
Current Trends in European International Law Publications

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LXIV and LXV *British Year Book of International Law* (1993 and 1994); 55 *Heidelberg Journal of International Law* (1995); XXV and XXVI *Netherlands Yearbook of International Law* (1994 and 1995); 65 *Nordic Journal of International Law* (1996); *Revue générale de droit international public* (1995 and 1996)

1 Introduction

A review of larger bodies of recent European international legal scholarship in a select number of distinguished European journals and yearbooks presents a challenging task. Therefore, rather than setting out to provide a detailed assessment, including historical data, of each of the publications covered in this survey, this essay intends to offer at most a sketch, a description, a 'feel' of their recent volumes. The picture it thus presents is a highly subjective representation of the manner in which these publications come across to their readers. It is written more by way of a proposition than as the final story.

Six themes were selected to serve as the basic elements — just like the eyes, nose and mouth — of an *identikit* for each publication, enabling an in-depth comparison. During initial readings I first paid attention to the topics covered, i.e. subject areas and thematized issues, and the emphasis awarded them in general by the different publications. Different issues are identified as problematic or significant by the different editorial groups and different authors. The 'emphasis' given to particular topics in each publication indicates a weak form of editorial policy followed. I asked, for instance, which regions of the world were represented, whether topics were new or old, whether some topics, such as human rights, received more space than others, or indeed secured so much attention as to amount to 'advocacy'.

Second, I examined the attitudes expressed by authors as well as the implicit and explicit editorial choices made in relation to some of the major questions of international law currently of concern to the discipline. For instance, what is the discipline's relationship to politics? Some journals explicitly insist on a clear-cut

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distinction between political and legal questions. Others, in contrast, frequently feature articles by policy-makers (administrative personnel, diplomats, etc.) and others who comment directly and with significant legal insight on contemporary political decisions of governments. An insistence on this distinction can lead to a problem of predetermination; if lawyers filter out legally meaningful issues of the political context, they simultaneously surrender any ability to control their determination. They thus accept that the political context of law is predetermined by others from the 'outside'. However, if one engages in a discussion of issues including their political context, a much broader knowledge than merely that of positive law is required in order to be able to offer a meaningful contribution.

A second relational question is that of the discipline's relationship to history and theory. For centuries the great international legal scholars have been aware that law is at least in one sense history. Yet historical themes appear very rarely in the literature. Rather, international legal history has become a separate subject matter for which separate books are written by separate specialists. It seems to me, however, that international legal writing must reflect a historical understanding in one way or another simply because all international problems develop over time and often have very tangled historical legal roots. Lack of consideration of the origin and evolution of these problems makes any analysis shallow. I therefore sought to uncover this implicit understanding: Are there historical truths to be found through empirical study and, if so, which empirical studies seem legally reliable? In other words, is there once more a problem of predetermination or is there a multitude of historical facts and legal conclusions that depend on something else?

The discipline seems to display a similar relationship with theory; there must be some theory because analysis needs some kind of guiding thread, but it is often kept implicit. I did not push this point very far but merely inquired whether the writings reflect law's open structure or strive more for closure; whether they see their issues eventually falling into the core areas of certain rules or lying 'ambiguously' in the penumbras.

Third, I compared the featured articles in terms of their communitarianism or 'étatism'. As might be expected, communitarianism was generally promoted. I shall show that in some cases, however, the general aspiration to community-building was linked to the need to understand international law as a coherent and unitary system (universalism). It would appear that decentralization and diversification of international legal regimes was considered at least potentially threatening to the task of community-building.¹

¹ I think it is important to state at the outset that this link between universalism and community-building does not seem quite sound to me because a diversification of norms and regimes — e.g. to better reflect different situations of different peoples and cultures — in no way necessarily impedes communitarianism in the international society. Of course, one can hold the opinion that the best community is a homogeneous one. On the other hand, one could also think, for instance, that the tolerance of heterogeneity and taking account different needs is community-building. The question is why then should it be thought necessary that community-building be linked to universalism in a society which may obviously never have universal values as a basis for its norms. Indeed, it is difficult to say how much

Fourth, I examined the strong influence of what is sometimes referred to as the invasion of the 'economic ideology' into the rhetoric of international law. This invasion is arguably caused by a loss of faith in universal values since, at first sight, economic values may not seem as subjective as others. For instance, the rhetoric of 'efficiency' is pushed *ad nauseam* throughout the articles, in some journals even more frequently than in others. It has replaced 'good' and 'right' because these words can no longer be used with any confidence by self-critical scholars in a multicultural, tolerant and multi-value society. Yet, regrettably, they make no mention of the inherent normativity and subjectivity of the efficiency rhetoric. In this way, they fail to comment on the very criticism which the economic theory first exercised against authoritative statements of 'good' and 'right', but has since had to turn against itself, i.e., the inherent normativity of the efficiency criterion itself. An even stronger criticism links the efficiency rhetoric to my point on anti-diversification, which, in turn, is falsely linked to community-building. In the words of Lyotard, it makes for a totalitarian practice: 'The application of the [efficiency] criterion to all our [different fields of life] necessarily entails a certain level of terror . . . : be operational (that is, commensurable) or disappear.'² Neither of these critiques, the self-critical element of the economic theory or the critique against forced commensurability, were noted in the writings supporting the efficiency criterion.

Fifth, I weighed up the general tones of optimism and criticism. Generally, there was an overwhelming attitude of optimism about achieving 'efficient' international legal solutions to all the matters discussed. Similarly, writings endorsing current doctrine clearly held stronger ground than proposals for law reform. Critical articles were the most eager to promote law reform, but there were few such contributions in comparison to accounts of doctrine as it stands.

The final, but certainly no less interesting, point of inquiry concerned the authors themselves. Although it was not possible to build up a comparative table of gender, nationality, career structure, language and age profile of contributors from the information given in the publications, the most striking imbalance could be seen, unsurprisingly, in the small number of female authors — except in one issue, the special edition of the *Nordic Journal* (1996, vol. 65). The publications' identikits were naturally most influenced by the choice of contributors and it was a pleasure to see that there was strong diversity among the publications in this respect, even if not yet enough to promote gender equality.

2 Identikits

In the following I shall sketch out tentative identikits for each of the publications. Not

cultural heritage would be lost if it ever did. The mere proposition of diversification as a threat seems to shut out many possibilities and take for granted that which may not even be a very good argument.

² Lyotard, 'The Postmodern Condition', reproduced in K. Jenkins (ed.), *The Postmodern History Reader* (1997) 37.

all of the six criteria will be used to analyse them as different publications devote greater attention to some points than to others.

The *British Year Book of International Law* is now well into its seventh decade. The very nature of a yearbook schedule means that its articles and commentaries on recent international phenomena appear only after a certain delay. For instance, in the 1993 and 1994 volumes we read about the aftermath of the Gulf War, but there is not a single piece on the crises in the former Yugoslavia or Rwanda. It may also be as a result of the publishing delay that the *British Year Book* seems to have taken it upon itself to provide a type of final seal on international legal debates. With precision, and taking no doctrinal risks, the articles featured represent a well-weighed, well-argued and also very predictable outcome for the issues debated.

