

# Abhandlungen

## Editorial: Progress and International Law: A Cursed Relationship?

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The notion of progress understood as 'the gradual perfection of humanity'<sup>1</sup> is one of our time's dominant, formative notions. It 'involves a synthesis of the past and a prophecy of the future'.<sup>2</sup> Given this all-encompassing presence of progress, it comes as no surprise that the idea of progress also holds a special position in international law.<sup>3</sup> For instance, the International Law Commission (ILC), one of the most prestigious bodies of the United Nations, is entrusted with the progressive development of public international law. Despite this forward-looking attitude, seemingly ingrained in public international law, a tension between progress in international law and developments in other scientific and social areas is often perceived. Especially given the numerous violations of public international law, the field is fre-

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<sup>1</sup> Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford University Press 2005), 761.

<sup>2</sup> John B. Bury, *The Idea of Progress: An Inquiry Into Its Origin and Growth* (Macmillan and Co, Limited 1920), 5.

<sup>3</sup> See in detail below.

quently attested to go through a crisis. For example, in 1965, during a Sixth Committee meeting on the ILC's work regarding the Vienna Convention on the Law of Treaties (VCLT), the Kenyan representative traced this crisis back to, *inter alia*, progress. He stressed that '[i]f there was a crisis in international law, that was not the fault of the developing countries, but was the result of scientific and technical progress, the obsolescence of certain parts of the law, and the creation of relatively new areas of law, such as the succession of States, where there were few agreed "traditional" rules'.<sup>4</sup>

Against this backdrop and the centrality of the notion of progress to international law discourse, the AjV-DGIR conference 'Progress and International Law: A Cursed Relationship?', which took place at the University of Cologne from 22 to 23 September 2023, and a related symposium on *Völkerrechtsblog* unpacked the unsettled relationship between progress and international law.<sup>5</sup> In the tradition of its predecessors,<sup>6</sup> the conference jointly convened by the Association of Young International Law Scholars (AjV) and the German Society of International Law (DGIR) brought together young and established international law scholars, the latter kindly agreeing to comment on the former's papers and presentations.<sup>7</sup>

<sup>4</sup> Statement by Kenya in the United Nations General Assembly, Sixth Committee, Official Records of the Twentieth Session, 850th Meeting, 13 October 1965, UN Doc. A/C.6/SR.850, 69, para. 30.

<sup>5</sup> Alexander Holzer, Lisa Kujus, Rebecca Kruse, Júlia Miklasová, Jasper Mührel, Paula Rhein-Fischer, Lorenz Wielenga, Sara Wissmann, 'Introducing the Symposium "Progress and International Law: A Cursed Relationship?"', *Völkerrechtsblog*, 18 September 2023. In certain aspects, this Editorial builds on the Introduction to the *Völkerrechtsblog* symposium.

<sup>6</sup> Since 2007, AjV-DGIR conferences have been held, *inter alia*, in Düsseldorf, Graz, Göttingen, Bochum, Berlin, and Bonn.

<sup>7</sup> In that regard, we are more than grateful for the comments of Professors Tilmann Altwicker (University of Zurich), Başak Çalı (University of Oxford), Hilary Charlesworth (International Court of Justice), Philipp Dann (Humboldt University Berlin), Michaela Hailbronner (University of Münster), Machiko Kanetake (Utrecht University), Thomas Kleinlein (Walther Schücking Institute for International Law), Felix Lange (University of Cologne), Angelika Nußberger (University of Cologne), Phoebe Okowa (Queen Mary University of London), Birgit Peters (University of Trier), Valentin Schatz (Leuphana University Lüneburg), Thomas Skouteris (The American University of Cairo), Christian Tams (University of Glasgow and Sorbonne Law School) and Silja Vöneky (Albert Ludwigs University of Freiburg). We also thank our partners and sponsors: the Fritz Thyssen Foundation, the Seidl-Hohenveldern Association, the Association for the Promotion of Jurisprudence at the University of Cologne, the German Society of International Law, the law firms Luther and Osborne Clark as well as the publishers Duncker & Humblot, Nomos and Springer. We would also like to thank *Völkerrechtsblog* for accompanying the conference with an online symposium and a livestream of the keynote speech (see n. 5). We would also like to thank the editors of *ZaöRV*, especially Professor Anne Peters, as well as managing editor Dr. Robert Stendel for accepting and collaborating on this Special Issue. Finally, we are greatly indebted to Professor Angelika Nußberger and the Academy for European Human Rights Protection at the University of Cologne for their generous financial and organisational support.

As the outcome of the conference, this Special Issue intends to inspire a new scholarly debate on the notion of progress and its specific meaning in and link with international law. Creating a platform for different methodological and theoretical approaches, the Special Issue centres around three objectives. First, the Special Issue aims to conceptualise the notion of progress itself, unpacking its constitutive elements, setting it in relation to the dimension of time and linearity, and discussing possible features of progress in international law. Second, it critically reflects on the notion of progress in international law by questioning the analytical value of the concept and identifying the strategic agendas behind progress narratives. Third, the Special Issue aims to pinpoint where progress can be identified in international law and where international law is perceived as lagging behind states' and societal expectations. In this respect, the Special Issue attempts to identify the factors that determine such a state of affairs and outline possible ways forward.

