

Russell A. Miller and Rebecca M. Bratspies (eds). ***Progress in International Law***, Leiden, Boston: Martinus Nijhoff Publishers, 2008. Pp. 912. \$333.00. ISBN: 9789004165717.

The title of this book must raise both interest and suspicion: on the one hand, no legal subject is so intimately related to expectations and hope for the improvement of the lot of humankind as is the case with international law. On the other hand, it is also generally known that these hopes have been disappointed in an uncountable number of cases. Most of us have a personal view of what progress means, and we are fairly convinced that this opinion more or less matches that of many other consociates. However, we are hesitant explicitly to formulate a general definition of this concept and, even in politics, this concept nowadays is used rather rarely. In international law, since the advent of deconstructivism at the latest, it has become nearly impossible to argue in such categories. To speak about progress presupposes the existence of commonly shared values; it evokes a sense of a unidirectional development of culture and human society. Progress has become one of the most abused words of the 20th century. In the East it has been used to justify repression in exchange for the promise of a mythical future to come about when true communism is achieved. The concept of 'progress' in the West was more closely associated with the hope of unprecedented technological and economic advancement. As is known, in both fields disillusionment has set in. Not only has the desirability of economic growth become overshadowed by the recognition that the associated environmental problems far exceed all previous calculations, but growth itself has become a mirage for many industrialized countries. To speak of progress before 1989 smacked of deceit, afterwards it sounded utterly naïve.

Nonetheless, the determination to contribute to a better future can be widely seen among international lawyers; indeed one may even say it is innate in them.¹ More often

⁹ Indeed, the views of elites and of ordinary citizens about the utility of international law may affect decisions of states to adhere to or to comply with international law. Posner cites a Chicago Council on Foreign Relations survey showing that 'only 43% of Americans considered "strengthening international law" a "very important" foreign policy goal' (at 57). But Posner fails to mention that that same survey shows that another 43% rate it as 'somewhat' important, and only 10% say it is not important. Chicago Council on Foreign Relations, *American Public Opinion and Foreign Policy* (2002) 33, <http://www.worldviews.org/detailreports/usreport.pdf>. If *The Perils of Global Legalism* could convince these citizens that international law is ineffective, their support for making and complying with international law could decline significantly, making Posner's work a self-fulfilling, and welfare-reducing, prophecy. See also M. Tomz, *Reputation and the Effect of International Law*, working paper dated February 2008, available at <http://www.stanford.edu/~tomz/working/Tomz-IntlLaw-2008-02-11a.pdf> (finding that 'Individuals are far more likely to oppose policies that would violate international law than to oppose otherwise identical policies that would not trammel upon the law').

¹ For some, this is innate in mankind or indeed in any living being. See Popper, 'Alles Lebendige

than not, the strongest critics of present-day international law appear to be, at the same time, outspoken idealists.² How can one overcome this chasm? It appears to be an ingenious idea that the editors of the volume under review have referred, to this end, to a book by Manley Hudson entitled *Progress in International Organization*, written in 1932, which was based on a series of lectures held in 1931 in Idaho. In this book, Hudson, a practitioner and academic who had exercised enormous influence on the shaping of the American perspective on international law,³ set out an optimistic view on how ever-closer interaction between states, in particular through international organizations, would help to overcome the historical woes assailing international society and, first of all, the scourge of war. Of course, this approach also has its pitfalls, and with the benefit of hindsight it is all too easy to say that Hudson was wrong in his predictions and that the creation of the League of Nations could not prevent the outbreak of a cataclysm even greater than the one which immediately preceded it and, in the end, fostered the creation of the League. Throughout this volume this contradiction is repeatedly addressed, and it is made clear that short-term predictions about the development of international law are always difficult to make. From many – though not from all – contributions, however, the conviction transpires that long term development assumes a direction which can be associated, at least implicitly, with the term 'progress'.

The editors of this book deliberately refrained from adopting even a working hypothesis on what progress could mean. As a consequence, a variety of views and opinions are presented in this regard. For some, reference to Manley O. Hudson is nothing more than a tip of the hat to a great lawyer, after

which they deliver a short account of the development in recent years of the specific subject attributed to them. Others come closer to Hudson's enthusiasm, and finally there is the group of contributors who point out that each success is the result of hard work, that setbacks are always possible, and that international society, while being confronted with ever-new challenges, has continuously to look out for new solutions. The result is a multicoloured picture of present day international law, an intriguing account of the most important challenges human society is facing at the moment, and, for the most part, a plea for the intensification of international cooperation.

