Some Reflections on the European Society of International Law Research Forum 2005

By Euan MacDonald *

The recent European Society of International Law Research Forum – only the Society's second conference following the inaugural event in Florence last year – took place from the 24-26th May 2005 in stunning surroundings on the shores of Lac Lemain in the buildings of the Graduate Institute of International Studies in Geneva. Quite apart from the obvious importance of a high-level international conference under the auspices of one of the most important international law societies in the world, and the attendant quality of the speakers and other participants, the event was of real significance in that it allowed for an insight into how the new Society itself is developing, and the manner in which it will go about the task of fulfilling the objectives that it has set itself.[1]

A. General Comments

That the European Society is a very recent creation is not unimportant; it has, in the past, appeared somewhat preoccupied with determining and defining its role in relation to other national international law societies in general, and the American Society in particular. Indeed, according to some, it was this latter concern that provided the theme (and much of the grounds for criticism) of the proceedings at the first conference one year ago.[2] It is perhaps surprising, then, that it seemed to trouble the participants so little this time around. If there was open disagreement last year over whether the ESIL should rival or complement its American

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[1] These objectives can be found on the Society's website, at http://www.esil-sedi.org/english/goals.html.

[2] See Alexandra Kemmerer and Morag Goodwin, *As Sounding Brass, or a Tinkling Cymbal? Reflections on the Inaugural Conference of the European Society of International Law*, 5 GERMAN LAW JOURNAL (2004), available at: http://www.germanlawjournal.com/print.php?id=461.

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counterpart, this issue was put to rest in the brief treatment of a very few sentences in Judge Bruno Simma's opening remarks (the only attention paid to it over the course of the event). He merely noted that the European Society was emphatically *not* set up in competition with any of the national organisations, but rather to cooperate with them; and that, essentially, was the end of the matter. Furthermore, the self-conscious attempts to carve out a rigorously and identifiably "European" approach to public international law, that seem to have characterised the first event, were, if anything, conspicuous by their absence in Geneva. This is not to say, of course, that broad generalisations as to dominant national "styles" (which seem to me both useful and accurate if used in moderation) were not referred to in the course of some presentations; they did not, however, provide the underlying theme for any of the individual sessions, let alone for the forum as a whole.

If this development is, in general, to be welcomed as a sign that the Society is rapidly becoming more secure in what it can itself offer, free from its perceived relationship with its US counterpart, it is not without some repercussions. International law is a vast and ever-expanding discipline; and yet, at forums such as these, the organisers are charged with the task of providing a programme that is at once general, profound and coherent – that is, broad enough to be of interest to all who are interested in the work of the society, and yet both detailed enough to satisfy specialists and based upon certain themes that draw all of the separate sessions and workshops together (although the absence of the latter, admittedly, is perhaps less of a problem to those attending the conference than it is to those endeavouring to report on it). The notion of some sense of "European-ness" was undoubtedly useful in discharging these tasks; without it, or something like it, it was always going to be difficult to provide the sense of coherence that creates one event from a series of panels on sometimes wildly differing topics. Perhaps the best illustration of these difficulties can be found in the fact that the forum itself was entitled simply "Contemporary Issues/ Problèmes Contemporaines".

One major goal of the European Society is to "foster the involvement and representation of younger scholars";[3] and this was very much reflected in the structure of the sessions and the speakers selected. The forum opened and closed with plenary sessions, all of which boasted an impressive array of established academics. Most time, however, was allocated to a series of parallel workshops, and it was here that the commitment to providing a platform for less experienced scholars was most readily evident. More often than not, these panels comprised four or five younger academics whose contributions were then drawn together and critiqued by an older, well-known discussant. The overall impression (with which I

[3] ESIL Constitution, Article 3(2).

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concur) seems to have been that this method was a success, generating interesting debates over a series of lively and original papers, and generally achieving the desired balance between youth and experience. Often at such events, it seems that the quality of the papers presented can be inversely proportional to the reputation of the speaker; quite simply due to the fact that the potential gains and losses for younger academics are both much higher than for their more established colleagues. This is not to argue, of course, that there should be no active role in the proceedings for more experienced scholars; rather, that a complex and difficult balance needs to be struck. It seems to me that in both the structure of the sessions and the selection of the individual panels, the organisers went a long way towards achieving this.

Another, perhaps even more complex, issue is that of linguistic diversity. Others have noted the prominent (perhaps even excessively so) status afforded to this question at the inaugural conference in 2004.[4] Nonetheless, there can be no doubt that it is an important and contentious issue, given the range of languages spoken by members of the Society. The ESIL Constitution notes that the official languages are English and French;[5] however, the website also notes that "The Society is committed to promoting linguistic diversity while at the same time maximising the ability of members to communicate effectively with one another."[6] The tension between diversity and practicality is therefore explicitly acknowledged. In one important sense, the recent Forum can be viewed as a success in this regard: the proceedings were genuinely bilingual (although admittedly mostly Anglophone). Most if not all of the sessions had at least one Francophone contribution, and one of the keynote speeches, that by the former President of the ICJ Gilbert Guillaume, was also delivered in French. For those fearing that only lip service would be paid to the second official language of the Society, and that English would be allowed to completely dominate the proceedings, this must have been welcome indeed.