The editors of the *Year Book* seem to be most intrigued by the weighty classical issues; in fact, the 1993 and 1994 volumes include discussion of only one topic that goes back less than a hundred years (other than the UN) — i.e., sustainable development. Other contributions map the developments of the law of the sea, the law of treaties, humanitarian law, diplomatic relations, and so forth. The *Year Book* clearly does not see itself as a forum for promoting law reform. There are no critics of the system of international law, whether understood as a system of norms or regimes, although most authors have a well-worked criticism of their topic. These, however, are not reform-oriented critiques but are rather technical in nature. They usually suggest some tinkering with the norm or regime in some way, but never criticize them structurally, culturally or systemically. To conclude (by simplifying) on this aspect of its identikit, the *British Year Book* performs the function of the gentlemanly, conciliatory, authoritative analyst of international law, second only to the ICJ.

The *Heidelberg Journal* was in its 55th volume at the time of this review. It provides a wholly different approach to international issues than is found in the *British Year Book*. Its favourite themes seem to be concentrated in the human rights area — indeed to such an extent that one could call it human rights promotion. The *Heidelberg Journal* clearly seeks to keep the human rights issues of Albania, East Timor, Iraq, Lithuania, South Africa, Croatia, among others, on the table. As I shall show later, the law/politics distinction is not very jealously drawn. On the contrary, many authors even comment on the German government policies relevant to their topics. History and theory are only implicitly present, though it will be shown later in this article, for instance, how certain evaluations of contemporary international legal questions are influenced by implications from the (German) historical experiences. Theoretically, the articles seem to leave room open for debate. Human rights issues, for example, are placed on the table and are kept there, though no final legal solution may be possible.

The inability to close these issues clearly does not diminish the value of the scholarship, but it differentiates the Heidelberg journal from some of the more classical ones. The special flavour of the journal derives from the interesting discussion of minority issues (a topic found only rarely in the other publications), a few German language pieces (with English summaries), the featuring of Eastern European authors, and the impressive quality of both the editing and the articles themselves. For the

purposes of the identikit, I would call the *Heidelberg Journal* a superbly organized and open-minded idealist with a strong interest in Central European issues.

The *Netherlands Yearbook* celebrated its first quarter century with the 1994 volume, included in this review. This volume, in particular, reflects the *Yearbook's* somewhat mediatory stand between two traditions: the British and the 'others' (Central European, Third World, Asian, and so on). In their introductory paragraphs, the authors often anticipate and try to pre-empt critiques of discussions that would seem to be the norm rather than the exception in the French and German publications. It thus seemed that the apology was directed westward — perhaps with the intention of promoting non-classical topics and integrating them in the classical British tradition.

Overall, and particularly considering that this is one of the smaller international law periodicals, the articles in the *Netherlands Yearbook* were very well written and the topics quite diverse, including both classical and more modern ones, such as international law in relationship to the environment, space, economic communities and terrorism. Among the publications included in this review, it clearly has the largest national section, which takes up about half (and sometimes more) of its pages.

Another point contributing to a mediatory and neutral appearance of the Dutch discourse was the superficially value-free efficiency rhetoric, found in virtually every contribution. If one accepts my critique concerning the illusory nature of the value-neutrality of this rhetoric, it can only provide an appearance of mediation between competing values and needs to be scrutinized very carefully. In its identikit, the *Netherlands Yearbook* presents an image of the trendy mediator with a large national agenda.

With its history of 65 volumes, as of 1996, the *Nordic Journal* is one of the oldest smaller periodicals. Its point of emphasis has clearly been in the area of human rights, although its editorial policy seems to have been shifting recently. Surprisingly, many authors choose as their topic a specific article of an international human rights document. However, the latest volumes also contain some very interesting more general studies, such as on the status of soft law, UN sanctions, disadvantaged groups, and systemic problems of international law.

Contributors generally come from academic circles, although it is not at all unusual for them to have extensive diplomatic experience. Therefore, these authors display greater ease in their relationship with politics and in their comments on the political processes of the international arena, as will be discussed later. The gap between these articles and the strongly textual strand of the more specialized articles in the *Nordic Journal* is very wide. Until the 1996 special edition, there was a complete absence of attention to historical and theoretical issues in the Nordic agenda. Then, with the special issue, it was almost as if the *Nordic Journal* had decided to remedy all its weak points at once: women's issues, theoretical discussion, and history as the background of contemporary international law. More generally, however, the implicit theoretical takes of the Nordic articles are as wide in range as their subjects. On the one hand, there are the more textually oriented articles, which assume a possibility of closure and proceed to provide an analysis of the core rules and, on the other, there are more general articles, which challenge law's openness and work from there. Somewhat

surprisingly, the *Nordic Journal* does not seem to hang between traditions, although it obviously incorporates many of them by virtue of the diverse influences at play within the Nordic world. It is very committed to the English language tradition in its choice of contributions, subjects and the reviewed literature. Our identikit may describe it as the broad-range optimist with deep roots and avant-garde aspirations.

The *Revue générale* completed its first century in 1996. Among the publications reviewed here, it has the most unique format and agenda. Its authorship is sometimes almost literary, its articles short and very up to date, with comments at times on issues that even politicians consider hot potatoes. Self-confidently, the *Revue* keeps its own agenda also as to which parts of the world attract attention; the English-language favourite, Iraq, is displaced by more contemporary debate on Yugoslavia, Rwanda, Togo, Gabon, among others. The articles are written to be reacted to, not as final analyses of resolved situations. As I shall show later, this dynamic approach has its costs: not all facts and arguments are fully developed or ripe for legal assessment and writers are often obliged to note in their conclusions that their appraisal is still 'premature', cautiously recommending prudence and patience or simply reporting on a process and wishing it well for the future. Fortunately, unlike judgments, a good legal article does not have to have the last word on its subject matter. It is equally respectable and important for an author to provide the international legal input to a lively socio-political debate. This seems to be the self-image of the *Revue*. Ranging from 'premature' paternalism to sharp, highly up-to-date commentary, the *Revue* provides good international legal arguments in the midst of dynamic international affairs. The identikit of the *Revue*, though somewhat simplified, is one of an experienced cosmopolite with dynamic capacity for discussion.

