The notion of progress in international law discourse

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PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van de Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 4 november 2008
klokke 13.45 uur

door

Thomas Skouteris

geboren te Athene, Griekenland in 1971

Promotiecommissie:

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Acknowledgments

Although this thesis was completed in the course of the past three years, it concludes a process that started over a decade ago in the context of my post-graduate studies, research fellowships, and teaching in different places. I feel indebted to several institutions and persons that continued to believe in me during the years. They provided me with the intellectual, institutional, and personal support that enabled this difficult journey come to a felicitous end. I hope that I will be forgiven for not being able to mention them all in the following lines.

I begin by expressing my gratitude to the Dissertation Program of the T.M.C. Asser Institute and the European Law Research Center of Harvard Law School. Both institutions made early years of research possible by providing financial support and exceptionally stimulating environments. The Faculty of Law of Leiden University has been supportive by granting me a seven-month sabbatical leave in 2006 and by allowing me to spend part of my working-time on completing the thesis thereafter.

Sincere thanks go to my colleagues at the Asser Dissertation Program (1997-2000); the Graduate Program of Harvard Law School (1997-1999); the network of the Foundation for New Research in International Law (FNRIL); my fellow Editors of the Leiden Journal of International Law; and the attendants of the various conferences and workshops of Critical international law at Birkbeck and elsewhere. They are the peer community that fuelled my desire to keep writing and continue participating in joint intellectual projects. My love goes to Juan Amaya Castro, Martin Björklund, Claudio da Silva Correa, Eric Durrer, Vangelis Herouveim, Florian Hoffmann, Orsalia Lambropoulou, Frédéric Mégret, Hélène Ruiz Fabri, Bruno Simma, Panos Triantafyllou, Nicholas Tsagourias, and Michael Vagias for their friendship. I will forever be indebted to Frank Turner for his companionship and for being there, in times of joy and grief. No words here can express my thanks to my mother, Eleftheria, my father, Michalis, and to Riikka Koskenmäki for their love. My gratitude to them is boundless.

T.S., Cairo, September 2008

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The Notion of Progress in International Law Discourse

1.1. General Synopsis

The present enquiry takes issue with the notion of progress in public international law discourse. The objective is not to develop a scientific theory, technique, method, or standard to help one determine what *is* progress in international law, nor to tell whether a given development *really* constitutes progress, although the possibility of such tools will be touched upon. Nor is the intention to conduct an exhaustive historical or other survey of the use of the idea of progress in public international law debates. This is therefore neither an ontology nor a genealogy of progress. The objective is much more modest, namely to explore what makes a given development *appear* as constituting progress in international law. It is an investigation of how meaning about progress may be produced in international law texts; and an investigation of the consequences of the production of such meaning. 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.

The enquiry puts forward and defends intellectual propositions (theses) relating to the role of the notion of progress in international law discourse. The basic contention is that although progress may be a convenient label to caption a certain international law event (argument, development, action, etc.), it is ultimately a notion devoid of meaning unless placed in the context of a narrative – a story about how things were, how things are, and how things need to be. Such narratives, it is argued, do not 'speak themselves': their plot is not objectively true. Instead, their plot is constructed by the author, based on concrete (epistemic, ideological, other) choices and is manifested through a vocabulary – a set of assumptions, images, metaphors, and other discursive structures. As a consequence, such narratives of progress compete with and exclude alternative accounts of progress. They also constitute the basis for policies and decisions that produce tangible effects on everyday life. In this light, progress narratives are no longer descriptions of an objective reality but powerful rhetorical strategies of (de)legitimation.

Although this claim may be considered self-evident by some, it is at loggerheads with the claim of objectivity (truth, universality, determinacy, neutrality, etc.) common to many of international law's progress narratives.

Engaging this feature of international legal argument leads to a 'new' way of thinking about international law, which in turn may be seen as 'progressive' or 'regressive' in itself, but one which opens different horizons of analysis and action.

To defend its propositions, this enquiry draws from three concrete case studies, chosen as examples of three different uses of the notion of progress in international law discourse. The method used in approaching the materials is the one of discourse analysis. Conclusions are limited to the three case studies in question but the enquiry participates in a broader project of social constructionist critique of public international law.

1.2. The Object of Study: Progress and International Law Debates

The history of international law is strewed with accounts of progress: events (institutional, doctrinal, methodological, or other) acclaimed by international lawyers as examples of some sort of improvement or advance, as important episodes in the long evolutionary march of the science. We are all familiar with the cases in point. Such is the case with 1899 and 1907 and the Hague Peace Conferences;[1] 1920 and the Statute of the Permanent Court of International Justice,[2] the Nuremberg and Tokyo Trials;[3] 1947 and the General Agreement on Tariffs and Trade;[4] 1948 and the Universal Declaration of Human Rights;[5] 1949 and the Geneva Conventions;[6] 1969 and

[1] The Hague Peace Conferences are typically portrayed as crucial moments for international law's (and international dispute settlement's) transition into the modern era. *See* S. Rosenne (ed.), Editor's Introduction, *The Hague Peace Conferences of 1899 and 1901 and International Arbitration – Reports and Documents* xv-xxi (2001); A. Eyffinger, *The 1899 Peace Conference: "The Parliament of Man – The Federation of the World'* (1999), at 438 *et seq.*

[2] John Fischer Williams joins other scholars of the interwar to proclaim the adoption of Article 38 as "the solid bed of rock of which the fabric of international law must be built". *See* J.F. Williams, *Aspects of Modern International Law – An Essay* (1939), at 37-38; *see also* Chapter 3.2, *infra*.

[3] Contemporary accounts of international criminal law and international criminal tribunals typically trace their origins to the International Military Tribunals in Nuremberg and Tokyo, as the first brave (albeit faulty in many respects) steps in the prosecution of individuals for the commission of international crimes. *See*, e.g. M.C. Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, (1997) 10 Harvard Human Rights Law Journal 11; W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* 11 (2006).

[4] Similarly, GATT 1947 is typically described as a founding moment for the development of a global liberalized trading system. *See* J. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 35-43 (1997).

[5] *See* e.g., H.J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals* (2008).

the Vienna Convention on the Law of Treaties;[7] 1982 and the United Nations Convention on the Law of the Sea;[8] 1992 and the Rio Conference on Environment and Development;[9] 1995 and the World Trade Organization;[10] 1998 and the Rome Statute;[11] 2001 and the Articles on State Responsibility.[12] The same holds for slower processes that undercut longer periods of international law's development, such as the codification of international law and the ensuing expansion of its regulatory reach; the limitation of the reserved domain of states, especially with regard to human rights violations; the prohibition of the use force and the establishment of an obligation to peacefully resolve international disputes. The list could go on indefinitely.

The notion of progress is a standard feature of our professional language and modes of thinking. The term progress pervades international law texts. It has enjoyed conscious and widespread use in the literature for nearly two centuries.[13] Progress in our methods and techniques, in our

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[6] F. Kalshoven, *Constraints on the Waging of War* (2001).

[7] I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984).

[8] *See* e.g., the Editor's introduction about recent developments in the theory and practice in the Law of the Sea since 1982 *in* R. Barnes, D. Freestone & D.M. Ong (Eds.), *The Law of the Sea: Progress and Prospects* 1-27 (2006).

[9] The 1992 Rio Conference on Environment and Development is typically described as a landmark event for international environmental law, parallel to the 1972 Stockholm Conference. Although both events are deemed to have had much less impact on international affairs than initially hoped, and although they failed to produce any binding international instruments, they are generally regarded as pivotal moments for the evolution of the field. *See* P. Birnie & A. Boyle, *International Law and the Environment* (2002).

[10] The WTO and the emergence of the new economic law of the 1990s was proclaimed a 'revolution' in international affairs, replacing the waning UN system with a new, much more capable agent of international governance. *See* J. Trachtman, The International Economic Law Revolution, (1996) 17 Pennsylvania Journal of International Economic Law 33.

[11] "We have an opportunity to create an institution that can save lives and serve as bulwark against evil"; Address by the UN Secretary General at the Rome Conference on 15 June 1998, *as cited in* I. Tallgren, We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court, (1999) 12 Leiden Journal of International Law683, at 683.

[12] *See* e.g., D. Caron, The ILC Articles on State Responsibility: A Paradoxical Relationship Between Form and Authority, (2002) 96 American Journal of International Law 857, at 857.

[13] For a few typical examples, see H. Wheaton, *Histoire des progrès du droit des gens en Europe depuis la paix de Westphalie jusqu'au Congrès de Vienne: avec un précis historique du droit des gens européen avant la paix de Westphalie* (1841); P. Pradier-Fodéré, *Traité de droit international public européen et américain suivant les progrès de la science et de la pratique contemporaines* (1885-1906); T. E. Holland, *The Progress Towards a Written Law of War* (1881); C. Calvo, *Le droit international théorique et pratique précédé d'un exposé historique des progrès de la science du droit des gens* (1896) ; L. Poinsard, *Comment se prépare l'unité sociale du monde: le droit international au XXe siècle, ses progrès et ses*

tendances (1907); L. Renault, *Les progrès récents du droit des gens* (1912); International Peace Forum, *The World Court: A Magazine of International Progress Supporting a Union of Democratic Nations* (1916-1919); League of Nations Union, *The Progress of the League of Nations* (1923); G.A. Johnston, *International Social Progress: The Work of the International Labor Organization of the League of Nations* (1924); F.B. Boeckel, *Progress of the Centuries toward World Organization* (1927); J.B. Scott, *Le progrès du droit des gens* (1930); H. Wehberg, La contribution des conférences de la paix de La Haye au progrès du droit international, 37 Recueil des Cours (1932); M. Hudson, *Progress in International Organization* (1932); D. Mitrany, *The Progress of International Government* (1933); G. Hutton, *The War as a Factor in Human Progress* (1942); F.K. Bieligk, *Progress to World Peace: A Study of the Development of International Law and the Social and Economic Conditions of Peace* (1945); T. Muirhead, *Amber Light: A Formula for Peaceful Progress* (1945); C.C. Lingard, *Peace with Progress* (1945); N.G. Ranga, *The Colonial and Colored Peoples: A Programme for their Freedom and Progress* (1946); C.G. Fenwick, The Progress of International Law during the Past Forty Years, 79 Recueil des Cours (1952); D. Eisenhower, *The Atom for Progress and Peace* (1953); C. Rousseau, *Scientific Progress and the Evolution of International Law* (1954); Q. Wright, *Problems of Stability and Progress in International Relations* (1954); I. Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (1956); N.S. Chruschev, *Peace and Progress Must Triumph in our Time* (1959); J.F. Kennedy, *Alianza para progreso*, U.S. Government Printing Office (1961); A. Ross, *The United Nations: Peace and Progress* (1966); International Labor Office, *The ILO in the Service of Social Progress* (1969); T. Buergenthal, The American Convention on Human Rights: An Illusion of Progress, *in Miscellanea W.J. Ganshof van der Meersch* (Vol. 1, 1972); P. de Lapradelle, Progrès ou déclin du droit international, *in Mélanges offerts à Charles Rousseau* (1974); *Progress and Undercurrents in Public International Law: The International Law Association's Committee on Legal Aspects of a New International Economic Order* (1986); R. Beddard, *Economic, Social and Cultural Rights: Progress and Achievement* (1992); L. Arbour, Progress and Challenges in International Criminal Justice, (1997) 21 Fordham International Law Journal 531-540; J. Charney, Progress in International Criminal Law?, (1999) 93 American Journal of International Law 452; S.D. Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, (1999) 93 American Journal of International Law 57; A. Gillespie, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (2001); C. Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (1999); L. Condorelli, Les progrès du droit international humanitaire et la circulaire du secrétaire général des Nations Unies du 6 août 1999, *in The international Legal System in Quest of Equity and Universality* (2001); Canadian Council on International Law, *Globalism: People, Profits, and Progress: Proceedings of the 30th Annual Conference of the Canadian Council on International Law, Ottawa, October 18-20, 2001* (2002); M. Delmas-Marty, Present-day China and the Rule of Law: Progress and Resistance, (2003) 2 Chinese Journal of International Law 11; E.C. Luck, Reforming the United Nations: Lessons from a History of Progress, *in The Politics of Global Governance: International Organizations in an Interdependent World* (2005); Y. Beigbeder, *International Justice Against Impunity: Progress and New Challenges* (2005); P. Bearman, The *Islamic School of Law: Evolution, Devolution, and Progress* (2005); R.J. Goldstone & E.P. Kelly, Progress and Problems in the Multilateral Human Rights Regime, in E. Newman, R. Thakur & J. Tirman (eds.), *Multilateralism under Challenge? Power, International Order, and Structural Change* (2006).

understanding, in solving problems, in achieving goals (e.g. maintaining peace, bringing justice, protecting human rights or the environment, and so on) remains a driving force of our projects.

The language of progress is also a language of authority, to legitimize and de-legitimize. When we speak of something as progressive we assume that it is a desirable improvement compared to the *status quo ante*. Its antonym, regressive, is something to be avoided at all costs. Making progress is the tenor of many claims about new-ness, renewalism and avant-gardism in international law.[14] Claims to progress are not hortatory statements only but starting points for policy making. From academic education to the way we choose to handle concrete situations or allocate resources, ideas of progress have palpable political consequences in everyday life. They mete out resources, power, justice, legitimacy, and set aside competing claims or understandings. The possibility of progress itself, in the sense of advance constituted in stages each one of which is somehow superior to its predecessor, is taken for granted. One need not look far for examples. The Preamble of the UN Charter reads:

> We the Peoples of the United Nations
> Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and […]
> to promote social progress and better standards of life in larger freedom,
> And for these Ends […]
> to employ international machinery for the promotion of the economic and social advancement of all peoples,
> Have Resolved to Combine our Efforts to Accomplish these Aims […].

Invoking or evoking of the notion of progress is one of the most popular rhetorical moves in international law argument. Progress is employed in a myriad of ways to signify a broad gamut of values, convictions, and aspirations. Accounts of progress vary with regard to the goal to be achieved, the way the goal should be achieved, or the beneficiaries of the goal. Among many possible typologies, let us look at three different uses of the notion in international law discourse.

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[14] For different strategies of renewalism see O. Spiermann, Twentieth Century Internationalism in Law, (2007) 18 European Journal of International Law 785; D. Kennedy, When Renewal Repeats: Thinking Outside the Box, (2000) 32 New York University Journal of International Law and Politics 335; N. Berman, In the Wake of Empire, (1999) 14 The American University International Law Review 1521.

First, the idea of international law as progress, in other words the idea that international law itself has a self-evident and immanent progressive value (for the world, for civilization, for humanity). The underlying rationale here is that international law (legal internationalism, the creation and use of more and better international law and international institutions, the rule of law in international affairs) signifies a desirable move towards a superior state of development. In mainstream accounts, this is usually understood as a move of internationalism away from power, politics, injustice, war, impunity, absolutism; and a corresponding move towards law, certainty, predictability, justice, peace, accountability, democracy, and so on, although often the reverse course has been called progressive at times with equal fervor. Rosenne writes:

> I have given this course the title *The Perplexities of Modern International Law*. […] The perplexities follow from the conviction that universal peace will become a reality when we have a workable, rational, balanced and accepted general system of international law and competent, impartial and appropriate instruments to enforce it when necessary, that it in times of crises. The World has not yet reached that state. That is what it is trying to find.[15]

Second, the idea of progress *within* international law, in other words the idea that international law achieves progressive internal development as working pure. According to such accounts, international law (as a science, as a discourse, as a tool, as a governance system, as a technique, and so on) becomes better in its own methods, ways, efficiency, and techniques, in attaining its goals. In different periods and places better international law has stood for a broad range of goals, such as more (less) rules, standards, empirical analysis, international institutions, (anti)formalism, (de)regulation, and so on. During the interwar period, some international lawyers considered that in order to make progress international law needs to codify more rules in the form of international treaties and based on sociological-empirical analysis of the needs of the international community.[16] In international criminal law, more recently, scholars have considered that international criminal law has made progress through its elucidation and elaborate in the work of International Criminal Tribunals for the Former Yugoslavia and Rwanda.[17] The adoption of Article 38 of the Statute of the Permanent Court of International Justice was welcomed as a moment of disciplinary progress *within* international law:

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[15] S. Rosenne, *The Perplexities of Modern International Law* 2 (2004).
[16] A. Álvarez, The New International Law, 15 Transactions of the Grotius Society 35-51 (1930).
[17] Charney (Progress), *supra* note 13.

> There was no established permanent court of international law; the lawyer advising a client, perhaps the government of his own country in the guise of a client, was often quite uncertain whether the matter in question would ever be referred to a tribunal at all; if it was to be referred to a tribunal, he had no knowledge of how that tribunal was likely to be constituted, and he might not even be sure what were the sources to which that tribunal was likely to appeal of the determination of the legal points at issue. The Institution of the Permanent Court of International Justice has changed all this. We now have it laid down, by the authority of all states which have become parties to the Statute of that Court, what are the sources of international law. [...] Many international lawyers of outstanding eminence and authority might have drafted this article differently had they been called on to do so in 1920, but nevertheless it stands as the text of capital importance, the solid basis of rock on which the fabric of international law has to be built.[18]

Third, there are instances where a single disciplinary development can be seen as embodying both categories (international law *as* progress; progress *within* international law) at the same time. This is the case in recent debates about the proliferation of international judicial institutions. The establishment of international tribunals is seen as having an intrinsic progressive value. This holds both for humanity and for the techniques and methods of international law, the story goes. The proliferation of tribunals completes the missing pieces of international law's institutional architecture while thickening the fabric of the law.

> An international judicial or arbitral body has in itself some claim to be regarded as a good thing: opposition to the establishment of such a body has to be based on questioning whether it is actually needed rather than on any denial of its virtues. The creation of new tribunals may indeed be regarded as an encouraging sign, as amounting to the "expression d'adhésion plus grande des acteurs de la vie internationale à la doctrine de la primauté de la règle de droit dans les rapports internationaux […]".[19]

Within each of the three broad categories, one finds numerous permutations revolving around additional properties of the idea of progress, such as the pattern with which progress occurs or the goal that progress needs to serve. The full range of meanings cannot be reproduced here. In terms of the first property (pattern or sequence of evolution), progress is seen by many to

[18] Williams (Aspects), *supra* note 2.

[19] H. Thirlway, The Proliferation of International Judicial Organs: Institutional and Substantive Questions: The International Court of Justice and Other International Courts, *in* N. Blokker & H. Schermers (eds.), *Proliferation of International Organizations* 251-278 (2001), at 255.

occur in bursts or single revolutionary episodes or in gradual processes of incremental change. Along these lines, some see individual bursts of progress in 1899 and 1907 and the Hague Peace Conferences; 1920 and the Statute of the Permanent Court of International Justice, 1945 and the Charter of the United Nations and the Nuremberg Trials; 1947 and the General Agreement on Tariffs and Trade; 1948 and the Universal Declaration of Human Rights; 1950 and the European Convention of Human Rights; 1966 and the UN Covenants on Civil and Political Rights, and Economic, Social, and Cultural Rights; 1969 and the Vienna Convention on the Law of Treaties; 1970 and GA Resolution 2625 (XXV); 1982 and the United Nations Convention on the Law of the Sea; 1992 and the Rio Conference on Environment and Development; 1995 and the World Trade Organization; 1998 and the Rome Statute; 2000 and the UN Millennium Development Declaration; 2001 and the Articles on State Responsibility; and so on.

Others see instead patterns of slow or gradual evolution and improvement, usually proclaimed as such in retrospect and with the benefit of hindsight. These accounts give context and meaning to individual events by interpreting them and relating them to one another into coherent historical or causal accounts of progress. Individual events would be quite meaningless without such explanations. It is very hard to understand why the 1899 and 1907 Hague Peace Conferences are important unless one refers, and among other things, to the significance of the codification of the obligation to resolve disputes peacefully. Likewise, the establishment of the ICTY or the ICC acquires its meaning only when placed in the context of an argument about the importance of international criminal responsibility for peace, security or justice. One could think here of the stories about the de-mystification of the absolute conception of sovereignty into a bundle of rights and obligations; the codification of international law and the ensuing expansion of its regulatory reach; the limitation of the reserved domain of states, especially with regard to human rights violations; the prohibition of the use force and the establishment of an obligation to peacefully resolve international disputes; the crystallization of important doctrines, such as sources or state responsibility, into generally accepted formulations, and many others. Some see such processes evolve in a linear way, others in the form of a spiral, of a river, in a succession of paradigms, with natural selection, by means of the ‘invisible hand’, by the intervention of an ‘invisible college’ of professionals, and so on.

In terms of the second property (the goal that progress serves), the picture is even more complex. The normative undertaking involved in figuring out the postulated goals of the progressive sequence of the discipline has led to a variety of radically different punch lines. The two main categories are about models that enhance the discipline's approximation to truth and, second, models that increase its effectiveness in problem solving. In the first category, progress involves a better understanding of the nature of the world, of the science of international law, of the foundational concepts of the discipline (state, community, truth, justice, fairness, etc). The purpose would be to reach a superior understanding, i.e. one that is more (less) pure, coherent, realistic, empirical, objective, inter-disciplinary, universal, political, sociological, flexible, etc. In the second category, emphasis is shifted to producing better results, such as more (less) correctness, efficiency, prevention, prediction, justice, closure, welfare, equality, liberty, determinacy, health, human rights, peace, etc. Accounts of progress here involve anything from codification of rules to the development of standards; from formalization of our idea of law to de-formalization; from power-oriented systems to rule-oriented systems; from separating law from politics to embracing power within our concept of the law; from solutions by means of processes and political institutions to solutions based on institutionalized judicial dispute settlement; from coexistence to cooperation; from privileging sovereign will to privileging community ends; from an international community of states to a global community of persons; and so on.

1.3. The Problem: Progress as a Notion that 'Speaks Itself'

Narratives of progress in international law texts, such as the ones listed above, have something in common. Beyond expressing a conviction or aspiration relating to a concrete legal situation, they seem to 'speak themselves'. With this phrase I do not refer to the lack of supportive evidence or arguments, although that may also be the case. I rather suggest that expressions, such as "social progress and better standards of life in larger freedom" (Preamble UN Charter), refer to some type of progress that occurs in a manner independent from subjective judgment. This idea of progress is not a political one that is made up by the author of its statement based on ideological grounds but, rather, it can be found unfolding before our eyes in a world out there. For progress to be 'true' it must not be invented or concocted by the author of a text (let it be an individual, institution, group, or the "founding fathers"). For progress to be 'true' it needs to be merely recorded or, at best, discovered by the author of a progressive discourse. This

is a very important point that is often missed. Although we all have different ideas about what true democracy is and how to achieve it, we all think that achieving more democracy means progress for society *because* there ultimately is such a thing as democracy (democratic institutions, democratic processes, etc.) which transcends our individual definitions and constitutes a greater good, irrespective of (or even against) our views. Similarly, 'true' progress needs to have some properties that transcend the subjectivity of the author and exist in some objective (immanent, obvious, true, neutral, universal, transcendental, etc.) dimension. Something is progress not because I say so but because it is so, regardless of whether I say so or not. Beneficiary must be not only the author of the claim but also a totality (e.g. international community, humankind, civilization, etc.). This is certainly the case with the UN Charter's Preambular commitment to "social progress and better standards of life in larger freedom" but also in debates about more international law, more democracy, more rule of law, more human rights, more international criminal law, more international tribunals, and so on. Progress may be realized by an author institution, but it may also occur without and beyond the author.

The use of a notion of progress that 'speaks itself' is a legitimating rherotical move. The content of one's claims is automatically placed beyond the test of internal critique, a critique of internal contradictions and gaps. In certain international law debates, it seems to be 'a general truth', or 'beyond doubt' that some developments have an intrinsic claim to be considered positive for international law or for society at large.

> When a world war came to an end in 1918, disposition existed to push out along new lines, and remarkable progress was made over a period of years. Intelligence and zeal were devoted to current problems of international life on an unprecedented scale, and some advance was made towards a proscription of force. If a larger measure of success did not attend these efforts, it was due to a variety of causes […]. The experience demonstrated that no scheme of organization and no method of procedure can be enough in itself. Enduring progress requires a sustained willingness of peoples to pursue common effort.[20]

One will immediately counter-argue that there is nothing wrong with using a notion of progress that 'speaks itself' in this way. The absence of the "I" of the author in our texts could be a mere narrative or aesthetic convention, imposed by our specific professional culture! It is not necessarily reflective of a commitment to objectivity. It is not about pretending that one's

[20] G. Finch *et al.*, *The International Law of the Future: Postulates, Principles and Proposals* 2 (1944).

statements are universal truths. Not all third-person expressions are covert claims to objectivity. A notion of progress that 'speaks itself' should rather be seen positively as the wishful projection of a subjective conviction or aspiration on a grand scale.[21] Such rhetorical projections are legitimate and necessary on different grounds, our imaginary interlocutor would add, from the humble (making formal theories of general application is the only way to advance science) to the noble (it is my hope that my ideas will become universally accepted) and the cynical (I use universalist vocabulary in order to appear more convincing). Most of us acknowledge the temptation to resort to grand accounts of progress and admit to have done so on occasion. Besides, there seems to be general agreement among the invisible college of international lawyers that international law *is* in a better state today than it was a hundred years ago, and so is the world at large, even though 'better' is understood differently by each person. So, what is the buzz all about?

The afore-mentioned explanation, although intuituve, misses one important point. The only way for any notion of progress to fulfill its narrative role in a text is precisely to eliminate the possibility of relativity in the essence of the claim. Should the essence of the phrase "social progress and better standards of life in larger freedom" in the Preamble of the UN Charter prove to be ultimately a non-objective notion, then the Preamble (and the project of the United Nations) are reduced to demagogy. The moment one can convincingly demonstrate that a certain type of bias (gender, race, economic, political, cultural, etc.) is hidden between the lines of the expression "social progress"; the moment the statement would be proven to privilege certain segments of the affected group over others; then one would open Pandora's Box and weaken the authority of a statement that legitimizes an entire project of internationalist reform. In order for progress to work as a label to caption one's reformist agenda, progress must demonstrate a certain property that 'speaks itself' and trumps relativist criticism in a decisive manner. Otherwise it would not be 'true' progress but the ephemeral prevalence of an ideological project. Progress can only exist if one accepts a meta-narrative which declares closure or end to contestation.[22] In this sense, narratives of progress are not different from narratives of regression or

[21] Different schools of international legal thought have made overtures to a more relativist approach, which denies in one way or another the non-political nature of legal argument. This is hardly the place for an extensive review of relativist, anti-formalist and other anti-foundational movements in international legal thought. For a masterful analysis, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002); Kennedy (Thinking Outside the Box), *supra* note 14.

[22] E.g. the neo-conservative idea that the turn to liberal democracy at the end of the Cold War heralds the 'end of history', ending ideological struggle and declaring the triumph of political and economic liberalism. See F. Fukuyama, *The End of History and the Last Man* (1992).

decline/declension.[23] Take for example the story about progress underlying the opening paragraph of Shaw's classic textbook on public international law.

> In the long march of mankind from the cave to the computer a central role has always been played by the idea of law – the idea that order is necessary and chaos inimical to a just and stable existence. Every society, whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop. What can be done, what cannot be done, permissible acts, forbidden acts, have all been spelt out within the consciousness of that community. Progress, with its inexplicable leaps and bounds, has always been based upon the group as men and women combine to pursue commonly accepted goals, whether these be hunting animals, growing food or simply making money. Law is that element which binds the members of the community together in their adherence to recognized values and standards. […] And so it is with what is termed international law, with the important difference that the principle subjects of international law are nation-states, not individual citizens.[24]

It could be argued that one should not read too much in this text. After all, is merey the overture to a student textbook and not a treatise on human history. Some degree of over-generalization is permissible for reasons of economy and necessary in order to situate the topic within a wider context. Indeed, the essence of the author's account of progress (whether it is right or wrong) is not at issue here. The text is interesting however because it does offer an example of how progress may be intertwined with international law argument and the production of meaning.

The excerpt speaks of human progress, the nature of human society and the role of law and, indeed, international law. It adopts a formal idea of progress that is catalytic for the production of meaning in the rest of the text. The first sentence immediately situates the reader within the context of a historical evolution of humankind: a story about how things were before, how things are today, and what is the distance traveled; or, to put it differently, a story with a well-marked beginning, middle, and end-phases. In

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[23] Narratives may use a similar form of determinism when speaking of regression or decline instead of progress. See for example de Lapradelle (Progrès), *supra* note 13, at 139-152; or, more recently, E.A. Posner & Mohr Siebeck, The Decline of the International Court of Justice, in S. Voigt, M. Albert & D. Schmidtchen (eds.), *International Conflict Resolution* (2006). An interesting review of decline or 'declension' narratives can be found in C. Landauer, *The Gentle Civilizer: Declension Narratives in International Law*, presented in the 3rd Birkbeck Workshop on Critical Approaches to International Law (Birkbeck, London, 16 May 2006) (on file with the author).

[24] M.N. Shaw, *International Law* (2003), at 1.

Shaw's excerpt, humanity has had a "long march from the cave to the computer", leading to the present day. With a single strike the reader is 'summoned from afar' and placed within a concrete and clearly defined context: a historical continuum (humanity's development) and a concrete social group (a universal community of human beings). The reader is also informed that humanity's progression (*our* progression) was long and arduous ("long march"). It has resulted, however, into definite progress. On the one hand, it has evolved from technologically primitive life ("the cave") to modern technological advancement ("the computer"); on the other, from a primitive social state ("chaos") to an advanced social state ("order"). This statement needs no further qualification and is taken as self-explanatory: our modern era *is* a much better time for humanity than its primitive past because of these advances.

Law, we are also told, has played a "central role" in this transformation. This central role was performed "always" and in "every society, whether it be large or small, powerful or weak". The idea of law that Shaw alludes to is universal, perennial, and transcendental. It is assumed, in the flow of the text, that law always stood on the side of progress and development, with benevolent effects for humanity. Law embodies the idea of order and is the element that binds the community of humans together and enables progress. Progress has "always been based upon the group as men and women combine to pursue commonly accepted goals". International law is finally introduced in the closing sentences as something similar to law at large, with the same effects and sharing the same history. The founding difference is that nation-states and not individuals are its principal subjects. At the end of Shaw's passage the student is assured that the history of humanity unequivocally demonstrates that law existed in every society and has always done well. In this account of progress, the "I" of the author is absent. Shaw adopts the posture of a dispassionate, neutral, objective chronicler that merely transcribes events as they unfold before his sight, from a seemingly external point of view.

Roland Barthes has famously written that narration "is a manner of speaking as universal as language itself, and narrative is a form of verbal representation so seemingly natural to human consciousness that to suggest that this is a problem might well appear pedantic".[25] Same with narration, narratives of progress seem intuitive discursive forms, indispensable tools of communication inextricably linked with everyday non-professional vocabularies and experience. For most people, striving for progress, striving for improvement, is a self-evident personal and professional goal whose

[25] R. Barthes, Introduction to the Structural Analysis of Narratives, in R. Barthes, *Image, Music, Text* 79-124 (Translated by Steven Heath, 1977), at 79.

questioning may appear pedantic. It is therefore not surprising that progress, as a notion, seems to play an important role in international law argument as well. So – what seems to be the problem?

To begin with, and regardless of whether one agrees with the essence of Shaw's account, one may wonder whether the transformation occurred *really* or *only* along the lines described. This is a crucial question: if the objectivity of the account is disrupted, and if a multiplicity of alternative histories of equal plausibility is allowed, then the background for his approach to the international law of today should be different, since different lessons should be learned from the past. If one could demonstrate, even for argument's sake, that life in today's world is not necessarily 'better' than the one in a previous era, one would have to adopt a more ambivalent posture towards the social function of (international) law than the one nurtured in Shaw's text. Second, one may also wonder about the epistemic basis of such an account of human progress and its political, cultural, ideological, gender, race, class and other orientations. Again, regardless of whether one agrees with the specific choices of each author, one could say that no compendium of historical records can be compiled without an external point of view that offers itself as a filter, which helps distinguish events worth being recorded from others that are not. As Historian and philosopher Hayden White writes, "the capacity to envision a set of events as belonging to the same order of meaning requires some principle by which to translate difference into similarity. In other words, it requires a subject common to all of the referents of the various sentences that register events as having occurred."[26] One can begin to ask what has been left out in this account of progress – what are the alternative accounts which have been set aside? What has been fore-grounded and what has been relegated to the background? How do the epistemic choices of this account de-legitimize alternative accounts? Finally, one can begin wondering whether it is a 'good' or a 'bad' thing to limit oneself to a single account of how humankind and international law have reached the present point. After reading Shaw's passage the reader is introduced to international law with the conviction that international law has always been a progressive agent for humanity. Is this a good starting point for one's approach to international law? Adopting this stance may prevent one from seeing how international law, on certain occasions, has been against one's conception of progress; and so on.

We can also see that Shaw's passage can work as a meaningful introduction to a textbook of international law only by creating the certainty that the progress achieved is objectively true in some way. It is this

[26] H. White, Narrativity in the Representation of Reality, in H. White, *The Content of the Form. Narrative Discourse and Historical Representation* 1-25 (1987).

overt/covert claim to transcendental truth that legitimizes, for the purposes of his introduction, the relevance (and the progressiveness) of the study of public international law. It is not suggested here that there is a way of invoking the notion of progress in a manner not susceptible to an internal critique (critique of internal gaps or incoherence) or an external critique (a critique that the account does not truly represent reality). Having an entire discipline, however, use progress as a notion that 'speaks itself' does raise some good questions about the way in which one perceives reality and translates it into legal argument.

First, can progress really ever 'speak itself' or is the meaning of progress always selected on the basis of certain epistemic or other choices (e.g. ideological, political, cultural, personal, etc.) which are open to the critique of relativism and automatically put to question its objective character? Second, if meaning is based on choices, can progress be for everyone or will it necessarily involve power relations and an ideological struggle? Third, if progress cannot 'speak itself', why does one need to use progress in a way that 'speaks itself' in order to be able to articulate a convincing argument about international law? Fourth, could one see 'progress talk' not as a descriptive exercise of 'how things are' but as a powerful rhetorical strategy of (de)legitimation? Finally, if progress talk legitimizes and de-legitimizes, includes and excludes, how aware are we of the exclusions of our own progress narratives?

These are very important questions. By investigating how meaning about progress is produced in international law one may be able to understand how rhetorical strategies remove from sight the ideological dimensions of legal argument, while at the same time de-legitimizing their ideological opponents. To put it in crude terms, if progress talk, aside from the legitimate expression of subjective conviction or aspiration, proves to be a powerful ideological rhetorical strategy of (de)legitimation, one may be forced to reconsider some well-rooted assumptions about the nature of legal discourse, such as the ideas that international law is a formal discourse which in principle has no gender, religion, culture, ideology, economic theory, and so on. One may also be confronted with uncanny exclusions and consequences produced by foundational narratives of the discipline, previously kept away from sight. Most importantly, one may be able to understand better the structure of concrete legal debates that invoke or rely on the idea of progress as part of their rhetorical apparatus and thus determine how specific relationships of power and exclusion are meted out in these specific contexts. The above considerations constitute the starting point of this enquiry.

1.4. Critique and Theses: Progress as the Product of Narratives

A notion of progress that 'speaks itself' stands in tension with developments in the humanities and social sciences since the early 20th century. Philosophy has debated the nature and properties of the notion of progress in great detail and, on occasion, has contested the very possibility of progress.[27] This work has revealed that there is no end to the different definitions and meanings of progress. Meanings have ranged from esoteric progress to progress in society and technological progress in the sense of control of the external physical world. The most common conception is the one of advance of knowledge in terms of techniques and sciences. It has also been conceived in terms of collective social progress, to refer to a world characterized by freedom, equality, health, and justice. More individualist conceptions would see progress as one achieved in terms of spiritual exaltation, one's liberation from tormenting physical or psychological compulsions.

The proposition that meaning is actively produced (as opposed to merely recorded) by text constitutes a principal tenet of some of the most influential intellectual movements of the 20th Century. Any attempt to draw here a synopsis of the theoretical origins of this proposition would be Sisyphean, for the additional reason that intellectual movements evade (or worse, detest) reduction to a standard set of propositions. The claim that meaning is actively produced (as opposed to being recorded) by text stands however in unison with a variety of writings in linguistics, social theory, history, ideology theory, philosophy. The movements of structural linguistics, structuralism, post-structuralism, deconstruction, post-modernism, social constructionism (all within or without inverted commas) have given rise to an enormous body of literature which shares some key starting points and parts company on others. Starting points include the idea that the world should not be treated as objective truth: knowledge and representations about how the world is 'out there' are not mere reflections of the world but products of certain ways of categorizing the world – they are products of discourse. Truth is a discursive construction. Different systems of knowledge determine what is true or not in their own way. The way we

[27] For some notable and informative reference works, see J.B. Bury, *The Idea of Progress: An Inquiry into its Origins and Growth* (1932); J. Baillie, *The Belief in Progress* (1950); L. Edelstein, *The Idea of Progress in Classical Antiquity* (1964); 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* (1970); 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* (1979); R.A. Nisbet, *History of the Idea of Progress* (1998). See generally J. Losee, *Theories of Scientific Progress: An Introduction* (2004). For the concept of progress in public policy studies, see C.L. Anderson & J.W. Looney (eds.), *Making Progress: Essays in Progress and Public Policy* (2002).

understand the world is culturally and historically specific, the product of interchange between people, cultures, society. As such, our understanding of the world is relatively contingent. This is an anti-foundationalist and anti-essentialist strand of thought which rejects the so-called foundationalist view that knowledge can be grounded on a meta-theoretical, decisive, or transcendental base. Structural linguistics at the beginning of the 20th century, and the structuralist movement later on, claimed that meaning is produced through linguistic, cultural, and other 'structures' that vary from person, language or culture.[28] Post-structuralist work has taken structuralist insights a step further and claimed that the structures identified by structuralists are further subverted and de-stabilized by the texts themselves, thus denying any possibility of systematic knowledge.[29] Authors such as Michel Foucault have linked knowledge with power and have demonstrated how knowledge and power presuppose each other.[30] Post-modern work has famously expressed incredulity towards meta-narratives or other discursive formations that claim to be decisive.[31] The practice of the imposition of the form of a narrative on truth or reality has been described in the social sciences as "narrativity" or "narrativizing discourse".[32] In his seminal work

[28] The works of Ferdinand de Saussure, Émile Benveniste, Roman Jacobson, Claude Lévi Strauss, Roland Barthes, Jacques Lacan, and early works of Michel Foucault and Julia Kristeva are associated with this movement. For some useful reviews of the structuralist movement, see J. Sturrock, *Structuralism* (1993); J. Sturrock, *Structuralism and Since: From Lévi Strauss to Derrida* (1981).

[29] The work of Jacques Derrida, Gilles Deleuze, Jean Baudrillard, Fredric Jameson, and later work of Roland Barthes, Michel Foucault and Julia Kristeva is considered representative of the post-structuralist turn. See generally J. Culler (ed.), *On Deconstruction: Theory and Criticism after Structuralism* (1983).

[30] See especially M. Foucault, Truth and Power, in C. Cordon (ed.), *Power/Knowledge – Selected Interviews and Other Writings 1972-1977* (1980); M. Foucault, *Discipline and Punish: The Birth of the Prison* (1977, Translated by Alan Sheridan, originally published in French in 1975).

[31] The notoriously elusive meaning of post-modernism is usually associated with the work of Jean-François Lyotard, Jacques Derrida, Richard Rorty, Jean Baudrillard, and Pierre Bourdieux. See J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (1984, translated by Geoff Bennington & Brian Massumi, originally published in French in 1979); F. Jameson, *Postmodernism or, the Cultural Logic of Late Capitalism* (1991).

[32] For the purpose of economy in this introductory chapter, I use as representative of this body of literature the seminal work of philosopher and historian Hayden White. See White (Narrativity in the Representation of Reality), *supra* note 26; and H. White, Historicism, History, and the Figurative Imagination, 14 History and Theory 48-67 (1975). Narrative and narrativity, however, have been among the most intensely debated topics in the social sciences for the best part of the 20th century. For some essential readings in support of the views taken in the present essay see Barthes (Introduction to the Structural Analysis of Narratives), *supra* note 25, at 79-124; C. Lévi-Strauss, *The Savage Mind* (1962, Translation by G. Weidenfeld, and Nicholson Ltd., 1966), *esp*. Chapter 9; G. Lukács, Narrate or Describe, in G. Lukács, *Writer and Critic and Other Essays* (Translated by A.D Kahn, 1971); J. Culler, *Structuralist Poetics: Structuralism, Linguistics, and the Study of Literature* (1975); G. Genette, Boundaries of Narrative, 8 New Literary History 1-13

Hayden White describes narrativizing discourse as "a discourse that feigns the world speak itself and speak itself as a story."[33] White writes:

> Unlike that of the annals, the reality represented in the historical narrative, is "speaking itself", speaks to us, summons us from afar (this "afar" is the land of forms), and displays to us a formal coherency to which we ourselves aspire. The historical narrative, as against the chronicle, reveals to us a world that is putatively "finished", done with, over, and yet not dissolved, not falling apart. In this world, reality wears the mask of a meaning, the completeness and fullness of which we can only imagine, never experience. Insofar as historical stories can be completed, can be given narrative closure, can be shown to have had a plot all along, they give to reality the odor of the real. This is why the plot of a historical narrative is always an embarrassment and has to be presented as "found" in the events rather than put there by narrative techniques.[34]

Following White's work, the odor of truth, reality, or objectivity in narrative is mostly generated by the absence of all references to a narrator. Events are recorded as they appear and they seem to present themselves to the reader without mediation by the author. The excerpt by Shaw, for example, spoke of humanity's progress "from the cave to the computer" as a fact and not as a personal interpretation of facts. Consequently, the filter by which the author has chosen to represent certain events but not others is removed from sight or denied altogether. Reality acquires a plot, a structure of relationships that makes events meaningful and runs from the beginning through the end. The story recounted is complete, linear, and without gaps. International law is assumed to have always done well and have always contributed to order, as a universal phenomenon, and these are facts that are self-evident and not constructed or debatable.

Does, however, international law present itself to observation in the form of such complete and coherent stories of progress, with proper beginnings, middles, ends, and causalities? Does our own personal experience of international law agree with such accounts? Or does international law present itself rather in the form of a mere sequence of facts without concrete beginnings or ends, or even as a series of beginnings and ends that could be read in a number of different ways depending on the agent of the observation? Is there something that is left out, that is excluded, when

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(1976); O. Ducrot & T. Todorov, *Encyclopedic Dictionary of the Sciences of Language* (1981, translated by Catherine Porter, Basil Blackwell Publishers, originally published in French, 1972), at 297-299; P. Ricoeur, Narrative Time, 7 Critical Inquiry 169-190 (1980). See generally R.H. Canary & H. Kozicki (eds.), *The Writing of History: Literary Form and Historical Understanding* (1978). *Cf.* I. Berlin, The Concept of Scientific History, 1 History and Theory 11 (1960).

[33] White (Narrativity in the Representation of Reality), *supra* note 26, at 2.

[34] White (Narrativity in the Representation of Reality), *supra* note 26, at 21.

we speak about international law this way? How aware are we of these exclusions? Or, as White would ask, "is the fiction of such a world, capable of speaking itself and of displaying itself as a form of a story, necessary for the establishment of that moral authority without which the notion of a specifically social reality would be unthinkable?"[35] In other words, is the use of the progress narrative, with all of its exclusions, the only way to speak about international law with authority? Is the resort to coherent and complete stories a good or a bad thing? Could we answer this question without giving our own narrative account of the history of international law's epistemology, an account that would already prejudice the outcome of the story we would tell? Is there actually a way of understanding international law beyond such progress narratives?

Such questions have been introduced in international law argument as well, albeit relatively recently. During the last two decades, different strands of Critical legal scholarship, under the rubrics of Critical Legal Studies,[36] New Approaches to International Law,[37] Feminist Approaches,[38]

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[35] White (Narrativity in the Representation of Reality), *supra* note 26, at 24-25.

[36] See e.g., R.M. Unger, *The Critical Legal Studies Movement* (1986); A. Altman, *Critical Legal Studies* (1993); J. Boyle, *Critical Legal Studies* (1994); M. Kelman (ed.), *A Guide to Critical Legal Studies* (1990); C. Douzinas (ed.), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994).

[37] D. Kennedy, A New Stream of International Law Scholarship, (1988-89) 7 Wisconsin International Law Journal 1; D.Z. Cass, Navigating the Newstream: Recent Critical Scholarship in International Law, (1996) 65 Nordic Journal of International Law 341; A. Carty, Critical International Law: Recent Trends in the Theory of International Law, (1991) 2 European Journal of International Law 66. For some book-length contributions in this regard, see in reverse chronological order D. Kenedy, *Of War and Law* (2006); A. Orford (ed.), *International Law and its Others* (2006); A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (originally 1989 – reissue 2005); D. Kennedy, *The Dark Side of Virtue* (2004); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004); B. Rajagopal, *International Law from Below: Development, Social Movement, and Third World Resistance* (2003); A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003); Koskenniemi (Gentle Civilizer), *supra* note 21; K. Knop, *Diversity and Self-Determination in International Law* (2002); S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000); O.C. Okafor, *Re-defining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000); O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000); Du. Kennedy, *A Critique of Adjudication [fin de siècle]* (1998); D. Danielsen & K. Engle (eds.), *After Identity: A Reader in Law and Culture* (1994); A. Carty (ed.), *Post-Modern Law: Enlightenment, Revolution, and the Death of Man* (1990); D. Kennedy, *International Legal Structures* (1987).

[38] C. Chinkin & H. Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (2000); H. Charlesworth, C. Chinkin & S. Wright, Feminist Approaches to International Law, (1991) 85 American Journal of International Law 613; A. Wing (ed.), *Critical Race Feminism: An International Reader* (2000).

Third World Approaches to International Law (TWAIL),[39] and so on, have drawn attention to the structure and politics of foundational doctrines and argumentative forms of the discipline which claim to 'speak themselves'.[40] Thus, in debates about democracy or human rights, the politics of the idea of universality has been demonstrated.[41] Same with the 'virtue' of humanitarian action and the various doctrines of *jus ad bellum* and *jus in bello*;[42] or the gender[43] and colonial bias[44] of international law doctrines; and so on. Despite the 'Critical turn', and unlike philosophy and the social sciences, the idea of progress is rarely an object of study as such in public international law literature.[45] International law's 'mainstream' continues to keep a (dis)interested distance from the 'newstream' argument.[46] Newstream critique is deemed not to really affect mainstream academic work or practices. It is frequently rejected for its alleged lack of commitment to concrete models of're-construction', following its 'de-construction', and as a practice with a nihilist sensibility that threatens to weaken the already precarious foundations of the international law edifice.[47]

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[39] See e.g. B.S. Chimni, Third World Approaches to International Law: A Manifesto, (2006) 8 International Community Law Review 3; M.W. Mutua, What is TWAIL? (2000) 94 Proceedings of the American Society of International Law Annual Meeting 31-40; O.C. Okafor, Viewing International Fragmentation from a Third World Plane: A TWAIL Perspective, in *Fragmentation: Diversification and Expansion of International Law: Proceedings of the 34th Annual Conference of the Canadian Council of International Law* 115-132 (2006).

[40] On the intellectual roots of these moments, see D. Kennedy, Critical Theory, Structuralism, and Critical Legal Scholarship, (1985-86) 21 New England Law Review 209.

[41] See e.g. Marks (Riddle of All Constitutions), *supra* note 37; Simpson (Great Powers and Outlaw States), *supra* note 37.

[42] See e.g. Kennedy (Of Law and War), *supra* note 37; Orford (Reading Humanitarian Intervention), *supra* note 37; Kennedy (Dark Side of Virtue), *supra* note 37.

[43] See, e.g., Charlesworth & Chinkin (Boundaries of International Law), *supra* note 38.

[44] See e.g. Anghie (Imperialism, Sovereignty, and the Making of International Law), *supra* note 37; Knop (Diversity and Self-Determination), *supra* note 37; Okafor (Re-defining Legitimate Statehood), *supra* note 37;.

[45] There are few exceptions. See e.g, the essays *in* J.H. Nieuwenhuis & C.J.J.M. Stolker (eds.), *Vooruit met het recht: wat geldt in de rechtenwetenschap als vooruitgang?* [Progress with the Law: What Counts as Progress in Legal Science?] (2006).

[46] On this point see T. Skouteris & O. Korhonen, Under Rhodes's Eyes: The "Old" and the "New" International Law at Looking Distance, (1998) 11 Leiden Journal of International Law 429. See also T. Skouteris, The New Approaches to International Law and its Impact on Contemporary International Legal Scholarship, (1997) 10 Leiden Journal of International Law 415; T. Skouteris, Bridging the Gap: The 1999 Annual Meeting of the American Society of International Law, (1999) 12 Leiden Journal of International Law 505.

[47] For some critiques along these lines, I. Scobbie, Towards the Elimination of International Law: Some Radical Skepticism about Skeptical Radicalism, (1990) 61 British Yearbook of International Law 339. On the alleged failure of critical international law to commit to 'an affirmative image' of itself see N. Purvis, Critical Legal Studies in Public International Law, (1991) 32 Harvard International Law Journal 81, esp. at 116 et seq.

The genre of Critical thought outlined above forms the context and starting point of this analysis, which sets out to explore the use of the notion of progress and progress narratives in international law debates. The objectives of this doctoral dissertation must not be overstated but, on the contrary, must be defined narrowly. The primary objective is to explain how meaning about progress is produced in specific international law discourses and how the use of progress narratives carries political/ideological consequences that tend to be masked or denied by the discipline. This is therefore a study on international law discourse. It does not aspire to contribute to debates about narrativity or power in the humanities at large. It rather relies on, and stands in dialogue with, such debates. Conclusions are drawn from, and are limited to, concrete international law materials, with the intention of contributing to the further study of the theory and practice of international law. To achieve its objectives, the book will put forward and defend the following intellectual propositions ("theses"):

i) *Progress as the Product of Narratives*: Although progress is a convenient rubric to describe international law events (arguments, developments, actions, and so on), it is a notion that is ultimately devoid of meaning unless placed in the context of a progress narrative.

ii) *Progress Narratives as Politics*: Progress narratives are by definition non-objective. As such, they compete with (or exclude) other progress narratives. International law discourse tends to deny or mask the non-objective character of its progress narratives.

iii) *Discourse Analysis as Action*: Although progress narratives may be a useful discursive form, the de-mystification of such narratives may be an equally productive and meaningful form of international law argument in itself, but one that gives access to a different horizon of action and intellectual possibility.

1.5. Approach, Method, Outline

Approach

The analysis relies on three case studies or illustrations, examples of how the notion of progress is used in specific instances of public international law discourse. The case studies exemplify three different uses of the idea of progress in international law argument outlined above, namely international law *as* progress, progress *within* international law, and the combination of the two.[48] They are drawn from the body of general public international law. The case studies do not mean to represent unique or exceptional moments of international law discourse. On the contrary, they are selected as examples of 'everyday' international law, as mundane stories symptomatic of

[48] See Section 1.2, *supra*.

international law's everyday life. In this sense, the selection of the case studies, although not random, does not seek to fulfil another grand narrative about what are the crucial or less crucial international law discourses.

The case study approach is used consciously and in lieu of the more customary international law genre of a scientific monograph, the term referring to a systematic, autonomous, and exhaustive disquisition on a limited subject, based on a set of well-defined and determinate set of materials. The case study approach does not abandon the central academic endeavor of demonstrating the validity of intellectual propositions on the basis of research and reasoning. The difference is that arguments are tested in the context of the three cases in question only. The choice of the case study approach is dictated by the otherwise infinite breadth of the topic (the notion of progress in international law discourse) and the parallel need to ground the argument in concrete examples taken from the practice of international law. The term case study is used for convenience to describe the focused study of individual instances of legal discourse (see also following paragraph on the method to be followed). It therefore does not wish to evoke images of empiricism (where 'facts come first') or any other such imagery associated with the term 'case-study' in the parlance of the humanities or natural sciences. Nevertheless the term may still be used to refer to a study of a specific instance of legal discourse which aspires to be complete and autonomous, analyzing a detailed and finite (albeit neither exhaustive nor closed) set of materials. The intellectual propositions (theses) are examined and defended against the mentioned case studies only, and not against the entire body of international law literature, albeit with the hope that this book constitutes the beginning of the author's reflection on the matter rather than its closure. The relevance of the conclusions of this investigation for international law research outside the scope of this work is explained in Chapter 5 (Section 5.4).

Method

In terms of method, the case studies are performed by means of the interpretative or deconstructive technique that is often referred to as 'critical analysis' or 'discourse analysis'.[49] Discourse, in simple terms, is understood

[49] For useful overviews, see L. Philips & M. Jørgensen, *Discourse Analysis as Theory and Method* (2002). See also B. Paltridge, *Discourse Analysis* (2007); M. Bloor & T. Bloor, The Practice of Critical Discourse Analysis: An Introduction (2007); J. P. Gee, An Introduction to Discourse Analysis: Theory and Method (2007); D. Schiffrin, D. Tannen & H. Hamiton, The Handbook of Discourse Analysis (2005); H. Widdowson, Text, Context, Pretext: Critical Issues in Discourse Analysis (2004); M. Hoey, Textual Interaction: An Introduction to Written Discourse Analysis (2000); N. Fairclough, Critical Discourse Analysis: The Critical Study of Language (Language in Social Life) (1995); G. Brown & G. Yule (eds.), Discourse Analysis (1983); M. Stubbs, Discourse Analysis: *The Sociolinguistic Analysis of Natural Language* (1983).

as "a particular way of talking about and understanding the world (or an aspect of the world)".[50] In this colloquial sense, we speak of medical, political, economic, or legal discourse to refer to the different ways (or the different vocabularies) in which a doctor, political scientist, economist, or jurist would speak in their professional language about the same topic. It is perhaps more to the point for our analysis to resort to Michel Foucault's definition.

> We shall call discourse a group of statements in so far as they belong to the same discursive formation; […] [Discourse] is made up of a limited number of statements for which a group of conditions of existence can be defined. Discourse in this sense is not an ideal, timeless form […] it is, from beginning to end, historical – a fragment of history […] posing its own limits, its divisions, its transformations, the specific modes of its temporality rather than its sudden irruption in the midst of the complexities of time.[51]

The method/technique of discourse analysis has been developed in tandem with the intellectual movements of structuralism, post-structuralism and deconstruction. It takes issue with the general idea that language is structured according to different patterns that people's utterances follow when they take part in different domains of social life. Following Foucault's passage above, these patterns set limits as to what may (and may not) be said, and produce determinations of what is true and false. Discourse analysis, in simple terms, is the analysis of the structures within a discourse that produce meaning. In our case, our investigation is a study of the structures within specific international law discourses that produce meaning about progress. Discourse analysis claims that discourses are forms of social action that play a big part in producing the social world, including knowledge, identities and social relations.[52] Therefore, within a particular world-view, some forms of action are considered as natural or possible, whereas others are ousted beyond the realm of mere possibility.[53] Understanding the structure of discourse helps one understand the limits of action accepted as natural, normal, universal, possible, progressive. It would be misleading, however, to try to understand discourse analysis as a strict method. Instead of providing a single method, discourse analysis must be seen as a way of thinking about a problem. This is neither a qualitative nor a quantitative research method but a manner of

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[50] Philips & Jørgensen (Discourse Analysis), *supra* note 49, at 1.
[51] M. Foucault, *The Archaeology of Knowledge* 117 (1972).
[52] Different approaches to discourse analysis part company with regard to the extent to which reality is constituted or constitutive of discourse. For a useful map of the different approaches, see Philips & Jørgensen (Discourse Analysis), *supra* note 49, at 18-21.
[53] This is one of the main tenors of Foucauldian discourse analysis. See in particular, Foucault (Archaeology), *supra* note 51, at 3-40 & 107-117.

questioning the basic assumptions of research methods. Discourse analysis aims to point to the ontological and epistemological assumptions that a text (a project, a statement, a method, a system of classification) has taken for granted in order to produce meaning and appear coherent. Discourse analysis traces the mechanisms that enable the production of meaning, by reference to the structure of a discourse. One could perhaps say that discourse analysis is a deconstructive reading and the interpretation of a text, while acknowledging that this deconstruction or interpretation is a text itself, which could be subjected to a similar type of analysis. Discourse analysis does not provide absolute answers to a problem. It is not a quest for truth. It hopes to enable one understand the conditions under which a specific problem emerges and make one realize that the essence of that problem (and its resolution) can be found in the very assumptions that enable the existence of that problem. There are numerous types or theories of discourse analysis. Jacques Derrida's 'deconstruction',[54] Chantal Mouffe's and Ernesto Laclau's critical discourse analysis,[55] Michel Foucault's 'archaeology'[56] and later 'genealogy,'[57] Fredric Jameson's Marxian analysis,[58] Julia Kristeva's reading of social practices,[59] are only some examples. While discourse analysis may be used very effectively as an autonomous technique of interpretation, it is not a strict technique and it is possible for one to combine elements from different discourse analysis perspectives.