However, in a Society whose members represent a bewildering array of different languages, bilingualism can only be a double-edged sword. Certainly, it is to be welcomed that French has been included to such a degree; however, it may legitimately be asked if *bi*lingualism is sufficiently inclusive of the linguistic diversity that exists within Europe, or, put otherwise, whether framing the issue in terms of a choice between "English only, or English and French" doesn't remove too much from the table at the very outset. As one conference participant remarked,

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[4] *See* Kemmerer and Goodwin, *supra* n. 2.

[5] ESIL Constitution, Article 20.

[6] See *supra* n. 1.

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"is French supposed to be the stand-in for everything to the east of Dover?"[7] Of course, certain decisions need to be taken in order that things can function smoothly on a practical level; however, perhaps the Society should have a more sustained discussion on ways in which it could begin to reflect its genuinely multilingual constituency. Article 20 of the ESIL Constitution seems to provide the framework within which such an expansion could be possible. It notes that "The Board or the Secretary General may decide that in pursuance of the goals of the Society an activity shall be conducted in a language other than the official languages". However, some care must be taken to ensure that provisions such as this remain active and relevant, and are not allowed to become a mere façade to hide a *de facto* preference for the (relatively) easy option of a limited bilingualism.

B. Substantive Matters

The first plenary session, although boasting an impressive array of speakers, was perhaps a little disappointing. This, however, was the fault of the topic chosen for discussion. Clearly here the organisers were struggling with the need to begin the event with a topic sufficiently broad to appeal to everyone; yet, "Are the Rumours of the Death of the Westphalian System Exaggerated?" seems almost too broad, too capable of vastly varied interpretations, to appeal to anyone. There was certainly little or no coherence to the presentations or an overall theme for general discussion. This is not to say that the individual papers were not enjoyable to listen to, but there was perhaps little of real academic worth in them – a little disappointing when the panel contains, amongst others, four members of the International Law Commission.

If, however, the sense of a lack of overall coherence would linger for the whole forum, the same cannot be said for the vagueness of the topics or the academic worth of the presentations. In the first of two keynote speeches, Judge Owada from the ICJ examined some recent proposals for reform of the United Nations system, and the Security Council and the ICJ in particular. Even if there was nothing particularly original in his own reform preferences (for example, reform of the veto power, or an increase in use of the advisory opinions mechanism), it is always interesting to hear a judge discuss his own court. The conference proper, however, really began the next morning with the first of the parallel workshops (and here apologies must be made for the slight bias in the report; it is, however, in the nature of such workshops that you can only attend one). The morning began with what, for this reviewer, was one of the best sessions of the entire forum, that on

[7] See my discussion on this point with Akbar Rasulov on the Transatlantic Assembly weblog, available at: http://transatlanticassembly.blogspot.com/2005/06/some-brief-reflections-on-esil.html#comments.

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international legal theory. Again, the topic itself was vague ("revisiting contemporary international legal theory"), but the papers given were all interesting and innovative, even if dealing with at times completely different subject matters (not to mention struggling with the profound injustice of being asked to talk on legal theory at 8.45 on a Saturday morning). Although there did seem to be an overall attempt to deal, in most papers at least, with critical approaches to international law, it did this from perspectives as varied as feminism, cultural relativism, or Nietzschean epistemology, before rounding off with a more positivistic attempt to "purify Kelsen". It fell to Koskenniemi to sum up and attempt to draw together the various threads; this he did by means of a memorable plea for the recognition for a norm of *jus cogens* against ever asking the question "how can this theory be applied in practice".

Other workshops dealt with a number of currently popular issues within the discipline: international environmental law; human rights and the "war on terror"; cultural heritage law; migrants and refugees; international administrations; the implementation of international rules in domestic law; and the role of private actors in the international legal system. The last of these was again particularly interesting, if, perhaps, a little schizophrenic, in that it focused on the two very separate issues of the changing role for NGOs in the international system, and the prospect of international legal accountability for multinational corporations. To this extent, this was really two panels rolled into one, as testified to by the fact that there was ltitle time left over at the end for discussion of either once the panelists and discussant had had their say. Nevertheless, there was much of interest in the presentations, ranging from the interactions between IGOs and NGOs (which has led, apparently, to the term "GONGOs" – governmental NGOs – being coined), to an interesting and detailed discussion of the recent *Khulumani* case from the New York District Court, which held that a number of companies that did business with the South African government during Apartheid could not be held legally accountable for having supported that system.

