A Matter of Personal Choice

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A Matter of Personal Choice
Bing Bing Jia*

Abstract

This short Essay is a comment on the Lead Essay of the Symposium. It seeks to make two points from personal observation. First, an approach for study, research, and practice in international law depends on the purpose the work of an international lawyer seeks to serve. Second, in terms of methodology, the social science approach overlaps to some degree with other approaches. The proposition drawn from the two points is that an approach, being individualistic in nature, is a matter of personal choice, unsuitable for general consumption.

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I. INTRODUCTION

The social science approach to international law, as described in the main essay by Abebe, Chilton, and Ginsburg (Lead Essay), is at once ambitious and modest.1 It is ambitious as it can account for a number of publications that have earned awards at the annual conferences of the American Society of International Law since 1990.2 In the Lead Essay, the social science approach is held up as a way to study and research international law that apparently displaces two assumptions3 shared by Oppenheim and the contributors to the American Journal of International Law Symposium of 1999.4 It is modest because the social science approach is one of the several known approaches for study and research in international law; thus, the Lead Essay does not claim to propose a new approach.5 Moreover, upon closer inspection, the basic methods representative of that approach seem to be familiar to international lawyers,6 even if these lawyers may not have embraced the methods fully.

Not to survey and evaluate again the existing approaches in international legal scholarship, which have been summarized admirably in both the Lead Essay7 and the conclusion to the Symposium of 1999,8 the present author would immediately make clear at the beginning of this short Essay that his approach is close to Oppenheim’s positivist approach,9 drawing where appropriate on the

2 See id. at 3 n.13.
3 Id. at 4–5. The two assumptions are (1) the shared omission that international law should be conventional social science, and (2) the shared conception that international legal scholarship is focused on studying the substantive obligations of international law.
5 Abebe et al., supra note 1, at 7 (“Our goal is thus not to identify new trends. . .[I]nstead, it is to more fully describe and justify this social science approach than prior efforts.”).
6 See id. at 14–15. It appears that the terms “approach” and “method” are used interchangeably in the Lead Essay, as well as in the Symposium of 1999. There may be a fine distinction between these two terms, in that the former captures the main feature of the usual way in which a lawyer deal with the discipline or issues of international law, whereas the latter seems to signify the actual steps undertaken by the lawyer in such dealings. Whether the distinction is correct is open to further consideration.
7 See id. at 7–15.
9 In this author’s view, Oppenheim’s list of seven tasks for international lawyers still rings largely true today. See L. Oppenheim, The Science of International Law: Its Tasks and Method, 2 Am. J. Int’l L. 313,
present author’s experience with others. International law, in short, is a profession that combines the academic and practical sides. Given past efforts by eminent lawyers, there is no need to defend the positivist approach in this Essay. Indeed, it would be unusual if a positivist lawyer queried whether international law exists as law.

In light of the Lead Essay, two comments will be given. The points which they seek to address are first sketched out at this juncture.

First, a debate about approaches to a discipline is generally interesting, but the approach definitive of international lawyers, academic or practicing, depends on the purpose their work aims to serve. They learn the ropes by way of study, research, teaching, publication, legal drafting, advocacy, and litigation. Their approaches are formed over a lifetime, driven by the purpose of their work.

Second, existing methods, or at least those of some international lawyers, may not differ much in nature from those employed by the social science approach as advocated in the Lead Essay. The suitability of methods for the study and research of international law perhaps depends on the identity of the intended audiences, such as students, professors, government lawyers, independent counsel, arbitrators, and judges. As different audiences have different expectations of this discipline, the presumption is that the motley collection of methods can coexist and inform each other.

The proposition to be established in this Essay is that personal approaches, however defined, may not be suitable for general consumption. An approach is personal when it is formed through the amalgamation of education, training, work, and all other life experiences. It is impossible to replicate, let alone replicate with a level of success matching that of those who created the approach. Besides, personal approaches affect not only the way international law is studied and researched, but also the way the law is practiced. As such, personal approaches do

314 (1908). It remains a remarkable list, considering that he wrote it at a time when there was no permanent international court in the world. No guidance, therefore, could be derived by him from a standing court’s statute that conveniently set out a list of sources of international law. Article 38 of the Statutes for the Permanent Court of International Law and the International Court of Justice provides the contours of a basic approach to international law as applied by judicial institutions. It pushes the positivist approach to the forefront of the discipline. In comparison with other approaches, Oppenheim’s remains the one that reflects most closely that basic approach of Article 38. See Statute of the I.C.J. art. 38 ¶ 1, June 26, 1945, 59 Stat. 1031.