Along these lines, the method applied claims no methodological purity. Each case study is performed in a manner that does justice to the materials in question and makes the style of analysis accessible to an international law reader, and as opposed to using of a strict technique laden with (post)structuralist and linguistic jargon. It is hoped that the final outcome remains loyal to the method, as explained above, and succeeds in investigating the intellectual propositions, while being able to speak to an international law audience.

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[54] See e.g. J. Derrida, *Of Grammatology* (1998).

[55] E. Laclau, Discourse, in R. Goodin & P. Pettit (eds.), *The Blackwell Companion to Contemporary Political Philosophy* (1993); E. Laclau & C. Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics (1985); E. Laclau & C. Mouffe, Post-Marxism without Apologies, in E. Laclau, *New Reflections on the Revolutions of our Time* (1990).

[56] See Foucault (Archaeology of Knowledge), *supra* note 51, esp. Part II, which discusses his notions of discourse and his methodology. See also M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1966).

[57] Foucault (Birth of the Prison), *supra* note 30.

[58] F. Jameson, *Marxism and Form* (1974); F. Jameson, *The Prison-House of Language* (1975).

[59] J. Kristeva, *Desire in Language: A Semiotic Approach to Literature and Art* (1980); K. Kristeva, *Revolution in Poetic Language* (1984).

The type of discourse analysis performed in the next Chapters generally consists of four inter-related 'moments'. The first 'moment' identifies the horizon of the discourse that will form the field of the analysis. It identifies the group of statements or events belonging to the same discursive formation and announces the point of unity between them. The three case studies that comprise the main body of the present research are examples of three such discourses. Along these lines, later Chapters speak of "interwar international law discourse", "sources discourse", or "tribunals discourse" to refer to sets of materials that form, in each case, the horizon of the field of the analysis. This operation is arbitrary, in the sense that it creates unity or continuity between a certain range of texts by means of a seemingly random (overt or covert) origin. The fact that different discourses could be identified, or the fact that the limits of each discourse could be drawn differently, however, does not undermine the claim that meaning within such discourses is conditioned by the existence of discursive structures or rules that circumscribe the limits of permissible statements.

The second 'moment' of the analysis is the identification of the structures within a discourse that enable statements to appear as true. This operation (which could be called the 'structuralist moment' of the analysis) looks at the texts that form the field of analysis and asks a wide range of questions about the ways in which meaning is produced. To fly the structuralist flag full-mast, it looks for important 'events' (words, terms, statements, notions) and 'structures' (systems of rules) that allow the production of the meaning.[60] The present enquiry uses the term 'vocabulary of progress' to refer to the conglomerate of discursive 'structures' that enable the production of meaning about specific 'events' ("progress") within each specific discourse.

The third 'moment' of the analysis assesses the claim of progress narratives to 'speak themselves'. This operation (which could be called the 'post-structuralism moment' of the analysis) borrows from the practices of post-structuralism and deconstruction. It aims to demonstrate that, although vocabularies may be the structures that produce meaning about progress in each discourse, the vocabularies themselves are not true or stable – they do not have transcendental meaning. To use an example: if the opposition of "democracy" and "absolutism" may be the basis of a vocabulary that determines what is progressive (democratic) and regressive (absolutist), the 'post-structuralist moment' of discourse analysis demonstrates that neither

[60] The pairs of signifier/signified, parole-langue, and event/structure form the classical vocabulary of structural linguistics, with origins in the work of de Saussure's classic word at the beginning of the 20th century. For a summary of the main characteristics of this approach see Sturrock (Structuralism), *supra* note 28, at 1-18.

democracy nor absolutism are terms which possess a fixed or stable meaning. The moment that a vocabulary is proven non-stable, then its claims to objectivity or truth are being undermined. As a consequence, the capacity of the progress narrative to 'speak itself' is also subverted.

Finally, a fourth 'moment' of the analysis identifies the benefits of looking at discourses this way. It points to the possibilities of action that are enabled, their social impact, and to ways in which such action can be seen in itself as progressive or regressive in turn. This final operation is discussed in Chapter 5.

Outline

Three Chapters of the book are each devoted to one case study. Along these lines, the first case study (Chapter 2) presents an example of a discourse that treats international law *as* progress. The study examines the role of the notion of progress in the work of an individual scholar of public international law. It sketches an intellectual portrait of Stelios Seferiades (1876-1951), a Greek scholar of the interwar (1918-1939) period who emerged as one of the most important intellectuals of his generation, in Greece and internationally. The study traces the life-work of Seferiades in order to take a close look at the ways in which the idea of progress became a crucial discursive structure in producing legitimacy and moral authority for his arguments. The horizon that forms the field of the analysis is the lifework (oeuvre) of Seferiades, namely his writings and political-social actions. The figure of Stelios Seferiades has been chosen not as example of a unique relationship between the idea of progress and international law but rather as symptomatic of a closely-knit relationship between the two. The essay looks at the work of Seferiades comprehensively, from his publications to the relationship between his scholarship and his life and, in particular, his identity as a statesman and refugee. Without revealing too much at this stage, the Chapter claims that Seferiades systematically used in his international law work a vocabulary of progress which helped grant legitimacy to his argument, while removing from sight the incoherence and political bias of his views. This vocabulary of progress (the 'structure') was centered on the opposition of the notions of democracy and absolutism. Democracy was associated with internationalism and, in turn, with progress, while absolutism was associated with introvert sovereignist politics and regression. Chapter 2 explains however that, despite its overpowering rhetorical effect, the vocabulary of democracy and absolutism proved to be far from 'speaking itself'. It was an un-stable vocabulary which involved generalizations and exclusions that eventually undermined its own foundation. In defending democracy, Seferiades went as far to defend measures that would fail the standards of democracy that he proclaimed as the benchmark of progress. The vocabulary

of absolutism and democracy, far from a descriptive concept of how human progress has been achieved, became of powerful ideological device for the exclusion of a series of political and legal initiatives. Progress, far from a formal and self-explanatory concept, was proven to be a deeply ideological and political rhetorical device to legitimize one's argument.

The second case study (Chapter 3) is an example of a discourse that speaks of progress *within* international law. It leaves behind the work of Seferiades in order to engage a public international law doctrine and, indeed, the most classical of international law doctrines, namely the doctrine of the sources of international law. The horizon that forms the field of the analysis is the literature about the source of international law during the interwar period (1918-1939). A digression is also made to contemporary debates (1989- to date) on the sources in order to demonstrate that the doctrine of the sources continues to be seen as a great moment of progress, in spite of continuing critique. Chapter 3 argues that the vocabulary of progress of the doctrine of the sources is constructed by the discursive effect of two sweeping rhetorical moves, termed standardization and formalization. The narrative moves produce meaning about progress by creating the perception that the 'new' (post-1920) doctrine of the sources has progressed by becoming determinate (closed, standard, technical, formal), and in opposition to the indeterminacy (open, fragmented, political, non-formal) of the 'old' (pre-1920) doctrine. A closer look reveals however that determinacy and indeterminacy have unstable content and can be used inter-changeably depending on the beholder. The 'new' doctrine of the sources of international law fails to meet its own (self-proclaimed) standards of determinacy although relies on the claim of determinacy in order to present itself as progressive. Progress in sources, far from a notion that 'speaks itself', was constructed by reference to terms, such as determinacy, which simply relocated the problem of politics to a different place within the doctrine instead of resolving it. Despite this apparent failure to meet its own standards, the doctrine of the sources continues to be recounted as a moment of progress for public international law.

The third case study (Chapter 4 of this book) offers an example of a discourse that combines the ideas of international law *as* progress and progress *within* international law. It turns to the institutional dimension of international law and draws attention to a well-known contemporary debate about the institutional architecture of the international legal system, namely the question of the proliferation of international courts and tribunals. The main focus of this essay is to trace the arguments that have been put forward in favor of proliferation of international tribunals. These arguments present the creation of international judicial institutions as a development intertwined

with progress, leading to more peace or justice, to strengthening of the fabric of the international legal system at large, and so on. Conversely, apart from some dangers of fragmentation or over-use of international tribunals, few dangers can be discerned. Conducting a close reading of the relevant literature, Chapter 4 describes the closely-knit relationship between the idea of progress and the persuasive power of the argument in favor of the 'judicialization' of the international legal system. The Chapter argues that the argument in favor of proliferation of tribunals is based on two inter-related 'vocabularies of progress', well rooted in the scholarly traditions and professional communities in the two sides of the Atlantic. Both vocabularies, and despite significant difference in their conception of the role of law, its relationship to politics, and so on, shake hands in their understanding of the relationship between tribunals and progress in internationalism. Both vocabularies use historical and causal narrative accounts to construct an history of the world and the positive role of tribunals leading to the contemporary international legal order. Chapter 4 demonstrates that such historical accounts of progress are far from unequivocal. On the contrary, they systematically elide and exclude alternative histories of internationalism and, in the process, prevent a number of viable alternative solutions from gaining currency in international law debates. Far from being a neutral, self-explanatory concept, the notion of progress performs in the debate about proliferation a crucial ideological role that is not acknowledged by the literature itself. By constructing a 'true' and 'incontestable' vision of 'what happened' in international law, the debate leaves alternatives and critiques dis-empowered and marginalized, thrusting them beyond the four corners of permissible argument.

The closing Chapter of this enquiry (Chapter 5) has a dual objective. First, to defend the intellectual propositions of this enquiry, as outlined above, against the conclusions derived from the three case studies. Secondly, to situate these intellectual propositions in wider debates about international law today. Chapter 5 offers some explanation about how this type of discourse analysis of progress narratives, although it can itself be considered as "progressive" or "regressive", makes a difference with regard to the recipients or beneficiaries of the transformative potential of international legal discourse. Although this analysis does not evade international law's entanglement with power, it explicitly embraces this entanglement and is committed to exploring the ever-changing bias and hidden antinomies of international law argument. In doing so, it empowers and dis-empowers, legitimizes and de-legitimizes, but explicitly and purposefully. Instead of undermining international law's vitality and stability, this approach is fully committed to a more conscious and supportive use of international law discourse.

Chapter 2

Case Study #1

International Law as Progress: Stelios Seferiades and Progress in Interwar International Law[61]

2.1. Introduction

This chapter sketches an intellectual portrait of Stelios Seferiades (1876–1951), a classic figure in European international law during the interwar period and, for many, the founder of the discipline of public international law in Greece.[62] This intellectual portrait, in addition to paying tribute to the work of a neglected, but fascinating, scholar, acts as a heuristic device which allows a close examination of the 'vocabulary of progress' of interwar international law: the discursive strategies used in legal argument to legitimize the transformation of the pre-war discipline of international law into the modern international law of the interwar period.

Underlying my interest in the work of Seferiades is therefore not a desire to identify errors or shortcomings in his scholarship. To be sure, that would be too simple a task, especially with the benefit of hindsight, and would result in an inquiry of limited analytical value. A certain amount of truth and falsity, realism and illusion, and so on, must be credited to any argument that seeks to explain why certain values or solutions are better than others. Most people would even agree that without some form of preference or bias, one would not be able to identify an issue or a situation, let alone pass judgment on it.

This paper pursues a different line of inquiry. It probes, instead, the ways in which Seferiades and his contemporaries argued their case for the renewal of international law. The term 'vocabulary of progress' is used here to refer to the discursive strategies with which arguments buttress their power over others and seek to distinguish themselves from their ideological

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[61] An earlier version of this chapter has been published as T. Skouteris, The Vocabulary of Progress of International Law: An Intellectual Portrait of Stelios Seferiades, (2005) 16 European Journal of International Law 823.

[62] The work of Seferiades as a whole has received very little attention so far, with the exception of a posthumous collection of essays in his honour, containing only a brief introduction to his life and work. See S. Kalogeropoulos *et al.*, *Mélanges Séfériadès* (1961) (2 Volumes, with essays in Greek, English and French) and, in particular, G. Tenekides, Στυλιανός Σεφεριάδης, 1873-1951 (Slylianos Seferiades, 1873-1951) (in Greek), at xv-xxiv. For a complete list of publications of Seferiades, see ibid. at xxv-xxvi.

opponents. In other words, this piece is not about truth or falsity in legal argument, but about the strategies that enable arguments to *appear* true, false, progressive, conservative, and so on. This line of inquiry leads one to pose a number of very different questions about the work of a scholar than the 'what did he do wrong?' type of investigation. Rather, it considers how Seferiades argued his case for the renewal of international law: What was his idea of progress? Did this idea 'speak itself'? Did he privilege any ideals in the process? Were other ideals denigrated? What was at stake in his plea for the transformation of the law? Who were his ideological opponents? What effects were produced? Who was the beneficiary of these effects? And so on.

Why should one be interested in the writings of a scholar in this manner? Although 'progress' is a convenient rubric to use in captioning one's reformist agenda, it will be demonstrated that progress does not have a natural or obvious meaning out of context or, in any case, without reference to other terms that are equally equivocal. One person's progress is another's regression. To understand the meaning of progress in a particular debate, one would have to look not at the etymology of the term but rather at the historical and political discourse in which the term is employed. 'Progress' does not acquire concrete meaning without a background story, an explanation of how things were before and how they ought to become, and why. Progress, in that sense, is not an essence but a narrative. And this essay makes the narrative itself the target of its inquiry.

Why use the intellectual portrait of an interwar scholar from the periphery of Europe as the heuristic device for this essay? Not only because one may understand, in hindsight, Seferiades' contribution as playing a catalytic role in the development of many international law doctrines and institutions that we consider important today. A much more symbolic function is envisaged for our scholar in this inquiry. The story of Seferiades appeals to contemporary consciousness as the story of an archetypal figure of our discipline, representing much of international law's efforts to reinvent itself. In a way, Seferiades 'did it all', and he 'did it well'. His legal and political credentials as a liberal internationalist would be considered impeccable even today. He advocated disarmament and the obligation to resolve international disputes peacefully; he argued the primacy of international law over national constitutions; he believed that democratic governance could lead to peace between nations; he fought for the right of individuals to stand before international tribunals; he sought to demystify the doctrine of state sovereignty; he promoted the notion of the nation as the basis for the formation of an international community; he subscribed to the sociological jurisprudence of the time; he believed in the importance of the role of public international lawyers in the reconstruction of the post-war

international community. Certainly, one might disagree with some of his lateral views: whether, for instance, foreign nationals should be subjected to mixed (internationalized) tribunals because of what he considered to be structural bias of domestic courts towards foreigners; or whether within a monist conception of law the national judge should nevertheless apply national law which has not been amended to comply with international obligations. Some of these choices might even be conceded to him for historical or other reasons. But few would disagree that Seferiades had his heart and his politics 'in the right place'.

Moreover, Seferiades published widely and excellently, addressing issues of the highest political currency. His work is still cited today as a source of authority, and copies of his classic textbook[63] still figure prominently on the bookshelves of Greek international lawyers. The facts of his life leave us in no doubt that Seferiades engaged with international law with greater skill and devotion than might be expected of anyone. Although he shared the international law stage in Greece with another outstanding scholar, Nicolas Politis, who indeed merits attention in a separate essay, Seferiades became Professor of International Law at Athens University and created the first complete set of reference works in Greek, thus becoming a founding figure of the international law profession in that country.

Seferiades was not your proverbial ivory tower scholar either. He served the dual function of statesman and academic, rising to prominence in both realms. He was able to exercise considerable influence over institutional, political and scholarly developments at the national and international level, including negotiation of the text of the Treaty of Versailles and other instruments of extreme national importance for Greece. For a large part of his professional life he was a close associate and advisor of Eleftherios Venizelos, the legendary Prime Minister who dominated Greek politics between 1910 and 1936. Seferiades publicly aligned himself with the liberal movement and became a staunch supporter of political reform in Greece, advocating constitutionalism, democratization and the codification of fundamental rights and liberties. He advised the Greek Government in times of monumental importance for the future of the nation. A curriculum vitae for Seferiades would include functions such as Professor, Dean of the Faculty of Law and Rector of the University of Athens, delegate at the Paris

[63] S. Seferiades, *Μαθήματα Διεθνούς Δημοσίου Δικαίου* (Courses on International Public Law) (in Greek), Volume 1, *Το εν Ειρηνη Διεθνές Δημόσιον Δίκαιον* (International Public Law of Peace), 1920; Volume 2, *Διεθνεις Διαφοραί και Συγκρούσεις* (International Disputes and Conflicts), 1928-1929.

Peace Conference, Judge *ad hoc* of the Permanent Court of International Justice, member of the *Institut de Droit International*, three times lecturer at the Hague Academy of International Law, member of the Greek *Conseil d'Etat*, legal advisor to the ministry of Foreign Affairs, among others. In addition, Seferiades wrote fine romantic poetry, translated many works from Ancient to Modern Greek, and was the father of one of the most important poets of his generation, Giorgos Seferis (Seferiades), a jurist and diplomat himself, and Nobel Prize laureate for literature in 1965.[64] All in all, an exemplary international lawyer, liberal intellectual, and more.

Against this background, and perhaps not surprisingly, the story of Seferiades appeals to that same contemporary consciousness as the story of a tragic figure of the discipline. Seferiades did not see his lifework come to fruition. His dream of lasting peace in the context of the League of Nations was shattered by the traumatic developments of the 1930s. On the home front, the 1936 dictatorship put an abrupt end to the vision of a democratically governed Greece and signaled the marginalization (and even persecution) of many liberal intellectuals. At the dusk of his career, Seferiades found himself unable to comprehend the reasons for the failures of the liberal reform projects of the interwar period. In one of his last publications, he pleaded for the 'moral armament' of the new generation as the last resort against what seemed to be the inevitable outcome of the boiling European front.[65] His last essay on international law was published in 1939, submitted for publication before the outbreak of the War.[5] World War II signaled the end of his academic writings and his complete withdrawal from professional life. During his last 12 years (his passing came in 1951), he was largely preoccupied with his literary interests, withdrawn to his Paris apartment.

Did the interwar internationalism 'fail'? If so, why? The explanation to be found in the writings of Stelios Seferiades appears to be quite an intuitive one to contemporary ears: liberal reform in international law, the story goes, failed because of the resistance of 'absolutism' as a system of domestic governance and as an approach to international politics as well. As he writes in one of his texts:

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[64] As a consequence, the student of Seferiades can benefit from a number of biographies of Giorgos Seferis where a useful amount of information can be collected about his father. Among those biographies, the ones that stand out are R. Beaton, *Γιώργος Σεφέρης - Περιμένοντας τον Αγγελο* (George Seferis - Waiting for an Angel. A Biography, Greek translation) (2004); I. Tsatsou, *Ο Αδελφός μου Γιώργος Σεφέρης* (My Brother Giorgos Seferis) (in Greek) (1974).

[65] S. Seferiades, *Ο Ηθικός Οπλισμός* (Moral Armament) (in Greek) (1935).

> [P]ublic law, domestic or international, and total absolutism are mutually exclusive concepts, concepts that cannot temporally co-exist.[66]

The view that international law is incompatible with autocratic ideologies of different sorts (absolutist, totalitarian, Nazi, fascist, communist, dictatorial, fundamentalist, and so on) has survived 20th-century mainstream international law writing and re-surfaces each time international lawyers discuss what to do with situations like Yugoslavia, Afghanistan. Iraq, terrorism, failed states, humanitarian intervention, and so on.[67] For Seferiades and his contemporaries, progressive efforts to reform international law were prevented from attaining their full potential because of the existence of an 'absolutist' approach to politics that resisted – and often waylaid – progress in international law and institutions. For Seferiades, the opposition of absolutism v democracy and the role of these two concepts in achieving progress in international law was a story that was beyond doubt, one that 'spoke itself'.

This Chapter addresses the narrative of progress that underlies the legal argument of Stelios Seferiades. The objective is not to draw parallels with contemporary discussions about democracy and its Others. Instead, this paper aims to help us understand the structure of the 'vocabulary' of progress (and regression) in his work. To this end, Section 2.2 introduces the international law writing of Seferiades and outlines the basic argumentative strategies that comprise his narrative of progress and its 'vocabulary" and, more specifically, delineates the role of the opposition of the notions of absolutism and democracy in this context. Section 2.3 describes the discursive functions of his narrative of progress within the context of his international law argument or, in other words, the way in which it is

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[66] S. Seferiades, *Το Μέλλον του Διεθνούς Δημοσίου Δικαίου* (The Future of International Public Law) (in Greek) (1919).

[67] Debates about the compatibility of international law with non-democratic systems of governance have been popular in international law writing since the interwar and post war periods: see e.g. S.E. Edmunds, *The Lawless Law of Nations: An Exposition of the Prevailing Arbitrary International Legal System in Relation to its Influence upon Civil Liberty, Disclosing it as the Last Bulwark of Absolutism Against the Political Emancipation of Man* (1925); G. Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943). These debates have become reinvigorated since the end of the Cold War. See e.g. M. Reisman, Islamic Fundamentalism and Its Impact on International Law and Politics, in M.W. Janis & C. Evans (eds.), *Religion in International Law* 357 (2004); A.-M. Slaughter, International Law in a World of Liberal States, (1995) 3 European Journal of International Law 503; F. Tesón, The Kantian Theory of International Law, (1992) 92 Columbia Law Review 53; G.H. Fox & B.R. Roth (eds.), *Democratic Governance and International Law* (2000). For a critical review of such debates see Marks (Riddle of All Constitutions), *supra* note 37; and Simpson (Great Powers and Outlaw States), *supra* note 37.

presented as 'speaking itself' while at the same time participating in an ideological discourse of inclusion and exclusion. Section 2.4 digresses to interwar Greece to situate Seferiades and his scholarship within the political landscape of the time and, in particular, the political movement of 'bourgeois modernization'. Sections 2.5 looks closely into the writings of Seferiades to explain the foundational relationship between his narrative of progress and his international law arguments. It rereads his ideas about the basis of obligation in international law as an example of how his 'vocabulary of progress' is reflected in his doctrinal prescriptions for the reform of international law. Section 2.6 suggests some directions for a critical reassessment of the work of Seferiades and the concept of progress in international legal argument.

2.2. The Narrative of Absolutism v. Democracy

Let us then begin at the beginning. What is the reform project that Seferiades seeks to bring about in public international law? In November 1919, with the echo of the Paris Peace Conference in his ears, Seferiades delivers his – long overdue – inaugural speech as Professor of Public International Law at the University of Athens, on the topic of 'The Future of International Public Law.'[68] This speech should have been delivered four years earlier, when he was first elected Professor. The dissolution of the liberal government of Venizelos by the King Constantine in 1915, however, prevented his appointment, due to the connection of Seferiades with the politics of the Liberal Party (Κόμμα Φιλελευθέρων). Seferiades had to wait until the next liberal government in order to be able to assume his duties. In 1919, standing before the friendly audience of his students, he reads out an evocative speech about the professional responsibility of the jurist in the reconstruction of the international community in the wake the Great War.

The *Future of International Public Law* constitutes Seferiades' first attempt to engage international law at such a level of abstraction and is his first international law publication in Greek. The language is direct and emotional, the tone intense, exuding the feeling of urgency and responsibility of a man standing before a crucial historical moment, when things shall be made or broken. Seferiades opens his speech in great style. He predicts that the future of international law would be similar to that of Ancient Greek art in the aftermath of the wars of the 5th and 4th centuries BC: although the wars almost decimated the monuments of all that had been achieved, those

[68] Seferiades (The Future of International Public Law), *supra* note 66.

monuments somehow became the 'life-giving beginning' for the production of the finest masterpieces of all times in the years following the wars.[69] So too with international law after the Great War:

> Thus embarking on our current enquiry, we believe that it is possible to assert that the elements of international law which existed till our day, and which were nearly extirpated by the recently terminated cataclysm, will create an international law superbly corresponding to the meaning and purposes of our discipline when rejuvenated and reshaped by the influence of a wider perception and new ideas.[70]

His project, in other words, is the reconstruction of international law. The idea of reconstructing international law was a common trope in interwar liberal scholarship on both sides of the Atlantic and Seferiades felt at home in this approach. With Le Fur, Brierly, Scelle, Lapradelle as his oft-cited authorities (and in some cases as his personal friends), Seferiades had no trouble agreeing with Alejandro Álvarez about the fact that "the task that is now necessary is the reconstruction of this law."[71] Brierly spoke of a "need of rehabilitation"[72]; Politis desired "la reconstruction du droit international sur de nouvelles bases",[73] and so did Nippold and a long list of others.[74] These writers presented reconstruction as a major, all-encompassing project of re-conceiving international law in its totality, from its theoretical foundations to institution building, the codification of new law, and the creation of new doctrines. Álvarez went as far to discern a fully-fledged professional "movement" of reconstruction.[75] In a symbolic way, the critical event enabling the transition from the 'old' to the 'new' for these scholars

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[69] Seferiades (The Future of International Public Law), *supra* note 66, at 5.
[70] Seferiades (The Future of International Public Law), *supra* note 66.
[71] See Álvarez (The New International Law), *supra* note 16, at 38.
[72] J.L. Brierly, The Shortcomings of International Law, in H. Lauterpacht (ed.), *The Basis of Obligation in International Law and Other Papers by the Late J.L. Brierly* 68 (1958). For Brierly's ideas on the matter, see the excellent intellectual portrait of the scholar by C. Landauer, J.L. Brierly and the Modernization of International Law, (1993) 25 Vanderbilt Journal of Transnational Law 881.
[73] N. Politis, Le Problème des Limitations de la Souveraineté et de la Théorie de l'Abus des Droits dans les Rapports Internationaux, (1925) 6 RCADI 1, at 5.
[74] O. Nippold, *The Development of International Law After the World War* (1923) 4, at 25, who sought future "reconstruction" of international law. For the project of the reconstruction of international law, *see also* Chapter 3, *infra*.
[75] Álvarez writes: "[W]e may conclude that there exists a movement for the reconstruction of International Law. And in view of the crisis through which International Law is now passing, it is the duty of all international associations to study this great problem of the reconstruction of the law of nations and to agree as to the best method of realizing it"; see Álvarez (New International Law), *supra* note 16, at 40.

was the Great War itself.[76] The atrocities offered the surface against which the new internationalist movement could be projected and they catalyzed the creation of a new internationalist sensibility: a 'wider', open-minded conception on which the new international law will be founded.[77]

The *Future of International Law* is an important essay not only because of its sensibility and timing, but also because it introduces the nuts-and-bolts of Seferiades' narrative of progress. First, and very importantly, Seferiades fervently argues the existence of a fundamental incompatibility between absolutist political ideology and the very existence of international law. International law, he pronounces in the speech, will never exist as long as states continue to suppress democratic development, either on the national or the international level.[78] *Secondly*, he stresses the need for the definition of a progressive agenda for reconstruction based on ideas of liberal democracy. The key to progress is the consolidation of an international community of democratic states.[79] *Finally*, Seferiades nominates public international lawyers as crucial agents for this change, both nationally and internationally.[80]

Let us take a closer look at this three-fold argument (critique of absolutism; international community of democratic states; the international lawyer as agent of change) and how, in particular, the three components are made to fit together into one coherent syllogism about progress in public international law. To do so we will perform a parallel reading of three crucial texts by Seferiades, all of which squarely address the question of the foundation and nature of public international law and the role of absolutism and democratic governance in this context. Aside from the *Future of International Public Law*, the same argument is elaborated in his other two major generalist texts, his textbook in Greek titled Μαθήματα Διεθνούς

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[76] See e.g. B. Schmitt & H. Vedeler, *The World in the Crucible 1914-1919* (1984), 455; Nippold (The Development of International Law After the World War), *supra* note 74, at 25; See generally also H. Barnes, *World Politics in Modern Civilization* (1930); and W. Langzam, *The World Since 1914* (1940). For a fascinating treatment of the international law's approach to the war and the birth of interwar institution, see D. Kennedy, The Move to Institutions, (1987) 8 Cardozo Law Review 841. See also the excellent account of the birth of "modern" international law in N. Berman, 'But the Alternative is Despair': Nationalism and the Modernist Renewal of International Law, (1993) 106 Harvard Law Review 1793.

[77] Alejandro Álvarez wrote that with the end of the war: "Almost overnight there came into being a new psychology, a new mentality, a new ideology, the fruit of new circumstances and environment, as well as of new political, philosophic and social concepts; they repudiate many ideas and doctrines which were until then accepted without question"; see Álvarez (New International Law), *supra* note 71, at 37. See also F.P. Walters, *A History of the League of Nations* (1952, Vol. I) 16.

[78] Seferiades (The Future of International Public Law), *supra* note 66, at 5-12.

[79] Seferiades (The Future of International Public Law), *supra* note 66, at 13-17.

[80] Seferiades (The Future of International Public Law), *supra* note 66, at 26.

Δημοσίου Δικαίου (*Courses on International Public Law*)[81] and his 1930 Hague Academy Courses on *Principes généraux du droit international de la paix*.[82] Mindful of their different audiences and contexts, the three texts adopt different tones and styles. The texts in Greek are engaged and polemical, taking sides not only in the international scholarly debate about international law but also in the Greek political scene of the time. The Hague Academy Course, in contrast, is more descriptive, avoiding unnecessary political puns in favor of a more poised, scholarly tone. All three texts, however, share a common narrative device: a historical account of progress of the human society, which enables the author to draw conclusions about the nature of international relations at large, and subsequently translate this knowledge into guidelines about the reconstruction of public international law.

All three texts reiterate one of the grand narratives of modernity: the nature of man.[83] In a burst of ontological statements and a style worthy of a 19th century treatise on socio-economic theory, Seferiades presents his account of human nature. Man is a social being, he declares.[84] He joins fellow men in forming communities, due to the realization that life within a community yields benefits to all. With Kant and Rousseau as his regular authorities, Seferiades assures the reader that each individual human being is endowed with special characteristics and comparative advantages that are indispensable for the well being of society at large. Society vests all men with equal rights, the exercise of which, however, often results to conflicts with rights of fellow men. There are two ways of resolving such conflicts, he argues. First, there is the solution that is frequently resorted to in the primitive stages of human development, namely the forcible enforcement of rights, or "the law of force", as he calls it.[85] Human nature, however, could never satisfy itself with such a violent state of being! It, therefore, soon devised a second way, according to our author: the concept of law, a set of rules based not on brutality but devised for the purpose of regulating the rights and obligations of the members of the community.[86] With the passage of time, individuals formed families, communities, tribes, nations, polities, in order to better protect themselves and their common interests. The writings

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[81] Seferiades (Courses on International Public Law), *supra* note 63.

[82] S. Seferiades, Principes généraux du droit international de la paix, (1930-IV) 34 RCADI 177, at 181-487.

[83] Seferiades (The Future of International Public Law), *supra* note 66, at 5 et seq.; Seferiades (Courses on International Public Law), supra note 63, at 7-15 & 47-107; Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 182-204 & 216-291.

[84] Seferiades (Courses on International Public Law), *supra* note 63, at 7-8; Seferiades (The Future of International Public Law), *supra* note 66, at 5-6; Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 182-4.

[85] Seferiades (Courses on International Public Law), *supra* note 63, at 7-8.

[86] Seferiades (Courses on International Public Law), *supra* note 63, at 8; Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 182-184.

of Adam Smith, David Ricardo and James Stuart Mill are the unmentioned but obvious sources of his understanding of the workings of the comparative advantage on a global scale and the contribution of international trade for increasing the wealth of nations. For, due to environmental, geographic, cultural, and other reasons, Seferiades contends that these social formations developed their own characteristics that could be helpful to the well being of the entire humankind. Similarly to the laboratory example of individuals operating in the scale of a small local community, states participating in the international community are endowed with equal rights and obligations.[87] The rules stipulating the extent of the rights and obligations of states comprise the object of study of the science of international law.[88] These rules can be ascertained in the workings of society by the contemporary lawyer through scientific observation, with the use of other social sciences that systematically study human behavior, such as history, political science, sociology, economics, and geography.[89]

> Rules defining rights and obligations for citizens in their relations with each other appear immediately after the emergence of such relations. But these rules are not always rules of law. For a rule of law to exist, there need be a society of natural or moral persons, feeling the need not for fighting each other but for some sort of peaceful co-existence. Such meaning has to be attributed to the saying of *ubi societas ubi jus*. Wherever we find a society, we also find law. And in order to be able to find International Public Law, we need to find ourselves before a society of nations, that is to say, before polities recognizing mutual rights, and most importantly, mutual obligations.[90]

Thus, Seferiades explains to us that the formation of an international community is not an easy matter. For it to exist, certain conditions need to be present. States must be prepared to realize the advantages of co-existence and, as a consequence, make concessions and undertake common responsibilities.[91] This presupposes a certain coincidence of views, values and principles among the different states participating in the international community.

> C'est qu'en vérité, l'existence et par suite l'application, des règles du droit international présupposent une certaine similitude de mœurs et des conceptions juridiques entres les peuples dont ce droit est appelé à régir les rapports.[92]

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[87] Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 182-184.
[88] Seferiades (Courses on International Public Law), *supra* note 63, at 9; Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 183.
[89] Seferiades (Courses on International Public Law), *supra* note 63, at 30-33.
[90] Seferiades (The Future of International Public Law), *supra* note 66, at 5-66.
[91] Seferiades (Courses on International Public Law), *supra* note 63, at 8, 47 & 99.
[92] Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 211.

The history of mankind teaches us, he suggests, that institutions similar to contemporary international law have come to existence only whenever such a common conception of morality and similarity of social institutions existed, such as in Ancient Greece or Ancient China.[93] The period of the Roman Empire or the Middle Ages, on the contrary, was a period of terrible regression ("un formidable renversement"[94]) because of the absence of such a shared conception.

> The spirit of international law assumes an internationalist sensibility, that is to say a modesty of desire, voluntary limitation of ambition, favoring justice over interest. Most importantly, it must be guided by the fair and clear vision of the common interest of states. Without such a spirit there can be no perception of international law.[95]

So, this is why international law took so many centuries to develop, he observes. International law "presupposes a superior civilization".[96] Until the beginning of the 20th century, there were practical reasons, such as the lack of technological advances in communication, which prevented the development of this sensibility.[97] There was, however, an additional "psychological" reason. Until recently, there was no common feeling of equality between states and, most crucially, the "maturity" to realize the need to foster such equality. With the exception of the enunciation of these principles in the French revolution and small brave steps taken here and there, international politics were governed by a Hobbesian perception of the world, where power and self-interest reigned paramount. In direct analogy to human societies, the closer the ties connecting two or more groups or individuals, the more similar were conceptions of ethics and social structures they would need in order that their bonds lasted.[98] Not any kind of common political institutions or morality fosters the creation of community and rules of law.[99] Here Seferiades shakes hands with many of his contemporaries in postulating the ideal of an international community based on a Euro-centric idea of civilization.[100] He explains that for an international community to

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[93] Seferiades (The Future of International Public Law), *supra* note 66, at 6.
[94] Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 234.
[95] Seferiades (Courses on International Public Law), *supra* note 63, at 15.
[96] Seferiades (Courses on International Public Law), *supra* note 63, at 10.
[97] Seferiades (Courses on International Public Law), *supra* note 63, at 10.
[98] Seferiades (The Future of International Public Law), *supra* note 66, at 14.
[99] Seferiades (The Future of International Public Law), *supra* note 66, at 6-12.
[100] See e.g. H. Wheaton, *Elements of International Law*, (1936) 15-16, at para. 1; L. Oppenheim, *International Law: A Treatise*, (1920, Vol. I) 8-10, at para. 7. See generally N. Tsagourias, The Will of the International Community as a Normative Source of International Law, in I.F. Dekker & W.G. Werner (eds.), *Governance and International Legal Theory*, (2004) 97-113; G. Abi-Saab, La "communauté internationale" saisie par le droit. Essai de radioscopie juridique, in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber* 81 (1998).

exist, it logically flows that nations need to share basically three elements: analogous moral principles, analogous political institutions, and a shared internationalist spirit. Without these three, disagreements between states would be of such nature that the system would break down.[101]

> Between 1648 and the end of the 19th century, the blood-stained armies of Europe and their diplomatic contests only seek to secure crowns and thrones. To be sure, the contests of that time for political equilibrium in Europe have nothing to do with *the open-minded and splendid conception of the public international law of morality which we espouse this very day*.[102]

With the passage of time, and culminating with The Hague Peace Conferences and the Treaty of Versailles, man managed to develop the 'splendid and open-minded conception' needed for the reconstruction of international law. Oscillating between descriptive and prescriptive language in the text, Seferiades suggests that this conception consists of three tenets/conditions, 'not different from those any human society relies upon'.[103] First, there is the principle of interdependence. Bonds of interdependence, without which the existence of an international community is impossible, connect polities around the world. Interdependence has to be realized and sustained through the development of legal principles and doctrines. Then there is the principle of compulsory settlement of international disputes on the basis of justice, which is a natural corollary of the principle of interdependence.[104] And finally, the principle of "homogeneous domestic structure", without which it will be impossible for nations to comprehend the possibility of interdependence.

> Especially in recent times, all those who have studied seriously the means by which an international community governed by rules of law would be possible, teach without reservation that a viable establishment of such a community will not be possible unless it comprises *democratic* states […], regardless of whether they are presided by Kings or ordinary citizens. Because indeed public law, domestic or international, and *total absolutism* are mutually exclusive concepts, concepts with impossible temporal co-existence.[105]

Seferiades avoids too frequent a use of the terms 'democracy' or 'democratic'. The terms are used in various passages as adjectives alluding

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[101] Seferiades (The Future of International Public Law), *supra* note 66, at 7; Seferiades (Courses on International Public Law), *supra* note 63, at 33.
[102] Seferiades (The Future of International Public Law), *supra* note 66, at 7 (emphasis added).
[103] Seferiades (The Future of International Public Law), *supra* note 66, at 9.
[104] Seferiades (The Future of International Public Law), *supra* note 66, at 11 et seq.
[105] Seferiades (The Future of International Public Law), *supra* note 66, at 15 (emphasis added).

rather abstractly to a representational system of governance inspired by Enlightenment ideas and in opposition to absolutism, but not to a clearly defined model of democratic polity.[106] This is hardly surprising: Seferiades, like his audience, is a jurist writing during the interwar period and not a political philosopher of the 21st century. International law writing traditionally did not concern itself directly with term democracy, a situation that has been reversed only recently.[107] In addition, and as Section 2.3 of this Chapter later demonstrates,[108] the fluid political scene in Greece at the time did not permit public commitment to a strictly defined system of governance, especially with regard to the sensitive matter of the future role of the Palace.[109] Seferiades, however, does sketch out with a broad brush a system of governance, which he openly calls democratic, and without which internationalism and international law appears to be impossible. With Rousseau and Kant as his authorities,[110] his system possesses many of the classical characteristics of liberal democracy: division of powers, rule of law, legislature elected by the population, representative government, a compulsory system of adjudication, liberty, equality – but also the realization that individuals must accept rights and obligations common to all.

> The more common the characteristics of domestic law that connect two peoples, the more lasting their international law bonds will be, based as they are on a firmer ground. States governed by absolutist rules of domestic public law find it difficult to accept being subjected to international rules, the same rules that would be accepted by polities governed constitutionally. History in its entirety teaches us the correctness of this perception.[111]

Seferiades remarks that in order to be governed by truly representative institutions, states need to have "settled" pending self-determination questions on their territory, so that the governments of these states truly represent their populations: in all cases where international associations have been successful, Seferiades asserts, people "of the same race" have populated states.[112] One can read here the echo of his concern about the Greek populations of Turkey. But his examples in the text are Alsace and Lorraine. It would not be possible for any association of human beings to be successful, he claims, if important matters remain pending and if the existence of

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[106] Seferiades (The Future of International Public Law), *supra* note 66, at 8, & 14-15.
[107] On this point see S. Marks, International Law, Democracy, and the End of History, in Fox & Roth (eds,), *supra* note 67, at 532-566.
[108] See Section 2.3, *infra*.
[109] See Section 2.3, *infra*, for a discussion on this point.
[110] Seferiades (The Future of International Public Law), *supra* note 66, at 14-15.
[111] Seferiades (Courses on International Public Law), *supra* note 63, at 33.
[112] Seferiades (The Future of International Public Law), *supra* note 66, at 14 & 16-17.

good faith between them is questioned.[113] Finally, states to accept the principle of compulsory resolution of international disputes on the basis of rules of law.[114]

In the antipodes of this "open minded and splendid conception" of international law, Seferiades postulates an opposite sensibility, which could be historically traced to the Middle Ages and the early origins of international law. The Treaties of Westphalia and Utrecht, he claims, were not treaties concerned with the interests of nations, but rather deals securing the interests of emperors and kings. They were "des règlements interroyaux", as he calls them, using a French neologism in the Greek text:

> The Treaties of Westphalia and Utrecht, which brought together to a peaceful negotiation after long-lasting wars the representatives of the powerful polities of Europe, are considered by public law jurists as the landmarks that laid progressively the foundations of later public international law. Unfortunately these foundations, at least for the most part, have nothing to do with law. They are not arrangements dealing with the interests of nations but arrangements between emperors and kings. They are, if you would permit me to create a new expression, inter-royal arrangements (des règlements interroyaux).[115]

Similarly to the use of term democracy, Seferiades does not make frequent use of the term absolutism. Again, one could assume many historical reasons for this choice, some related to the Greek political situation of the time. Recent appraisals in political theory deny the term absolutism any determinacy or even any historical accuracy.[116] Misleadingly or not, in mainstream political theory, absolutism is normally associated with the type of government of *Ancien Régime* states (especially France, Russia, Spain, and Prussia) and connotes, in its more colloquial sense, a despotic, dynastic form of governance that encroaches on subjects' rights and privileges.[117] Absolutism is autocratic. It describes a system in which the only legitimate source of power is the monarch, or agencies dependent solely on the monarch, and where consultation is shunned in favor of a centralized decision-making process, eschewing the vestiges of a representative form of

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[113] Seferiades (The Future of International Public Law), *supra* note 66, at 14.
[114] Seferiades (The Future of International Public Law), *supra* note 66, at 9 & 23.
[115] Seferiades (The Future of International Public Law), *supra* note 66, at 6.
[116] See e.g. N. Henshall, The Myth of Absolutism: Change and Continuity in Early Modern European Monarchy (1992), at 1-6 and 199-214. Henshall argues that standard descriptions of absolutism are misleading on account of a very myopic understanding of the role of consultation and delegation of powers in their system of governance and the nature of their economic policies and objectives.
[117] See e.g. M. Beloff, *The Age of Absolutism* (1954), esp. at 11-27.

government. Seferiades appears to be using the term abstractly, in this general meaning of non-democratic, autocratic governance, both nationally and internationally: on the one hand, the idea of the absolute power of the state in international law (e.g. unlimited exercise of sovereignty, self-limitation, etc.); on the other, absolutism as a political concept of non--representative domestic governance. It is hard to tell whether Seferiades was aware of the historical reappraisals of absolutism that entered the debate of political theory in his time. It is clear, however, that the image of a coherent philosophy of autocratic governance with roots in the monarchic past of Europe was perfectly suited to his argument and was very well in line with mainstream accounts of history of the time.[118] In his international law writings Seferiades carefully sketches out a political sensibility constant in European history since the Middle Ages, privileging the interests of the monarch or hegemon over those of the people; and those of the sovereign state over the international community of states. The Hague Peace Conferences of 1899 and 1907, for example, crucial as they were for the consolidation of basic principles of law and the concept of the international community, would have been so much more successful, he claims, had it not been for the resistance of regimes such as that of Germany, refusing to accept the principles of disarmament and compulsory arbitration of disputes.[119] International law was confronted with this sensibility not only in 1648 but also throughout its history, from the ancient times until the present, and he mentions many examples. The 1814 Congress of Vienna, for example, when the plenipotentiaries of the Great Powers decided to divide the continent "purely in order to ensure the balance of power", instead of the prevalence of the rules of justice. The outcome of the Congress of Vienna "had nothing to do with the interests of nations: dynastic interests governed the division of lands".[120] The establishment of the *Sainte Alliance* in Paris one year later had the same objectives: the creation of an alliance of hegemonic rulers for the sole purpose of suppressing any popular revolutionary movement capable of challenging the decisions of the Congress of Vienna.[61] The long historical narrative that follows includes numerous events recounted in the same light, from the Greek revolution in 1821 to the Greek-Turkish war of 1897.[121]

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[118] Whatever it meant to be a liberal or even a republican in modern Europe, it meant repudiating the age-old belief that monarchy is the best form of government. This often necessitated the re-writing of history, with the accusation of "absolutism" associated with practices of European monarchy. For an excellent collection of essays on this topic, see M. van Gelderen & Q. Skinner (eds.), *Republicanism: A Shared European Heritage* (2002), esp. Vol. 1, Part I, at 1 and 9-84.

[119] Seferiades (Courses on International Public Law), *supra* note 63, at 88 et seq; Seferiades (The Future of International Public Law), *supra* note 66, at 10.

[120] Seferiades (Courses on International Public Law), *supra* note 63, at 63.

[121] Seferiades (Courses on International Public Law), *supra* note 63, at 55-102.

> What comes out of these Congresses is not a community but rather an association of Great Powers, or rather of their hegemons, aiming at the limitation of any democratic activity, without which the existence of an international community, and of public international law, is impossible.[122]

The Treaty of Versailles is the first true example of a new conception that manages to reverse the tides of resistance to internationalism.

> Par ailleurs, l'idée que la société interétatique, pour pouvoir être régie par des règles de droit communes, doit être compose d'Etats ayant de mœurs politiques analogue et une conception similaire de la morale, se rencontre plus accentuée encore dans les textes adoptes par la commission française qui, le 8 juin 1918, présenta les principes sur lesquels pourrait être constituée la Société des Nations. D'après ces principes, en effet, dans le sein de la Société des Nations a établir, ne devaient pouvoir être admises que "les Nations constituées en Etats et *pourvues s'institutions représentatives*".[123]

So, what is the future of international law against this historical narrative absolutism v democracy? And how will his vision of a liberal international law be attained? The Treaty of Versailles and the establishment of the League are, for Seferiades, the "centuries-long awaited cornerstone of the future progress of international law".[124] He is quick to caution his readers not to expect too much for now: they should not imagine the 1919 Paris Conference as able to instantly overpower the preexisting regime.[125] For the future of international law to be peaceful, hard work and substantial reform would be needed. In the closing section of the *Future of International Public Law* Seferiades answers the question of the outlook for the discipline by pointing to his audience.[126] It is ultimately the duty of public international lawyers to educate the general public, and especially the youth, and to do everything within their means to disseminate the new internationalist spirit that endorses the idea of a community of democratic states.

On the doctrinal level, Seferiades sees a number of principles, already articulated in the Covenant of the League of Nations, that require further elaboration and development:[127] the principle of compulsory adjudication of international disputes before international arbitral or judicial institutions; the "forcible imposition of the principles of law" through a

[122] Seferiades (The Future of International Public Law), *supra* note 66, at 8.
[123] Seferiades (Principes généraux du droit international de la paix), *supra* note 82, at 222-223.
[124] Seferiades (The Future of International Public Law), *supra* note 66, at 18.
[125] Seferiades (The Future of International Public Law), *supra* note 66, at 19.
[126] Seferiades (The Future of International Public Law), *supra* note 66, at 22 et seq.
[127] Seferiades (The Future of International Public Law), *supra* note 66, at 22-3.

system of collective forcible action against outlaw states; the abolition of what he describes as the "immoral" principle of neutrality. Finally, albeit less importantly, one needs to add the careful codification of new doctrines and principles of public international law. The creation of professional associations, such as the American Society of International Law and the *Institut de Droit International*, is crucial for the purpose.[128] The future of international public law, he emotionally proclaims at the end of his lecture, ultimately depends on the extent to which internationalist spirit will become disseminated and accepted widely, by society and political institutions alike. It is especially up to the youth, students of international law and others alike, to protect the rights and obligations of their country, not on the basis of "empty phrases" but on the basis of international law.[129]

2.3. The Function of the Vocabulary of Progress in the Argument

This otherwise inconspicuous historical narrative in the argument of Seferiades about the nature of man and the contest between absolutism and democracy performs an extremely crucial function. To begin with, the narrative is presented as 'speaking itself'. The world begins in a primitive state of being, where life was nasty, brutish and short. Guided by Reason and, later, the spirit of Enlightenment thought, slow and arduous progress has yielded the advances of civilization. International law, and especially the post-1919 "new international law", is the crown jewel of this advancement. In engaging history and the grand narrative of the Enlightenment in such a manner, Seferiades situates international law at the apex of the long process of maturity of human perception of society.

In a strange way, however, such lessons from history do precisely the opposite to what they claim: they *de-historicize* his account of the nature of international law, which is made to appear natural, universal and unequivocal. In this self-referential way, the account of the nature of international law *becomes* the nature of international law. Seferiades assumes that which requires demonstration and presents history in terms of a stark opposition between absolutism and democracy, in which polar opposites appear as the only options. The result is an argumentative vicious circle. This process, as Terry Eagleton has described it, "involves a specific ideology creating as tight a fit as possible between itself and social reality, thereby closing the gap into which the leverage of the critique could be inserted".[130] Social reality is redefined by ideology to become co-extensive with itself, in

[128] Seferiades (The Future of International Public Law), *supra* note 66, at 26.
[129] Seferiades (The Future of International Public Law), *supra* note 66, at 27.
[130] T. Eagleton, *Ideology – An Introduction* (1991) 58.

a way that occludes the possibility that ideology may have constructed the reality by the use of narrative account. Along these lines, Seferiades' historical account performs a number of important functions in his international law argument.

First, the concepts of democracy and absolutism are 'naturalized'.[131] Instead of being described as historically and culturally specific ideological projects, they are dehistoricized and de-politicized: they appear as forces of nature which somehow simply exist, as traits of humanity, like the propensities to drink, to eat, to maximize our individual interest, and so on. Scholars of ideology critique have identified this discursive strategy as 'naturalization', "whereby existing social arrangements come to seem as obvious and self-evident, as if they were natural phenomena belonging to a world 'out there'".[132] Along with other grand narratives about the eternal struggles between passion and reason, evil and good, now we have yet another one: absolutism and democracy.

Along with the naturalization of these concepts as formal categories, on a more concrete level comes the naturalization of their content and meaning. If the concepts are no longer trenches of ideological contestation but real and tangible elements of the human habitat, their meaning can somehow be found in the social nature of man. The terms acquire an essence that is not a product of the discursive framework in which they are employed but is somehow eternal, and delightfully unequivocal. The essentialization of the term not only removes from view the problem of linguistic indeterminacy, but it occludes the character and significance of heterogeneity – the complexity of social processes in which such concepts have thrived and constituted the banners of ideological opposition. Absolutism thus becomes a concrete, coherent mode of governance, despite the substantial differences that may have distinguished British, Prussian and Greek monarchies from each other. Likewise democracy is presented as a coherent global standard without internal ruptures or discontinuities. In this story Pericles, Kant and Wilson can be pictured as having advocated the same thing. As Eagleton caustically puts it, with such accounts of history "[o]ne just has to accept that twelfth-century French peasants were capitalists in heavy disguise, or that the Sioux have always secretly wanted to be stock-brokers".[133]

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[131] The terms "naturalization" and "dissimulation" used in the next few paragraphs are borrowed and adapted from the partly over-lapping discussions of "ideological modes and strategies" that can be found in Eagleton, *supra* note 130; Marks (Riddel of All Constitutions), *supra* note 37, at 18-25; J.B. Thomson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communications* (1990); and S. Žižek, Introduction: The Spectre of Ideology, *in* S. Žižek (ed.), *Mapping Ideology* (1994) 1.

[132] Marks (International Law, Democracy, and the End of History), *supra* note 107, at 22. See also Eagleton (Ideology), *supra* note 130, at 58-61.

[133] Eagleton (Ideology), *supra* note 130, at 59.

Now, if the true meaning of the terms can be derived normatively, this allows them to be used in a fairly self-evident way. It reduces the necessity to explain in detail the assumptions behind one's political agenda or to subject them to scrutiny. If my political agenda is derived from the concept of democracy, and if democracy stands on the side of progress, then my agenda is progressive. The logical error here is obvious. Most importantly, for my international law project, it would be enough for me to claim or prove that I contribute to democracy in order to gain legitimacy, without really having to enter into investigations of the notion of democracy (what does it really mean? what are its limits?) or the potentially adverse (even 'un-democratic') consequences of my project.

Together with democracy and absolutism a whole set of derivative terms are essentialized, acquiring their meaning in a descending manner from the normative concept: justice, nation, good nationalism v. bad nationalism, people, rights, liberties, rule of law, and so on. The naturalization of the terms also brings about a new field of expertise: the knowledge of how to extract a project of international governance out of the social nature of man. This is the field of expertise that Seferiades carves out for himself and the new international law jurists of the interwar period. The liberal intellectuals are the repositories of the new knowledge, managing authoritatively its content, its political vocabulary and its agenda, under the rubric of the new international law. Here Seferiades assumes one of the fundamental postures of 'sociological jurisprudence' of the interwar period: Law is the product of society, and in order to be able to improve this law one has to scientifically study the workings of society to derive the norms that should govern it.

Second, this naturalization formalizes the relationship between absolutism and democracy into a fixed opposition. It postulates that the dichotomy of the two is a stable one, or at least relatively stable, to the extent that one can ask what is the role of the one versus the other in history. The two opposites cannot be flipped. Metternich is an absolutist dictator, but Her Majesty's colonial administrations have served the purpose of civilizing the colonial subjects. The 1917 policy of the government of Venizelos to lay off thousands of civil servants loyal to monarchy is undoubtedly to the service of democracy and progress, whereas a similar policy regarding civil servants of liberal political persuasions by royalist governments a few years later is described as a terrible absolutist measure.[134] The concepts themselves acquire meaning through their opposition. Absolutism *is* the Other of Democracy. This is a totalizing teleology. The history of the world can be recounted through this polarizing prism, where there is no room for

[134] W. Edgar, The 1917 Cleansings: Their Importance for the Reformist Agenda of Eleftherios Venizelos (in Greek), in O. Dimitrakopoulos & T. Veremis (eds.), *Μελετήματα Γύρω απο τον Βενιζέλο και την Εποχή του* (Studies on Venizelos and his Era, in Greek) (1980) 519-50.

alternative explanations. The Treaty of Westphalia was a legal instrument exemplifying the absolutist sensibility; the Hague Peace Conferences were an ambivalent fight, narrowly won by the forces of progress; and the Paris Treaty, redefining the borders of Europe, constitutes the capstone of progress in international law so far; the 'old' international law stands for regression; the 'new' international law stands for progress; being a monist is a part of the open-minded and splendid conception of the world, regardless of the international norms that you may admit in your national legal order; being dualist means that you support an absolute conception of sovereignty and you are thus an absolutist; and so on.

Along these lines, international law's victories and defeats can be recounted rather tautologically, in much the same way as the Manichean struggle. The mystified binary opposition becomes the interpretative device to understand almost any social or political decision. This hides terrible interpretative pitfalls. For one thing, the manifestations of a phenomenon can be mistaken for its causes. Thus, the eruption of the Great War is explained as the product of the resistance of absolutist governments to democratic internationalism. Surely, historical analysis does support the argument that some absolutist regimes did undermine specific efforts in international organization. Identifying absolutism, however, as the main agent for these events is a slightly different matter. As demonstrated above, Seferiades in his writings mystifies the role of absolutist 'resistance': he vests it with mythical proportions and specific cultural and political traits. Resistance becomes a recurrent interpretative device in order to explain failures of the past and of the present – and to legitimate one's political agenda.

This is the moment in the argument of Seferiades when his commitment shifts radically: from a commitment to the humanist agenda of democracy to the formalized interpretative device of absolutism versus democracy, a lens through which interpretations are made, judgments are passed, and agendas are legitimated. Resistance averts our attention from the incoherence or the lack of genuine transformative potential in interwar liberal argument itself.

Third, the naturalized, formalized opposition masks relationships of domination produced by the liberal project itself. Scholars of ideology critique describe this function as 'dissimulation', whereby "relations of domination are masked, obscured, or denied".[135] The transfer of attributes belonging to the one side can be displaced (transferred) to the other. Democracy is depicted as the force of Good, without considering the possibility of itself creating injustice in the name of progress. The 1928 law passed by the government of Venizelos penalizing with imprisonment 'communist beliefs' is undoubtedly to the service of democracy and

[135] Marks (International Law, Democracy, and the End of History), *supra* note 107, at 20.

progress.[136] This is part of the "open-minded and splendid" conception of the new international law that Seferiades has in mind which, one supposes, can be found also in the mandate system of the League and its infamous Article 22, which placed a sacred trust for the administration of former colonies in 'civilized states'. The same splendid conception of international law envisages wars liberating "unredeemed" fellow nationals abroad, with a view to "settling" self-determination questions in third states. Dissimulation is the effect of obscuring relations of domination created by the advocacy of the democratic agenda, with measures such as the above, leaving no doubt about the compatibility of the project with progress. Finally, dissimulation also resituates the causes of the failure of the internationalist project outside the project itself. Since the democratic project stands on the side of progress, regression has to be attributed not to the project itself but to external factors that have resisted or undermined it.