3 Common Themes

Although each of the reviewed publications has its own focal points, I was surprised to encounter almost identical concerns, such as, for instance, the United Nations Security Council. A review of the publications offers a very concrete feel for the power of repetition in international law. Undeniably, the same discussions of the same doctrines acquire strength and pedigree through the compilation of more and more learned pieces. Every piece is slightly different but essentially the same, as though providing building blocks to raise the molehill of international legality into a mountain. It seems to presume that international law needs, and always has needed, buttressing against *Realpolitik*. This presumption, however, is becoming outdated and is quite contrary to what other scholars, especially across the Atlantic, seem to think nowadays.³

³ See, e.g., T. Franck, *Fairness in International Law and Institutions* (1995), at 6; L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law Cases and Materials*, (1993), at 23–42; A. Chayes and A. H. Chayes, *The New Sovereignty — Compliance with International Regulatory Agreements* (1995), at 118–127; Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205, at 205.

Although one could criticize the endless repetition, this does not seem to be of particular interest since most readers are probably also more or less reconciled with the fact that international law gains strength and customary authority, both very useful properties, through repetition. In addition, repetition is the cornerstone of the western representational culture, so that a counter-argument would lead to the depths of cultural critique.⁴ On the whole, the guiding words of Umberto Eco's Old Jorge in *The Name of the Rose* seem to be followed in international legal science, just as in our entire Western culture: 'Preservation, I say, and not search, because it is a property of knowledge, as a human thing, that it has been defined and completed over the course of the centuries . . . [There is] no revolution of ages, in the history of knowledge, but at most a continuous and sublime recapitulation.'⁵

I propose now to look closely at one of the most commonly recurring topics — the Security Council — and compare the ways in which different European publications treat it in their most recently available volumes. The above-mentioned traits in the European discipline will thus be demonstrated in the course of this discussion.

A From the Netherlands Yearbook: Security Council Enforcement — No Right without Remedy, but Much Power with Little Remedy

The United Nations Security Council is an evergreen for all the publications in the survey. The *Netherlands Yearbook* (1995) included a substantial presentation, well over 100 pages, by T. D. Gill, which examined the enforcement powers of the Council.⁶ In a detailed analysis, starting from the 'Second' Gulf crisis, Gill throws several assumptions on the table: first, an assessment of the Council activities should focus on their efficacy;⁷ second, there is no other feasible alternative to the Council's enforcement measures;⁸ third, impairment of the inalienable right to self-defence is the most significant concern;⁹ fourth, the imbalances and inequalities are a political question to be distinguished from an analysis of legality;¹⁰ fifth, the Purposes and Principles of the Charter provide the only *jus cogens*-like ground on which the Council's measures can be deemed illegal, voided and overturned by the Court.¹¹

Gill's insistence on a law/politics distinction, thereby representing the other extreme in the different views presented above concerning the discipline's relationship to politics, seems rather old-fashioned in 1995. Also, the teleological emphasis on the UN Charter's Purposes and Principles in the evaluation of the Council's role contrasts interestingly with the utilitarian metre of efficacy to which Gill continuously defers as

⁴ This critique has been part of the Western culture throughout its existence, some of its highlights being, among others, the work of Nietzsche, Heidegger, Derrida, Foucault and Lyotard.

⁵ U. Eco, *The Name of the Rose* (1980, transl. W. Weaver, 1994), at 399.

⁶ Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', XXVI *Netherlands Yearbook of International Law* (1995) 33.

⁷ *Ibid.*, at 35, 137.

⁸ *Ibid.*, at 36.

⁹ *Ibid.*, at 36, 90.

¹⁰ *Ibid.*, at 119, 121, 127, 136.

¹¹ *Ibid.*, at 121, 126, 134, 136.

though it provided unquestionable justification. It is not quite so simple as to say that legitimation based on the Purposes and Principles can be reconciled with the efficiency criterion of the Council's enforcement measures. Consider, for instance, a situation where proposed measures are challenged by other members: if the Council's proposed actions are challenged on the basis of the determination of Purposes and Principles by the non-Council Member States, lengthy debates and arguments will ensue and result in differences of opinion, which tend to frustrate any proposed action. This is because Purposes and Principles are general and value-laden standards, which cannot be simply or instantly applied and interpreted in a given situation. Thus, inevitably, the goal of efficacy will probably be frustrated when a Purposes and Principles analysis is conducted — and *vice versa*. The salience of the right of self-defence is, of course, a contemporary trend reflected, for instance, in the Bosnia debate and most recently in the Nuclear Arms Opinion.¹²

What seems somewhat surprising for a European (Dutch) discussion is the analysis of the Council activity in the light of very American-sounding constitutional principles. Like the other smaller publication, the *Nordic Journal*, the *Netherlands Yearbook* also features some American-imported authors or authoring styles. Gill questions whether there is a system of 'checks and balances' for the Council¹³ or 'judicial review' as defined in *Marbury v. Madison*.¹⁴ Not so surprisingly, however, the answer to these questions is an obvious 'no'. However, this answer does not stop Gill from inquiring further in the American tone: What would the appropriate 'balancing' test and 'reasonable standard in the light of the circumstances' entail for the Security Council?¹⁵ Yet, unlike in America, he finds no court to provide the answers.

The conclusion leaves the entire questioning more or less hanging in the air. Its obviousness leaves the reader puzzled. It is not clear whether Gill suggests that international law should aim at an American-type constitutionalization. However, Gill further concludes that, since 'there is no right without a remedy',¹⁶ in an extreme situation of illegality the ultimate empowerers of the Security Council (the members of the UN) can limit the Council's enforcement powers by resorting to non-compliance with the faulty resolution(s) and seek a determination of illegality by the Court in the form of an advisory opinion.

For the concerned reader, this conclusion seems meagre, especially since the evoked right-remedy maxim usually supposes some kind of proportionality between the right, its abuse and the remedy. Gill, however, spends a convincing number of arguments and pages showing that the Council could be legally opposed only if found in violation of *jus cogens*,¹⁷ and even then only with simple non-compliance with its resolution(s)

¹² See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1997) which found that self-defence is the extreme case in which the right to use nuclear weapons cannot definitely be deemed illegal.

¹³ Gill, *supra* note 6, at 37.

¹⁴ *Ibid.*, at 126.

¹⁵ *Ibid.*, at 102, 104.

¹⁶ *Ibid.*, at 136.

¹⁷ The *jus cogens* field consists of the peremptory illegality of such crimes as genocide, torture, piracy, slave trade, etc., in which the Security Council of the UN would seem highly unlikely to engage in any kind of

or with an advisory opinion. Many of us would like to believe that there is more to be said in response, and in many more situations even when they do not quite clearly reach the gravity level of *jus cogens* violations. After all, there must be something to say about the Council's activities, even when it is not overstepping the final boundary to piracy, torture or genocide. It is simply not very likely that it would ever violate *jus cogens*, or that some legal instance would be there to hold it liable in *jus cogens* even if it did.

