

PREFACE

This book takes issue with the notion of progress in public international law. Terms such as progress or progressive are familiar slogans in international law rhetoric and writing, commonly used to accentuate proposals for improvement or change. They are not the only ones. Claims about progress find their place next to stories of disenchantment, declension, stagnation, which carry their own slogans and narrative forms. In this book I only focus on progress as a manner of speaking about international law. Progress is and has been for over two centuries an indispensable part of the everyday language of international law. It continues to fulfill an essential role in the choice of suitable doctrinal, procedural, or institutional solutions. At the same time, the notion of progress is rarely explored as such in the literature. The book hopes to begin addressing this gap by offering some reflections on its function in international law discourse.

A few preliminary remarks are due here to explain the approach to such a broad topic. My aim is not to devise a scientific method to define progress in international law or a yardstick to measure the ‘progressiveness’ of reform proposals. The intention is not to embark on a conceptual history of the use of progress either. This is, in other words, neither an ontology nor a genealogy of progress. Instead, this book is concerned with the function of the notion of progress in public international law discourse. It aims to address fellow public international law scholars and practitioners and begin a debate about how our professional community constructs/ is constructed by progress narratives. The objective is therefore circumscribed narrowly: it is to explore ‘what is it’ that makes a given development *appear* as constituting progress in international law. It is an investigation of how meaning about progress may be produced and a study of the consequences of the production of such meaning. Instead of developing a theory or a method to find the meaning of progress, this book demonstrates how a given event may become synonymous with progress, regardless of whether ‘it is’ progress or not.

The book does not therefore belong to the genre of theory of science whose task is the development of normative or descriptive theories of

progress. By using different techniques, such analyses are concerned with an investigation of the nature of progress.¹ To follow John Losee's classification,² theories of progress typically apply themselves to any of three different types of investigation. The first is to identify the distinguishing features of progress and the conditions necessary for science to be 'good', which normally leads to prescriptions about how science evolves. A classic example here is Thomas Kuhn's claim that real scientific revolutions occur only when a major taxonomic system is replaced with a new one.³ The second is to define the kind of 'goodness' that needs to be attained for science to achieve progress. This 'goodness' could be about developing models that lead to a closer approximation to truth, increasing effectiveness in problem solving, or a myriad other goals. The example here is Larry Laudan's claim that true progress occurs only through increased success in the problem-solving ability of theory and not through claims to better approximation to truth, which he considers to be a false promise.⁴ A third type of investigation involves an explanation of why science develops the way it does, i.e. it is about uncovering the underlying mechanisms or conditions that are chiefly responsible for the attainment of scientific progress. Answering such questions could lead to making (normative version of the approach) or avoiding (descriptive version) recommendations about how science should be practiced. The example here is Karl Popper's evolutionary analogy, namely that progress in science may be regarded as a means used by the human species to adapt itself to the environment.⁵

¹ See, e.g., J.B. Bury, *The Idea of Progress: An Inquiry into Its Origins and Growth* (1920); J. Baillie, *The Belief in Progress* (1950); L. Edelstein, *The Idea of Progress in Classical Antiquity* (1967); G. Sorel, *The Illusion of Progress* (1969); W.W. Wagar, ed., *The Idea of Progress Since the Renaissance* (1969); R.A. Nisbet, *Social Change and History: Aspects of the Western History of Development* (1969); D.W. Marcell, *Progress and Pragmatism: James, Dewey, Beard and the American Idea of Progress* (1974); F.J. Teggart, ed., *The Idea of Progress: A Collection of Readings* (1929); R.A. Nisbet, *History of the Idea of Progress* (1980). See generally, J. Losee, *Theories of Scientific Progress: An Introduction* (2004). For the concept of progress in public policy studies, see C.L. Anderson and J.W. Looney, eds., *Making Progress: Essays in Progress and Public Policy* (2002).

² Losee (Theories of Scientific Progress), *Ibid.*, at 1-3.

³ Th. Kuhn, *The Structure of Scientific Revolution*, 2nd edn. (1970).

⁴ See, e.g., L. Laudan, *Progress and Its Problems* (1978).

⁵ See, in particular, K. Popper, *The Rationality of Scientific Revolutions* (1981); and K. Popper, *The Logic of Scientific Discovery* (1959).