The naturalizing, dichotomizing, and dissimulating effects of the narrative of progress of Seferiades are not 'shortcomings' or 'errors' in the writings of Seferiades. It is contended here that every historical account, to some extent, inevitably naturalizes something and privileges and occludes something else. These points are made here in order to demonstrate how such argumentative strategies perform deeply ideological functions in legal argument and present claims as unproblematic. The reader of Seferiades, for example, having read only the historical account of the opening 50 pages of his textbook, is already assured that the "new international law" of the interwar period is progressive compared with the past. The reader is already convinced that the science of international law had to combat absolutism at every turn of its history and has helped bring peace to the world through its progressive democratization. The League of Nations and the teachings of public international lawyers *are* the contemporary agents of the uninterrupted flow of the dissemination of humanist ideals. The legal argument to follow, as long as it can be explained on the basis of the basic principle, is also situated on the side of progress.

But one could also argue that these very argumentative strategies that produce the feeling of forward movement are also the veil that prevents the reader from understanding the inadequacies and shortcoming of the liberal project itself. The liberal international law project becomes co-extensive with progress, without internal ruptures or shortcomings. The legal

[136] This is the infamous Law 4229/1929, which has stayed in history under the nickname "Ιδιώνυμον". On the topic of Law 4229/1929, see G. Katiforis, *Η Νομοθεσία των Βαρβάρων* (The Legislation of the Barbarians, in Greek) 64-76 (1975). See also N. Alivizatos, *Οι Πολιτικοί Θεσμοί σε Κρίση 1922-1974: Όψεις της Ελληνικής Εμπειρίας* (Political Institutions in Crisis 1922-1974: Aspects of the Greek Experience, in Greek) (1982).

argument is no longer acting in the service of the ideal of democracy but in defending the coherence of a system, in which democracy versus absolutism can remain the central, interpretative device.

In a tragic twist of fate, the same narrative that 'speaks itself' brings Stelios Seferiades dangerously close to his ideological opponents. A few years later, and for the protection of the liberal project, Seferiades goes as far as advocating the censorship and punishment of individuals advocating ideas subversive to the liberal project. For Seferiades, there is no conflict between the "splendid and open-minded conception of law" that he advocated earlier and his suggestion for an International Press Court which would take journalists disseminating "false news" to trial. In 1934 Seferiades inaugurated the new academic year as Rector of Athens University and delivered another fervent speech on the topic of *The Moral Armament*.[137] The speech reverberates with the passion and zeal of the newly appointed Professor of International Law who, 15 years earlier, inspired his students on the topic of the 'Future of International Public Law'. In 1934, however, Seferiades is anxious and no longer optimistic. The interwar reform has failed to yield a peaceful international community of states. Hitler's ascent to power, the progressive demise of the League of Nations, the election of yet another royalist government in Greece, and the ensuing marginalization of liberal intellectuals are his primary concerns. Seferiades asks his students to "arm" themselves with morality in order to stand against the "hatred" and "moral decay" that absolutist practices have brought about.[138] Moral armament is the last remaining trench of resistance when states (such as Germany) or state institutions (such as the Greek pro-monarchic government) engage in absolutist practices, and when international institutions cannot manage to achieve the limitation of the absolute power of sovereign states. As a consequence, Seferiades proposes the "modernization" of the social sciences and the education of the public through the teaching of "objective history" and objective knowledge; that is to say, history and knowledge purified from the morals of absolutism.[139] He suggests that the objectivity of knowledge is controlled by international institutions and is disseminated through the school system and mass media. He proposes three concrete plans of action in order to cultivate "moral armament". First, reform of the criminal codes of all nations, criminalizing 'subversive action' that threatens international peace and security, committed either by individuals or groups of people.[140] Second, the creation of an International Press Agency which will censor and prevent the release of news misrepresenting reality for the purpose of destabilizing peace between nations.[141] This Agency should

[137] Seferiades (Moral Armament), *supra* note 65.
[138] Seferiades (Moral Armament), *supra* note 65, at 3-4, 9 & 21.
[139] Seferiades (Moral Armament), *supra* note 65, at 5.
[140] Seferiades (Moral Armament), *supra* note 65, at 13 & 16-17.
[141] Seferiades (Moral Armament), *supra* note 65, at 14 & 18-19.

retain the right to put to trial journalists engaged in such subversive behavior. Third, the education of youth and the general public on the basis of "objective" history which, once more, will be safe-guarded by international institutions.[142]

The purchase of the narrative of absolutism v democracy as an interpretative device for Seferiades becomes even more apparent when situated in the historical, political, and personal setting of the life of our hero. The following paragraphs digress to the life of Seferiades and sketch out an uncanny correspondence between his international law writings and life trajectory.

2.4. A Vocabulary Situated

Intellectual ruminations of liberal scholars in interwar Greece must be read in the context of the political project of "bourgeois modernization" ("αστικός εκσυγχρονισμός"), launched by Prime-Minister Eleftherios Venizelos in 1910 and pursued until the 1936 dictatorship and the final withdrawal of Venizelos from active politics.[143] The immense literature surrounding the personality of Venizelos bears testament to the momentous influence that the legacy of his era continues to exercise over contemporary Greek political consciousness.[144] In Greek history "Venizelism" represents the most ambitious, dynamic, and comprehensive attempt for the modernization of the country and the one that got the closest to achieving its declared objectives.[145] It marked some of the nation's most celebrated successes, such as the consolidation of its borders in their current form, and some of its most lamented disasters, such as the 1922 destruction of Smyrna (Izmir).[146] Its power emanated from an unprecedented (at least in Greek political reality)

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[142] Seferiades (Moral Armament), *supra* note 65, at 14 & 19-25.

[143] For the project of bourgeois modernization see e.g. G. Mavrogordatos, *Stillborn Republic: Social Coalitions and Party Strategies in Greece, 1922-1936* (1983); G. Mavrogordatos & C. Hatziiosif (eds.), *Βενιζελισμός και Αστικός Εκσυγχρονισμός* (Venizelism and Bourgeois Modernization, in Greek) (1988); O. Dimitrakopoulos & T. Veremis (eds.), *Μελετήματα Γύρω απο τον Βενιζέλο και τιν Εποχή του* (Studies on Venizelos and his Era, in Greek) (1980).

[144] For an interesting interwar appraisal of the statesmanship of Venizelos, see V.J. Seligman, *The Victory of Venizelos: A Study of Greek Politics 1910-1918* (1920), esp. at 171-185.

[145] For an appraisal along those lines see G. Mavrogordatos, Venizelism and Bourgeois Modernization, in Mavrogordatos & Hatziiosif, *Venizelism and Bourgeois Modernization*, *supra* note 143, at 9.

[146] For a concise account of Greek interwar history, see R. Clogg, *Concise History of Greece* 46-141 (2002); and T. Vournas, *Ιστορία της Νεώτερης και Σύγχρονης Ελλαδας*, Volume B: 1909-1940 (History of Later and Modern Greece, in Greek), (1977). For the destruction of Smyrna and the Minor Asia campaign, see A.A. Pallis, *Greece's Anatolian Venture - And After: A Survey of the Diplomatic and Political Aspects of the Greek Expedition to Asia Minor (1915-1922)* (1937); M. Housepian Dobkin, *Smyrna 1922: The Destruction of a City* (1971).

combination of nationalism and modernization in organic partnership. Bourgeois modernization was a political-ideological project aimed at transforming Greece into a modern, Western state. It aspired to effect changes on a variety of levels, from the economy to language, education, law, administration, architecture, urban planning, social welfare, defense, and so on. In that sense, it shared a lot with similar projects of nationalist modernization elsewhere, from Turkey to Africa, Latin America, and Asia.[147]

Bourgeois modernization operated on two broad, interdependent levels. First, a nationalist one, aimed at uniting the population under a new national identity. Venizelism sought the symbols necessary to forge nationhood on a new basis and found them in the idea of "national fulfillment" ("εθνική ολοκλήρωση"), a set of irredentist ambitions concerning the liberation of "un-redeemed" ("αλύτρωτοι") Greeks beyond the borders of the Greek state of the time, predominantly under Ottoman (later Turkish) domination, and possessing strong historical, ethnic, and other ties with mainland Greeks.[148] The re-uniting of Greeks on both sides of the Aegean Sea was a desire that resonated vibrantly across the Greek political and social spectrum and thus quickly became a central policy for Venizelos.

Second, there was a modernizing level as well. The project sought to reorganize society across Western, liberal lines, espousing secularism, pragmatism, economic efficiency, rational development, industrialization, and so on. It signified the transition from the pre-capitalist 19th-century economy, which was primarily based on agriculture, an inflated state apparatus, and state interventionism, to a capitalist, industrialized model of production, with all its social and cultural consequences. It necessitated linguistic reform; secularization of education; sanitization of public administration; interventionist urban planning to accommodate mass flows of factory workers; and, of course, a flexible political system to absorb the turbulence of the transition. In political terms, this meant the difficult task of reassessing the role of monarchy, which was, in more than one ways, associated with the pre-capitalist system. This in fact meant advocating the transition to a new constitutional model, monarchic or republican. It is in this context of political survival against monarchic institutions that the notion of absolutism as a social and political force resisting progress started having purchase for liberal intellectuals.

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[147] See e.g. J.M. Landau (ed.), *Atatűrk and the Modernization of Turkey* (1984). For mainstream accounts on the relationship between modernization and nationalism, see E. Hobsbawm, *Nations and Nationalism since 1780: Program, Myth, Reality (Canto)* (1992); A.D. Smith, *Nationalism and Modernism, A Critical Survey of Recent Theories of Nations and Nationalism* (1998).

[148] For a chronicle of the changes in the Greek borderline, see the informative account of D. Dakin, *The Unification of Greece 1770-1923* (1972).

From its beginning in 1910, bourgeois modernization in Greece placed itself in the service of "national fulfillment". In return, "national fulfillment" served modernization to its very end, offering indispensable political legitimacy for the project and a wide social basis.[149] The political power of Venizelos stemmed from an uncanny multi-party alliance, spearheaded by bourgeois entrepreneurs, and powered by the emerging labor class and a landless rural population, craving for social and political rights, the welfare state, and the redistribution of land.[150] Bourgeois modernization in Greece, not unlike other similar movements, was a flexible amalgam of secularism, realism, empirical rationalism, and nationalism. Key to its success was the ability to regularly shift between various objectives and components in order to forge temporary political alliances and guarantee stability. Paramount was its ability to reject for itself the denomination of an Ideology in uppercase (like 'Marxism' or 'Communism') but, rather, to present itself as a political program focusing on pragmatic, tangible political objectives, governed by the over-arching goals of national fulfillment and modernization, as values that were 'good for everyone'. The strong link between modernization and nationalism is key to understanding both the momentum and the incoherence of the project. The combination of the two often led to brave progressivism in legislation and social reform (rights of women, labor unions, a system of free public education, urban planning, social welfare), which earned Venizelos and his governments the support of liberal intellectuals and a rapidly growing labor class. Other times, it led to measures restricting fundamental rights and fostering nation building, which earned Venizelos the occasional support of the capital and the Palace. In spite (or, because, one should say) of such contradictory strategies Venizelism, as a political/ideological movement, developed a clear sensibility, style, and morals, which were liberal par excellence.[151] They included optimism, pragmatism, faith in education, and the usual strategies of rationalist planning, reconstruction, and piece-meal social engineering.

The most interesting example, at least for the purposes of this essay, of the opportunistic oscillation between conflicting positions, is the relationship between liberalism and the institution of monarchy. Although republicanism, democratization, and constitutionalism were at the heart of its

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[149] Mavrogordatos (Venizelism and Bourgeois Modernization), *supra* note 143, at 11.

[150] On the origins of the problem of land ownership and redistribution, see W.W. MacGrew, *Land and Revolution in Modern Greece, 1800-1881: The Transition in the Tenure and Exploitation of Land from Ottoman Rule to Independence* (1985).

[151] See A. Ioannidis, Ο αισθητικός λόγος στο μεσοπόλεμο ή η αναζήτηση της χαμένης ολότητας (Aesthetic Discourse in the Interwar or the Quest for the Lost Wholeness, in Greek), in Mavrogordatos & Hatziiosif (Venizelism and Bourgeois Modernization), *supra* note 143, at 369.

political agenda, Venizelism was not necessarily, and not at all times, opposed to a system of constitutional monarchy. Recent assessments conclude that Venizelos and his governments considered Greece to be "unready" to become a Republic and that the King could perform useful stabilizing functions, at least as long as his behavior did not counter the project of bourgeois modernization.[152] Venizelos himself indulged on more than one occasions in extreme and unconstitutional political measures that he usually associated with his counterparts.[153] On two occasions (1909 and 1916-1917) he assumed power by means of an armed coup and attempted another coup to "restore democracy" in 1935.[154] In early 1917 thousands of royalist civil servants were made redundant in a systematic effort of the government to "cleanse" the state apparatus from anti-liberal elements.[155] In 1929 Venizelos fielded an infamous law penalizing heavily the propaganda of communist beliefs.[156] At the same time both the Palace and the King were depicted as agents of absolutism. In 1932, with the prospect of losing the forthcoming parliamentary election looming in the horizon, Venizelos used the accusations of absolutism and "not accepting the democratic system of governance" as one of the main campaign slogans against his royalist counterparts.[157] The Palace stood in the consciousness of interwar liberals as the political establishment that defended pre-modern, pre-capitalist political and social structures. It also stood for foreign interventionism, due to the foreign family-line of King Constantine and the open sympathy of the latter towards the Central Empires at the beginning of the Great War. Venizelos called the King "a tool of our enemy, of our chief enemy the German" and an agent of autocracy and absolutism in Greece.[158] Venizelos is responsible for Greece joining World War I on the side of the *Entente*, a decision that brought significant territorial gains to Greece in the region and renewed hopes for the creation of a "Greater Greece", including the "unredeemed" populations of Minor Asia. The Palace, on the contrary, insisted on a policy of neutrality during the war, which permitted accusations of allegiance to the Central Empires to appear convincing. Venizelos was cited in a newspaper of the time stating that "the gap which divides me and my friends, on the one

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[152] V. Papakosmas, Ο Βενιζέλος και το Ζήτημα του Αβασιλεύτου Δημοκρατικού Πολιτεύματος 1916-1902 (Venizelos and the Question of the Republic, 1916-1920, in Greek), in Dimitrakopoulos & Veremis, (Studies on Venizelos and his Era), *supra* note 143, 485-499, at 485.

[153] Papakosmas (Venizelos and the Question of the Republic), *supra* note 152, at 485-490.

[154] Vournas (History of Later and Modern Greece), *supra* note 146, at 368.

[155] W. Edgar, The 1917 Cleansings: Their Importance for the Reformist Agenda of Eleftherios Venizelos, *supra* note 134, at 519-550.

[156] Regarding Law 4229/1929, see *supra* note 136.

[157] See Vournas (History of Later and Modern Greece), *supra* note 146, at 348.

[158] E. Venizelos, *The Internal Situation in Greece and the Amnesty of Political Officers*, Speech of E. Venizelos in the Greek Chamber, 23 April 1920, A Literal Translation from the Official Report (pamphlet) (1920), at 17.

hand, and King Constantine on the other, is as deep as the gap that divides the Allied Powers and the Central Empires. These are two entirely incompatible political conceptions".[159]

Seferiades' attraction to the liberal politics of Venizelos is not hard to understand in this context. Stylianos Prodromou (Stelios) Seferiades was born in 1873 in the town of Smyrna (today Izmir, Turkey). Although little is known of the family's occupation, it is clear that they belonged to the well off, newly established bourgeois class that constituted the economic heart of the city. Smyrna was at the time the most important international commercial port of the Ottoman Empire with the West and was home to a vibrant Greek community dating back to the ancient Greek Ionian colonies.[160] Greeks on both sides of the Aegean considered the Greek population in Smyrna and the rest of Asia Minor to be 'unredeemed', as living under foreign rule. It is no wonder that Greek–Turkish relations became an important focus of Seferiades' work later on.

Seferiades studied law in Aix-en-Province, where he ranked top of his class in all three years of study. He received his doctorate title at the Sorbonne for a celebrated thesis on civil law in 1897.[161] Days after attaining his doctoral title he returned to Smyrna to practice law and settle down. Before long he married Despo Tenekidou, daughter of one of the richest and most influential families in the town. Roderick Beaton describes Seferiades as a handsome man, extrovert, a zealous idealist in matters of politics and the arts, and uncompromising in his demands towards himself and his family.[162] In 1900 Stelios and Despo celebrated the birth of their first son Giorgos, later to become Nobel Prize laureate for literature in 1965, under the *nom de plume* of Giorgos Seferis.

Seferiades is not reported to have had any involvement with international law before 1912. He spent his time mostly with his family, practicing law, translating ancient Greek texts into Modern Greek, and writing (mostly romantic) poetry.[163] His only publications, aside from his

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[159] Statement as published in daily newspaper "Πατρίς" ("Patris", in Greek), 22 May 1917.

[160] Estimates on the exact size of the Greek population range between 25-50% of the total population of the city. On the position of the Greek community in the commercial life of Smyrna, see E. Frangakis-Syrett, *The Commerce of Smyrna in the Eighteenth Century (1700-1820)* (1992), esp. at 43-118. See generally B. Braude & B. Lewis (eds.), *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society* (1982).

[161] S. Seferiades, *Etude Critique sur la théorie de la cause* (Ouvrage couronne par la Faculté de droit de Paris) (1897).

[162] Beaton (Waiting for An Angel), *supra* note 64, at 33; Tsatsou (My Brother Giorgos Seferis), *supra* note 64, at 19.

[163] The only collection of his poetry will only appear one year after his retirement from his academic life: S. Seferiades, *Απο το συρτάρι μου, Ποιηματα 1895-1912* (Out of my Drawer, Poems 1895-1912, in Greek) (1939).

doctorate, included poetry published in local newspapers and a booklet on the regulation of the Smyrna stock exchange.[164] In 1912, a set of events on the island of Samos triggered his career shift to public international law. Samos was populated by ethnic Greeks and enjoyed special autonomy within the Ottoman Empire. After a successful armed revolt in 1912, the local population declared the island independent. Seferiades was quick to offer his services to the French consul in Smyrna (as legal adviser and translator), who was acting as mediator between the Sultan and the independence movement. Seferiades became crucially involved in the negotiations that eventually led to the independence of the island from the Ottoman Empire and its unification with Greece in October 1912. He was present on the island at the local parliamentary session that declared independence.[165] Beaton concludes that Seferiades appreciated at the time that his first sortie into international affairs had led to the best possible outcome for his country and his own political beliefs.[166] In the course of the same year Seferiades published his first international law essay addressing the legality of boycottage under international law,[167] evaluating recent practices of the Ottoman Empire against Greeks in Minor Asia. This was the first in a long series of international law writings.

Following the Samos incident, Seferiades abandoned his legal practice in Smyrna to move with his family to Athens in 1914. The deteriorating relations between Greece and the new Turkish state made life for Greeks in Asia Minor more difficult than ever. This was not only the result of the First Balkan War, which yielded significant territorial gains to the Greek side (at Turkey's expense), but was also a product of the political change brought about by the 'Young Turks' revolution of 1908, the formation of the modern Turkish state, and the rise to power of Mustafa Kemal Atatűrk.[168] Commenting on the impossibility of liquidating his property when leaving Smyrna, Seferiades published his second international law essay on the regime of immobile property in Turkey seen from the point of view of international law.[169] The forced departure from Smyrna and the eventual destruction of the city by the Kemalist army in 1922 was a traumatic experience for the entire family. Seferiades is reported to have

[164] S. Seferiades, *Les Jeux de Bourse en droit international privé* (1902).
[165] Documents confirming his presence have been discovered in the archive of the Seferiades family and are on file with the author.
[166] Beaton (Waiting for An Angel), *supra* note 64, at 51.
[167] S. Seferiades, *Réflexions sur le Boycottage en droit international* (1912).
[168] For an account of the monumental influence of Atatűrk's arrival on the Turkish political scene, see the recent biography of A. Mango, *Atatűrk* (1999). For a brief account of the years 1908-1915 see also A. Mango, *The Turks Today* (2004) 15-25.
[169] S. Seferiades, *Le Régime immobilier en Turquie au point de vue du droit international* (1913).

lamented the loss of his homeland for the rest of his life, fervently hoping for its eventual liberation from Turkish rule.[170] It is conceivable that this burning desire for liberation of his homeland forged the link between his early attraction to liberal internationalism (since his Paris years) and his subsequent identification with the liberal project of bourgeois modernization. His involvement in the Samos incident earned Seferiades a fine reputation in continental Greece which, combined with his studies in Paris, led to a successful nomination for a professorship in international law at the Faculty of Law of Athens University. Although international law had been offered as a subject since the end of the 19th century, this was the first time that a specific Chair on the subject was established.[171] His allegiance to the liberal politics of Venizelos, however, caused a major setback. Venizelos lost the 1915 election with a landslide and the new political situation prevented Seferiades from assuming his position. As a consequence, and in order to be able to cater for the growing economic needs of his family, Seferiades temporarily moved to Paris to practice law.[172] The following years signaled his rise to prominence, becoming one of the most important international law figures in Greece. While in Paris, he became personally acquainted with Venizelos and started advising him and actively participating in Greek foreign politics. The years following the return of Venizelos to power in 1917 found Seferiades representing Greece in a number of international *fora* and, most notably, participating in the Paris Peace Conference in 1919. The same year he finally received his overdue appointment as Professor of International Law at Athens University and returned to Greece to be reunited with his family.

Seferiades spent the following years traveling between Athens, Paris, and other European capitals, on mission and for the needs of his private practice. Amongst his different functions, one has to single out his appointment as member of the "National Commission for Unredeemed Greeks" ("Εθνική Επιτροπεία Αλυτρώτων Ελλήνων"), established by Venizelos in 1918. He later became Legal Advisor to the Greek ministry of Foreign Affairs and received a number of international appointments, such as member of the Permanent Court of Arbitration (1920), Greek delegate at the Assembly of the League of Nations (1920 and 1924), chair of the League Assembly sub-committee on the revision of the Paris Pact (1921), Greek Agent at the Mixed Arbitral Tribunals (1922-1923), Judge *ad Hoc* before the

[170] Tsatsou (My Brother Giorgos Seferis), *supra* note 64, at 24.
[171] See Tenekides, Introduction, in Kalogeropoulos *et al.* (Mélanges Seferiades), *supra* note 62, at xvi.
[172] Beaton (Waiting for an Angel), *supra* note 64, at 58; Tsatsou (My Brother Giorgos Seferis), *supra* note 64, at 36-7.

PCIJ.[173] The *Institut de Droit International* invited him to join its prestigious ranks in 1925, where he remained member until 1936. In 1920, 1925 and 1929 he published two editions of his major work – Courses on Public International Law, and taught at The Hague Academy of international law on three different occasions.[174]

2.5. Bourgeois Modernization and the Writings of Stelios Seferiades

One should not fail to notice at this point an uncanny correspondence between important political stakes for bourgeois modernization in Greece and the work of Seferiades on general international law. The majority of his publications display similar features that are crucial for our analysis. The work of Seferiades in public international law is all written in French, with the exception of three texts written in Greek and discussed above.[175] His work adopts a descriptive style of professional writing that avoids political un-necessary political references or puns in favor of a poised, scientific style. At the same time, his work could be reread as articulate legal defenses of the rights of the Greek population on Ottoman/Turkish territory or the policies of Venizelos. A few examples may illustrate the point.

His first international law work ever is his monograph on *boycottage*.[176] The book is framed as a general academic study on the question of the legality of the practice of boycotting under international law and the limits of a boycott that is exercised in accordance with international law. This essay constitutes, nonetheless, an elaborate if covert legal condemnation of the Turkish boycott of Greek products in Asia Minor in early 1910. It is a passionate plea for the illegality of boycotting under international law on the grounds that, although in theory non-state-supported ('pure') boycotts are permissible, in practice such a policy may not be implemented without the collusion (or active involvement) of the state apparatus. As a consequence, individuals of the nationality of the boycotted state and domiciled in the territory of the boycotting state (see, e.g., Greeks in Turkey) suffer the most. Their livelihood is threatened, they are

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[173] *Lighthouses Case between France and Greece*, Judgment of 17 March 1934, PCIJ Series A/B, No. 62 (1934).

[174] S. Seferiades, L'échange des populations, (1928-IV) 24 RCADI 307; S. Seferiades, Principes généraux du droit international de la paix, *supra* note 82; S. Seferiades, Le problème de l'accès de particuliers a des juridictions internationales, (1935-I) 51 RCADI 1.

[175] See bibliography for a complete list of publications. The three publications originally written in Greek are *The Future of International Public Law* (*supra* note 66), *The Moral Armament* (*supra* note 65) and his *Courses on Public International Law* (*supra* note 63).

[176] Seferiades (Réflexions sur le boycottage), *supra* note 167.

discriminated against and persecuted, and all this amounts to unequal treatment of foreign nationals with the support of the state, which is prohibited by international law.

In this paper Seferiades forcefully argues that the practice of boycottage needs to be seen as a measure outside the limits of the law. One could consider that boycottage in its 'pure' form is in accordance with international law since it concerns acts of private individuals not attributable to the state and thus not of interest to public international law. He concludes, however, that acts of boycottage need to be always attributable to the state. This is because, regardless of the state's direct involvement in the planning and execution of a boycottage, a state has means at its disposal that could prevent boycottage and safeguard the rights of aliens. The rights of aliens of the boycotted state living in the boycotting state always get violated in the process. The only legal ('pure') boycottage could be conceived in cases where consumers, by themselves, and without any external pressure, decide individually to abstain from the products of services of boycotted states. If state organs advocate the boycottage, the host state then has the responsibility to prevent and punish those actors. This form of legal boycottage, however, constitutes for Seferiades a utopia and therefore should not be entertained. His reasoning, which employs historical and legal analysis with many case studies, including the Greek-Turkish one, goes as follows.

The history of diplomatic relations can be retold as a continuous flight for the maintenance of a balance of powers. In this context, states often commit aggression while victim states can take (economic, strategic, military) coercive measures in return, aiming at the prevalence of justice and restoration of the equilibrium. Boycottage is one of these measures. It is an activity that, while legal in theory (as it concerns the exercise of one's right to express its protest towards another state), tends to involve consequences that are against international law (since it always involves the violations of the nationals of the boycotted state which happen to be domiciled within the boycotting state). Although often encouraged by the state, consumers and importers within national legal orders who are bound by state legislation in fact exercise boycotts. Such individuals must be mindful of what a justified reason for a boycott is and what a legitimate target is. Each individual has this right to choose whether to participate in the boycott or not because by means of such action one could be in fact causing injustice through the use of otherwise legal instruments. Economic sanctions limiting the economic existence of the boycotted state can be favourable for the boycotting economy, as its market share will increase by means of such unfair competition and protectionist policy, while also working in favour of

nationalistic feelings and illegal traffickers. States are internationally responsible for whatever actions brought out by their own consumers or importers as they have the means to prevent violations, repress offences and preserve free market economy.

Every right, for Seferiades, carries a corresponding duty: state prerogatives (such as the performance of a boycottage) can only be exercised while taking into consideration a state's correlative responsibilities under international law as well, within and outside its *domaine reservé*. Personal liberty, he states, requires conscious behaviour towards the rights of the other, the alien. Clearly, the dichotomy between the self and the other, and its inherent values, has to be transposed from the micro-social level to the interstate level as well. In no case should legitimate rights of individuals be infringed by governmental measures. The violation of the principle of equal protection between nationals and aliens, on the one hand, and between civilized nations on the other, necessitates the reparation of damages inflicted upon the victim. Nonetheless, the recognition of individual legal personality on the international plane, where only nation states are participants, remains controversial. In that sense the acts of individuals (e.g. when deciding to boycott) can only be brought to the international level through state organs. The attribution of the choices and actions of the people to their own governments, acknowledges the conjunctive will of the majority represented in their government. Boycottage invariably has the effect of the violation of rights of aliens and, following the reasoning just described, should be imputable to the state.

State involvement in boycottage becomes apparent when one considers states, such as Turkey, whose society, the story goes according to Seferiades, is not democratic during the years in question (the will of the people is not reflected in governmental institutions) and ethnically heterogeneous. Its population consists of many different ethnic groups, including in some places majority populations of the ethnic origin *boycotted* state. It is hard to imagine in such cases a successful boycottage which is not supported by the government, since it would involve individuals behaving again our own interests – and Seferiades is quick to refer to the example of the Greeks in minor Asia. 'Pure' boycottage, one not instigated or supported by the state, is a utopia, especially in cases such as the example of Greeks in Asia Minor mentioned above, and should be prohibited.

One year later follows his next publication, a disquisition on the laws regulating the immobile property of foreign nationals in Turkey.[177] There can be little doubt that this monograph was inspired by the problems

[177] Seferiades (Le régime immobilier en Turquie), *supra* note 169.

that Seferiades and numerous other Greeks encountered in Smyrna when trying to liquidate their property and flee to Greece. Turkish property law of the time imposed substantial limitations on the rights of foreigners over immobile property, particularly with regard to ownership and inheritance. As a consequence, and despite owning substantial assets in Smyrna, the Seferiades family only managed to bring along to Athens a tiny fraction of their wealth, causing serious financial problems. In the *Régime immobilier*, Seferiades, who had an excellent knowledge of the Turkish legal system since his practicing years in Smyrna, assumes once more the posture of the academic commentator, elaborating his argument in no less than 243 pages. His analysis is scholarly and comprehensive, systematically examining the history of Ottoman and Turkish property law, international agreements in force concerning foreign nationals (especially the system of capitulations), and the relevant practice. Seferiades concludes that property questions relating to foreign nationals in Turkey should be regulated either on the basis of the law of their nationality or be resolved by international or 'mixed' (consisting of national and foreign judges) tribunals.

Already in the opening page of the book Seferiades opposes two different conceptions of property. First, he identifies an outdated conception of collective ownership common to all primitive or ancient civilizations, to feudal times, and as of late, to the Ottoman Empire and the new Turkish state. This conception is based on conquest and occupation: the conquering state is free to appropriate and distribute at will to its own subjects the property of the defeated nation, as spoils of war and depending on their individual contribution to victory. This conception of property, Seferiades claims is outdated since it is irreconcilable with the conception of human society and economy put forwarded by Enlightenment thought and supported by international law. Second, Seferiades identifies a modern conception of property, one of individual ownership, which is in line with the Enlightenment values and which protects the rights of ownership of the individual regardless of the outcome of the war and the identity of the occupying power. In other words, individuals retain their right to property regardless of whether their territory has been occupied by a foreign state.

Régime Immobilier is a brilliant monograph, examining systematically and exhaustively the legal rules applicable to immobile property in Turkey by aliens or nationals. A private lawyer by training and practicing lawyer in Smyrna, Seferiades presents a masterful summary of the theory and practice of property law in the context of the Ottoman Empire/ Turkey. His account, however, is inadvertently and crucially placed within the historical, cultural and religious setting of the two opposing conceptions of property described above. The consecutive Balkan wars and the

succession of occupying powers over cities, including Izmir/ Smyrna, are the unspoken recent historical context. The opposition between the two conceptions becomes a crucial narrative device for his account.

Seferiades claims that although the Ottoman system favoured the conception of collective property, some progress could be reported since. Diplomatic rapprochement and international agreements between the Sublime Porte and the European allies has established a climate of mutual friendship. It has guaranteed the continuous property rights of aliens as long as the latter observe the laws of Turkish public order. This 'assimilation' of rights of aliens with those of the Turkish population, however, implied also the regulation of personal matters, such as succession and marriage, by Ottoman law and not the law of the nationality of the alien. Although the capitulations between the Ottoman Empire and the European states have led to a progressive granting of property rights to foreigners, the current legal regime is unclear and creates interminable conflicts. The overlapping legal orders of capitulations and Ottoman law, ownership and other private law relations, such as family law and succession of rights to property, has lead to endless disputes as to the applicable law and its precise content. Some treaties accorded European powers the right to intervene in order to protect the property rights of their nationals. The London Treaties already granted unalienable property rights for Greek citizens within Turkish territory. Ottoman law, however, prevented the sale of this property or even prohibited ownership. In addition, for Seferiades, Ottoman/ Turkish law has to be read in the context of the latter being a "warrior", non-democratic, pre-modern, non-Christian state, where prejudice against other cultures and national bias reigns paramount.

According to Seferiades, disputes created because of overlapping legal regimes regarding the property of aliens are very hard to resolve by means of local national courts. The Ottoman real property regime, full of contradictions and incoherence, and its practice of injustice through tribunals that, according to Seferiades, imposed politically pre-determined judgments against the benefits of aliens, did not guarantee a fair and equal trial for all litigant parties. He therefore proposed two different internationalized solutions: a) arbitral tribunals consisting of international judges that would only apply the capitulations or other international agreements, or b) a system of "mixed" domestic courts. For Seferiades, a mixed bench (consisting of judges of different nationalities) could avoid the problems of bias and prejudice of the existing system and reform progressively and efficiently the legal order of the Ottoman Empire. An arbitral tribunal based in The Hague, as envisaged in the 1913 Treaty of Peace between Turkey and Greece, or

international commissions were the only judicial institutions to eliminate contradictory interpretations of the applicable law on real property issues.

The main argument behind his prescription for mixed courts is the inherent bias that, the story goes, exists in all national courts against non-nationals. This a question that he addressed only a few years later in yet another monograph in French, entitled *Le Problème de l'accès des particuliers a des juridictions internationales*.[178] The latter, which was presented both at the *Institut de Droit International* and the Hague Academy,[179] is primarily concerned with the rights of individuals in foreign countries and their access to justice when there is legitimate suspicion that their access to justice will not be fair due to bias within the system. Subjecting foreign nationals to national courts, Seferiades argues, using the situation in Turkey as one of his examples, means that the prosecutor and the judge will be serving 'the same interests' (the best interest of the state), which goes against basic principles of procedural law. Seferiades resorts, once more, to international law-based alternatives to solve the problem: international or mixed judicial solutions are preferable.

Again, this essay is a scholarly effort to approach the topic. Again, however, the rights of the Greek minority in Minor Asia and their grievances echo throughout the text. In a nutshell, the substance of his argument with regard to individual access to justice goes like this: The rights of individuals to life, freedom, and propriety are to be recognized and protected by the states in whose territory they are domiciled but without discrimination on the basis of nationality, language, race or religion. In case such individuals, however, have grievances regarding equal treatment or the protection of their rights, they should have direct access to an international judicial institution. Seferiades concedes that it would be utopian to allow every such alien to seize international tribunals whenever one feels that rights have been violated by the host state. As a matter of course, it is the national jurisdiction that should become seized of such grievances.

The protection of the interests of minority (ethnic, religious, other) groups, however, can be better achieved through judicial channels instead of diplomatic ones since the latter should be seen as political means that carry nationalist bias which is not neutral to the interests of these those groups. In fact, for Seferiades, These minorities and its members should be treated as aliens before the law, in the sense that non-discriminatory protection can be guaranteed for them. Equality and justice means in this case, for Seferiades, the direct access to international justice by individuals of alien status. (p.104)

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[178] Seferiades (Le problème de l'accès de particuliers), *supra* note 174.
[179] Seferiades (Le problème de l'accès de particuliers), *supra* note 174.

Whereas aliens tend to be are treated in a privileged manner compared to nationals, and whereas they can benefit from diplomatic protection, minorities do not receive such treatment As history demonstrates, whenever the material conditions of aliens flourish, the consequence is economic investment and friendly relations among nations are reinforced.

Seferiades claims that whenever an alien stands before a national court, especially in states such as Turkey, in which there is a "legitimate suspicion" of bias and prejudice in the system against aliens, aliens are in a predicament. In such cases, there is a paradoxical situation where the host state is both the Judge (by means of the appointment of a national judge) and a litigating party, while the judge is supposed to protect the alien from the discrimination of the host state. There is an incontestable dependency between the national judge and the state because the judges are appointed by the state, they get paid by the state, they get promoted by the state, and in any case a national judge will have to apply national and not international law – because maybe international obligations are not implemented.

To avoid this paradox Seferiades suggests the intervention of international law and the direction of the case to an international court. Absolute impartiality, Seferiades concedes, is almost impossible to achieve, especially when one acknowledges the importance of the judge's social background in forming his personality. On the international level though, even if the litigant state is not represented by a national judge, the composition of the international bench can be supplemented by national *ad hoc* judges respecting the equality of arms principle. This addition confirms the diplomatic nature of dealing with judicial problems. As a national judge can recuse himself, so should an international judge. Effective diplomatic protection depends on the relation of forces and has nothing to do with law as such but only with politics. Consequently, such protection can have serious implications for international politics as the power struggle can determine its course. Arbitral justice decides on the conflict which initially was defended through diplomatic means. From then onwards, the individual whose rights are infringed upon defends its cause in front of an international judiciary. Justice starts when politics disappears. The wisdom of international law regulating such relations of force and violence has no morality or justice within it, as it always depends on the government's discretion.

The growing importance of the international legal personality of individuals and shareholders of corporations characterizes the progress that international law dictates to national legislations in order to agree upon common principles of public international law shared by both law orders. Despite this positive evolution, critics claim that only states have the

prerogatives to be party to a conflict before an international court. Only states can make abstraction of the individuals' interests that are harmed. However, the Vattelian fiction, seen as a barrier to justice, does not stand any longer.

Developing the same argument in a separate essay, Seferiades also proposes this very model in the case of property being seized during times of war, in his relevant essay on Prize Tribunals. The latter essay should at least partly be attributed to his involvement in defending Greek shipping interests during the War.[180] The creation and functions of the Greek administrative tribunals dealing with the confiscation of contraband goods in the different wars between Greece and Turkey raise questions regarding the legality of their judgements. As Greece had not ratified the 1907 Hague Conventions related to maritime law and had not signed the 1909 London Declaration on the Laws of Naval War, it would only need to conform with international customary law. These provisions were of special concern for ships of states, neutral to the belligerent parties. Commercial ships of neutral states can transport merchandise that are forbidden given its blockade, that are hostile property, that are smuggled or that are suspected to give assistance to the enemy. In all cases, the goods are confiscated, regardless of the genuine owner. The Greek authorities clearly have a restrictive interpretation of the freedom of navigation of neutral commercial ships and seize commercial and valuable materials, probably to finance their war efforts against the dissolving Ottoman hegemon.

Although there might be considerable security reasons for seizing suspicious goods, the legitimate owner has to right to be compensated for the damage suffered (*damnum emergens*) and the losses of possible profit (*lucrum cessans*). Greek authorities can issues measures to protect its national interests. They cannot claim to be the new owners of the seized goods without respecting the rights of the previous one. In some cases, neutral ships have been assimilated with the enemy power, apparently no restrictions at all prevent the new capturers to decide arbitrarily on the former's fate. Despite the harsh reality of power politics, judicial means to object against such decisions should be available for the victims. However, the tribunals have witnessed no cases where the defendants were present. Also their impartiality is questionable because of their administrative nature and thus absence of judicial independence. Moreover, the Ottomans would

[180] S. Seferiades, *Les Tribunaux de Prises en Grèce - Leur Constitution, Leur Fonctionnement et Leur Jurisprudence*, (1916) 23 Revue Générale de Droit International Public 31. This can be inferred from the account in Tsatsou (My Brother Giorgos Seferis), *supra* note 64, at 36-37.

be quite reluctant to defend their cause in front of the Greek jurisdictions, especially in those times of war.

An international court would judge more effectively, independently and with more dignity the cases under his jurisdiction. By allocating equal arms to both litigant states, justice could prevail over the discretionary power of the Greek administrative tribunals lacking all those qualities. Nevertheless, from the political perspective, the states that were morally backing Greek policy were more important than the illegal goals it defended.

It is worth noting also his 1916 *Chronique sur l'arrestation*.[181] This brief note is a clear defense of the policies of Venizelos. Seferiades explains why the arrest of the German and Austrian consuls by the British and French occupying forces in Thessaloniki was in accordance with international law. What is not mentioned in the paper is that, during the early years of the War, Britain and France exercised all their political influence to cause the resignation of the Greek royalist government, which favored a stance of neutrality during the Great War. In the meantime Venizelos, who advocated Greek participation in the war on the side of the *Entente*, prepared with the support of France and Britain an armed revolt that brought him back to power.[182]

His essay on the exchange of populations is, once more, inspired by the aftermath of the Balkan wars and the 1922 disaster.[183] In this essay, Seferiades articulates his views about the international law governing the exchange of populations. By means of introduction, Seferiades begins by contending that the relation between state and man is characterized by reciprocal recognition and respect. Although public international law purports to regulate mostly interstate affairs, states have obligations towards individuals as well. States, as social institutions consisting of individuals, should advocate the individual's rights to life, freedom, religion, and so on. These rights perform a crucial constitutional function in national legal orders and constitute goals that policies should serve and not undermine. The protection of such human rights should remain applicable in times of warfare as well, since it is not persons but states that make war. For Seferiades, law-making treaties (because of their orientation towards serving interests of the international community as a whole) create rights for individuals which are more durable than those created by treaties-contracts, which in his view serve mostly sovereign interests. International agreements, international courts and

[181] S. Seferiades, *Chronique sur l'arrestation des consuls d'Allemagne, d'Autriche-Hongrie etc. a Saloniq*ue, (1916) 23 Revue Générale de Droit International Public 84.
[182] Vournas (History of Later and Modern Greece), *supra* note 146, at 178-200.
[183] Seferiades (L'échange des populations), *supra* note 174.

even, in some cases, intervention are the guarantees for the respect of human rights. Now, the dissolution of the Ottoman Empire, in his view, had to be followed by international treaties that would protect the rights of minority groups or aliens within the newly created states. Through public international law, the protection of the individual can be effected deliberately within national legislations, as non-discriminatory application of human rights contributes to global peace and human dignity. In addition, governments should conserve the wealth that their populations represent, since without this wealth there is no state.

In this light, treaties stipulating the exchange of populations between nations without taking into account the interests of such populations are in total opposition with the goals of international law. The voice of the populations must be heard is public international law debates. In principle the outcome of such treaties should be that at the end of the population transfer should end up having precisely the same rights and liberties with the autochthonous populations. However, the exchange of populations conventions prove that the sharing of resources among a state's residents after the transfer of population cannot be effected in a fair way is not possible as long as the newly arrived populations are discriminated against. The lack of political power of international institutions such as the League of Nations allows states to sign treaties for the exchange of populations circumventing the rights of the populations in question as well as their own obligations under conventions protecting minorities and ethnic groups. Although it is believed that the creation of homogeneous states facilitates its respect for international obligations, for displaced populations this harsh reality can easily become a form of collective punishment.

Several years later, Seferiades will again defend Greek foreign policy interests with another essay on the international regime of the Marmara straits in Turkey.[184] This essay too adopts the posture of the neutral academic observer, despite the obvious link between the subject of the paper and his role as advisor to the Greek government of the time. The case is quite well known. In 1806 a British military and diplomat removed a number of the marble statues and other object from the Acropolis in Athens and transported them to the British Museum in London, under permission to do so by the Ottoman authorities of the time. In his article, Seferiades is not against the civilizing mission of the Western world (*mission civilisatrice*) which often involves the safeguarding of the art of mankind. Indeed, advanced conservation methods may protect them from eventual disregard and decay which may occur under barbaric rule, as indeed it was the case in

[184] S. Seferiades, Contribution a l'Etude du régime international de la mer de Marmara, in *Mélanges Mahaim* (1935, Vol. II), 320-31.

Greece at the time, which found itself under Ottoman occupation. Since Greece became an independent state, however, even British authors urged their government to return the artefacts to the Greek people, who nurture a "legendary respect" for its antiquities. Seferiades makes a legal argument to plead the existence of a rule of customary international law which obliges states to repatriate such objects when the initial reason for the removal is no longer there and when the new state is able to conserve its antiquities. At the same time, he makes passionate political pleas as well. Seferiades, a man of the arts and the law, felt deeply involved in this matter, personally and professionally. Although the Ottomans could be blamed for failing to protect the antiquities for centuries, for Seferiades a British collector who deprives a country (Greece) of its national and cultural heritage for more than one century can equally be regarded as uncivilized.

The decline of Venizelism in the mid-1930s coincided with the progressive withdrawal of Seferiades from active duty both as a statesman and an academic. Following the 1936 dictatorship, which led to the persecution of many liberal intellectuals and the definite end of the bourgeois modernization movement, Seferiades retired from the University in 1938. Thereafter he moved to his old apartment in a suburb of Paris, where his family only visited him occasionally. He never published in international law again and the remaining years of his life were devoted to his literary interests, leading to the publication of a collection of his own poems.

Aside from the temporal parallels sketched above between historical events and his publications, there are more associations to be made, on a structural level, between the work of Seferiades and the ideology of bourgeois modernization. One can read much of his generalist texts as an effort to convert the project of bourgeois modernization into legal doctrine. This is important ideological work that involves 'translation' into different discursive levels. First, it requires the carving out of a world-view in which the historical narrative and the founding assumptions of the project can be sustained. The historical argument discussed in Section 2.2. above belongs to this category of system-building work. The historical account of the world through the lens of the opposition between absolutism versus democracy is such a founding assumption of the liberal world-view, paving the way for the prescriptive-reconstruction project of interwar international law. Second, it involves the construction and elaboration of legal doctrines that operationalize these assumptions into a coherent legal system, with doctrines ranging from the question of the basis of obligation in international law, to sources, subjects, responsibility, substantive norms, standards, and the setting up of devices that would explain away inconsistencies and restore the system when failures occur.

Seferiades' textbook, *Courses on International Public Law*, can be reread as a collection of doctrines performing this second type of 'translation' work for the liberal project. One classical example can be found when Seferiades tries to square the difficult question of the basis of obligation in international law with his ideal "international community of democratic states of coherent domestic structure". How was international law to be created in a world where many states could not be called democratic?[185] To tackle the problem of the basis of obligation in international law, Seferiades produces the doctrine of a three-track international law, prescribing different legal relationships between states, depending on their degree of democratization. The argument goes as follows. The existence of nations whose governance and culture do not share the model of European-type liberal democracy makes it clear that these states cannot be an equal part of the international community. This is a matter of "pure logic" for our author.[186] There are nations whose history has demonstrated that their 'morality' is different or inferior to that of 'civilized states'. Such states are unable to comprehend and respect the system of international law. As a consequence, only states exhibiting a 'European' democratic civilization enjoy the privilege of being part of the international community, even if they are located outside Europe, such as the USA and Japan.[187] Japan is included on account of the "most splendid perception" of the doctrines of morality of the civilized world of its people and "their will, which within very few years achieved the re-shaping of the condition of their society in accordance with the most admirable [European] models".[188]

The world is thus divided into three categories of states: a) civilized states, which ought to respect the rules of international law in their mutual relations, in all circumstances and with no exceptions; b) semi-barbaric states, that is to say states that have adopted some democratic principles but by no means fully or consistently (such as Turkey and China), and towards which civilized states should respect, on the basis of reciprocity, only those rules of international law that semi-barbaric states themselves have consented to; and c) savage states, towards which civilized states have absolutely no legal obligation and are bound only by rules of general morality (such as respect of life, honor, property and the like).[189] In other words, international law is of universal scope but not "pan-ethnic": it only concerns states that are part of the international community – only states with a European culture.

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[185] Seferiades (Courses on International Public Law), *supra* note 63, at 38-43.
[186] Seferiades (Courses on International Public Law), *supra* note 63, at 38.
[187] Seferiades (Courses on International Public Law), *supra* note 63, at 39.
[188] Seferiades (Courses on International Public Law), *supra* note 63, at 39.
[189] Seferiades (Courses on International Public Law), *supra* note 63, at 42-43.

At this point in his text Seferiades realizes the need to establish a secondary set of rules of thumb, explaining some of the gray areas in his model.[190] What happens when a civilized state persistently objects to the rules of international law? What if a group of civilized states decides to collectively deviate from "general international law", such as the "American International Law" movement that Alejandro Álvarez and others proposed?[191] How does one deal with "non-democratic" states of European civilization (such as Germany) or "democratic" states of non-European civilization? Seferiades builds his theory of the basis of obligation in international law revolving round this doctrine of a three-track international law. In an argument that could be called simultaneously "ascending" and "descending", to use Koskenniemi's well-known metaphor,[192] Seferiades seeks the basis of obligation in the consent of states while resorting to normative safety valves to guard against the ever-present threat of absolutism. The basis of obligation is the "mutual consent" of states of European civilization ("consentement mutuel"), which may be express or tacit.[193] Public international law is based on the "gradual coincidence" of the volition of many such states. When this mutual volition is united, it forms a superior volition ("volonté supérieure"), from which individual states may not deviate under any circumstances.[194] There are, however, limits. The Judge, for one thing, must not apply rules stemming from this superior volition if for some reason the rules have ceased to be in conformity with the morality of European civilization.[195] He terms the system of this morality as "international public order", in analogy to the public order of domestic legal systems.[196] Seferiades has "absolutist" European states in mind, such as Germany, and "semi-barbaric" states, such as Turkey. One can hear the echo of Greek sovereign interests of the time (e.g., in securing the rights of the Greek minority in Minor Asia) in the contestation that the volition of such states is canceled out by the peremptory norms of the international public order. As long as these states do not endorse a democratic system of governance and 'European' morality they will remain outsiders to the law-making process. Similarly, a group of civilized states may not collectively deviate from "general" international law and form a system of their own, such as "American" International Law. This would fragment the system "unacceptably", Seferiades contests, and would in fact violate "general"

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[190] Seferiades (Courses on International Public Law), *supra* note 63, at 41-43.
[191] A. Álvarez, *Le Droit International Américain. Son fondement – Sa Nature* (1910).
[192] Koskenniemi (From Apology to Utopia), *supra* note 37.
[193] S. Seferiades, Aperçus sur la Coutume Juridique internationale, (1936) Revue Générale de Droit International Public 129; Seferiades (Courses on International Public Law), *supra* note 63, at 11 and 28.
[194] Seferiades (Aperçus sur la Coutume), *supra* note 193, at 172.
[195] Seferiades (Aperçus sur la Coutume), *supra* note 193, at 189-94.
[196] Seferiades (Aperçus sur la Coutume), *supra* note 193, at 192.

international law if it involves existing rules.[197] There is only one international law, and this is the "general" international law formed along the lines of mutual consent described above.

So, if we reconstruct the matrix of legal relations in the new international law of Seferiades, we would have to concede the following categories of legal relations:

i) The mutual consent of numerous states of European civilization, when united, forms a superior volition that constitutes the basis of obligation in international law;

ii) Civilized states become bound by certain rules of international law only by expressing their consent (expressly or tacitly);

iii) Civilized states have the duty to respect rules of international law at all times, but only towards other civilized states;

iv) Semi-barbaric states may become civilized through the acceptation of rules of general international law and by implementing the necessary changes in its domestic structure, such as establishing democratic institutions or settling questions of self-determination;

v) Civilized states ought to respect international obligations towards semi-barbaric states only to the extent that the latter have accepted the same rules;

vi) Civilized states ought to respect only basic principles of general morality towards savage states;

vii) Although different standards may be applied between civilized and non-civilized states, civilized states have to apply "general" international law between themselves, and not "American" international law or law of any other denomination.

viii) Civilized states (such as Germany) with absolutist governments remain fully bound by international law obligations, since they were initial members of the international community, but they cannot create new rules if these rules contradict the international public order;

ix) The persistent objection of civilized states towards specific rules of international law results in non-binding effect of these rules towards these states;

x) The mutual consent of semi-barbaric or savage nations may never create rules of international law or principles that general international law would take aboard.

[197] Seferiades (Courses on International Public Law), *supra* note 63, at 42.

The conception of a three-track international law and its consequences may sound outrageous today, at least to some ears. It does appear, however, as a perfectly logical and legitimate world-view when seen through the lens of the narrative of progress, where the opposition of absolutism v. democracy forms the lens for determining what is progressive and what is not. If absolutism has undermined progress since the beginning of time, and if the European model of democracy exemplifies progress, it is perfectly logical that non-democratic states must not derive unjust benefits from a system to which they are not committed. Reciprocity is to be enjoyed only by those who are committed to the rights and obligations that international law stipulates. On this basis, a number of exceptions are called for in the relationship between civilized and semi-barbaric states, including, not surprisingly, in Greek–Turkish relations. This model explains, for example, the need for and legitimacy of capitulations, privileges and concessions for foreign nationals, which are derived from international agreements between Turkey and European states. The same holds for the institution of mixed tribunals: if Turkey is a semi-barbaric state whose legal system does not provide the necessary procedural guarantees for foreign nationals, then Greek nationals should be subjected to either mixed tribunals or to Greek law directly.[198] On a global scale, the idea of a three-track international law explains the Mandate system of the League, which is understood as the holy duty of civilized states to pass on their lights to savage states that became "prematurely independent".[199] The list of such exceptions can go on indefinitely.

2.6. The International Lawyer as 'Organic Intellectual'

This Chapter has sketched out an intellectual portrait of Stelios Seferiades and, in the process, has used the term 'vocabulary of progress' in order to refer to the argumentative strategies in his work that gave purchase to his narrative of progress and, more concretely, to his prescriptions about the reconstruction of public international law. The opposition of absolutism and democracy was one of these argumentative strategies, straddling political agendas and priorities on both the national and international level. On the national level, it was in tune with the strategy of bourgeois modernization to portray monarchy as an agent of foreign interventionism and autocratic governance. On the international level, it paved the way for faith in the establishment of the League of Nations and the 'sociological jurisprudence' of the interwar period, while conveniently explaining away Greek irredentism in Asia Minor and the exceptionalism of Greek foreign policy towards Turkey. Altogether, the progress narrative of absolutism and

[198] Seferiades (Le problème de l'accès de particuliers), *supra* note 174.
[199] Seferiades (Courses on International Public Law), *supra* note 63, at 101.

democracy reinforced the self-perception of interwar liberal intellectuals as internationalist and progressive by situating them on the right side of a long historical tradition of struggle for social progress.

The same vocabulary of progress, however, became the veil that prevented Seferiades from speaking of the dark sides of the liberal project and the inherent limitations of its transformative potential. Seferiades blamed absolutism for the failures of democratization of Greece and of the 'new international law' of the interwar period. To make matters worse, he went so far as to defend, in the name of progress, measures and doctrines that could be viewed as being dangerously close to those of his 'absolutist' ideological opponents. The vocabulary of absolutism v democracy, far from a descriptive concept of how human progress has been achieved, became of powerful ideological device for the exclusion of a series of political and legal initiatives. Progress, far from a formal and self-explanatory concept that 'speaks itself', was proven to be a deeply ideological and political rhetorical device to legitimize one's argument.

In addition, Seferiades identified himself and his fellow liberal international lawyers as experts in the technique of deriving a project of international governance from the social nature of man. He presented the international lawyer as scientific observer of human history, devoted to the task to defending human values through his scholarship. Indeed, from a scholarly point of view, his work was outstanding. His texts were thoroughly researched, written in fine style and celebrated for their accuracy and attention to detail. His publications became the basis of the nascent discipline of international law in Greece. In dialogue with colleagues in Europe and elsewhere, he helped build faith in the new international law of the interwar period in the task of reconstructing doctrines and institutions on a new basis, avoiding the mistakes of the past. He helped construct a comprehensive vision of public international law with universal application, with doctrines applicable to all states and in an infinite number of circumstances. At the same time, a decisive correlation may be traced between his universalist ideas and local-personal ideological stakes. His international law work was reread as 'translating', at least in many instances, personal/collective ideological stakes into a workable universalist vocabulary about international law. Specific political goals which were high on the agenda of the liberal Greek governments of the time, but also in the personal life of our hero, were presented as indispensable components in the process of reconstructing international law in the aftermath of the Great War. Democratization of states, self-determination of minorities, discrediting monarchy as a system of governance, the protection of the rights of the Greek minority in Anatolia, the characterization of Turkey as a 'semi-barbaric' state, all became part and

parcel of a progress narrative. His international law reform, a universalist vocabulary *par excellence*, was simultaneously a personal struggle.

