

## REVIEW ESSAY

### PROGRESSING IN INTERNATIONAL LAW

*THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* BY THOMAS SKOUTERIS (THE HAGUE, NETHERLANDS: T M C ASSER PRESS, 2009) 276 PAGES. PRICE €9.95 (HARDBACK) ISBN 9789067042994.

#### I INTRODUCTION

A ‘gigantic absurdity’ and ‘grotesque’: with these and other caustic words, Charles Baudelaire described what, in his view, was the idea of progress that ‘bloomed on the rotten ground of the modern self-conceit’.<sup>1</sup> But, in 1855, when Baudelaire wrote his essay *Exposition universelle*, he could not possibly have imagined the impact of this idea, not only in art, his main concern at that time, but also in politics and in law. Paradoxically (or not), progress has been at the same time — especially since the 19<sup>th</sup> century — one of the most powerful and one of the least studied discursive strategies in legal argument. Such a state of affairs deeply contrasts with the immense interest philosophers and social scientists devoted to the topic during and after World War II. To take a well-known example, Horkheimer and Adorno’s *Dialectic of Enlightenment* targets precisely the notion of progress that is behind enlightened reason, and the catastrophic effects it produces in, for example, giving intellectual support to the rise of totalitarian regimes.<sup>2</sup> When we turn our eyes to the field of international law, such a paradox becomes even more evident. Progress is normally taken for granted, and rarely studied. Only in recent years has this situation changed, with the growing interest in new theoretical and historical approaches in international law.

The notion of progress has been one of the main concerns of critical international legal thinking since at least the 1990s. Some commentators have correctly identified that one of the central theses of the ‘newstream’ in international law is that the ‘mainstream’ insists on constructing the history of the discipline as a ‘narrative of inevitable progress’.<sup>3</sup> No matter that the evolution of international law will take many years or centuries: one day, progress will come, with its fruits of prosperity and happiness. This is the promise, implicit or explicit, of several doctrines of the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Two of the most important representatives of contemporary critical international legal thinking have shown how progress can deeply affect the perceptions of different issues by international lawyers. Showing the ‘brilliant

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<sup>1</sup> Charles Baudelaire, *Oeuvres complètes* (Michel Lévy Frères, 1868) vol 2, 219–20 [author’s translation of ‘une absurdité gigantesque’, ‘une grotesquerie’, ‘fleuri sur le terrain pourri de la fatuité moderne’].

<sup>2</sup> Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment* (John Cumming trans, Stanford University Press, 1976) [trans of: *Dialektik der Aufklärung* (first published 1947)].

<sup>3</sup> See, eg, Deborah Z Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ (1996) 65 *Nordic Journal of International Law* 341, 354.

insights', but also the 'blindness' and 'paradoxes', in the thinking of a number of eminent European international lawyers of the past two centuries, Martti Koskenniemi powerfully contested the prevailing narrative that international law evolved in a linear way.<sup>4</sup> In a similar manner, David Kennedy has been stressing for years that international law's perceptions of its own are founded in a biased vision of the past, mostly of the 19<sup>th</sup> century, and how international lawyers felt the need to build such a vision to create their self-image.<sup>5</sup>

Notwithstanding the recent interest in the idea of progress in international law, no systematic study had emerged, at least in English, on the issue. Thomas Skouteris's *The Notion of Progress in International Discourse*<sup>6</sup> tries consciously to fill this gap.

The book originates from a doctoral dissertation presented before the faculty of law of Leiden University, and takes as its point of departure Skouteris's previous articles published in the *European Journal of International Law*<sup>7</sup> and in the *Finnish Yearbook of International Law*.<sup>8</sup> A very different and shorter version of the chapter on the sources of international law has also appeared in the *Hague Yearbook of International Law*.<sup>9</sup>

The book must be enthusiastically welcomed for dealing with a difficult and, apart from efforts in the newstream, unexplored topic. It is well-written and clearly divided into five chapters. In method, *The Notion of Progress* relies on structuralist, post-structuralist, and deconstructivist authors. Thus, the inherent risks of labelling aside, it can be considered a typical piece of critical international legal thinking, and perhaps another newstream effort to reveal the inconsistencies, obscurities, and dark sides of writing about international law and applying international legal rules.

In this review essay, I will try to discuss some of the issues covered or, from my perspective, neglected by Thomas Skouteris's book. My main proposition is that *The Notion of Progress* deals with an aspect so essential to the international lawyer's self-understanding that it must be studied deeply, not only to disclose hidden priorities supported by lawyers, but to stimulate the development of at least two research agendas in the international legal discipline: historical methodology, and the connection between time and international law.

In the first part, I will briefly summarise the main ideas contained in the book. In the second and third parts, I will deal with, respectively, some topics related to historical methodology in international law and the relationship between time and international law that are, or should be, treated in *The Notion of Progress*.

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<sup>4</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002) 7.

<sup>5</sup> See especially David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 *Nordic Journal of International Law* 385.

<sup>6</sup> Thomas Skouteris, *The Notion of Progress in International Law Discourse* (T M C Asser, 2010) ('*The Notion of Progress*').