To this end, this Editorial proceeds in four steps: After providing an overview of the general idea of progress, the notion as developed and perceived by international law scholarship is presented. Subsequently, the Editorial displays critical perspectives on progress narratives in public international law. This is followed by a presentation of the contributions to this Special Issue with a view to its overarching aims.

## I. Introducing the Idea of Progress

The contemporary idea of linear progress, understood as a continuous change towards improvement, is rather young.<sup>8</sup> Bury's influential 1920 account entitled *The Idea of Progress: An Inquiry Into Its Origin and Growth* shows, in particular, that the Greeks, and later the Romans, believed in a cyclical rather than linear vision of history.<sup>9</sup> Humanity was believed to be in a state of decay rather than one of positive, forward-

<sup>8</sup> See Reinhart Koselleck, "Fortschritt": Einleitung' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Wissenschaftliche Buchgesellschaft 2022, original 2004), 351-353: late 18th century.

<sup>9</sup> According to this view, despite certain spontaneous events, 'disaster and decline' are 'inevitable'. Margaret Meek Lange, 'Progress' in: Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopedia of Philosophy*, <<https://plato.stanford.edu/entries/progress/>>, last access 30 December 2024; Bury (n. 2), 7-13. The cyclical vision of time was similarly present across the ancient world, in particular in India. In China, 'the absolute stability of cosmos' dominated the focus more so than deterioration and degradation. Tyson Retz, *Progress and the Scale of History* (Cambridge University Press 2022), 13-14.

looking development.<sup>10</sup> It was arguably no sooner than 1757 that the word progress was employed as a ‘forward movement of civilization toward an ever more flourishing condition’.<sup>11</sup>

Originating in the intellectual movement of the Enlightenment, followed by the French Revolution, the concept’s emergence cannot be separated from the emergence and advancement of sciences such as physics and medicine.<sup>12</sup> Just as the accumulation of human knowledge in sciences claimed improvement, it was claimed that improvement could be achieved through ‘the organization of human society and the character of human conduct’.<sup>13</sup> Thus, in parallel with the demise of religious belief, a new ‘secular faith’ in progress emerged.<sup>14</sup>

This modern understanding of progress rests on a particularly optimistic interpretation of history and assumes processes which are propelled by *human* activity – not stemming from the divine or other external powers.<sup>15</sup> Undeniably, the concept is deeply rooted and embedded in European modernity.<sup>16</sup> Consequently, it also served European colonialism apologists in locating colonial expansion in a progress narrative of modernising ‘the supposedly backward non-European world’.<sup>17</sup>

Against the backdrop of the 20th-century catastrophes, the totalising 18th and 19th-century ideas of progress were criticised and rejected. While the

<sup>10</sup> Bury (n. 2), 8-13, 21; Lange (n. 9). See also on the Hellenistic philosophy Retz (n. 9), 15-16; Jacques Le Goff, *Must We Divide History Into Periods?* (Columbia University Press 2015), 8.

<sup>11</sup> Le Goff (n. 10), 102 (*emphasis in original*). See, however, for certain elements of the medieval thought that led to the idea of progress: Bury (n. 2), 22-29; Lange (n. 9). The idea of a linear improvement took root only through the rise of Christianity in Ancient Rome, which interpreted world history from its point of view as a continual positive change in accordance with God’s intentions. Christian Meier, ‘Fortschritt in der Antike’ in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Wissenschaftliche Buchgesellschaft 2022, original 2004), 362. While the Renaissance refocused orientation on human life on earth, its engagements with Ancient Greek philosophy entailed the belief in the theory of decline and degeneration. This lasted until the late Renaissance. Bury (n. 2), 30-36.

<sup>12</sup> Lange (n. 9); Meier (n. 11), 358-359.

<sup>13</sup> Charles Frankel, ‘Progress, History Of’ in: *Encyclopedia*, <<https://www.encyclopedia.com/humanities/encyclopedia-almanacs-transcripts-and-maps/progress-idea>>, last access 30 December 2024.

<sup>14</sup> Retz (n. 9), 2; John Scott, *Oxford Dictionary of Sociology* (Oxford University Press 2014), 837; Reinhart Koselleck ‘‘Protectus’’ im Mittelalter und ‘‘Fortschritt’’ im religiösen Bereich der Neuzeit’ in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Wissenschaftliche Buchgesellschaft 2022, original 2004), 352.

<sup>15</sup> Bury (n. 2), 5; Retz (n. 9), 5.

<sup>16</sup> Retz (n. 9), 58.

<sup>17</sup> Lange (n. 9).

scientific explorations of the notion generally seem to be in decline in contemporary philosophy and historical sciences, we are still under the sway of its logic.<sup>18</sup> However, already in 1920, Bury wrote that '[i]f there were good cause for believing that the earth would be uninhabitable in A.D. 2000 or 2100 the doctrine of Progress would lose its meaning and would automatically disappear'.<sup>19</sup> A hundred years ago, these prophetic words were portrayed as absurd, unimaginable claims, but today they weigh all too heavily.