Is the closely-knit relationship between personal/collective ideology and universalist prescriptions problematic? Does it undermine the value of his otherwise excellent scholarship? Is this troubling news for the overall quality of our international law scholarship – if one assumes that the story of Seferiades is not unique? Should this relationship be castigated or could it be embraced and placed at the heart of a 'new' reading of the history of the discipline of public international law? To answer these questions I propose an image of the public international lawyer which is quite different from that which Seferiades carves out for himself and his peers in his own writings. To do so, I resort to Antonio Gramsci's well-known essays on the role of the intellectual in the organization of culture.[200] Gramsci argued in his work that every social group, created in the sphere of an operation indispensable for economic production, "creates with it, organically, one or more layers of intellectuals, which vest it with homogeneity and consciousness of their proper function, not only in the economic field but also in the social and political one'.[201] For Gramsci 'organic intellectuals' are a crucial component in the production of culture. Gramsci's representation challenges the classical image of the intellectual as a technician, whose influence is derived from specialist knowledge and talent. For Gramsci, the latter qualifications are only "external and ephemeral instigators of affections and passions" ("motrice esteriori e momentanea degli affetti e delle passioni")[202] and not the true basis of their role. It is rather their active involvement in practical life as constructors, organizers, and "permanent persuaders" (propagandists) of new ideas that should be fore-grounded in our understanding. These functions transform the intellectual from a technical laborer into an instructor, an educator, a political cadre ("dirigente").[203] Thus, intellectuals are therefore not mere observers of our social reality. With their work they 'organize' human masses and 'guarantee' their consent to and their confidence in the dominant class. Their important role rests precisely in creating the basis for a new and comprehensive world-view, which is organically related to the dominant ideological group. They are servants ("commessi") of the dominant group for the performance of what he famously calls "interconnected, subaltern functions of social hegemony and

[200] Antonio Gramsci's views on the topic can be found in the essays written during his long years of imprisonment, the relevant selection of which was published posthumously in Italian in A. Gramsci, *Gli Intellettuali e L'Organizzazione della Cultura* (Intellectuals and the Organization of Culture, in Italian) (1949).
[201] Gramsci (Gli Intellettuali), *supra* note 200, at 3.
[202] Gramsci (Gli Intellettuali), *supra* note 200, at 7.
[203] Gramsci (Gli Intellettuali), *supra* note 200, at 7.

political governance".[204] The capitalist businessman, Gramsci brings the example, brings along the industrial technician, the political scientist, the designer of a new educational system, of a new legal system.[205] Gramsci sees a division of labor between intellectuals in this process, similarly to the prescriptions of classical economic theory. On the top of the pyramid will be the creators and theoreticians of the various sciences, natural and social, of philosophy, of art, etc. In the lower ranks one will find the administrators and disseminators ("amministratori e divulgatori") of the accumulated intellectual wealth.[206] Different specialties of organic intellectuals (including jurists) become necessary, depending on the social context.

Gramsci's idea of the organic intellectual is useful because it offers a more complex understanding of intellectuals, such as public international lawyers, who are pictured as having their technical-professional work closely conditioned by personal/collective ideological struggles and projects. This image contests the assertion that the law professional is (or should be) autonomous from the dominant socioeconomic class and the hegemonic political discourses; the classical conviction that the task of the jurist is precisely to help harness politics to the direction of the 'rule of law', the latter being an apolitical, non-ideological ideal. Albeit different, Gramsci's image presents the intellectual as equally and terribly important in the production of culture, as translator and converter of ideology into a coherent world-view and the necessary doctrinal and institutional machinery for its implementation.

Along these lines, I would like to suggest an alternative assessment of Stelios Seferiades as an organic intellectual, operating simultaneously in more than one ideological debate. In the context of the Greek political scene, for example, Seferiades can now be viewed as having actively participated in the defense of the bourgeois modernization project and drawn legitimacy from it. As a French-educated, bourgeois sophisticate from Smyrna, his scholarship bore the credentials of cosmopolitan knowledge and personal-historical experience. Seferiades truly believed in the capacity of international law to bring about change at the local level through democratic reform. In the service of these ideas, he offered the scientific vocabulary that the political movement of bourgeois modernization needed in order to bolster its purchase with its own ideological opponents in Greece. Seferiades gave legitimacy to the project by neatly placing it along a historical continuum of social progress. His universal narrative of progress and its international law vocabulary of progress rationalized foreign policy choices and placed it in

[204] Gramsci (Gli Intellettuali), *supra* note 200, at 9.
[205] Gramsci (Gli Intellettuali), *supra* note 200, at 3.
[206] Gramsci (Gli Intellettuali), *supra* note 200, at 10.

the service of European foreign policy goals. Aside from his involvement in Greek politics, Seferiades participated in a separate scene: a worldwide, 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. As a Sorbonne-educated jurist, he enjoyed the confidence of the professional elite of scholars of the centre. As a sophisticate from the periphery of Europe, he furnished the new international law with some of the universal legitimacy that it needed.

2.7. Conclusions

In the case study on Stelios Seferiades, the opposition of absolutism and democracy was proven to form the backbone of a historical narrative of international law as progress. Seferiades tells a linear story according to which democrac and internationalism have been, for centuries, the catalyst for progress in social organization. In the antipodes, absolutism and sovereignism have been the source of social regression and misery. For a historical account of this sort to be convincing, it needs to be presented as objectively true, as 'speaking itself'. As demonstrated, Seferiades does exactly that and recounts a story that is complete, universal, and diachronic. In his writings, the opposition of democracy and absolutism is 'naturalized' and 'formalized', as the case study explains. The notions of democracy and absolutism acquire fixed and stable meaning and they are defined in opposition to each other. Absolutism *is* the Other of Democracy. This is a totalizing teleology. The history of the world can be recounted through this polarizing prism, where there is no room for alternative explanations. The historical narrative spans the entire course of history, from ancient times till our day, and is applicable to different parts of the world, creating a complete reality which allows no room for doubt: democracy/internationalism appears to be the only path to progress. The notion of progress acquires its meaning through this historical narrative, which determines the range of permissible statements within the discourse. Thus the binary opposition becomes the interpretative device to understand almost any social or political decision.

The case study went however a step further and demonstrated that neither democracy nor absolutism had a stable meaning in the (same) texts of Seferiades. The two notions were de-historicized and de-politicized: they were made to appear as forces of nature that somehow simply existed in an absolute form, as traits of humanity. Seferiades presented the dichotomy of the two as a stable one, or at least relatively stable, to the extent that one could ask what is the role of the one versus the other in history. The

essentialization of the terms performed a crucial role in the production of meaning. Not only did it remove from view the problem of linguistic indeterminacy but it occluded the character and significance of heterogeneity, namely the complexity of social processes in which such concepts have thrived and constituted the banners of ideological opposition. Absolutism thus became a concrete, coherent mode of governance, despite the substantial differences that may have distinguished different types of monarchies from each other; and democracy is presented as a coherent global standard without internal ruptures or discontinuities.

Such a use of the narrative was crucial for the persuasive effect of the writings of Seferiades. The use of the opposition of absolutism v democracy was a narrative technique that placed Seferiades safely and at all times on the side of progress, even when his argument would fail even its own standards of what is progressive. The opposition, far from having a stable content, was rather a trope or style of argument that helped vest with legitimacy a liberal ideological-personal project and jump over the ruptures and discontinuities of the experience of reality. The perception of progress was produced by the instability and iterations of the vocabulary rather than its stability. These iterations allowed all claims of Seferiades to be placed at all times on the side of progress (e.g. democracy), even when the claims were in logical contradiction with his own definition of progress at a different point in the text. Despite this incoherence, the vocabulary was nevertheless able to discredit his opponents as regressive (e.g. absolutist). Ultimately, however, Seferiades was not in control of his own vocabulary. His work, instead of the pursuit of a political-ideological agenda, became devoted to the defense of the opposition of absolutism and democracy. This strategy prevented Seferiades himself from realizing the contradictions of the bourgeois modernization project and the reasons for its failure. Failure was attributed to an external enemy (regression, absolutism) and not to the instability of the opposition itself.

Chapter 3

Case Study #2

Progress within International Law: The Doctrine of the Sources of International Law

3.1. Introduction

Leaving behind the lifework of Seferiades, Chapter 3 continues the exploration of the over-arching theme of the function of the notion of progress in public international law. We now turn to a different plane of international argument and a different horizon for our analysis. The present case study concerns international law doctrines and, in particular, the way in which the formation of a doctrine may be regarded as a moment of progress for public international law (progress *within* international law). To exemplify the point, the most classic of doctrines has been selected, namely the doctrine of the sources of international law.

In its colloquial sense, the term 'doctrine' refers to a corpus of taught beliefs, principles, or positions within a given system of knowledge.[207] In international law, the term doctrine enjoys a diversity of meanings and may refer to a single principle, norm, rule, idea, belief, or a set of inter-twined principles, norms, rules, ideas, or beliefs, related to international law. Although no clear line can be drawn between the various uses, a quick typology would reveal several distinct meanings. Thus, by doctrine one may refer to the writings of qualified publicists on a certain matter.[208] Other times we speak of the 'Monroe Doctrine',[209] the 'Bush Doctrine',[210] the 'Human Security Doctrine',[211] to refer to a set of policies that may (or may not) become operationalized by means of international law instruments or

[207] See e.g. *Webster's Third New International Dictionary of the English Language* (2002) 666 giving the following meanings to the term: "something that is taught or held or put forth as true and supported by a teacher or school or sect"; "a principle or position or body of principles in any branch of knowledge"; "a principle of law established through past decisions and interpretations"; "a formulated theory supported or not controverted by evidence, backed or sanctioned by authority and proposed for acceptance"; Black's Law Dictionary (2004) 518, describes doctrine as a "legal principle that is widely adhered to".

[208] A. Carty, A Renewed Source for Doctrine as a Source of International Law in Times of Fragmentation, in R. Huesa Vinaixa & K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* 239-261 (2006).

[209] A. Álvarez, *The Monroe Doctrine: Its Importance in International Life of the States of the New World* (1924).

[210] M. Buckley & R. Singh, *The Bush Doctrine and the War on Terrorism: Global Responses, Global Consequences* (2006).

[211] M. Glasius, *A Human Security Doctrine for Europe: Project, Principles, Practicalities* (2006).

institutions. In technical international law talk, we also speak of the 'legal doctrines' of *uti possidetis*,[212] precedent,[213] Joint Criminal Enterprise,[214] indirect expropriation,[215] responsibility to protect,[216] and so on, to refer to a norm (or a set of interrelated norms, standards, rules) regulating a specific international law problem. The present Chapter speaks of doctrine as understood in this technical-legal sense -- a regulatory approach to a legal question that has become crystallized into a finite set of binding norms.

The doctrine of the sources of international law is generally used to signify an agreed upon set of abstract forms (criteria, tests of validity, boundary conditions, categories) that determine two essential functions of the international legal system: law-creation (how is international law made) and law-ascertainment (how do we distinguish between legally binding and non-binding norms). For scholars and practitioners today, the starting point for any discussion on the sources is the wording of Article 38(1) of the Statute of the International Court of Justice (ICJ). Article 38(1) ICJ reflects with minor modifications Article 38 of the Statute of the Permanent Court of International Justice (PCIJ),[217] and reads as follows:

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[212] H. Ghebrewebet, *Identifying Units of Statehood and determining International Boundaries: A Revised Look at the Doctrine of "Uti Possidetis" and the Principle of Self-Determination* (2006).

[213] M. Sellers, The Doctrine of Precedent in the United States of America, (2006) 54 American Journal of Comparative Law 67.

[214] A. Cassese, The Proper Limits of Individual responsibility under the Doctrine of Joint Criminal Enterprise, (2007) 5 Journal of International Criminal Justice 109.

[215] V. Heiskanen, The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal, (2007) 8 Journal of World Investment & Trade 215.

[216] B. Delcourt, The Doctrine of the 'Responsibility to Protect' and the EU Stance: Critical Appraisal, 59 Studia Diplomatica 69-93 (2006).

[217] The PCIJ version of Article 38 reads:

"The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

There are four minor differences between the PCIJ and the ICJ versions of the text: a) the chapeau of Article 38 of the PCIJ version ("The Court shall apply") was moved to the body of paragraph 38(1) of the ICJ version; b) the phrase "whose function is to decide in accordance with international law such disputes as are submitted to it" was added to the text of paragraph 38(1) of the ICJ version; c) paragraphs 38(1) to 38(4) of the PCIJ version were converted into sub-paragraphs 38(1)(a) to 38(1)(d) in the ICJ version. Finally, the two periods of paragraph 38(4) of the PCIJ version were separated as sub-paragraph 38(1)(d) and paragraph 38(2) of the ICJ version.

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Although its drafters never intended nor foresaw such a development back in 1920, soon after its adoption, Article 38 PCIJ became the basis of a new conception of the sources of international law. Within a few years, the idea of a 'doctrine of the sources', in the contemporary sense of a finite list of abstract forms that determine law-creation and law-ascertainment, became introduced and consolidated as the standard approach on the subject. By the early 1930s, a previously divided literature started displaying great uniformity of views. The formative impact of Article 38 on post-1920 theory and practice is hard to overstate.[218] The adoption of the Article was heralded as an important moment of disciplinary progress at the time. Commentators described it as "the solid bed of rock on which the fabric of international law has now to be built,"[219] a development that ended an "embarrassing uncertainty"[220] about the sources of international law, and so on.

At the same time, the emergence and success of the doctrine of the sources is perhaps one of the greatest riddles of interwar international law. Surely, international law craved for reform in the aftermath of the Great War. But why the turn to sources? Why not institutions, processes, the judiciary? Although determinacy of legal obligations may appear an intuitive goal for the discipline today, why would anyone need a 'doctrine' to do it? How can a provision describing the law to be applied by the PCIJ become "the solid basis of rock on which the fabric of international law has to be built"?

Similar to the previous Chapter, this case study does not care to confirm or deny the view that the creation of the doctrine of the sources of international law in the early 1920s *was* a positive development for international law. The purpose is rather to scrutinize the discursive structures that produced the perception of progress associated with the dosctrine of the sources.

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[218] Several authors acknowledge this. See e.g. C. Rousseau, *Droit International Public* 59 (1970, Vol. I); M. Sørensen, *Les sources du droit international: étude sur la jurisprudence de la Cour Permanente de la Justice International* (1946) 40.

[219] Williams (Aspects), *supra* note 2, at 38-9.

[220] H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (1927), at 67-68.

An extraordinary amount of work has been published on the sources since 1920, with recent years being no exception.[221] Some of this work has covered the topic exhaustively. Moreover, Critical scholarship during the last two decades has set new standards of analysis by exposing the deep structure of sources argument with great lucidity and persuasiveness.[222] The aim of this Chapter is not to replicate the above-mentioned work but, rather, to refer to it for the purpose of supporting its analysis.

The propositions explored in this Chapter, closely following the ones outlined in Chapter 1, is that the watershed effect of the doctrine of the sources becomes very plausible when seen in the light of the foregoing analysis about the role of vocabularies of progress in international law. It is argued that, contrary to the mainstream understanding, the success of the doctrine of the sources cannot be attributed to its (alleged) claim of bringing closure to the perennial questions of law making and law ascertainment. Sources talk, however, managed to capture the fantasy of an entire profession as a means of moving forward with the discipline. The idea was that, if only one was able to devise a set of finite, universally applicable, formal categories of legal norms, one would be able to end the problem of

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[221] For some post-1989 book-length publications on the topic, see A. Boyle & C. Chinkin, The Making of International Law (2007); A. Orakhelashvili, *Peremptory Norms in International Law* (2006); C. Tomuschat & J.-M. Thouverin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006); R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty Making* (2005); M. Craven & M. Fitzmaurice, *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (2005); C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); A. D'Amato, *International Law Sources* (2004); I. F. Dekker & H. G. Post (eds.), *On the Foundations and Sources of International Law* (2003); R. Gaebler & M. Smolka-Day (eds.), *Sources of State Practice in International Law* (2002); M. Koskenniemi (ed.), *Sources of International Law* (2000); A. Aust, *Modern Treaty Law and Practice* (2000); M. Byers, *Custom, Power and the Power of Rules* (1999); B. Mulamba Mbuyi, *Introduction à l'étude des sources modernes du droit international public* (1999); O.A. Elias & C.L. Lim, *The Paradox of Consensualism in International Law* (1998); M.E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (1997); V.D. Degan, *Sources of International Law* (1997); M. Ragazzi, *The Concept of International Obligations "Erga Omnes"* (1997); J. Klabbers, *The Concept of Treaty in International Law* (1996); G.M. Danilenko, *Law Making in the International Community* (1993); K. Wolfke, *Custom in Present International Law* (1993).

[222] The work of David Kennedy and Martti Kosenniemi has been seminal in this regard. See Kennedy (International Legal Structures), *supra* note 37, *esp*. Chapter 1 (Sources of International Law), at 11-107, reprinted in D. Kennedy, The Sources of International Law, (1987) 2 American University Journal of International Law Review 1-96; M. Koskenniemi, Editor's Introduction, in Koskenniemi (Sources), *supra* note 222, at xv-xxvii; M. Koskenniemi, The Normative Force of Habit: International Custom and Social Theory, (1990) 1 Finnish Yearbook of International Law 77; Koskenniemi (From Apology to Utopia), *supra* note 37, *esp*. Chapter 5 (Sources of International Law), at 264-341.

indeterminacy. The case study demonstrates how this feeling of progress is generated by a vocabulary, a set of discursive structures.

The backbone of this vocabulary is a narrative of progress that tells a story about forward movement and evolution. This narrative tells the story of 'old' international law, whose law-making processes were indeterminate and open-ended. Article 38 was described as being able to resolve these problems and thus initiate a new era in international law making, bringing determinacy and closure. Similarly to Seferiades, however, this Chapter demonstrates that the new doctrine was based on notions that were themselves neither stable nor determinate but were subverted each time they were put to application. Legitimacy in sources discourse was produced not because Article 38 PCIJ Statute had the capacity to decisively tell whether a certain norm was one of public international law. Legitimacy was produced via the *invocation* of the vocabulary of Article 38. In that sense, progress in sources discourse did not have a concrete essence: it was the product of a narrative whose essence was floating, allowing a multiplicity of meanings according to the occasion. Like Seferiades, one could argue that the iteration of meanings is what enabled the success of the language of the sources doctrine.

The study has defined as the horizon of its field of analysis interwar (1919-1939) on the sources of international law. Sections 3.2, 3.3 and 3.4 situate the adoption of Article 38 PCIJ (which occurred in 1920) within the cultural and professional habitat of "new international law" of the years between the two World Wars. The chief aim of those Sections is to explain how the need for law making, and an ensuing doctrine of the sources, emerged as crucial part of the reconstruction rhetoric. Section 3.5 tries to resolve the 'riddle' of the success of the doctrine of the sources in capturing the imagination of interwar international law. It explains how the doctrine of the sources seemed able to satisfy the need for clarity, determinacy, and ground for public international law, while avoiding the pitfalls of 19th century international law theory. Section 3.6 briefly digresses to some contemporary interntional law writings that illustrate the vocabulary of progress of the sources doctrine. Section 3.7 looks behind the claims of the doctrine and assesses the limits of its vocabulary of progress.

3.2. Interwar Discourse on the Sources of International Law and the Quest for Reconstruction

In the years following World War I international law appears deeply immersed in reflection about its future. An unusual number of publications of the time address squarely the theme of the outlook, future, or prospect for international law and pose openly the question of how to achieve progress

within the science.[223] In this spirit, Manley Hudson publishes in 1925 a celebrated article titled *The Prospect for International Law in the Twentieth Century*.[224] The paper echoes Hudson's other publications of the time[225] and is written in the grand, evocative style typical of interwar scholarship.[226] The tone is engaging, intense, almost zealous, inviting international lawyers to join the author in a large-scale effort to redefine the goals of the science. Hudson sets out to answer the basic question of "what do we hope to be the contribution of the twentieth century to the progress of international law?"[227] To answer, he performs an anatomy of the problems plaguing international law, followed by suggestions for future action. This publication is illustrative of many of the standard tropes[228] of mainstream interwar scholarship and brings out the crucial role of the turn to law making and the doctrine of the sources. Hudson's article is examined here in some detail to help us flag out the main contours of interwar argument and the context in which the debate on the sources acquired its meaning.

Hudson begins with an appraisal of the influence of World War I on the development of international law.[229] The War is presented as a cataclysmic event that, quite paradoxically, produced two opposite effects. On the one hand, it put an abrupt end to the progress that was being achieved previously.[230] For Hudson, pre-War progress consisted of an ever expanding

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[223] See in chronological order, Seferiades (The Future of International Public Law), *supra* note 66; L. Oppenheim, *The Future of International Law* (1921); Nippold (The Development of International Law After the World War), *supra* note 74; M.O. Hudson, *The Outlook for the Development of International Law* (An Address before the American Branch of the International Law Association, New York, January 1925); Lauterpacht (Private Law Sources), *supra* note 220; N.S. Politis, *The New Aspects of International Law: A Series of Lectures Delivered at Columbia University* (1928); Álvarez (The New International Law), *supra* note 16; J.B. Scott, The Progress of International Law During the Last 25 Years, (1931) 25 Proceedings of the American Society of International Law 2; W. Simons, *The Evolution of Public Law in Europe Since Grotius* (1931); Hudson (Progress in International Organization), *supra* note 13; A. Álvarez, The Necessity for the Reconstruction of International Law – Its Aim, Proceedings of the 4th Conference of Teachers of International Law and Related Subjects (1930) 11; Brierly (Shortcomings of International Law), *supra* note 72.

[224] M.O. Hudson, The Prospect for International Law in the Twentieth Century, (1925) 10 The Cornell Law Quarterly 419.

[225] See *supra* note 223.

[226] See the discussion of the writings of Seferiades, Chapter 2, *supra*.

[227] Hudson (Prospect), *supra* note 224, at 420.

[228] The term trope is understood here in its meaning under literary theory, namely as a common motif, story or pattern in literary accounts. The term has a different meaning in linguistics, where it is used in the sense of a figure of speech, namely a deviation or modification of the meaning of a primary expression that is regarded as normal. See e.g. Ducrot & Todorov (Encyclopaedic Dictionary of the Sciences of Language), *supra* note 32, at 275.

[229] Hudson (Prospect), *supra* note 224, at 421-423. This part of the argument is elaborated in great detail in Hudson (Progress), *supra* note 13, at 16-25.

[230] Hudson (Progress), *supra* note 13, at 6-15.

and intensifying process of internationalization. Its main aspects were the emergence of new international organizations to handle sectoral issues of inter-state relations (notably telecommunications, transportation etc.) and the creation of new international agreements (what he later calls 'international legislation').[231] The failure of international law to prevent the War seems to have embarrassed deeply the international law profession.[232] On the antipodes, for Hudson, the War also gave rise to the more constructive realization that institutional and doctrinal structures needed to be reconsidered. Had the international community achieved more progress with international organization, Hudson writes, the War could have been prevented in the first place.[233] Eventually, the War managed to catalyze a 'new spirit' that allowed mankind to believe that progress was again possible, and begin the reconstruction of the science of public international law.[234] Against the backdrop of the War, Hudson invites a redefinition of the goals of international law and its reconstruction. The reconstruction effort involves two distinct but parallel tasks. On the one hand, rethinking the philosophical foundations of international law. On the other, developing new methods of international law making.

> The War has left many specific problems which cry out to us for solution. They are so numerous, so varied, and so bewildering, their background is so new, so shifting and so complicated that even if the War had purified us as some people seem to believe, we could hardly summon the courage to face them without a pretty clear understanding of our situation and of the methods by which our work may be done. Two fundamental tasks lie at the threshold of our endeavor, therefore, and they must receive attention before our generation can entertain much hope of solving specific problems. The first task is the renovation of the philosophical bases of the law of nations; the second task is the improvement of the method by which nations may consciously legislate to enact international law.[235]

Hudson resolves his anxiety about how to cope with the quicksand of the new terrain by resorting to the first task, namely the rethinking of the

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[231] Hudson (Prospect), *supra* note 224, at 436 et seq.

[232] "Even in the excited periods of the war we lawyers were not immune from suspicion. Perhaps we were never quite absolved from guilt in connection with the lawless situation that inaugurated the war. There lurked in many people's minds a feeling that our failure to build a system of laws which no people would dare to violate had enabled particular peoples to play their role in causing the war. The Hague Conferences became most unpopular, and the man on the street came to be certain that international law had broken down." Hudson (Outlook), *supra* note 223, at 2.

[233] Hudson (Progress), *supra* note 13, at 16 & 18.

[234] Hudson (Progress), *supra* note 13, at 23.

[235] Hudson (Prospect), *supra* note 224, at 423 (footnotes omitted).

philosophical foundations of international law. These philosophical foundations required a 'divorce from religion'.[236] Hudson cites frequently Elihu Root, Benjamin Cardozo, and Roscoe Pound to demonstrate the need for legal scholarship to become emancipated from theology, religion and any other mode of naturalist thinking. Any nexus between one's approach to international law and Christianity, religion, the law of nature, right reason, positive morality, or any such concept, is of "doubtful utility".[237] Hudson includes in this category of naturalist thought even those who consider consent, common consent, or any kind of "social comtact" as constituting the foundation of international law. For Hudson, such concepts are a "mere substitute" of naturalist thought.[238] Foremost among these concepts is the absolute conception of sovereignty that prevailed in the past. The failure to develop a philosophy of law divorced from naturalism bore negative consequences for international law, Hudson claims. It prevented the development of an accepted theory of rights and, in addition, it prevented international law from dealing with the circumstances that led to the Great War.[239] As a consequence, international law needs to develop a new and sound philosophical basis. This will not be an easy task, Hudson warns, but thankfully a task that can take place over time, with trial and error. What international law mostly needs is a direction for enquiry rather than a complete set of answers. This direction can be found in the study of human society. For Hudson, the law of nations must seek contributions from history, political science, sociology, and keep pace with the society it serves. The international law of the twentieth century – Hudson cites again Pound and Cardozo to drive the point – "can only result from 'a functional critique of international law in terms of social ends'".[240] The starting point of the new way of thinking about public international law is the rejection of any theory or idea that prevents the science from being connected to its social basis.

Aside from rethinking the philosophical foundations of international law, the second task for Hudson is the elaboration of "new methods for the development of international law".[241] This second task should occur simultaneously with the first task and one should not wait for the development of a complete philosophical model before embarking on the practical reconstruction.

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[236] Hudson (Prospect), *supra* note 224, at 423-436.
[237] Hudson (Prospect), *supra* note 224, at 428.
[238] Hudson (Prospect), *supra* note 224, at 429-430.
[239] Hudson (Prospect), *supra* note 224, at 430-431.
[240] Hudson (Prospect), *supra* note 224, at 435 & footnote 75.
[241] Hudson (Prospect), *supra* note 224, at 436-459.

> An attempt to construct a philosophy of law apart from its application in current life and affairs, would almost certainly prove futile. It would result in the very unreality from which we seek to escape. Induction and deduction must proceed fairly evenly along parallel courses; we must live and move in a turgid stream of international events, and juristic development must ever follow its current. Time will not wait for any re-examination of the philosophical assumptions underlying our law of nations, and scant results would be yielded if it would. Our attention must be given to the methods of current development, therefore, at the same time that we are seeking to control its direction and purpose.[242]

The problem with the old sources of international law is that they were too dependent on sovereign will and thus "negatived the possibility of promoting common action." The creation of the PCIJ changed all that and gave international law a source of law (here Hudson refers to the inclusion of General Principles in the list of sources of Article 38), which was "freed from the national character of court decisions in the past".[243] To make progress, international law needs to develop new methods of legislation ('international legislation') that would allow common action and common interests to be taken into account. For him, the primary source in that direction is the codification of international law in the form of international agreements. The difference between the 'old' international law and this new form of law making is the joint participation of all states. This would allow the creation of rules that embody 'common interest'. To achieve the purpose of representing common interest and common action, these agreements should be the product of negotiation between many states along the lines of well-organized codification conferences.[244]

Finally, Hudson suggests that the reconstruction of international law has to be performed in a new spirit. In different parts of the text he reveals the properties of a new ethical posture to be adopted by the international lawyer. It involves pragmatism (solutions need to be based on the practical and contemporaneous needs of society and then be abandoned when they no longer serve the purpose), open-ness (detachment from any sort of fixed ideas, including the old philosophical traditions), communitarian spirit (thinking of the common interest instead of national interests), optimism, humility, but also boldness. In a characteristic passage he writes:

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[242] Hudson (Prospect), *supra* note 224, at 436.
[243] Hudson (Prospect), *supra* note 224, at 437.
[244] Hudson (Prospect), *supra* note 224, at 441 et seq.

> New needs have come with the manifold changes in world society and new furrows may have to be plowed to meet them. We must have not only the patience and the detachment necessary to understand them, but also the boldness to make the departure which understanding may prompt us to undertake.[245]

3.3. Tropes of Reconstruction

Interwar international law argument is a complex terrain. Rich and exciting stories can be told about the period and the various styles of argument that dominated international law discourse in various professional communities on either side of the Atlantic. The purpose of this Chapter is not to attempt to do justice to the wealth of interwar literature but simply to provide the setting within which sources discourse emerged. Without doubt, there are important scholars of the period, such as Hans Kelsen, Alf Ross, and others, whose work does not fit neatly within the picture. The purpose of this chapter, however, is not to write an intellectual history of interwar argument but rather, point to the existene of a specific discourse about public international law that produced meaning about progress relating to the doctrine of the sources. For this purpose, the term 'sociological jurisprudence' is used to refer to the mainstream style of argument of the interwar period, with due knowledge of the limitations of such a reduction.[246] The sociological style reflected to some extent voices in domestic law that demonstrated a similar

[245] Hudson (Prospect), *supra* note 224, at 422.

[246] What is referred to as interwar internationalist sociological style includes a broad alliance of scholars on both sides of the Atlantic who shared, despite many differences, a similar style of argument. For the purposes of this analysis, the group would include Alejandro Álvarez, Léon Bourgeois, James Leslie Brierly, James Brown Scott, Léon Duguit, George Finch, Sir John Fischer Williams, Torsten Gihl, Manley Hudson, Joseph Kunz, Albert de Lapradelle, Hersch Lauterpacht, Sir Arnold McNair, Lassa Oppenheim, Nicolas Politis, Louis Renault, Georges Scelle, Stelios Seferiades, Charles de Visscher, and others. Voices that are partly or entirely in disagreement with this mainstream view continued to thrive, as will be explained below. See note 266 and accompanying text, *infra*. For the interwar sociological movement see Koskenniemi (Gentle Civilizer), *supra* note 21, at 266-412; D. Kennedy, International Law and the 19th Century: The History of an Illusion, (1996) 65 Nordic Journal of International Law 385; N. Berman, A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework, (1992) 33 Harvard International Law Journal 353; E. Jouannet, La critique de la pensée classique durant l'entre les deux guerres: Vattel et van Vollenhoven: Quelques réflexions sue le modèle classique en droit international, in P. Kovacs (ed.), *History in International Law: Historia ante Portas* 61-83 (2005); and E. Jouannet, Regards sur un siècle de doctrine française du droit international, (2001) 46 Annuaire Français de Droit International 1; S.J. Astorino, The Impact of Sociological Jurisprudence on International Law in the Interwar Period, (1996) 34 Duquesne Law Review 277; Landauer (Brierly), *supra* note 72; and the essay in F. Johns, T. Skouteris & W. Werner (eds.), *The Law and Periphery Series: Alejandro Álvarez*, (2006) 19 Leiden Journal of International Law 875.

rejection of foundationalism, conceptualism, and legal formalism.[247] Hudson's essay highlights some of the tropes of mainstream interwar argument that are relevant for our account of the sources. Despite their many differences, scholars of the sociological movement advocated a pragmatic approach to law, which rejected (what they understood as) the rationalist epistemology of 19th Century thinking – the idea that law is a matter of formal reason, whose study can be exhausted in books and abstract logical argument. They favored a practical, functional understanding of truth and knowledge based on human experience and experimentation. They advocated a turn to the social sciences and scientific observation of society to retain the characterization of law as science, and despite their rejection of formalism. Five narrative tropes, relevant to our purposes, are identified here.[248]

The War as the Catalyst for Reconstruction

The first trope is the use of the Great War as the surface against which the new beginning for international law could be projected. The War was seen as a catalyst and the starting point for reconstruction. Like Hudson, much of the interwar mainstream considers that the War, aside from putting an end to elements of progress previously attained, was a unique event that revealed the bankruptcy of the 'old' international law. Authors estimated that the prestige and credibility of international law was shattered by the atrocities committed in the course of the War and the repeated violation of legal rules

[247] For the relationship between international and domestic discourses in Continental Europe, see Koskenniemi (Gentle Civilizer), *supra* note 21, at 266-352. For the United States, primary candidate for such parallels would be the sociological jurisprudential movement exemplified by the writings of Oliver Wendell Holmes, Benjamin Cardozo, Roscoe Pound, and others. For the sociological movement in the USA, see G. Minda, *Post-Modern Legal Movements: Law and Jurisprudence at Century's End* (1995), at 13-43; see also the commentary of D. Kennedy & W. Fischer, *The Canon of American Legal Thought* (2006), at 19-26 & 47-51. The sociological movement is to be distinguished from the movement of American Legal Realism, of Karl Llewellyn, Wesley Hohfeld, Jerome Frank, Felix Cohen, Walter Wheeler Cook, Robert Hale, and others. Although American Legal Realism shared much of the claims of legal formalism made by the sociologists, they parted company in seeing the sociological movement as formalist in its own right, which failed, among other things, to take into account the complex and fluid nature of reality in rule interpretation and judicial decision making. The more radical strand of the realists went many steps further by seeking to expose the political context of both public and private law. For a classic account of American Legal Realism, see M. Horwitz, *The Transformation of American Law (1870-1960): The Crisis of Legal Orthodoxy* (1992); W.M. Fischer, M.J. Horwitz & T.A. Reed (eds.), *American Legal Realism* (1993).

[248] Hersch Lauterpacht, when discussing the work of James Leslie Brierly, identified five different contributions of Brierly to international law: "the rejection of positivism, the affirmation of the moral foundations of international law; the recognition of the individual as a subject of international law; the vindication of the unity of international and municipal law, and his criticism of the notion of the international sovereignty of the state"; H. Lauterpacht, Brierly's Contribution to International Law, (1955-56) 32 British Yearbook of International Law 1.

so soon after the codification efforts of the Hague Conferences of 1899 and 1907. International law's constraining ability was challenged, its ethical commitment questioned, its potential discredited.[249] At the same time, in all its destructive effect, the Great War was seen as having created the space for the reconstruction of international law.[250] It awakened the legal profession, the story goes, and reminded it of its responsibility to take action.[251]

The Project for the Reconstruction of International Law

A *second* trope is the urge to reconstruct international law in the ashes of the Great War. The theme of renewal, 'renaissance', rethinking, renovation, reconstruction of international law is central to interwar writing.[252] The idea

[249] Politis (Aspects), *supra* note 223, at 1; Herbert Smith wrote that "[u]pon the essential limitations of all such [pre-war] law-making the war itself threw vivid light. By this I do not mean that the rules so carefully drawn up were lightly broken or openly condemned, but that they were so dubiously worded that each belligerent might find in them authority for doing whatsoever he might desire to do"; H. Smith, International Law Making, (1930) 16 Grotius Society Transactions 93. Álvarez writes: "When the world war broke out, public opinion, overwhelmed and anguished by this event, and especially by the repeated violations of legal rules, believed that the law of nations had gone bankrupt, and many publicists shared this belief"; Álvarez (New International Law), *supra* note 223, at 36; A. Zimmern, *The League of Nations and the Rule of Law 1918-1935* (1936), at 94-101; Walters, *A History of the League of Nations*, *supra* note 76, at 16.

[250] See e.g. E.E.F. Descamps, Le droit international nouveau. L'influence de la condamnation de la guerre sur l'évolution juridique international, (1930-I) 31 RCADI 393; Álvarez (Necessity), *supra* note 223, at 2. Nippold warned that "[t]he science of international law is therefore not allowed to fold its hands idly, as it only too often has done. Instead of wearying itself with the Sisyphean labour of cleansing its own country of all guilt for violations of international law that may have occurred or instead of criticizing violations of international law on the part of enemies of its country [...] it will above all have to find its task in the deduction of useful applications from the lesson of this war for the future shaping of international law and in pointing out the way to nations for the future policy of international law"; Nippold (The Development of International Law After the World War), *supra* note 74, at 4. Politis writes: "A calmer, more dispassionate scrutiny of the situation brought the conviction that, far from being fatal to it, the trial that it [international law] had undergone, has been, in the end, a very good thing for international law; it had brought sharply into light certain changes which had already taken place [...]"; Politis (Aspects), *supra* note 223, at 1.

[251] E.g. Finch spoke of the "acid test of the World War in 1914" to which past conceptions of international law have submitted and proven insufficient; G. Finch, *The Sources of Modern International Law* (1937) 28. Nippold wrote that "this whole great war has really been nothing less than one great lesson for mankind"; Nippold (The Development of International Law After the World War), *supra* note 74, at 28.

[252] There is an abundance of sources advocating the necessity for a reconstruction of international law at the end of the war. Álvarez suggested that "the task that is now necessary is the reconstruction of this law" see Álvarez (New International Law), *supra* note 223, at 38; Brierly spoke of a "need of rehabilitation"; Brierly (Shortcomings of International Law), *supra* note 72, at 68. Politis writes: "Its [International law's] regeneration, bringing up to date, renovation, recasting on democratic principles and development"; Politis (Aspects), *supra* note 223, at 2; Nippold sought the future "reconstruction" of international law; Nippold (The Development of International Law After the World War), *supra* note 74, at 25.

was that international law should enter a new phase, a new step in its evolution, and regenerate itself. Reconstruction was seen as consisting of two distinct moments: a "critical" and a "constructive" one.[253] The critical element was principally understood as a theoretical enquiry into the foundations and methods of international law, whereas the constructive part was seen as largely positive and practical, having to do with institutional and doctrinal modifications.[254] The literature was worried that a reconstruction project would run the risk of becoming overtly theoretical and therefore irrelevant. As consequence, theoretical work should be coupled with practical measures addressing the everyday, immediate needs of the international society.[255] The tasks of critique and construction therefore would need to take place simultaneously and in a complementary manner, even if this meant that some of the measures were only temporary.

Critique of the Philosophical Foundations

A third trope was the contention that "critique" has to begin by scrutinizing the foundations and methods of international law, as they existed before the War.[256] What was problematic with the foundations of the 'old' international law? International law, the story goes, had become too attached to theoretical constructions instead of observing the practice of states, became socially irrelevant and, thus, disempowered. Law became too separated from politics;[257] too dependent on national and sovereign political interest;[258] too invested in preventing war instead of fostering peace;[259] out of pace with the evolution of the international society;[260] too rigid and detached from the practice of states.[261] Authors spoke of the need for the law to be able to

[253] The division between a critical and a constructive component is widely reflected in the literature of the time. Álvarez (New International Law, *supra* note 223 at 41), for example uses the exact words to describe his project: "It includes two phases: that of criticism and that of construction". "[Le] travail de critique et de reconstitution du Droit International". Oppenheim argued that the new task for the science of international law is, first, to ascertain the existing rules and identify gaps in the existing law and, on that basis, then make de *lege ferenda* proposals for codification: Oppenheim (Future), *supra* note 223, at 57.

[254] Álvarez (New International Law), *supra* note 223, at 37 & 42.

[255] Álvarez (New International Law), *supra* note 223, at 40.

[256] See e.g. J. Kunz, On the Theoretical Basis of the Law of Nations, (1925) 10 Grotius Society Transactions 115; W. Roemer, *The Ethical Basis of International Law* (1929); J.L. Brierly, Le fondement du charactère obligatoire du droit international, (1928-III) 23 RCADI 463.

[257] Álvarez (New International Law), *supra* note 223 at 37.

[258] Oppenheim (Future), *supra* note 223, at 17.

[259] The League of Nations and the Laws of War (Anonymous), (1920-21) 1 British Yearbook of International Law 109, at 115; A. Pearce Higgins, The Law of Peace, (1923-24) 4 British Yearbook of International Law 153, at 153.

[260] Politis (Aspects), *supra* note 223, at 2-3.

[261] Álvarez (Necessity), *supra* note 223, at 2.

accommodate "change" in international legal situations.[262] All these critiques led to the primary interwar concern, namely, the attachment of international law to theoretical rumination instead of pragmatic thinking, and especially to the traditions of naturalism and positivism, to which international law's failures were ascribed.[263] The critique was directed not against the two intellectual traditions as such, but against their extreme forms, which were presented in stark colors and in some cases even caricatured.[264] Authors were quick to confirm that they did not reject the essence of these traditions, which ought to be retained in a sensible way within legal argument.

The effect of the extreme conceptions of positivism and naturalism was three-fold, the story goes. *First*, these conceptions made international law vulnerable to the so-called 'Austinian' critique,[265] namely that international law is not really law proper because of the absence of a superior coercive authority. The 'Austinian' challenge was empowered to challenge international law by the fact that neither of the two theories was able to adequately explain the basis of obligation. Extreme positivism[266] could not explain how law can be binding over entities whose essential nature is supposed to place them above the law. Similarly, naturalism in its extreme form[267] claimed that law binds because there is a moral duty to do so, while the principles of international law (e.g., equality, independence) could be inferred from the essential nature of the state. This understandng could not retain the autonomy of law from morality. When the basis of obligation in

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[262] T. Gihl, *International Legislation: An Essay on Changes in International Law and in International Legal Situations* (1937), at 77-135, suggests that international law has to find ways to include, handle and manage changes in international law and international legal situations. See also J.F. Williams, *International Change and International Peace* (1932), esp. at 1-5 & 15-20.

[263] The parallel rejection of the extreme forms of positivism and naturalism is one of the most common themes in interwar literature. See J.L. Brierly, *The Law of Nations – An Introduction to the International Law of Peace* (1936), at 1-18; Gihl (International Legislation), *supra* note 262, at 7-21; Williams (Aspects), *supra* note 2, at 59-75; Politis (Aspects), *supra* note 223, at 4-5. For an analysis of the positivist view only, see Lauterpacht (Private Law Sources), *supra* note 220, at 1-90; Oppenheim (Future), *supra* note 223, at 9-13.

[264] Álvarez writes that positivists "disdain systematic construction, general principles and theories, which seem to them abstract and dangerous things; they confine themselves to the study of concrete cases"; Álvarez (The New International Law), *supra* note 223, at 43.

[265] J. Austin, *The Province of Jurisprudence Determined* (1995), esp. Lectures I, V, and VI.

[266] The positivist works of Dionisio Anzilotti, Carl Bergbohm, Arrigo Cavaglieri, Georg Jellinek, Adolf Lasson, Heinrich Triepel, and, in later texts, Hans Kelsen, were the frequently cited examples of this view. For criticisms of this view see, in particular, H. Lauterpacht, *The Function of Law in the International Community* (1933), at 415 et seq.; Brierly (Le Fondement du caractère obligatoire du droit international), *supra* note 256, at 484 et seq.

[267] Samuel Pufendorf & Emer de Vattel were primary among the authors identified with this version of extreme naturalism.

international law is declared to be an indemonstrable postulate, it presents itself as a mystery. It is no surprise, in this context, that international law of the time engaged in such vocal critiques of the traditional concept of sovereignty[268] and, for that matter, the PCIJ Judgment on the *Lotus Case*.[269] The *second* negative consequence was that, by consuming itself in the effort to meet the doubt of its deficiency and craft a credible theoretical model that could explain international law's existence to the skeptics, the science became detached from the everyday practice of international law, fell asleep at the wheel and failed to attend to the needs of the international community. Failure to understand the current needs of the international community distanced academic theory from the everyday practice of states. The body of norms of international law became superseded and ill equipped to attain the ends for which it was established. The third (related) effect was that the extreme conceptions of positivism and naturalism legitimized irresponsible state behavior, leading ultimately to the causes of the Great War. Extreme positivism, in failing to provide an explanation about how international law can bind sovereign states against their will, became the pretext for the disregard of the rights of other states. By the same token, in naturalism it was impossible to point to an authentic text of the law without a contesting interpretation, creating indeterminacy and the room to legitimize any contention of what a natural right is.

The answer was to be found in rethinking of the philosophical foundations of the law and, more concretely, the basis of its obligation. The goal was to side-step the problem of high theory while being able to provide a convincing answer to the Austinian critique. The solution was a turn to pragmatism. For interwar scholars, international law exists as a social product, as a 'pure fact', which we have become conscious of through observation.[270] Despite different expressions and emphasis, many interwar authors shake hands in the contention that international law needs to liberate itself from the tyranny of finding an impregnable explanation about its basis of obligation and turn towards more useful enquiries. Those who contest international law's existence, the story goes, are mostly theorists. States and statesmen, who use international law in their everyday life, rarely deny its existence. If there is a final answer to be found on the question of the basis of obligation, it is for legal philosophy and not for international law to find it.

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[268] E.g. W.R. Bisschop, Sovereignty, (1921-22) 2 British Yearbook of International Law 122.

[269] Lotus Case, P.C.I.J Ser. A, No. 10 (1927). For some criticism, see J.L. Brierly, The Lotus Case, in Lauterpacht (Brierly), *supra* note 72; L. Cavaré, L'arrêt du "Lotus" et le positivisme juridique, (1930) 10 Travaux juridiques et economiques de l'Université de Rennes 144; A. Steiner, Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice, (1936) 30 American Journal of International Law 414.

[270] For a fascinating analysis of how interwar literature dealt with the 'Austinian' question, see Kennedy (History of an Illusion), *supra* note 246.

For Álvarez, on the question of the basis of obligation the lawyer is entitled to take a pragmatic standpoint: "the international lawyer needs no special explanation of the obligatory force of international law, beyond the explanation, whatever it may be, of the obligatory force of law in general.[271] Gihl explains the legal phenomenon as the product of "complex forces actually at work".[272] If there should be an obligation to obey international law, this obligation should not come out of any theoretical acrobatism, trying to reconstruct it out of the sovereignty or the law of state. It must be moral in character.[273] In one of the most classical statements of this view, Brierly writes:

> There need to be no mystery about the source of the obligation to obey international law. The same problem arises in any system of law and it can never be solved by a merely juridical explanation. The answer must be sought outside the law, and it is for legal philosophy to provide it. The notion that the validity of international law raises some peculiar problem arises from the confusion which the doctrine of sovereignty has introduced into international legal theory.[274]

Elaboration of methods for the development of the law

A *fourth* trope in the literature is the contention that the "constructive" moment of the new international law should take place by clarifying the legal methods for the development of the law and, primarily, by creating more law and more determinate law. The term frequently used to refer to this activity was "legislation" or "international legislation"[275] and the method par excellence for its attainment was codification.[276] Although codification was

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[271] Álvarez has addressed the matter in a number of publications. In addition to the texts already mentioned, see also A. Álvarez, New Conception and New Bases of Legal Philosophy, (1918-19) 13 Illinois Law Review 167, at 179 & 181. For a review of Álvarez's idea of the basis of obligation, see W. Samore, The New International Law of Alejandro Álvarez, (1958) 52 American Journal of International Law 41. See also Johns, Skouteris & Werner (Alvarez), *supra* note 246.

[272] Gihl (International Legislation), *supra* note 262, at 19.

[273] Brierly (Fondement), *supra* note 256, at 546 et seq.

[274] Brierly (Law of Nations), *supra* note 263, at 44-45.

[275] Gihl (International Legislation), *supra* note *supra* note 262, at 1; Hudson (Prospect), *supra* note 224, at 436 et seq.

[276] From the large body of literature on codification in the period, see P.J. Baker, The Codification of International Law, (1924) 5 British Yearbook of International Law 38, at 40; C. de Visscher, La Codification du droit international, (1925-I) 6 RCADI 325; E. Root, The Codification of International Law, (1925) 19 American Journal of International Law 671; S. Cole, Codification of International Law, (1927) 12 Grotius Society Transactions 49; J.B. Scott, The Gradual and Progressive Codification of International Law, (1927) 21 American Journal of International Law 417; A. McNair, The Present Position of the Codification of International Law, (1928) 13 Grotius Society Transactions 129; F.-J. Urrutia, La codification du droit international en Amérique, (1928-II) 22 RCADI 81; J.L. Brierly, The Future of Codification, (1931) 12 British Yearbook of International Law 2; Smith (International Law-Making), *supra* note 249; M. Sibert, Quelques aspects de l'organisation et la technique des conférences internationales, (1934-II) 48 RCADI 387.

used as a standard term across the literature, different ideas about codification were underlying the common vocabulary. Some saw codification as a scientific enterprise, to be executed by trained, independent international law professionals in their individual capacity. Others saw codification as an exercise to be performed by sovereign states in duly organized diplomatic conferences. Some suggested that codification should solely aim at the transcription into written form of norms that already existed as customary international law. Others favored the modification of existing rules in order to reconcile conflicting views and make agreement possible. Others suggested progressive development or even the development of entirely new rules. Jurists of a civil law background were thought of as more enthusiastic about codification than those of common law background, allegedly due to the fact that the former were more accustomed to codes.[277] It was scholars in the Americas, however, who got a head start with codification efforts.[278] The divisions on the two sides of the Atlantic was not random but could be traced to the different intellectual traditions and influences. General consensus was formed around the idea that codification, in the general sense of the creation of written texts containing binding international law rules, was the desirable way forward.[279] Another common denominator was the conviction that codification should not aim at drafting complete 'code' of public international law but rather at the gradual and progressive codification of areas 'ripe' for the purpose, either because of 'common purpose' to be found among states and/or already existing adequate practice and principles.[280] Elihu Root writes:

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[277] See e.g. comments in McNair (Present Position), *supra* note 276, at 130.

[278] Two major codification projects dominated the 1920s in the opposite sides of the Atlantic. On the one hand, there was the codification effort commissioned to the American Institute of International Law by the Pan-American Union. This resulted in 30 codification projects that were discussed in Rio de Janeiro in 1927. The text of these projects was published in a Supplement to the American Journal of International Law (Special Number, 1926), at 300-387; and *Codification du Droit International* (Pan-American Union, 1925 & 1926). For a review of these efforts, see Scott (Gradual and Progressive Codification), *supra* note 276.

On the other, there was the League of Nations. On 22 September 1924, the Assembly of the League adopted a Resolution whereby the Council was requested to convene a committee, later to be known as "Committee of Experts for the Progressive Codification of International Law", with the mandate to identify a list of subjects and areas ripe for codification. This effort led to the First Hague Conference for the Codification of International Law, which took place from 13 March – 12 April 1930. See the multi-volume publication by S. Rosenne (ed.), *Conference for the Codification of International Law [1930]* (1975), *esp*. the Editor's Foreword, at viii-lvi; for another appraisal, see Álvarez (Impressions), *supra* note 276.

[279] Scott exclaims that "codification is the order of the day"; Scott (Progress), *supra* note 223, at 11; McNair speaks of a "desire", even a "craving" for codification; McNair (Present Position), *supra* note 276, at 130; Cole (Codification), *supra* note 276, at 51, speaks of "widespread demand".

[280] Oppenheim (Future), *supra* note 223, at 23-24; Scott (Progress), *supra* note 223, at 10; Williams (Aspects), *supra* note 2, at 54; Politis (Aspects), *supra* note 223, at 70-71.

> As a declaration of war brings to the soldier the opportunity for which his life has been in preparation, so this call [for codification] from both sides of the Atlantic presents the occasion for which all these societies, learned in international law, exist. It is for such an opportunity as this that they have been preparing, some of them for seventy years past. Now is their time to justify. Of course they will justify with ardor and devotion, and there will be no more avoidable delay, no more hesitation.[281]

A strong connection was forged between codification and the PCIJ.[282] To begin with, it was the Advisory Committee of Jurists that drafted the PICJ Statute that submitted the first-ever official proposal to the League of Nations to begin a codification project.[283] In addition, and although many authors were quick to underline that the new international law should not emulate the structure of domestic legal systems, many saw that some version of the classical model of the division of powers of the liberal state should and could apply to international law as well. The establishment of the Permanent Court created, at least formally, the first international court with potentially universal appeal. The general view was that the new World Court should have some kind of 'world law' at its disposal. Codification was one of the ways to achieve rules of potentially universal application and a common, or universal international law.[284]

> We end as we started, in a wilderness of divergence and a conflict of right and duty and interpretation. The common law of nations requires a common code, and a common code is the result of a conference, discussion, agreement upon the content, as well as the form of each of its articles, with an agency for their interpretation and application which, fortunately for us, exists at The Hague.[285]

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[281] Root (Codification), *supra* note 276, at 684.

[282] The role of the PCIJ in the interwar equation is a complex topic that would require a separate study to do justice to its complexity. For an interesting recent assessment, see O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005).

[283] See Rosenne (Conference for the Codification of International Law), *supra* note 278.

[284] Root (Codification), *supra* note 276, at 678-9. Scott writes: "The multilateral treaty is a recognition of a unity of interest on the part of the international community. The Permanent Court of International Justice is a recognition of the unity of the international community and of the necessity of a single and universal interpretation of each and every obligation arising under a treaty and the common law of nations"; Scott (Progress), *supra* note 223, at 9. Álvarez wrote that the solution to the theoretical uncertainty of the past may be the establishment of "uniformity of views concerning the most essential principles of international law"; Álvarez (New International Law), *supra* note 223, at 45; Oppenheim (Future), *supra* note 223, at 15-17.

[285] Scott (Progress), *supra* note 223, at 10.

The nexus between codification and progress in international law now begins to emerge. The contention was that the development of new rules to regulate previously unregulated areas of international practice would prevent future setbacks, what Brierly appositely called the "annexation" of matters within the domain of international law.[286] Not only would the presence of 'new law' regulate the conduct of states and limit their reserved domain. Law produced via the process of codification was also seen as more likely to restrain states than customary law, by virtue of the fact that it would be the product of conscious, scientific labor, as opposed to law ascertained in retrospect from the conduct of states.[287] The strict procedural rules of codification conferences would harness sovereign power into civilized debate where equality of states would prevail over power disparity. Conferences would produce law, the story goes, that is crafted with the consent of all civilized states and with universal application. It would thus be law that is not produced abstractly, that is to say based on some pre-fabricated theories and explanations about law (such as the theories of positivism and naturalism), but law made to address the current needs of the international community.[288] As one commentator wrote characteristically, with codification

> […] law is scientifically examined. It is rational, coherent, modern, obsolete law is removed, efficient rules substituted for inefficient.[289]

Recent literature has exposed how the promise of capturing both sovereign and community goals in one single international instrument is also its defeat.[290] The codification rhetoric of the time paved the road for the development of a second generation of doctrines that would allow the new treaties to operate effectively. In order to ensure that treaties would not become obsolete, mechanisms for the revision and secondary doctrines (e.g. on reservations or interpretation) would have to accompany codification.[291] Clarity on the topic of the sources was an imperative condition for progress. Corbett writes:

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[286] Brierly (Law of Nations), *supra* note 263, at 54.

[287] Oppenheim (Future), *supra* note 223, at 23 & 33, writes that "international law must no longer be left to mere chance" and what is needed is "conscious creation of law in contrast to the growth of law out of custom"; Root (Codification), *supra* note 276, at 681.

[288] Álvarez sees codification as a practical (and thus not theoretical) exercise; Álvarez (New International Law), *supra* note 223, at 45.

[289] Gahan (Codification), *supra* note 276, at 112.

[290] For analyses of the structure of treaty argument see Koskenniemi (From Apology to Utopia), *supra* note 37, esp. 291-302; Kennedy (Sources), *supra* note 222; D. Kennedy, The Turn to Interpretation, (1985) 58 California Law Review 1; Klabbers (Concept of Treaty), *supra* note 221.

[291] Some authors were worried that codification would bring rigidity to the law, Baker (Codification), *supra* note 276, at 46 et seq.; de Visscher (Codification), *supra* note 276, at 386 et seq.

> The movement towards general codification is gathering force, and it is not quite inconceivable that the widespread confusion in relation to the various ideas connoted by the word "source" may manifest itself in an equal uncertainty as to what are the rules to be codified?[292]

This is the promise of codification:

> If only we succeeded in the clear enunciation of legal rules for all international relations; if only we could succeed in finding independent and unbiased men to whose judgment a state could confidently submit its cause; if only we could succeed in bringing such men together in an independent international court – there would be no reason why the great majority of states should not follow the example of the very small minority which has already agreed to settle all possible disputes by means of arbitration.[293]

If only… Enthusiasm with codification was proven to be short-lived. By the mid-1930s the codification projects of the League of Nations and the Pan-American Union were proclaimed unsuccessful and the literature adopted a more reflective and moderate tone.[294] This turn did not dislodge the initial commitment in the core idea that 'international legislation' by means of codification would lead to progress. It was in this context that the possibility of a doctrine of sources started getting traction in international law argument: the idea of a closed list of law-making methods that can operate on a level or 'register' which is independent from theoretical rumination about the basis of obligation in public international law. They would help create the new common code of humanity on a manner based both on the consent of states and scientific observation, but without the pitfalls of high theory. To this we will return in a second.

The New Spirit

There is finally *a fifth* trope, characteristic of interwar writing, which relates to the 'spirit' with which the project of the reconstruction of international law should be undertaken. Some authors understand this 'spirit' as a state of mind, others as an ethical posture, or a method or approach to international law. Either way, for the interwar authors under review, it seems that it is not enough to get the principles of the new international law right – it also matters how you do it. The theme common to the literature is that the end of the Great War became a catalyst for the creation of such a new spirit whose

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[292] P.E. Corbett, The Consent of States and the Sources of the Law of Nations, (1925) 6 British Yearbook of International Law 20, at 21.
[293] Oppenheim (Future), *supra* note 223, at 14.
[294] Álvarez (Impressions), *supra* note 276; Brierly (Future of Codification), *supra* note 276; Smith (International Law-Making), *supra* note 249; Gihl (International Legislation), *supra* note 262, at 64-73.

guidance would be indispensable in order to achieve its objectives. Alejandro Álvarez, one of the champions of the psychological transformation of international law, wrote:

> Furthermore, almost overnight there came into being a new psychology, a new mentality, a new ideology, the fruit of new circumstances and environment, as well as of new political, philosophic and social concepts; they repudiate many ideas and doctrines which were until then accepted without question.[295]

The psychological dimension of the 'new spirit' involved a turn to optimism, modesty, and courage in the discharge of one's professional activities. The ethical dimension involved assuming personal responsibility for change, becoming personally and consciously engaged in the task of reconstruction, without complacency or dependency on prefabricated ideas. One should not only modernize and innovate, but also take the lead and invent.[296] On the methodological level, it involved the use of 'scientific' method in international law. Oppenheim suggests that this new approach to law involves four distinct aspects.[297] First, a positive approach, in the sense of giving up on the deductive methods of the natural sciences and adopting an inductive approach based on close observation of the facts, as well as the identification of sociological, psychological, or other factors that are necessary in order to make accurate inductions.[298] Second, the approach would have to be 'impartial', in the sense of being free from the bias and animosity of national politics. Third, it would have to be free from the 'domination of phrases'. Here interwar scholars refer to their perception of the 'old' international law maxims and concepts which were portrayed as derived directly from the grand theories of naturalism and positivism instead of the positive practice of states – "fanciful doctrines instead of rules of law", as Oppenheim adds. Finally, the approach would have to be international in terms of research and analysis, in the sense of taking aboard literature, practice and concepts that are not derived solely from one's intellectual tradition but from the ones of other states as well. A new spirit that craves for reform, re-conceptualization, transition to a "new" world order.