<sup>7</sup> Thomas Skouteris, 'The Vocabulary of Progress in Interwar International Law: An Intellectual Portrait of Stelios Seferiades' (2005) 16 *European Journal of International Law* 823.

<sup>8</sup> Thomas Skouteris, 'The New Tribunalism: Strategies of (De)Legitimation in the Era of Adjudication' (2006) 17 *Finnish Yearbook of International Law* 307.

<sup>9</sup> Thomas Skouteris, 'The Sources of International Law: Tales of Progress' (2000) 13 *Hague Yearbook of International Law* 11.

### A *The Uses of Progress in International Law*

It is difficult to define exactly what ‘progress’ is. Sometimes used as a self-explanatory word, it seems clear that the modern idea of progress has a strong connection with the theological idea of salvation. Whether the former has completely substituted for the latter is a question open to debate.<sup>10</sup> The fact is that both ideas have to do with amelioration or improvement in a certain direction in time. But what is amelioration or improvement? In other words, what is the possibility of progress?

Philosophers, much more frequently than historians, have tried to provide an answer to that question. By formulating their philosophies of history throughout the centuries, they have tried to find a sense of the idea of progress. But since the ‘possibility of progress’ is not simply ‘an empirical matter, but a matter of judgment’,<sup>11</sup> their systems of thought become susceptible to critique and are inevitably judged by time — exactly what progress wants to grasp. Lawyers, who observe the world more as philosophers than as historians, do the same.<sup>12</sup> It could be no different with international lawyers.

Some international lawyers found the possibility of progress in promoting self-determination, allowing new nations to flourish; others believed in building a world state, and so on. Finding a sense for progress is an act of judging. It is not the mere recollection of clues or developments in history. Indeed, it is ideological. But judging is not a problem in itself. The problem is with the false notion that time will not judge again, or that a certain idea will remain immune to critique. This means thinking of progress as an inevitable force, in the sense that certain developments will invariably occur. In sum, it is not progress, but inevitable progress, that seems to be the crucial problem. Inevitability in progress, as a gift of the Enlightenment, influenced many international lawyers of the 19<sup>th</sup> and 20<sup>th</sup> centuries who built up their doctrines under this assumption. Several variations of nationalism and cosmopolitanism, for example, read the past and the future in a linear way, with a definite beginning and a specific *telos*. Even today, narratives of progress are present in international law. Thomas Skouteris gives an account of some of those past and present inevitable narratives of progress.

In the preface, Skouteris alerts the reader that the purpose of the book is not to trace an ontology or a genealogy of progress in international law. Rather, the book focuses on the function of the notion of progress in international legal discourse.<sup>13</sup>

Although few have reflected about the proper function that progress plays in international legal discourse, it occupies a privileged, even central, role in forging the identity of the international lawyer. Behind the belief in internationalism rests a belief in progress. If this is so, Skouteris argues, progress becomes a language of authority. Arguments can be legitimised or delegitimised

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<sup>10</sup> For a sample of this classical debate, see Nathan Rotenstreich, ‘The Idea of Historical Progress and Its Assumptions’ (1971) 10 *History and Theory* 197.

<sup>11</sup> See James Connelly, ‘A Time for Progress?’ (2004) 43 *History and Theory* 410, 421.

<sup>12</sup> For a brief, but very interesting account, of the differences between the lawyer and the historian see J G A Pocock, ‘Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi’ (1998) 43 *McGill Law Journal* 481.

<sup>13</sup> Skouteris, *The Notion of Progress*, above n 6, v.

by whether or not they are 'progressive'.<sup>14</sup> A greater conundrum arises when one does not specify what one means by using the term 'progress'. The success of many progress narratives in international law has lain, Skouteris continues, on their ability to make progress 'speak itself'. In other words, by creating the image that there is an objective notion of progress in international legal discourse, international lawyers put progress on their side and, at the same time, purge any relativist criticism against their position.<sup>15</sup> By making their narratives 'speak themselves', international lawyers assign the trace of inevitability to their idea of progress.

This leads to the three main propositions advanced by the book. First, that of 'progress as the product of narratives': progress has no meaning at all if not situated in a particular context. Second, that of 'progress narratives as politics': because these are non-objective narratives, they play a political role that can clash with other narratives (which are also political). Finally, that of 'discourse analysis as action': by de-mystifying progress narratives, new possibilities are opened for the intellectual imagination on which to act in the world.<sup>16</sup>

Resting on the newstream contribution to international law, the author suggests that progress is anything but anti-ideological. Taking away ideology from legal argument is in itself an ideological act.<sup>17</sup>

Skouteris depicts three different ways of using progress in international law. The book is structured around this classification.<sup>18</sup> The first is to approach 'international law *as* progress'. Here, international law has a progressive value for the advancement of broad (and abstract) concepts, such as world, civilisation, or humanity. More international law means more world, civilisation, or humanity. Another approach can be termed 'progress *within* international law'. This second category relates to the development of the discipline of international law, and to its internal structures. A final usage identified by Skouteris is an amalgam of the previous two: international law *as* an instrument of progress, and simultaneously, progress *within* the inner boundaries of the discipline of international law.