The structure of this work refers to Manley Hudson's book and resembles that of a modern textbook on international law. After an exposition of the research project's content, the various contributions refer to 'History and Theory of International Law', the 'Sources of International Law and their Application in the United States', 'International Actors', 'International Jurisdiction and International Jurisprudence', 'The Use of Force and the World's Peace', and, finally, 'Challenge of Protecting Environment and Human Rights', the last being a genuinely modern subject, although some traces of it can already be found in Hudson's work.

The main difference with regard to a traditional international law textbook can be found in the fact that this work tries to highlight the dynamic elements, the factors of change, and also to sort out the direction the development of international law will take in the near future. At the same time it can be noted that the whole research project is inspired by a generally optimistic attitude. Several contributions contain clear hints at measures to be taken if basic problems of international society are to be solved. Thus, elements of legal policy are given far more weight than in traditional international law manuals.

The list of authors contributing to this work is long: It contains seasoned experts and younger but promising names. They come both from academia and from ministries. As a consequence, an inspiring mixture of information and notions is assembled. It is

sucht nach einer besseren Welt', in Kulturamt der Stadt Mannheim, *Auf der Suche nach einer besseren Welt. Vorträge und Aufsätze aus dreißig Jahren* (1984), at 1.

² For a recent, prominent example see D. Kennedy, *The Dark Side of Virtue* (2004).

³ Manley O. Hudson, 1886–1960.

not possible here to pay tribute to all contributions individually. Thus this reviewer has to limit himself to a few selective remarks.

Barry E. Carter starts his contribution ('Making Progress in International Institutions and Law') with an overview of what distinguishes current international law from that of Manley Hudson's time (the expansion of individual rights and responsibilities, the proliferation of international, regional, and national tribunals, and the expansion of their role, and the new interaction between international and domestic courts and other entities which contributes to the formation of a new 'transnational law'). He continues by stating that the network thereby created is giving expression, in many cases, to American ideas. Such a statement may be dear neither to European nor to American ears and, in fact, it sounds a little exaggerated. On the other hand, immediately thereafter, the policy purpose of this statement is made clear by the author himself, and this consideration sounds convincing: While the United States have repeatedly made important contributions to the formation of international institutions and legal frameworks, they afterwards, more often than not, took a step back, refusing to ratify these instruments or apposing far-reaching reservations to the act of ratification. By emphasizing that these instruments are a genuine expression of the American spirit (while isolationism is not) Carter hopes to achieve broader commitment to international law in the US. For Carter, this commitment is an expression of 'enlightened self-interest'.

In an intelligent contribution on 'The Necessity of International Law', Sergio Dellavalle points out that the neo-conservative school, now of great relevance in particular in the US, is also hegemonic in its ambition, but with a specific characteristic which differentiates it from previous hegemonic approaches. While 'classical' hegemonism as espoused by Carl Schmitt and Samuel Huntington never bore true global aspirations (at 110), this has changed with authors like Robert Kagan, who asserts the superiority of Western (American) values (at 111). For Dellavalle this attitude is a source of continuous

conflict. Here, the necessity for international law becomes evident. It must make sure that the universality of rights and values is less a result than a precondition. It should be the product of a discursive process 'including all really and potentially interested individuals and groups' (at 116).

Perhaps this whole problem has lost some of its urgency as it was closely associated with the politics conducted by the last US administration. Dellavalle points to the need to universalize Western values and not merely to globalize them. This seems to be a sound proposal but it will not be easy to implement it. What appears easy to distinguish on paper may often be interchangeable in practice.

Karin Oellers-Frahm writes on 'The Evolving Role of Treaties in International Law'. Starting from the basic assumption that consent is the central aspect of treaty law, she proceeds to draw a variegated picture of the ways in which treaty obligations are differentiated, interpreted, and further developed. In this context she gives new prominence to the old concept of 'law-making treaties' which is often and unjustly rejected in modern international law textbooks. At the same time she demonstrates how progressive development of international law comes to blur the line between treaty law and customary international law. She also points out that alternative law-generating entities in international law like the UN Security Council pose a serious legitimacy challenge.

Andrew T. Guzman and Timothy L. Meyer turn to an evergreen of international law literature: the modern relevance of customary international law. While usually codification is portrayed as the passage from customary international law to treaty law and as a phenomenon which must necessarily reduce the relevance of the former, Guzman and Meyer argue convincingly that codification actually further enhances the relevance of customary international law. In fact, both sources interact with and consolidate each other.