B From the British Year Book: The Continuum from War to Peace and the UN

The 1994 *British Year Book* featured almost exactly the same topic of discussion — the UN Security Council — as the *Netherlands Yearbook* in an article entitled 'After the Ceasefire: Iraq, the Security Council and the Use of Force'.¹⁸ This time the Council's measures were discussed with reference to Iraq after the ceasefire. The author, Christine Gray, focused on the gap between the reach of the UN Charter Chapter VII's applicability and the normalization of relations between conflicting parties: in other words, the gap between open use of force and normal peacetime. It is clear that the Council can act in situations of open conflict. But under these powers, how far can it go in regulating the situation when the hostilities 'cool down' and what level of security must be reached before the mandate stops?

The utilitarian efficiency criterion is also conspicuously frequent in Gray's analysis. For Gray, the Gulf War was 'efficient'.¹⁹ On the other hand, the Secretary General Boutros-Ghali's proposal²⁰ to fill the gap between military action and peace is too general to be 'efficient'.²¹ Gray is also prepared to discuss the questions of destabilization and alleged inequality, which, for instance, Gill set aside as political problems. For Gray, analysis of the content of the Council's Resolutions 686 (ceasefire by Iraq) and 687 (both-side ceasefire), the Iraqi objections to its being held to different standards than Israel,²² and problems with 'the appearance of legitimacy' of the unilateral enforcement measures by the United States all have a direct impact on the legal issues.²³ Thus, in Gray's discussion, politics are not severed from law; she is careful not to categorize appeals of unequal or unbalanced treatment and opposition to or criticisms of the use of a double standard by the Council as political challenges outside of the ambit of law properly so called. Thus, she clearly overcomes the more

circumstances where any international legality is still in force. And if it is no longer in force, then the investigation, demonstration and international condemnation also seems highly impracticable and unlikely.

¹⁸ Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', LVI *British Yearbook of International Law* (1996) 135.

¹⁹ *Ibid.*, at 172.

²⁰ 'Agenda for Peace', 31 *ILM* (1992) 935.

²¹ Gray, *supra* note 18, at 174.

²² *Ibid.*, at 149, 173.

²³ *Ibid.*, at 172–174.

formalist line-drawing still practised by some writers here reviewed who leave only Charter/Statute application to the realm of proper law susceptible to international legal analysis.

The nebulous zone between war and peace seems to be a timely theme in European international legal scholarship, which has surrendered to the fact that lines between states of war and peace, as any other dividing lines, are impossible to draw. Bosnia, as well as post-ceasefire Iraq, provide a plethora of examples of these grey zones beyond classical definitions. Gray sees unilateral acting as legally doubtful and calls for UN action or at least authorization.²⁴ Yet, the 'post-conflict peace-building' proposals by the Secretary General fail to satisfy her.²⁵ Concluding in a critical tone, she leaves open the question of the proper legal management of the twilight zone between war and peace.

This piece is one of the many examples of skilfully crafted and insightful assessments of the technical problems of a regime and its background, without, however, even a hint at structural, systemic or cultural problems of the regime itself.

C From the Heidelberg Journal: Security Council Enforcement Measures Hit People Not the State

The *Heidelberg Journal of International Law* (1995, vol. 55) also features an article on the Security Council enforcement measures.²⁶ It fleshes out the very question to which the corresponding article in the *Netherlands Yearbook* gave, in my opinion, a very unsatisfactory answer: the extent of the Council's competence in the enforcement of the resolutions it adopts. Bernhard Graefrath's piece, compared to the articles already described, appears to be a rare case of strong points; the questions are strong as is the argument, the critique and the authorship itself. Graefrath comes to the same conclusions as Gill above: the Council can act *ultra vires* of the Principles and Purposes of the Charter, in which case the General Assembly should act in concert with the Court.²⁷ Correspondingly, in these cases the International Court should be able to sever its proper 'legal' sphere from the politics of the matter.²⁸

Unlike Gill, for Graefrath, the utilitarian measure of efficiency is far from the main concern about the Security Council's actions towards Iraq. Carrying a side theme of German redemption,²⁹ Graefrath argues that the enforcement of the Iraqi Reparations recalls the 'Ghost of Versailles' (1919)³⁰ and amounts to illegal punishment of a people for the crimes of a criminal regime (or state).³¹ Here we encounter the implicit recognition of insight into contemporary problems gained from historical analysis.

²⁴ *Ibid.* at 174 and note 231.

²⁵ *Ibid.* at 173–174.

²⁶ Graefrath, 'Iraqi Reparations and the Security Council', 55 *Heidelberg Journal of International Law* (1995) 1.

²⁷ *Ibid.* at 73.

²⁸ *Ibid.* at 67.

²⁹ *Ibid.* at 1–2, 36, 45.

³⁰ *Ibid.* at 45.

³¹ *Ibid.* at 35–36, 60.

Graefrath shows that the Compensation Commission's (CC) administration costs do anything but 'efficiently' mitigate the plight of the Iraqi nation.³² For him, however, the violations of sovereign equality and human rights by imposition of the costs of a state's crime on innocent 'women and children',³³ and the impairment of a nation's inalienable right to its natural resources, seem a more flagrant outrage. Here we can see another value which can be regarded as an alternative to the generally popular 'efficiency' criterion: inalienable rights and freedoms. For Graefrath the procedural violations and the defeat of the delegation of powers principle complement the list of the Council's *ultra vires* behaviour. The remedies seem to be the same as in Gill's conclusion: General Assembly resolution, Advisory Opinion by the International Court, and possible disobedience by states. Despite the scarcity of the available remedies, all in all whether one agrees with Graefrath or not, the sharply argued investigation into the 'meanings' and contexts of the Council's reparation schemes³⁴ and the significant questions thereby posed for today's international lawyers and scholars provide a fascinating argument and a strong feeling that international lawyers still have much to say. It is a fine example of an open-ended argument grounded in human rights concerns, which largely describes the *Heidelberg Journal's* identikit.

D From the Nordic Journal: Unacceptable Procedural Primitivity of the Security Council Sanctions Committees

The *Nordic Journal's* 1996 volume features a short article on the 'Legal Problems at the Centre of the United Nations Sanctions'.³⁵ This too is an exceptionally critical piece authored by Paul Conlon, a former officer with the United Nations. He calls for international legal scholars, the International Law Association and the International Law Commission to urgently bring the rule of law to the Council's sanctions committees. If this is not done, an alternative to the contemporary *ad hoc* schemes should be swiftly found.³⁶ Thus, Conlon's article at least points as a rare exception to a structural criticism as an alternative if the shortcomings of the present regime are not quickly remedied.

Conlon is very critical of the set-up and actual work of the Council's sanctions committees. The bodies created for the purposes of enforcing the particular sanctions are, in Conlon's view, beyond 'primitive' — legally speaking.³⁷ Conlon stresses that even 'superstitious divination practices' by the Council would fail to make the Committee regime rise to the challenge of proper legal standards.³⁸

As an example, Conlon offers the practice of humanitarian waiver-granting by the

³² *Ibid.*, at 48.

³³ *Ibid.*, at 36.

³⁴ *Ibid.*, at 66, 68 and *passim*.