## II. The Self-Evidently Optimistic Vision of the Relationship between Progress and International Law

Given the idea of progress's origins, under persistent Kantian influence, progress has been one of the key structuring principles and narratives of international law. International law has been sketched as a tool of progress for humanity. In his *Idea for a Universal History from a Cosmopolitan Perspective* (1784), Kant posited that history – seemingly confused and irregular when zoomed in on single individuals – nevertheless can be perceived as consistently progressing.<sup>20</sup> In his view, humanity's 'inevitable antagonism' ultimately leads to peace and security, making progress a perpetual task.<sup>21</sup> According to Kant,

'through wars, through the excessive and ceaseless preparations for war, through the resulting distress that every state, even in times of peace, must ultimately feel internally, nature drives humankind to make initially imperfect attempts, but finally, after the ravages of war, after the downfalls, and after even the complete internal exhaustion of its powers, [nature] impels humankind to take the step that reason could have told it to take without all these lamentable experiences: to abandon the lawless state of savagery and enter into a federation of peoples'.<sup>22</sup>

As can be concluded from these poignant lines, Kant believed in international law as an indispensable element of this vision of progress. In his essay *Towards*

<sup>18</sup> Retz (n. 9), 1 and see 37-46 and 58.

<sup>19</sup> Bury (n. 2), 5.

<sup>20</sup> Immanuel Kant, 'Idea for a Universal History from a Cosmopolitan Perspective' in: Pauline Kleingeld (ed.), *Toward Perpetual Peace and Other Writings on Politics, Peace and History* (Yale University Press 2006, original 1784), 3.

<sup>21</sup> Reinhart Koselleck 'Die Ausprägung des neuzeitlichen Fortschrittsbegriffs' in: Otto Brunner, Werner Conze and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Darmstadt: Wissenschaftliche Buchgesellschaft 2022, original 2004), 382.

<sup>22</sup> Kant (n. 20), 10.

*Perpetual Peace: A Philosophical Sketch* (1795), Kant holds that a treaty among people, creating a pacific federation (*foedus pacificum*), is an essential requirement for lasting peace and the prevention of future wars.<sup>23</sup> Thus, from this perspective, international law carries within itself the seed of optimism; it is forward-looking, believing that we will move into the future with history as our ally.<sup>24</sup> Since public international law accordingly assumes progress, any defects in this system are viewed as barriers to this ultimate objective.<sup>25</sup>

An example of this self-evident and optimistic link between progress and international law is Hudson's 1932 book on *Progress in International Organization*, in which he examines the establishment of the League of Nations, the Permanent Court of International Justice, and other international organisations as institutions for co-operation in an applauding manner.<sup>26</sup> Despite the different crises that occurred during the first quarter of the 20th century, in Hudson's view

‘[i]n this brief period since the war, our generation has not been idle. It has suffered, as all generations suffer, from apathy, from ignorance, from opposition to its steady purpose. Yet it promises to leave something to show for its efforts. It has followed the method by which progress is achieved. It is building institutions which promise to serve future generations. It has made greater progress in organizing the world for co-operation and peace than was made in a hundred years before the war.’<sup>27</sup>

International legal scholarship is replete with similar attitudes. For example, in one of his essays, Brierly acknowledged that the assumption that international law merits preserving and refining needed no further justification and outlined the necessary conditions for its progress.<sup>28</sup> An increased abundance of law was thus automatically presumed to be progressive, and the international lawyer would be at the heart of this project, the ‘organ of the legal conscience of the civilized world’.<sup>29</sup> One might even suggest that progress substituted the stabilising effect formerly offered to society by

<sup>23</sup> Immanuel Kant, ‘Towards Perpetual Peace: A Philosophical Sketch’ in: Pauline Kleingeld (ed.), *Toward Perpetual Peace and Other Writings on Politics, Peace and History* (Yale University Press 2006, original 1795), 80.

<sup>24</sup> David Kennedy, ‘When Renewal Repeats: Thinking Against the Box’, *N. Y. U. J. Int’l L. & Pol.* 32 (2000), 335–500 (347).

<sup>25</sup> Phillip C. Jessup, *A Modern Law of Nations* viii (2nd edn, Macmillan 1949), 2.

<sup>26</sup> Manley O. Hudson, *Progress in International Organization* (Oxford University Press 1932).

<sup>27</sup> Hudson (n. 26), 122.

<sup>28</sup> James L. Brierly, ‘International Law: Some Conditions of Its Progress’, *Int’l Aff.* 22 (1946), 352–360 (352) (*emphasis added*). See further references employing the notion of progress, Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMS Asser Press 2010), 2–3.

