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## Nostalgia: A Nordic International Law

Noll, Gregor

*Published in:*  
Nordic Journal of International Law

*DOI:*  
[10.1163/15718107-08504009](https://doi.org/10.1163/15718107-08504009)

2016

*Document Version:*  
Early version, also known as pre-print

[Link to publication](#)

*Citation for published version (APA):*  
Noll, G. (2016). Nostalgia: A Nordic International Law. *Nordic Journal of International Law*, 85(4), 265 – 280.  
<https://doi.org/10.1163/15718107-08504009>

*Total number of authors:*  
1

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Citation for the forthcoming article:

Gregor Noll

‘Nostalghia: A Nordic International Law’

Forthcoming in the *Nordic Journal of International Law*  
(2016)

This paper is available at:

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*Gregor Noll\**

*Abstract*

Is there a Nordic approach to international law? I argue that a substantive Nordic approach to international law is absent today, and go on to explore, in an essayistic form, why the question of a Nordic international law would emerge today and how the craving for Nordic identity might be overcome.

In a first step, I look into select evidence relating to the use of force, to international recognition and to international humanitarian law to show the material vacuity of contemporary Nordic cooperation in key areas. The epoch of Nordic legal entrepreneurialism taking off during the 19<sup>th</sup> century Nordic international law is now ending, and non-alignment with it.

So why have a special issue on a phantom pain? This brings me, second, to ask how the melancholic longing for a ‘Nordic International law’ might be transgressed. Here, Andrei Tarkovsky’s *Nostalgia* of 1983 comes in. It confronts us with the question of what imperatives – legal or other – grow from our melancholia for homelands and persons no longer with us.

*Keywords*

Nordic international law, neutrality, non-alignment, international legal history

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\* Professor of International Law, Faculty of Law, Lund University. I am grateful for comments and critique from participants of the conference on “A Nordic Approach to International Law?”, held 27-29 August 2015 in Oslo, Norway. I remain particularly indebted to its convenor Astrid Kjeldgaard-Pedersen and the journal’s anonymous reviewer. Thanks are also due to Miran Crnalic and Teresa O’Neill for research assistance. Research for this project was in part conducted when I occupied the Torsten and Ragnar Söderberg Foundations’ Chair in Commemoration of Samuel Pufendorf.

## 1. Introduction

Is there a 'Nordic Approach to International Law'? This question positively rubs me the wrong way. It presupposes another one: 'what is the Nordic?' As any questions of identity would be, this is a dubious question indeed.<sup>1</sup> And if the Nordic is so acutely in question, how could we possibly identify its peculiar way of making, shaping or breaking international law?

I can see two ways of dealing with this problem. I might write a text looking back at the origins of a purported Nordic international legalism, say the 1930s, or the 1950s and 1960s, or any other period which I think reflects authentic Nordicness in international law. There, I would compare the degree of cohesion among Nordic governments, parliaments and institutions in matters of international law existing back then with the currently prevailing one. Today's Nordic approach to international law, I would conclude, is but a shadow of its former self. The temper of this text would be melancholic, and the sentiment impregnating it nostalgic in relation to the origins of Nordic international legalism. Another text I could write would move in the opposite direction; I would seek to show the existence of a new, unprecedented Nordicness and speculate how it might engender a distinct international law for the future. This text would be optimistic in tone, its temper sanguine, and its agenda redemptive. Either of these two texts would be a naive response to the question asked by this special issue.

There is the problem of *method* it engenders. Are we to think of a 'Nordic approach to international law' as a phenomenon akin to a *regional custom*, suggesting that we map the practice and *opinio juris* of Nordic states and other international actors in the region? In doing so, we would appear to apply a 'Nordic positivism', and content ourselves with the formal means of deducing the law well-rehearsed within our discipline. Here, the 'Nordic' would evidence itself strictly through positive law. The chances for such a project are slim.

Or is that 'Nordic Approach to International Law' actually about the *mentality* held by its practitioners and theorists? A kind of *opinio juris* aggregated *across* international law at large, a historically shaped ontology of the law? If the project of explaining the Nordic through its positive law alone were bound to fail, then this would seem to be the only way left. But what method are we to apply when thinking about the mentality of Nordic international lawyers? An ethnology, psychology, sociology or neurobiology of Nordic international law?

Why do I think that the Nordic is something that has become ever more dubious? States do not harmonize their approach to international law just because their territories happen to share roughly the same geographical corner of the world.<sup>2</sup> But

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<sup>1</sup> Why dubious? The literature on the Nordic self-positioning after the Cold War suggests that we still lack any clear-cut reformulation of what being Nordic means today and that (self-)doubt persists. N. Parker's 'Differentiating, Collaborating, Outdoing: Nordic Identity and Marginality in the Contemporary World', 9 *Identities* (2002) pp. 355-381 has aged well and offers a relevant account from a perspective of Nordic marginality even today. The same goes for O. Wæver, 'Nordic Nostalgia: Northern Europe after the Cold War', 68:1 *International Affairs* (1992) pp. 77-102. But asking the question of Nordic identity is dubious for another paramount reason: because the moulding of complex histories into an identitarian cliché always brings with it very real political risks.