³⁵ Conlon, 'Legal Problems at the Centre of the United Nations Sanctions', 65 *Nordic Journal of International Law* (1996) 73.

³⁶ *Ibid.*, at 90.

³⁷ *Ibid.*

³⁸ *Ibid.*

Iraqi sanctions committee. He contrasts it to the Committee's other functions, which should in theory be its priorities. The former task — the granting of exceptions to the rules that the Committee is supposed to be upholding — consumes approximately 95 per cent of its efforts. In addition, these exceptions often have inefficient, imprudent and counter-productive results. Conversely, there seems to be a 'lack of interest in dealing with sanctions violations'³⁹ — which after all is the Committee's primary function.

Conlon argues that the delegation of Chapter VII powers by the Council to similar committees, like the Iraqi one, has fallen into disfavour among Member States and the Secretary General of the UN.⁴⁰ The problems are many, ranging from the committees' 'unclear' legal relations⁴¹ and nature,⁴² their 'inability' to grasp their functions,⁴³ the 'uncertainty'⁴⁴ and 'unequal burdens of compliance'⁴⁵ thus created, to 'competitive disadvantages' caused between complying and non-complying states.⁴⁶

Like Graefrath and Gill, Conlon worries about the secrecy, consensus-method and degree of discretion of the committees.⁴⁷ There are discrepancies between their grand goal and their underdeveloped structures. There is a gap between the dignity of the Charter and the Council's lack of effort to preserve it. These sanction enforcement practices raise many questions. Maybe one of the most important is whom do these organs really represent.⁴⁸

Conlon's piece is an example of one of the most reformist and deeply critical articles in the volumes under review — a real rarity. It hints at structural critique and asks a culturally critical question about whose interests are served by such inadequate and incomplete management structures. It is not shy of bringing political issues to the discussion and differentiates itself greatly from many other pieces in the *Nordic Journal*. It thus also provides an excellent example of the non-classical 'other side' of the *Nordic Journal's* extremely wide scope.

E From the Revue générale; From Rwanda to Bosnian Security Zones — International Legal Commentaries on Complex Problems

In the issues under review, the *Revue générale* featured four articles which touch on UN peace measures. They dealt with the UN actions in the Rwandan tragedy,⁴⁹ UN

³⁹ *Ibid.*, at 83.

⁴⁰ *Ibid.*, at 89.

⁴¹ *Ibid.*, at 78.

⁴² *Ibid.*, at 76.

⁴³ *Ibid.*, at 77.

⁴⁴ *Ibid.*, at 81.

⁴⁵ *Ibid.*, at 89.

⁴⁶ *Ibid.*, at 90.

⁴⁷ *Ibid.*, at 77, 82.

⁴⁸ Cf. Graefrath's questions, Conlon *supra* note 35, at 77–78.

⁴⁹ Ouguergoux, 'La tragédie Rwandaise du printemps 1994: Quelques considérations sur les premières réactions de l'organisation des Nations Unies', *Revue générale de droit international public* (1995) 149.

observers,⁵⁰ the 1994 Convention on the Safety of United Nations and Associated Personnel,⁵¹ and the security zones.⁵² These articles greatly expanded the geographical variety in the European discussion by bringing in countries and regions that are hardly ever highlighted on the seemingly very narrow world maps of other publications.

Fatsah Ouguergouz's article portrays the UN action as an ebb and flow. Though concerned by the momentous paralysis of the Rwanda 'pilot operation',⁵³ the author praises the rapidity of the Security Council's decision-making.⁵⁴ In Ouguergouz's view, the overall good work of the Special Rapporteur on Rwanda, despite inadequate financial and logistical means,⁵⁵ as well as and most importantly the establishment of the Crimes Tribunal⁵⁶ inspired confidence in the UN among the peoples of the world.⁵⁷

Arnaud de Raulin's article reports on peace consolidation by means of UN observation activities. He describes the observation activity as an 'excellent' vehicle for democratization, international legal order, and institutional global society where sovereign rivalry is left to take its place in history.⁵⁸ Apparently, however, observation alone cannot fulfil peace consolidation in situations such as those discussed by Gray (the *British Year Book*⁵⁹), yet Raulin omits them without reference. Raulin speaks for the incorporation of humanitarian and pro-democracy intervention in the Council powers⁶⁰ and dismisses the critique against potential (Western) cultural imperialism of such action as hopelessly premature in this case.⁶¹

The observation and peace consolidation activities in the grey zone between war and peace pose many concrete questions for international lawyers, who at least partly constitute the cadre of envoys of the Organization. Claude Emanuelli writes on UN efforts to deal with some of these questions through positive law. He elaborates on the recent UN Convention which aims to set safety standards for its personnel engaged in the various global conflicts. Theoretically, under the Convention, the entire Bosnian Serb force and government could eventually be tried for crimes against UN personnel in the national criminal courts of the state parties to the Convention.⁶² Although this is still a long way into the future, Emanuelli believes that the Convention will increase safety. The optimum level of efficient operation of the Convention regime, and thus also safety, can be attained once all the confusing compromises and ambiguities of the

⁵⁰ De Raulin, 'L'Action des observateurs internationaux dans le cadre de l'ONU et de la société internationale', *Revue générale de droit international public* (1995) 566.

⁵¹ Emanuelli, 'La convention sur la sécurité du personnel des nations unies et du personnel associé: des rayons et des ombres', *Revue générale de droit international public* (1995) 849.

⁵² Torrelli, 'Les zones de sécurité', *Revue générale de droit international public* (1995) 787.

⁵³ It was a pilot operation in terms of testing for the agenda of peace, *ibid.*

⁵⁴ See Ouguergouz, *supra* note 49, at e.g. 151, 152, 174.

⁵⁵ *Ibid.*, at 161, 171, 172, 175.

⁵⁶ *Ibid.*, at 175.

⁵⁷ *Ibid.*, at 176.

⁵⁸ *Ibid.*, at 597, 598.

⁵⁹ Gray discusses the case of Iraq, see *supra* note 18 and accompanying text.

⁶⁰ De Raulin, *supra* note 50, at 599.

⁶¹ *Ibid.*, at 600.

⁶² Emanuelli, *supra* note 51, at 877.

Convention text have been fleshed out in state practice, Emanuelli claims.⁶³ For Emanuelli, practical problems can be resolved by a clear and unambiguous legal text, which, however, needs to be clarified by the very same practice first. The paradoxical nature of this statement is not explored by the author.

All of these articles can be seen to 'suffer' some of the problems of dealing with legal issues before they have matured in all their complexity. As was mentioned earlier, some of the most interesting critiques may seem 'premature' (Raulin), or state practice may not have accumulated sufficiently yet (Emanuelli), or it may be that the conclusions must be confined to general 'inspiration of good will' (Ouguergouz). The gravest dangers for these kinds of dynamic reactions to rising international legal questions are thus that they remain wishy-washy or at best optimistically paternalistic since the situations seem too open and difficult to grasp. Nevertheless the advantages of well-written, dynamic, up-to-date scholarship cannot be underlined enough.