<sup>29</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2009, original 2001), 516; Kennedy, ‘When Renewal Repeats’ (n. 24), 347.

religion. In this sense, practising progress would ultimately lead to a utopian world, just as the observance of religion leads human life to heaven.<sup>30</sup>

These optimistic visions seem to be as true today as ever since referring to the concept of progress continues to be one of the most commonly used rhetorical strategies in international law.<sup>31</sup> Indeed, employing the progress narrative in its varied forms and facets has been central to many international law analyses in the wake of Russia's war of aggression against Ukraine. For example, scholars have asked whether the war marks the demise of the international legal order as we know it or called for its renewal and reimagining.<sup>32</sup> Emphatically, Hathaway has written that we should not give up on the pursuit of a more just world merely because some champions of justice and accountability are not entirely above criticism.<sup>33</sup> Allott has called on international lawyers to investigate every potential avenue for creating a better future for humanity, among others, through perfecting the rule of law.<sup>34</sup> Others have claimed that the Russia-Ukraine war may in fact spearhead progress in many areas of international law.<sup>35</sup> However, scholars have also raised questions, denouncing certain proposals for their exceptionality and selectivity.<sup>36</sup>

### III. Scholarship's Critical Introspection of the Assumed Positive Progress Vision

While progress narratives have remained at the heart of international law doctrine, scholarship has also increasingly critically scrutinised the taking for granted of the link between international law, progress, and evolution. Notably inspired by Hudson's 1932 book on *Progress in International Organiza-*

<sup>30</sup> See Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?', *EJIL* 25 (2014), 425-444 (429-431).

<sup>31</sup> Skouteris, 'The Notion of Progress' (n. 28), 5.

<sup>32</sup> Barrie Sander and Immi Tallgren, 'On Critique and Renewal in Times of Crisis: Reflections on International Law(ers) and Putin's War on Ukraine', *Völkerrechtsblog*, 16 March 2022; Paul Harper, 'Why Russia's Invasion of Ukraine is Not the End of the UN Charter System', *MDX Minds*, 28 March 2022; Rachael L. Johnstone, 'Is Ukraine The End of International Law as We Know It?', *Journal of the North Atlantic & Arctic (JONAA)*, 10 April 2022.

<sup>33</sup> Oona A. Hathaway, 'How Russia's Invasion of Ukraine Tested the International Legal Order', *Brookings*, 3 April 2023.

<sup>34</sup> Philip Allott, 'Anarchy and Anachronism: An Existential Challenge for International Law', *EJIL: Talk!*, 1 April 2022.

<sup>35</sup> Elena Chachko and Katerina Linos, 'International Law After Ukraine: Introduction to the Symposium', *AJIL Unbound* 116 (2022), 124-129 (124).

<sup>36</sup> Ralph Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, What-aboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting', *Opinio Juris*, 17 March 2022.

tion, Miller and Bratspies edited their own volume *Progress in International Law* in 2008. In their Introduction, Miller and Bratspies, among others, criticised Hudson's approach for not addressing the connection between progress, international law, and cooperation, but instead taking it for granted.<sup>37</sup> In their view, for Hudson, like for many international lawyers both before and after him, the idea that international law is a predestined tool for attaining progress 'was an accepted tenet of the faith [...].'<sup>38</sup> Thus, through the critical perspectives offered in the Introduction to Miller and Bratspies' edited volume, postmodern criticism of Enlightenment ideas, such as the concept of human progress, has irrevocably made its way into the discourse on international law.<sup>39</sup> However, regarding the edited volume itself, Skouteris in his review assessed that, while the publication is notable for cataloguing the state of international law at the turn of the 21st century and highlighting the essential link between international law and progress, it misses a significant chance to enhance its analysis by engaging in a crucial dialogue with contemporary critiques of narratives of progress.<sup>40</sup> In doing so, the volume 'helps to confirm, rather than dislodge, historical narratives of progress' and 'nurtures a range of optimistic (in some cases enthusiastic) progress narratives'.<sup>41</sup>

Despite this criticism, the introduction to the edited volume indeed teased out some critical perspectives on this 'accepted tenet of faith'. Already since the late 1980s and 1990s, critical scholars have highlighted the paradoxes underpinning the progress narratives in international scholarship, even though at first the exploration of the notion of progress itself was not the key focus.<sup>42</sup> For example, Cass claimed that the mainstream continuously frames

<sup>37</sup> Russell A. Miller and Rebecca M. Bratspies, 'Progress in International Law – An Explanation of the Project' in: Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law* (Martinus Nijhoff Publishers 2008), 9-29 (21-22).

<sup>38</sup> Miller and Bratspies (n. 37), 22. Nevertheless, Galindo nuanced the critique of Hudson's approach to progress, highlighting that when Hudson was writing the book, he 'had no access to the vast literature on the critique of Enlightenment and the critique of progress, which was only produced years later'. While this is an important contextual factor to be taken into account, the paradigm of the self-evidence of progress has been persistent until today. George R. B. Galindo, 'Review Essay: Progressing in International Law', *Melbourne Journal of International Law* 11 (2010), 1-16 (10).

<sup>39</sup> Thomas Skouteris, 'Review Essay: Russell A. Miller and Rebecca M. Bratspies (eds) *Progress in International Law*, foreword by José E. Alvarez, *Developments in International Law* 60, Leiden: Martinus Nijhoff Publishers, 2008', *LJIL* 22 (2009), 857-865 (858).