The five tropes of the interwar scholarship create a narrative of progress that constructs a privileged ground for a new doctrine of the sources to thrive. *First*, a rejection of the foundationalism and formalism of what

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[295] Álvarez (New International Law), *supra* note 223, at 37.
[296] Álvarez (New International Law), *supra* note 223, at 42.
[297] Oppenheim (Future), *supra* note 223, at 56 et seq.
[298] E.C. Stowell, International Law: A Restatement of Principles in Conformity with Actual Practice (1931); D. Schindler, Contribution à l'étude des facteurs sociologiques et psychologiques du droit international, (1933-IV) 46 RCADI 229.

they perceived as the legal tradition of the previous centuries.[299] In international law, the 'critical' moment of the reconstruction project, i.e. the rejection of the grand theories of positivism and naturalism, allowed international law the possibility to disconnect the 'registers' of practical application of a doctrine of the sources from 'high theory'. This double rejection tried to disconnect sources theory from the question of the basis of obligation in international law. The foundational questions of the discipline (how can international law be 'law-proper' in the absence of a superior authority; what is the basic norm? etc.) were set aside or thrusted beyond the realm of necessary/relevant enquiry for everyday life. The practicing lawyer could now work in international law without having to reckon with such questions. The profession became liberated from the tyranny of explaining its own existence and could thus turn its attention to other matters. The question of law-creation and law-ascertainment, the dual mission of the sources doctrine, was now to be determined not by recourse to theory but by some other new test, which would appear determinate, pragmatist, scientific, all at the same time. It is suggested here that the doctrine of the sources offered such a style of argument that claimed to be determinate, pragmatist, and scientific, able resolve the important question of law-creation/ascertainment while steering clear of the reefs of 'high theory'.

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[299] Kennedy (History of an Illusion), *supra* note 246. David Kennedy explains how, in rejecting the traditions of naturalism and positivism, the interwar project rejected in fact an "illusion" of the 'old' international law of the 19th century. For Kennedy the inter-war project is a modern, rationalist project of "renewal through recollection" to explain how international law was possible in a world of sovereign states. This was a project that understood itself in philosophical battle with doubt, in argument against legal order denial. How was law possible in a world of politics? Kennedy argues that the Austinian challenge was actually "backdated" to the 19th century. For him, it is only in the first half of the 20th century that the Austinian question really perplexed the profession, and not at the end of the 19th century, as it was being argued at the time. Connecting interwar international law with the arrival of modernity, Kennedy claims that the anxiety about international law's possibility in a world of politics was much more a product of the 20th century. It is then that a "responsive theoretical tradition of positivism is elaborated, that naturalism can be seen as its natural, if unsatisfactory antagonist". After 1918 international lawyers felt the urgent need to develop a new polemic for international cosmopolitanism and they did so in part by re-interpreting the traditions of 19th century international law "as *alter egos* to their newly pragmatic sensibility." Only in the modern era would international law be anxious enough about its status and existence to reject philosophy, sovereignty and formalism so soundly, or to create them. For Kennedy, the 19th century we remember is largely "an aftershock of modernity's own violent arrival": "it is in this sense that international lawyers leave the 20th century clutching the memory of an illusion". It seems that the modernism, pragmatism, and progressivism of today's international law is more rhetorical effect and political claim than historical achievement, and more part of the field's internal dynamic than an artifact of a distant era: "Only by shooting its rapids can international lawyers become successful polemicists for the new. In this century international law has become a discipline of persuasion, its doctrines and institutions harnessed to narratives of progress toward the international, a place figured both as practical and as humane".

Second, the rejection of the extreme versions of positivism and naturalism permitted the new international law of the interwar period an uncanny eclecticism:[300] the right to keep the 'useful' components of positivism and naturalism, while not having to worry about how to connect them into a model that would necessarily stand the test of internal or external critique. The 'useful' component of positivism was the central role of the sovereign *voluntas* in law-making. New international rules would be irrelevant unless they remained grounded in sovereignty. Thus, codification projects performed by professional lawyers and/or conferences with wide participation by all nations of the world would allow for the creation of treaty norms representing common, as opposed to individual or sovereign, interests, while being the product of sovereign will. Naturalism, on the other hand, pointed out the need to embed the law in morality and values that would prevent atrocities such as the ones committed during the Great War. International law should not only be a 'self-sufficient' body of consensually created rules. The addition of General Principles in the list of sources of Article 38, as explained later in this Chapter, would be able to at least partly cater for this need. Any incompatibility between the positivist and naturalist elements in the doctrine would be resolved, one imagines, by some kind of benevolent co-existence or complementarity, managed by the skill of the international lawyer. The coexistence is justified by pragmatism (one needs both) and supported by faith in the capacity of the international law professional to manage this co-existence, with one eye fixed on the practice of states and the other on the future. Consequently one could accept different sources of international law derived from consensual and non-consensual processes, without being bothered by the theoretical impurity of such an endeavor, and as long as the sources would serve the purposes of the new project of the reconstruction of international law. The doctrine of the sources, in this context, appears to offer a language, a style, a 'trope' of legal argument able to accommodate both intellectual traditions, held together by the authority of Article 38 PCIJ Statute. Positivists would be pleased with the central role of consent-based sources, such as international treaties and, to a lesser extent, custom. Those leaning towards naturalism or the sociological approach would rejoice in the inclusion of general principles. Custom served both to deny the anarchy of extreme positivism and, at the same time, guarantee a process based on sovereign will. Custom thus presented a category onto which interwar scholars could project their fantasies of a naturally harmonious society capable of progress and growth but saved from the tyranny of the sovereign state.

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[300] The effort of successive generations of international lawyers to construct a model of international law simultaneously based on sovereign consent (concreteness) and normatively derived standards (normativity) has been explained beautifully in Koskenniemi (From Apology to Utopia), *supra* note 37.

Third, the 'constructive' moment of the new international law project, with its emphasis on new forms of law-making, brought new attention to the question of clarifying the forms and law-making processes of international law as such. Although much of the debate revolved around codification and the enhanced role of international treaties, interwar international law forged a strong link between determinacy and progress in international law. Clearer norms and law-making methods would bring more legal certainty, would improve the binding force, and allow better application by the Permanent Court of International Justice. The emphasis on international treaties was accompanied by the rise of a new body of specialized literature, devoted to technical aspects of treaties, for the first time in international law.[301]

Before we turn to the 'vocabulary of progress" of the sources doctrine, a brief digression to the drafting of Article 38 PCIJ Statute and its impact on the scholarship of the time is necessary.

3.4. Article 38 as Progress

The story of the adoption of the Statute of the PCIJ and its famous Article 38 is often told and well documented.[302] In a few words, the chronicle of events could be recounted as follows. Article 14 of the Covenant of the League of Nations directed the Council of the League to formulate and submit to the members of the League plans for the establishment of a Permanent Court of International Justice. On February 12, 1920 the Council of the League adopted the suggestion of appointing an Advisory Committee of Jurists to prepare a plan for the establishment of the Court. The Committee was eventually composed by 10 members, supplemented by James Brown Scott, who acted as legal adviser of Elihu Root. The Committee met in the Hague on June 16, 1920 and elected Baron Descamps (Belgium) as President, Bernard Loder (The Netherlands) as Vice-President, and Dionisio Anzilotti (Italy) as Secretary General. The mandate of the Advisory Committee of Jurists included the entire range of topics related to the organization, structure, and functioning of the Court, including the number and manner of appointment of the Judges, the seat of the Court, its rules of procedure and applicable law, the nature of its jurisdiction, and so on. Léon Bourgeois, delegated by the Council of the League to inaugurate the work of the Committee, summoned the Committee to its task with the following words:

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[301] See e.g. A. McNair, The Function and Differing Legal Character of Treaties, (1930) 11 British Yearbook of International Law 99; C.J.B. Hurst, The Effect of War on Treaties, (1921-22) 2 British Yearbook of International Law 37.

[302] Procès-verbaux of the Proceedings of the Committee, 16 June – 24 July 1920, with Annexes (1920).

> Gentlemen, you are about to give life to the judicial power of humanity. Philosophers and historians have told us the laws of the growth and decadence of Empires. We look to you, gentlemen, for the laws that will assure the perpetuity of the only empire that never can decay, the empire of justice, which is the expression of eternal truth.[303]

This Herculean task had to be completed in no more than six weeks, between June 16 and July 24, 1920. In thirty-five sessions the Committee managed to draft, revise, and submit to the Council a preliminary text that eventually became, with only minor modifications, the final text of the Statute. On December 13, 1920, the Assembly of the League of Nations approved the Statute[304] and three days later, on December 16, the Protocol containing the Statute was opened for signature.[305] Forty-six states signed the Protocol within a year, twenty-six of which deposited their ratifications within the same period. The election of the Judges took place in September 1921 and the Court was able to have its official inauguration on February 15, 1922. The League embarked on the project of a Court with the conviction that this was an unprecedented legal and political achievement that signified a new era for international relations, a place where nobody else has been before. In that ceremony, Sir Eric Drummond, the first Secretary General of the League, pronounced:

> At last an international judicial organ has been established which is entirely free of political influences and absolutely independent of any political assembly in its deliberations.[306]

Even a cursory look at the *Procès-verbaux* of the Advisory Committee gives the impression of a group of jurists that worked under tremendous time-pressure but in a collegial spirit. The question of what are the rules that the Court must apply entered the debate during the 13th Session of the Committee and was discussed in only three sessions, between July 1st and 3rd, 1920.[307] The President, Baron Descamps, presented an initial proposal that formed the basis of the debate.[308] It became immediately evident that the question of the rules to be applied by the Court was intricately connected to questions about the basis of obligation, the nature of international law, and

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[303] Speech of Léon Bourgeois before the Advisory Committee of Jurists, 16 June 1920, as cited in A. Sanchez de Bustamante, *The World Court* (1925), at 97.

[304] Resolution concerning the Establishment of a Permanent Court of International Justice, Assembly of the League of Nations (13 December 1920).

[305] Protocol of Signature of the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations with a text of this Statute, signed at Geneva, 16 December 1920 (in force 20 August 1921); 6 League of Nations Treaty Series 379.

[306] As cited in Sanchez de Bustamante (The World Court), *supra* note 303, at 111.

[307] Procès-verbaux, *supra* note 302, at 293-338.

[308] Annex 3 of the Procès-verbaux, *supra* note 302, at 306.

the rule of judicial institutions – questions that, not surprisingly, could not be answered unanimously by the members of the Committee. The range of views corresponded roughly to the broad disciplinary alignments of the time on both sides of the Atlantic.[309] 'Positivists', 'naturalists' and those of the 'sociological school' re-staged in the *Procès-verbaux* some of the standard disagreements of the time about the nature of international law and the function of an international tribunal within that system, which were briefly presented above. For some, the rules to be applied became a question of whether the list should limit itself to 'positive law' or whether other rules should be included as well. Others wondered whether the Court should only apply existing law or develop or "ripen" new rules with its decisions. Others raised the question of *non liquet*, of whether the Court should decline to decide if no positive rule of law exists on the matter or whether it should rely on non-positive law for its judgment. Not surprisingly, the Committee became quickly divided on these 'hard' questions. The additional parameter was of course the role and the function of the first permanent international court in history and speculations about how its Statute should be drafted in order to achieve maximum endorsement by as many states as possible. Phillimore and Root, for example, expressed strong reservations about the proposal to extend the list of the rules that the Court should apply beyond "positive law", by which they referred primarily to international treaties and "statutes".[310] It was feared that states would hesitate to accept the jurisdiction of a Court that may apply rules to which states have not explicitly expressed their consent to and that for that reason the Court should be limited to applying law already in force. Others suggested that the Court has the duty to "develop" or "ripen" new law,[311] that equity and justice need to become part of the decision making process[312] and that the Court must have the freedom to apply principles to fill the gaps in existing law.[313] Descamps refuted concerns that the idea of justice varied from country to country by suggesting that this is not true "when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations".[314]

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[309] Members of the Committee acknowledged this in their statements. See e.g. statement of Phillimore, Procès-verbaux, *supra* note 302, at 315.
[310] Statement by Root, Procès-verbaux, *supra* note 302, at 293-4; Statement by Phillimore, Procès-verbaux, *supra* note 302, at 295.
[311] Statement by Loder, Procès-verbaux, *supra* note 302, at 294.
[312] Statement by de Lapradelle, Procès-verbaux, *supra* note 302, at 295.
[313] Statement by Hagerup, Procès-verbaux, *supra* note 302, at 296.
[314] Procès-verbaux, *supra* note 302, at 310-11.

The division culminated with the question of whether to include General Principles in the list of rules, as the President Descamps suggested in his initial proposal. The deadlock persisted until the third day, when the solution proposed by the President managed to receive the support of all sides.[315] With the exception of Root and Phillimore, all other members of the Committee seemed willing at the end to accept a formulation that would include a reference to general principles of law, albeit as applicable only when no international convention or customary law could be found.[316] Root and Phillimore eventually consented out of "conciliatory spirit".[317] The role of the President seems to have been catalytic in achieving this outcome, as evidenced in his speech to the members:

> Let us therefore no longer hesitate – I would put in this appeal all the ardour and all the foresight that my mind as a jurisconsult gives me – to insert, amongst the principles to be followed by the judge in the solution of the dispute submitted to him, the law of objective justice, at any rate in so far as it has a twofold confirmation of the concurrent teachings of jurisconsults of authority and the public conscience of civilized nations.
> On the threshold of the Palace of Peace where we meet daily there is a mosaic bearing the inscription *Sol Justitiæ Illustra Nos*. Let us draw inspiration and encouragement from this, and let us recognize that the conception of justice and injustice as indelibly written on the hearts of civilized peoples, and with the two additional guarantees I would give it, is not only the element *par excellence* making for progress in international law, but an indispensable complement to the application of the law, and as such essential to the judge for the performance of the great task entrusted to him.[318]

Consensus was reached on July 3, 1920. Article 38 survived the dissolution of the PCIJ to become Article 38(1) of the Statute of the ICJ the way we know it today with only minor modifications.[319]

The adoption of Article 38 was welcomed as a moment of progress by international lawyers of the time. It was received with relief and hope that it will signify a new era in international law by virtue of three main reasons. First, because it ended what was perceived as an 'embarrassing uncertainty' about the sources of international law. Article 38, the story goes, brought important clarity and determinacy in the question of the law-making processes of international law. Second, because it would contribute to the

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[315] Procès-verbaux, *supra* note 302, at 334 et seq.
[316] Statement by Ricci-Busatti, Procès-verbaux, *supra* note 302, at 318.
[317] Statement by de Lapradelle, Procès-verbaux, *supra* note 302, at 334.
[318] Speech by Baron Descamps, Procès-verbaux, *supra* note 302, at 324-325.
[319] *Supra* note 217.

quality of the judgments of the PCIJ and increase the legitimacy of the institution. Third, because it acknowledged the important role of general principles of law, which symbolized the corrective normative standards of justice, reason, equity and so on, which would prevent formalism in the application of the law. Hersch Lauterpacht writes in his classic monograph on *Private Law Sources and Analogies*:

> Concluding, as it does, a chapter of embarrassing uncertainty as to the sources of the law to be applied by international tribunals, it [Article 38] is most instructive from many points of view. It signifies the final and authoritative abandonment of the misleading doctrine that international law is a self-sufficient body of rules. The discussions conducted in this subject by the members of the Committee of Jurists charged with the drafting of the Statute show clearly that the authors of the draft were conscious of the importance of the rule adopted ultimately by the Committee. What, until now, was done spontaneously by individual arbitrators and in individual arbitration conventions, received here the sanction of practically the whole family of nations. What was, until now, exposing international arbitration to the reproach that it was not judicial, has here been included as a source of decision of the international judicial tribunal par excellence.[320]

Fischer Williams writes in another passage:

> [Before 1920] There was no established permanent court of international law; the lawyer advising a client, perhaps the government of his own country in the guise of a client, was often quite uncertain whether the matter in question would ever be referred to a tribunal at all; if it was to be referred to a tribunal, he had no knowledge of how that tribunal was likely to be constituted, and he might not even be sure what were the sources to which that tribunal was likely to appeal of the determination of the legal points at issue. The Institution of the Permanent Court of International Justice *has changed all this. We now have it laid down, by the authority of all states which have become parties to the Statute of that Court, what are the sources of international law.* [...]
>
> Many international lawyers of outstanding eminence and authority might have drafted this article differently had they been called on to do so in 1920, but nevertheless it stands as the text of capital importance, *the solid basis of rock on which the fabric of international law has to be built.*[321]

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[320] Lauterpacht (Private Law Sources), *supra* note 220, at 67-68.
[321] Williams (Aspects), *supra* note 2, at 37-38 [emphasis added].

The adoption of Article 38 is the founding moment of sources discourse as we know it today. It marks a gradual but profound transformation in the way the entire concept of law making is perceived and treated in the literature and practice thereafter. This transformation, part and parcel with the general transformation of international law during the interwar period, as described above, did not take place overnight but progressively and in steady pace. As will be demonstrated below, by the mid-1930s the majority of textbooks of public international law in most countries adopted Article 38 as the standard starting point of their enquiry, and a style of argument very similar to the one of contemporary textbooks.

3.5. The Vocabulary of Progress of the Sources

The emergence of the doctrine of the sources is best explained by pointing to its 'vocabulary of progress', a set of narrative moves that are common to the literature of the time. These moves are not only symptomatic of sources discourse. They are also *enabling* moves since they actively create the discursive space for the doctrine to be accepted as an element of progress by the mainstream view. They are grounded in the five tropes of the interwar reconstruction project recounted above but, much more concretely, they carve out the specific traits of a new style of argument about law-creation and law-ascertainment. The narrative moves tell a before/after story, about how international law was before and how it needs to become in order to achieve progress: a story about how the 'old' international law was plagued by an anarchic system of norm-making, pinned on an archaic idea of sovereignty and further weakened by sterile theoretical squabble. The narrative moves try to purge these deficiencies and re-frame sources discourse along the lines of a new doctrine. Two crucial narrative moves are discerned here and termed *standardization* and *formalization*.

Standardization

The first narrative move is standardization. Standardization is a conscious process by which reality, in all its diversity, is re-organized on the basis of categories that carry the promise of universal legitimacy and application. Standardization affects the structure and organization of the argumentative forms permitted within sources discourse, rather than the relationship of the doctrine of the sources to politics or the basis of obligation of international law (*see* formalization, *infra*). Standardization presents the doctrine of the sources as 'closed' (comprising a determinate and finite list of sources) and 'universal' (applicable to all areas of international practice and by all states) system of norm-types. The before/after story is that, while under the 'old' international law one was not sure "what were the sources to which that

tribunal was likely to appeal of the determination of the legal points at issue",[322] the new model of the sources 'has changed all that'. Under standardization, the question of which are the sources of international law and the relationship between them can be answered determinately in the affirmative.

A standardized representation of the doctrine of the sources based on Article 38 is a crucial before/after move. It tells a story of evolution by explaining a newly found possibility of a universal one-size-fits-all doctrine, despite its disparity with the diversity of law-making methods in the actual practice of states. Standardization carries a political message as well, namely that closure and universality is better than a previously fragmented system in which everything goes. Difference is toned down or set aside for the purpose of reaching a generally acceptable formulation. For standardization to be acceptable, it must invoke scientific method in order to discern common denominators, at the cost of reducing reality into an artificially uniform essence. The amount of information about the object is reduced, with the result of fore-grounding specific properties only. In sources theory, the process occurs by dissecting substance from form, that is to say by regarding the list of sources as forms that exist independently from the content of the substantive norm that they embody. Standardization sustains the claim that the doctrine of the sources can remain unaffected from the contestation, frequently argued in international law, that different fields of legal practice use substantially different forms of law-making, practices and professional cultures. The doctrine of the sources determines the validity of norms regardless of their substantive content, e.g. regardless of whether they regulate the law of the sea, treaty law, human rights, and so on. The Report of the Advisory Committee of Jurists states:

> Doubtless, on certain matters, for instance in Naval Prize Law, two systems of European jurisprudence exist, or at any rate did exist before the War; perhaps, on some points, differences still exist between the respective methods used by Europeans, Americans or Asiatics, in dealing with questions of International Law; but no matter what the main national tendencies in International Law may be, the meaning of the expression adopted by the Committee is not and cannot be to maintain existing distinctions between different conceptions of International Law, for such an intention would be opposed to the guiding principle upon which the establishment of a single Court of Justice for all nations is based: that is to say, the principle of the unity and universality of international law.[323]

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[322] Ibid.
[323] Procès-verbaux, *supra* note 302, at 709-10.

Thus, the term sources of international law usually refers to a set of criteria (tests, conditions, standards) that need to be met by any norm of international law, in whichever field, and whatever its content, for it to qualify as a norm of public international law. As a field of scholarly study, the topic "sources of international law" refers to an enquiry aimed at defining or refining such criteria and their modes of application without reference to a specific area of the application of the law. The doctrine of the sources is, in this sense, an exercise in abstraction. The abstraction, however, is not only descriptive: it is also prescriptive. Sources are not only a tool for telling how legal norms 'are' but also how they should look like in order to acquire binding effect. It is an endeavor to demarcate, in the best possible way, a set of ideal-type forms that, when applied to an infinite range of situations by an infinite number of professionals or institutions, they would lead to reliable determinations of whether a particular norm is legal or not.

Standardization is precisely what Article 38 PCIJ Statute brings to the style of argument (and the permissible argumentative forms) of sources debate. Prior to 1920, sources were not a settled domain of scientific or professional knowledge. This can be explained by virtue of the fact that ideas about law making were directly linked to one's ideas about the basis of obligation in international law, positivist, naturalist, or other.[324] Consequently, each author appeared to have his own view about the number and properties of the sources. The terminology used, the list of sources, and the importance of the topic varied substantially from text to text. While most authors would agree that international custom and international treaties were part of the list,[325] this is where agreement ended. Many authors included in their list of sources divine law,[326] natural law,[327] ancient law,[328] general

[324] Koskenniemi (From Apology to Utopia), *supra* note 37, at 264.

[325] See e.g. H. Wheaton, *Elements of International Law* (1866), at 23-4; S. Amos, *Lectures on International Law* (1874) 8-12; T.J. Lawrence, *The Principles of International Law* (1913) 98-114; R. Phillimore, *Commentaries upon International Law* (1879, Vol. 1) 68; H.S. Maine, *International Law – The Whewell Lectures* (1894) 1, at 20; T.D. Woolsey, *Introduction to the Study of International Law: Designed as an Aid to Teaching and in Historical Studies* (1899) 28; H.W. Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War* (1893, Vol. 1) 51-2, 62; B.B. Davis, *The Elements of International Law, With an Account of its Origin Sources and Development* (1908) 20-8; W.E. Hall, *A Treatise on International Law* (1909) 6-7; L. Oppenheim, *International Law: A Treatise* (1912, Vol. 1) 22-3; P. Heilborn, Les sources du droit international, (1926-I) 11 RCADI 1.

[326] Phillimore (Commentaries), *supra* note 325, at 68; Halleck (International Law), *supra* note 325,, at 48.

[327] See e.g. Maine (International Law), *supra* note 325,, at 14; Davis (Elements), *supra* note 325,, at 20 et seq.; Phillimore (Commentaries), *supra* note 325,, at 68, equates natural law with the "will of god" as a source; W.O. Manning, *Commentaries on the Law of Nations* (1875) 67; L. Twiss, *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Times of Peace* (1884) 146-7.

[328] Amos (Lectures), *supra* note 325.

history,[329] Roman law,[330] principles of justice and reason,[331] the opinion of eminent jurists,[332] the universal consent of nations, international usage,[333] decisions of tribunals[334] (prize courts,[335] mixed tribunals,[336] local courts[337]), ordinances, commercial law and municipal law,[338] international state papers other than treaties and diplomatic correspondence and documents,[339] international conferences,[340] instructions issued by states for the guidance of their own affairs and tribunals,[341] the sea laws of various ports,[342] international public opinion,[343] and so on. Following what was stated above about theories of sources derived directly from theories about the nature and basis of international law, some understood the term source as referring only to the basis of obligation in international law;[344] others to the law making-processes as well as the places where one needs to look in order to find evidence of the existence of the rule of law.[345]

Article 38 has indeed 'changed all that', albeit gradually. By the mid-thirties, the overwhelming majority of textbooks of public international law adopted Article 38 as the standard starting point of their enquiry. In addition, specialized literature on the sources of international law appeared

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[329] Wheaton (Elements), *supra* note 325, at 27; Davis (Elements), *supra* note 325, at 26; Halleck (International Law), *supra* note 325, at 57.

[330] Maine (International Law), *supra* note 325, at 20; Phillimore (Commentaries), *supra* note 325, at 30 et seq.; Halleck (International Law), *supra* note 325, at 57-8; Davis (Elements), *supra* note 325, at 20; J. Westlake, *International Law* (1910), at 15.

[331] Phillimore (Commentaries), *supra* note 325, at 68; Westlake (International Law), *supra* note 330, at 14-15.

[332] Halleck (International Law), *supra* note 325, at 60-1; Lawrence (Principles), *supra* note 325; Wheaton (Elements), *supra* note 325, at 26.

[333] Davis (Elements), *supra* note 325, at 23.

[334] Wheaton (Elements), *supra* note 325, at 26; Amos (Lectures), *supra* note 325; Woolsey (Introduction), *supra* note 325, at 28-9; Davis (Elements), *supra* note 325, at 24-25; Lawrence (Principles), *supra* note 325.

[335] Halleck (International Law), *supra* note 325, at 58-9; Lawrence (Principles), *supra* note 325.

[336] Halleck (International Law), *supra* note 325, at 59.

[337] Ibid.

[338] Davis (Elements), *supra* note 325, at 60; Halleck (International Law), *supra* note 325.

[339] Woolsey (Introduction), *supra* note 325, at 29; Amos (Lectures), *supra* note 325; Davis (Elements), *supra* note 325, at 25-26; Halleck (International Law), *supra* note 325, at 63-64; Lawrence (Principles), *supra* note 325.

[340] Lawrence (Principles), *supra* note 325.

[341] Lawrence (Principles), *supra* note 325; Wheaton (Elements), *supra* note 325, at 24-26.

[342] Woolsey (Introduction), *supra* note 325, at 28.

[343] Davis (Elements), *supra* note 325, at 27.

[344] Oppenheim (International Law), *supra* note 325, at 21-22; Phillimore (Commentaries), *supra* note 325, at 68.

[345] Woolsey (Introduction), *supra* note 325, at 28; Wheaton (Elements), *supra* note 325, at 23 et seq.

for the first time and sources became a recognized field of academic study.[346] Suffice it here to compare the two successive editions of Brierly's popular textbook. In its section on sources, the 1928 Edition makes no reference whatsoever to Article 38 PCIJ. Instead, Brierly states that the sources of international law are custom and reason. Brierly adds that one is "probably justified" to add treaties as a third source.[347] Brierly is defensive in the passage on treaties, explaining to the reader the nature of each treaty, their authority in the practice of states, and their necessity for international law. Custom is dealt with first, reason follows, and the section is concluded with treaties. Eight years later, the book's 2nd Edition (1936) begins its section of the sources with the text of Article 38.[348] No explanation for the reference of Article 38 is given other than that this is a text of "highest authority", and one may "fairly assume" that it expresses the duty of every tribunal which is called upon to apply international law. The remaining of the Section is structured on the basis of Article 38, following the order of the sources as listed there. Reason, in no longer listed as a source of law but it is ousted to an additional section.[349] Brierly hastens to explain that "reason" needs to retain its place in the system of international law, as judicial corrective reason that, in case of need, would entail the discovery of legal principles by applying methods of legal reasoning. Reason is however no longer a primary source, as in the 1st Edition of the book.

Quite ironically, the practice of the PCIJ during the same years is strikingly indifferent to Article 38. Generally speaking, Judgments and Advisory Opinions of the PCIJ refrain from making explicit references to Article 38, to the term 'sources', or to a doctrine of the sources of international law.[350] In most cases, and when determining the applicable law, the Court turns to specific treaties and custom without further a-do, sidestepping the phraseology, definitions, and structure of Article 38. Thus in the *Lotus Case*, and when explaining the nature of public international law, the PCIJ defines international treaties and custom in a manner different from

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[346] The term sources appears in international law literature only in the mid-1920s: Heilborn (Sources), *supra* note 325, at 5 et seq.; Finch (Sources), *supra* note 251; M. Koppelmanas, Essai d'un théorie des sources formelles du droit international, (1938) 1 Revue de Droit International 101.

[347] Brierly (Law of Nations), *supra* note 263, at 39.

[348] Brierly (Law of Nations), *supra* note 263, at 46.

[349] Brierly (Law of Nations), *supra* note 263, at 55.

[350] This has also been noted in S. Rosenne, *The Law and Practice of the International Court of Justice 1920-1996* (1997, Vol. III) 1595; Sørensen (sources), *supra* note 218, at 38; and, more recently in A. Pellet's Commentary to Article 38 ICJ Statute in A. Zimmermann, C. Tomuschat & K.. Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary* (2006) 695.

the terms of Article 38.[351] When examining the process of formation of customary law, the Court refers to the role of publicists in the formation of customary law in a manner that would be at odds with Article 38.[352] It takes nearly a decade and the *Serbian and Brazilian Loans Case* for the Court to explicitly rely on Article 38 as a means for determining the applicable law.[353] Even there, Article 38 was used to emphasize the applicability of international, and as opposed to national, law by the Court, and not in order to enumerate or define the sources of international law.[354] In the *Mavrommatis Case*, the Court said that "a principle taken from general international law cannot be regarded as constituting an obligation" for Britain unless it was reflected in an international agreement.[355] The first Advisory Opinion that uses the term "source" is the *Danube Commission*.[356]

The disconnect between the literature and the practice of the Court is a fascinating one. An explanation can only be found after a careful analysis of several parameters such as the majority views in the Bench, the ensuing vision of the role of Courts on the international level – a subject that cannot be pursued at length here. The jurisprudence of the PCIJ on the sources of international law is a matter that has been covered extensively by the literature.[357] Such studies draw rich conclusions about the way the PCIJ understood the sources of international law but generally acknowledge that PCIJ jurisprudence was couched in terms of treaty interpretation rather than looking for the applicable law in other sources. In a recent study, Ole Spiermann argues that the decisions of the Court "cannot be explained in a unitary structure" and that "Article 38 of the Statute does not provide a

[351] The PCIJ states: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed"; The Lotus Case, *supra* note 269, at 18.

[352] The Lotus Case, *supra* note 269, at 26.

[353] Case Concerning the Payment of Various Loans Issued in France, PCIJ Series A – No. 20/21 (12 July 1929), at 19.

[354] The Judgment reads: "Article 38 of the Statute cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law, seeing that the Statute itself expressly provides for this possibility. All that can be said is that cases in which the Court must apply international law will, no doubt, be the more frequent, for it is international law which governs relations between those who may be subject to the Court's jurisdiction"; ibid., at 20.

[355] The Mavrommatis Jerusalem Concessions Case, PCIJ Series 1 – No. 5 (26 March 1925), at 27.

[356] Jurisdiction of the European Commission of the Danube Between Galatz and Braila, PCIJ Series B – No. 14 (8 December 1927), at 22.

[357] H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934); Sørensen (*Sources)*, *supra* note 218.

language in which the Permanent Court's work and the several differences between various decisions can be expressed".[358] Regular and explicit references to Article 38 in fact seem to be a post-World War II phenomenon, although recent accounts often backdate it to the interwar period.[359]

Formalization

A *second* narrative move, closely related to the previous one, is termed *formalization*. Similarly to standardization, formalization is also a crucial move in the before/after narrative of progress. Formalization proclaims the existence of a (new) transcendental object (a new doctrine of the sources) whose properties are unaffected by the analyzing subject; or a transcendental subject (e.g. sources discourse) which is capable of making by itself pronouncements that are authoritative. Unlike standardization, formalization does not relate to the range of permissible arguments but rather to the process by which the doctrine remains unaffected by non-objective elements, from ideology and politics to philosophical views about the nature of international law. Formalization is a narrative move that claims the possibility for a doctrine of the sources to operate autonomously and on a different 'register' than theoretical contemplation or political contest. The "I" of the subject applying the law is seen, at best, as the aid or the catalyst for the application of the doctrine, or she is entirely removed from the picture. Formalization is essential for the new doctrine of the sources. Without it, the practical application of the doctrine would be pinned on an external, non-objective point of reference and, as a consequence, disagreement could continue interminably without a possibility of closure. Formalization claims that the new doctrine enables one to decide whether norm x is "law" or not without reference to the question of the basis of obligation of international law or the politics of the user. Sources would not have to be derived from either state consent or natural justice. Martti Koskenniemi writes:

> A distinct, normative doctrine of sources can emerge only after these two views have been rejected. Something should not be law simply because its content corresponds to some *a priori* normative standards or state consent. To carry out its task, sources doctrine must become formal. That is, it must assume that something is not norm merely by virtue of its content reflecting natural justice or state consent. If sources doctrine did not contain such assumption, then it could not maintain law's distance from States' subjective, political views – the task for which it was created. Only if the criterion for law is formal, a

[358] Spiermann (Argument in the Permanent Court), *supra* note 282, at 396.
[359] For the extensive list of references of the ICJ to Article 38, see Pellet (Commentary), *supra* note 350, at 695. For references to Article 38 by a large number of Arbitral Tribunals see Pellet (Commentary), *supra* note 350, at 691.

> decision applying it does not involve the implication that one sovereign's political views are preferred to those of another's.[360]

If not state consent or natural justice, then what? Standardization has already constructed a 'closed' and 'universal' list of sources, thus calling the end of debates wondering about the range of permissible argumentative forms. One may only claim that a certain norm "is" conventional, customary, or a general principle. Formalization sees the list of Article 38 as one which may be used the same way irrespective of the basis of obligation of international law and irrespective from the politics of the analyzing subject. The doctrine and its application acquire an objective, technical, mechanical property. Thus when we speak of criteria or 'tests of validity' of international law, we think precisely of criteria that could be applied by an infinite number of people in an infinite number of circumstances and yield similar results. This way the process of law-identification seems like a technical exercise, removed from the realm of politics or philosophy, situated in the realm of technical-professional expertise. Thus a norm of customary law is ascertained categorically when the conditions of state practice and *opinio iuris* are met. A formal model would allow this conclusion to be reached by a trained professional, regardless of whether she thinks that the specific norm should be binding, fair, just, good, and so on.

In interwar literature, the narrative move of formalization is manifested in different ways, all of which are concerned precisely with creating space for the doctrine of sources to operate without reference to an external point. Typically, two different ways were identified. The first would is to separate the practical application of the doctrine from the question of the basis of obligation of international law. The two 'registers', of high theory and practical application, were postulated as two separate levels or planes of contemplation, which could operate autonomously. Trying to bring 'terminological clarity' did this and a separation between the two registers that were ascribed different names and role.[361] This literature has strived to explain the differences between terms such as 'source', 'cause', 'basis', 'evidence', 'material source', 'historical source', and so on. This approach did not require one to be agnostic about the basis of obligation. The important thing, however, is not to allow the level of high theory to affect one's practical application. Another way of solving the problem would be to melt the two registers into each other thus removing the need to reconcile the two. This way the doctrine of the sources can capture both the processes by

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[360] Koskenniemi (From Apology to Utopia), *supra* note 37, at 265-266 [footnotes omitted].

[361] For some classic attempts to separate the various meanings of the term source along these lines see Corbett (Consent of States and Sources), *supra* note 290; T. Gihl, The Legal Character and Sources of International Law, (1957) 1 Scandinavian Studies in Law 53.

which law is created and the places where law can be found. As Koskenniemi writes, this way sources doctrine "includes a concrete and a normative perspective within itself".[362] Manning, for example, writes:

> the word 'source' […] as applied to law has, at the least, two distinct meanings which, however, are clearly connected. The one is that of the quarter to which recourse must be had to know what a rule of law is. The other is the immediate fact or group of facts which originally called a rule of law into existence. It is a peculiarity of the Law of Nations that, in reference to it, the two meanings are scarcely distinguishable.[363]

The pursuit of correctness as progress

The narrative moves of standardization (the reduction of the number of sources and different fields of practice into an exhaustive list) and formalization (the separation of the two 'registers' of practical application and high theory) frame a discursive space which seems insulated from the experience of the everyday practice of the law (standardization) and the question of the basis of obligation (formalization). Thus the doctrine of the sources can create a formal language whose rules seem objectively ascertainable by the trained user. This creates a trope or style of argument that seems new, stable, determinate, and superior to the one of the 'old' international law. The 'new' doctrine of the sources is not framed as a project directed at revealing justice or truth. By divorcing itself from the subjective standards of personal experience or theory, sources discourse becomes agnostic about justice, truth, or the ability of the discipline of international law to know them. Because these objects seem out of reach or, in any case, excluded from the tasks of sources theory, theoretical contemplation turns to decisions and judgments of practical thinking, what Panu Minkkinen calls 'correctness'.[364] If one cannot really determine what is just or true, the decision could as well be correct according to the rules of the game. Writing has turned its attention for nearly a century towards determinations of observable and verifiable juridical phenomena: whether or not, for example, norm x is a norm of law according to the doctrine of the sources; or whether interpretation y of norm z is 'correct', according to the same doctrine. The quest is for a technique, tool, or standard that would enable correctness to be determined decidedly or terminally. By regarding itself not as an enterprise of high theory but as an exercise in practical thinking, the juissance of the

[362] Koskenniemi (From Apology to Utopia), *supra* note 37, at 267.
[363] Manning (Commentaries), *supra* note 325, at 66. For this approach see also R.R. Foulke, *A Treatise on International Law, With an Introductory Essay on the Definition and Nature of the Laws of Human Conduct* (1920, Vol. I), at 160.
[364] P. Minkkinen, *Thinking Without Desire: A First Philosophy of Law* (1999), at 3 & 9-47.

new field turns to inventing and sharpening abstract criteria (boundary conditions, tests of validity, definitions), the tools of the trade of making correct professional statements about the law. Article 38, initially concocted as a procedural guideline for the PCIJ, became the first generally accepted list of such professional criteria. For nearly nine decades thereafter, sources theory has 'progressed' in pursuit of formal correctness in the form of a newer, sharper, more potent doctrine with more determinate application. The pursuit of correctness has been the primary concern of the doctrine of the sources in the literature, mostly along two directions. The first will be termed here as the quest for determinacy; the second as the quest for social relevance.

First, the quest for determinacy. The idea here is that the doctrine of the sources as a whole, or each and every one of the individual sources listed, must be formulated as clearly and determinately as possible, in order it to be able to produce the desired effects of legal certainty and predictability when applied in an infinite number of cases by an infinite number of actors. If the formulation is proven not to be clear enough, then recourse needs to be found to a higher, superior, final, meta-criterion that will produce such a determination with finality. The quest for determinacy is couched in terms of the quality of the legal machinery. The idea here is that, if only we were able to create sharper criteria (categories, boundary-conditions, etc) for law-creation and law-identification, we would have been able to remove indeterminacy and produce certainty and predictability in the application of the doctrine. The critique of indeterminacy has many guises. Sometimes it concerns the quality of our legal definitions of the different sources. Thus, if our understanding of what is a treaty, custom, general principles, or the nature and properties of their constituent elements are too crude or imprecise, we can replace or supplement this old understanding with a new one which is finer, more precise. If custom as a source of international law is criticized for being indeterminate due to the fact, for example, that the extent of state practice needed for its ascertainment remains unclear, the profession would then need to conduct studies to ascertain the extent of necessary practice. If Article 38 does not sufficiently define the concept of a treaty or the means for its interpretation, then perhaps an additional convention on the law of treaties may be needed; and so on. Other times, the problem can be traced to the conflict between sources or the lack of clear hierarchy between them. In this case scholarship must turn to creating conflict resolution doctrines in the form of hierarchical systems that privileges in a decisive way one component over the other. Thus, the story goes, we need to develop the necessary tools for the regulation of the relationship between different sources, or between norms belonging to the same formal source (e.g. between treaties), or between regimes or systems of norms. The last century has witnessed the

creation of an intricate web of additional conditions, practices, and second-generation criteria to that effect, which came in waves to guarantee the sharpness of the way each period understands the sources.

Second, there is the quest for elevance. The problem here is not that the doctrine of the sources may have lost its logical or definitional sharpness but rather that it may have failed to contain recent developments in the practice of international law-making. The classical examples here are debates about "new" sources, relative normativity, or new law-making practices in emerging areas of international practice, such as international economic law, international environmental law, and so on. This problem can be resolved by modernizing, to the extent possible, our understanding of the existing sources so as they can include, to the extent possible, such recent developments. This is the type of writing which tries to assimilate and regularize change in international law by passing it through the grind-mill of the classical understanding of the doctrine of the sources. Is development x a "new" source of international law or is it the evolution/permutation of an existing source? The idea is to bend our understanding of each source in order to include developments in practice but put a firm stop before the imaginary breaking point of this understanding. It is a question of moving the invisible Rubicon to a different location, while allowing sources to maintain their on/off quality. Although, the story goes, General Assembly Resolutions, Codes of Conducts, and other 'soft-law' instruments cannot be considered as sources of international law proper, these new forms of law-making can nevertheless be brought within the ambit of Article 38 by means of upgrading their relevance in the determination of existing sources of law, such as international customary law. Our understanding of what is a treaty can change by including Memoranda of Understanding in this definition – or not.

3.6. Digression: Sources in Contemporary textbooks

Let it be made clear that the present Chapter does not wish to bring within the ambit of its enquiry contemporary sources discourse, the volume and complexity of which demands separate studies. Nevertheless, it is claimed that a telling illustration of the narrative moves of standardization and formalization can be found in references to the sources doctrine in present-day textbooks. This illustration only serves to exemplify the function of the moves of standardization and formalization and does not aim to characterize an otherwise extremely complex discoursive terrain.

When reading passages on the sources of international law in popular present-day textbooks,[365] the reader is confronted with two contrasting feelings. On the one hand, there is a reassuring feeling of certainty and order. A significant amount of uniformity is displayed in the tone, style, and substance of the texts. Accounts of the doctrine of the sources are normally brief and succinct. Authors agree on what are the sources of international law (mostly by reference to Article 38 Statute ICJ) and on the role and importance of the doctrine at large (e.g. it determines the twin processes of law-creation and law-ascertainment). When discussing each source in detail, the impression is one of legal certainty, created by consistent references to the same classical cases and scholars. In this reading, sources appear to be a settled, traditional field of scientific knowledge, where brevity can be explained by the fact that the authors transmit information so basic that over-elaboration would be redundant. The consistency between the different accounts may even lead one to think that by reading one chapter on the sources of international law one 'has read them all', in the crass sense of having been exposed to an uncontroversial and sufficient threshold of knowledge. For one thing, repetition of a similar argument in a broad gamut of texts dramatically enhances the feeling of certainty about the nature of the knowledge that is being transmitted. This reading of the literature on the sources is optimistic about the potency of the doctrine to adequately regulate the processes of law-creation and law-ascertainment and, consequently, international law's capacity to regulate international affairs at large. Sources bring to mind 'grand days' of international law: moments in the history of the discipline (is it not also the reason why most of us joined the field?) when professionals feel confident that law is an effective tool for the regulation of conflict and dissonance.[366]

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[365] For some classic post-1989 textbooks, see J. Dugard, *International Law – A South African Perspective* (2006) 27-46; M. Dixon, *Textbook on International Law* (2005) 21-48; I. Brownlie, *Principles of International Law* (2003) 3-31; Shaw (International Law), *supra* note 24, at 65-120; H. Thirlway, The Sources of International Law, in M. Evans (ed.), *International Law* (2003) 117-43; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997) 35-62; R. Jennings & A. Watts (eds.), *Oppenheim's International Law* (1996) 22-52; R. Higgins, *Problems and Process: International Law and How We Use It* (1994) 17-38. Occasional references are made to other texts, such as P. Dailler & A. Pellet, *Droit International Public* (1999) 177-297; P.-M. Dupuy, *Droit International Public* (1993).

[366] The phrase 'grand days' is borrowed from the homonymous novel on the League of Nations in F. Moorhouse, *Grand Days* (1994). Moorhouse recounts the story of the League of Nations through the eyes of Edith Berry, a young officer in the League Secretariat in Geneva. In her first encounter with internationalism, our heroine experiences the dream of the 'grand days' by imagining internationalism as a place where no one has ever been before: a brand new plane of contemplation and action which is above and beyond national politics, a *sui generis* location, a way of life, and a personal/professional identity that is autonomous from, and escapes and eludes, the shortcomings of national politics.

Yet there is another feeling, one of unease and disharmony, which the same texts also generate. When reading the fine print of the same passages on the sources, one senses that the hand of the authors is less steady than originally assumed. One begins to think that, instead of a stylistic choice guarding against over-elaboration, brevity and uniformity are by-products of discomfort. In fact, most authors admit that the doctrine of the sources is fraught with terminological discrepancy, scholarly disagreement, logical or epistemological incoherence, inability to capture the diversity of modern law-making practices, inability to stand the test of 'high theory', and so on. Some authors wonder whether it is even sensible at all to identify or equate the diversity of law-making forms in international law with the list of sources to be applied by the World Court. A closer reading reveals that the list of sources is more controversial that initially assumed (what about General Assembly Resolutions, soft-law, or unilateral acts of states?) and that law-making practice has moved into directions often incompatible with Article 38. The process of the formation of some of the sources (such as custom or general principles) turns out to be less determinate than promised; and the distinction between the basis of obligation in international law and its law-making processes less stable than one would wish. Instead of providing concise answers, elaboration on the sources would probably open Pandora's Box, generating more questions to non-initiates than can be answered within the confines of a textbook. In this reading, sources are not a field of settled scientific knowledge but rather one plagued by recurring questions that continue to baffle even the best of scholars. This reading is also much less optimistic. It casts a shadow over the possibility of the 'grand days' of international law and over our power as professionals to live them. Sir Robert Jennings wrote in his seminal article not too long ago:

> I doubt whether anybody is going to dissent from the proposition that there has never been a time when there has been so much confusion and doubt about the tests of validity – or sources – of international law, than the present.[367]

Yet this shadow is a fleeting one. In most textbooks, quick deliverance from the discomfort of these ruminations comes in the form of pragmatist faith. Difficulties associated with sources theory are not engaged with but rather set aside, bracketed, deferred to other enquiries, suspended. Scholars acknowledge that the doctrine of the sources as we know it today is problematic in a number of ways. Nonetheless this admission is accompanied by the conviction that, despite such shortcomings, the doctrine of the sources of Article 38 remains, will remain, and should remain central in international legal argument. Thirlway writes:

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[367] R.Y. Jennings, What is International Law and How Do We Tell it When We See it, (1981) 37 Annuaire Suisse de Droit International 59, at 60.

> The doctrine of the sources has attracted enormous amounts of discussion and criticism among international lawyers, and various proposals have been made for re-thinking the subject, or for getting rid of the idea of 'sources' altogether. While the traditional view presents some anomalies and difficulties, it has so far proved the most workable method of analyzing the way in which rules and principles develop that States in practice accept as governing their actions. The reasoning in the decisions of the International Court of Justice has consistently used the traditional terminology and structure of source-based law, and it seems unlikely that any other system will be able to replace it.[368]

At the beginning of the 21st century, the doctrine of the sources of international law is the profession's workhorse: reliable yet imperfect, concrete yet indeterminate, it stands for international law's foundation and defense. Sources sustain a memory and a promise of order, predictability, good administration of justice, rule of law, and other systemic goals that international law strives to achieve. Yet, and ever since the first articulation of the doctrine in Article 38 PCIJ Statute in the early 1920s, lawyers have been doubtful about its ability to *really* determine the twin processes of law-creation and law-ascertainment. The doctrine remains an apparatus that falls short and requires reinvention. In nearly a century of professional engagement with sources, debate has grown into a field of study of great sophistication, yet the even the term 'source' still evades a generally accepted definition. Despite its shortcomings, we routinely rely on the doctrine of the sources in our everyday work as international lawyers, in arguments before international courts, everyday policy debates or academic work. We still live international law in times when the idea that legal normativity possesses an objective on/off quality permeates much of the way we think. In the beginning of the 21st century, Article 38(1) is both an artifact of a by-gone era of international law and our "melancholy second-best"[369] companion.

The ambivalent intellectual posture that acknowledges (some of the) limitations of the doctrine of the sources while defending and reinventing it again and again on pragmatic grounds characterizes mainstream modern-day literature. Caught between ambivalence and faith, sources debates continue in our times. Viewed from this angle, the doctrine seems to embody paradigmatically the modernist experience with science. Each time that "all that is solid melts into air",[370] each time we are confronted with the wonder and dread of a doctrine dislodged in the quick-sands of everyday practice,

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[368] Thirlway (Sources), *supra* note 365, at 120.

[369] This expression belongs to Martti Koskenniemi (Editor's Introduction, Sources of International Law), *supra* note 221, at xiii.

[370] M. Berman, *All That is Solid Melts into Air: the Experience of Modernity* (1982).

each time we find the strength and faith to salvage it and reinvent it. There is still a sense that despite failed attempts to capture the multiplicity and complexity of sources discourse in a single doctrine, we will eventually manage to get it right. Either by refinement, renewal and modernization of our perception; by a new perception more grounded in sociological or empirical observation; or perhaps by the invention of some meta-theory, meta-criterion, meta-hierarchy, meta-standard, or other "decisive discourse", we shall be able to make progress in our conception of the sources. Its present failures, in some way or another, appear remediable. Each time, however, we try to re-conceive the doctrine along these lines, we are confronted again and again with the same shortcomings we wanted to avoid in the first place. This cycle of critique and renewalism, ambivalence and faith, characterizes present day sources discourse.

The two narrative moves of standardization and formalization discussed are symptomatic of contemporary sources argument as well. The moves remain crucial in creating a narrative site for a debate in which the language of sources can be used and remain safe from the critiques of realism or high theory.

Standardization

Standardization is a very familiar move in today's discourse, manifested in textbooks by heavy reliance on Article 38(1) ICJ Statute. Most modern accounts on the sources begin by reference to Article 38(1). This otherwise surprising use of an Article taken from the Statute of the International Court, receives a standard explanation. First, authors begin with the caveat that it is ultimately the will and the practice of states that determines what are the sources of international law.[371] It is however useful not to "underestimate"[372] the importance of Article 38 but instead to "consult"[373] it as an indication or a "starting point"[374] of how state practice stands. The reader is told that the provisions of Article 38(1) were initially expressed in terms of the function of the Court: they were not meant to be a codification of the state of the law at the time. Article 38(1) remains nonetheless 'authoritative' because it is part of the UN Charter, which has been signed by virtually all states.[375] In addition, it continues to largely reflect the general practice of states and international tribunals.[376] For lack of any other formulation, it should be

[371] Jennings & Watts (Oppenheim's International Law), *supra* note 365, at 24. See also A. Cassese, *International Law* (2005), at 153-5.
[372] Dixon (Textbook), *supra* note 365, at 22.
[373] Jennings & Watts (Oppenheim's International Law), *supra* note 365, at 24.
[374] Malanczuk (Akehurst's International Law), *supra* note 365, at 36.
[375] Shaw (International Law), *supra* note 24, at 67.
[376] Jennings & Watts (Oppenheim's International Law), *supra* note 365 at 24; Dixon (Textbook), *supra* note 365, at 22; Brownlie (Principles), *supra* note 365, at 5; Shaw (International Law), *supra* note 24, at 66-67; Thirlway (Sources), *supra* note 365, at 120-1.

regarded as valid statement of the sources of international law today.[377] Caution, however, is also habitually advised: Article 38 is badly drafted, does not make a direct reference to the term sources, does not explain the hierarchy between norms, and confuses formal and material sources.[378] In addition, Article 38 does not truly reflect the variety of modern practices in law making.[379] During recent years, some authors warn that modern practice of law-making forces one to acknowledge the existence of new methods.[380] Even such authors, however, admit the need to assimilate such new law-making methods to the extent possible within the existing system of Article 38. John Dugard writes:

> Article 38 was first drafted in 1920 for the Statute of the Permanent Court of International Justice. It no longer accurately reflects all the materials and forms of state practice that comprise today's sources of international law. Despite this, every effort is made to bring new developments in respect of sources of law within the categories of sources recognized in article 38. Inevitably, this, at times, leads to the expansion of these sources beyond those originally contemplated in 1920.[381]

At the end of these accounts, the reader is left suspended. Is Article 38(1) a description of the state of affairs? Or is it a prescription to be cherished in order to guarantee the integrity of the system? Is it both or none of two? Textbooks write that Article 38(1) should not be treated as panacea but as a formula with inescapable normative authority. What does this mean in terms of our intellectual travail as professionals? Should one strive to re-conceive reality in a way compatible with Article 38(1) or move beyond it? Standardization, to begin with, is not unproblematic in its merits.[382]

Another illustrative example can be found in the debates about the unity of international law and the distinction between 'primary' and 'secondary' rules. The question of the unity of international law is not a new

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[377] Brownlie (Principles), *supra* note 365 at 5; Shaw (International Law), *supra* note 24, at 66; Thirlway (Sources), *supra* note 365, at 120-1.

[378] Brownlie (Principles), *supra* note 365, at 5.

[379] Dixon (Textbook), *supra* note 365, at 22; Dugard (International Law), *supra* note 365, at 27.

[380] A. Aust, *Handbook of International Law* (2005) 5-12; Pellet (Droit International), *supra* note 365, at 265-297; Dugard (International Law), *supra* note 365, at 27-46; Degan (Sources), *supra* note 221, at 5-6 (1997); Danilenko (Law-Making), *supra* note 221, at 30-43.

[381] Dugard (International Law), *supra* note 365, at 27.

[382] Many authors have realized the difficulties associated with the list of sources in Article 38 ICJ Statute: R. Jennings, The Identification of International Law, in B. Cheng (ed.), *International Law* (1982) 9; R.A. Falk, On the Quasi-Legislative Competence of the General Assembly, (1966) 60 American Journal of International Law 782. Y. Onuma, The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law, in N. Ando *et al.* (eds.), *Liber Amicorum Judge Shigeru Oda* (2002) 191.

concern. Since the mid-nineties the question has received a new wave of attention,[383] which eventually culminated with the recent work of the International Law Commission.[384] One of the main theses about the unity of international law suggests that international law has a 'general part', namely a set of doctrines common to all fields of specialized practice. Doctrines such as the one on the sources, state responsibility, reparation for injuries, and so on, are said to enjoy a relatively uniform application in all areas of international law. The uniform application of these doctrines, the story goes, is crucial for the maintenance of the unity of the system of international law. As Dupuy writes, formal unity of the system is essentially linked to the use of the same "secondary rules of recognition".[385] The doctrine of the sources is one example among many doctrines with the same effect.

> Prenons en quelques exemples: l'expression « responsabilité internationale » doit avoir le même objet et la même signification, quels que soient les types d'obligation à la violation desquels elle s'applique ; ceci, même si elle reçoit, dans son régime d'application. […] *Leitmotiv* omniprésent, quelles que soient les originalités de son champ d'application, cet adage du *Lotus* sure le devoir de réparation marque ainsi d'unité de sens apporté à un terme comme à l'institution juridique à laquelle il se réfère, la responsabilité.[386]

Textbooks habitually represent international law this way. Introductory chapters initiate the reader to the 'general part' of international law,

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[383] For some representative work, see R. Huesa Vinaixa & K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* (2006); Diversity or Cacophony? New Sources of Norms in International Law: Symposium, (2004) 25 Michigan Journal of International Law 845; P.M. Dupuy, L'unité de l'ordre juridique international, Cours général de droit international public, (2002) 297 RCADI, at 15-489; L.A.N.M. Barnhoorn & K. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (1995) and, in particular, the essay in this volume by K. Wellens, Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends, at 3-39; I. Brownlie, Problems Concerning the Unity of International Law, in *International Law at the Time of its Codification: Essays in Honor of Roberto Ago* (1987) 153-62. See also the discussion on fragmentation in Chapter 3, *supra*. See also B. Simma, Self-Contained Regimes, (1985) 16 Netherlands Yearbook of International Law 112; and B. Simma & D. Pulkowski, Of Planets and the Universe: Self-Contained Regimes in International Law, (2006) 17 European Journal of International LAw 483. *Cf.* A. Fischer-Lescano & G. Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, (2004) 25 Michigan Journal of International Law 999.