In his article on security zones, Maurice Torrelli takes up a truly hot potato of UN discussion.⁶⁴ This is quite an exceptional legal topic: the disappointments, difficulties and abhorrent failures of security zone management, for instance in the former Yugoslavia, would frustrate the writing attempts of many tough political scientists, let alone an international lawyer. One does not encounter many fresh international law pieces on such legally 'chaotic' situations in the finest European publications. Torrelli, however, has written a highly interesting piece, combining strong analysis with details and curiosities of the security zone regime and with the shortest time lapse from the actual events.

To avoid the irony expressed by the Bosnian graffiti, 'Zones de sécurité de L'ONU: attention, danger', Torrelli calls for precision, concentration, careful delimitation, expediency and sufficient arms, if security zones are to be established.⁶⁵ Otherwise, the Organization should strictly confine itself to mere observation activities.⁶⁶ In Torrelli's argument we can hear the echo of those military experts who have demanded that if security zones are established, they should be either strictly enforced, or not at all. Yet in its opinionated tone, Torrelli's argument is clear and engaging and fulfils its function of inviting independent thinking and challenging response rather than flatly endorsing the military view.

However different it may be to the English language tradition, the *Revue's* articles also very often rely on the utilitarian measuring stick of efficacy: from conceptual clarification of the 'security zones',⁶⁷ to resolving ambiguities in the Convention on Safety of United Nations and Associated Personnel,⁶⁸ to prudence and waiting in the reinforcement of the Organization's observation activities, to creation of the Council's

⁶³ *Ibid.* at 851, 875, 878.

⁶⁴ Torrelli, *supra* note 52.

⁶⁵ *Ibid.* at 845.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 844–845.

⁶⁸ Emanuelli, *supra* note 51, at 851.

emergency troops.⁶⁹ Every proposal and critique seems to gain momentum by being expressed in the name of efficiency. It is quite disappointing that an internal critique seems to be missing here too. For instance, let us suggest, as Emanuelli does, that state practice will in time clarify the ambiguity of the UN Personnel Safety Convention and its relationship to general humanitarian law, thus rendering the Convention 'efficient'.⁷⁰ This means that the solving of ambiguities by accumulation of state practice will raise the Convention regime higher on the utilitarian scale. Put this way, the obvious questions jump out: Good for what, promoting whose efficacy, doing what efficiently? For some states the solving of ambiguities in one way, and practice following this particular interpretation, might not seem good at all. In fact, it might not seem at all efficient, but rather uncontrollable, abusive of discretion, or anti-democratic. The frequency and conclusive tone of 'efficiency' however belies this fact in most of the articles.

One is left with the wish that authors, and perhaps even editors, would beware this magic word a little more in the future in all the international law publications.

4 Thematic Issues

A Netherlands Yearbook's Anniversary: Emergence of Specialized Fields Not to Threaten Unity of International Law

The *Netherlands Yearbook* celebrated its 25th anniversary with the 1994 issue. It claims loyalty to its reformist origin at heart, but maintains realistic reservations.⁷¹ On a comparative scale with other European publications, any reformism seems rather subdued and the agenda appears to be tilted more toward achieving a (mediatory) foothold between traditions than toward renewal.

The editors themselves authored the anniversary volume, the focus of which is the relationship between the international legal system and its sub-systems. The term 'sub-system' is taken to include such various fields as diplomatic, humanitarian, environmental, space and European Community law as well as human rights treaties and the GATT regime. The issue explicitly tries to avoid being 'a full and detailed inventory'.⁷² It seeks to discover 'the really relevant, captivating features' of the otherwise quite flat doctrinal discourse.⁷³ This way the volume makes itself generally interesting to a large and also theoretically oriented audience, for whom the tenet underlying the doctrinal body is always of keen interest. Along these lines the importation of some of H. L. A. Hart's legal philosophy as a red thread throughout the volume is a welcome heuristic input.

Even if evading the most detailed doctrinal labyrinth, the discussion is not,

⁶⁹ Ouguergouz, *supra* note 49, at 174.

⁷⁰ Emanuelli, *supra* note 51, at 849.

⁷¹ Tanja and Voskuil, XXV *Netherlands Yearbook of International Law* (1994), Preface at xiv.

⁷² Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections and Current Trends', XXV *Netherlands Yearbook of International Law* (1994) 3, at 5.

⁷³ *Ibid.*

however, guided by holistic perspectives or boundary-abolishing. I refer here to my earlier theme (and criterion) of relationship to, for instance, theory, history and politics. In the *Netherlands Yearbook* boundaries between these and the 'proper' legal discussion have not been eliminated. Instead, the Introduction states that each author follows the mode of analysis most appropriate to 'the peculiarities of a field'. The delimitations of fields of international law are taken 'as a starting point beyond controversy', since they 'present . . . and impose . . . themselves in a natural way in the reality of State practice'.⁷⁴ This type of naturalistic 'box-thinking' aims to rule out extra-legal concerns and free it from theoretical, historical or political underpinnings.

Thus, in clear and simple terms the Anniversary volume poses a question and offers the obvious answer: 'Has the "compartmentalization" of international law reached a level at or beyond which the international legal order runs the risk of fatal disintegration?'⁷⁵ No, on the contrary: 'the relative autonomy of the fields has been used by the different actors . . . in a way which . . . promote[s] and guarantee[s] the growing effectiveness of their own particular set of primary rules, without putting in jeopardy the unity and coherence of the international legal order'.⁷⁶ One can only ask whether there was ever any real question about the matter before the editors set out to find the answers. If there was not, the question seems at best rhetorical. As I have indicated earlier, however, there is also an alternative reason as to why this question had to be presented this way.

I pointed out that the *British Yearbook* tradition does not seem to favour discussion on the newer topics. Thus, if arguing primarily in the classical British tradition, the *Netherlands Yearbook* may be attempting to show that emergence of new and modern 'sub-systems' and the ensuing rapid decentralization of our disciplinary discourse (which we have in fact witnessed in this century) does not endanger the integrity of the discipline. If this is so, then they can also be discussed without the threat of exacerbating the disintegration of the discipline. If this is in fact the Dutch agenda, the question posed in this anniversary issue is not just rhetorical. But then one has to ask how distant is the relationship of the Dutch discourse to its continental neighbours, who have not entertained any anxieties about the disintegration of the discipline and have dealt quite comfortably with the modern increase in sub-systems and the decentralization of the topics. Is there a strong implicit criticism?

The theoretical set-up of this thematic issue is based on H. L. A. Hart's legal philosophy. The inquiries into the sub-systems (or fields) are organized around the secondary rules of the legal system; the rules of structure and administration. According to the Dutch view, the secondary rules of international law are the solidifications of its 'natural' compartmentalization. The secondary rules serve in the administration of very different legal regimes from human rights to world trade. Yet

⁷⁴ *Ibid.*, at 6.