11 These are personal in that they are created and employed by individual writers and have subsequently achieved a degree of general recognition in terms of uniqueness or distinction among peers or the individual writers’ followers.

not fall neatly under a single label, such as positivism or critical legal studies, because they grow and change with personal experiences.  

II. Approach Is Purpose-Determined

The point of the first comment is that approach is determined by purpose, pursued, and perfected throughout a career to which there is a firm commitment. Such a purpose supplies the motivation to study and work in this field. Consequently, this Essay is more relevant to established lawyers than to students—even though this author teaches students his approach with a clear aim that they consider careers in light of that approach, but without any pressure to adopt it.

If the purpose is to study, analyze, or critique international law as a discipline, the issue of viability of this system of law, which consists in questions of efficacy and compliance, would be high on the list of research questions. Many approaches, including the social science approach, have attempted to provide an answer and, while doing so, reveal their own external views of international law both as an academic discipline and as a legal order. 14 There is not, and there need not be, a consensus regarding which existing approach is better for this (external) purpose.

If the purpose is, however, to be qualified one day to enter practice in this field, the approach would be the one chiefly employed by lawyers and legal advisors. Here, a solid knowledge about state practice and caselaw is essential but not exclusive of other sources, which has been the hallmark of influential international law textbooks in the past. 15 This characteristic aligns largely with the positivist approach. For a practice-minded lawyer, law is for settling and preventing disputes, although innumerable issues accompanying the interpretation and application of law for that purpose can also be intellectually challenging and often require study and research. Some of those issues may indeed require in-depth theoretical studies, and most can become points for arguments in disputes between states. In this type of situation, intellectual challenges will have to be balanced by the practical consideration of the client’s wishes.

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13 There might be some truth to the assumption that the approaches displayed during the Symposium of 1999 have all grown out of the positivism first championed by Oppenheim and subsequently reflected in the Statutes of the Permanent Court of International Justice and the International Court of Justice. The diversion from positivism, as it were, began to appear when external views emerged in legal scholarship.

14 See Abebe et al., supra note 1, at 13–15. On the internal and external views, see id. at 5 (citing H.L.A. Hart, The Concept of Law (1961)).

As a personal choice, the present author prefers the latter to the former as the purpose that defines his own approach to international law. This must be qualified by saying that his choice has been consequent upon personal circumstances, and that he has no intention to assert it as a general approach. Moreover, that approach has gradually come to reflect elements of both purposes mentioned above. In spite of that convergence, the purpose with practice looming large in the background clearly has a greater influence. Ultimately, even the purpose of study, research, and teaching is supposed to assist in the realization of the grand design of international law as a tool to order international relations and settle interstate disputes. That settling disputes and keeping order can be a purpose for studying and researching in this discipline may not be surprising given that the international relations of today’s world are still dominated by the international relations of nation-states, as they were a century ago. This domination is even more conspicuous in times of global crisis. While it is recognized that, from a doctrinal perspective, different approaches provide interesting and often contrasting insights into the nature of this discipline, interest of that kind per se is not likely to sustain itself for so long that it leads to persistent efforts in applying a particular approach, unless the object of that interest, international law, is also useful as a living system of law. On that account, international law cannot exist as a pure science, insulated from the real events that are its lifeblood.

III. THE POSITIVIST PURPOSE VIEWED INTERNALLY

The purpose of keeping order and settling disputes primarily among states distinguishes international law from municipal law. The constant comparison between municipal and international law often hinges upon the relative utility of these two bodies of law with respect to similar problems. That may be the cause for the rivalry, if any, between them. But progressive dualism considers this an unlikely scenario, for each operates for its own purpose and within its own context without necessarily encroaching upon the purpose the other seeks to uphold.17

Taking an internal view of the discipline of international law, the positivist can, in the course of study or practice, analyze and apply substantive and procedural rules of international law covering diverse areas of interests, like climate change, the law of the sea, territorial changes, state responsibility, international trade practices, international institutions, international human rights, and so forth. A study carried out in this broad way is obviously expansive in scope, where the existence of a discipline can be quantitatively discerned and qualitatively recognized. Moreover, the expansiveness of the subject of international law is