[384] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006).

[385] Dupuy writes that formal unity is « essentiellement liée à l'utilisation des mêmes règles secondaires, de reconnaissance, de production et de jugement»; Dupuy (L'unité), *supra* note 383, at 39.

[386] P.M. Dupuy, Préface: Fragmentation du droit international ou des perceptions qu'on a?, in Huesa Vinaixa & Wellens (L'influence des sources), *supra* note 383, at xv-xvi.

consisting of themes deemed common to all specialized fields.[387] The sources are *par excellence* a doctrine that is described as one which applies uniformly. In the same vein some authors employ the distinction between "primary" and "secondary" rules within a legal system, usually citing H.L.A. Hart and Roberto Ago's well-known analyses.[388] Primary are rules containing the substantive rights and obligations of the subjects of the law, while secondary are those directed at managing, from a systemic point of view, the creation, application and functioning of the system's primary rules. According to this model, the doctrine of the sources belongs to international law's secondary rules, in the sense that it comprises a set of criteria that help determine the creation of primary rules that lay down the rights and obligation of the subjects of the law.[389] The idea of "international custom, as evidence of a general practice accepted as law", to use the classical definition of custom in Article 38(1)(b), is about an abstraction that is potentially applicable to any international norm that claims such a status regardless of its content and area of application, as long as it concerns behavior of states.

Formalization

In today's literature, and similarly to the interwar period, the narrative move of formalization is manifested in different ways, all of which are concerned precisely with separating the two 'registers' of high theory and practical application and eliminating any confusion in that regard.[390] Sometimes these debates concern the "quasi-constitutional" function of the doctrine of the sources; often times the dual nature of the doctrine of the sources as defining the dual processes of law-creation and law-ascertainment; and other times the distinction between "formal" and "material" sources. Let us briefly see these in turn.

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[387] Dupuy (L'unité), *supra* note 383, at 428-32.

[388] The intellectual origins of the primary/secondary rules distinction can be traced to the work of different authors. See e.g. H.L.A. Hart, *The Concept of Law* (1961), at 77-96. Roberto Ago's ILC Reports on State Responsibility also elaborate on the distinction: see R. Ago, Fifth Report on State Responsibility, Yearbook of the International Law Commission (1976, Vol. II), at 6 et seq. For a review of this debate, see J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002), at 14-16. Crawford points to Alf Ross' usage of the terms in A. Ross, *On Law and Justice* (1958), at 209-10. See also the debate in Koskenniemi (Fragmentation of International Law), *supra* note 384, at para. 138 et seq.

[389] Thirlway (Sources), *supra* note 365, at 117-20.

[390] For post-War debates, see G.G. Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, in *Symbolae Verzijl: présentées au professeur J.H.W. Verzijl à l'occasion de son LXX-ième anniversaire* (1958) 153-76; C. Parry, *The Sources and Evidences of International Law* (1965), at 1; G.J.H. van Hoof, *Rethinking the Sources of International Law* (1983), at 13-17, 57-60 & 71-82. See also Thirlway (Sources), *supra* note 365, at 119; Jennings & Watts (Oppenheim's International Law), *supra* note 372, at 23.

In the textbooks under review, many authors try to establish a clear distinction between domestic legal systems governed by a constitution, on the one hand, and international law on the other.[391] Constitutionalism proper implies, amongst other things, a legislature capable of producing legal rules of general application and a coercive power of enforcement. The same norms that govern the conduct of the actors of the system are the same norms that are applied by the Courts of the same domestic system, thus allowing a direct correspondence between law-making and law-application, between law-creation and law-ascertainment, and so on. The characteristics obviously do not exist in international law, the story goes. Any system of law, however, needs a method of identifying the processes by which legal norms are created or ascertained. In the absence of a world constitution that would stipulate the processes by which international law norms come to existence; and in the absence of a world legislature that would produce norms of universal application, states have devised a set of accepted methods by which rules come into existence and by which the content of norms can be identified, called the doctrine of the sources.[392] This often means that there is some times no direct correspondence between how law is made and what law can be applied, or between law-creation and law-ascertainment. The doctrine of the sources cannot perform its constitutional function as well as national constitutions do because of its birth defects. Sources are therefore a second-best constitutional apparatus ('quasi-constitutional') that is nevertheless able to perform its function despite its handicaps.

> Ascertainment of the law on any given point in domestic legal orders is not usually too difficult a process. […] The contrast is very striking when one considers the situation in international law. […] There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is therefore faced with the problem of discovering where the law is to be found and how can one tell whether a particular proposition amounts to a legal rule. This perplexity is reinforced because of the anarchic nature of world affairs and the clash of competing sovereignties. Nevertheless, international law does exist and it is ascertainable. There are 'sources' available from which the rules may be extracted and analyzed.
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> By 'sources' one means those provisions operating within the legal system on a technical level, and such ultimate sources as reason or morality are excluded, as are more functional sources such as libraries and journals. What is intended is a survey of the process whereby rules of international law emerge. [393] (Footnotes omitted)

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[391] Brownlie (Principles), *supra* note 365, at 3; Shaw (International Law), *supra* note 24, at 65; Thirlway (Sources), *supra* note 365, at 118; Malanczuk (Akehurst's International Law), *supra* note 365, at 35.

[392] Dixon (Textbook), *supra* note 365, at 21; Shaw (International Law), *supra* note 24, at 66.

[393] Shaw (International Law), *supra* note 24, at 65-66.

Another way of separating the two registers (of high theory and practical application) is by asserting that the doctrine of the sources simultaneously regulates two different aspects of normativity: law-creation (the processes by which legal norms come to being in international law); and law-ascertainment (how can we tell law when we see it or what are the forms of legal and non-legal norms).[394] Most authors recognize that fusing law-creation and law-ascertainment in the same doctrine constitutes some form of intellectual compromise. They therefore find the distinction to be a "complication" of the functioning of the doctrine, a distinction "difficult to maintain"[395] and as a paradox, but one that nevertheless should not be seen as deeply problematic or disturbing. Some suggest that it is the nature of international relations that requires this kind of compromise and the reader is assured that this does not affect the functionality of the doctrine.[396] Law-creation and law-ascertainment, however, are two logically distinct aspects of normativity as they describe the processes for achieving two different ends. The first one (law-creation) is a descriptive notion, as it explains the ways in which states create law. The second is prescriptive, as it tells us how norms need to look like from the formal point of view in order to be considered as law, without reference to the process that created them. When fused into one doctrine, these two different ways of approaching normativity render the doctrine of the sources circular, faltering between a descriptive and a prescriptive function. Sir Robert Jennings writes, once more:

> It should be remembered at the outset that in considering the sources of international law, we are looking not only at the tests of validity of the law — the touchstone of what is law and what is not — but also at the ways in which law is made and changed. This is a complication not found, at least not to the same degree, in domestic systems of law. [...] But in international law the questions of whether a rule of customary law exists, and how customary law is made, tend in practice to coalesce. [397]

Often scholars use the distinction between "formal" and "material" sources to underline the difference between the two.[398] Brownlie explains that "formal" are those legal procedures and methods for the creation of rules of

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[394] Dixon (Textbook), *supra* note 365, at 21 & 23.
[395] Brownlie (Principles), *supra* note 365, at 3.
[396] Ibid, at 3-4.
[397] Jennings (What is International Law), *supra* note 367, at 60.
[398] See Brownlie (Principles), *supra* note 365 at 3; Shaw (International Law), *supra* note 24, at 67; Malanczuk (Akehurst's International Law), *supra* note 365, at 35; Dixon (Textbook), *supra* note 365, at 23; Thirlway (Sources), *supra* note 365, at 118-19; Dailler & Pellet (Droit International), *supra* note 365, at 111-112; Jennings & Watts (Oppenheim's International Law), *supra* note 365, at 23; Dupuy (Droit International), *supra* note 365, at 179; Van Hoof (Rethinking), *supra* note 390, at 46-56.

general application which are legally binding on the addresses. "Material" sources, on the other hand, provide evidence of the existence of rules that have the status of legally binding rules of general application.[399] In international law it is said that, in the absence of a world constitution and a world legislature that would provide clear answers to these questions, law-creation and law-ascertainment may be legitimately fused.[400] The questions of 'high theory' are seen as somehow belonging to a different 'register' than the one of the sources, one in which enquiries may take place but without affecting the functioning of the doctrine of the sources in its everyday application. Although of course the two registers are inter-related, in the sense that answering the question of what is the basis of obligation in international law could have serious ramifications on the law-creation and law-ascertainment processes, international lawyers try to segregate the two registers to protect the 'everyday' practice of the law from the uncertainties of the ruminations of high theory. Hence sources, in the sense of tests of the validity of rules, are seen in today's literature as a rather technical exercise of applying an abstract, formal model to facts. By offering an acceptable (and sometimes even convincing) description of the processes by which international law is made or ascertained, the doctrine of the sources seems to allow the functioning of 'everyday practice' of the law in a way that it is unaffected by questions of 'high theory'. Foundational questions are set aside, suspended, or even rendered irrelevant: if all states of the international community seem to agree that treaties, custom, and general principles are the primary forms that international law may take, international law may continue existing in the relations between these states, despite the fact that the edifice in its totality could be found incoherent or unfair by theoretical critiques which are external to the sources debate. Thirlway writes of the separation of the two "registers":

> None of the theories advanced commands universal assent; but nor are any of the actually essential to international legal relations in practice. The issue is fortunately one of purely academic interest. The realistic answer to the conundrum can probably only be that this is the way international society operates, and has operated for centuries, and probably the only way in which anything that can claim to be a society or community could possibly operate.[401]

[399] Brownlie (Principles), *supra* note 365, at 3.
[400] Danilenko (Law-Making), *supra* note 221.
[401] Thirlway (Sources), *supra* note 365, at 119.

3.7. The Vocabulary as an (Un)Stable Discursive Structure

If only, however, it was that easy. The vocabulary of progress of the sources doctrine (the moves of standardization and formalization) and the ensuing pursuit of correctness break under the weight of their claims. The narrative move of standardization may only work successfully if the list of sources of Article 38 remained 'closed' and 'stable' when applied by an infinite number of users in an infinite number of circumstances. Standardization claims to bring determinacy by replacing a previously anarchic field with a closed and finite list that can be used with certainty and predictability before international courts. A theoretically infinite range of sources is now reduced to a closed list of three 'primary' sources that can constitute permissible autonomous bases of legality; and two 'subsidiary' sources. According to this logic, comity, reason, or non-binding 'international engagements'[402] could no longer be invoked as autonomous sources of legal obligation. Should such instruments provide evidence for the existence of a rule of customary international law, they could be relevant on that basis only. Even if one was to accept the eventual addition of a new source to the list (e.g., unilateral acts of states), this addition would have to be permanent and simply extend the list of sources but not alter the closed nature of the system. The study of the needs for an eventual addition can be delegated to legal theory or sources theory. Until that re-thinking takes place, and in a way reflective of general consent, the practitioner should continue taking cues from the generally accepted list of Article 38. Sources discourse thus allows one to contest another's view on what is binding on the basis of a limited set of arguments, regardless of whether these arguments are *truly* representative of law-making practices in a world out there. Sources discourse this way claims a language of communication based on certain and predictable rules, not on a true representation of reality of law-making processes. The list of sources is also postulated as 'stable', in the sense of each source being distinguishable from the one next to it. Each source is determined by different boundary conditions that circumscribe its abstract form. One can only argue whether something "is" law only if it "is" has the normative form of a treaty, custom, or general principle. Standardization can only work if it can remain closed and stable each and every time that it is used.

[402] The term "international engagement" which was used in Article 18 of the Covenant of the League of Nations was abandoned in Article 102 of the UN Charter that only speaks of international agreements, partly because the term was considered too wide and imprecise, allowing instruments that were not 'hard' treaties to enter the definition. For a discussion and relevant sources see the Commentary to Article 102 in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary* (2002, Vol. II), 1277-82.

Similarly, the narrative move of formalization can only be successful if the conditions for the creation/ascertainment of each source of law can maintain their autonomy from politics or 'high theory' at all times. They must remain technical, transcendental, apolitical, and neutral. By doing so, formalization presents itself as a progressive, anti-foundationalist move, which escapes the conceptualism of the 'old' international law and liberates the practice from the tyranny of non-objective parameters. Formalization can only work if it can successfully (and permanently) disconnect sources doctrine from politics and high theory. The move would fail if one would demonstrate that sources discourse fails to maintain this autonomy.

Recent work has demonstrated that sources discourse fails to meet the standards set out by standardization and formalization. When it comes to the claims of standardization (the doctrine being 'closed' and 'stable'), David Kennedy writes that, aside from a set of abstract categories, sources discourse is a set of well worked out argumentative practices about the binding nature of international legal instruments.[403] For Kennedy, sources discourse allows two rhetorical styles, which he respectively calls "hard" and "soft".[404] "Hard" are arguments based on the consent of states while "soft" rely on some extra-consensual binding authority. The literature embraces this distinction but presents a stable opposition between "hard" and "soft" sources, with treaties belonging to the former category while general principles, and sometimes custom, belong to the latter. As Kennedy demonstrates, however, the various sources evade stable classification as either exclusively "hard" or "soft", as you can always present a "soft" version of 'hard' sources and the other way round. One may switch continuously from a "hard" to a "soft" rhetorical style of argument but neither argument can be convincing by itself. The debate thus could go on interminably without resolution. The continuous peregrination defeats any effort to protect the closed nature of the doctrine or the stability and autonomy of the separate sources from each other. As Kennedy writes, "the two opposed themes present rhetorical possibilities and strategies more than decisive identifications and differentiations".[405]

When it comes to the claims of formalization (sources as a technical language disconnected from politics or high theory), Kennedy also explains that closure cannot be brought without a meta-discourse that validates one's decisions and renders an external point of reference part and parcel of the

[403] Kennedy (Sources), *supra* note 220.
[404] Ibid., at 20 et seq. Koskenniemi describes a similar dynamic in international legal argument in his metaphor of "ascending" and "descending" patterns of justification. See Koskenniemi (From Apology to Utopia), *supra* note 37, esp. at 40-51 & 264-341.
[405] Koskenniemi (From Apology to Utopia), *supra* note 37, at 88.

final outcome. Although justice or truth is too elusive to serve as the declared object of sources discourse, positive law cannot be studied scientifically without encountering them again and again. Despite grand theories and a sophisticated doctrinal web, which at least appears to provide a solid technical professional language, determinations about the law encounter in each instance the same high theory they wished to avoid by turning to practical thinking. In the end, the two registers cannot be kept apart. As Kennedy writes characteristically:

> Discourse about sources searches abstractly to delimit the norms which bind sovereigns in a way that relies neither on the interests of sovereigns nor on some vision of the good which is independent of state interests. The search is for a decisive discourse – not for a persuasive justification – which can continually distinguish binding from nonbinding norms while remaining open to expressions of sovereign will. The argumentative moves made by those engaged in sources discourse reflect this central goal. The result is a discourse of evasion which constantly combines that which it cannot differentiate and emphasizes that which it can express only by hyperbolic exclusion. Pursued in this fashion, sources doctrine moves us forward from theory towards other doctrines which it supplements, remaining both authoritatively independent and parasitic. This paradoxical position between theoretical discourse and the doctrines of substance and process in maintained by endlessly embracing and managing a set of ephemeral rhetorical differences. The turn to sources doctrine thus seems to provide an escape from fruitless theoretical argument, moving us towards legal order, precisely by opening up an endlessly proliferating field of legal argumentation.[406]

The paradox of formalization is that it claims to be both the product of social observation (sociological move) and a defense against the indeterminacy of 'external' theory. In trying to be anti-foundationalist, in its move away from high theory, formalization falls into the trap of essentializing the science of social observation. Things seem to appear in a world out there, passing before the eyes of the scholar who merely reports them. The problem is, however, as Koskenniemi remarks, that "'social facts' do not come before our eyes 'an sich'".[407] To understand what takes place in the social world we need to interpret, and this process involves both external elements as well as a subjective understanding. Thinking about the sources in terms of correctness is about what Kennedy calls a quest for a "decisive discourse",[408] namely a way of continually distinguishing binding from non-binding norms, while remaining open to expressions of sovereign will. Whenever confronted

[406] Kennedy (Sources), *supra* note 222, at 95-6.
[407] The same point is made by Koskenniemi (From Apology to Utopia), supra note 37, at 340.
[408] Kennedy (Sources), *supra* note 222, at 95.

with interminable disagreement about whether a norm x is customary or not, the discipline translates this problem as one of correctness, as a technical lapse, without accepting that no end may be brought to the debate unless a choice is made by reference to an external point of view. Deliverance is found in more technical solutions, which simply relocate the problem into a different doctrine, technique or criterion.

One needs not go far to illustrate the point: standardization and formalization claim determinacy by reducing the list of possible legal instruments that qualify as sources to a closed list of abstract categories of norms. Before the arrival of Article 38, the story goes, a Court would debate indefinitely whether reason, comity, or Roman law are sources of international law – an admittedly uncomfortable situation for any judicial institution to be in. Now such debates become redundant and indeed transformed into legal-technical questions of whether a certain instrument fulfills the conditions of any of the sources of Article 38, e.g. whether it "is" an international treaty, custom, general principle. This however does not bring closure. Each time someone makes a 'hard' argument (e.g. the obligation is binding because it is contained in a treaty), another could respond using a 'soft' argument.

> In a schematic and preliminary way, we can imagine the arguments which might be made on behalf of hard and soft sources in a world of autonomous states. Suppose that one sovereign state (State 1) when invoking a norm against another (State 2) argues that the norm invoked is authoritative and binding because it is "hard". A hard source is binding because the state to be bound has agreed that it is binding, so that its autonomy will not be threatened by compliance. State 2 may […] attack the source directly. It may argue that if its consent is the basis for its being bound, it has changed its mind, or did not intend to consent in the first place.
> These classic responses force State 1 to argue that such change is not permissible […] because if everyone did it would be a mess; because State 1 would not want its treaty partners to do so; because you just have to keep your word; etc. One may invoke a doctrinal expression of these conclusions such as pacta sunt servanda. State 2, against whom the norm is invoked, might respond that these norms or considerations have nothing to do with consent. It they do, State 2 might simply reinvoke its initial objection that it does not *now* consent to this application or interpretation. Perhaps State 2 is willing in similar circumstances to let its treaty partners off as well, or finds the state of the system less important than its own release from the particular norm. In responding, State 1 has forced State 2 to shift gears and argue from some non-consensual perspective. To State 2, all hard sources have become soft sources in disguise.[409]

[409] Ibid., at 39.

Take the example of a treaty. Disagreement as to whether a treaty exists or is binding would require a definition of what a treaty is. Such a definition is provided in Article 2 of the 1969 Vienna Convention on the Law of Treaties. This Article would only be helpful if it was not amenable to "hard" and "soft" arguments, which appear equally legitimate or which would transmute into each other. The ICJ has on many occasions battled with the question with contradictory results.[410] Is a given agreement a treaty because the parties intended it to be a treaty ("hard") or because it 'objectively' meets the definition of Article 2, or for maintaining the legal certainty of the system, and aside from the intention of the parties ("soft")? Who decides what was the initial intention of the parties? Is it the parties themselves, or some objective evidence of their intentions? Since Article 38 ICJ Statute and Article 2 VCLT do not in themselves bring determinacy, one needs to resort to yet another doctrine of interpreting the evidence of that would help one apply these definitions. A doctrine of interpretation, say Articles 31 and 32 of the Vienna Convention on the Law of Treaties, would however also be open to "hard" and "soft" forms of argument. In order to interpret a treaty provision should one look at the intention of the drafters ("hard"), the objective meaning of the terms ("soft") or the object and purpose ("hard"/"soft")? The search for a 'decisive discourse' can continue indefinitely and without closure.

3.8. Conclusion

The present case study tried to seek out the discursive structures that produced meaning about progress in the case of the doctrine of the sources of international law. The rhetoric about the reconstruction of international law, which dominated international law debates in the wake of the Great War; and the narrative moves of 'standardization' and 'formalization' in sources literature, which followed the adoption of the Statute of the Permanent Court of International Justice, weave a persuasive historical narrative of progress. This narrative presents pre-1920 doctrine of the sources as unable to fulfill its

[410] See for example, the findings in the Aegean Sea Contintental Shelf Case (Greece v. Turkey) (Judgment of 19 December 1978), ICJ Rep. (1978), at 3; South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Judgment of 21 December 1962), ICJ Rep. (1962), at 319; Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain) (Jurisdiction and Admissibility) (Judgment of 5 February 1995), ICJ Rep. (1995), at 6. In each one of these cases, the Court has resorted to a different criterion to determine whether a certain instrument was an international treaty, ranging from the intentions of the parties (SWA Cases) to subsequent reliance (Aegean Sea) to a 'reasonable man's' criterion (Qatar v. Bahrain). For a discussion, see C. Chinkin, A Mirage in the Sand? Distinguishing between Binding and Non-Binding Relations Between States, (1997) 10 Leiden Journal of International Law 223.

role as a tool for separating law from non-law. The reason given is that the doctrine was indeterminate: it was too open-ended (nobody knew the exact number and nature of the sources) and too dependent on arbitrary theoretical/political opinion (pinned on partial philosophical theories). On the antipodes, the post-1920 doctrine of the sources (under Article 38 Statute PCIJ) is presented as hugely superior on account of it being determinate. The problem of open-endedness was resolved with the move to standardization (a new 'closed' and 'universal' list of sources). The problem of dependence on arbitrary political or philosophical opinion was resolved with the move to formalization (the creation of a set of secondary rules belonging to a different register than 'high theory' or politics). The transition from fragmentation to standardization, from philosophy/politics to technique, from academic formalism to pragmatism, is the totalizing narrative that 'speaks itself' and produces meaning about progress in sources discourse. The narrative moves of standardization and formalization capitalize on a background story that privileges determinacy, scientific technique, and pragmatism, to leave no choice as to the meaning of progressiveness in doctrinal debates. Like Seferiades, however, the only way for this story to perform its discursive effect is to buttress its claim to objective truth. The terms themselves (determinacy, pragmatism, technique) need also to be assumed as having stable and determinate meaning. Again, the mystified opposition between a primitive past and an advanced present/future becomes the interpretative device to understand doctrinal progress (correctness, determinacy, social relevance).

Like Chapter 2, the case study of Chapter 3 goes however a step further to demonstrate that the projected virtue of determinacy of the new doctrine is based on notions that are themselves neither stable nor determinate. Closure and universality are subverted each time they were put to application. The 'new' doctrine of the sources, despite its claim to limit the range of sources that could be invoked, allows two opposing patterns of argument ('hard' and 'soft') to operate simultaneously within each of the sources of the list of Article 38 PCIJ. Instead of bringing closure, the possibility of both 'soft' and 'hard' patterns of argument enables the debate to continue interminably. The only way to bring closure is to invoke yet another and new decisive discourse, this time external to Article 38. The same holds for the narrative move of formalization. Formalization aspired to disconnect the 'registers' of high theory and practical application in order to allow a technical (non-political, non-theoretical) application of the doctrine. It was however demonstrated that the two registers collapsed into each other each time one would seek their autonomous application.

Like the vocabulary of absolutism and democracy, the vocabulary of standardization and formalization, far from having a stable content, can be better understood as a trope or style of argument that helped vest with legitimacy a project for the reconstruction of public international law. 'Talking sources' is not 'more' determinate than 'talking theory'. At the same time, the language of the sources is able to capture anew the fantasy of the international lawyer as a discourse that is able to jump over the ruptures of everyday experience. Legitimacy in sources discourse is thus produced not because pragmatism or Article 38 PCIJ Statute had the capacity to decisively tell whether a certain norm is one of public international law. Legitimacy is produced via the *invocation* of the vocabulary of pragmatism and Article 38. In that sense, progress in sources discourse does not have an essence: it is the product of a narrative whose essence is floating, allowing a multiplicity of meanings according to the occasion. Like in the case of Seferiades, one could argue that the iteration of meanings is what enables the success of the language of the sources doctrine. As explained in the digression to the contemporary literature, literature on the sources has found peace in bracketing (setting aside) all the hard questions that would bring out the indeterminacy of the doctrine. The feeling of certainty in the literature is forged by standard references to classical cases and materials. In such references the iteration of the vocabulary is either silenced or under-played. The success of the vocabulary of the sources rests in its capacity to legitimize certain events as progressive, regardless of whether it is determinate or stable. The authors of the new doctrine are not the authors of determinate/rational set of technical tools, but the users of a set of discursive structures that legitimize legal-social outcomes.

Chapter 4 Case Study #3 International Law as Progress/ Progress within International Law: The New Tribunalism

4.1. Introduction

The third (and final) case study leaves turns to yet another plane of international legal argument, namely international institutions and the way they can be considered as progress for/within international law. Specifically, Chapter 4 takes issue with international law's recent fascination with international courts and tribunals – or what is called here, for argument's sake, 'the new tribunalism'. In the course of the past two decades international judicial dispute settlement has stridently re-entered the stage of international law argument to claim a central role. Even if one sets aside the most enthusiastic advocates of the phenomenon of "proliferation" or "multiplication" of tribunals, as the trend is usually captioned in international law talk,[411] international lawyers in all quarters of the discipline are

[411] On the topic of proliferation/multiplication, see generally C. Brown, *A Common Law of International Adjudication* (2007); T. Treves, Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?, in Wolfrum & Röben (Developments), *supra* note 221, at 587-620; P.S. Rao, Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation? (2004) 25 Michigan Journal of International Law 929; F. Pocar, The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community, (2004) 2 JICJ 304; L. Reed, Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law? (2002) 96 American Society of International Law Proceedings 219; T. Buergenthal, Proliferation of International Courts and Tribunals: Is it Good or is it Bad?, (2001) 14 Leiden Journal of International Law 267; H. Thirlway (Proliferation), *supra* note 19; D. Praeger, The Proliferation of International Judicial Organs: The Role of the International Court of Justice, in Blokker & Schermers (Proliferation of International Organizations), *supra* note 19, at 279-95; P.C. Szasz, The Proliferation of Administrative Tribunals, in Blokker & Schermers (Proliferation of International Organizations), *supra* note 19, at 241-249; B. Kingsbury, Is the Proliferation of International Courts and Tribunals a Systemic Problem? (1999) 31 New York University Journal of International Law and Politics 679; J. Charney, The Impact on the International Legal System of the Growth of International Courts and Tribunals, (1999) 31 New York University Journal of International Law and Politics 697; J. Charney, Is International Law Threatened by Multiple International Tribunals? (1999) 271 Recueil des cours 101; G. Hafner, Should One Fear the Proliferation Mechanisms for the Peaceful Settlement of Disputes?, in L. Caflisch, *Règlement Pacifique des différences entre états* (1998) 25-41; L. Boisson des Chazournes, Multiplication des instances de règlement des différences: vers la promotion de la règle de droit, (Zero Issue) Forum (1998) 14-16; R. Jennings, The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers, in L. Boisson des Chazournes (ed.), Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution: Proceedings of a Forum Co-Sponsored by the ASIL and the HEI (1995) 2-7.

becoming increasingly comfortable in dealing in their everyday work with international, internationalized and hybrid judicial techniques, bodies, and processes. Not only as an important new parameter broadening the range of available situational or long-term policy choices (e.g., choices between different dispute settlement solutions, post-conflict management strategies, or even architectures of multilateral treaties or organizations), but also as a trendy and lucrative domain of professional expertise for academics, practitioners, functionaries. Although the most visible manifestation of the new tribunalism can be found in debates about international criminal justice, the discipline in its entirety witnesses a rejuvenated faith in the potential of international judicial institutions to further its objectives.

Tribunals-related literature is obviously not a coherent body of texts. It is work produced in different parts of the world, notably on both sides of the Atlantic. Most of this work seems to be concerned with specific cases and procedural issues rather than with articulating an analytical framework for the study of the international judiciary. In its heterogeneity, this scholarship reflects the variety of personal-professional projects that constitute the discipline of public international law. Nonetheless a sense of cohesion can be traced in the various texts. This cohesion is forged by a certainty, sometimes stated overtly, other times assumed, that the turn to adjudication constitutes a moment of disciplinary progress: an institutional-professional development with benevolent systemic consequences.[412] The term "new tribunalism" is used in this Chapter in order to caption the different expressions of this narrative of progress in international law literature. Post-1980 literature relating to international courts and tribunals this way forms the horizon of the field of enquiry of this case study.

Proliferation of courts and tribunals is typically seen as progress in two different ways. First, as a process of internal maturation, marking the completion of international law's institutional structure (the missing 'third pillar' of the international division of powers),[413] thus leading to more cases resolved before courts, more case law, more determinate rules, more

[412] In recent years several authors have tried to perform comprehensive and elaborate cost/benefit analyses of whether proliferation is a "good thing" or not. Typically such analyses conclude that the benefits greatly outweigh the costs. For some notable ones, see Buergenthal (Good or Bad?), *supra* note 411; Charney (Impact), *supra* note 411; Charney (Is International Law Threatened), *supra* note 411; R. Higgins, The ICJ, the ECJ and the Integrity of International Law, (2003) 52 International and Comparative Law Quarterly 1; Societé Française pour le Droit International, *La Juridictionnalisation du droit international: Colloque de Lille* (2003); and the Editorial comments, (2004) 2 JICJ, at 300 et seq.

[413] Rosenne explains the necessity of the International Court of Justice on the grounds that "[since] the world organization already possessed executive, deliberative, and administrative organs, [it] would be incomplete unless it possessed a fully integrated judicial system of its own"; S. Rosenne, *The World Court: What it is and How it Works* (1962) 36.

certainty and predictability, more precedent, more thickening of the texture of the legal fabric (progress *within* international law). Second, as the hallmark of a new rule-oriented approach, widely regarded as an absolute and necessary condition for social progress (international law *as* progress).[414] Along these lines, the mere phenomenon of proliferation, the mere creation of more international judicial institutions, is said to have an immanent positive value.[415]

The understanding of proliferation "in itself" as a moment of progress is already a radical shift compared to the past, when scepticism prevailed (*see* Section 4.2.1., *infra*). But the new literature on tribunals raises the stakes further. It makes bold statements about a new paradigm of international lawyering that revolves around the development of judicial institutions. This new paradigm, the story goes, initiates a new rule-oriented approach to international governance, whose beneficiaries are the entire community of states and their citizens, as opposed to narrow (sovereign or other partial) interests. For some, proliferation is accompanied by an attitude shift: allegedly, and more than any other actor, courts are today willing to assume responsibility for social progress and apply international law in a manner beneficial for international community as a whole.[416] For others, the new professional community of 'dispute settlers' can forge a new culture of cooperation based on the respect of democratic values of pluralism, persuasive authority, positive conflict, comity, and so on.[417] Tribunals, along these lines, are able to serve justice in specific disputes (this is the so-called 'private' function of international dispute settlement) without sacrificing the universality of international law ('public' function).

These are mighty claims. In this light, the new tribunalism is an appealing story of disciplinary progress: a story about how institutional development (e.g. courts), a new professional culture (e.g. rule oriented approach), and a substantive social goal (rule of law, more justice, less war) can bear fruit if pursued with persistence and commitment. It is a compelling story about how international law may finally be able to travel the coveted distance from a power-oriented to a rule-oriented approach, from indeterminacy to determinacy, from impunity to accountability, from justice without peace (and peace without justice) to peace with justice. Tribunals, in this vein, are not only the latest addition to the repertoire of international legal action: they are also the catalyst for coping with the realist challenges of the 21st century.

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[414] This idea dates back to the Kantian claim about the importance of international dispute settlement. See I. Kant, Perpetual Peace, in I. Kant, *Political Writings* (1991) 93, at 102-5.

[415] Thirlway (Proliferation), *supra* note 411, at 255 (footnotes omitted).

[416] P. Sands, Turtles and Torturers: The Transformation of International Law, (2001) 33 New York University Journal of International Law and Politics 527, at 536.

[417] A.M. Slaughter, A Global Community of Courts, (2003) 44 Harvard International Law Journal 191, at 194.

Like the two previous case studies, the present study does not address the ontological/policy question of whether proliferation of tribunals *is* progress for international law. The purpose is rather to expose the structures within tribunals' discourse which generate the feeling of progress associated with the phenomenon of proliferation. It explores the proposition that, although progress may be a convenient label to caption a certain international law development, it is ultimately a term devoid of meaning unless placed within the context of a narrative – a story about how things were, how things are, and how things need to be. Such narratives of progress, it is argued, do not 'speak themselves': their plot is not merely recorded by the author. Instead, their plot is created by the author, based on concrete (epistemic, ideological, or other) choices and is expressed through a 'vocabulary' – a set of assumptions, images, metaphors and so on. As a consequence, such narratives of progress compete with and exclude alternative ones; they also constitute the basis for policies and decisions with tangible effects on everyday life. In this context, progress narratives are no longer mere descriptive statements but powerful rhetorical strategies of (de)legitimation.

Although some may consider this claim self-evident, it is at loggerheads with the claims of objectivity (universal, determinate, neutral, secular, natural, etc.) that many of international law's standard progress narratives have. A 'progress kick' – the zeal of feeling part of a moment of disciplinary progress – yields tremendous energy and can be a compelling source of institutional, doctrinal, social transformation, storming resistance by force. In the case of tribunals, this involves major policy decisions such as deciding UN strategy on post-conflict reconstruction, institution building, norm development, ranking of expenditure priorities – choosing few among many battles to fight when resources are scarce. What if, however, the narrative is not an objective representation of reality but based on partial epistemic choices? Then one will have taken for granted what yet needs to be proven. Instead of using tribunals as a means of promoting certain goals, the defense of the progress narrative itself will have become the self-referential goal of the intellectual pursuit. At that moment, initial exhilaration and confidence gives way to what Pierre Schlag calls *ennui*,[418] a feeling of weariness and discontent with the narrative and an eventual shift to new projects. There is good evidence that tribunals literature has started experiencing this feeling of *ennui*.[419]

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[418] P. Schlag, Normative and Nowhere to Go, (1990) 43 Stanford Law Review 167, at 184.

[419] Tribunal literature shows signs of reaching this moment of *ennui* after the initial exhilaration. Compare for example recent work by Romano and others that take a markedly more pragmatic assessment about the social impact of proliferation and contrast their previous writings. See e.g. C. Romano, The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent, (2007) 39 New York University Journal of International Law and Politics 791, at 834-837.

Seen in this light, the new tribunalism can help understand the pivotal role of progress narratives in international law work. Roland Barthes has famously written that narration "is a manner of speaking as universal as language itself, and narrative is a form of verbal representation so seemingly natural to human consciousness that to suggest that this is a problem might well appear pedantic".[420] Even if that is the case, much can still be said about the relationship between progress narratives, the discipline's exclusions, and the feeling of *ennui* which is all too often part of the professional experience of being an international lawyer. Section 4.2 outlines the main thrust of the progress narrative of the 'new tribunalism' and explains what is 'new' in today's engagement with international courts. Section 4.3 performs a discourse analysis of the relevant literature and describes the discursive structures (vocabularies) of the new tribunalism. Section 4.4 performs a critique of the vocabularies in order to demonstrate that, despite their claims, they do not reflect a 'world out there' but are unstable discursive structures. Section 4.5 closes the Chapter with a re-assessment of the new tribunalism in the light of the above.

4.2. The New Tribunalism

4.2.1. Tribunals and pre-1980s International Law

Professional interest in international courts and tribunals is hardly a novelty. International courts have always stood as important paragons of internationalism, even if sentiments towards them oscillated considerably. Since 1899 and the formal inauguration of the era of adjudication with the launching of the Permanent Court of Arbitration, the international judiciary has been a global constant of the profession, an emblematic sign of its rule-oriented culture and trade-mark of its liberal-democratic ideology. Tribunals belong, so to speak, to the universal language of public international law. Featured in every textbook or university course, they are entities to be reckoned with by students and policy-makers alike. Their pronouncements are classic sources of normative and political authority and the prospect of appearing before one is a major foreign policy consideration.

It is not hard to guess some of the reasons behind international law's traditional interest in courts and tribunals: international adjudication seems to exemplify central credos of internationalism. Take, for example, the idea that before international arbitral or judicial institutions one considers problems from a truly 'international' standpoint, rather than considering them as problems that have to be worked out bilaterally between sovereign states: "[T]o apply to the Court, is to place oneself on the plane of international

[420] Barthes (Narratives), *supra* note 25, at 79.

law" – this is the metaphor of the "international plane" employed by the International Court of Justice in the *Nottebohm* case,[421] capturing the imagination of generations of scholars about the existence of an "international mind", standpoint, or sensibility, providing a space for conflict resolution which is above and beyond national politics.[422] The judiciary is also the place where public international lawyers are at their best, as judges or advocates, repositories of the knowledge for the management of the procedural and substantive norms that govern these institutions. The metaphor of the international plane assumes the existence of a class of professionals who imagine looking down from the international plane towards the problem, equipped with their internationalist professional expertise, which is resistant to partial political or ideological interests. Recent literature, and in some contrast to the more cautious approach of the past, has started portraying international judges as individuals exhibiting such rare professionalism, high moral character, independence and wisdom which escape conventional standards.[423] Tribunals and international judges are pictured as able to resolve disputes with one eye to the specific needs of each case and another to forging the legitimacy and universality of international law as a system, by means of *obiter dicta*, elucidation or corrective interpretation of existing norms.[424]

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[421] The celebrated metaphor of the international plane descends from the Judgment of the International Court of Justice in the *Nottebohm* case (second phase) (Lichtenstein v. Guatemala), Judgment of 6 April 1955, ICJ Rep. 1955, 4, at 20-1. The Court stated: "But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court." On the metaphor of the international plane, see A. Riles, The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law, (1995) 6 *Law and Critique* 39.

[422] N.M. Butler, *The International Mind: An Argument for the Judicial Settlement of International Disputes* (1912), at 102: "The international mind is nothing else than the habit of thinking of foreign relations and business, and the habit of dealing with them, which regard the several nations of the civilized world as friendly and cooperating equals in aiding the progress of civilization, in developing commerce and industry, and in spreading enlightenment and culture throughout the world".

[423] See e.g. M. Reisman, Judge Shigeru Oda: A Tribute to an International Treasure, (2003) 16 Leiden Journal of International Law 57. See also D. Terris, C. Romano & L. Swigart (eds.), *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007).

[424] Karen Knop explains how the doctrine of the general principles of law has been used by international tribunals to reinforce their claims of being able "to do justice to diversity without sacrificing universality"; K. Knop, Reflections on Thomas Franck, *Race and Nationalism* (1960); K. Knop, "General Principles of Law" and Situated Generality, (2003) 35 New York Journal of International Law and Politics 437, at 439 & 455-469.

In addition to its internationalist outlook, the international judiciary is often seen as the location *par excellence* where law may be carefully dissected from politics. It is the space where formal rules appear to be applied and enforced with an acceptable degree of certainty and predictability and where the parties are expected to enjoy the protection of equitable procedural principles. Some of the most emblematic doctrines and secondary rules of international law (e.g. sources, state responsibility) and procedural principles (e.g. equality of arms, *audi altera partem*) operate at their best before tribunals, where the language of law is spoken with as few diversions as possible. All this seems to add up to relative fairness, equality, and predictability in the process, replacing coercive force with the language of law while relocating the initial international dispute to a symbolic adversarial battleground. Hence tribunals are traditionally believed to contribute positively to the aims of public international law, as mechanisms essential for maintaining international peace and as necessary components of any internationalist governance project. The starting assumption of this contention is that the creation of tribunals signifies the recognition from the side of states of the importance of the rule of law in their relations. It is to be presumed that more tribunals will lead to more justice and to more situations in which resort to forcible means of settling disputes is avoided; the proliferation of institutions and mechanisms will lead to a higher proportion of disputes being settled this way. This in turn will result to more pronouncements about international law, which will strengthen its materiel and increase its volume of pronouncements, leading to more certainty and predictability in dispute settlement in the future.

Despite various critiques that can be leveled against such a chain of reasoning, mainstream scholarship has always accepted it as axiomatic. Lasting mythologies have been created about some international courts, such as the ICJ, the International Criminal Court (ICC), or the European Court of Human Rights (ECHR). Fluency with their work is the benchmark of one's initiation into the deeper secrets of the discipline and the usual material for student examinations. The normative value of their judgments and *obiter dicta* is a standard way of validating one's legal argument. For nearly a century 'international dispute settlement' has already existed as a separate field of study, associated with awe-inspiring figures of the discipline, such as James Brown Scott, Manley Hudson, Alejandro Álvarez, Steven Schwebel, Hersch Lauterpacht, Robert Jennings, Shabtai Rosenne, Taslim Olawale Elias, and many others.

Now, despite the prominent role of courts in the dream of a peaceful international community, the style of the engagement of international lawyers with courts has been ambivalent and, until very recently, skeptical. The judicialization of international law may have always been a declared

goal of the discipline since 1899 or earlier but one was never sure whether this could ever be attained or how to precipitate the process. Creating more tribunals, although part of the overall plan, was never a priority and came second to other institutional developments which were considered much more capable of ensuring systemic goals.

With the danger of over-simplification, mainstream skepticism about international courts and tribunals can be boiled down to two different concerns. The first has a typically positivist accent. It questions whether an international judicial system is at all feasible on the face of other structural pathologies in international law at large.[425] Authors here are concerned that international courts will remain a distant dream as long as international law has bad quality (indeterminate/political/few) rules and norms, gaps in the body of its law, lack of enforcement mechanisms and compulsory jurisdiction,[426] and so on. The main priority was therefore the creation of better international law rather than more judicial institutions.[427] In 1949 the President of the ICJ himself advised against "extravagant faith" in the possibility of peace through judicial means and stated that "the International Judge alone cannot assure peace".[428]

The second set of concerns has a more realist accent. It worries that, due to the nature of international politics, courts will always give way to political pressure and thus be unable to handle sensitive disputes, even when those revolve around a strong legal component.[429] In its most extreme version, this concern repeats the credos of realism: judges can never apply the law impartially but will favor the interests of their home states; and courts are the victim of conflicting interests among the states that use and control it. In its milder form, this concern captures the disappointment of scholars in the handling of particular cases by international tribunals. Post-War II literature (1965-1989), liberal, realist, and post-colonial, was the most

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[425] For a typical example of these concerns see P. Weil, Towards Relative Normativity in International Law, (1983) 77 American Journal of International Law 413.

[426] The small number of states having accepted the jurisdiction of the ICJ and the number of reservations were a constant concern. See e.g. C.H.M. Waldock, Decline of the Optional Clause, (1956) 32 British Yearbook of International Law 269; this is one of the main arguments in Romano (Shift), *supra* note 419.

[427] The interwar period (1918-1939) identified the development of new law (codification) as the main priority. From the large body of literature on codification in the period, see Baker (Codification), *supra* note 276, at 40; de Visscher (Codification), *supra* note 276; Root (Codification), *supra* note 276; Cole (Codification), *supra* note 276; Scott (Codification), *supra* note 276; McNair (Present Position), *supra* note 276; Urrutia (Codification), *supra* note 276; Brierly (Future), *supra* note 276; Sibert (Quelques aspects), *supra* note 276.

[428] J. Basdevant, *Peace Through International Adjudication?* (Brochure, translated 1949).

[429] M. Katz, *The Relevance of International Adjudication* (1968), esp. at 145 et seq.

dramatic in its predilection,[430] although this style of argument has found strong support at all post-1918 times, including today.[431] Critiques were particularly vocal in the context of so-called "hard" or "big cases"[432] before the International Court of Justice, such as the *South West Africa*[433] and the

[430] See e.g. the "General Debate" on the role of international tribunals in international law, in H. Mosler & R. Bernhardt (eds.), *Judicial Settlement of International Disputes* (1974), at 165-87.

[431] This is particularly the case with "neo-conservative", "neo-con", or "nationalist international law" claims. The term "neo-conservative" is a figurative term borrowed from US domestic politics and launched recently in international law debates to caption a style of scholarship that has become prominent in the United States during the last years and sees international law as the product of states pursuing their interests on the international stage which does not pull states towards compliance contrary to their interests, and therefore its possibilities for what it can achieve are limited. The specificity of the neo-conservative argument can be better understood when situated in the context of contemporary domestic political debates in the United States about the relevance of international law for the American legal order and its foreign policy. The tenor of the neo-conservative argument is that the whole movement of proliferation needs to be met with caution since the only "effective" international tribunals are so-called "dependent" tribunals, by which they mean ad hoc tribunals staffed by judges closely controlled by governments or threats of retaliation. By contrast, "independent" tribunals meaning tribunals that resemble domestic courts, pose a danger to international cooperation. Independent judicial decision makers are suspect because they are more likely to allow moral ideals, ideological imperatives, or the interest of third parties to influence their judgments.

For a brilliant review of neo-conservative work see A. Lorite Escorihuela, Cultural Relativism the American Way: The Nationalist School of International Law in the United States, (2005) 5 *Global Jurist Frontiers*, http://www.bepress.com/gj/frontiers/vol5 /iss1/art2. ; I. De la Rasilla del Moral, All Roads Lead to Rome or the Liberal Cosmopolitan Agenda as a Blueprint for a Neoconservative Legal Order, (2007) 7 Global Jurist 2, at 1. For representative 'neo-con' literature, see J.R. Goldsmith & E.A. Posner, *The Limits of International Law* (2005); E.A. Posner, International Law and the Disaggregated State, (2005) 32 Florida State University Law Review 797; J.R. Bolton, Is There Really "Law" in International Law? (2000) 10 Transnational Law and Contemporary Problems 1; E.A. Posner & J.C. Yoo, Judicial Interdependence in International Tribunals, (2005) 93 California Law Review 1; E.A. Posner & J.C. Yoo, *A Theory of International Adjudication*, John M. Olin Law and Economics Working Paper No. 206, www.law.uchicago.edu/Lawecon/index.html. *Cf*. L.R. Helfer & A.M. Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, (2005) 93 California Law Review 899.

[432] The term "big case" was prominently used by Falk and described as a "controversy of major significance among the actors in the political arena; R. Falk, *Reviving the World Court* (1986), at xiii.

[433] *South West Africa (Second Phase)*, 1966 ICJ Rep. 6. Friedman, for example, wrote in 1967: "The International Court of Justice, like its predecessor, represents an important but as yet weak attempt to detach international legal issues from national prejudices and passions"; W.G. Friedmann, The Jurisprudential Implications of the South West Africa Case, (1967) 6 Columbia Journal of Transnational Law 1, at 2 & 10-14. For surveys of the views condemning the South West Africa Judgment, see J. Dugard, *The South West Africa/Namibia Dispute* (1973), esp. at 332-74, 554-9; and R. Falk, The South West Africa Cases: An Appraisal, (1967) XXI International Organization 1, who acted as legal counsel for Ethiopia and Liberia in the case.

Hostages[434] cases, but they were believed to hold for most instances where significant political interests intersected with the object of the dispute.[435] The impartiality of the international judge and the fair composition of the bench were often put to question, especially in the context of Cold War or post-colonialism debates.[436] Scholars were asked to nuance their expectations about the potential of international courts in a world of sovereign states and some warned that a certain type of disputes should be altogether kept away from international courts.[437] In a profession prepared to give only "two cheers"[438] to adjudication the project of creating of new international tribunals (today's "proliferation") was considered a luxury problem,[439] even a potentially destabilizing and hazardous development. It is only during the mid-1980s and, notably, after 1989 that a new form of engagement with international courts and tribunals entered the stage of international law argument.

4.2.2. Facts and trends of Proliferation

Attitudes have changed during the past two decades. Post-1980s tribunals-related debate has built its coherence around the terms proliferation and multiplication of international courts and tribunals, introduced to label the sudden increase in the numbers of new international judicial bodies with

[434] See Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, ICJ Rep. 3 (1980). See R.A. Falk, The Iran Hostage Crisis: Easy Answers and Hard Questions, (1980) 74 American Journal of International Law 411; R.A. Falk, Realistic Horizons for International Adjudication, (1971) 11 Virginia Journal of International Law 314.

[435] According to Friedmann, "[i]t is to be feared that the Judgment of the International Court in the South West Africa case has dealt a devastating blow to the hope that the International Court might be able to deal with explosive and delicate international issues"; Friedmann (Implications of SWA Cases), *supra* note 433, at 16. The type of "expectations" that should be placed upon international courts and whether they should be expected to deal with "hard" political cases was at the heart of these debates. See e.g. E. Gordon, Old Orthodoxies Amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice, (1971) 1 Denver Journal of International Law 65.

[436] See e.g. T.O. Elias, Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements Which Follow from its Functions as the Central Judicial Body of the International Community? – Report in Mosler & Bernhardt, *supra* note 430, at 19-31.

[437] Falk (Reviving), *supra* note 454, esp. Chapter 1; Katz suggested that "Cold War disputes" were unsuitable for adjudication; see Katz (Relevance of Adjudication), *supra* note 429, at 7-40.

[438] R.R. Baxter, Two Cheers for International Adjudication, (1979) 65 American Bar Association Journal 1185, at 1188-9; Baxter feared that the world may be still far from being able to give a "third cheer" to adjudication, primarily on account of the fact that the system was not sufficiently used and supported by states.

[439] P. Jessup, Do New Problems Need New Courts?, 65 Proceedings of the American Society of International Law 261-268 (1971), at 266-267.

general or specialized competence applying international law.[440] When one speaks of proliferation of international courts and tribunals today, one usually refers to two complementary trends. First, a numerical increase in both the institutions performing a judicial or semi-judicial function and in their case load. Literature has documented quite extensively the various parameters of this demographic growth.[441] Although criminal justice, international economic law and the environment are the fastest growing components, numbers seem to have increased in most areas of international legal practice. Although a steady increase in the number of tribunals has been occurring ever since the end of World War II, the growth-rate has accelerated dramatically since 1989[442] and the system has evolved "beyond recognition."[443] The Project for International Courts and Tribunals (PICT) lists in its "matrix" some 25 permanent, formal, independent international courts.[444] Other authors count more than 50 international courts and tribunals in existence.[445] If one includes other institutions exercising judicial or quasi-judicial functions, the number easily climbs to 70 or more.[446] The widely told story is that whereas in 1946 the ICJ was the only standing international Court, the situation has changed dramatically today with more than 25 permanent international courts in operation. Among many new institutions, one must single out the International Tribunal for the Law of the Sea (ITLOS), several new or reinvigorated tribunals dealing with economic disputes or economic integration,[447] mass claim reparation tribunals or

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[440] See note 411, *supra*.

[441] See e.g. C. Tomuschat, *International Courts and Tribunals with Regionally restricted and/or Specialized Jurisdiction*, in Judicial Settlement of International Disputes: ICJ, other Courts and Tribunals, Arbitration and Conciliation (1987), at 285-416; C. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, (1999) 31 New York University Journal of International Law and Politics 709; R. Alford, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance, (2000) 94 American Society of International Law Proceedings 160; S. Spellicsy, The Proliferation of International Tribunals: A Chink in the Armor, (2001) 40 Columbia Journal of Transnational Law 143; C. Brown, The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze, (2002) 3 Melbourne Journal of International Law 453.

[442] Romano (Shift), *supra* note 419, at 803-834.

[443] Sands (Turtles and Torturers), *supra* note 416, at 553.

[444] See http://www.pict-pcti.org/publications/synoptic_chart.html.

[445] Alford (Proliferation), *supra* note 441, at 160.

[446] Spellicsy (Proliferation), *supra* note 441, at 146.

[447] World Trade Organization Dispute Settlement Mechanism; North American Free Trade Agreement Dispute Settlement Panels; European Court of Justice; Court of Justice of the European Free Trade Agreement (EFTA); Court of Justice of the Benelux Economic Union; Court of Justice of the Andean Community (Andean Community); Central American Court of Justice (Organization of Central American States); Court of Justice for the Common Market for Eastern and Southern Africa; Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa; Judicial Tribunal of the Organization of Arab Petroleum Exporting Countries (OAPEC, 1978); Court of Justice of the Arab Maghreb Union.

processes,[448] human rights tribunals,[449] the ICC, several international or internationalized criminal tribunals under the auspices of or in agreement with the United Nations,[450] and many others that fit in none of the above categories.[451] There has been a corresponding increase in the case law of existing institutions. The ICJ, the ECHR, or the World Trade Organization Dispute Settlement Mechanism (WTO DSM) have never been so busy before. In addition, the total number of international claims settled by courts has increased substantially as well, thanks to the establishment of new mass claims judicial procedures. It is reported that the Iran-U.S. Claims Tribunal (IUSCT) has resolved more than 3,000 claims, the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) has rendered more than 7,500 decisions, the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina (CRPC) has rendered more than 25,000 decisions,[452] and the United Nations Compensation Commission (UNCC) has resolved in excess of 125,000 claims.[453]

There is also a second trend, parallel and complementary to the first one. The quantitative increase is embellished with an unprecedented diversification of the structural characteristics (e.g. scope, jurisdiction, binding nature of findings, enforcement mechanisms, and so on) of the new institutions. In 1946 the ICJ was the stereotype of an inter-state, international judicial organ with general competence and which could be seized (under certain conditions) by any state in the world. The literature observes that the variety in formats today challenges traditional categories of the discipline. National and international, diplomatic and judicial, binding and non-binding, are some of the oppositions that traditional textbooks adhered to in order to define international judicial dispute settlement. Even today, most textbooks

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[448] E.g. Iran-United States Claims Tribunal; United Nations Compensation Commission; Ethiopia-Eritrea Boundary Commission; Eritrea-Ethiopia Claims Commission; Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina; Claims Resolution Tribunal for Dormant Accounts in Switzerland; Marshall Islands Nuclear Claims Tribunals; Housing and Property Claims Commission in Kosovo; International Commission on Holocaust Era Insurance; German Forced Labor Compensation Program.

[449] European Court of Human Rights; Inter-American Court of Human Rights; African Court of Human and Peoples' Rights.

[450] International Criminal Tribunal for the Former Yugoslavia; International Criminal Tribunal for Rwanda; The Special Court for Sierra Leone; Special Tribunal to Try Suspects in Assassination of Rafiq Hariri.

[451] E.g. Permanent Court of Arbitration, International Center for the Settlement of Investment Disputes (ICSID), the World Bank Inspection Panel Procedure, the Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, and many more.

[452] For a recent analysis, see A. Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective, with a Case Study on Bosnia and Herzegovina* (2007), at 275-311.

[453] Alford (Proliferation), *supra* note 441, at 160.

of international dispute settlement exclude from their scope diplomatic, political, internationalized, or other alternative means of international dispute resolution, in order to devote their attention to inter-state permanent judicial institutions, such as the ICJ or the ITLOS. Recent developments blur and transcend in their individuality these classical dividing lines, creating a great variety of formats. 'Judicialized institutions' such as the WTO DSM straddle the distinction between diplomatic and legal means; the creation of 'internationalized' or 'mixed' tribunals, such as the one in Cambodia seems to bridge the divide between national and international adjudication. A long list of hybrid solutions, such as the UNCC, the CRT, the Housing and Property Claims Commission in Kosovo (HPCC), compulsory or directed conciliation methods, Truth and Reconciliation commissions in lieu of judicial closure, explode classical categories into a polyphony of creativity and adaptability.

4.2.3. The New Form of Engagement

The traditional form of scholarly engagement with tribunals fades next to the spirited comeback of tribunal-related work in public international law during the past two decades, which has come much to the surprise of some observers.[454] Today's engagement seems to be permeated by a different sensibility, both in terms of its intensity and attitude. In contrast to previous decades, today's argument is upbeat and certain, parting company with realist concerns about judicial independence and positivist concerns about the pathology of international law. The force of the new institutional development appears to be beyond doubt or contestation. Proliferation seem to have an immanent value "in itself' to be considered an element of progress in international law.

> An international judicial or arbitral body has in itself some claim to be regarded as a good thing: opposition to the establishment of such a body has to be based on questioning whether it is actually needed rather than on any denial of its virtues. The creation of new tribunals may indeed be regarded as an encouraging sign, as amounting to the "expression d'adhésion plus grande des acteurs de la vie internationale à la doctrine de la primauté de la règle de droit dans les rapports internationaux […]".[455]

This conviction has even become an "article of faith" among contemporary international lawyers:

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[454] Kissinger writes in 2001: "In less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected to systematic debate, partly because of the intimidating passion of its advocates"; H. Kissinger, *Does America Need a Foreign Policy?* (2001), at 273.

[455] Thirlway (Proliferation), *supra* note 411, at 255 (footnotes omitted).