This book steers clear from such investigations. This is a book about international law discourse. It looks closely at concrete examples in international law's everyday practice in order to make the following argument: while progress may be a convenient label to caption a certain event (doctrine, process, institution, action, etc.), it is ultimately a notion empty of meaning unless placed in the context of a narrative – a story about how things were, how things are, and how things need to become. Such narratives, it is argued, give meaning to the idea of progress. But narratives do not 'speak themselves': their plot does not unfold in a world out there for the observer to record – it is not objectively true. Instead, their plot is constructed, based on concrete epistemic, ideological, or other choices and presented by means of assumptions, images, metaphors, and other discursive structures. Instead of recording reality 'as it is', narratives discursively represent and construct our perception of reality. Narratives of progress compete with and exclude alternative accounts. They also constitute the basis for policies and decisions that produce tangible effects on everyday life. In this light, progress narratives, and everyday invocations of the notion of progress in international law, are no longer descriptions of an objective reality but powerful rhetorical strategies of (de)legitimation. The term 'vocabulary of progress' is used throughout to refer to the conglomerate of discursive structures that produce meaning about progress in international law argument.

Although this argument may sound uncontroversial to some, it is at loggerheads with the claim of objectivity (truth, universality, neutrality, and so on) that continues to be ascribed overtly or covertly to many of international law's founding narratives. It is also at loggerheads with much of the mainstream understanding about the potential of our work to represent reality 'as it is', to achieve a 'more correct' representation of reality, or to lead to 'more efficient solutions', without necessarily asking what is left out by such characterizations. While international law debates are becoming increasingly accustomed to critiques that challenge the universality or objectivity of some of its doctrines and techniques, such critiques have not necessarily altered traditional perceptions about the possibility of international law to achieve or contribute to some sort of true progress that 'speaks itself'. And while narrative may be an inevitable rhetorical form for the expression of international law reformist proposals, not enough has been

said about the capacity of progress narratives to simultaneously include and exclude, legitimize and delegitimize, or present the world as ‘speaking itself’.

Hence this book is not a manifesto ‘for’ or ‘against’ progress narratives but a contribution to the understanding of their discursive function. Without doubt, there are several international law events that enjoy the endorsement of a majority or minority of international lawyers as progressive or good, the present author being no exception. This is not incompatible with seeking to understand the mechanisms by which the very same events and their accompanying explanations may also produce a whole range of exclusionary outcomes, either unanticipated or hidden from sight. Commitment to individual goals certainly does not prevent the re-evaluation of foundational narratives of the discipline that claim to represent reality ‘as it is’ and therefore constrain the horizon of available possibility for action. Commitment to individual goals certainly does not mean loyalty to traditional narratives of progress or traditional forms of telling international legal histories either. In that sense, the examination of the function of the notion of progress is part of a wider legal-political constructionist project of realizing the limits and potentials of legal discourse as well as the beneficiaries of their social outcomes.

Writing this book has been a long process that started over a decade ago in the context of my doctoral study, research fellowships, and teaching in different places. I am deeply indebted to several institutions and persons that provided the intellectual, institutional, and personal support that enabled this journey to come to an end. The Dissertation Program of the T.M.C. Asser Institute in The Hague and the European Law Research Center of Harvard Law School made early years of research possible by providing exceptionally stimulating environments and important financial support. The Faculty of Law of Leiden University kindly granted an eight-month sabbatical leave in 2006 and leeway in my working hours to complete the manuscript thereafter. Many of the reflections that became part of this book were generated in discussions with colleagues in different locations, such as the Asser Dissertation Program; the Graduate Program of Harvard Law School (1997-1999); Dighton weekends and gatherings; Foundation for New Research in International Law and Birkbeck University workshops; and discussions with colleagues at Leiden University and the Leiden Journal of International Law. My appreciation goes to T.M.C. Asser Press and, in par-

ticular, Philip van Tongeren and Marjolijn Bastiaans, for their enthusiasm, patience, and professionalism. Finally, I am thankful to Paola Gaeta and Laurence Boisson de Chazournes for the hospitality of the University of Geneva during the last month of the production of the text.

While all remaining shortcomings are my own, different parts of the manuscript have benefited from the thoughtful commentary and caring advice of John Dugard, David Kennedy and Martti Koskeniemi. I am beholden to them for all they have done for me over the years. A profound thank you also goes to Juan Amaya Castro, Martin Björklund, Claudio da Silva Correa, Matt Craven, Eric Durrer, Vangelis Herouveim, Florian Hoffmann, Rikki Holtmaat, Orsalia Lambropoulou, Frédéric Mégret, Sundhya Pahuja, Nikolas Tsagourias, Panos Triantafyllou, Frank Turner, and Michael Vagias for their friendship. They are all present in this book, each in their different way. My last word, one of boundless gratitude, goes to Riikka Koskenmäki and to my parents, Eleftheria and Michalis, for their love.

Earlier versions of Chapters 2 and 4 first appeared as ‘The Vocabulary of Progress of Interwar International Law: An Intellectual Portrait of Stelios Seferiades’, 16 *European Journal of International Law* (2005) 823-856; and ‘The New Tribunalism: Strategies of (De)Legitimization in the Era of Adjudication’, *XVII Finnish Yearbook of International Law* (2006) 307-356.

Cairo/Geneva, Autumn 2009

Thomas SKOUTERIS