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equally palpable to practitioners, as testified to by, among others, the numerous intergovernmental organizations that build up practices in a great variety of areas of specialty.\footnote{See Martti Koskenniemi, \textit{International Law in the World of Ideas}, in \textit{The Cambridge Companion to International Law} 47, 57 (James Crawford & Martti Koskenniemi, eds., 2012).}

\section*{IV. Approach Evolves with Experience}

The point of my second comment is the following. A personal approach is akin to a personal habit, formed in the course of personal development. It would be wrong to see it as fixed after the defining work comes out or the approach has become a habit. As it evolves with experience, the approach cannot, a priori, discriminate among the existing approaches or methodologies; rather, it will be likely to absorb elements of the approaches or methodologies along the way, as required by the circumstances of current work.

Some years back, the present author began to work in the area of international criminal law, when he came upon a case in which the policy-oriented approach had played a decisive role because customary law was silent with respect to a particular legal issue arising in the case. The positivistic instinct might be to pronounce a \textit{non liquet}; whereas, in the proceedings, no judge was willing to do that, for the personal freedom and individual responsibility of a defendant, as well as the credibility of the judicial institution, were on the line. The majority finding was reached through a combination of the positivist methodology and a healthy dose of policy considerations.\footnote{See Bing Bing Jia, \textit{International Case Law in the Development of International Law}, 382 \textit{Recueil des Cours} 175, 322–25 (2015).} As a consequence, the personal approach of the present author was changed in a way that he never anticipated, and the change, albeit in a limited sense, was wrought by the circumstances of that particular case. But this recourse to another approach was only possible when the purpose of the work demanded an answer.

\section*{V. Relations Between the Social Science and the Positivist Approaches}

Labels, such as the ones used in the heading, are used for the sake of convenience only. They may conveniently describe the principal characteristics of approaches without signifying the comparative worth of a particular approach. It is conceivable that there are lawyers who do not care much about the suitable label under which they may characterize themselves.

The social science approach, as described in the Lead Essay,\footnote{See Abebe et al., \textit{supra} note 1, at 5–6.} is not different from the positivist approach in terms of two methods: first, the setting of a
research question; and second, the empirical way to test a hypothesis developed from the research question. This may be demonstrated by an example in which a government relies on the right of passage through international straits to justify continuing use of a waterway bordered by another state.\footnote{See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), No. 2017-06, Written Observations and Submissions of Ukraine on Jurisdiction, Perm. Ct. Arb., ¶¶9, 78 (Nov. 27, 2018).}

The positivist starts by focusing on an issue or research question, like whether a legal right of passage applies in that particular waterway. No empirical research is necessary for claiming the right, which is generally recognized in Part III of the United Nations Convention on the Law of the Sea of 1982.\footnote{U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.} However, an empirical study would be required to test the hypothesis that the waterway in question has been used as an international strait, including an assessment of the volume of international shipping plying the waterway over a period of time. Here, a problem arises in whether the social science approach will pursue the same research question. Perhaps that approach is more likely to focus on the question of why the coastal state had allowed international shipping to use the waterway for a period of time in the past and discontinued it prior to the emergence of the dispute. But the positivist will be less concerned with that question than with the legal consequences of the discontinuance of the status quo ante.

In short, methodologically, it may not be easy or necessary to draw a bright line between the two approaches. The difference between them probably lies in the different research questions posed from the perspectives of international law and social science,\footnote{This author is aware of the fact that the 1999 Symposium posed a single question of substantive law to all contributors and wonders what might be the answer given by a social scientist.} for lawyers and social scientists are interested in different aspects of a situation.

VI. CONCLUSION: A MATTER OF PERSONAL CHOICE

The starting point for this Essay is the purpose a lawyer seeks to attain through studying and working in international law. It is not necessary that lawyers always treat the discipline as if they were engaged in practice. To combine study and research with practice is, however, an approach that may serve both academic and practical purposes. Such an approach can be enriched by borrowing from other approaches where appropriate. While it may be unscientific to conclude that an approach to this discipline is individualistic, that realist view at least leaves the field open to all past, present, and future approaches, so that no lawyers feel constrained in pursuit of the purpose they seek to attain in this discipline.