<sup>40</sup> Skouteris, 'Review Essay' (n. 39), 864.

<sup>41</sup> Skouteris, 'Review Essay' (n. 39), 865.

<sup>42</sup> Galindo (n. 38), 1-2. For example, Koskeniemi in his Introduction to *The Gentle Civilizer of Nations* claims that in his book 'no assumption about history as a monolithic or linear progress narrative is involved, nor any particular theory about causal determination of ideas or by ideas of something else'. Koskeniemi (n. 29), 2. See Skouteris, 'The Notion of Progress' (PhD Thesis, University of Leiden 2008), 19-20.

the field's history 'as a "narrative of inevitable progress"'.<sup>43</sup> Kennedy argued that the construction of modern international argument has always been tied with a narrative of linear progress.<sup>44</sup> According to Galindo, indeed, this mainstream approach in international law scholarship is, in fact, the tacit or express pledge of several 19th and 20th-century doctrines.<sup>45</sup>

The first systematic monograph focusing on the notion of progress was written by Skouteris himself and titled *The Notion of Progress in International Law Discourse* (2010). Exploring the employment of the progress narrative and notion in the field's debates, Skouteris offers typologies of three uses of this notion: (i) international law *as* progress (international law has a self-evident and intrinsically progressive value); (ii) progress *within* international law (improvement of international law's internal development); (iii) instances which fall within both categories, i. e. international law *as* progress and international law *within* progress.<sup>46</sup> Skouteris claims that certain debates consider some of public international law's developments intrinsically positive for the field as such or for the international community. These tenets are 'beyond doubt' and accepted as a 'general truth'.<sup>47</sup> However, crucially, '[t]he language of progress is also a language of authority, to legitimize and delegitimize'.<sup>48</sup> It is, therefore, essential to shed light on and become aware of the fact that invoking progress narratives in a self-evident manner automatically places one's claims 'beyond the test of internal critique, a critique of internal contradictions and gaps'.<sup>49</sup> Ultimately, for Skouteris, the notion of progress is therefore not a neutral discursive device. He assumes that the notion is based on subjective premises and, as a result, is an expression of subjective (e. g., political, or ideological) perspectives and conflicts, while creating an objective guise.<sup>50</sup> Similarly, McGuinness and Bratspies claim that

<sup>43</sup> Deborah Z. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', *Nord. J. Int'l L.* 65 (1996), 341-384 (354).

<sup>44</sup> David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', *Nord. J. Int'l L.* 65 (1996), 385-420 (420).

<sup>45</sup> Galindo (n. 38), 1. See earlier.

<sup>46</sup> Skouteris, 'The Notion of Progress' (n. 28), 6-8 and 30.

<sup>47</sup> Skouteris, 'The Notion of Progress' (n. 42), 10.

<sup>48</sup> Skouteris, 'The Notion of Progress' (n. 28), 5.

<sup>49</sup> Skouteris, 'The Notion of Progress' (n. 42), 10.

<sup>50</sup> Skouteris, 'The Notion of Progress' (n. 42), 185. In this context, Skouteris puts forward three arguments: (i) progress as the product of narratives (progress is essentially 'devoid of meaning' without being located in a specific context); (ii) progress narratives as politics (since they are 'non-objective', these narratives have a political function and compete with other narratives); (iii) discourse analysis as action ('demystification' of these opens up pathways for new intellectual and legal imagination). Skouteris, 'The Notion of Progress' (n. 42), 185. Altwicker and Diggelmann join Skouteris in this subjectivity-assessment, see Altwicker and Diggelmann (n. 30), 428.

the progress narratives tend to 'overlook the normative ambiguity of slippery and value-laden reference points'.<sup>51</sup>

Moreover, in this regard, special attention has been paid to uncovering and directing the reader's attention to how progress narratives and arguments are formed. For instance, according to Skouteris, progress arguments require a two-step narrative: First, historical facts need to be ordered linearly to construct a coherent timeline moving towards one goal. Second, this linear movement must be connotated positively.<sup>52</sup> Similarly, Altwicker and Diggelmann identified several specific techniques for constructing progress narratives and their underlying strategic assumptions.<sup>53</sup> These techniques include (i) ascending periodisation, (ii) evidence of increasing value orientation of international law, (iii) trend-talk and (iv) identification of paradigm shifts.<sup>54</sup> The argumentative technique of ascending periodisation sets out the tendency of dividing the field of law into different eras or periods and ascribing the most recent or ongoing era with the most positive term.<sup>55</sup> Prominent examples are the classification as 'classic' and 'modern', or 'old' and 'new' public international law.<sup>56</sup> When employing this argumentative technique, it is striking that the argument can be communicated on a subtle, even subconscious level. Simple as it may be, the chosen words for categorisations themselves carry a semantic connotation that describes a certain improvement. The social reality we live in with its linguistic specialities constructs the impression of progress all by itself.<sup>57</sup> The second technique of proving increasing value orientation leaves this guise of subtlety by openly and actively trying to prove progress via value orientation.<sup>58</sup> This technique, seemingly empirical in its methodological approach, detects hints at shared ethical convictions within a panoply of legal documents.<sup>59</sup> Accordingly,

<sup>51</sup> Margaret E. McGuinness and Rebecca M. Bratspies, 'Progress and Paradox in the Regulation of the Use of Force', *Proceedings of the Annual Meeting (ASIL)* 102 (2008), 454-459 (457).