The three subsequent chapters in the book deal with each of those usages of progress in international law. Chapter 2 is about the Greek international lawyer Stelios Seferiades's conception of international law as an instrument of progress in the world during the inter-war period. Chapter 3 deals with the doctrine of sources, also as developed in the inter-war period, and with how it was viewed as a moment of progress within the discipline. Finally, Chapter 4 focuses on the 'new tribunalism' in international law and its functions of promoting progress in the world using international law and, at the same time, as a promoter of progress in the discipline.

*The Notion of Progress* achieves a great accomplishment in 'excavating' the doctrine of a relatively forgotten author like Stelios Seferiades, a man who

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<sup>14</sup> Ibid 1, 5.

<sup>15</sup> Ibid 17.

<sup>16</sup> Ibid 30.

<sup>17</sup> Ibid 21.

<sup>18</sup> Ibid 6–8.

‘situates international law at the apex of the long process of maturity of human perception of society’.<sup>19</sup>

In his reading, Skouteris identifies three main historical accounts in Seferiades works during the interwar period. First, by using concepts like absolutism and democracy, Seferiades naturalised them, de-historicising and de-politicising them. Second, the naturalisation of the relationship between absolutism and democracy fixes the opposition between these concepts, each being defined only by its polarisation from the other. Finally, the naturalised opposition between the two concepts concealed relationships of domination that could be found within the liberal project: in the Greek context of the time, much harm was caused in the name of democracy.<sup>20</sup>

The opposition between absolutism and democracy fulfilled functions both in domestic and international realms. Domestically, it helped to forge the view of the monarchy as ‘an agent of foreign intervention and autocratic governance’; internationally, it ‘paved the way for faith in the establishment of the League of Nations and the “sociological jurisprudence” of the interwar period’.<sup>21</sup> In the end, the vocabulary of progress in Seferiades’s writings was an ideological instrument to legitimise or delegitimise arguments. Because it ‘spoke itself’, the same vocabulary always inserted Seferiades on the side of progress, while preventing him from seeing the contradictions and the oppression caused by the liberal project.<sup>22</sup>

Chapter 3 is about the doctrine of sources as a decisive moment in the development of the discipline of international law in the 1930s. Skouteris aptly describes how the doctrine, in order to be successful, had to promote a revision of the past of the discipline. For its supporters, the process of international law-making was open-ended and indeterminate: no one could identify either the quantity of sources that existed nor the precise authority these had on international reality.<sup>23</sup> This was the very reason that the advocates of the new doctrine were so heavily involved in the elaboration of art 38 of the *Statute of the Permanent Court of International Justice*<sup>24</sup> and its celebration in the 1930s: the article would encapsulate in a binding rule a certain number of sources and define their authority.<sup>25</sup>

However, behind the elaboration and support for art 38 there was a clear (and ideological) intention: the struggle against formalism that prevailed in international law in the 19<sup>th</sup> century. Supporters of the new doctrine identified themselves with sociological jurisprudence, a way of legal thinking that privileged knowledge founded on ‘human experience and experimentation’.<sup>26</sup> They saw the interwar period as an opportunity to reconstruct international law, from its philosophical foundations to its methods of elaboration, emphasising, for example, codification. Some of them even insisted on an ethical

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<sup>19</sup> Ibid 58.

<sup>20</sup> Ibid 58–62.

<sup>21</sup> Ibid 87.

<sup>22</sup> Ibid 90–2.

<sup>23</sup> Ibid 97.

<sup>24</sup> Opened for signature 13 December 1920, 6 LNTS 390 (entered into force 16 December 1920).

<sup>25</sup> Skouteris, *The Notion of Progress*, above n 6, 121–6.

<sup>26</sup> Ibid 103–5.

reconstruction of the discipline, by returning to what they called the ‘new spirit’.<sup>27</sup>

Such a reconstructive move was well-founded in a narrative of progress. By rejecting naturalism and positivism, it was possible to decouple the question of the sources of international law from that of its basis of obligation. This allowed international lawyers of that time to be eclectic, picking up elements from both theories and, simultaneously, freeing themselves from criticism both internal and external. Acting in this way they could be, at the same time, both positivists and naturalists. The idea of clarifying the forms of and law-making process in international law was the engine of progress: more legal determinacy was equal to more progress.<sup>28</sup>

The way art 38 was elaborated is a good example of how such a narrative of progress worked. If, on the one hand, the closed list of sources rejected the recursion to principles of natural law, on the other hand, the posing of general principles of law at the same order of importance as other sources such as treaties and custom ‘prevent[ed] formalism in the application of law’.<sup>29</sup>

In other words, the advocates of the doctrine of sources were looking for the reorganisation of reality ‘on the basis of categories that carry the promise of universal legitimacy and application’ (standardisation)<sup>30</sup> and of ‘the existence of a (new) transcendental object (a new doctrine of the sources) whose properties are unaffected by the analyzing subject (the user or interpreter of law)’ (formalisation).<sup>31</sup> With those targets in mind, it was possible to build an opposition between ‘before’ and ‘after’ the new doctrine. Nonetheless, the sources of international law failed (and still fail) to achieve the goals of standardisation and formalisation, as Skouteris shows when discussing the place of ‘other’ sources — soft law, for instance — in contemporary international law.<sup>32</sup>

The third usage of progress in international law highlighted by Skouteris is the ‘new tribunalism’. The proliferation or multiplication of international courts is seen both as a process of international law’s maturation and as a rule-oriented approach, a condition for world progress through international law.<sup>33</sup>

During the Cold War, the book states, many international lawyers had, for different reasons, an ambivalent attitude toward international courts. However, in the mid-1980s and 1990s, the whole picture changed and enthusiasm took the place of ambivalence.<sup>34</sup>

Skouteris identifies in the ‘new tribunalism’ two vocabularies of progress: ‘lawyer-as-architect’ and ‘lawyer-as-social-engineer’.