The conference organisers also managed to make good use of the location (above and beyond, that is, the sun, lake and mountains) by holding one afternoon in the UN *Palais des Nations*, at a session of the International Law Commission. Quite apart from affording the opportunity for those attending to visit the UN headquarters in Geneva, it also provided the chance to listen to the special rapporteur to the Commission on the issue of the responsibility of international organisations under internationational law, Giorgio Gaja, and to question him on this area of his expertise. This is undoubtedly both an interesting and important topic; however, given that, by the time of the Forum, only some seven recommendations had actually been adopted by the Commission, the two and a half hours devoted to this single issue may have been a little excessive. With the

entire ILC present, the opportunity could perhaps have been taken to widen the discussion to the work of the Comission more generally.

The closing plenaries fortunately managed to avoid the pitfalls of the opening one: a topic was chosen that was of interest to most if not all, but that was sufficiently well circumscribed to give the panels a sense of coherence and purpose. In effect, all of Saturday afternoon was devoted to a discussion of the recent ICJ Advisory Opinion on the wall in the occupied Palestinian territory.[8] It began with some detailed discussion of the judgment itself (such as the competencies of the Court, responsibilities of the UN organs, humanitarian law and the question of "occupation", and the issue of self-defence in the case at hand), followed by a round table on the wider implications of the decision for international law more generally. Naturally, having a number of ICJ judges present lent a particular force to the critiques and calls for clarification that were peppered throughout the contributions.

C. Conclusion

There are a couple of criticisms that should be made in conclusion: one minor, and another, related, more significant. The first is that each speaker was only given ten minutes in which to present their papers. The rationale behind this was both clear and laudible: clearly, the organisers wanted to encourage as much dialogue as possible, rather than allowing things to degenerate into something closer to a series of set lectures. In some ways, this was a success; more often than not, there was sufficient time at the end of the presentations for a reasonably long discussion of some of the major points raised. On the other hand, ten minutes is not at all long to develop an argument in any great depth or detail – a shortcoming that must be felt all the more clearly when panel topics are so broadly framed. This inevitably damaged the quality of the ensuing question and answer sessions, as speakers had often simply not been able to develop their ideas to the extent necessary to allow for profound and fruitful discussion. In this regard, the fact that in each two-hour workshop there was at least four speakers to get through (already a busy programme), but also a discussant, chair and convener to hear comes to seem perhaps a little excessive.

This admittedly relatively minor complaint becomes, however, more serious in the light of the second criticism; namely, that the papers to be presented were not made available to those attending the sessions in advance. All that was provided was a

[8] For a comment on the Court's Opinion see, Iain Scobbie, *Smoke, Mirrors and Killer Whales: the International Court's opinion on the Israeli Barrier Wall*, 5 GERMAN LAW JOURNAL, No. 9 http://www.germanlawjournal.com/article.php?id=496.

series of short abstracts, which were really far too short to give any real sense of the arguments that would be put forward. This meant in effect that not only did all of the presentations have to be fast, but they were also performed to an audience that were coming to it absolutely "cold", so to speak. It is of course true that the size of the conference would have made the provision of hard copies of full papers for all those who attended something of a logistical nightmare. There would have been nothing, however, to stop the organisers from making them available online a week or so beforehand, in order that those interested could get a better grasp of exactly what was to be argued. The failure to do so meant inevitably that both the complexity of the arguments advanced and the worth and detail of the subsequent discussions were impaired as a result.

Despite these points, however, the 2005 ESIL Research Forum must be viewed as a success on all levels: academically, intellectually and socially. As noted above, the decision to focus on less experienced academics within the framework of the parallel workshops seemed to work well, and certainly demonstrated that the Society takes its own commitment to encourage and facilitate the participation of younger scholars very seriously. The same can be said of the Society's commitment to bilingualism, as amply illustrated by the high profile afforded to the French language throughout the proceedings, although it remains less than clear as to whether this alone will suffice in terms of the broader, vaguer goal of reflecting and expressing the linguistic diversity of its membership. And, although it was missed in terms of providing an overall guiding theme to the various sessions, the fact that there was no real attempt to construct a distinctively "European" approach to international law is probably to be welcomed. This, indeed, could have been any high-level public international law conference; its "European-ness" was derived overwhelmingly from the nationality of the participants, and not from their homogeneity of purpose. As noted before, generalisations of this sort (e.g. a "US" approach to the discipline) can be both useful and apt, if used in moderation; however, the construction of a "European" approach to rival this, if one exists now or is to exists at any point in the future, should be the coincidental, organic result of events such as these, and not the consciously adopted driving force behind them. Anything less would do an injustice to the variety and depth of the viewpoints and arguments on display in Geneva last month.