<sup>52</sup> Thomas Skouteris, 'The Idea of Progress' in: Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 939-953 (947).

<sup>53</sup> Altwicker and Diggelmann (n. 30), 432-443.

<sup>54</sup> Altwicker and Diggelmann (n. 30), 433 f.

<sup>55</sup> Oliver Diggelmann, 'The Periodization of the History of International Law' in: Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012), 997-1011 (1000-1001, 1008 f.); William E. Butler, 'Periodization and International Law' in: Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2nd edn, Edward Elgar 2020), 281-295.

<sup>56</sup> Altwicker and Diggelmann (n. 30), 434.

<sup>57</sup> Altwicker and Diggelmann (n. 30), 432-433.

<sup>58</sup> Altwicker and Diggelmann (n. 30), 434-435.

<sup>59</sup> Altwicker and Diggelmann (n. 30), 434.

increasing value orientation can especially be observed when considering the increasing importance of human rights in public international law, a phenomenon that is also ascribed to the 'modernization' of public international law.<sup>60</sup> Criticism can though be raised since this seemingly methodologically sound endeavour may intentionally omit references to contrary trends to strengthen its own claim.<sup>61</sup> In contrast to increasing value orientation, the third technique of 'trend-talk' can be described as 'soft and elegant'.<sup>62</sup> It does not promise anything, but it suggests. It creates hope for a brighter future by engaging with current or recent developments in the discipline.<sup>63</sup> In doing so, this technique gazes into the crystal ball of public international law and offers a spirit of fortune-telling.<sup>64</sup> Lastly, the fourth technique engages in the identification of paradigm shifts, evidencing similarities with the first technique on periodisation.<sup>65</sup> Equally, underlying connotations simplify a choice between two paradigms (e. g., universalism vs. particularism).<sup>66</sup> Our intuition tells us what is good or bad, what is to be considered progressive or old fashioned.<sup>67</sup>

## IV. Zooming in on the Contributions

It is against this background that the contributions of this Special Issue offer some novel perspectives on the relationship of progress and international law.

Hilary Charlesworth, in her colourful keynote contribution *Searching for Progress in International Law*, sheds light on the notion of progress in international law. The first of her three vignettes in which she offers to trace this relationship reads like a condensation of the historical struggle for that notion: The glass windows of the Peace Palace in the Hague, depicting 'The Evolution of the Peace Ideal' in four phases, the Primitive Age, the Age of Conquest, the Present Age and Peace Achieved, in her view, reflect two contradictory accounts of progress. One is a cyclical account emphasising the legitimacy of adjudication since time immemorial, the other a linear account

<sup>60</sup> Ruti G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', *Cornell Int'l. L.J.* 35 (2002), 355-387 (359 f.).

<sup>61</sup> Altwicker and Diggelmann (n. 30), 434.

<sup>62</sup> Altwicker and Diggelmann (n. 30), 435.

<sup>63</sup> Altwicker and Diggelmann (n. 30), 435.

<sup>64</sup> See similarly Altwicker and Diggelmann (n. 30), 436.

<sup>65</sup> Altwicker and Diggelmann (n. 30), 436-437.

<sup>66</sup> Altwicker and Diggelmann (n. 30), 436.

<sup>67</sup> Altwicker and Diggelmann (n. 30), 437.

depicting adjudication as the culmination of history. At the same time, her interpretation demonstrates that the windows are emblematic of the Kantian vision of international law as promoting eternal peace. They are, as Charlesworth reminds us, 'very much a creation of their time', presenting international adjudication as a marker of civilisation. Delving further into the relationship in her two other vignettes – access to international adjudication and the field of women, peace, and security – she argues that progress is rarely linear, but most of the time a shuffling movement. Challenging the common understanding of international law as constituting progress *per se*, she highlights that normative progress can come with deplorable simplifications and injustices, when e. g. the United Nations' Women Peace and Security agenda portrays women and girls uniquely as permanent victims and neglects sexual crimes against other victims than women. Charlesworth also takes up the criticism of critical scholarship against progress speech and calls on international lawyers to be explicit about the frame they are using.

Typically, accounts of human rights development have been presented as intrinsically progressive. Giulia Raimondo's contribution *Negative Dialectics: Shifting Borders, Extraterritorial Jurisdiction and New Possibilities of Resistance* challenges this preconceived assumption of progress for the field of international migration law, highlighting what has been excluded from such a narrative. Building on Adorno's concept of negative dialectics, her analysis of the European Court of Human Rights' (ECtHR) case law on jurisdiction in extraterritorial border control examines the dialectic processes defined by, on the one hand, expanded protection of refugees and, on the other hand, states' cooperative deterrence policies and accountability gaps. Unlike the Hegelian view, according to which through tension and contradiction two opposites are sublated into progressive synthesis, Raimondo embraces the contradictions and seeks to unravel the inherent tensions the concept of jurisdiction under the European Convention on Human Rights (ECHR) seems to hold in order to reveal its limitations and injustices in the context of extraterritoriality. Ultimately, Raimondo calls for the critical reassessment of the very notion of progress and argues it should be freed from narratives of (historical and legal) advancement and emancipation.