The lawyer-as-architect vocabulary tries to trace the emergence of new tribunals in international law as an objective historical account. Ideology and historical conjunctures do not play a role in the process. This vocabulary insists

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<sup>27</sup> Ibid 105–17.

<sup>28</sup> Ibid 117–20.

<sup>29</sup> Ibid 125.

<sup>30</sup> Ibid 127.

<sup>31</sup> Ibid 133.

<sup>32</sup> Ibid 150–5.

<sup>33</sup> Ibid 160–1.

<sup>34</sup> Ibid 167–79.

on affirming that there is a coherent and uniform system of international justice that brings values such as justice, peace, the rule of law, certainty and predictability to international relations, despite a serious lack of empirical or sociological research supporting such coherence or values. A special role for the international lawyer is also visualised as a guarantor of the coherence of the system.<sup>35</sup>

The second vocabulary of progress is that of the lawyer-as-social-engineer, which ‘presents itself as the pragmatist alternative to the lawyer-as-architect vocabulary’.<sup>36</sup> Here, tribunalism is faced as a mature way of dealing with difference and conflict in the international sphere. This vocabulary pays tribute to the behaviourist thesis in international law and focuses on how democratic and non-democratic states behave regarding international courts. Tribunalism is seen as a good thing if it is efficient in solving problems. As for the international lawyer, his or her role is to identify whether and in what circumstances states comply with international decisions and to develop ‘specific techniques of social engineering’ accordingly.<sup>37</sup>

Despite the fact that each of those two vocabularies tries to distance itself from the other, there are strong similarities between them. For both, tribunalism is ‘the materialization of their respective historical necessities about progress in international law’; there is a unitarian system of international justice, even if it is named differently; and the proliferation of tribunals is “‘in itself” an element of progress in international law’.<sup>38</sup> Both vocabularies, using the label of progress, avoid internal and external critique.<sup>39</sup>

In its conclusions, *The Notion of Progress* restates the propositions made by the author that progress is the product of narratives, that progress narratives are non-objective and that the discourse analysis presented by the book is a way to act in the world in itself.<sup>40</sup>

## II THREE METHODOLOGICAL POINTS

As mentioned above, Skouteris’s book aims to investigate how the notion of progress can be identified in the writings of a specific author (Seferiades), in a doctrine (sources) and in a new enthusiasm in international law (new tribunalism). These three issues are approached using a discourse analysis, as made explicit by the author. However, one may question whether the book would not fulfil its goals more properly if the contexts in which the discourses operate were more evident. Let me give some examples.

While discussing Seferiades, it is not always clear whether the book situates the work of the Greek international lawyer within the broad picture of international law at that time. Some questions remain, such as: compared to his international lawyer colleagues of the first part of the 20<sup>th</sup> century, did Seferiades use a new vocabulary or did he appropriate from an existing one? If it is certain that by drawing on the opposition between absolutism and democracy

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<sup>35</sup> Ibid 181–97.

<sup>36</sup> Ibid 197.

<sup>37</sup> Ibid 197–206.

<sup>38</sup> Ibid 215.

<sup>39</sup> Ibid 206–16.

<sup>40</sup> Ibid 220–30.

Seferiades's vocabulary fulfilled functions both in Greece and internationally, was it his intention to do so? What did notions such as absolutism, democracy and, ultimately, progress mean for other scholars when Seferiades's major writings were produced? Taking the existence of an *esprit d'internationalité*<sup>41</sup> that informed much of the conscience of international lawyers in Europe (and outside Europe, as well)<sup>42</sup> in the first half of the 20<sup>th</sup> century, did Seferiades help to foment or to break this *esprit*?

A similar point could be made about the analysis of the doctrine of sources. In his study, Skouteris tends to be confined only to the limits of international law. However, it seems there are much broader explanations about the ascent of the doctrine of sources. Not only the great disillusionment with ideas like culture, humanity and even law after World War I, but also the growing influence of legal theories produced in the United States, apparently exerted a considerable role in the development of the new doctrine of sources. If 'London Bridge is falling down falling down falling down'<sup>43</sup> — to quote a famous line from *The Waste Land* that superbly explains the consciousness of the interwar period — there was also a need to reconstruct culture, humanity, and law. To many, the American version of sociological jurisprudence could provide a way to the effort of reconstruction.<sup>44</sup> Perhaps for this reason, as recognised by Skouteris, North American scholars such as Manley O Hudson and James Brown Scott were so influential in the development of the new doctrine. Progress 'spoke itself' in this context of disillusionment and need for reconstruction. It is possible that the notion of progress was used by international lawyers due to the circumstances of the time, or because there were no options available for the difficult task of 'reconstructing' international law after one of the bloodiest wars in history. Perhaps international lawyers, using the notion of progress in their writings, were only re-stating common understandings about progress in the intellectual environment of the interwar years. Such a sweeping analysis is scarcely presented in the book.