> The whole question of the empirical impact of international courts and tribunals on behavior and attitudes has not yet been sufficiently studied, although the work on compliance and on other effects of rules and decisions is growing steadily. Nevertheless, it is an article of faith among most international lawyers that the growing availability and use of international tribunals advances the rule of law in international relations. Within this professional cadre, most of the concern expressed with regard to the proliferation of international courts and tribunals is not about the intrinsic desirability of creating such institutions but about the systemic problems may give rise.[456]

Proliferation is often regarded as the latest episode in a long process of maturation of the discipline and the transition to a rule-oriented model, what Jennings calls the "quiet revolution of international law".[457] Proliferation brings advancement and improved levels of effectiveness:

> […] the combined effect of these two recent developments [the increased density, volume, and complexity of international norms; and greater commitment to the rule of law in international relations], greater acceptance of the compulsory jurisdiction of international courts and tribunals and the institutionalization of international dispute settlement mechanisms, entails the advancement of international law in new and improved levels of effectiveness.[458]

It is also a sign of the growing strength of international law, reducing arbitrariness and power-play in international relations.

> [I]t is a sign of maturity and growing importance of the rule of law in international affairs that international machinery and an appropriate judicial system also accompany the creation of any new and comprehensive international legal regime. The judicial enforcement of international rights and obligations reduces arbitrariness and power plays in international relations.[459]

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[456] Kingsbury (Proliferation), *supra* note 411, at 20. See also Buergenthal (Good or Bad?), *supra* note 433; Charney (Is International Law Threatened), *supra* note 411, at 101; Romano writes: "When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development in the post Cold-War age"; Romano (Pieces of a Puzzle), *supra* note 441, at 709.

[457] Jennings (Implications), *supra* note 411, at 1.

[458] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), at 4-5.

[459] Rao (Multiple Judicial Forums), *supra* note 411, at 960 (footnote references in the original omitted).

For many, the 'new' judicial dispute settlement system performs a markedly different function than in the past. From one-among-many mechanisms available in international law for the peaceful resolution of disputes (Art. 33 UN Charter), international tribunals arguably serve today a much more important systemic cause. They are mechanisms for the application and interpretation of the rules of law, thus performing a unifying and stabilizing constitutional function for international law.[460] The importance of the development, for some, even justifies the creation of new field of study, "international judicial law and organization", which should be studied separately from the traditional subject of "international dispute settlement".

> The intent is to show that 'international judicial law and organization' can and should be studied as a discipline in its own right, without the need to be subsumed under the general category of 'Peaceful Settlement of International Disputes.'[461]

The underlying logic here is that, although in the past judicial settlement was merely a means of seeking a peaceful solution to an international dispute, international courts, much like domestic courts, are third-parties applying and interpreting the law in an independent manner, performing a deeper systemic-constitutional function than the "political" or "diplomatic" means of dispute settlement listed in Article 33 of the UN Charter (the 'public' function of international dispute settlement). This is an important cultural shift compared to the past. From the interpretation of legal norms to the outbreak of violence, tribunals no longer simply resolve disputes between parties ('private' function of courts) but foster the growth of a plethora of systemic goods. Looking down from the international plane, they deter international crimes, avert the displacement of populations,[462] save lives, become bulwarks against evil,[463] bring peace[464] and normalcy,[465] reduce

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[460] For the "constitutionalist" thesis and the significance of international tribunals in the process, see E.-U, Petersmann, Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?, (1999) 31 New York University Journal of International Law and Politics 753; P.M. Dupuy, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, (1999) 31 New York University Journal of International Law and Politics 791; J. Allain, The Continued Evolution of International Adjudication, in J. Levasseur (ed.), *Looking Ahead: International Law in the 21st Century* (2002) 50-71, at 65 & 71.

[461] Romano (Pieces of a Puzzle), *supra* note 441, at 711. See also Allain (Continued Evolution), *supra* note 460.

[462] See e.g. N. Pillay, International Criminal Tribunals as a Deterrent to Displacement, in A. Bayefsky & J. Fitzpatrick (eds.), *Human Rights and Forced Displacement* (2000) 262-266.

[463] See note 11, *supra*.

[464] R.J. Goldstone, Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals, (1996) 28 New York University Journal of International Law and Politics 485, esp. at 488-90.

[465] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* 7 (Oxford: Oxford University Press, 2003).

arbitrariness,[466] and strengthen the fabric of international law with their pronouncements. International law appears, indeed, so much stronger and more potent with tribunals in its institutional machinery. And international lawyers emerge more vindicated, relevant, and definitely back in business. Even if tribunals do not always work precisely the way one would hope, they are at least a good 'second-best' response. One needs to start somewhere and, after all, the ICJ, the ICTY, the ITLOS, despite all valid criticisms leveled against them, haven't they all had an overall positive effect on public international law? The story goes that although we may be still looking at the early stages of the process, and although we have to beware systemic hazards, international law may be finally experiencing the long-awaited historical moment of the evolution of the third pillar (next to legislature and the executive) of international governance, the coming of age of international adjudication.

Seen this way, the narrative of progress of the new tribunalism has irresistible allure. First, because it tells a compelling story about how international law may finally be able to travel the coveted distance from a power-oriented to a rule-oriented approach, from indeterminacy to determinacy, from impunity to accountability, from justice without peace (and peace without justice) to peace with justice. The path of progress passes through the development of yet another generation of improved legal doctrines and institutions – international adjudication. Second, in the narrative of proliferation international lawyers are given a central role, as builders and defenders of the integrity of the system. Third, with the new tribunalism international law can carve out a new sovereign ground for itself (maintain its autonomy) on the face of the new post-Cold-War realist challenges. Fourth, the new tribunalism appears to be a 'real', tangible institutional development, as opposed to a mere theoretical possibility. Proliferation appears to be 'happening out there' with palpable examples and as an expression of deep social forces. Have we not, after all, managed to establish the International Criminal Court, a dream-come-true of many generations? Is it also not true that the International Court of Justice was never so busy before? Has the relative success of the ICTY and ICTR not triggered a domino effect in the domestic orders of many states that now endorse universal jurisdiction? For the first time powerful states have found themselves on the losing side of important cases before international tribunals, rebutting the realist claim that international courts would bow to power. International judges have also become better professionals, voting on occasion even against the state of their nationality, and projects for the creation of new codes of professional ethics are under way. Finally, the story

[466] Rao (Multiple Judicial Forums), *supra* note 411, at 960.

of progress appears to 'speak itself'. What can be wrong about international tribunals after all? One can intuitively assume that more tribunals can only lead to more cases being dealt with judicially, more precedent, more rule oriented culture, more accountability, more justice, more peace. A system of international tribunals will hush the last remaining skeptics about international law's claim to being 'law proper'. The argument goes that proliferation, if managed correctly, will bring systemic benefits whose beneficiaries are both the collectivity and individual, such as justice, peace, rule of law, legal certainty and predictability, deterrence of crimes, end to impunity, etc.

The cultural shift is strikingly reflected in developments in the sociology of the profession. An astounding amount of monographs, journals, edited volumes, articles, even "manuals" of international tribunals are showcased in publishers' lists during the last years.[467] Specialized LL.M. Programs, summer schools, seminars, and new subjects in university curricula respond to market pressure and forge of a new field of scientific study. New professional associations, NGOs and academic institutes have emerged,[468] dealing with tribunals, judicial processes, or the phenomenon of proliferation.[469] Tribunals have also become a distinct niche of professional practice. Twenty years ago the idea of international advocacy as a career choice sounded a little absurd. Not only because there were not enough instances to practice such a profession; or because advocacy, say, before the ICJ was a privilege belonging to a small elite of QCs and professors from London or Paris; but also because international tribunals somehow appeared too marginal to the overall international law project to deserve one's whole-hearted commitment. Tribunals were simply not seen as the place where catalytic new developments were taking place. Today, prosecuting war criminals, say, in Sierra Leone or working for the Registry of the ICC is considered hip, sexy, and potentially one's key career move to enter the inner

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[467] P. Sands, *Manual on International Courts and Tribunals* (1999). The volume of tribunal related work is reflected in the Selected Bibliography of International Dispute Settlement, published quarterly by the Leiden Journal of International Law, comprising hundreds of titles each year.

[468] Project for International Courts and Tribunals (www.pict-pcti.org/); The New York University Transitional Justice Project (www.nyuhr.org/transitional.html); Transitional Justice Project of the Notre Dame Law School Center for Civil and Human Rights (www.nd.edu/~cchr/programs/tjp.html); Grotius Center for International Legal Studies of Leiden University (www.campusdenhaag.nl/pagina/16).

[469] See e.g. International Center for Transitional Justice (www.ictj.org); Coalition for International Justice (www.cij.org); No Peace Without Justice (www.npwj.org/); The International Justice Mission (www.ijm.org); Advocates International (www.advocatesinternational.org/).

circles of the profession and climb academic hierarchies. Universities willing to seize the moment receive nowadays troops of post-graduate students wishing to enter the practice of international tribunals. Cities such as The Hague welcome the arrival of hundreds, nowadays thousands, legal or paralegal professionals, employed by or around international tribunals.

The sociology of the forming of this professional community is worthy of a separate study. What is striking at first sight, though, is the shared feeling of belonging to a professional caste. A whole lot of professional associations,[470] newsletters,[471] and common social activities related to tribunals are created, forging alliances and the feeling of community across different judicial institutions. Professionals of the international judiciary in The Hague, from students and interns to registry and press officers, IT specialists, translators, prosecutors, defense attorneys, even judges, recognize fellow professionals in each other, partaking in complementary projects of international justice. They socialize together in ex-pat circles that span different tribunals but are, more or less, limited to them, attend and organize their own events, and so on. The Hague claims the title of "Legal Capital of the World" for precisely the same reason.[472]

4.3. Two Vocabularies of Progress

The feeling of progress associated with the new tribunalism is intricately related with the argument of two distinct styles of arguent that dominate international law debates today. These styles are called here mainstream, inasmuch as they constitute generally acceptable narrative styles about international law. They enjoy the respective confidence of large segments of the profession and occupy dominant positions in the debate. As such, they are common reference points, encapsulating two distinct orthodoxies about the discipline of international law. It is argued here that the conglomerate of

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[470] See e.g. The International Criminal Bar (www.icb-bpi.org/); International Criminal Defense Attorneys Association (www.aiad-icdaa.org); the International Criminal Law Network (www.icln.net/).

[471] See e.g. International Justice Tribune, self-described as "independent website providing information and documentation in international justice", http://www.justicetribune.com/ (as downloaded in March 2006); The International Courts and Tribunals Project (http://www.worldlii.org/int/cases/, as downloaded in March 2006), "a comprehensive search facility for final decisions of all international and multi-national courts and tribunals, whether global or regional".

[472] See the "Hague Legal Capital" coalition (www.thehaguelegalcapital.nl/) and the "Hague Justice Portal", http://www.haguejusticeportal.net, containing information about all different tribunals, international criminal law activities and seminars, etc. See also P.J. van Krieken & D. McKay (eds.), *The Hague: Legal Capital of the World* (2005).

assumptions, metaphors, and other discursive structures that constitute each one of these styles of argument, what is called their 'vocabularies', are responsible for the feeling of progress experienced in our encounter with international tribunals. The two vocabularies are named here, for argument's sake, "lawyer-as-architect" and "lawyer-as-social-engineer" and are described in turn.

4.3.1. The 'lawyer-as-architect'

The first vocabulary appears to be, on the face of it, politically agnostic and evolutionary[473] and is firmly rooted in the practices and insights of traditional European-style positivism.[474] The vocabulary, for the purposes of this study, could be reduced into a narrative of progress, a before/after account of public international law's evolution, which is manifested in the literature with four narrative moves. *First*, an objective historical account: proliferation of tribunals is described as a natural and long-awaited institutional development. *Second*, the existence of a system (albeit nascent or imperfect) of international justice. *Third*, judicialization seen as a moment of disciplinary progress. *Fourth*, the identification of an important role for the international lawyer as a defender of the coherence of the system.

Historical Account

The first component of the vocabulary of the 'lawyer-as-architect' is an evolutionary account of the history of international law. The story goes that the advent of tribunals is a natural stage in the evolution of the discipline. As Guillaume assures as, "in all human communities justice had to be done and judicial institutions were established as soon as such communities were organized."[475] Proliferation, in this sense, constitutes a decisive turning point in the long history of international law because it evidences its legalization and constitutionalization. It signifies an important paradigm shift in favor of law over politics and legal discourse over power-based diplomacy. Until

[473] Romano begins his article with Ockham's principle of parsimony: "Entia non sunt multiplicanda praeter necessitatem" (Entities should not be multiplied unnecessarily); Romano (Pieces of a Puzzle), *supra* note 441, at 709.

[474] For some representative writings in this approach, see Thirlway (Proliferation), *supra* note 411; Hafner (Should One Fear), *supra* note 411; Jennings (Dangers and Possible Answers), *supra* note 411; Treves (Judicial Lawmaking), *supra* note 411; Boisson des Chazournes (Multiplication des instances), *supra* note 411; Praeger (Proliferation of International Judicial Organs), *supra* note 411; Pocar (Proliferation of International Criminal Courts), *supra* note 411; Dupuy (Danger of Fragmentation), *supra* note 461; Shany (Competing Jurisdictions), *supra* note 465; Petersmann (Constitutionalism), *supra* note 461;; Rao (Multiple Judicial Forums), *supra* note 411.

[475] G. Guillaume, The Future of International Law and Institutions, (1995) 44 International and Comparative Law Quarterly 848.

recently international law was not ready or mature enough to sustain a developed system of international justice, due to structural deficiencies, pathologies or birth defects, these colleagues argue.[476] The absence of an obligation to settle disputes peacefully, the power of the sovereign state to flout the rules, the limited regulatory domain of international law, the anarchic/ fragmented development of its norms and doctrines, the absence of enforcement mechanisms, the lack of compulsory jurisdiction, are all reasons that prevented a system of international courts to emerge and flourish. The proliferation of tribunals, according to this view, is "feature of a growing sophistication in the relationship of states,"[477] the "expansion of international law"[478] or its "quiet revolution", as Sir Robert Jennings put it once, referring to a "radical change in character of the discipline".[479]

Why did this legalization take place today and not in the past? The answer is found for these authors found in the enabling concurrence of a number of variables and factors. So, for example, the diversification of the ways in which states relate to each other, and the regulation of previously unregulated domains, have led to the codification of new law and the creation of regulatory frameworks and corresponding international organizations.[480] Such areas of practice fell once within the reserved domain of the sovereign states (such as criminal justice or human rights); were the object of bi- or pluri-lateral regulation only (trade in goods or services); or were simply unregulated (natural resources, the high seas, biotechnology, etc.). Other variables include the increased inter-dependence of states, technological advances, globalization, the positive experience of existing tribunals, the greater acceptance of the compulsory jurisdiction of tribunals, the need for specialized expertise on the bench or tailor-made rules of procedure and evidence (e.g. intervention rules, publicity, language, time-lines), the progressive acceptance of compulsory jurisdiction clauses,[481] and

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[476] Rao (Multiple Judicial Forums), *supra* note 411; Thirlway (Proliferation), *supra* note 411; Romano (Pieces of a Puzzle), *supra* note441. See also Shany (Competing Jurisdictions), *supra* note 465, at 1-11, esp. 1-5; Hafner (Should one Fear), *supra* note 411.

[477] M.C.W. Pinto, Pre-eminence of the International Court of Justice, in C. Peck and R.S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997) 281-309, at 282.

[478] Dupuy (Danger of Fragmentation), supra note 461, at 795.

[479] Jennings (Proliferation), *supra* note 411, at 2; Allain (Continued Evolution), note 461, at 57 et seq.

[480] G. Guillaume, The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order, 27 October 2000, Speech to the Sixth Committee of the General Assembly of the United Nations, www.icj-cij.org; Shany (Competing Jurisdictions), *supra* note 465, at 1-2; Romano (Pieces of a Puzzle), *supra* note 441; Spellicsy (Chink in the Armor), *supra* note 441.

[481] This is the main argument in Romano (Shift), *supra* note 419.

so on. Dispute settlement mechanisms are said to have sprung into existence, in order to enforce the application of the new norms.[482]

Let us briefly observe, already at this stage, the style of this historical account. The creation of new courts and tribunals is presented, sometimes overtly, other times implicitly, as a natural development of a historical process, complying with an inevitable historical determinacy: *ubi societas ubi jus* – now perhaps *ubi curia*? History is linear and progress is evolutionary, with direct correlation between cause and effect: fact x brings systemic reaction y.[483] Remarkably, all factors and variables are regarded as belonging to a world external to the public international lawyer herself. The regulatory domain of international law expands, states recognize the importance of law, diversify their ways of relating to each other. Tribunals emerge, sprout, spring out like mushrooms in a natural chain of cause and effect, but not as parts of ideological projects or historical conjunctures in which the discipline (and its scientists) are an organic part. The author adopts the posture of a dispassionate, neutral, objective chronicler that merely transcribes events as they unfold before his sight, from a seemingly external point of view. Her agency in the process of organization and representation of these developments or variables is underplayed. The language used to convey the observations is descriptive and technical. The reader is assured that this is how 'it happened'. In this account of progress, the "I" of the author is absent.

A System of International Courts and Tribunals

But let us move on a little. Complementary to the historical account is the system-building component of the argument. In the literature, the development of judicial institutions is generally seen as sporadic, fragmented, and anarchic.[484] New institutions are described as having paid little attention to compatibility issues with pre-existing ones. Because of the decentralized method of delineation, jurisdictional overlaps and conflicts were created.[485] At the same time, different developments in the world of the international judiciary can (and should be) seen as part of an inter-connected system[486] or as the pieces of a puzzle.[487]

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[482] Guillaume (Outlook), *supra* note 480, at 2; Romano (Pieces of a Puzzle), *supra* note 441, at 710; Thirlway (Proliferation), *supra* note 411, at 253.
[483] See e.g. the historical narrative in Bassiouni (Versailles to Rwanda), *supra* note 3.
[484] See R. Jennings, The Judiciary, International and National, and the Development of International Law, (1996) 45 International and Comparative Law Quarterkt 5; Hafner (Should one Fear), *supra* note 411; Rosenne (Law and Practice), *supra* note 350, at 529.
[485] Shany (Competing Jurisdictions), *supra* note 465, at 8.
[486] Shany (Competing Jurisdictions), *supra* note 465, at 105-108.
[487] Romano (Pieces of a Puzzle), *supra* note 441.

This is puzzling imagery indeed. The argument goes like this. Typically, authors begin by defining what a tribunal is and, on that basis, distinguish between those institutions that qualify as such and the rest.[488] Such a typology is necessary because it can help one decide which tribunals should be studied in order to determine their systemic effects, positive or negative.[489] For example, if the pronouncements of a given court do not formally qualify as a subsidiary source of international law in accordance with Article 38 of the Statute of the ICJ, then potential conflicts between this court and others are academic (thus not real). Hence such courts should not be taken into consideration in the enquiry.[490] Jennings suggests for this reason the need to compile "a comprehensive list of tribunals" to take stock of the existing range of institutions.[491] Along these lines several authors have pieced together detailed charts, typologies and taxonomies of international courts and tribunals, mapping out the complex morphological diversity in elaborate classification systems.[492] Institutions are ordered according to their constitutive instrument, jurisdiction, institutional autonomy, popularity, and so on. For some authors, this kind of demographic work is an object of study in itself. The systematic mapping of international courts and tribunals is precisely one of the declared objectives of the *Project for International Courts and Tribunals* (PICT). PICT explains the rationale of the exercise as follows:

> The PICT Research Matrix is the first comprehensive, systematic, and holistic mapping of the international judicial system. […] [T]his stupefying variety [of institutions] can itself be the object of research. To date, the international judicial process and organization has not been considered a field of study in itself. Scholars and practitioners of one forum are rarely familiar with the law and procedure of another. Moreover, international courts and tribunals are not only judicial bodies – and as such a worthwhile object of research only for legal scholars – but also

[488] Several authors think that it is necessary to begin with the definition question of what is a tribunal in order to assert the extent of the problem. See Thirlway (Proliferation), *supra* note 411, at 251; Hafner (Should One Fear), *supra* note 411, at 27; Shany (Competing Jurisdictions), *supra* note 465, at 12-15.

[489] Thirlway (Proliferation), *supra* note 411,, at 251; Shany (Competing Jurisdictions), *supra* note 465, at 13.

[490] Thirlway (Proliferation), *supra* note 411, at 266; H. Thirlway, The Proliferation of International Judicial Organs and the Formation of International Law, in W. Heere (ed.), *International Law and the Hague's 750th Anniversary* (1999) 433-441, at 433.

[491] Jennings (Proliferation), *supra* note 411.

[492] Tomuschat (International Courts and Tribunals), *supra* note 441. Tomuschat identifies four reference points namely 1) on the basis of international law; 2) a binding decision is handed down by 3) a permanent body of independent persons after 4) formalized proceedings have been conducted pursuant to a body of rules which are not at the disposal of the parties (at 397). See also Brown (Maze), *supra* note 441.

> international organizations. They have bureaucratic and administrative aspects that can be compared. Comparisons allow cross-fertilization and sheds new light on the functioning of each body, contributing to a more efficient, equitable and effective delivery of justice.[493]

The literature describes the quantitative increase as being characterized by exponential growth of tribunals during the last two decades in almost all fields of international legal practice. Although criminal justice, international economic law and the environment are the fastest growing components, the numbers are up across the board, adding up to unmistakable growth everywhere. One should add here the increase in the work-load of traditional dispute settlement institutions, such as the World Court, which were never so busy in the history. The quantitative increase is accompanied by diversification in scope (universal v. regional mechanisms), jurisdiction (*ratione materiae*, *personae*, *temporis*, *loci*), binding nature of findings, enforcement mechanisms, and so on. The literature observes that the variety in formats seems to challenge classical classifications of the discipline. Textbook accounts of "international law dispute settlement mechanisms" habitually revolve round Article 33 of the UN Charter. Methods are divided into diplomatic (negotiation, enquiry, mediation, conciliation), legal (arbitration, judicial dispute settlement), and political (resort to regional agencies or arrangements). Legal means used to be contrasted to diplomatic-political ones on account of the standards applied (law and determination of rights as opposed to reconciling interests) and the binding (or not) nature of the outcome. In their individuality, the literature agrees, recent developments seem to blur or transcend these distinctions, creating an infinite variety of formats.[494] 'Judicialized institutions' such as the WTO DSM straddle the distinction between diplomatic v. legal means; the creation of 'internationalized' or 'mixed' tribunals, such as the ones in Cambodia or Sierra Leone seem to bridge the divide between national v international adjudication. A long list of hybrid solutions, such as the United National Compensation Commission, the Claims Resolution Tribunal for Dormant Accounts in Switzerland, The Housing and Property Claims Commission in Kosovo, compulsory or directed conciliation methods, explode classical categories into a polyphony of creativity and adaptability. The literature is interested in impact of such demographic growth over the system, such as the fragmentation of its norms,[495] conflicting or overlapping jurisdictions,[496]

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[493] PICT Research Matrix, www.pict-pcti.org/matrix/matrixintro.html.

[494] A. Peters, International Dispute Settlement: A Network of Cooperational Duties, (2003) 14 European Journal of International Law 1.

[495] A. Boyle, Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction, (1997) 46 ICLQ 37.

[496] V. Lowe, Overlapping Jurisdiction of International Tribunals, (1999) 20 Australian Yearbook of International Law 191.

forum-shopping, lack of hierarchy (role of ICJ and other tribunals), and so on. Most of the new debates take place under the rubrics of the "proliferation" or "multiplication" of tribunals and their consequences for the international system, as explained at the beginning. More recently, the related questions of post-conflict and transitional justice,[497] the emerging profession of the international judiciary and its independence,[498] 'international legal procedure', and so on, are becoming part of a new debate about the role of adjudication in international law. The literature, however, sees a pattern in all this diversity leading to a system of international justice. For Romano, the "Matrix" of judicial institutions

> […] depicts the beginning of a process towards the construction of a coherent international order based on justice, an order where all participants (sovereign states, individuals, multinational corporations, etc) can be held accountable for their actions or seek redress through an impartial, independent, objective, and law-based judicial institution.[499]

The 'system' of international justice extends to its professionals and the creation of a new category of international practice, the international judiciary,[500] referring to judges working in different international institutions. There are several reasons enabling (and, in some cases, demanding) one to see the existence of a common professional body spanning different institutions. Some pragmatic reasons can be attributed to the common nature of the functions performed by professional international judges regardless of the institution in which they serve: "they share a common characteristic insofar as they all, at least potentially, play a central role in interpreting and applying international law".[501] Others reasons can be traced to the gradual but certain formation of a new sensibility amongst professionals of international judicial institutions, that acknowledges the common function and common identity. The new sensibility is committed to the promotion of the rule of law and is oriented towards meting out justice without deference to traditional interference of the sovereign state in the administration of

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[497] R. Teitel, *Transitional Justice* (2004).

[498] R. Mackenzie & P. Sands, International Courts and Tribunals and the Independence of the International Judge, (2003) 44 Harvard International Law Journal 271; M. Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirement of Art. 6 ECHR* (2004).

[499] Romano (Pieces of a Puzzle), *supra* note 441, at 751.

[500] See e.g. Terris, Romano & Swigart (The International Judge), *supra* note 423. See also the special issue on "The Independence and Accountability of The International Judge" in 2 The Law and Practice of International Courts and Tribunals (2003). See also Mackenzie & Sands (Independence), *supra* note 498.

[501] Mackenzie & Sands (Independence), *supra* note 498, at 271.

justice.[502] Consequently, international judges have common problems and concerns and one could find comprehensive solutions, such as standards of impartiality for the international judiciary[503] and legal norms to promote the independence and accountability of international tribunals at large.[504] Sands goes as far as to identify a professional community of nearly 200 serving judges, encompassing all areas from traditional inter-state judicial institutions (such as the International Court of Justice or the European Court of Human Rights) to international (and internationalized) criminal tribunals and standing arbitration institutions (such as the International Center for the Settlement of Investment Disputes) or inspections panels (such as the World Bank Inspection Panel) at various multilateral development organizations.[505] The International Law Association has created a "Study Group on Practice and Procedure of International Tribunals", which has identified the issues of the independence of the international judiciary, professional ethics, and *litis pendens* as constituting its agenda for the years to come.[506]

System building has recently been explored also on the level of a common procedural law of international tribunals.[507] Although the tenor of such analyses is to explore similarities and identify gaps rather than postulate a system, the ideal of a system of an international adjudication remains the standard against which such a research is conducted. Most authors will confirm, albeit carefully and conditionally, the proliferation of tribunals has led to what can be regarded as an international system of courts[508] or a community of courts comprising an 'informal system'.[509] Authors will typically go at lengths explaining the structural and morphological similarities between courts that justify such a conclusion, carefully underlining disparities and the limits of such an understanding.

Judicialization as Progress

So, what is the grid on which the system of international tribunals is constructed? What unites a disparate array of judicial institutions into a

[502] Sands writes that "the powerful new international judiciary […] has taken on a life of its own and has already, in many instances, shown itself unwilling to defer to traditional conceptions of sovereignty and state power"; Sands (Turtles and Torturers), *supra* note 416, at 553.
[503] Brown (Maze), *supra* note 441.
[504] D. Shelton, Legal Norms to Promote the Independence and Accountability of International Tribunals, (2003) 2 The Law and Practice of International Courts and Tribunals 27.
[505] Mackenzie & Sands (Independence), *supra* note 498, at 273-4.
[506] See the Study Group's "Burgh House Principles on the Independence of the International Judiciary", www.ila-hq.org/html/main_studygroup.asp.
[507] See notably, Brown (Common Law of Adjudication), *supra* note 411.
[508] Shany (Competing Jurisdictions), supra note 465, at 105-108.
[509] Brown (Common Law of Adjudication), *supra* note 411, at 257-258.

system that signified progress or forward movement for public international law? Here comes, as a wedge, the third narrative move of the lawyer-as-architect vocabulary: tribunals are believed to provoke similar systemic effects to international law, positive or negative, albeit of varying intensity. In addition, the existence of a system of tribunals helps international law reinforce its sovereign ground as a discourse, science, discipline, practice that can operate autonomously from politics. Here are some of the effects tribunals are assumed to bring to public international law:

Justice: it is to be presumed that more tribunals will lead to more justice and to more situations in which resort to forcible means of settling disputes is avoided; the proliferation of institutions and mechanisms will lead to a higher proportion of disputes being settled this way;[510] It reduces the powers of the sovereign states to appreciate themselves the legality of their acts.[511]

Peace: Provided that certain conditions are met, tribunals can also bring peace.[512] The idea here is that tribunals, especially, criminal tribunals, can bring peace in a number of psychological ways: exposure of the truth can help individualize guilt and thus avoid the imposition of collective guilt on an ethnic, religious, or other group; a "healing process" is initiated through the public acknowledgment to the victims; by ensuring that truth is recorded more accurately and more faithfully than otherwise would have been the case; it is one of the best ways to curb criminal conduct (deterrence).

Rule of law: the creation of tribunals signifies the recognition from the side of states of the importance of the rule of law in their relations;[513] this in turn will result to more pronouncements about international law, which will strengthen the materiel of its norms.[514]

Certainty and predictability: The argument here is that gaps in the law will be sorted out by the accumulation of case law; and increase its volume of

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[510] Dupuy (Danger of Fragmentation), *supra* note 460, at 796.
[511] Praeger (The Role of the International Court), *supra* note 411, at 279.
[512] See S.C. Res. 827, U.N. SCOR, 48th Sess., Res. & Dec., U.N. Doc. S/INF/49 (1993), which states:
"Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,
Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively addressed."
[513] R. Ranjeva, Quelques observations sur l'intérêt á avoir une juridiction internationale unique, (Zero Issue) International Law Forum 10 (1998); Goldstone (Justice), *supra* note 464, at 500.
[514] Goldstone (Justice), *supra* note 464, at 499.

pronouncements, leading to more certainty and predictability in dispute settlement in the future.

Efficiency: by helping the implementation of obligations and by generating a more refined and precise system of interpretation of norms.[515]

Normalcy: the more adjudication, the more the international law system becomes similar to a domestic legal system, through a routine subjection of international disputes to settlement by independent third parties, as opposed to non-judicial solutions that used to be routine in the past.[516]

Quality through specialization: specialized tribunals will, arguably, possess expertise in particular areas of the law, which may render them more appropriate for the resolution of particular kinds of disputes.[517] Additionally, their statutes and rules of procedure may also be geared to deal more suitably with specific kinds of disputes (say the arrest of ships at ITLOS).

Renewed interest in international law: Tribunals give rise to an international resurgence of interest in international law.[518]

What is striking in the above statements, however, is how little they are supported by empirical evidence or relevant sociological research.[519] The benign effect of tribunals on international law is treated as a self-evident fact. One will have to suppose that such statements are made in good faith by the literature and that they implicitly allude to some valid previous professional experience in similar situations, which is either exclusively the author's or common to the profession at large. One can also assume that the unspoken

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[515] Dupuy (Danger of Fragmentation), *supra* note 460, at 796.

[516] "The result of this impressive proliferation of new judicial and quasi-judicial bodies […] and the augmentation of pre-existing compulsory jurisdictions is that in many areas of international relations, and in regard to a significant number of international actors, international law offers relatively sophisticated and effective dispute-settlement procedures, culminating in judicial or quasi judicial proceedings. Thus, despite the lingering problem of enforcement, it is safe to assert that the recent strengthening of dispute-settlement facilities has contributed to greater legal normalcy in the operation of international law, assimilating to a considerable degree its dispute settlement procedures to those prevalent in domestic legal systems"; Shany (Competing Jurisdictions), *supra* note 465, at 7. See also Allain (Continued Evolution), *supra* note 460, at 65 & 71. Dupuy writes that "[…] the growing number of international jurisdictions and international institutions of control should be seen, from a technical point of view, as a decisive step in the evolution of the international legal system as it develops a real judicial function"; Dupuy (Danger of Fragmentation), *supra* note 460, at 796.

[517] Thirlway (Proliferation), *supra* note 411, at 257.

[518] Goldstone (Justice), *supra* note 464, at 500; Rao (Multiple Judicial Forums), *supra* note 411.

[519] This has also been noticed in F. Mégret, Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project, (2001) XII Finnish Yearbook of International Law 193.

Other of such analogies is the domestic system and the effects of civil, administrative, or criminal justice on the behavior of citizens or the improvement of the quality of the system in domestic legal orders; or even previous cases that international law had to deal with. But the literature reviewed here rarely resorts to comparisons or analogies with previous cases, domestic or international. The language is normative and it is the authority of the scholar generally legitimizes the various statements. The effect is further amplified by the standard professional practice of citation and cross-referencing to the work of influential authors. The self-referential nature of the discourse forges and solidifies the impression of the existence of a common professional knowledge or experience.

This practice has profound consequences over the discourse. First, it legitimizes the original statement and creates tacit consent to its authority. Contestation of such statements by a critic would both audaciously challenge the integrity of the author and doubt collective professional wisdom. Hence critical enquiries are automatically ousted to the margins of the debate. This reverses (and increases) the level of proof needed for the credibility of these critiques, as the person contesting would have to adduce empirical evidence contradicting what is believed to be common professional knowledge and experience, even if the original claim was not supported by any such empirical evidence. This practice of legitimation constitutes the "grid" on which the 'system' of international justice is built and adds enormous persuasive power to the argument.

The International Lawyer

The circle is closed with the final narrative move, which regards the international law professional as a key actor for the new tribunalism. In this first vocabulary of the 'lawyer-as-architect', the jurist has an important role in establishing clearer hierarchies of norms, institutions, and powers on the international level, to enhance certainty, predictability and fairness. Her intellectual travail consists of designing and defending the coherence of the system in a way that would withstand both the test of high theory and the challenges of the practice. In this model, the international lawyer is the system's architect. She welcomes the arrival of the age of adjudication as an important new development but also a system-building challenge.

The system-building function of the jurist becomes apparent by looking at another debate common in tribunals literature, namely the possible systemic hazards of fragmentation.[520] Two types of fragmentation hazards

[520] Literature in unison addresses the fear of fragmentation as the primary danger of the phenomenon of proliferation. Guillaume (Future), *supra* note 475; Thirlway (Proliferation), *supra* note 411; Boisson de Chazournes (Multiplication), *supra* note 411, at 14; Dupuy (Danger of Fragmentation), *supra* note 460.

are identified. *First*, the quality of international law norms or doctrines.[521] Different courts may take different views on specific problems, leading to a multiplicity of interpretations (at best), or a "cacophony of views", as Judge Oda put it.[522] If one allows multiple interpretations of the same norm or doctrine without, at the same time, devising ways of resolving conflicts, the story goes, we are undermining the determinacy of an already fragile system. *Second*, the fear of fragmentation through competing, conflicting, or overlapping jurisdictions.[523] Some even see a "battle" of tribunals raging out there.[524] The availability of many dispute settlement mechanisms may lead to situations in which more than one tribunal may assert jurisdiction over one dispute. A whole set of questions then emerge. What happens when more than one institution becomes seized of the same case? What is the value of the pronouncements on fact and law of the one court over the next one? And how does one resolve conflicting judgments? What if each one of the parties submits the dispute to different competent forums? What are the consequences of two rival decisions on the same dispute, especially mutually contradictory ones? Further, tribunals may differ in terms of their conditions of operation or the means of enforcement, which may encourage parties to indulge in forum-shopping, in other words to seize the instance the most favorable to its interests.[525] The lack of clear hierarchies between institutions and the existing normative framework render it very difficult to resolve such conflicts. The spin-off effect could be the undermining of the position of existing institutions, such as the ICJ, since other courts may start competing with it. As Kingsbury puts it, "issues that could previously be delicately finessed in one body are abruptly forced in another", forcing adverse comparisons to be drawn between institutions.[526]

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[521] See also M. Shahabudeen, *Precedent at the World Court* (1996) 67; Guillaume (Future), *supra* note 475, at 862; Dupuy (Danger of Fragmentation), *supra* note 460, at 797-8.

[522] S. Oda, The International Court of Justice from the Bench, (1993) 244 RCADI 9, at 139.

[523] See generally Shany (Competing Jurisdictions), *supra* note 465. See also Dupuy (Danger of Fragmentation), *supra* note 460, at 797; Thirlway (Proliferation), *supra* note 411. For concerns about proliferation diminishing the salience of the ICJ in particular, see H. Lauterpacht, *The Development of International Law by the International Court* (1982) 4-5; Guillaume (Future), *supra* note 475; S. Oda, Dispute Settlement Prospects in the Law of the Sea, (1995) 44 International and Comparative Law Quarterly 863.

[524] N. Lavranos, Concurrence of Jurisdictions between the ECJ and Other International Courts and Tribunals, (2005) 14 European Environmental Law Review 213; see also "The Battle Between International Courts and Tribunals", Seminar of the Amsterdam Center for International Law, 21 October 2005 (www.jur.uva.nl/aciluk/events.cfm, last visited March 2006).

[525] Thirlway (Proliferation), *supra* note 411, at 259.

[526] Kingsbury (Is Proliferation a Systemic Problem), *supra* note 411, at 684.

The fear or fragmentation is not new in international law. Similar debates have taken place in different times and contexts.[527] In the seventies the profession asked itself whether international economic law is a part of public international law or whether it is a different discipline with its own specificity which threatens the overall unity of the discipline.[528] Same with the debate on self-contained regimes and their relationship to general international law.[529]

How do scholars deal with the fear of fragmentation in international tribunals? The general call is for more thorough research into the systemic effects of the different types of fragmentation, in order to assert the extent to which they the overall coherence of the system is *really* threatened. As one author remarks, "until that work is done, the complacent and the critic alike will be at a disadvantage."[530] In these debates, unity and fragmentation acquire a boundary, on/off quality: there is a critical point where the system gets fragmented. Until we reach that point unity and coherence are preserved. Authors are quick to admit that the idea of fragmentation presupposes the idea of unity that could be fictional in some respects. Unity "is to some extent a fiction – a valuable fiction, and one to be cherished, but [still] a fiction".[531]

Despite this warning, scholars paradoxically believe that there exists a real critical moment when the system loses its unity or coherence and that this should be avoided. The question is thus not only whether we can live with a fragmented international law *in abstracto*, but whether "the

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[527] During the last decade, fragmentation has become an extremely popular research field. See Report of the Study Group on Fragmentation of International Law, *supra* note 384. Some interesting recent work on fragmentation includes M. Craven, Unity, Diversity, and the Fragmentation of International Law, (2005) 14 Finnish Yearbook of International Law 3; G. Hafner, Pros and Cons Ensuing from Fragmentation of International Law, (2004) 25 Michigan Journal of International Law 849; J. Pauwelyn, Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands, (2004) 25 Michigan Journal of International Law 903.

[528] The question of whether international economic law should be seen as a "chapter" of public international law or as a separate discipline of its own specificity dominated the early days of international economic law debates. Public international law scholars argued against the autonomy of international economic law and used arguments in favor of the unity of the discipline and expressed fears of fragmentation. See P. Weil, Le Droit International Économique: Mythe ou Réalité?, in *Colloque D'Orléans, Aspects du Droit International Économique: Élaboration, Contrôle, Sanction* (1972) 1. For an opposite view, see Trachtman (The International Economic Law Revolution), *supra* note 10.

[529] Simma (Self-Contained Regimes), *supra* note 382.

[530] N. Miller, An International Jurisprudence? The Operation of "Precedent" Across International Tribunals, (2003) 15 Leiden Journal of International Law 483, at 526.

[531] Thirlway (Proliferation), *supra* note 411, at 266; Dupuy (Danger of Fragmentation), *supra* note 460.

proliferation of tribunals [is] such as to lead to a greater or more marked fragmentation than that which has always existed".[532] The struggle therefore is about deciding where the critical line should be drawn, and how to define that boundary in legal terms. This is primarily "conceptual", system building work, and not an invitation for situational solutions.[533] It poses a "theoretical challenge" of whether international law is "one coordinated system" or "an accumulation of independent self-contained regimes".[534] Solutions need to be found along the lines of first, avoiding the conflict between norms and institutions. If this cannot be avoided and genuine conflict arises, then international law needs to operationalize doctrinal solutions that could be applied to an infinite number of conflict situations and resolve such conflicts.

This is a solution reminiscent of the sources of international law doctrine, which constitutes the foundation of our hierarchical system of norms. Article 38 lists abstract categories, boundary conditions, for the creation or ascertainment of norms, which can theoretically be applied to an infinite number of circumstances and irrespective of the content of the norm. Thus, secondary doctrines of conflict resolution (or jurisdiction-regulating norms), should be devised along these lines in order to help determine with relative certainty, without reference to the content of each specific case, and when applied in an infinite number of circumstances, which norm will prevail.

Much in the same vein, authors try to resolve the problem of proliferation of international tribunals by first, establishing whether the system has reached the critical fragmentation point; and then by suggesting the creation of conflict resolution doctrines (or jurisdiction-regulating norms) to explain away or resolve the conflict. When it comes to the quality of norms and doctrines, a number of important areas are identified where the impact of the practice of tribunals needs to be studied carefully, such as sources of international law, the law of treaties, state responsibility, rules of procedure, and so on. Another way is to examine whether courts refer to each other's pronouncements 'sufficiently' to create unity in the system.[535]

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[532] Thirlway (Proliferation), *supra* note 411, at 267.

[533] This is the approach chosen by Joost Pauwelyn: "This book does not go into specific cases of interplay or conflict between WTO rules and other rules of international law. Rather, it attempts to provide a conceptual framework within which the interplay between norms can be examined"; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law* (2003), at 3.

[534] Shany (Competing Jurisdictions), *supra* note 465, at 10-11.

[535] Miller describes his project as a survey of the case law of important judicial institutions looking "not for commonalities of result but for instances of one body referring to the decision of another". Miller concludes that there are patterns discernible in the interaction of tribunals at this stage but the parameters influencing these patterns remain unclear; Miller (An International Jurisprudence), *supra* note 530.

Authors have generally identified a list of problem cases, but their views as to whether they lead to conflict of norms have varied. Jennings, for example, finds a conflict between the *Loizidou v. Turkey* case[536] pronouncement on the admissibility of territorial limitations on a state's acceptance of the jurisdiction of the court and the jurisprudence of the ICJ with regard to its own Statute;[537] whereas Thirlway concludes that the two pronouncements were in fact compatible.[538] The ICTY and the ICJ both had to deal with the question of whether there has been genocide in the former Yugoslavia or whether the conflict was an international one.[539] The Tadić/Nicaragua Cases question on the attribution of acts to a state of acts of individuals; the Pinochet and Belgium/Congo Cases; the teleological interpretation of treaty provisions common in human rights debates (especially after Comment 24 of HRC); the question of binding nature of provisional measures. When it comes to conflicting/overlapping jurisdictions of tribunals, one would have to look, once more, into the practice, and see whether there is a danger of reaching the critical threshold of fragmentation. Authors look at the MOX Plant/OSPAR cases between Ireland and the UK to determine whether such cases exemplify conflict between tribunals that is systemically troubling and whether more instances are likely to occur in the future.

How would one protect the system from fragmentation? In response to the two types of fragmentation hazards mentioned (conflict of norms and conflict of jurisdictions), one could devise conflict resolution doctrines for each. When it comes to conflict of norms Pauwelyn, for example, creates an analytical framework by first deciding which norms should be included of his classification scheme ("hard", "soft", "super-norms", "obligations", processes"), and then determines the difference between different kinds of conflicts and interpretative differences ("inherent normative conflicts" and "conflicts in the applicable law"), and builds his framework on such abstract categories without looking at the content of any norm in particular.[540] In the end he comes up with an elaborate set of eight conflict resolution steps to be applied.[541] When it comes to conflicts of jurisdictions, once more a repertoire of doctrinal solutions could be deployed. One obvious albeit radical way is to establish a formal hierarchy of institutions. States could nominate a Court that will perform a supervisory or appellate role to resolve conflicts of norms or jurisdictions. The ICJ, some authors propose, could potentially perform this role, since it is the official organ of the UN, one of the most prestigious

[536] ECHR, 23 March 1995, Judgment No. 40/1993/435/514.
[537] Jennings (Proliferation), *supra* note 411, at 5-6.
[538] Thirlway (Formation of International Law), *supra* note 490.
[539] Guillaume (Future), *supra* note 475, at 862.
[540] Pauwelyn (Conflict of Norms), *supra* note 533, at 5-11.
[541] Ibid, at 436-438.

of these tribunals, and thus the one best suited for the job.[542] But there could be other hierarchical solutions as well, such as Art. 177 of the Treaty of Rome;[543] or Article 287 of the UNCLOS, which are designed to ensure a single identifiable tribunal for any given dispute; or even the *Chorzow Factory case* principle, according to which Courts would have to yield jurisdiction to other tribunals if those claim exclusive jurisdiction according to their statutes, and one can then imagine or devise a whole new set of secondary doctrines defining what is "exclusive jurisdiction". Alternatively, one could "identify and study rules of international law which might govern competition between different jurisdictions, and to consider introducing additional norms and arrangements".[544] Forum selection principles, the role of the *res iudicata* principle, abuse of rights, judicial comity, conflicting treaty obligations are some of the potentially useful norms, but one could consider several ways of calibrating or reforming the system as well, by introducing stay of proceedings or doctrines borrowed from private international law.

4.3.2. The 'Lawyer-as-Social-Engineer'

The second vocabulary of progress of the new tribunalism is more politically conscious, and presents itself as the pragmatist alternative to the 'lawyer-as-architect' vocabulary.[545] The 'lawyer-as-social-engineer' also tells a before/after story of progress. This time it concerns the self-constitution of international society and it has its own idea about progress. At the same time, the role and function of law and tribunals in the picture are very different. The liberal view fashions itself as a sophisticated correction of the positivist one, which is described as inadequate, formalist, and obsolete. The narrative moves of this second vocabulary are very similar to the first one, and go as follows:

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[542] A typical statement of this claim can be found at F. Orrego Vicuña & C. Pinto, The Peaceful Settlement of Disputes: Prospects for the 21st Century, Preliminary Report Prepared for the 1999 Centennial of the First International Peace Conference, C.E. Doc. CAHDI (98) 15. See also Pinto (Pre-Eminence of The International Court of Justice), *supra* note 477. This is endorsed by a number of other scholars, such as Guillaume (Future), *supra* note 475; Thirlway (Proliferation), *supra* note 411 at 270-278; Dupuy (Dangers of Fragmentation), *supra* note 411, at 798-807.

[543] Guillaume (Future), *supra* note 475, at 862; Jennings (Proliferation), *supra* note 411, at 7.

[544] Shany (Competing Jurisdictions), *supra* note 465, at 11.

[545] For classical expressions of this view see generally A.M. Slaughter, *A New World Order* (2004), esp. 65-103; A.M. Slaughter, Toward A Theory of Effective Supranational Adjudication, (1997) 107 Yale Law Journal 273; Charney (Is International Law Threatened), *supra* note 411; Charney (Impact), *supra* note 411; A. Chayes & A. Chayes, *The New Sovereignty – Compliance With International Regulatory Agreements* (1998), esp. at 197-229; D. Sullivan, Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy, (1993) 81 Georgetown Law Journal 2369; W.J. Aceves, Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation, (2000) 41 Harvard International Law Journal 129.

Historical Account

Historical account performs a crucial role in this second vocabulary as well. For the 'lawyer-as-social-engineer' proliferation is not the inevitable culmination of a long historical process of evolution between a power- and a rule-oriented approach to law, but evidence of a more mature way of dealing with dissonance. Both law and politics were always part of the international system according to this view: international law always had multiple options in its dispute settlement system and, despite appearances, the ICJ never stood alone.[546] The difference is that, for a variety of reasons, tribunals could not be used in the past as extensively as they do today. The distance traveled in our understanding of international society during the last decades is not measured in a paradigm shift from 'politics' to 'law' but in a move from 'less' to 'more' mature ways of exercising international governance. In this scheme tribunals do not perform the constitutional function of the ultimate enforcer of rules of law, but are yet another instrument of managing conflict in international relations. Tribunals are part of a multiplicity of "international information, enforcement, and harmonization networks"[547] and an "instrument of active management"[548] of compliance with international norms in a world of liberal states. Now, if one looks for reasons why proliferation became possible today as opposed to the past, a number of factors could be identified, ranging from pure practicality, to globalization, the de-centralization of international governance and pivotal political developments, such as the gradual 'democratization' of the world and the emergence of liberalism as the dominant socio-political paradigm.[549] So tribunals could be no more than

> a case of international lawyers doing what comes naturally, but in a world increasingly dependent on the reliable performance of international regimes, states and their citizens may also be less willing to rest content with either negotiation or the hope that some ad hoc arrangement of umpire a dispute will be set up in the event of an impasse.[550]

Alternatively, there are other "legitimate reasons" that help explain why states and other members of the international community could prefer to have available a variety of international tribunals to solve their disputes.

> They include, but are not limited to, the desire of secrecy, control over the membership of the forum, panels with special expertise

[546] Charney (Impact), *supra* note 411, at 698.
[547] Slaughter (New World Order), *supra* note 545, at 100.
[548] Chayes & Chayes (The New Sovereignty), *supra* note 545, at 200-225.
[549] Charney (Is International Law Threatened), *supra* note 411, at 117-135.
[550] Chayes & Chayes (New Sovereignty), *supra* note 545, at 216.

> or perceived regional sensibilities, preclusion of third state intervention, and forums that can resolve disputes in which non-state entities may appear as parties.[551]

But, most importantly, the end of the Cold War is the event that unlocked the process of the progressive move of international law to the rule of law and adjudication. The Cold War and its antagonistic nature did not allow the application of international law[552] or encouraged "discretionary behavior associated with the doctrine of national sovereignty".[553] The competing hegemonies of the East and the West were so focused in securing strategic advantages and negotiating power that the application of laid law was not within their list of top priorities. In such an environment judicial institutions could not succeed due to the absence of a common understanding of norms, procedures, institutions, principles, politics – the cultural coherence needed for their flourishing.[554] The end of bi-polar international law and the advent to multilateralism, on the one hand, the abandonment of Marxist-Leninist interpretations of international law, on the other, the fact that capitalist, market-based economies and free-trade doctrines have remained the only plausible way to viable economic development.

Democracy, Peace and International Courts

This is a variant of the "how nations behave" thesis.[555] There is a direct correlation to be drawn between liberal democracy and compliance with rules of law. In its internationalist version this thesis claims by and large that although there are serious differences from a religious, linguistic and cultural

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[551] Charney (Impact), *supra* note 411, at 698. See also Charney (Is International Law Threatened), *supra* note 411, at 132.

[552] M. Reisman, International Law After the Cold War, (1990) 84 American Journal of International Law 859.

[553] Falk (Realistic Horizons), *supra* note 433, at 325.

[554] Milton Katz wrote in 1968: "It will be useful to enquire how far the apparent irrelevance of international law adjudication or arbitration to the settlement of Cold War disputes may result from the absence of tribunals to determine and apply the law; or, if tribunals exist, from their lack of adequate means to assert their authority; of, if the means exist, from the tribunal's lack of a will to use the means available. How far may the apparent irrelevance result in some inadequacy in the content of international law as the law then stands? How far may the irrelevance derive from limitations inherent in the nature of adjudication, as exhibited by older and more highly evolved legal systems than international law?"; Katz (Relevance of International Adjudication), *supra* note 429, at 10-11.

[555] See L. Henkin, *How Nations Behave – Law and Foreign Policy* (1979); B. Russett, *Grasping the Democratic Peace: Principles for a post-Cold War World* (1993); For expressions of the rational actor view in liberal political and international relations theory see e.g. J. Elster, *The Cement of Society: A Study of Social Order* (1989); R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (1991).

standpoint between liberal states, such states share certain basic traits, and in particular a fundamental commitment to individual civil rights and liberties. Liberal states are more prepared than other states to accept the rule of law and the possibility of limitation of their rights for the general good. The task of the scholar is to provide a systematic study of international affairs by analyzing the behavioral patterns of 'democratic' and 'non-democratic' states and to identify the principal variables that influence state behavior.

The liberal view is not based on hard statistical evidence either, but rather on assumptions about behavioral propensities of states (how states behave). These assumptions have been crafted on a pragmatic assessment of state behavior. Thus, according to Slaughter, there are several attributes that describe with reasonable accuracy liberal states and provide a basis for a more generalized distinction between liberal and non-liberal states: peace (liberal states tend to have peaceful albeit not always harmonious relations between themselves); liberal democratic government; a dense network of transnational transactions by social and economic actors; multiple channels of communication and action that are both transnational and trans-governmental rather than formally inter-state; and a blurring of the distinction between domestic and foreign issues.[556] In this model, the propensity to comply with international law is the general rule whereas not observing the law is an aberration.[557] Non-compliance can be explained on the basis of factors that pull states in that direction, because it is easier or more efficient for them do so (such as ambiguity of norms. The same way one could make lists of factors pulling towards compliance, one could understand – or even justify – noncompliance as a rational choice: noncompliance is a "premeditated and deliberate violation of a treaty obligation."[558]

What is more 'sophisticated' about this way of looking at the world? To begin with, law here is not seen as a set of prohibitions with on-off quality but as one among many institutions necessary in order to manage an issue-area over time. Traditional scholars with their emphasis on classifications, hierarchies, and rule-fetishism have over-rated the power of the law to contain international relations. There are clearly things that law cannot do and other solutions need to be found. In that sense, legal argument has different characteristics (and thus, different advantages, disadvantages, and uses) compared to other discourses, such as politics. Although traditionalists regard conflict as something that needs to be avoided, liberals see conflicts of views within the system as a routine manifestation of

[556] Slaughter (International Law), *supra* note 67, at 510 et seq.
[557] Chayes & Chayes (New Sovereignty), *supra* note 545, at 10.
[558] Ibid., at 9.

individual actors seeking customized ways to maximize their interest. Actually conflict can be a productive source of progress if managed well. The liberal view claims to be more pragmatic and sophisticated because it appears to embrace conflict instead as something good that could potentially enrich international law. Maturity in international law here comes by means of developing expert ways of managing difference to the service of 'good politics' – meaning a liberal political agenda. Embracing conflict and a continuum of dispute settlement mechanisms means for the liberals that one is no longer obsessed with devising an economy of normativity or a doctrine of sources. Relative normativity and interpretative ambiguity are embraced as a routine manifestation of conflict, and as a tool for its resolution. In this sense, it would make sense to see questions of treaty interpretation less like a matter of applying in the best way Articles 31 and 32 of the Vienna Convention and more as questions about "the requirements and functioning of a regime."[559]

In this scheme tribunals are not the ultimate enforcers of rules of law but yet another instrument of managing international relations or, as some authors put it, a component of a variety of "international information, enforcement, and harmonization networks"[560] or an "instrument of active management"[561] of compliance with international norms in a world of liberal states. Where traditional international law saw a hierarchical system of tribunals, with a world supreme court (or doctrines exercising the same function) at the center, resolving disputes between states and pronouncing on rules of law, liberals see "a system composed of both horizontal and vertical networks of national and international judges, usually arising from jurisdiction over a common area of the law or a particular region of the world."[562] Binding judicial resolution of international disputes (international tribunals) is not *necessarily* the best way of resolving international disputes. They would see no hierarchy either between the dispute settlement means mentioned in Article 33 of the Charter and would be in favor of hybrid forms of dispute settlement, provided they do the job. They would reject the obsession of some public international lawyers with legally binding means, as these are formalistic and thus not efficient. They recognize advantages to all different means and regard them as expressions against of the propensity of rational actors to find solutions more suited to their own needs without being hung-up on formal categories. Even within judicial resolution, different institutions may have comparative advantages but common interests, so it may be fruitful to see them not as fighting for supremacy but

[559] Ibid., at 206.
[560] Slaughter (New World Order), *supra* note 545, at 100.
[561] Chayes & Chayes (The New Sovereignty), *supra* note 545, at 200-225.
[562] Slaughter (New World Order), *supra* note 545, at 67.

as fellow professionals who participate in a common judicial enterprise. Liberals see also the creation of a international system of international justice and a corresponding profession. One can speak of an "international judiciary" because judges sitting in different tribunals share a common characteristic insofar as they all, at least potentially, play a central role in interpreting and applying international law. Another reason for the creation of the profession can be traced to the gradual but certain formation of a new sensibility amongst professionals of international judicial institutions, that acknowledges the common function and common identity. This "self-awareness"[563] has been groomed by frequent personal and institutional contacts among the community and have led to the realization that each of them represents (and serves) not only a particular polity, but they are also "fellow professionals in an endeavor that transcends national borders".[564]

Tribunals as Progress

But, is the proliferation of tribunals a good or a bad thing? The response is savvy and rather dispassionate and managerial: tribunals are good only as long as they 'work'[565] but the conviction is that they normally do.[566] The liberal agenda towards tribunals could be described as an effort to neither "over-estimate" nor "under-estimate" their role in a world of liberal states. In other words, to avoid both the mystification of legal architects and the dismissal of the realists. The search of a reasonable standard, or a balance between these two extremes, is a standard trope of liberal scholarship since the early post-war period.[567] The four corners of the search of the third way are circumscribed, on the one hand, and similarly to the legal architects, by the assumption that more law and more tribunals are a good thing.