<sup>2</sup> Considering the distance, geographical and otherwise, between Quanaaq in Greenland and Finnish Imatra, even this suggestion is open to challenge. Greenland is commonly held not to be part of the Nordics (or, more specifically, *Norden*, as the Danish, Norwegian and Swedish term has it, describing a region in the singular rather than a plurality of states). Yet there is no doubt that Danish international legal practice extends to Greenland, notwithstanding the expansion of Greenland's competencies in the area of foreign affairs during the past decade. So any discussion of Nordic international law would seem to extend to Greenland, although it remains outside the Nordic sphere in geographical terms.

states might harmonize their approach to international law to the extent they conceive of their internal and external affairs as being exposed to similar problems and pressures. And, I would think, because it makes sense to form a cartel against what are perceived as antagonistic forces. Thinking about the commonalities of states' approach to international law invariably means to think about their historical, political and personal situation.

The theme of this special issue would be unintelligible to us were it not for the backdrop of 19<sup>th</sup> century Nordic neutrality politics, including the embrace of *mare liberum* thinking, or the mid-20<sup>th</sup> century as intense periods of Nordic international legalism. Constellations of antagonistic forces have changed since then, as have other aspects of the personal and political situation of the Nordics. So the question of this special issue is of extraordinary complexity. Methodologically, it would require a determination of the contemporary politico-historical situation of the Nordics as a preliminary step to identify the Nordic, before embarking on an inventory of the law subsumable under that Nordicness. It is quite a task, and not one that we international lawyers routinely undertake.

For the purposes of this text, I will limit myself to a less daunting exercise, combining an argument on decay with an essay on how to overcome this aching for identity. In a first step, I will gather select evidence to indicate that a common Nordic approach to international law hardly exists today. My avowedly limited probing relates to the use of force, to international recognition and to international humanitarian law – all three touching upon the fundamentals of international law. There should be reasonably good odds of detecting traces of Nordicness in the conduct of Denmark, Finland, Iceland, Sweden and Norway in the three cases I choose to pursue (section 2).

To give the presence of Nordic international law some contours, I move back in time to sketch up the geopolitical heyday of Nordic international law to make clear that the non-alignment epoch is coming to an end (section 3).

Together, sections 2 and 3 will suggest the absence of a Nordic approach to international law in current state practice other perhaps than an unfulfilled expectation, a nostalgic memory, a phantom pain. But should not the fact that this special issue, and the conference preceding it, is organized around a phantom pain give us pause?

This brings me, second, to ask how the melancholic longing for a 'Nordic International Law' might be transgressed (section 4). I read this longing through Andrei Tarkovsky's *Nostalghia* of 1983. It confronts us with the question of what imperatives – legal or other – grow from our melancholia for homelands and persons no longer with us.

## **2. Substantive Nordic Convergence in Contemporary Practice?**

But why start in this sombre mood? Are there not quite a few contemporary indications that Nordic countries continue to coordinate their international legal positions, and quite successfully so?<sup>3</sup> Consider the common statements by the Nordics in the UNGA Sixth Committee, the primary forum for dealing with legal issues in the General Assembly. In a recently concluded four-year period, sixteen such statements were presented by Denmark, Finland, Iceland, Norway and Sweden on a rotating

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<sup>3</sup> In the 1990s and the early 00s, the *Nordic Journal of International Law* published reports on Nordic state practice in coordination, usually authored or co-authored by legal advisers. This laudable form of reporting had to be abandoned by the *Nordic Journal of International Law* as Nordic foreign offices suggested they lacked the necessary resources to continue it.

basis.<sup>4</sup> As a matter of routine, these common statements move to the top of the speakers' list and are more likely to be quoted by Special Rapporteurs. Without any doubt, coordination at this and other levels can be successful in making and shaping international law. The separability of impermissible reservations is a material example that has been pointed out to me: drawing on earlier Nordic practice and making use of an article by Jan Klabbers in this journal<sup>5</sup>, the Nordics managed to convince ILC Special Rapporteur Alain Pellet that the ILC Guidelines should contain language supporting the separability approach.<sup>6</sup>

On this level of concretion, I am confident that further evidence could be adduced for the continued pursuit of a Nordic international law. The question is whether the continuation of a formal and bureaucratic coordination practice and its occasional substantive successes are enough.<sup>7</sup> So, let me embark on a brief exploration of whether any commonalities in the approach to international law are traceable in three subject matters that possess some actuality and touch upon central areas to contemporary international law.

One of these is the confrontation between a coalition of states and the Islamic State (hereinafter IS), identified by Denmark as a top priority on the agenda of international security during the 69<sup>th</sup> session of the UN General Assembly.<sup>8</sup> Sweden, Finland and Iceland joined many other states in stressing the need for joint action in this area.<sup>9</sup> Three of four Nordic states possessing military capability steer clear from U.S. military action against IS on Syrian territory. Denmark is the only Nordic state that participates in military operations in both Syria and Iraq with a squadron of fighter aircrafts deployed.<sup>10</sup> Denmark, Finland, Sweden and Norway provide military training to Iraqi forces alongside humanitarian assets, while Iceland, lacking armed forces of its own, provides but humanitarian assets.<sup>11</sup> Denmark is clearly an outlier among the

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<sup>4</sup> I looked at a period stretching from 1 October 2011 to 30 September 2015. Thematically, Nordic common statements in that period dealt with the work of the ILC (which obviously covered a wider array of themes), with international humanitarian law, the responsibility of international organizations and the protection and security of diplomatic missions.