In other words, it is possible to say that *The Notion of Progress* is more focused on texts than contexts. Of course there are some discussions of contexts — no high-level intellectual enterprise, such as Skouteris's book, can

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<sup>41</sup> Here, I refer to the influential idea introduced in Koskenniemi, *The Gentle Civilizer of Nations*, above n 4.

<sup>42</sup> I have previously identified the impact of the *esprit d'internationalité* in the works of some Brazilian international lawyers. See George R B Galindo, 'De Guerras, Normas e Teses: Sobre um Concurso para a Cátedra de Direito Internacional Público da Faculdade de Direito do Recife' in Marcelo Casseb Continentino, Marcos André Couto Santos and André Melo Gomes Pereira (eds), *Estudantes — Caderno Acadêmico — Edição Comemorativa* (Editora Nossa Livraria, 2008) 353.

<sup>43</sup> T S Eliot, *The Waste Land and Other Poems* (Penguin, 2003) 53.

<sup>44</sup> This point is made by Samuel J Astorino, 'The Impact of Sociological Jurisprudence on International Law in the Inter-War-Period: The American Experience' (1996) 34 *Duquesne Law Review* 277 (who posits that sociological jurisprudence, although designed to be applied in the confines of American law, was brought to the international legal field as a project of reform that competed with other projects, as well). It must also be stressed that sociological jurisprudence was not just looking for an answer to technical legal problems. Its intention was not modest. Its proponents were trying 'to save liberalism from itself': Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 *Hastings Law Journal* 1031, 1034.

avoid them — and the author makes this point explicit when he describes his method.<sup>45</sup> But there seems to be no relationship of dependence between texts and contexts, once it is established that the book's aim is to identify the existing structures in a text or in a defined number of texts.

The debate on contextualism and textualism in intellectual history is not new, but it is still intense. The debate is too complex and extensive and can only be summarised here.

Traditionally, contextualists take the position that 'the meaning of a document is radically dependent upon the systems of words and concepts in which the author moved when he or she was writing'.<sup>46</sup> For this reason, contexts of the time must be reconstructed and texts interpreted in accordance with such contexts. For their part, textualists emphasise, among other aspects, the openness of texts to diverse interpretations and the need to construct critical or innovative narratives of the texts studied. They insist on criticising contextualists for looking for one meaning in a defined context.<sup>47</sup>

However, the opposition between textualists and contextualists does not need to be so rigid. In one of his most famous articles, 'Living On', Jacques Derrida doubts whether there are boundaries within a text (beginning, title, margins, etc). Rather, he calls attention to the fact that a text is not 'a finished corpus of writing', but 'a differential network, a fabric of traces referring endlessly to something other than itself'.<sup>48</sup> Excavating the past means to take notice of this 'endlessly referring' of texts (that is, the inevitable and strong relationship between texts and contexts). On the other hand, texts are also 'endlessly referring' to the reader's subjectivity.<sup>49</sup> The meanings of contexts are not given or static, as some orthodox contextualists could assume.<sup>50</sup>

One may argue that if intertextuality is an endless process, it is impossible to apprehend all the contexts that influence a given text. In other words, if there is no single meaning, there is no meaning at all. This may be true, but as we look for meanings in a text, and in a context, more historical narratives open doors to other historical narratives in an unpredictable way. Perhaps the 'endlessly

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<sup>45</sup> Skouteris, *The Notion of Progress*, above n 6, 31–5.

<sup>46</sup> William W Fisher III, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History' (1997) 49 *Stanford Law Review* 1065, 1068 (contains an excellent summary of intellectual historical methodologies as applied to law).

<sup>47</sup> *Ibid* 1069–70.

<sup>48</sup> Jacques Derrida, 'Living On' (James Hulbert trans) in Harold Bloom et al, *Deconstruction and Criticism* (Continuum, first published 1979, 2004 ed) 62, 69.

<sup>49</sup> This is also Martin Jay's insightful reading of Derrida. See Martin Jay, *Force Fields: Between Intellectual History and Cultural Critique* (Routledge, 1993) 164.

<sup>50</sup> However, I doubt if there are many orthodox contextualists today. Even Skinner, who became famous for his insistence on finding intentions in past authors — a typical contextualist venture — has openly admitted the interference of subjectivity in analysing contexts. See, eg, Quentin Skinner, *Visions of Politics* (Cambridge University Press, 2002) vol 1, 90.

referring' point made by Derrida is not only about existing written texts but also texts that will be written in the future.<sup>51</sup>

*The Notion of Progress* is a very rich account of internationalist discourse, but it would be richer with more attention to broader contexts that have had a significant impact on international law.

A second point, deeply related to the previous one, concerns the choice made by the author not to write a genealogy of the idea of progress in international law. In my own view, it seems impossible to talk about progress without taking into account what past authors thought progress meant. Even in the domain of discourse analysis, progress needs to be placed in the context in which authors wrote about or inferred the concept.