> Tribunals evidence the understanding that the effectiveness of international law can be increased by equipping legal obligations with means of their determination and enforcement.[568]

Apart from the immanent link between democracy and rule of law, a strong link is being drawn between justice and peace. Judicial, as opposed to

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[563] Ibid, at 192.
[564] Ibid.
[565] See A.M. Slaughter & A. Stone, Assessing the Effectiveness of International Adjudication, (1995) 89 Proceedings of the American Society of International Law 91; Chayes & Chayes (New Sovereignty), *supra* note 545, at 200-225.
[566] Helfer & Slaughter (Response to Posner & Yoo), *supra* note 431.
[567] The effort to avoid extreme swings of the pendulum towards either formalism or cynical realism is a standard concern of liberal scholarship since the post-war period. See e.g. J. Kunz, The Swing of the Pendulum: From over-estimation to under-estimation of international law, (1950) 44 American Journal of International Law 135.
[568] S. Schwebel, Address by the President of the International Court of Justice to the General Assembly of the United Nations, 28 October 1998, www.icj-cij.org.

diplomatic, settlement of international disputes performs a special symbolic role for such authors who go as far as to say that there can be "no peace without justice". As Inis Claude writes, "peaceful settlement of disputes is perhaps the oldest and most ubiquitous of the approaches to peace which have been formulated by thinkers about international relations".[569] They offer an ever-grown diversity of dispute settlement means, with the added advantage of finality and binding-ness, which is sometimes a good thing. What liberal scholars fear is not fragmentation, but rather avoiding extremes of all sorts, from fragmentation to over-formalization of the system. What we need is not unity but not disrupting a reasonable level of coherence in the system. Not absolute conformity with the law, but how to contain deviance within acceptable levels.[570] No rigid hierarchies, but a continuum of diverse forums with different comparative advantages;[571] and so on. How do liberal scholars deal with their fear of extremity? The answer is through sociological observation and piecemeal social engineering. Already in 1945 Karl Popper outlined this approach. The "piecemeal engineer"

> may or may not have a blueprint of society before his mind, he may or may not hope that mankind will one day realize an ideal state, and achieve happiness and perfection on earth.. But he will be aware that perfection, if at all attainable, is far distant, and that every generation of men, and therefore also the living, have a claim; […] The piecemeal engineer will, accordingly, adopt a method of searching for, and fighting against, the greatest and most urgent evils of society, rather than searching for, and fighting for, its greatest ultimate good. This difference is far from being merely verbal. In fact, it is most important. It is the difference between a reasonable method of improving the lot of man, and a method which, if really tried, may easily lead to an intolerable increase in human suffering.[572]

The International Lawyer

In unison, liberal internationalist scholars will be quick to confirm that the task of the jurist is to identify factors that lead states towards either compliance with or disregard for the law and develop techniques of social engineering based on this knowledge. This is not a theoretical enquiry *in abstracto*, as the 'legal architects' sought to do with their quest for normative hierarchies and conflict resolution doctrines. Piecemeal social engineers claim to reject narratives of historical necessity ('historicism') and they believe that the task of the science is rather to suggest situational solutions.

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[569] Claude (Swords), *supra* note 13, at 199.
[570] Chayes & Chayes (New Sovereignty), *supra* note 545, at 17.
[571] Charney (Impact), *supra* note 411, at 698.
[572] K.R. Popper, *The Open Society and Its Enemies, Volume 1, The Spell of Plato* (1962) 158.

Each problem could and should have its own solution in a world of liberal states and any enquiry into the nature of the system or of international law is not with a view to producing a theoretically coherent answer to reply to the skeptics but a functional exercise that improves the system by lending it coherence and legitimacy through a more meaningful explanation. The explanation does not need to stand the test of high theory but the one of persuasion. In a celebrated passage of *How Nations Behave* Louis Henkin explains the task ahead in such terms.

> The undertaking is ambitious and, I believe, important. Answers to some of the questions raised here would, at least, help us to appreciate the place of law in international life and understand the "pathology" of international behavior with respect to law. Answers might even help us find ways to extend the domain of the law and improve law observance, for greater order and stability in international relations. Unfortunately, what may properly be called "answers" are not possible to come by. The processes by which decisions policy are made are mysterious altogether. […] The motivations of governmental behavior are complex and often unclear to the actors themselves. If we can sometimes identify actors that contribute to national policy, and find law among them, there are no scales to determine the weight of each of them. If in an occasional decision the influence of law can be shown and measured, any generalizations would still be deficient, given the inevitable inadequacy of sampling. […] In substantial measure, then, the exploration must be *a priori* and speculative, less scientific than impressionistic. I shall assert propositions about how nations behave, based on what appears reasonable, on what international actors have done and said, on the opinions of observers, on impressions gained from some experience in a foreign office. These suggestions may perhaps be only "education in the obvious". […] Still, at the least, one may learn whether the behavior of nations in regard to international law is susceptible of meaningful study, and what additional knowledge might make such a study more fruitful.[573]

This is precisely what Jon Charney sets out to do in his is his Hague Academy courses.[574] In this important text Charney asks whether tribunalism pulls more towards relative coherence in the system or against it. Relative coherence means for him that the system continues to work and being legitimate. The decision of whether to invest further or not in tribunals is a political decision taken on precisely these grounds, namely the effect of the "pull" of tribunals towards the one or the other extreme. Others claim, in a

[573] Henkin (How Nations Behave), *supra* note 555, at 6-7.
[574] Charney (Is International Law Threatened), *supra* note 411.

similar vein, that classical cost and benefit analysis can be used in order to determine whether a specific tribunal is needed or not. The idea here is that one invests resources in a particular solution "up to the point where the value of the incremental benefit from an additional unit equals the cost of the last unit of additional enforcement."[575] What is acceptable in terms of compliance will reflect the perspectives and interests of the participants in an ongoing political process, rather than some external, scientifically of market-validated standard. Reisman speaks of "pathological congestion", "homeopathic medicine" and "birth defects" of international law, while using "cost-benefit analysis" and the need to "assess redundancies" when confronting dilemmas about taking policy decisions for the future:

> For, ultimately, this is a cost-benefit question: courts are nice, of course, and allow more lawyers to become judges, but because public resources are finite, each prospective new institution will preclude the financing and performance of some other urgent community task. So each new institution must justify itself competently. Dispute resolution mechanisms are indispensable, yet like homeopathic medicine which is supposed to heal in the smallest doses but harm in large draughts, is it appropriate to ask whether the increase in adjudicatory bodies in many sectors of international law has become too much of a good thing? Is there "proliferation"? Will it endlessly increase transaction costs with few corresponding gains for human rights or whatever other social values are at stake? Will the many new and diverse voices of authority prove to be inconsistent on critical issues and ultimately undermine the essentially clarifying and educations function of legal decision? Will the proliferation of institutions transform the lingua franca of international law into a regionalized Babel? Will the financial burden be too heavy?[576]

4.4. (Un)Stable Vocabularies

We have seen how the notion of progress associated with the phenomenon of proliferation is closely intertwined with the two vocabularies just described. The two vocabularies, despite their many differences, display uncanny similarities in various components. Let us look at these similarities in turn.

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[575] Chayes & Chayes (New Sovereignty), *supra* note 545, at 20.

[576] M. Reisman, Adapting and Designing Dispute Resolution Mechanisms for the International Protection of Human Rights, in L. Boisson des Chazournes (ed.), *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution: Proceedings of a Forum Co-Sponsored by the ASIL* (1995) 8-14, at 8.

4.4.1. Necessity

First, both vocabularies laud the arrival of tribunals as the materialization of their respective historical necessities about progress in international law. For the lawyer-as-architect, tribunals are the missing piece in the puzzle of international hierarchy of norms and judicial institutions. For the lawyers-as-social-engineer, tribunals confirm the relevance of the comparative advantage and division of labor paradigms, as applied to international law and institutions. For both, international law evolves in a linear fashion and the advent of tribunals is welcomed as an element of progress in this process of evolution. The jurist assists by creating coherence (fitting the pieces in the puzzle, in the politically agnostic variant) or by intervening to remove failures and pathologies (in the liberal version). Both vocabularies borrow their language and metaphors from biology or economics to accentuate the causal nature of the evolutionary process. The moment conditions are ripe ('maturity' within the discipline for the evolutionists/ liberal democracy as a system of governance for the liberals) the emergence of tribunals follows as the natural consequence of progress in social development, similar to the way in which law has always been the natural product of human socializing. The more pieces of the puzzle in place, the faster the filling up of the blank space in the middle. The less intervention (the less totalitarianism and the more democracy), the quicker the system will find its way. The setbacks encountered in the history of international law (too much politics; not enough democracy) explain the originally fragmented nature of the developments, which are eventually now taking shape in the form of a system. Tribunals emerge and disappear on the basis of natural selection, like the flora and fauna of an ecosystem, or like other social-political institutions in liberal societies.

The invocation of historical necessity has a crucial role in the feeling of progress that is generated by the new tribunalism. Tribunals are thereby presented as 'speaking themselves', as a natural development and, consequently, not part of a political/ideological agenda of reform. The accounts accept a formal idea of progress that is catalytic for the production of meaning in the rest of the argument. The historical account immediately situates the reader and the field of study within the context of a historical evolution of internationalism: a story about how things were before, how things are today, and what is the distance traveled; or, to put it differently, a story with well-marked beginning, middle, and end-phases. In Guillaume's or Romano's etiology of the advent of proliferation,[577] to name an example, the emergence of tribunals is a 'natural' development. With this simple move the reader is 'summoned from afar' and placed within a concrete and clearly

[577] Guillaume (Future), *supra* note 475; Romano (Pieces of a Puzzle), *supra* note 441.

defined context: a historical continuum (humanity's development) and a concrete social group (a universal community of human beings). Both vocabularies locate the process leading to proliferation to factors exogenous to the agency of the international lawyer. In this account of progress, the "I" of the author is absent. The author adopts the posture of a dispassionate, neutral, objective chronicler that merely transcribes events as they unfold before his sight, from a seemingly external point of view. The movement takes place more in the observable world 'out there' and less within the professional community of international lawyers. In this image, the international jurist is not author but mere witness to the process. She is summoned to report, document, make sense of, ameliorate, and intervene. Either way, to perform legal, system-building, international law work, and not to partake in any kind of ideological-professional project.

In spite of their claim to historical necessity, such accounts are easy to de-center. One only needs to ask whether the transformation occurred *really* or *only* along the lines described, or whether there is such an automatic relationship between the expansion of international law and the turn to adjudication, and so on. Such questions are very important: if the reasons behind the emergence of proliferation are more complex than the ones recounted, then our certainty about what is historically necessary should be different – and different lessons will have to be learned. As it has been demonstrated in Chapter 1, the capacity to envision a set of events as belonging to the same order of meaning requires some principle by which to translate different into similarity. In other words, it requires a "subject" common to all of the referents of the various sentences that register events as having occurred. In recent years, several authors have challenged the historical necessity of the new tribunalism. Regardless of the extent to which one would agree with each of those critiques, they are sufficient to disrupt the claim of historical necessity. These critiques have been particularly vocal in the area of international criminal justice, where tribunals are often seen not as the culmination of a long historical process but as a savvy move of political redemption, as a "fig leaf" effort, and expression of the inability or unwillingness of the international community to prevent or end conflict in the first place.[578] Far from spontaneous social reactions triggered by exogenous factors, tribunals are seen by many as part of a political project of some members of the international community to assuage its guilt for failing to intervene to stop the 1994 genocide by pouring money into the ICTR without making any real commitment to rebuilding Rwanda.[579] It is argued

[578] Murphy (Progress), *supra* note 13, at 95; R. Goldstone, Assessing the Work of the United Nations War Crimes Tribunals, (1997) 31 Stanford Journal of International Law 1, at 5; see also Mégret (Three Dangers), *supra* note 519, at 232 et seq.

[579] P. Gourevitch, Justice in Exile: Hutu Genocide of Tutsi People in Rwanda Can Never be Fully Brought to Justice, The New York Times (24 June 1996), at A15.

that both ICTY and ICTR were created rather "by the mobilization of shame by non-governmental organizations and especially the grisly pictures beamed to the world by the television camera"[580] and manifest an ex-post facto effort to redeem the international community for its inability to prevent the catastrophe. Even more, it is suggested that tribunals present themselves as an opportunity for the powerful nations to convert a catastrophe into a positive, humanist project for themselves, appropriating for that end the suffering of the victims. In a similar vein, one could turn to the agents of the new tribunalism, namely international lawyers themselves. In opposition to the professional claim of jurists being mere witnesses and reporters of the phenomenon of proliferation, an argument could be made that international jurists could be found to have professional interest in adopting an optimistic view about the importance of international judicial institution building. Given the lucrative terms of employment and the creation of thousands new posts for international lawyers in and around international tribunals, international lawyers have a lot to gain by pursuing a rhetoric which re-situates international law and its professionals in the driving seat of international post-conflict resolution efforts.[581]

4.4.2. Unity

Second, despite the great diversity of institutional formats, both sets of explanations discern the emergence of a system of international justice, a global community of courts. Both sides acknowledge the creation of a new profession as well, the international judiciary, and concur with the claim that proliferation brings both systemic benefits and hazards for international law. Similar to the account of history that preceded, a lot could be said about system-building claims of the sort. For one thing, the methodological tool-kit of the comparative study can easily be problematized. One could argue that considering the ICTY, ITLOS, the Special Court for Sierra Leone and the Ethiopia-Eritrea Claims Commission, as part of the same "puzzle", "system" or "project", is an intellectual leap that may be stretching one's imagination and deny the plethora of political, historical, and other contexts in which these institutions operate.

The 'discovery' of similitude and homologies between different entities is a statement that goes beyond the (self-proclaimed) task of the lawyer/observer of the transformation of systemic factors or variables. One could instead contend that the actual process of categorization and

[580] M. Mutua, Never Again: Questioning the Yugoslav and Rwanda Tribunals, (1997) 11 Temple International and Comparative Law Journal 167, at 174.

[581] This argument is made for the world of commercial arbitration by Y. Dezalay & B.G. Garthes, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

enumeration is the one that preeminently constructs a system instead of merely recording or discovering its existence. Projects of classification could be seen as conscious and active efforts to bring disparate things under the same symbolic site. It is a process of agency that chooses to emphasize points of convergence and, equally, underplay divergence. Describing all tribunals as a system creates a stable relation between them, the idea for example that a pronouncement before one court has consequences over the functioning of the next one and therefore their relation needs to be studied, and so on. The common site where the system is placed remains symbolic, no matter how intuitive it may appear to be, or regardless of efforts made to vest it with a physical location (e.g. The Hague as the legal capital of the world). This symbolic site is created, as Michel Foucault would say, on the basis of a "grid of identities, similitude, analogies".[582]

> [T]here is nothing more tentative, nothing more empirical (superficially, at least) than the process of establishing an order among things; nothing demands a sharper eye or a surer, better articulated language; nothing that more insistently requires that one allow oneself to be carried along by the proliferation of qualities and forms. And yet an eye not consciously prepared might well group together certain familiar similar figures and distinguish between others on the basis of such and such a difference: in fact, there is no similitude or distinction, even for the wholly untrained perception, that is not the result of a precise operation and of the application of a preliminary criterion. […] Order is, at one and the same time, that which is given in things as their inner law, the hidden network that determines the way they confront one another, and also that which has no existence except in the grid created by a glance, an examination, a language; and it is only in the blank spaces of the grid that order manifests itself in depth as though already there, waiting in silence for the moment of its expression.[583]

If that is indeed the case, one should not wonder what is wrong with the methodological tool kit but, rather, what is the added benefit by calling something a system?

4.4.3. Progress

Third, the conviction that proliferation is 'in itself' an element of progress in international law. The lawyer-as-architect and the lawyer-as-engineer both adopt a similar sensibility of cautious optimism in their engagement. On the one hand, they share the view that tribunals have a nearly-automatic claim to be regarded as a positive development – by virtue of their alleged systemic effects; on the other, they prescribe caution and the need to study the

[582] Foucault (Order of Things), *supra* note 56, at xxi.
[583] Ibid.

systemic hazards that may be provoked. The rhetorical strategy that peregrinates between these two positions consolidates the feeling of progress that permeates the debate. The feeling of progress is possible only as long as the link between tribunals and the unity of the system remains presumed. All authors agree that much empirical work still needs to be done to elucidate the precise systemic consequences. Until that work is done "the complacent and the critical alike will be at a disadvantage."[584] Should the empirical base be refuted or proven elusive, what would be left in the project is faith: in international institutions and in the ability of an international community of scholars to establish a well functioning system of checks and balances. The need for empirical research is both the promise and the defeat of the new tribunalism. The nature of comparative and empirical work is a never-ending task: it is an endless accumulation of similitude and comparisons, infinite as knowledge itself. As international law remains fearful of both idealism and formalism, its support of tribunals needs to remain pinned on the sociologically and empirically basis advocated by both the architect and the social engineer.

But this type of work will never come to an end. The end point, proving the deterrent effect of international criminal tribunals, to name only one example, may not even be quantifiable or measurable with empirical analysis.[585] As long as the link between courts and their social effects remains unclear, presumed, or under review, the new tribunalism will continue to reside safely and modestly on the side of progress, on account of the legitimating assumptions that construct it. Not as a panacea but as a token of hope, tribunals seem like a safe extra to an ever-growing repertoire of the professional strategies. Cautious optimism is indeed an irresistible sensibility when the alternative is despair.

The question remains however as to whether there is a price to be paid for this sensibility. Tribunalism entrusts the success of the project, once more, to the invisible college of international lawyers: a sophisticated interpretative community trained to establish a tight system of hierarchies or checks-and-balances, norms or standards, and so on. This time, the task in hand is described as one of observation and accumulation of know-how. Operating under the assumption that the creation of international courts and tribunals is generally benign, the role of the international lawyer is to make

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[584] Miller (An International Jurisprudence), *supra* note 530, at 526.

[585] See the excellent analysis of Mégret (Three Danfers), *supra* note 519, and in contra-distinction to an entire genre of writings in international criminal law which embraces 'pragmatic idealism' and cultivates optimism about the capacity of tribunals to achieve deterrence but without reference to a background theory of how to measure or assess their impact. For an example of this type of writing see P. Akhavan, Beyond Impunity: Can International Justice Prevent Future Atrocities?, (2001) 95 American Journal of International Law 7.

sure that the development is systemically sustainable. What is needed is technical/ empirical/ statistical work of all sorts, which will create a sufficient information basis to assess each development. The project of mapping and comparing has already begun but much work will have to be done continuously. The role is limited to observations or small-scale engineering, a locus par excellence for the techniques of international law.

Similarly to the claim of historical necessity, the claim of progress that is associated with tribunals is easy to de-center. The reported positive effects of tribunals in resolving disputes could be seen as exaggerated (at best) or fictional (at worse). Take the paucity of empirical or statistical analysis to support any of the claims to progress. Or take, as one among many, the critique that tribunals do not take sufficiently into account the interests of the parties to the disputes and/or the victim societies.[586] The argument here is that international courts leave out important parts of the political context, resulting to a formally correct decision which may be only partly relevant to the initial dispute. The handling of the *Hostages* case[587] by the ICJ, was criticized for presenting a very narrow view of the long and complex Iran-United States relationship prior to the Hostages crisis.[588] Reasons can be found, for example, in the definition and use of the concept of "dispute"[589] in international law, whose oppositional structure of claims necessarily reduces the wide scope of interests and conflicts into legal propositions that are accepted or rejected by the tribunal. Tribunals can be seen as giving more emphasis on abstract principles of international law rather than the specific requirements for social reconstruction.[590] When looking at tribunals-related work, one reads more about the systemic effects of their pronouncements (was the quality of the judgment good? Was it in conformity with previous judgments?) rather than about the perception of the involved parties about whether the 'books are closed', to use Jon Elster's expression.[591] In this latter sense, tribunals do not necessarily close or resolve disputes. A narrative of progress that privileges judicial resolution while denigrating alternative strategies would therefore be far from progressive if tested against the very social goals (e.g. justice, peace, etc.) postulated by the new tribunalism itself. As long as the empirical basis for such critiques is missing, however, the vocabulary of progress remains unchallenged.

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[586] For criminal justice and the claim of 'neutrality' of international criminal tribunals, see Mégret (Three Dangers), 519 note 541, at 210 et seq.

[587] See text corresponding to note 434, *supra*.

[588] Falk, *supra* note 434.

[589] Jennings states the orthodoxy about the nature of the legal dispute in his oft-cited article: R. Jennings, Reflections on the Term "Dispute", in Macdonald (Tieya), *supra* note 410, at 401-415.

[590] See e.g. the argument in M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998), at 22-51.

[591] J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (2004).

Such critiques are particularly vocal in the cases of the ICTY and the ICTR, where local scholars claim that the tribunals did not tell the story of how the dispute arose and what were its causes. Indeed in international criminal law, one could argue that lawyers are actively and successfully developing mechanisms of international criminal justice without first developing (at least without debating) a criminology of mass violence, a penology for the perpetrators of this violence, and a victimology for those who are affected by the violence.[592] As a consequence, within the process of international criminal justice, the notion that guilt and wrongdoing can be individualized and placed on the shoulders of a handful of individuals that are brought forward to be prosecuted and punished while it may not be an accurate reflection of the conditions precedent that exist on the ground in order for mass atrocity to be perpetrated on a massive level. Local populations don't always agree with this presumption[593] and may disagree about whether the books were in fact closed or not. Victims are regularly believed to be marginalized in the process, their interests not sufficiently being taken into account. The argument here is that tribunals do not meet their targets of bringing a feeling of justice to the local communities, "closing the books", national reconciliation, and so on. By clearly identifying the guilty individuals and penalizing them for their crimes, an international war crimes tribunal may hope to facilitate a de-escalation of tensions and animosities between the ethnic collectives, and encourage a rapprochement between the formerly warring entities. From the political and social point of view, this was the objective of both the ICTY and ICTR. Many commentators agree that international criminal tribunals have fallen short of such objectives. Both in the cases of the Former Yugoslavia[594] and Rwanda,[595] the argument is made that international criminal proceedings have not helped reconciliation.

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[592] M. Drumble, Remarks, in S. Ratner & J. Bischoff, *International War Crimes Trials: Making a Difference? Proceedings of an International Conference Held at the University of Texas School of Law, November 6-7, 2003* (2003) 30; see also M. Drumble, Collective Violence and Individual Punishment: The Criminality of Mass Atrocity, (2005) 99 Northwestern University Law Review 539.

[593] "For the majority of Rwandans, the ICTR is a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide and its tolerance of the crimes of the RPF"; K. Marks (International Crisis Group), *Criminal Tribunal for Rwanda: Justice Delayed*, www.globalpolicy.org/tribunals/2001/0607icg.htm (last visited 17 February 2004), as cited in T. Longman, The Domestic Impact of the International Criminal Tribunal for Rwanda, in Ratner & Bischoff (International War Crimes Trials), *supra* note 592, at 33-41.

[594] E.g. A. Fatic, *Reconciliation via the War Crimes Tribunal?* (1999); E. Stover, *The Witness – War Crimes and the Promise of Justice in the Hague* (2003), at 144-145.

[595] Longman (Domestic Impact), *supra* note 593.

4.5. Conclusion

The case study on international tribunals aimed at exposing the discursive structures by which the new tribunalism rhetoric generates a feeling of progress in international law. The starting point was the intuition that, although the notion of progress may be invoked in order to lend legitimacy for one's argument, progress is a notion that acquires its meaning by being placed in the context of a narrative. In our case study the two vocabularies (lawyer-as-architect and lawyer-as-social-engineer) tell two parallel – if different – historical narratives of progress. Despite many lateral differences, both narratives shake hands in their historical determinism. Both narratives laud the arrival of tribunals as the materialization of their respective historical necessities about progress in international law (rule-oriented approach as progress in law). Both narratives discern the emergence of a system of international justice and a global community of courts (proliferation of courts as a system of international justice). Finally, they share the conviction that proliferation is 'in itself' an element of progress in international law (tribunals has benevolent effects on the international community).

These vocabularies tell a persuasive story of evolution in international law in which a transition to a rule-oriented system supported by an organized international judiciary is tautologically identified with progress, with no room for contestation. The phenomenon of proliferation announces the arrival of this new institutional moment. The persuasiveness of the story is reinforced by the fact that both narratives draw from the credos of two main traditions about international law thinking on both sides of the Atlantic (constitutional formalism and policy pragmatism). In order for the narrative of progress to work, the benefits of the rule oriented approach, the possibility of a system, the social effects of judicialization; all need to be presented as unequivocally true, as 'speaking themselves'.

The Chapter demonstrated how the literature sidesteps the empirical proof dimension of all the main assumptions as stated and takes them for granted. The literature relies on the fact that these assumptions are not contested rather than by demonstrating their validity. This way the narratives reverse (and increase) the level of proof needed for the critic, since one would have to adduce empirical evidence contradicting what is believed to be common professional knowledge and experience, even if any such empirical evidence did not originally support the original claim. The creation of a system of international justice in which all institutions performed similar effects is only possible by ignoring their morphological differences, social-political functions, aims and mandate. These narratives once more mystify a before/after historical account that tautologically becomes the interpretative device to explain and understand social reality.

Like the two previous case studies, this Chapter took a step further to demonstrate that the structures that produced meaning about progress were unstable and indeterminate. The advantages of the rule-oriented approach, the existence of a system of international justice, the social benefits of judicialization, were shown to be taken for granted instead of havig been proven. They key for the persuasiveness of the vocabulary was not its determinacy but its rhetorical capacity to set aside (or disempower) any internal or external critique that would give concrete meaning to these terms. Challenging the empirical basis of the assumptions is enough to immediately position one at the margins of the discipline, where one would have to assume the entire burden of proof. The vocabulary of progress of the new tribunalism, far from based on stable or determinate assumptions, can now be seen as a set of discursive structures that legitimize social and institutional action, allocate resources, and decide the limits of contemporary humanitarianism.

Chapter 5 | Conclusions

5.1. Introduction

The objective of this project, as announced in Chapter 1, was to test the validity of a set of propositions (theses) relating to the discursive function of the notion of progress in international legal argument. The purpose was neither to define the notion of progress nor to devise a scientific tool that enables one to decisively determine whether a specific international law event (statement, development, doctrine, institution, etc.) constitutes (or not) progress in public international law. The intention was rather to call attention to the ways in which meaning about progress is produced in/by international law texts. The analysis was triggered by the intuition that the notion of progress performs a much more complex role than the one usually ascribed to it. Far from being a neutral discursive form, a term-of-art signifying the objective reality of a world 'out there', it is suspected to originate from non-objective assumptions and, as a consequence, to be the expression of non-objective (political, ideological, other) views and struggles, while denying that character. Borrowing from the insights of structural linguistics, structuralism, post-structuralism, and related Critical thought movements in law and the social sciences, this enquiry expressed, at the outset, skepticism about the coherence and politics of the mainstream assumption that progress is a notion that 'speaks itself'. To transpose such intuitions into legal enquiry, three intellectual propositions (theses) were put forward, questioning the role of the notion of progress in international law discourse.

i) *Progress as the Product of Narratives*: Although progress is a convenient rubric to describe international law events (arguments, developments, actions, and so on), it is a notion that is ultimately devoid of meaning unless placed in the context of a progress narrative.

ii) *Progress Narratives as Politics*: Progress narratives are by definition non-objective. As such, they compete with (or exclude) other progress narratives, based on different assumptions. International law discourse tends to deny or mask the non-objective character of its progress narratives.

iii) *Discourse Analysis as Action*: Although progress narratives may be a useful discursive form, the de-mystification of such narratives may be an equally productive and meaningful form of international law argument in itself, but one that gives access to a different horizon of action and intellectual possibility.

The enquiry was not meant to take place *in abstracto*. It has originated from concrete experiences with international law situations and it aspired to engage concrete international law debates. The propositions were therefore tested against three case studies, drawn from the everyday practice of public international law. Each case study involved a different use of the notion of progress, *i.e*. international law *as* progress, progress *within* international law, and a combination of the two. Each case study also pointed to different planes of international law discourse. The first study (Seferiades) told the story of the lifework of a single scholar. It exemplified how a personal-ideological project of reform (on the national and international levels) may gain legitimacy by means of a universalist vocabulary about international law as progress. The second study (sources) told the story of an international law doctrine. It offered an example of how the notion of progress may become part of debates about renewalism in the doctrinal structure and methods of the discipline. The third study (tribunals) told the story of an institutional development (the proliferation of judicial institutions). It looked at the ways in which the notion of progress may form part of debates about resource allocation and decisions about the institutional architecture of the international system. The three case studies were approached by means of the method of discourse analysis. The approach, method, and objectives were circumscribed narrowly. The conclusions drawn by the three case studies are limited to the studies in question, although they participate in, and stand in dialogue with, a wider social constructionist project of international law critique. It is now time to turn to the conclusions of the enquiry.

5.2. Progress as the Product of Narratives

This first proposition that was put forward seeks to demonstrate that progress in international law, aside from being a convenient label to caption international law events (arguments, developments, actions, and so on), is ultimately a notion devoid of meaning unless placed in the context of a narrative. It is suggested that the analysis of the three case studies confirms this proposition. All case studies begin by identifying the horizon of the discourse that constitutes the field of their analysis. The first study (Seferiades) turns to the lifework of a single scholar (his writings and actions) as the horizon of the discourse. The second study (sources) turns to interwar (1918-1939) and post-1989 literature on the sources of international law. The third study (tribunals) applies itself to post-1989 literature devoted to the topic of proliferation or multiplication of international judicial institutions. In addition to specifying the horizon that limits their respective fields of analysis, all case studies propose the specific ‘vocabularies of progress’ of each discourse. In other words, they point to the presence of

discursive structures that, it is argued, produce meaning within that discourse about what is progressive. In the first study (Seferiades), the opposition of the notions of absolutism and democracy is proposed as the vocabulary of progress of our hero; in the second study (sources) the narrative moves of standardization and formalization perform the same role; whereas in the third study (tribunals), the vocabularies of the lawyer-as-architect and the lawyer-as-social engineer are fore-grounded as generative of meaning about progress.

How do the vocabularies produce meaning about progress? This operation, it is suggested, involves the deployment of different narrativization techniques, primary among which is the form of historical narrative. The vocabularies just identified form the basis of grand historical narratives of evolution, which are presented as 'speaking themselves' (as true, objective, natural, neutral, diachronic, transcendental, etc.). This hides terrible interpretative pitfalls: the narratives take for granted what still needs to be proven. Such narratives postulate a specific vision of the future, and a specific account of the past and the present, as inescapable truths, thrusting alternative views beyond the four corners of permissible argument. Progress is thus tautologically identified with what is projected as the desired future of international law. This is a self-fulfilling prophecy. This way the structure (the vocabulary of progress) becomes a legitimizing language. It becomes the standard against which options are assessed, the interpretative device by means of which reality is perceived, the mechanism that determines the range of permissible statements. The narrative production of meaning about progress is not a 'bad thing' in itself. In other words, the purpose of the first proposition is not to suggest a 'regression', error, or fault in legal argument each time meaning is produced via a progress narrative. The purpose is to point to the operations that produce meaning textually and to flag the difference of this approach against the mainstream use of the notion of progress as one that 'speaks itself'.

All three studies have confirmed the validity this proposition. Thus, in the first study (Seferiades), the opposition of absolutism and democracy was proven to form the backbone of a historical narrative of progress. Seferiades tells a linear story according to which democracy/internationalism has been, for centuries, the catalyst for progress in social organization. In the antipodes, absolutism/sovereignism has been the source of social regression and misery. For a historical account of this sort to be convincing, it needs to be presented as objectively true, as 'speaking itself'. As demonstrated in Chapter 2, Seferiades does exactly that and recounts a story that is complete, universal, diachronic. In his writings, the opposition of democracy and absolutism is 'naturalized' and 'formalized', as the case study explains. The

notions of democracy and absolutism acquire fixed and stable meaning and they are defined in opposition to each other. Absolutism *is* the Other of Democracy. This is a totalizing teleology. The history of the world can be recounted through this polarizing prism, where there is no room for alternative explanations. The historical narrative spans the entire course of history, from ancient times till our day, and is applicable to different parts of the world, creating a complete reality which allows no room for doubt: democracy/internationalism appears to be the only path to progress. The notion of progress acquires its meaning through this historical narrative, which determines the range of permissible statements within the discourse. Thus the binary opposition becomes the interpretative device to understand almost any social or political decision.

In the second study (sources), a similar phenomenon occurs. The rhetoric about the reconstruction of international law, which dominated international law debates in the wake of the Great War; and the narrative moves of 'standardization' and 'formalization' in sources literature, which followed the adoption of the Statute of the Permanent Court of International Justice, weave a persuasive historical narrative. This narrative presents pre-1920 doctrine of the sources as unable to fulfill its role as a tool for separating law from non-law. The reason given is that the doctrine was indeterminate: it was too open-ended (nobody knew the exact number and nature of the sources) and too dependent on arbitrary theoretical/political opinion (pinned on partial philosophical theories). On the antipodes, the post-1920 doctrine of the sources (under Article 38 Statute PCIJ) is presented as hugely superior on account of it being determinate. The problem of open-endedness was resolved with the move to standardization (a new 'closed' and 'universal' list of sources). The problem of dependence on arbitrary political or philosophical opinion was resolved with the move to formalization (the creation of a set of secondary rules belonging to a different register than 'high theory' or politics). The transition from fragmentation to standardization, from philosophy/politics to technique, from academic formalism to pragmatism, is the totalizing narrative that 'speaks itself' and produces meaning about progress in sources discourse. The narrative moves of standardization and formalization capitalize on a background story that privileges determinacy, scientific technique, and pragmatism, to leave no choice as to the meaning of progressiveness in doctrinal debates. Like Seferiades, however, the only way for this story to perform its discursive effect is to buttress its claim to objective truth. The terns themselves (determinacy, pragmatism, technique) need also to be assumed as having stable and determinate meaning. Again, the mystified opposition between a primitive past and an advanced present/future becomes the interpretative device to understand doctrinal progress.

In the third study (tribunals), the two vocabularies (lawyer-as-architect and lawyer-as-social-engineer) tell two parallel – if different – historical narratives of progress. Despite many lateral differences, both narratives shake hands in their historical determinism. Both narratives laud the arrival of tribunals as the materialization of their respective historical necessities about progress in international law (rule-oriented approach as progress in law). Both narratives discern the emergence of a system of international justice and a global community of courts (proliferation of courts as a system of international justice). Finally, they share the conviction that proliferation is 'in itself' an element of progress in international law (tribunals has benevolent effects on the international community). These vocabularies tell a persuasive story of evolution in international law in which a transition to a rule-oriented system supported by an organized international judiciary is tautologically identified with progress, with no room for contestation. The phenomenon of proliferation announces the arrival of this new institutional moment. The persuasiveness of the story is reinforced by the fact that both narratives draw from the credos of two main traditions about international law thinking on both sides of the Atlantic (constitutional formalism and policy pragmatism). In order for the narrative of progress to work, the benefits of the rule oriented approach, the possibility of a system, the social effects of judicialization, all need to be presented as unequivocally true, as 'speaking themselves'. Chapter 4 demonstrated how the literature sidesteps the empirical proof dimension of all the main assumptions as stated and takes them for granted. The literature relies on the fact that these assumptions are not contested rather than by demonstrating their validity. This way the narratives reverse (and increase) the level of proof needed for the critic, since one would have to adduce empirical evidence contradicting what is believed to be common professional knowledge and experience, even if the original claim was not originally supported by any such empirical evidence. The creation of a system of international justice in which all institutions performed similar effects is only possible by ignoring their morphological differences, social-political functions, aims and mandate. These narratives once more mystify a before/after historical account that tautologically becomes the interpretative device to explain and understand social reality.

5.3. Progress Narratives as Politics

The second proposition that was put forward takes the argument one step further. It seeks to demonstrate that progress narratives, such as the ones above, are not only responsible for the production of meaning about progress. They are also, and by definition non-objective, despite their claims

to objectivity. Being non-objective, progress narratives in fact compete with (often exclude) other narratives, based on different partial vocabularies. As explained in Chapter 1, this proposition finds its origins in post-structuralism, deconstruction, and post-modern work. It aims to demonstrate that, although vocabularies may be the structures that produce meaning about progress in each discourse, the vocabularies themselves are not "true" or "stable". Rather the opposite holds true: the vocabularies acquire different meanings in different contexts, even in ways in which their own authors cannot control or predict. In fact, it is claimed that the instability/ indeterminacy of the vocabulary is crucial for the production of meaning. Along these lines, although a certain vocabulary may be based on the opposition of, say, democracy and absolutism, the proposition here is that neither democracy not absolutism have fixed or stable meaning, although their opposition remains crucial for the production of meaning. A certain notion, such as democracy, acquires its meaning in relation to the notion of absolutism (e.g. in opposition), but both the meaning of democracy and the meaning of absolutism may change in the various contexts in which they are being used. They may in fact collapse into each other. Thus vocabularies, despite their claim to 'speak themselves', are nothing more than ephemeral and unstable structures of the production of meaning which may, nevertheless, constitute powerful mechanisms of (de)legitimation within the context of specific discourses. This would depend on one's capacity to claim decisive use of the vocabulary. The perception of progress is produced by the instability and iterations rather than by the stability of the opposition. This analysis of the three case studies does not (mean to) lead to the conclusion that these narratives were badly crafted or of poor quality, in the sense of having failed to be determinate enough. This would assume some original state of determinacy that could have been achieved if only they had done 'better' legal work. Rather, the point is that determinacy is no longer the appropriate frame of reference for charting the relation between legal language and the practices it ostensibly seeks to regulate. The value of the vocabulary rests in its capacity to legitimize certain events as progressive, regardless of whether it is determinate or stable. This way, the presumed authors of each vocabulary (Seferiades, interwar social jurisprudes, the new tribunalists) are not authors of a determinate/rational set of a assumption, but the controllers of a set of discursive structures that legitimize social outcomes. The second proposition, similarly to the first one, does not suggest that the instability of vocabularies is a fault or error on the side of the authors or users of the vocabulary. It rather points to the iterations in text and the operations in which meaning may be produced. This understanding, however, is in loggerheads with the understanding of progress as an objective notion, as demonstrated in the case studies and Chapter 1.

This point was addressed in all three case studies. Take for example the first study (Seferiades). We saw earlier that the opposition of democracy and absolutism became the backbone of a historical narrative, doubling democracy with progress, and absolutism with regression. The case study went however a step further and demonstrated that neither democracy nor absolutism had a stable meaning in the (same) texts of Seferiades. The two notions were de-historicized and de-politicized: they were made to appear as forces of nature that somehow simply existed in an absolute form, as traits of humanity. Seferiades presented the dichotomy of the two as a stable one, or at least relatively stable, to the extent that one could ask what is the role of the one versus the other in history. The essentialization of the terms performed a very crucial role in the production of meaning. Not only did it remove from view the problem of linguistic indeterminacy but it occluded the character and significance of heterogeneity, namely the complexity of social processes in which such concepts have thrived and constituted the banners of ideological opposition. Absolutism thus became a concrete, coherent mode of governance, despite the substantial differences that may have distinguished different types of monarchies from each other; and democracy is presented as a coherent global standard without internal ruptures or discontinuities. Such a use of the narrative was crucial for the persuasive effect of the writings of Seferiades. The use of the opposition of absolutism v democracy was a narrative technique that placed Seferiades safely and at all times on the side of progress, even when his argument would fail even its own standards of what is progressive. The opposition, far from having a stable content, was rather a trope or style of argument that helped vest with legitimacy a liberal ideological-personal project and jump over the ruptures and discontinuities of the experience of reality. The perception of progress was produced by the instability and iterations of the vocabulary rather than its stability. These iterations allowed all claims of Seferiades to be placed at all times on the side of progress (e.g. democracy), even when the claims were in logical contradiction with his own definition of progress at a different point in the text. Despite this incoherence, the vocabulary was nevertheless able to discredit his opponents as regressive (e.g. absolutist). Ultimately, however, Seferiades was not in control of his own vocabulary. His work, instead of the pursuit of a political-ideological agenda, became devoted to the defense of the opposition of absolutism and democracy. This strategy prevented Seferiades himself from realizing the contradictions of the bourgeois modernization project and the reasons for its failure. Failure was attributed to an external enemy (regression, absolutism) and not to the instability of the opposition itself.

Likewise, in the second study (sources), the narrative moves of standardization and formalization become the basis of a vocabulary and a historical narrative of progress. According to the story told by interwar

international layers, the post-1920 version of the doctrine of the sources constituted progress for international law on account of its determinacy (closure, universality, technical nature), and in opposition to the indeterminacy of the pre-1920 doctrine (fragmentation, politics). Like in the case of Seferiades, the case study of Chapter 3 went a step further to demonstrate that the projected virtue of determinacy of the new doctrine was based on notions that were themselves neither stable nor determinate. Closure and universality, to name an example, were subverted each time they were put to application. The 'new' doctrine of the sources (based on Article 38 PCIJ Statute), despite the claim of limiting the range of sources that could be invoked, allowed two opposing patterns of argument ('hard' and 'soft') to operate simultaneously within each of the sources of the list of Article 38 PCIJ. Instead of bringing closure, the possibility of both 'soft' and 'hard' patterns of argument would enable the debate to continue interminably. The only way to bring closure is the invocation of yet another and new decisive discourse, this time external to Article 38. The same holds for the narrative move of formalization. Formalization aspired to disconnect the 'registers' of high theory and practical application in order to allow a technical (non-political, non-theoretical) application of the doctrine. It was however demonstrated that the two registers collapsed into each other each time one would seek their autonomous application. Like with the vocabulary of absolutism and democracy, the vocabulary of standardization and formalization, far from having a stable content, was rather a trope or style of argument that helped vest with legitimacy a project for the reconstruction of public international law. 'Talking sources' was not 'more' determinate than 'talking theory'. At the same time, the language of the sources was able to capture anew the fantasy of the international lawyer as a discourse which was able to jump over the ruptures of everyday experience. Legitimacy in sources discourse was produced not because pragmatism or Article 38 PCIJ Statute had the capacity to decisively tell whether a certain norm was one of public international law. Legitimacy was produced via the *invocation* of the vocabulary of pragmatism and Article 38. In that sense, progress in sources did not have an essence: it was the product of a narrative whose essence was floating, allowing a multiplicity of meanings according to the occasion. Like with Seferiades, one could argue that the iteration of meanings is what enabled the success of the language of the sources doctrine. As explained in the digression to the contemporary literature, literature on the sources has found peace in bracketing (setting aside) all the hard questions that would bring out the indeterminacy of the doctrine. The feeling of certainty in the literature is forged by standard references to classical cases and materials. In such references the iteration of the vocabulary is either silenced or under-played. The success of the vocabulary of the sources rests in its capacity to

legitimize certain events as progressive, regardless of whether it is determinate or stable. The authors of the new doctrine were not the authors of determinate/rational set of technical tools, but the controllers of a set of discursive structures that legitimized social outcomes.

The same holds for the third study (tribunals). As explained earlier, meaning about progress in tribunals discourse is produced by two parallel, if different, vocabularies and progress narratives. The lawyer-as-architect and the lawyer-as-social-engineer differed in many ways but both shook hands in their historical determinism that saw judicialization as synonymous with progress. Like the two previous case studies, however, Chapter 4 went a step further to demonstrate that the structures that produced meaning about progress were unstable and indeterminate. The advantages of the rule-oriented approach, the existence of a system of international justice, the social benefits of judicialization, were taken for granted instead of being proven. They key for the persuasiveness of the vocabulary was not its determinacy but its rhetorical capacity to set aside (or disempower) any internal or external critique that would give concrete meaning to these terms. Challenging the empirical basis of the assumptions is enough to immediately position one at the margins of the discipline, where one would have to assume the entire burden of proof. The vocabulary of progress of the new tribunalism, far from based on stable or determinate assumptions, can now be seen as a set of discursive structures that legitimize social and institutional action, allocate resources, and decide the limits of contemporary humanitarianism.

5.4. Discourse Analysis as Action

This leads to the last proposition that was put forward in Chapter 1, namely the purpose and value of the current enquiry. It is indeed habitual in academic exercises to conclude one's analysis by answering a number of questions about the academic, social or other significance of the enquiry. What is then the solution, as it emerges from your analysis? What do you propose instead? What should we do next? Failure to be (re)constructive or normative in answering the 'what's next?' question, failure to provide with an alternative solution or future perspective or directions, is sometimes taken as indication of lack of competence or, worse, as a stance betraying cynicism, agnosticism, nihilism, or just bad taste. The alleged failure to answer such questions has been the primary critique against Critical thought and, in our case, of the various Critical movements in public international

law.[596] The tenor of such critiques is that this type of analysis is ultimately a nihilist or regressive approach to law. Despite its occasional intellectual virtuosity, Critical analysis uses its zeal in order to de-construct and criticize rather than to offer concrete solutions.[597] The first thing to notice with the 'what's next' question is that it is structured in a way that reproduces precisely the kind of answer that the present project has set out to disrupt, namely the idea that 'there *is* something to be done' in some kind of decisive, foundational, or other progressive meta-way. The question is postured in such a way as to assume that the author is a rational, coherent, autonomous, subject able to stand outside the problem itself and immediately assume action the moment the 'right' solution is 'convincingly' argued. The problem is that the adverb 'convincingly' already sets out the frame of what kind of moral argument is permitted to come forward. The 'what's next' question embodies and reproduces the idea that there *is* such a thing as a progress narrative for legal thought which travels the distance from relativism to a decisive meta-narrative. In other words, in order for one to be 'convincing', one would have to create a decisive meta-narrative. The circularity of this proposition is obvious. It assumes that the creation of 'better' or 'more correct' meta-narratives is the right thing to do – and as opposed to 'merely' demonstrating that the creation of meta-narratives is itself a political act which cannot stand the test of internal criticism. The 'what's next' question in fact de-legitimizes *ab initio* the conclusions of this enquiry, namely that there is something problematic in finding meta-narratives an unavoidable way of doing science.

In response, and to pay tribute to the customary 'what's next' question, I will close by turning instead to explaining my own understanding of the motives of the present enquiry. These motives may be considered progressive or regressive but hopefully only in context, and in a non-decisive way. While hoping to evade a permanent categorization of being progressive or not, I submit that there is an intrinsic value in this type of analysis as action. First, the analysis leads to the conclusion that narratives of progress, such as the ones described in the three case studies above, should not be accepted without question. As a consequence, our evaluation of them must remain pending. They must be neither approved nor rejected in a decisive

[596] Unfortunately, only few authors have taken on the claims of these Critical movements. See e.g. Scobbie (Towards the Elimination of International Law), *supra* note 47. On the alleged failure of Critical international law to commit to 'an affirmative image' of itself see Purvis (Critical Legal Studies), *supra* note 47, at 116 et seq.

[597] Korhonen explains the perceived moral duty to reconstruct as the "defense of the fortress". She writes: "the fortress describes how, after deconstruction, one dutifully returns to the fortifications of the old order and works to strengthen the most solid parts of what remains". O. Korhonen, New International Law: Silence Defense or Deliverance, (1996) 7 European Journal of International Law 1, at 20 et seq.

way, but the untroubled facility ease with which they are accepted, incorporated, replicated, cited in the literature must be unsettled and questioned. Second, the analysis wanted to call attention to a point that has already been made convincingly during the last twenty years,[598] namely that international law vocabularies, our everyday vocabularies, including the present text, are not stable or determinate but are nevertheless able to produce meaning and define the four corners of permissible statements within a discourse. Third, this enquiry calls for uncovering structures that allow the production of meaning and a critical scrutiny of these structures. Fourth, we must decide for ourselves in which circumstances would a given narrative of progress be a progressive way of speaking about a problem. Fifth, and as a consequence, this analysis does not suggest the abandoning of progress narratives or vocabularies and their castigation as erroneous or illusory tools for the science. What must we do then? What's next? I will borrow, for the last time, Michel Foucault's potent language, in lieu of an answer.

> What we must do, in fact, is to tear away from their virtual self-evidence, and to free the problems that they pose. To recognize that they are not the tranquil locus on the basis of which other questions (concerning their structure, coherence, systematicity, transformation) may be posed but that they themselves pose a whole a whole cluster of questions (what are they? How can they be defined or limited? What laws do they obey? Which specific phenomena do they give rise to in their field of discourse?). We must recognize that they may not, in the last resort, be what they seem at first sight. In short, they require a theory, and that this theory cannot be constructed unless the field of the facts of discourse on the basis of which those facts are built up appears in its non-synthetic unity. Once this is done an entire field is set free.[599]

This, however, should be the subject of a separate enquiry.

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[598] This is, of course, not a new point and has been at the heart of the Critical Legal Studies and New Approaches to International Law Movements. For a latest discussion, see Koskenniemi's Epilogue, in Koskenniemi (From Apology to Utopia), *supra* note 37, at 562-617.

[599] Foucault (Archaeology of Knowledge), *supra* note 51.

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Curriculum Vitae

Thomas Skouteris was born in Athens, Greece, on 25 May 1971. His primary and secondary education was followed by studies in Law at Democritus University of Thrace, where he obtained in Degree in Law ('Ptychio Nomikis') in 1993. In 1994 he joined Leiden University as a Master's student, to complete his degree in Public International Law *cum laude* in 1995. In 1996 he became Research Fellow at the T.M.C. Asser Institute, as part of the Asser Dissertation Program. In 1997-1999 he spent two years as Senior Fellow at the European Law Research Center of Harvard Law School, only to return to Leiden in 2000 to accept a position as Lecturer and Academic Coordinator of the LL.M. Program in Public International Law, a position that he holds till today.

Between 2000-2008 Thomas served in various posts and capacities, such as General Editor and Editor-in-Chief of the Leiden Journal of International Law, Chair of the Foundation for New Research in International Law, and Founding Member and Secretary General of the European Society of International Law (2004 – to date). He has co-organized several international law conferences and events; he leads the Law Moot Court competition of the Balkan Case Challenge and reviews manuscripts for Cambridge University Press. While on leave from Leiden University (2008-2009), Thomas lives in Egypt and works as Assistant Professor at the Law Department of the American University in Cairo.

Samenvatting

The notie van vooruitgang in het internationaal juridisch discours

Dit proefschrift kijkt naar de notie van vooruitgang in het internationaal juridisch discours. Het doel is niet om een wetenschappelijke theorie, techniek, of ander instrument te ontwikkelen waarmee kan worden vastgesteld wat vooruitgang is in het internationaal recht, al zal worden gekeken naar de mogelijkheid van zulke instrumenten. Het is ook niet de bedoeling om een uitputtend historisch of ander onderzoek uit te voeren naar het gebruik van de notie van vooruitgang in internationaal juridische debatten. Aldus is dit niet een genealogie of ontologie van de notie van vooruitgang. Het doel is om te onderzoeken hoe een specifieke ontwikkeling zich kan voordoen als vooruitgang in het internationaal recht. Het is een onderzoek naar hoe de betekenis van vooruitgang geproduceerd kan worden in internationaal juridische teksten; zowel als een onderzoek naar de consequenties van zulk een productie van betekenis. Dit project stelt en verdedigt een aantal intellectuele standpunten (theses) gerelateerd aan de rol van de notie van vooruitgang in het internationaal juridisch discours.

i) Vooruitgang als het product van narratieven: Ondanks het feit dat vooruitgang een bruikbaar concept is bij de beschrijving van internationaal juridische gebeurtenissen (argumenten, ontwikkelingen, acties, en zo voort), is het een notie die uiteindelijk geen betekenis heeft, tenzij geplaatst in de context van een narratief over vooruitgang.

ii) Vooruitgangsnarratieven als politiek: Vooruitgangsnarratieven zijn per definitie niet objectief. Als zodanig wedijveren ze met (en sluiten ze uit) andere vooruitgangsnarratieven die gebaseerd zijn op verschillende uitgangspunten. Internationaal juridisch discours neigt naar de ontkenning of verhulling van het niet-objectieve karakter van diens vooruitgangsnarratieven.

iii) Discours analyse als actie: Hoewel vooruitgangsnarratieven een nuttige discursieve vorm bieden, de de-mystificatie van zulke narratieven kan een even productieve als betekenisvolle vorm van internationaal juridisch argument op zichzelf vormen, doch een die een reeks van nieuwe en verschillende opties voor actie en intellectuele mogelijkheden biedt.

De basis stelling is dat, hoewel vooruitgang een handig etiket biedt om een specifiek internationaal juridische gebeurtenis (argument, ontwikkeling, actie, enz.) te duiden, uiteindelijk is het zonder betekenis, behalve wanneer geplaatst in de context van een narratief – een verhaal over hoe dingen

waren, hoe dingen zijn, en hoe dingen moeten worden. Zulke narratieven hebben uiteindelijk geen objectief ware verhaallijn; ze ‘spreken zichzelf’ niet als zodanig. De verhaallijn wordt in feite geconstrueerd door de auteur, gebaseerd op concrete keuzes (van epistemische, ideologische en andere aard). De verhaallijn manifesteert zich door middel van een vocabulair: een aantal uitgangspunten, beelden, metaforen, and andere discursieve structuren. Vooruitgangsnarratieven wedijveren met andere, alternatieve, verhalen over vooruitgang, en sluiten ze uit. Ze vormen ook de basis voor beslissingen en voor beleid met tastbare effecten op het dagelijks leven. In dit opzicht zijn vooruitgangsnarratieven niet zozeer beschrijvingen van een objectieve werkelijkheid, maar krachtige rhetorische strategieën voor (de)legitimatie.

Hoewel gezegd zou kunnen worden dat deze claim vanzelfsprekend is, is het in tegenspraak met de pretentie van objectiviteit (waarheid, universaliteit, bepaalbaarheid, neutraliteit, enz.) die gebruikelijk is in internationaal juridische vooruitgangsnarratieven. Internationaal juridische literatuur is over het algemeen vasthoudend aan het idee dat er zoiets is als een vooruitgang die verder gaat dan het subjectieve waardeoordeel. Een kritische benadering van deze eigenschap van het internationaal juridisch argument leidt tot een ‘nieuwe’ manier van denken over internationaal recht, een manier die op zijn beurt als ‘progressief’ of ‘regressief’ gezien kan worden, maar ook een manier van denken die verschilt met betrekking tot wie er voordeel kan trekken uit diens emancipatoir en transformatief potentieel.

Om deze stellingen te onderbouwen kijkt dit proefschrift naar drie voorbeelden van hoe de notie van vooruitgang wordt gebruikt in specifieke gevallen van internationaal publiekrechtelijk discours. De drie gevallen zijn voorbeelden van verschillende vormen van gebruik van het idee van vooruitgang in internationaal juridische argumentatie, namelijk het idee van internationaal recht als vooruitgang, het idee van vooruitgang binnen het internationaal recht, en de combinatie van beiden. In termen van methode worden de drie gevallen geanalyseerd door middel van een interpretatieve of deconstruerende techniek die soms wordt benoemd als ‘kritische analyse’ of ‘discours analyse’. Discours analyse is een analyse van de structuren die binnen een discours betekenis produceren. In het geval van dit onderzoek betreft het een analyse van de structuren binnen specifieke argumenten over het internationaal recht die specifieke betekenissen verlenen aan het idee van vooruitgang.

De eerste analyse (Hoofdstuk 2) kijkt naar de rol van de notie van vooruitgang in het werk van een individuele denker over het internationaal publiekrecht. Het betreft een intellectueel portret van Stelios Seferiades (1876-1951), een Griekse jurist in het interbellum (1918-1939) die zich

ontpopte to een van de belangrijkste intellectuelen van zijn generatie, zowel in Griekenland als internationaal. De analyse volgt de oeuvre van Seferiades om een dieper inzicht te krijgen in de manieren waarin het idee van vooruitgang zich ontwikkelde tot een cruciale discursieve structuur in de productie van morele autoriteit en legitimiteit voor zijn argumenten. De tweede analyse (Hoofdstuk 3) biedt een voorbeeld van een discours dat spreekt over vooruitgang binnen het internationaal recht. Het laat het werk van Seferiades achter en richt zich op internationale rechtsdoctrine, in feite op de meest klassieke rechtsdoctrine: die van de bronnen van het internationale recht. De derde analyse (Hoofdstuk 4) biedt een voorbeeld van een discours dat het idee van internationaal recht als vooruitgang combineert met dat van vooruitgang binnen het internationaal recht. Het richt zich op de institutionele dimensie van het internationale recht en kijkt naar een bekend en actueel debat over de institutionele architectuur van het internationaal juridisch systeem, namelijk het debat over de proliferatie van internationale hoven en tribunalen.

De conclusies beperken zich tot de drie individuele analyses, alhoewel dit werk participeert in een breder project dat zich richt op de sociaal constructivistische kritiek van het internationaal publiekrecht. Het laatste hoofdstuk (Hoofdstuk 5) heeft een dubbel doel. Ten eerste bekijkt het de intellectuele stellingen van dit werk in het licht van de conclusies van de drie analyses. Ten tweede situeert het deze stellingen in een ruimer debat over het huidige internationale recht. Dit werk (en de bredere kritiek) aanvaardt de manier waarop het internationaal recht vervlochten is met macht, en wijdt zich aan het ontwaren van de voortdurend veranderende vooroordelen en tegenstrijdigheden van het internationaal juridisch argument. Als zodanig versterkt het en ontkracht het, legitimeert het en delegitimeert het, maar expliciet en doelbewust. In plaats van een ondermijning van de vitaliteit en stabiliteit van het internationaal recht, betreft het hier een benadering die toegewijd is aan een bewuster en ondersteunend gebruik van het internationaal juridisch discours.