” seeks to know what the law is, feminist methods respond by raising his consciousness concerning not only the plight of women worldwide, but also, more fundamentally, the way that what he takes to be “objective” and “impartial” international legal rules are in fact deeply gendered. Finally, the role of CLS is ultimately to question, to challenge, to unsettle. The status quo is the enemy—whatever it may be. It is thus not surprising that Koskenniemi warns the critics to be prepared to turn their tools on themselves and deconstruct deconstruction. The critics’ comparative advantage is fighting complacency.

Comparative Commitments

It is tempting to rank the methods, in the order listed above, as relatively better, or more “useful,” for the practitioner, the policy maker, the reformer or system builder, the advocate, and the professional critic. Lawyers perform all these roles, but are they all properly part of the legal profession? Our authors disagree. Simma and Paulus, for instance, draw a sharp distinction between law and policy. They acknowledge that policy-oriented jurisprudence, IR/IL and L&E may be very valuable for analyzing decision-making processes and formulating policy proposals. In their view, however, such activity is not lawyering: the provision of “guidance” to “real-life decision makers.”⁷

Most American-trained lawyers, at least, accept the legal realist deconstruction of this distinction. They define themselves primarily as problem solvers, a role that involves lawmaking as much as law finding, policy evaluation as much as textual interpretation. International lawyers like Abbott, Dunoff and Trachtman thus assume as a matter of course that lawyers ask many questions other than What is the law? or even What should it be? and that the answers to those questions are as likely to be found in other disciplines as they are in treaty texts or state practice.

Yet this particular divide cannot simply be Anglo-American versus European; Koskenniemi, after all, is equally European and his description of the Finnish legal academy, at

⁵ Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351, 352 (1999).

⁶ Dunoff & Trachtman, *supra* note 1, at 394.

⁷ Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302, 305 (1999).

least, portrays a quite heterodox and interdisciplinary place. Nor can Simma and Paulus be so easily pigeonholed; they are all too aware of positivism's unfashionable reputation as the repository of "old-fashioned, conservative, continental European nineteenth-century views" but choose to defend it anyway.⁸ Moreover, policy-oriented jurisprudence took Legal Realism to heart and sought to reconstruct international law on its foundations; yet it comes in for equal, if not greater, criticism by other Anglo-Saxon lawyers, based both within and outside the United States.

Conceptions of role and hence choice of method are less likely to be informed by geography than by differing understandings and beliefs about how each individual lawyer can best advance her or his normative commitments. Abbott expresses this point most directly in his response to Koskeniemi, in which he insists that the choice of "style" as a lawyer "reflects (and shapes) one's personal and professional goals." "My goals as a lawyer, scholar and teacher," he writes, "are . . . to better understand and communicate the functions, origins and meanings of legal rules and institutions, and thereby to contribute, in even a small way, to improving global governance and ultimately the human condition."⁹ "Improving global governance and ultimately the human condition" is a mantra with which few international lawyers would disagree; some version of these sentiments must lie at the core of any choice to embrace international law as a career.

The question is how best to advance these goals. For the positivists, sticking close to concrete rules is the best hope of knitting together a minimum world order in the face of enormous cultural and political diversity. For Charlesworth, challenging deeply held assumptions about the "objective nature" of international law—so deep as to be essentially invisible—is the only way to bring the needs of the women of the world into focus. Wiessner and Willard claim that their method produces legal analyses directly oriented to helping policy makers address vital and immediate global problems. O'Connell sees new ILP as helping identify and achieve the values of a global community. Dunoff and Trachtman hope to motivate empirical research that will provide as concrete answers as possible to instrumental questions. Koskeniemi, too, has his normative agenda; he passionately believes that how we talk about law can blind and deafen us to the demands of justice. Translation of social, economic and political needs into legal claims is a transformation of lived and felt experience into the dry distance of words and concepts—a transformation that lawyers need to remember even as they conclude that they cannot find a better or more effective way to advance their cause.

CONCLUSION

This symposium is designed to facilitate a comparison of method, not only in the instrumentalist sense of which method may be better for which purposes, but also in the deeper sense of aiding comparative understanding, whereby different methods come more sharply into focus relative to one another. The questions we have posed to our authors were designed to encourage introspection as much as self-promotion. Exposing assumptions about the nature of international law, the identity of decision makers in the international system, the relationship between *lex lata* and *lex ferenda*, and the processes of lawmaking naturally leads to the next level of inquiry: why make these assumptions rather than those? The answer, we suggest, lies in perceptions of comparative advantage in performing a particular professional role, a role that is itself shaped by a set of

⁸ *Id.* at 302.

⁹ Abbott, *supra* note 3, at 363–64.

normative commitments. From this vantage point, the underlying premise of the symposium is that the practice of a particular method is a matter of choice, for our readers as much as our authors, and that it is a choice that should be as self-conscious as possible.

Viewed only in this light, however, the symposium risks being seen as a voyage in collective narcissism. We also sought to focus our authors' attention on a problem of pressing importance in international life, to move beyond often arid theoretical debates. Indeed, the application of theory to a concrete problem is at the core of our definition of method. In rising to this challenge, our authors have demonstrated not only the relative merits of their methods, but also the value of having a wide range of methods to bring to bear on issues that stir the conscience and move us to professional and personal action. It thus seems appropriate to end on a cumulative, rather than a competitive, note by suggesting at least one way to put these methods together.

How should we address the problem of atrocities committed in internal conflict? The positivists tell us the cutting edge of international lawmaking is the criminalization of ordinary war crimes, an issue that should then be the focus of international activism. Policy-oriented jurisprudence directs our attention to the real values we hope to advance, noting that living in fear of impending violence clearly deprives human beings of things they value but asking whether such a deprivation should constitute a human rights violation. Feminist jurisprudence, on the other hand, suggests the strong possibility of answering yes to that question, seeking not to minimize the horrors of human rights atrocities in both international and domestic conflict but noting that over half the world's population is more likely to experience domestic violence than "ethnic cleansing."

L&E begins from the premise that leaders are unlikely to criminalize their own potential behavior, preferring the comforting shelter of traditional doctrines of state responsibility. International legal regimes seeking actually to deter atrocities in internal conflict must thus incorporate very specific implementation provisions to create pressure on governments to create domestic institutions that could help shift the domestic balance of power. IR/IL offers additional suggestions of how to link international and domestic courts, as well as how to pick specific acts to criminalize so as to draw maximum support from NGOs and individuals operating in transnational society. Classic ILP helps us figure out what impact the Geneva Conventions and customary law have actually had on foreign-policy making; new ILP offers a theoretical foundation for allowing existing international institutions to crystallize emerging international norms. Finally, CLS helps give voice to the horrific, but deeply human, experiences of violence and injustice that cannot be captured even by the word "atrocious," much less by the clinical technicality of "violation."

In conclusion, this symposium demonstrates that as a discipline, we are better off with a multiplicity of methods. As individual scholars, we are better off understanding how to choose between them.

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