Take, for example, the famous book by Manley O Hudson, *Progress in International Organization*.<sup>52</sup> A contemporaneous reader would probably try to find the author's definitions of progress and international organisation in the introduction or in the first chapter. However, one looks for them in the first pages of the book and does not find anything. This, one could say, is evidence that Hudson, like his international lawyer colleagues, made progress 'speak itself' in his works. We can agree, but this does not answer the question of *why* Hudson and others made progress 'speak itself'. To give a plausible answer to this question, we need to investigate whether the omission made by Hudson was typical at the beginning of the 20<sup>th</sup> century or whether, within the confines of the text, he deliberately omitted it in giving his own conception of progress and international organisation. At the time of the book, Hudson certainly had no access to the vast literature on the critique of Enlightenment and the critique of progress, which was only produced years later. He could not defend himself from something that was not invented yet. My argument is that if we do not involve ourselves in such investigations, we can fall into the trap of judging the past by attributing to authors statements or thoughts they did not express, or may have even tried to avoid in their writings.

Writing history is certainly an act of judging. It is impossible to put aside certain preconceptions we have about the past.<sup>53</sup> But not taking into account contexts can close rather than open doors to future narratives about the past, given that it blocks the time flux: the present imposes its agendas on the past and impedes it from coming to the ground (that is, to the present).

Although it is obviously difficult to make a genealogy of the notion of progress, due to the amount of information needed, some have been successful in their attempts. Reinhart Koselleck, for example, as part of his monumental work

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<sup>51</sup> Agamben puts differently the endless processes of intertextuality between past and future texts: 'Every written work can be regarded as the prologue (or rather, the broken cast) of a work never penned, and destined to remain so, because later works, which in turn will be the prologues or the moulds for other absent works, represent only sketches or death masks'. Giorgio Agamben, *Infancy and History: The Destruction of Experience* (Liz Heron trans, Verso, 1993) 3 [trans of: *Infanzia e storia* (first published 1978)]. Similarly, in the field of international law, Anne Orford has creatively pointed out that 'we might think of the writing of international law as an open letter, or a postcard': Anne Orford, 'A Jurisprudence of the Limit' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 1, 31.

<sup>52</sup> See Manley O Hudson, *Progress in International Organization* (Stanford University Press, 1932).

<sup>53</sup> See Skinner, above n 50, 27.

on conceptual history, traced the concept of progress in different historical moments.<sup>54</sup> The meaning of progress has changed in the past and international law did not stay immune to this process. A further investigation of this issue is urgent to enhance international lawyers' understanding of their past and to put doctrines in their proper contexts.

A third point relates to the categorisation made by Skouteris between international law *as* progress and progress *within* international law. Although the distinction may be useful in understanding the main arguments of the book, it is not quite evident whether there are clear boundaries between the two categories.

In his historical account of Seferiades, Skouteris clearly claims that:

Aside from his involvement in Greek politics, Seferiades participated in a separate scene: a world-wide, scientific, international law movement for disciplinary reconstruction in the aftermath of the Great War. He joined forces with friends and scholars in Paris, Geneva, London and elsewhere, in proposing a European conception of public international law based on a democratic community of states.<sup>55</sup>

This quotation is revealing because it shows that Seferiades's works were not only designed to promote progress by means of international law; he also intended to bring progress to the discipline of international law by engaging himself in a movement that transcended the frontiers of the Greek state (which may suggest that Seferiades embraced the *esprit d'internationalité* in vogue in Europe). If this is so, Seferiades's intellectual efforts were to bring progress not only to the world or to humanity by means of international law, but also to the discipline he mastered.

Similarly, it is likely that the doctrine of sources also envisioned international law as an instrument for progress. To many authors in the interwar years, disciplinary progress was clearly instrumental to broad objectives. Peace, order, solidarity, co-operation were some of the ends the international lawyer had to pursue. In one of the most influential books of the 1930s, Hersch Lauterpacht — an enthusiast of the doctrine of sources — commenting on another doctrine, that of justiciable and non-justiciable disputes, eloquently said:

[I]t is a duty incumbent upon the lawyer to adopt a critical attitude in regard to the doctrine in the interest not only of the dignity of the science of international law, but also of an effective peaceful organization of the international community which is the legitimate business of international lawyers to promote.<sup>56</sup>

His attitude to the doctrine of sources was no different. Lauterpacht and others at that time treated international legislation 'as a temporary solution on the way to the organisation of the international realm in the image of the domestic State, with proper legislative machinery'.<sup>57</sup> For them, the science of international law, on one hand, and an effective peaceful organisation, on the other, were not

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<sup>54</sup> See Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Ernst Klett, 2004).

<sup>55</sup> Skouteris, *The Notion of Progress*, above n 6, 90.

<sup>56</sup> Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, 1933) 436.

<sup>57</sup> Martti Koskenniemi, 'International Legislation Today: Limits and Possibilities' (2005) 23 *Wisconsin International Law Journal* 61, 69.

distinct, but formed part of the ethos of the international lawyer. The idea was that by giving certainty to the discipline of international law, certainty would also emerge from the application of law and, in the final analysis, contribute to the world's progress.