<sup>5</sup> J. Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties', 69:2 *Nordic Journal of International Law* (2000) pp. 179-193.

<sup>6</sup> International Law Commission, *Guide to Practice on Reservations to Treaties*, A/66/10/Add.1. I am grateful to my colleague Marie Jacobsson for making me aware of the causalities in this case.

<sup>7</sup> The list of examples on Nordic cooperation on international law issues could evidently be prolonged. Nordic countries make common statements in the Security Council, *inter alia* on thematic issues, as they do in bodies as UNDP, UNFPA, UNICEF and UN Women. Nordic Heads of Missions to the UN hold a weekly meeting in New York. Every four years, a Nordic country seeks a non-permanent seat in the UNSC.

<sup>8</sup> UNGA, Statement by Denmark at the General Debate 24 September 2014, <[www.un.org/en/ga/69/meetings/gadebate/24sep/denmark.shtml](http://www.un.org/en/ga/69/meetings/gadebate/24sep/denmark.shtml)>, accessed on 11 August 2016.

<sup>9</sup> UNGA, Statement by Finland at the General Debate 24 September 2014, <[www.un.org/en/ga/69/meetings/gadebate/24sep/finland.shtml](http://www.un.org/en/ga/69/meetings/gadebate/24sep/finland.shtml)>; UNGA, Statement by Iceland at the General Debate 29 September 2014, <[www.un.org/en/ga/69/meetings/gadebate/29sep/iceland.shtml](http://www.un.org/en/ga/69/meetings/gadebate/29sep/iceland.shtml)>; UNGA, Statement by Sweden at the General Debate 29 September 2014, <[www.un.org/en/ga/69/meetings/gadebate/29sep/sweden.shtml](http://www.un.org/en/ga/69/meetings/gadebate/29sep/sweden.shtml)>, all accessed on 11 August 2016.

<sup>10</sup> G. O'Dwyer, 'Denmark to Reinforce Military Fight Against ISIS', *Defense News*, 21 April 2016, <[www.defensenews.com/story/defense/international/2016/04/21/denmark-isis-syria-iraq-military/83338340/](http://www.defensenews.com/story/defense/international/2016/04/21/denmark-isis-syria-iraq-military/83338340/)>, accessed on 11 August 2016.

<sup>11</sup> J. Drennan, 'Who has contributed what in the coalition against the Islamic State', *Foreign Policy*, 12 November 2014, <[foreignpolicy.com/2014/11/12/who-has-contributed-what-in-the-coalition-against-the-islamic-state/](http://foreignpolicy.com/2014/11/12/who-has-contributed-what-in-the-coalition-against-the-islamic-state/)>, accessed on 11 August 2016; D. O'Dwyer, 'Finland to Strengthen Training Mission in Iraq', *Defense News*, 21 April 2016, <[www.defensenews.com/story/defense/international/2016/04/21/finland-iraq-isis-troops/83332046/](http://www.defensenews.com/story/defense/international/2016/04/21/finland-iraq-isis-troops/83332046/)>, accessed on 11 August 2016.

Nordics in that it operates militarily on Syrian soil and justifies this with reference to Iraq's right to collective self-defence under article 51 of the UN Charter.<sup>12</sup> An analogous rift on the legality of the use of force against IS in Syria exists between the US and its Middle Eastern allies on one side, and other Western coalition members on the other. Throughout most of the 20<sup>th</sup> century, the Nordics have been careful to delimit permissible uses of force under international law. That heritage appears to be insufficient today, as the position taken by Denmark indicates.

Remaining in the Middle East, the status of Palestine is another question whose significance for international peace and security is beyond doubt. Here, Nordic states are far from converging. The Icelandic Parliament passed a resolution in 2011 recognizing the statehood of Palestine.<sup>13</sup> The current Swedish government has also recognized Palestine<sup>14</sup>, while the previous one saw the criterion of territorial control as not being fulfilled and precluding recognition. On the other side of the divide, we find Norway, Finland and Denmark. The Norwegian prime minister is on record with making the achievement of a two-state solution a precondition for Norwegian recognition of Palestinian statehood.<sup>15</sup> This practice can be neatly projected on rifts in the international legal doctrine of recognition. These rifts continue to exist, although the pragmatic Nordics have decided in 2013 that Palestine missions to the Nordic countries should have the same status.<sup>16</sup> As self-determination of small states has been a prominent issue for the Nordics since the 19<sup>th</sup> century, one might have expected a material convergence of sorts here.

Both Israel and Palestine are small and exposed to massive political tectonics. To a degree, the traditional Nordic insistence on the self-determination of small states lends itself to support the Israeli as well as the Palestinian cause. The fact that there is no joint position on the recognition of Palestine – positive or negative – suggests that the material similarity of Nordic history might be exaggerated, or at the very least has lost its traction in our days.