The assessment that progress is but an illusionary construct is shared by Julian Hettihewa in his insightful contribution *Youth as Progress*. He tells the circular story of how international law, first and foremost the United Nations General Assembly 'Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples' of 1965, has historically idealised and demonised youth. Youth, so the narrative goes, must be educated to maintain peace and prevent another war, to secure progress and prevent decline. The author offers a fresh perspective on the

role of international law in this respect: international law not only reinforces this sharp dichotomy between dream and nightmare, but it also shares the Messianic feature with youth. Just as youth, international law exists as 'a promise of justice'. Hence, the author concludes, both youth and international law 'are constructed as progress'.

Undoubtedly, progress and time are intimately intertwined, and, therefore, the reflection on their relationship is of categorical importance. In her contribution *Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity*, Eliana Cusato demonstrates how deeply ingrained the Western linear conception of time is with the idea of progress through international law. She presents continuities of linear progress narratives in leading concepts of international environmental law, such as the concepts of sustainable development, environmental human rights and ambition. On this basis, she argues that (environmental) law's progressive direction towards an open future conceals that futurities are unevenly distributed. She critically highlights that the emphasis on an open future in a legal discourse determined by a linear progress narrative risks distracting from necessary mitigation measures in the present. Besides, she argues, mainstream discourse on future generations risks reproducing Western assumptions about unilinear time and does not sufficiently take into account that the future always inherits burdens from the past.

Tania Ixchel Atilano joins Cusato in revisiting dark sides of historical progress narratives. In her contribution, *Visions of Progress and International Law in Nineteenth Century Latin-America: The Experience of the French Intervention in Mexico*, she challenges the conventional formulations of progress narratives built upon the European and North-American visions of the world. In describing Mexico's way to independence and equal sovereignty using international law against its former colonisers, she analyses how Latin American visions of progress in international law came into being through legal and linguistic education. Furthermore, she delves into liberal internationalism and then-new Mexican laws as a manifestation of progress. She locates the precedents for the 'transformative visions of international law' (most significantly, international criminal law) outside Europe and the United States, more specifically in the context of the French Intervention in Mexico (1862-1867) and the following trial against Maximilian of Habsburg.

Janina Barkholdt critically scrutinises and reverses the supposed underlying notions found in the argumentative techniques of ascending periodisation and increasing value orientation. Innovatively and provocatively, she asks the reader: *Progress Through Preservation: Paradox or Prerequisite?* In attempting to outline under which conditions progress can be achieved, the author argues for the necessity of stabilisation in order to enable change.

Barkholdt understands 'preservative' rules, e.g., the principle of *uti possidetis*, as enablers of change since these rules build an equilibrium with what she labels as 'transformative' rules. Ultimately, she posits that a sensible and limited application of preservative rules – the natural antichrist of progress – leads to a fruitful environment for progress to unfold.

Intuitively, progress requires an element of power, but one can reverse the question: Is progress achieved when the original power-holder is constrained or resisted, ultimately displacing the locus of power? Several contributions in this issue relate to the complex and underexplored inter-relationship between power and progress. Sissy Katsoni, in her contribution *Towards a Feminist Interpretation of ECHR's Provisions on Access to Abortion*, examines how in cases related to abortion, the ECtHR could implement a feminist interpretation of the ECHR by relying on customary interpretative techniques. Feminist scholars criticise the Court for its narrow interpretations of human rights provisions and argue against the alternative of 'abortion travelling', highlighting its inaccessibility to marginalised individuals. They also critique the Court's victimisation of pregnant persons. Katsoni's primary objective is to explore how the interpretative approach of the Court could be modified to address these concerns and to ensure that states grant access to abortion based on the impact of pregnancy and birth on the pregnant person's private life. She advocates for a broader, more contextual, and less formalistic approach to legal interpretation that takes the pregnant person's gendered experiences and the patriarchal nature of society into account. Finally, she asserts that this can already be achieved by emphasising contextual and dynamic considerations over other interpretative approaches without deviating significantly from customary rules of interpretation.

Finally, Martin Schwamborn, in his article *Progress and Responsibility: A Healing Relationship – The 'Responsibility to and for Progress' in International Law*, develops a novel approach to progress-related responsibility, particularly in scientific and technological development. According to Schwamborn, states have a duty to create a favourable environment to advance technological and scientific knowledge, which he calls responsibility *to* progress. Responsibility *for* progress, on the other hand, refers to questions of liability and compensation when the consequences of progress turn into damage. Historically, states have balanced promoting and restricting progress, and they are legally bound by a responsibility *to and for* progress. This responsibility, grounded in human rights and the UN Charter, requires a coordinated international effort to address the challenges of progress responsibly. This is how Schwamborn draws a parallel between the notion of scientific, technical, and technological progress on the one hand and the

notion of progress in international law on the other hand and highlights their interdependencies. He shows that regulating emerging technologies requires a delicate equilibrium between sovereignty, sovereign equality, human rights, and liability for damages.

