Editorial

When the editors of this Journal tried to define the *raison d'être* of their enterprise, one premise was met with instant agreement: we shared the conviction that there is 'a European tradition in international legal scholarship ... characterized by a strength in, and sensitivity to, doctrine and theory, by a strong awareness of history and its role in the development of international law, and, in recent decades, by an inbuilt respect for pluralism of approaches and the value of diversity'.[1]

The way in which we attempt to translate this conviction into action consists of a deliberate 'opening' of the Journal toward innovative, original, and, above all, challenging contributions to the theory of international law. Fortunately, this opening has coincided with a remarkable renewal of interest in such theory. More and more voices question the status quo of international legal scholarship. One does not have to be a follower of the critical legal studies movement in the United States to sympathize with David Kennedy's sharp reaction to his first exposure to the mainstream of our discipline: '[N]o one seemed to think international legal theory could offer more than an easy patois of lazy justification and arrogance for a discipline which had lost its way and kept its jobs.'[2] The time for re-examination of international legal theory is ripe indeed. It is ironic to note that precisely the branch of jurisprudence where the impact of factors like power, time, history, diversity of language and culture is most obvious, has remained in a state of theoretical dormancy, while domestic legal theory has been constantly shaken and enriched. Mainstream thinking in international law – epitomized in Prosper Weil's somber warnings against 'relative normativity'[3]– appears to continue to adhere to legal positivism of a variety which, 'out there' in the living world of the philosophy and theory of law, has definitely been judged as unable to maintain its own epistemological premises.

Nowhere is this ostrich-like refusal to acknowledge the theoretical state of the art more striking than in the established views on international law-making, and here particularly in the theory of customary international law. To state that customary law finds itself in the midst of an identity crisis[4] is to put it mildly. While the classic formula of the so-called two elements of customary law is still being repeated with the monotony of a Tibetan prayer-mill by most mandarins of our profession, apparently to preserve the confidence of the believers (above all, of course, the practitioners), quite a few of the

1 Editorial, 1 *EJIL* (1990) 1.

2 Kennedy, 'A New Stream of International Law Scholarship', 7 *Wisconsin International Law Journal* (1988) 6.

3 Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983) 413 et seq.

4 See Simma, Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1992) 88.

high priests seem to have themselves lost faith.[5] Thus, the recent (ninth) edition of the treatise which is probably most widely used among international legal practitioners, at least in the English-speaking world, manages to spell out the established wisdom on customary international law in little more than five (out of 1300) pages without even mentioning any doubts as to its continuing viability[6] while one of its editors, no less than the current President of the International Court of Justice, noted a decade ago that the orthodox tests for the existence of customary law were 'outworn and inadequate' and that 'most of what we perversely [*sic*] persist in calling customary international law is not only *not* customary law: it does not even faintly resemble a customary law'.[7] As to the practice of the International Court itself, which is still going through the formal motions of Article 38 and repeating the traditional mantras, more and more of its legal conclusions are determined 'by the application of rules of law largely treated as self-evident'.[8] Let there be no misunderstanding: what I see at work here is entirely acceptable judicial reasoning. It is only that the theory of customary international law finally has to get rid of its 19th century blinders and open the door to legal hermeneutics and linguistic theory.[9] The process of customary 'law-making' is far from complete when the States have made their moves; customary law is nowhere 'out there', more or less ready to be ascertained by way of mere cognition. Its 'verification' will, by necessity, comprise the selection of certain facts and statements as being more relevant than others; such interpretation of state practice or *opinio juris* is never an automatic operation but involves the choice and use of conceptual matrices[10] that have to be made transparent, discussed and reasoned.

But it is not only customary international law that is desperately seeking a theory worthy to be so called. The mainstream view on treaty interpretation, too, has yet to acknowledge that legal texts have no definitive, fixed meaning and that their content cannot be frozen, stored away for future consumption, so to speak. Such meanings will have to be established (rather than 'found') in each concrete instance of interpretation, through an enterprise involving both the semantic and the pragmatic level of language. The fact that there is still so much controversy over static versus dynamic (or evolutionary) treaty interpretation may serve as an illustration. If one takes modern philosophy of language into account, a dynamic understanding of legal rules becomes simply inevitable.[11] To recognize this contingency of language is far from saying that

5 This theological image is borrowed from Unger, *The Critical Legal Studies Movement* (1986) 119.

6 Oppenheim's *International Law* (9th ed. Jennings & Watts eds. Vol. I: Peace, 1991) Introduction and Part 1, 25-31.

7 Jennings, 'The Identification of International Law', in B. Cheng (ed.), *International Law: Teaching and Practice* (1982), 4 et seq.

8 Kearney, 'Sources of Law and the International Court of Justice', in 2 *The Future of the International Court of Justice* (Gross ed. 1976) 653.

9 For a pioneering work in this direction see U. Fastenrath, *Lücken im Völkerrecht* (1991) (extensive summary in English on pp. 286-299); *id.*, 'Relative Normativity in International Law', 4 *EJIL* (1993) (forthcoming).