⁷⁵ This is a question inspired by a 1985 article on the existence of 'self-contained regimes' by Bruno Simma, 'Self-contained Regimes', *Netherlands Yearbook of International Law* (1985). Wellons, *supra* note 72, at 4, 37.

⁷⁶ Wellons, *supra* note 72, at 28.

The Netherlands Yearbook's articles show that the regimes do not exist in every 'naturally' delimited field of international law in quite the same way. They are different in Vierdag's analysis of the full-blown inter-state regime of human rights treaties,⁷⁷ and in Barnhoorn's analysis of the diplomatic law regime which seems to be struggling with the problems of sanctions and countermeasures, i.e., whether they are the rule or the exception.⁷⁸ Similarly, Kuyper's analysis of GATT evolving into the WTO demonstrates how a regime is emerging around a set of secondary rules from a bundle of negotiated deviations of general international law.⁷⁹ Quite differently, Fitzmaurice states from the beginning that his intention is not even to imply that an international environmental law as 'a special branch or regime separate from the mainstream of traditional or classical international law' exists. To his mind, even if there was an embryo of a framework for it, the construction of such a field would be 'stretching and possibly straining the limits of classical international law'.⁸⁰ Thus, Fitzmaurice's piece is perhaps the most extreme example of the disintegration anxiety and fear that particular problems requiring particular solutions would threaten the unity of international law and the community-building efforts surrounding this unified core.

All in all, the articles reaffirm the elaborating power of a legal philosophy, such as H. L. A. Hart's, whenever a theme of broader interest needs to be developed. Unfortunately, in this issue the substantive international legal questions — the significance of decentralization and the emergence of new fields — often seem pre-empted (in the introductory paragraphs) even before they are discussed. In the *Netherlands Yearbook's* anniversary discussion international legal order clearly means a coherent and unitary system of law. The task is somehow to reconcile it with the undeniable decentralization. Today, there are many voices to challenge the consensus of only one structure.⁸¹ Even the regime theories, which are making their way into the discourse, as the Dutch articles demonstrate, include an idea of multicentrism. The question is why, in the face of the different challenges and the approaches of the other European publications, a consensus of one structure and an anxiety of difference needs to be entertained. To conclude, it should be emphasized once more that such a consensus is not necessary for the aspiration towards community-building nor any other such project which I could find in the texts.

⁷⁷ Vierdag, 'Some Remarks about Special Features of Human Rights Treaties', XXV *Netherlands Yearbook of International Law* (1994) 119.

⁷⁸ Barnhoorn, 'Diplomatic Law and Unilateral Remedies', XXV *Netherlands Yearbook of International Law* (1994) 39.

⁷⁹ Kuyper, 'The Law of GATT as a Special Field of International Law', XXV *Netherlands Yearbook of International Law* (1994) 227.

⁸⁰ Fitzmaurice, 'International Environmental Law as a Special Field', XXV *Netherlands Yearbook of International Law* (1994) 181, at 182–183.

⁸¹ The feminist work on international law, approaches of indigenous cultures to international law and the so-called third world approaches to international law, to name but a few, challenge the very presumption of one (international) legal order or one law.

B Nordic Journal: *Special Issue on New Approaches to International Law*

The questions presented above concerning the European international legal academia come to the fore in various contexts in very different and challenging pieces on *New Approaches to International Law*. The *NAIL* is the subject of the 1996 *Nordic Journal of International Law* (Nos. 3–4), Special Issue. The issue cannot really be called an introduction to the ‘newstream’ of international law, although it is a valuable compilation of the so-called ‘new’ work. It serves both those who have so far failed to do their ‘homework’ on the new approaches (*NAIL*), but also interests those who have been in touch or currently participate in this type of scholarship. The volume includes new approaches writings by Australian, American and Nordic contributors.

It is probably extremely difficult to say or show what the *New Approaches to International Law* might be, especially since many of its most prominent writers doubt whether anything ‘new’ or any definable ‘approach’ exists or should exist. This is obvious in the first pages of the *Nordic Journal*’s *NAIL* issue; in the Preface, Editor Martti Koskenniemi, is prepared to say only that ‘it is difficult not to sense . . . a break . . . and the sensibility of a new generation’,⁸² but also that there does not seem to be ‘anything substantive that would mark *NAIL* out as a movement’.⁸³

The introductory article by Deborah Cass,⁸⁴ however, seems to map out this ‘sensibility’ quite neatly. With clarity, but also with a simplicity similar to H. L. A. Hart’s presentation on the opposite forces of Formalism and Realism,⁸⁵ Cass posits *Newstream* against *Mainstream*. She finds a simple structure of three challenges, each of which divides into three elements. Her critical conclusion points out the problems of ‘inconclusiveness’, ‘lack of concretisation’, ‘reductionism’, ‘equivocation’, and ‘condescension’ in the *Newstream* scholarship.⁸⁶

Rather paradoxically, she regards very critically the criticism of the *Newstream*; that is, that the *Newstream* seems rather to aim to critique and to explicitly avoid constructivism in the form of a list of solutions to a variety of social and legal problems. The *Newstream*’s ‘aspirations’ are, among others, criticism and the pointing out of contradictions, socio-philosophical deconstruction, anti-foundationalism, and indeterminacy as to goals and axiomatic definitions. Because of these negative (anti-constructive) traits, the *Newstream* does not seem to achieve what Cass would like to see it aspire for. Cass criticizes the unwillingness/inability to, for instance, take political stances, transform the practice, be effective, provide adequate diagnoses, and make explicit the debate with the *Mainstream* and the alternative *Newstream* choices. Because the *Newstream* refuses to — for Cass it fails to — take these positive,

⁸² Koskenniemi, ‘Preface’, 65 *Nordic Journal of International Law* Special Issue, *New Approaches to International Law* (1996) 337, at 337.

⁸³ *Ibid.* at 340.

⁸⁴ Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’, 65 *Nordic Journal of International Law* (1996) 341.

⁸⁵ H. L. A. Hart, *The Concept of Law* (1961). Hart seems to be very up to date both as a stylistic influence (here) and as a theoretical influence (*Netherlands Yearbook* 1994, see Wellons, *supra* note 72).

⁸⁶ Cass, *supra* note 84, at 378–383.

constructive actions, she reads some samples of the very heterogeneous Newstream writing very critically. As an example of the Newstream's many different faces Cass's critical introduction is very elaborate.