In her epilogue, Angelika Nußberger reflects on the various meanings of progress, including progress as a linear movement directed towards a specific goal, improvements through proceduralisation, and the most modest form, a better understanding of law. She highlights the ambiguity of progress and its potential costs, pointing out unwanted side effects such as a shrinking universal recognition of human rights as a result of their expansion.

## V. Conclusion: Criticism and Possible Ways Forward

‘The relationship between progress and international law is not cursed, but neither is it charmed. It is rather a complicated relationship that is constantly being re-negotiated’. This conclusion by Hilary Charlesworth is best illustrated by the contributions of this Special Issue. The very notion of progress in international law, its assumed linearity and, in particular, the widespread assertion of ‘international law as progress’ (using Skouteris’ typology), still at least implicitly acknowledged by most international lawyers, appears to stand on shaky ground. Progress, understood as improvement, most often comes about as a shuffling movement, not as a linear line. One step forward may be followed by two steps backwards.<sup>68</sup> Besides, progress through more international law may be beneficial for some, but detrimental for others as the effects ultimately depend on the content of the relevant norms. In addition, a prerequisite of progress may be its exact opposite, preservation, for change may be possible only in the state of stabilised order.<sup>69</sup>

More fundamentally, following the footsteps of Skouteris, Altwicker, Diggelmann, Kennedy and others, many contributions to this Issue challenge the usage of the notion of progress in international law as a line of argument altogether. Progress narratives are unravelled as techniques that legitimise and potentially enhance pre-existing power relationships, conceal counter-developments in opposition to improvement and emancipation,<sup>70</sup> fail to account for the uneven distribution of futurity resulting from climate

<sup>68</sup> Hilary Charlesworth, ‘Searching for Progress in International Law’, *ZaöRV* 84 (2024), 801–814; Giulia Raimondo, ‘Beyond Progress: Interrogating the Limits of Jurisdiction and Migrant Rights Through Negative Dialectics’, *ZaöRV* 84 (2024), 815–842.

<sup>69</sup> Janina Barkholdt, ‘Progress Through Preservation of the Legal Status Quo: Paradox or Prerequisite?’, *ZaöRV* 84 (2024), 925–954.

<sup>70</sup> Raimondo (n. 68).

change,<sup>71</sup> instrumentalise specific groups of people such as the Youth,<sup>72</sup> and reflect mostly Western values.<sup>73</sup> The various subfields of international law that are used to illustrate these claims, including human rights, international environmental, humanitarian and economic law, indicate that the arguments made in these articles can be applied more generally.

At the same time, turning to the progress *within* international law, Skouteris' second category, the various contributions demonstrate that in many areas, international law has brought about improvement in some respects, but is still lagging behind expectations. The reasons for this vary. To cite but a few examples, in the case of women, peace, and security, the implementation of international law is undermined by institutional cultures; in international refugee law, the 'progressive' expansion of migrants' rights by the ECtHR has led states to adopt counter-policies aiming at evading the resulting obligations.

This leads to the question of what may be possible 'ways forward' – to use a classic progress metaphor. One possible way might be to establish an environment in which progress can unfold. In this respect, Barkholdt, in her contribution, points to the adoption of 'preservative' rules stabilising the order to enable change.<sup>74</sup> Interestingly, Katsoni's plea for a contextual and dynamic interpretative approach of the ECtHR, in opposition to more static approaches,<sup>75</sup> can be seen in juxtaposition to this first technique. Schwamborn's identification of state responsibility *to* progress is a further factor that could point out possible ways for the future.<sup>76</sup>

The relationship between progress and international law is far from being settled. But we hope that this Special Issue brings us closer to possible solutions, even if in a non-linear, deconstructivist way.

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<sup>71</sup> Eliana Cusato, 'Progress and Linear Time: International Environmental Law and the Uneven Distribution of Futurity', *ZaöRV* 84 (2024), 865-893.

<sup>72</sup> Julian Hettihewa, 'Constructing Youth as Progress: Tracing Shared Efforts of the League of Nations and the United Nations', *ZaöRV* 84 (2024), 843-863.

<sup>73</sup> Tania Atilano, 'Visions of International Law in the Nineteenth-Century: The Experience of the French Intervention in Mexico', *ZaöRV* 84 (2024), 895-924 and Cusato (n. 71).

<sup>74</sup> Barkholdt (n. 69).

<sup>75</sup> Sissy Katsoni, 'A Feminist Re-Interpretation of Access to Abortion Under the European Convention on Human Rights', *ZaöRV* 84 (2024), 955-978.

<sup>76</sup> Martin Schwamborn, 'The Responsibility *to* and *for* Progress in International Law', *ZaöRV* 84 (2024), 979-998.