Finally, I choose to add a question from the field of international humanitarian law, an area in which the Nordics are traditionally seen to have a particular stake. In that field, the advent of new weapons systems that operate with a high degree of autonomy is one of the most significant challenges to IHL. With massive public as well as private investments taking place in robotics in the military sector, the moment for regulation is arguably now. As far as I am aware, there is an industrial interest in the Nordic defence industry, too.<sup>17</sup>

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<sup>12</sup> Danish Ministry of Defence, 'The Effort Against ISIL', <[www.fmn.dk/eng/allabout/Pages/the-effort-against-isil.aspx](http://www.fmn.dk/eng/allabout/Pages/the-effort-against-isil.aspx)>, accessed on 11 August 2016.

<sup>13</sup> 'Iceland recognises Palestinian state', *The Guardian*, 30 November 2011, <[www.theguardian.com/world/2011/nov/30/iceland-recognises-palestinian-state](http://www.theguardian.com/world/2011/nov/30/iceland-recognises-palestinian-state)>, accessed on 30 August 2016.

<sup>14</sup> Protocol of the Government's Meeting of 30 October 2014 [*Protokoll vid regeringssammanträde 2014-10-30*] UF2014/68085/UD/MENA, <[www.regeringen.se/contentassets/6c7d07c17c2241939a2590497424c14f/regeringsbeslut\\_palestina.pdf](http://www.regeringen.se/contentassets/6c7d07c17c2241939a2590497424c14f/regeringsbeslut_palestina.pdf)>, accessed on 10 August 2016.

<sup>15</sup> 'Ingen palestinsk stat tross massiv anerkjennelse', *Aftenposten*, 30 October 2014, <[www.aftenposten.no/verden/Ingen-palestinsk-stat-tross-massiv-alerkjennelse-75635b.html](http://www.aftenposten.no/verden/Ingen-palestinsk-stat-tross-massiv-alerkjennelse-75635b.html)>, accessed on 9 August 2016.

<sup>16</sup> See Danish Ministry of Foreign Affairs, 'Denmark and Finland to upgrade relations with Palestinians', 4 May 2013, <[um.dk/en/news/newsdisplaypage/?newsID=0D2BA8C4-D5A1-4503-80A9-7EAA1A72F019](http://um.dk/en/news/newsdisplaypage/?newsID=0D2BA8C4-D5A1-4503-80A9-7EAA1A72F019)>, accessed on 10 August 2016.

<sup>17</sup> Saab, the Swedish defence business, has a number of unmanned fixed wing and rotary wing systems on offer or under development.

Here, we have the opportunity to follow the nucleus of regulatory deliberations in the records of the 2015 Meeting of Experts on Lethal autonomous weapons systems (or LAWS, as the portentous acronym has it) held under the Convention on Certain Conventional Weapons. The concept of ‘Meaningful Human Control’ of such systems was discussed at that meeting, with Denmark and Sweden voicing support for it in their respective general statements, while the Finnish concluding statement expressed a measure of scepticism towards its usefulness to clearly define this category of weapons.<sup>18</sup> There seems to have been no intervention by or on behalf of Norway at the meeting. Other statements, as that of Israel, were rather more sophisticated in their categorization than any of the three intervening Nordics. One needs to acknowledge, though, that the intervention by Israel would seem to counter regulation rather than to promote it. The impression of lacking coordination and shallowness of governmental analysis prevailed at the 2016 meeting, during which Sweden, Finland and Norway intervened.<sup>19</sup> Had the Nordics been interested in articulating the IHL of the future, after an epochal change in fighting wars, this meeting might have been an opportunity to coordinate.

For today, I conclude that it is not warranted to think of Nordic states as pursuing a substantive Nordic approach to international law in any of these areas.

### **3. The Nordics’ International Legalism at the Threshold of an Epochal Shift**

Whence these expectations of a Nordic international law? Historically, the Nordics have been extremely productive in shaping and articulating an international law of neutrality in the course of the late 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> centuries. The law of neutrality is in recession today and has to a large extent been replaced by the law of collective security post World War II. So we find ourselves in times where neutrality as the very *topos* that made the Nordics into remarkable international lawmakers approaches its vanishing point.<sup>20</sup> Some of the arenas of Nordic international legalism today – a knack for free trade, for small states, for humanitarian law – can be properly understood only with that past in mind.

It is, of course, tempting to imagine this former abundance as a product of good statesmanship, political wisdom or social virtue. That benign reading would veil the very real and very material pressures that made weakening Denmark and Sweden to adopt an early form of lawfare as part of its European power politics. The basic tenet of this politics was the growing insight that none of the Nordics could successfully participate in what would become the Concert of Europe: the domination of five major powers in European alliances and conflicts. As lesser powers unable to unite along the nationalist models that would work for Italy and Germany<sup>21</sup>, the Nordics

<sup>18</sup> Delegations’ statements, including those of the named states, can be readily consulted at the website of the 2015 Experts’ Meeting:

<[www.unog.ch/80256EE600585943/\(httpPages\)/6CE049BE22EC75A2C1257C8D00513E26](http://www.unog.ch/80256EE600585943/(httpPages)/6CE049BE22EC75A2C1257C8D00513E26)>, accessed on 12 August 2016.