10 Koskenniemi, 'The Pull of the Mainstream' (review article on T. Meron, *Human Rights and Humanitarian Norms as Customary Law*), 88 *Michigan Law Review* (1989/90) 1952.

11 Cf. Fastenrath, *supra* note 9, at 189 et seq.

the very concept of legal rules should be relinquished in favour of a view of international law as a constant flow of authoritative decisions, as the New Haven approach wants to do. Rather, such recognition allows us to perceive this flow of decisions, this 'process of continuous interaction, of continuous demand and response',[12] as the environment in which the meaning of legal rules is continuously being shaped and reshaped.

For some of the new theorists in the field, however, the movement towards analytical philosophy of language and a hermeneutical theory of law which I have advocated in the preceding paragraphs would not go far enough. Thus, in his contribution to the first issue of this Journal, Martti Koskenniemi – who, through his book *From Apology to Utopia* (1989) managed to convey to a wide audience the challenging but hitherto rather mysterious message of Critical Legal Studies for international law – tries to demonstrate nothing less than the circularity of all legal argumentation, the impossibility of separating international law from politics and, consequently, the futility of claiming a distinct role for the international lawyer.[13] Even if one – the present writer included – does not agree with Koskenniemi's purely analytical conception of law and with the deliberate narrowing of his viewpoint to the level of semantics and rhetoric, one must acknowledge that his paper throws light on the political contingency of international law and that it is due to the CLS movement – and, among its protagonists, particularly to Koskenniemi – more than to any other theoretical contribution that the complacency of traditional international legal scholarship is finally being shattered, giving way to fresh new thoughts.

The second issue of *EJIL* carried an article by Anthony Carty[14] which does not rest content with an explanation of how critical scholars like David Kennedy, Martti Koskenniemi, Friedrich Kratochwil and Ulrich Fastenrath attempt to unveil the inherent dilemma of positivist theory, but also presents the first contours of what I think is a highly original hermeneutical approach to international law, based on cultural anthropology and grounding the law in the cultural history of peoples conceived as autonomous interpretative communities.

The paper by Eibe Riedel in the third issue of the Journal, while remaining essentially within the positivist paradigm of 'sources' of international law, demonstrates how international standards, which are not themselves legally binding, are being used in many fields to overcome the technical poverty of the sources triad established in Article 38.[15] In my view, Riedel's contribution comes tantalizingly close to recognizing that, when approached from the angle of linguistic analysis, the phenomenon of 'soft law' can be accommodated in a modern theory of international law-making in a manner which is intellectually more convincing than the contorted attempts of legal positivism.

12 McDougal 'The Hydrogen Bomb Tests and the International Law of the Sea', 49 *American Journal of International Law* (1955) 356.

13 Koskenniemi, 'The Politics of International Law', *EJIL* (1990) 4 et seq.

14 Carty, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991) No. 1, 66 et seq.

15 Riedel, 'Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?', 2 *EJIL* (1991) No. 2, 58 et seq.

Philip Allott has left such theoretical worries far behind. In his contribution to the present issue,[16] which restates and further develops the main theses of his book *Eunomia* (1990), he considers how international society and international law must be re-conceived in order to transform what he calls the present international 'unsociety' and its 'so-called law' into a world order capable of promoting well-being and securing the ultimate survival of humanity. Allott's meticulously argued answer takes the form of a radical utopia. Most readers will probably find the article unsettling in content and unfamiliar in style, yet I suggest that its message is timely.

The Journal's series of challenging articles on the theory of international law will continue. In the next issue we will publish a contribution by Ulrich Fastenrath on 'Relative Normativity in International Law', a response – admittedly somewhat belated – to Prosper Weil's well known article of ten years ago, in which Fastenrath demonstrates that relative, differentiated normativity is nothing pathological, as Professor Weil assumed, but simply unavoidable, even natural, from the viewpoint of all legal theories, including the legal positivism championed by Weil himself.

The second issue of 1993 will contain a paper by the Bulgarian author Dencho Georgiev entitled 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law'. This defense of international legal argumentation against 'deconstruction' by critical legal scholars will contend that, in spite of its indeterminacy, inconsistency and lack of coherence, international law does have a distinct existence of its own and, further, that the concept of legitimacy can be of significance because it addresses a possibility of changing and developing the law without having to erode its validity.[17]

Let me state in conclusion that it would be inaccurate to locate the origin of renewed interest in the theory of international law in Europe. As I mentioned before, this interest has been triggered by the Critical Legal Studies movement in the United States which had the openness to see the potential of, inter alia, French Post-Modernist theory for law in general and international law in particular. This turn to theory has now come back to Europe, and the range of contributions published – or to be published – in this Journal seems to me to be strong evidence that such interest in the very basis of what we international lawyers are doing, is here to stay. Hence, the present Editorial was not only designed to explain why we published the papers that I have described, but is, above all, meant to be an invitation to theorists worldwide to continue this dialogue in the pages of this Journal.

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16 Allott, 'Reconstituting Humanity', *infra* at 219.

17 In this respect, Georgiev's paper also constitutes a critique of Thomas M. Franck, *The Power of Legitimacy among Nations* (1990).