In a category of her own among the recent European international law publications, Hilary Charlesworth writes in the NAIL issue on responses to feminist scholarship.⁸⁷ She sees two kinds of responses: critical 'cries' and benevolent 'whispers' among the scarce feedback which feminist international legal scholarship has received. She points out quite adequately how self-respecting scholars struggling to keep up to date with their discipline's latest debates tend to push aside the feminist pieces. They are always to be read later, if extra time can be found in between other activities. They are not considered a professional 'must', though there is already a quite extensive literature. There is a parallel to the treatment received by the general NAIL scholarship in the academic world, although Charlesworth points out that even the other 'new' approaches hardly remember to mention the feminists. Characteristically, the attention which feminist writers receive, according to Charlesworth, stops at a short reference in a 1000-page course book and 'the occasional footnote'.⁸⁸

However, in reading Charlesworth's piece, the initial questions about the existence and 'mapability' of something called a 'new' approach continue. Is recognition really just to be set on a map (whose map?), to acquire a mention as a school of its own in a textbook or perhaps a footnote? It is almost odd to note that Charlesworth seems to want feminist international law on the NAIL map without any reservations; the same map that Deborah Cass just drew, but the existence of which many new approach adherents seem to doubt or oppose outright. In a way these existential questions keep the NAIL scholarship and the *Nordic Journal's* special issue theoretically interesting throughout. They compel the reader to stay alert and reflect on the questions of law and social legitimacy whatever the particular questions on the table.

The rest of the NAIL issue's articles seem to be less concerned with making a statement about where they stand, should stand, or should advise others to stand. They are investigations into argumentation and discourse in international law. They are concerned with international legal consciousness, and the breaks, shifts and gaps in it, as well as their consequences, which often seem more than obvious, yet completely unacknowledged.

The last piece of the 1996 *Nordic Journal* is a short article by Martti Koskenniemi and Marja Lehto.⁸⁹ It is a true pearl. It is positive and delightful in the way that it investigates the intricacies of the 'cunning of legal reason as it works to produce co-operation from diametrically opposed public positions and legitimacy from empty legal principles and institutions'.⁹⁰ It provides a whole new outlook on the ever topical issue of the UN Law of the Sea Conference (III) and its more recent legal intrigues.

⁸⁷ Charlesworth, 'Cries and Whispers: Responses to Feminist Scholarship in International Law', 65 *Nordic Journal of International Law* (1996) 557.

⁸⁸ *Ibid.*, at 567.

⁸⁹ Koskenniemi and Lehto, 'The Privilege of Universality: International Law, Economic Ideology and Seabed Resources', 65 *Nordic Journal of International Law* (1996) 533.

⁹⁰ *Ibid.*, at 533.

Whatever one might think of the New Approaches, their existence or their relevance, the *Nordic Journal's* special issue on NAIL offers great stimulation for those who maintain a fresh intellectual curiosity towards the law's repetitive tradition. There is hardly any reason any longer to fend off the 'new' writings because of their often quite sharp criticisms. For many, the international legal discipline has started a new era of self-assurance. As Thomas Franck puts it, the discipline has reached a stage of 'maturity' where it no longer needs to 'defend the very existence of international law'.⁹¹ In other words, there seems to be a more relaxed attitude, with the effect that perspectives can be enlarged and new ideas imported from outside the canon without endangering the project of the Rule of Law. The *Nordic Journal* quite courageously takes note of this development, among the first in Europe, and at the same time remedies many of its own shortcomings and those of all the discussions reviewed here.

5 Conclusion

Read back to back, the five publications reviewed here offer quite a tour of European international legal academia. There are much more specific cultural influences than one would expect from such cosmopolitan scholars and editorial boards. Only the small publications, the *Netherlands Yearbook* and the *Nordic Journal*, seem to be lacking in the most poignant regional or cultural adherence. In a way they fall between the British tradition, whose language they have chosen, and the other notable European traditions, which have perhaps had quite a strong influence on their legal consciousness. However, there are also attempts to acquire a voice of their own in these publications. It is possibly much easier for the smaller publications to break away from a consolidated single track and to emerge on the European scene every now and then with new colour.

All in all, the absence of newer topics was quite striking to me. These include access to technology, international media, East Asian approaches to human rights, women's issues and certain transnational economic issues which one finds frequently, for instance, in the American journals. The absence of these topics in the European publications seems quite inexplicable, given their profound significance. I do not mean to say that the consolidated doctrines do not need to be discussed in ever new practical situations and with the benefits of hindsight, but the fact that among some 90 full-length articles there is not one on international media and only one on women's international legal issues is very unfortunate. Of course, every writer knows that in order to acquire a place in the discourse, one has to write about what everybody else is writing about. Yet, this is often carried one step too far. One could, for instance, link the discussion 'with special reference to' a newer topic.

Another way to enrich the discourse and enlarge its scope would be to feature more theoretical discussion and thus fight theoretical predetermination by other disciplines. The benefits of theoretical discussion — larger significance, larger audience — were clearly demonstrated in the publications which took the effort to set out their theme(s)

⁹¹ Franck, *supra* note 3, at 6.

in theoretical terms. At the moment, the theoretical stance of European scholarship as reflected in these journals seems to be frozen to pragmatism and utilitarianism, with the exception of an occasional special issue or anniversary volume. As a result, the articles continue to call for more 'efficacy', more 'efficient implementation' and better institutional administration, when we all know that the global regimes and institutions are immensely complex bureaucratic structures which move slowly and 'inefficiently' simply due to their sheer size and inner decentralization. It may be time to hear more about what we think about the qualities of the law rather than just mere efficiency arguments. Such thinking may also introduce greater diversity to the conclusions. The European tradition does not lack legal philosophical treasures and these should not be left to gather dust.

Notwithstanding these two reservations, the European publications generally speaking complement each other at a high level of sophistication. They form an interesting mix of consensus and contradiction, which keeps a certain freshness in the European international legal culture, despite its age. I do not intend to draw any more of a comparative conclusion on the relatively small sample of readings and arguments I have been able to present here. I have had to focus my attention only on those questions which seemed most suitable for comparison and I apologize for any forced generalizations I have had to make in so doing. What is clear to me, however, as a party to our disciplinary discourse, is that a look in the mirror is necessary. Perhaps most importantly this time, we should reflect more explicitly on the relationships we have in our discipline to our historical, theoretical and political frameworks and, on the other hand, be more aware of the underpinnings of imports such as economic rhetoric.

Secondly, it is for each publication to consider whether they do not grossly and without justification under-represent or over-represent one field, region, gender or viewpoint in international law, if we all aim at least for some sort of equality. To leave 'special questions and fields' — the investigation of history, socio-political context, theoretical presumptions, women's issues — to their special publications, specialized writers, or to other disciplines is to defer one's responsibility elsewhere; quite often there is no one there to pick it up in the international legal discipline or, alternatively, the question is determined by some other discipline and we rather uncritically defer to them, as often occurs, for instance, with economics or political science. Sometimes I am asked why deference is such a bad policy since it is clear that everyone has to focus on something in our contemporary specialized world. I respond that deference is not so bad until it narrows our focus down so much that what is left is a policy of anti-historicism, Western hegemony, political and theoretical predetermination and patriarchy.

Comments on this review essay are invited on the *EJIL*'s web site: <www.ejil.org>.