<sup>19</sup> Delegations’ statements, including those of the named states, can be readily consulted at the website of the 2016 Experts’ Meeting:

<[www.unog.ch/80256EE600585943/\(httpPages\)/37D51189AC4FB6E1C1257F4D004CAFB2?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/37D51189AC4FB6E1C1257F4D004CAFB2?OpenDocument)>, accessed on 12 August 2016.

<sup>20</sup> H. Lödén’s ‘Reaching a Vanishing Point? Reflections on the Future of Neutrality in Finland and Sweden’, 47 *Cooperation and Conflict* (2012) pp. 271-284 offers an excellent overview of political and academic debates on the current state of neutrality in the two Nordics which stand outside NATO. On the decline of the law of neutrality in international law: M. Gavouneli, ‘Neutrality – A Survivor?’, 23 *European Journal of International Law* (2012) pp. 267-273.

<sup>21</sup> The mid-19<sup>th</sup> century Scandinavianist movement had unsuccessfully aspired to unite Norway, Sweden and Denmark under one crown.

were now looking for a new posture and found it in the international law of neutrality. Articulating the rules of that law and seeking to enforce it to the extent possible would seem to secure both military, political and commercial interests. This would act as a constraint on the use of force in a spirit of legalism.

As both Denmark and Sweden had experienced the growing power of Germany and Russia and their own inability to hold on to exposed territories, it made sense to seek a neutral posture in the dangerous political constellations of the rest of Europe, and to insist on the interest of free trade against hostile interventions by warring parties. In the course of a century ending with the 1907 Hague Conventions and World War I, the Nordics had contained British articulations of neutrality law and in part replaced them with their own versions. The power of warring parties would diminish and the immunity of neutral parties would be confirmed.<sup>22</sup> It was no coincidence that Martin Hübner, one of the great names of the international law of neutrality, was a Dane, and had first-hand experience of negotiating the release of seized Danish and Norwegian vessels with the British government.<sup>23</sup>

With a few strokes of the brush, political scientist Noel Parker draws a picture of the epochal change that the 19<sup>th</sup> century brought to the Nordics:

“Since the principal axis of European wealth moved north-westward from the 16th century, the Danish, Swedish, Polish, and German political orders (the last in the form of Prussia/Germany from late 18th century) have all fought over the wealth and power to be derived from straddling Europe’s access to Baltic resources ... Driven back to Scandinavian territory by the 18th century, Denmark and Sweden then reached (uneasy) compromise in their competition over the Baltic.

By the mid-19th century that arrangement was devalued by the intrusion of the two powers with major land-bases outside the area, Russia and Germany. Significantly, it is only then that we find surfacing the romantic vision of a Nordic society, more ancient and quite separate and independent from a “Europe,” [sic] which was by then dominated by German and/or French versions of “European Civilization”.<sup>24</sup>

This is an important point. The question of Nordicness emerged back then at the threshold to a new and uneasy political constellation, exposing the real weaknesses of the Danish and Swedish Realms. The question of Nordicness asked today (not at least by and in this special issue) would then be a sign of an epochal shift, just as the ones that Denmark and Sweden experienced by the middle of the 19th century.

As the last bastion of neutrality, these shifts are perhaps best read through Swedish - and to some extent Finnish - policy reorientation from more pronounced neutrality towards an ‘enhancement’ of bi- and multilateral defence cooperation. Within the first six months of 2016, Sweden had concluded a Memorandum of Understanding with Denmark on enhanced defence cooperation<sup>25</sup>, signed a Statement of Intent with the U.S. on defence cooperation<sup>26</sup>, and agreed to a Programme on Defence Cooperation

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<sup>22</sup> W.G. Grewe, *Epochen der Völkerrechtsgeschichte* (Nomos, Baden Baden, 1984) pp. 433-461.

<sup>23</sup> Hübner is given a prominent role in Grewe’s account of the formation of neutrality law. *Ibid.*, p. 439.

<sup>24</sup> N. Parker, ‘Differentiating, Collaborating, Outdoing: Nordic Identity and Marginality in the Contemporary World’, 9 *Identities* (2002) pp. 355-381, p. 362 (reference and footnote omitted).

<sup>25</sup> Government Offices of Sweden, ‘Sweden and Denmark sign enhanced defence cooperation agreement’, 14 January 2016, <[www.government.se/articles/2016/01/sweden-and-denmark-sign-enhanced-defence-cooperation-agreement/](http://www.government.se/articles/2016/01/sweden-and-denmark-sign-enhanced-defence-cooperation-agreement/)>, accessed on 11 August 2016.