Skouteris knows why it is so difficult to split progress *as* and progress *within*. By stating (correctly) that discourse analysis is a kind of action, he is implying that the knowledge of how progress was used in international law allows (or empowers) people to transform the world, to participate, in his own words, 'in a struggle to redefine the filter of right solutions'.<sup>58</sup>

Adorno once said that we cannot decouple the notion of progress from the notion of humanity, because '[a]s little as humanity *tel quel* progresses by the advertising slogan of the ever new and improved, so little can there be an idea of progress without the idea of humanity'.<sup>59</sup> And, since Foucault, it has become extremely reductionist to speak about knowledge and not about power, since 'in knowing we control and in controlling we know'.<sup>60</sup> Progress is never in the confines of a discipline, nor is any discourse whose aim is the progress of the world (or humanity) irrelevant to a discipline.

The book ties many elements together to conclude that progress as a discourse in international law impacts the world and the discipline as well. It is doubtful whether the typology of progress *as* and progress *within* is valid for the critical project adopted by Skouteris.

### III CONSIDERING TIME

The publication of *The Notion of Progress* can bring to the core of international lawyers theoretical and historical preoccupations not only concerning the notion of progress per se, but also a more constitutive and elementary notion hardly discussed, with few exceptions,<sup>61</sup> in recent scholarship: that of time.

Reflecting profoundly about progress invariably leads to a reflection about the conceptions of time that are behind progress. Linearity and circularity have been the preferred models in which Western thought has laid its conception of progress throughout centuries, and such a posture affects the way the world is viewed.<sup>62</sup> Let me give just two brief examples of how the notion of time that international lawyers embrace affects the doctrines they build up, ultimately leading them to embark on a progressive view of the past.

<sup>58</sup> Skouteris, *The Notion of Progress*, above n 6, 229.

<sup>59</sup> Theodor W Adorno, *Critical Models: Interventions and Catchwords* (Henry W Pickford trans, Columbia University Press, 2005) [trans of: *Eingriffe: Neun kritische Modelle* (first published 1963) and *Stichworte: Kritische Modelle 2* (first published 1969)] 145.

<sup>60</sup> Gary Gutting, 'Michel Foucault' in Edward N Zalta, *Stanford Encyclopedia of Philosophy* (Centre for the Study of Language and Information, 2008) <<http://plato.stanford.edu/entries/foucault>>. Foucault's seminal work on what he called 'power/knowledge' is Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage, 1995) [trans of: *Surveiller et Punir: Naissance de la prison* (first published 1975)].

<sup>61</sup> See, eg, some of the essays in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, 2007).

<sup>62</sup> For an excellent overview of Western conceptions of time in history, see Agamben, above n 51, 89–106.

In the last decades, some creative historians have challenged the emphasis on *longue durée*<sup>63</sup> that dominated the scholarship influenced by the *École des Annales* and insisted on the importance of doing microhistory (that is, historiography on a small scale, focusing, for example, on a single event occurring a long time ago and already forgotten, or on a person reputed of small importance to the great historical narratives).<sup>64</sup>

What is really original in many of the approaches adopted by microhistorians is their conception of chronological distance of a specific historical event. For them, ‘the effective distance can be diminished or augmented in ways that can fundamentally change our sense of what that history represents’.<sup>65</sup> So, natural or chronological time is not the same as historical time because historians can make distant events close and close events distant in terms of chronological time.

This leads us to ask why some international legal doctrines are so enduring and others not. A possible explanation could be provided by an investigation concerning how such doctrines become appealing by distancing themselves from or getting closer to older doctrines. Since every doctrine to be built up needs to retell the story that was left behind it, historiographical time is an essential tool for an idea to become victorious over several others.<sup>66</sup> In the international legal field, one may question, for instance, why the doctrine of sources was incorporated to the mainstream in a few years while the ‘new tribunalism’ was quickly challenged, as Skouteris suggests, by different doctrinal segments.

Further investigation may also indicate that sentiments such as sympathy, shock, or abandonment<sup>67</sup> play a crucial role in attachment or detachment to legal doctrines. Depending on the way the past is told in the narrative of a new doctrine (as a story close to or far from the prevailing sentiments of a given community of international lawyers), it can be successful in the stock market of legal ideas.

Investigating what the notion of time means to the critical project is also a very important task. Structuralism — which gives great support to the critical project in international law — puts a great emphasis on language but not on time. Skouteris’s method of discourse analysis, for example, seems to treat objects that are separated by more than fifty years (the doctrine of sources and the ‘new tribunalism’) the same way methodologically. Structuralism’s near omission of time has to do with the fact that ‘[p]aradigms based on language have a low aptitude for modeling time in its productivity, and — most crucially — in the

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<sup>63</sup> A classical study on the *longue durée* is Fernand Braudel, ‘Histoire et Sciences Sociales: La Longue Durée’ (1958) 13 *Annales. Histoire, Sciences Sociales* 725.

