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Of Doubts and Confusions

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The present report intends to sketch an impressionistic view of the 16th Annual Conference of the European Society of International Law, held in Stockholm in September 2021. Such an impression is inherently personal, and the picture painted might have more to do with the mind of the author than that of the audience. The depiction is, furthermore, betrayed by an already vanishing memory. The report is presented for what it is: a very subjective feeling remaining a few days after a long, rich, nuanced and very pleasant journey into international law.

The organizers of the conference invited a wide range of speakers to address the question of changes in international lawmaking. Such a question is indisputably urgent, and the numerous changes presented in the various fields of international law were bound to spark a strong wave of enthusiasm regarding the dynamism of the discipline. Nevertheless, it is quite a different impression that stayed in one's mind at the end of the conference: an image of intense doubts, perhaps even an image of defeatism for those who are historically, methodologically and maybe affectively attached to international law. Of course, this impression has nothing to do with the inherent quality of the whole conference or its remarkable speakers. In one way, doubt is nothing but a very normal state of mind in every ongoing scientific process. Nevertheless, the doubts expressed throughout the conference were of a more fundamental nature: they touched on the very structure of international law, its boundaries, its singularity (regarding its actors, processes, forms, norms and object) and, ultimately, its very existence. Rather than consolidating the discipline through a constant refining of its knowledge and methods, those doubts seem to slowly dissolve the idea of international law itself. The international lawyer seems riddled with doubt about his or her discipline, whose relevance and legitimacy have become suspicious. Most certainly, such questions are necessary, and it could be a valid conclusion that international law is a fraud, as has been the case in many fields of pre-scientific knowledge in the past. International law could be to legal studies what alchemy once was to chemistry. But it may be too soon to draw such a conclusion, especially since it

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seems to rely on various epistemological confusions. The omnipresent method of seeking international law *elsewhere* leads to the fuzzy image of international law being *everywhere*, which ultimately is just another way of saying that international law is *nowhere*.

The elsewhereness of international law. Many speakers seemed anxious to seek international law within empirical fields that exceed by far the classical domains of international law research. Of course, 'research for new' or 'pushing the limits'[1] is most relevant and legitimate: it is the only way to dig into aspects of international law that have been overlooked in the past. But in many cases this expansion tends to take the more radical shape of a displacement: classical components of international law (states, treaties…) are then not presented as being supplemented by new actors and methods, but simply replaced. However, such a replacement is premature if we consider, first, that the most classical methods of creating international law have not disappeared and, second, that many new fields scrutinized by legal scholars depend primarily on these classical methods. There is no United Nations bureaucracy without a UN Charter. While it is important to ask how old and new practices work and fit together, focusing solely on the novelty seems a hazardous method. There have been many discussions opposing the telescope and microscope approaches: perhaps it is worth stressing that there is a continuum between these two instruments, and that every micro-observation is part of a macro-picture. A cell is not a universe: it belongs to it, according to certain links and to a certain hierarchy. On the other hand, the universe is not an accumulation of cells: the mere compilation of microscopic views can certainly give a 'kaleidoscopic' picture of reality, but the kaleidoscope has never been a scientific tool. It is just a deforming toy.

The everywhereness of international law. This constant expansion of the field of international law leads to the curious impression that international law now stands everywhere. This does not only mean that international law has now penetrated all aspects of human activities (which seems obvious). It also implies that international law is the correct field and language to describe an unlimited range of actors, methods and norms, whose belonging to the field of international law seems to be taken for granted. However, such an assumption relies simultaneously on two premises: first, that the described phenomenon has an *international* character, and second, that the phenomenon has a *legal* character. If the described phenomenon falls short of one of those two criteria, it is probably not relevant to view it as a constitutive element of international law itself. Perhaps the study of this phenomenon is useful in order to shed light on the functioning of international law (this is the case of almost anything, from sociological studies to mere material facts), but it does not suffice to conclude (at least immediately) that it is an integral part of international law. Even less so should such an external element lead to any drastic redefinition of the discipline. If we are to admit that any phenomenon, as soon as it does not have purely domestic consequences, is international by nature, and if we admit that any statement, as soon as it relates to

[1] These expressions are borrowed from the concluding speech by Andrea Leiter.

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an international behaviour, is of a legal nature, then there are no more boundaries to international law. International law then includes each and every aspect of reality, because any aspect of reality can be part of any legal reasoning. The revered French legal scholar Jean Carbonnier was very sceptical about what he labelled 'Panjurisme', i.e. the idea that every human phenomenon is doomed to fall within the scope of legal analysis.[2] Many contemporary studies seem to rely on a form of 'international panjurism', as though legal relevance were a title of nobility for a cause, if not proof of its very existence and legitimacy. Of course, such a pursuit of international recognition might be, in several cases, of the utmost importance and a matter of life or death. But, as an academic tendency, it raises the question of the very existence of disciplinary boundaries. This appetite for expansion paradoxically leads towards this ultimate question: If international law is to be found everywhere (regardless of any inherent international and legal nature), is there anything specific left to call international law?

The nowhereness of international law. This is precisely the starting and ending point of the conference. In the opening Keynote conversation, Martti Koskenniemi reiterated the idea that parts of international law and some of its institutions might be no more than 'zombies': 'dead, but not knowing that they are dead, they simply do not lay down and disappear'[3]. According to such a representation, not only has the former continent of international law now been fragmented into various islands (human rights law, economic law, environmental law, etc.), but its historic core (general international law) has entirely sunk, as had the ancient Atlantis, under the fresh waters of postmodernity. The concluding panel title explicitly exposed this anxiety of 'the end' of international law. The suggestion that international law (necessarily 'Westphalian') might have been substituted with a global law, open to new actors, methods and values, amounts to a rather dark picture of international law itself, considered as unable to integrate those actors, methods and values. If such a depiction is correct, perhaps international law deserves to disappear, being inadequate to describe the reality of contemporary international relations. But this shrinking image of international law does not correspond to what, I believe, many of us now think or teach.

By sheer chance, I chose to take the classic Thomas S. Kuhn's *Structure of Scientific Revolutions* on my flight to Stockholm. This reading probably has distorted to some extent my understanding of the whole conference (and the orientation of the present report). The question raised by the organizers has placed 'changes' at the very centre of the debate, at the exact midpoint of 'normal' international law and 'revolutionary' new paradigms. At what point do changes in law call for changes in legal theory? Here the doubts remain, and some confusion.

[2] J. Carbonnier, *Flexible droit: Pour une sociologie du droit sans rigueur* (2001).

[3] For an edited version of the Keynote conversation, see Koskenniemi and Nouwen, 'The Politics of Global Lawmaking: A Conversation', 32 *European Journal of International Law* (2021) 1341. For a previous exposé of this analysis, see D. Schmalz, 'On Kitsch, Zombies and True Love – An Interview with Martti Koskenniemi', *Voelkerrechtsblog*, 21 May 2014, available at https://voelkerrechtsblog.org/de/on-kitsch-zombies-and-true-love-an-interview-with-martti-koskenniemi/.

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