<sup>26</sup> Government Offices of Sweden, ‘Statement of Intent between the Secretary of Defense of the United States of America and the Minister of Defense of Sweden’, 8 June 2016, <[www.government.se/globalassets/government/dokument/forsvarsdepartementet/statement-of-intent-swe\\_us-20160608\\_signed.pdf](http://www.government.se/globalassets/government/dokument/forsvarsdepartementet/statement-of-intent-swe_us-20160608_signed.pdf)>, accessed on 11 August 2016.

with the United Kingdom<sup>27</sup>. Defence ties to Finland have been intensified step-by-step since 2014, culminating in a joint statement of the defence ministers of both countries.<sup>28</sup> And perhaps most significantly, both Finland and Sweden concluded Host Nation Support Agreements with NATO in 2014.<sup>29</sup>

While this is not necessarily the end of military non-alignment for both countries in the formal sense, this process of repositioning gives us pause. Not only does it suggest that non-NATO Nordics are actively preparing for mutual assistance to their neighbours in- and outside NATO on the most concrete technical level, but also that the ties to Western powers and to NATO are now enhanced to such a degree that it is a matter of taste whether to attach a label of 'post-neutrality' or to rescind the use of neutrality terminology at all. Both moves can be seen in a sharper light if we compare them to mid-19<sup>th</sup> century Nordic politics of military *dégagement* from conflicts in neighbouring Nordics (as vividly exemplified by Swedish non-intervention in the 1863 Danish-German war) and of non-alignment. If the Nordics tried to make a home at the margins of violent European politics by then, their successors appear to seek themselves to their centre right now. In the area of international law, this would mean that the last vestiges of an entrepreneurial legalist role will be evacuated, slowly but surely.

#### 4. Nostalgia

This brings us to a point where all the preconditions for a case of nostalgia are in place: a mentality that is acutely mindful of past grandeur and therefore sees and laments present decay. *Algos* is the Greek term for pain, while *nostos* signifies to return home. So nostalgia lives off the difference between our present and our origins. But nostalgia might also provide the springboard for thinking of the potential of our present historical situation: yes, it is different from its origins, but what kind of actions does this difference – and the reflected experience of it – enable?

Andrei Tarkovsky was a Soviet film director of international repute, his name associated with works as *Ivan's Childhood*, *Stalker* and *Solaris*. Tarkovsky's filmmaking is rich in overtones and lives off spiritual and poetic allusions. During the shooting of *Nostalgia* in Italy in the early 1980s, state-owned *Mosfilm* withdrew support, and Tarkovsky resolved never again to work in the Soviet Union. He died in 1986 in self-imposed Parisian exile, after completing *Nostalgia* and *The Sacrifice*, his final work.

The protagonist of *Nostalgia* is Andrei Gorchakov, a Russian writer researching the biography of Pavel Sosnovsky, a fictional Russian 18<sup>th</sup> century composer. Sosnovski, who was befallen by nostalgia during a prolonged stay in Italy, decided to return to his oppressive homeland and committed suicide there; and Andrei now visits the places Sosnovsky visited during his Italian stay. In doing so, Andrei's longing for his Russian origins grows to the point of deep melancholy: images of his house, his

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<sup>27</sup> Government Offices of Sweden, 'Sweden and the United Kingdom enhance defence cooperation', 11 June 2016, <[www.government.se/articles/2016/06/sweden-and-the-united-kingdom-enhances-defence-cooperation/](http://www.government.se/articles/2016/06/sweden-and-the-united-kingdom-enhances-defence-cooperation/)>, accessed on 11 August 2016.

<sup>28</sup> Government Offices of Sweden, 'Joint Statement Regarding Deepened Defence Cooperation between Finland and Sweden', 22 May 2015, <[www.regeringen.se/globalassets/regeringen/dokument/forsvarsdepartementet/2015-05-22-joint-statement---signed.pdf](http://www.regeringen.se/globalassets/regeringen/dokument/forsvarsdepartementet/2015-05-22-joint-statement---signed.pdf)>, accessed on 11 August 2016.

<sup>29</sup> NATO SHAPE, 'Finland and Sweden Sign Memorandum of Understanding with NATO', 5 September 2014, <[www.shape.nato.int/finland-and-sweden-signing-a-memorandum-of-understanding-with-nato-for-operational-and-logistic-support](http://www.shape.nato.int/finland-and-sweden-signing-a-memorandum-of-understanding-with-nato-for-operational-and-logistic-support)>, accessed on 10 August 2016.

wife and his family appear in dreamlike sequences; and he recurs to his mother tongue's poetry and ponders its untranslatability.

In a decisive turn, Andrei encounters Domenico, an eccentric mathematician who has withdrawn from the world, lives in a dilapidated house with his German shepherd and is taken to be a madman by the village locals of Bagno Vignoni. Domenico, at first recalcitrant towards Andrei's advances and unsettled by his use of the phrase '*va bene*', explains to Andrei that saving the world is quite easy: it can be done by carrying a burning candle through the pool of the Holy Catherine in the village, an act the local population denies him as a madman. Before letting Andrei go, Domenico hands him a candle stump.

The film eclipses in a double gesture: in the course of his public speech on Rome's Capitol Hill, Domenico exhorts a strangely dispersed audience to listen to the insects before immolating himself. Unaware of Domenico's fate, Andrei simultaneously returns from Rome to Bagno Vignoni in a sudden change of heart and carries the burning candle stump through its pool, failing twice to keep the flame alive in the soft breezes, and succeeds on his third effort. While the camera retains its focus on the burning candle placed atop the pool wall, Andrei suffers a heart attack with locals rushing to his assistance, and only then the camera moves to show the bewildered gaze of a woman witnessing Andrei's fall.