<sup>64</sup> Some aspects of microhistory methodology are summarised in the important study by Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (John Tedeschi and Anne Tedeschi trans, Johns Hopkins University Press, 1980) [trans of: *Il formaggio e i vermi: Il cosmo di un mugnaio del ‘500* (first published 1976)]. See especially the preface to the Italian edition, xiii.

<sup>65</sup> Mark Phillips, ‘Distance and Historical Representation’ (2004) 57 *History Workshop Journal* 123, 124.

<sup>66</sup> David Kennedy skilfully showed how the ‘the move to institutions’ was achieved by a retelling of international law history: David Kennedy, ‘The Move to Institutions’ (1987) 8 *Cardozo Law Review* 841.

<sup>67</sup> Philipps, above n 65, 130–1.

perverse inertia with which temporality shows its refractoriness'.<sup>68</sup> However, language deeply affects time and is affected by it. Microhistories have established how this happens constantly. An investigation of the uses of time within the critical international legal thinking narratives could show why the mainstream is so resistant to its findings<sup>69</sup> or why narratives centered on the peripheries or on 'the others' are so appealing (or not!).

A linear conception of time may also be at the center of international law as we know it today.

Koskenniemi's recent research has shown how international lawyers, following David Hume, tended to see the international world in terms of economics rather than politics. Only economics, and not politics, could provide the language of the universal. In this sense, international law had to be transformed into '[the] law of a universal commercial society'.<sup>70</sup>

Recent studies have questioned the thesis that the Enlightenment, as well as the Scottish Enlightenment, were based on a process of complete secularisation.<sup>71</sup> For this reason, it seems more appropriate to speak of 'the Enlightenments' rather than 'the Enlightenment'. Important figures like William Robertson, who was an ecclesiastical leader and former principal of the University of Edinburgh, tried to accommodate the interests of the Church on one side, and the emerging importance of commerce on the other. Robertson felt (no different from other Enlightenment thinkers) that the juncture in which he was living was unique — so unique that it could be identified as a moment of acceleration of time. More than a simple eighteenth century narrative of progress, Robertson was trying to develop a political theology by transforming the ancient notion of apocalyptic hope into an (apparently secularised) historical hope.

If this is a plausible interpretation, it might show that at the very moment international law was being designed as a universal language — accommodating commerce on its core — a political theology was emerging. To support the birth of this new international law, time was conceived not as a breakthrough but as an (accelerated) continuation of past traditions, which could allow the conciliation of notions that at first sight appeared as opposites: the old natural law with the new positive law.

These are only speculations (and maybe ill-conceived speculations). Nonetheless, what seems indisputable is that conceptions of time inform international legal theories and practice. It is thus absolutely essential that future research take a look at this issue.

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<sup>68</sup> Richard Terdiman, 'Temporal Representations and Cultural Politics' in Tyrus Miller (ed), *Given World and Time: Temporalities in Context* (Central European University Press, 2008) 131, 137.

<sup>69</sup> Skouteris himself has some good clues about this that could be investigated, taking the notion of time into account. See Thomas Skouteris, 'Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship' (1997) 10 *Leiden Journal of International Law* 415.

<sup>70</sup> Martti Koskenniemi, 'The Advantage of Treaties: International Law in the Enlightenment' (2009) 13 *Edinburgh Law Review* 27.

<sup>71</sup> See László Kontler, 'Time and Progress — Time as Progress: An Enlightened Sermon by William Robertson' in Tyrus Miller (ed), *Given World and Time: Temporalities in Context* (2008) 195.

## IV CONCLUSION

After reading *The Notion of Progress*, one may find it strange that no definition or concept of the notion is introduced by the author, despite the book's title. In my view, this absence is one of the greatest merits of Skouteris's work. Progress only makes sense if we can distinguish its different uses, and the historical examples he draws upon show this clearly. By making progress 'speak itself', international lawyers gave the notion a voice, even a mouth, but not a face; or they gave it so many faces that we cannot recognise only one.

The strength of the book lies also in what it does not say. It approaches the study of the notion of progress in international law in challenging and creative ways so as to open possibilities for interpretation and stimulate future research on the topic. I have traced here two possible paths that can be followed. One relates to the historical methods and the other to the connection between time and international law.

The focus on methods can offer international lawyers different ways to investigate the discipline's own past and face more critically any superficial and allegedly apolitical narratives of it. The investigation concerning the conceptions of time that are behind international legal theory and practice can put the spotlight on an issue that deeply affects language and our interpretations of it.

In an age when progress had only a few enemies, Baudelaire found a way to combat it. With spleen, he could see the slow flux of time against the speed of machines and people walking rapidly through the boulevards of Paris. With spleen, 'nothing could cheer him', not even 'his people dying before his balcony'.<sup>72</sup> Who knows if progress was not on Baudelaire's side? Perhaps progress is the eternal struggle against time, to make it slow or fast. And maybe trying to realise what men and women make of their time is what matters. If this is so, the book under review is a signal that we are indeed progressing in international law.

GEORGE RODRIGO BANDEIRA GALINDO \*

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<sup>72</sup> Charles Baudelaire, *Oeuvres complètes* (Michel Lévy Frères, 1868) vol 1, 201 [author's translation of : 'Rien ne peut l'égayer' and 'son peuple mourant en face du balcon'].

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