Tarkovsky dedicated *Nostalghia* to his mother, and the sacrifices of caring and love are a central theme. One of its visually most captivating scenes has a young woman kneeling in prayer before a processional figure of the pregnant Mary. Then she buttons open the front of Mary's gown and a swarm of birds is released. The birds turn the air into sheer sound and movement. This image, as others in the film, denies itself to sensemaking; all its spiritual allusions strike but a tone, dissolve fixity and nudge us towards a possibility.

So, where is the analogy to Nordic international law? Let me imagine an Andrei in our midst, brought up as an international lawyer at a university somewhere in Sweden, having done his grand tour through some of the institutions of our profession, and retaining childhood images of his Nordic upbringing. Perhaps that childhood took place somewhere between the 40s and the 70s of the last century. Perhaps the 90s were an era of great enchantment as much as of a great insecurity for him: an unmooring from a well-rehearsed historical pattern forming his mentality. The internationalism of the 90s now feels stale: the Cold War was followed by the Global War Against Terror and yet another Cold War, Bosnian refugees were to be followed by Syrian refugees, and the financial crisis of Sweden, the largest Nordic economy, was followed by a financial crisis of Western economy at large, where austerity overrode economic and social rights. The idea of *folkhemmet*, the people's home - originally invented as a countersocialist move by the Swedish correlate to Carl Schmitt Rudolf Kjellén, but successfully appropriated by Nordic social democracy to a point where it made up much of Nordic identity at home and abroad, was now re-appropriated by scheming nationalists whose nostalgic subliminalities had brought them into four of five Nordic parliaments.

In the domain of the international use of force, Andrei might see the chasm between the 1991 Operation Desert Storm with its express mandate by the Security Council under Chapter VII and the possibly ex post-mandated Operation Enduring Freedom, a failure in which Nordic governments had their military and political share, or, worse still, he might see the chasm between Desert Storm and the illegally waged Iraq war of 2003 to 2011. Andrei might have realized in 2001 that the laws on the use of force cannot be changed by the instant custom of a coalition of the willing. He feels

that the engagement of Nordic states in Afghanistan and Iraq is forgetful of formative Nordic experiences – such as the German aggression against and occupation of Denmark and Norway in 1940, or the Swedish Prime Minister's joining a demonstration against the 1972 Christmas Bombings of North Vietnam.

Andrei is very much aware that the Nordics as a region of international law grew out of the experience of being placed where the tectonic plates of two larger geopolitical entities meet. He might think of Nordic self-positioning in the period preceding World War II: Denmark, Finland, Norway and Sweden jointly publishing a Declaration for the Purposes of Establishing Similar Rules of Neutrality in 1938 in the League of Nations Treaty Series, at the brink of war.<sup>30</sup> Or he might think of the 1960s 'Nordic Model' of peacekeeping, drawing on regular meetings by Nordic defence ministers, national stand-by forces and a high willingness to contribute to UN operations.<sup>31</sup> By the end of the Cold War, some 25 per cent of UN peacekeeping personnel were from the Nordics.<sup>32</sup> In UN contexts, Peter Viggo Jacobsen believes the Nordics were regarded a single actor rather than separate states.<sup>33</sup>

It seems, thinks Andrei, the Nordics have now evacuated the friction zone, and climbed onto one of the tectonic plates. This obviously reduces the need for an approach to international law that is distinct and shaped by the need to make the most out of a handful of states with small militaries and a limited population.

Even in other areas Nordic international lawmakers had been vanishing from view. Andrei is still aware of the Nordic Passport Union created by a series of agreements between 1954 and 1957<sup>34</sup>, long before the Schengen Agreement was concluded by five Western European states in 1990<sup>35</sup>. So, was not the free movement of persons and an integrated labour market already a reality in the avant-garde Nordics long before the EU mainstream started getting serious about it? And was there a Laval case in the Nordic labour market at the time?<sup>36</sup> The constituent geometry of polis, market and law seemed to have changed.

Let me move back to Tarkovsky's Andrei now. During his whole stay in Italy, he feels acutely out of place, out of time and out of context. His melancholy grows and he is unable to make contact with the Sosnovski project that brought him there, with the Italian spirituality that Sosnovski once appreciated and with the Italian woman who seeks his love. There is no way back to his origins, it appears, not even at a point where he is about to be driven to the airport for his return flight. The point of this nostalgia is just that it is suffered, that one is handed over to it. There is no social, political or other imperative to be drawn from it. Then there is Domenico's nostalgia: programmatic and righteous. It is about great ideas, about saving the world and its end

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<sup>30</sup> Declaration for the Purposes of Establishing Similar Rules of Neutrality (1938) 188 LNTS 295.

<sup>31</sup> P.V. Jacobsen, *Nordic Approaches to Peace Operations* (Routledge, London, 2006) p. 10.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 1.

<sup>34</sup> Agreement between Denmark, Finland, Norway and Sweden concerning a Common Labour Market 199 UNTS 3; Protocol concerning the exemption of nationals of the Nordic countries from the obligation to have a passport or residence permit while resident in a Nordic country other than their own 199 UNTS 29; Convention between Finland, Denmark, Iceland, Norway and Sweden respecting Social Security, 254 UNTS 55; Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the Intra-Nordic frontiers, 322 UNTS 245 (amended by the agreement of 27 July 1979 and supplemented by the agreements of 2 April 1973 and of 18 September 2000).

<sup>35</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, (1991) 30 ILM 68, also known as Schengen I.

<sup>36</sup> Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, [2007] ECR I-11767.

point is suicide, just as the end point of Sosnovski's attempt to return to his origins. If Sosnovski and Andrei long for past origins, Domenico longs for future fulfilment and seeks to hasten it violently.

Andrei, our international lawyer, is angry at himself for his melancholic clinging to past Nordicness, because he knows that the 1938 Neutrality Declaration and the peacekeeping of the Nordic Model were gambles growing out of concrete and dangerous geopolitical pressures. This is nothing to cling on to, but he cannot help longing for the intense sensation that the international law and practice of these small states – his small states – actually mattered. Our Andrei knows that there is as little a way forward as there is a way back: to posit the past as the future, to promote an iteration of Nordic international law would seem to be overbearing and ahistorical to him. In a word: idiotic.

In Tarkovsky's *Nostalghia*, the idiot plays a catalytic role. Domenico's gesture does just what our Andrei believes to be impossible: posits the past as the future. His exhortation to listen to the insects is an exhortation to return to the origins of natural creation, and his choice of Marc Aurel's statute as a pulpit for his last speech to the people of Rome points his listeners back to the origins of antiquity and a stoical heroization of the sage. His speech and auto-da-fé is a work of art, a terrifying *Gesamtkunstwerk* whose point is "to gather the polis together by giving form to a projective embodiment of an originary sacred unity".<sup>37</sup>

The same ahistorical overbearing is at work when actors of international law intentionally play out a Nordic legacy to promote a particular norm as the new international *lex ferenda*.<sup>38</sup>

But Domenico, after all, does something important for the storyline of *Nostalghia* before his auto-da-fé: he delivers a gesture that Andrei appropriates, and in appropriating it, Andrei converts his own nostalgia into a third form that neither seeks to return to an origin nor to make it into a redemptive future.

Nothing in *Nostalghia* suggests that Andrei is an astute believer, be it in Christianity or in Domenico's hermit spirituality. Nothing suggests that he lets himself be recruited into Domenico's programme for saving the world. What he does is that he executes Domenico's *gesture* – the gesture of carrying a burning candle through the pool of the Holy Catherine. For Domenico, the Mathematician, this gesture might have evoked redemption into that which is divinely determined. Andrei enters the pool without assurances of divine determinism, in fact, without anything but his mood. For him, the gesture is sheer openness, the openness I experience when I join my own longing and suffering into that of another person. This is a way to live in community with the other, an other who has put himself ablaze in a place far away to enforce the fulfilment of the original law.

The question of a Nordic international law is a question of how to live in a true community, and how that community is to live with others. Both questions are normative. The state, as it emerged out of European secularisation processes, is a way to respond to that question. It is no universal form, or so we are reminded by an

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<sup>37</sup> S-O. Wallenstein, 'Tropes of Nostalgia. Winckelmann, Hegel, Heidegger and the Quest for Origins', <iloapp.philosophy.se/blog/thinklink?ShowFile&doc=1212586706.pdf>, accessed on 10 August 2016, drawing on Alex Potts' work to characterise Winckelman's agenda in reconstituting the original greatness of Greek art, p. 2.

<sup>38</sup> For an example of how Nordic model rhetorics may turn hubristic, see M-L. Skilbrei and C. Holmström, 'The "Nordic Model" of Prostitution Law is a Myth', *The Conversation*, 16 December 2013, <theconversation.com/the-nordic-model-of-prostitution-law-is-a-myth-21351>, accessed on 10 August 2016.

Islamic state attempting to assert its existence. We have to put it in quotation marks to keep it from contaminating our abstract universal of the state.

So Domenico's gesture turns Andrei's backward longing into openness. What is to be its form? The film ends in this question, culminates in it, as his giving himself over to this question is witnessed by the woman cleaning the pool.

Heraclitus' fragment 119 reads *ethos anthropoi daimon*, or, in a standard English translation, 'for man, character is the demon'. "Once restored to its etymological origin", Giorgio Agamben writes, "Heraclitus's fragment then reads: 'For man, *ethos*, the dwelling in the 'self' that is what is most proper and habitual for him, is what lacerates and divides, the principle and place of a fracture.'"<sup>39</sup> Tarkovsky's Andrei encountered fracture in his final effort to carry Domenico's candle. So nowhere is Nordic international law more at home and more itself than at the point where its fracturing is experienced. We are at this point now.

What might an international lawyer learn from *Nostalghia*? Nothing as an international lawyer, nothing as a professional, and everything as one who lives in doubt about his profession, the community it implies, and about the personal obligation she or he enters into by assuming it. The question is then, which madman will bequeath us with a gesture that we may execute, thereby opening up our idiotic longing for the Nordic, the Greek, the identic, the authentic and the communal and turn it into openness – an openness that is concrete, historically situated and at work in the world.

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<sup>39</sup> G. Agamben, '\*Se: Hegel's Absolute and Heidegger's *Ereignis*', in G. Agamben and D. Heller-Roazen (trans. and ed.), *Potentialities. Collected Essays in Philosophy* (Stanford University Press, Stanford (CA), 1999) pp. 116-137, p. 118.