In 'Transnational Networks and the International Public Order', Jenia Iontchweva

Turner makes use of a concept developed by political scientists. They have evidenced that foreign affairs are very much influenced by 'sets of direct interaction among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments'.⁴ Such networks can be horizontal or vertical in structure – the first are 'alliances among peers in government agencies of different countries', the second relate to international organizations and make 'individual government institutions responsible for the implementation of rules created by a supranational institution' (at 415).

Many phenomena can be explained through recourse to this concept: the reciprocal coordination of international tribunals, deference of international tribunals to core provisions of national law in order to avoid conflict,⁵ and the doctrine of subsidiarity. At the same time however, it is to be said that this whole development is still very much in flux and the concept of transnational networks is still much closer to political science than to law in the proper sense.

If talk turns to progress in international law (or, more modestly, to modern developments in this area of law) much importance is usually attributed to the rising relevance of judicial settlement of disputes. This aspect has been broadly treated in this volume. Two contributions in this field stand out: 'Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts' by Cesare P.R. Romano and 'Triumph of Progress: The Embrace of International Commercial Arbitration' by Mary A. Bedikian. Romano in his contribution again gives evidence of his profound knowledge of the international

judiciary. Approaching this issue from a comparative vision he manages to provide interesting new insights. His statement that '[a]dvisory jurisdiction has allowed the ICJ to make foray into terrain generally considered to be the preserve of politics' is presently again confirmed by the request for an opinion on the secession of Kosovo.⁶

Mary A. Bedikian, on her part, gives an informative overview of modern international commercial arbitration, a matter often widely neglected in international law textbooks. She convincingly argues that there is a great future for this subject.

Another important subject repeatedly addressed in this volume is the legitimacy and the legality of the use of force. In this context, this reviewer would like to give particular attention to the contribution by Abraham D. Sofaer, entitled 'International Security and the Use of Force'. Sofaer starts with an inquiry into the reasons for the League of Nations' failure. He argues that the main reason was too much leniency and forbearance towards dictators whereby violence and abuse were finally tolerated. He deplores similar developments in the modern UN system and therefore argues for more 'Charter-based' intervention. It goes without saying that this is a very problematic position, both from a theoretical, academic point of view⁷ and from a political perspective. While there is a broad literature on

⁴ Cf. at 409 where the author cites Keohnae and Nye, 'Transgovernmental Relations and International Organization', 27 *World Pol.* (1974) 39, at 43.

⁵ In this context the author (at 423) mentions the doctrine of 'margin of appreciation' applied by the European Court of Human Rights.

⁶ See Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories', 8 *Chinese Jnt'l L.* (2009) 47.

⁷ See Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?', 12 *EJIL* (2001) 437 and, with regard to the attempt to re-establish a new 'responsibility to protect', Hilpold, 'The Duty to Protect and the Reform of the United Nations – a New Step in the Development of International Law?', 10 *Max Planck Yrbk UNL* (2006), at 35–69.

For a cautious, balanced approach with regard to the discussion on the Use of Force with the UN system see also Paulus, 'Between Incapacity and Indispensability: The United Nations and International Order in the 21st Century', in the volume here under review, at 289.

the first aspect, it is often overlooked that the strongest impediments to interventions are frequently less legal considerations than the lack of political will.⁸ The creation of a 'Charter-based' right to intervention (an approach this reviewer considers to be fallacious from a technical point of view) would not change much with regard to this problem. The proposal to interpret Article 51 of the Charter extensively should be met with similar scepticism. On the whole, Soafer tries to promote a more pro-active attitude by states and groups of states in order to guarantee international peace and security. It cannot be contested that such an attitude was much in vogue at the beginning of this century, but nor can it be overlooked that, in the meantime, prudence prevails.

More resolve is further required by Ordre F. Kittrie in his contribution, 'Progress in Enforcing International Law Against Rogue States?: Comparing the 1930s with the Current Age of Nuclear Proliferation'. He evidences that the non-proliferation regime has been quite successful until recently. In the meantime, however, too much passivity has created a series of new threats which will be hard to come by in the future. This contribution contains very interesting details on non-proliferation – information only an insider could provide.

On the whole, it can be said that this book is unique not only in its theoretical approach but also in the wealth of information and different theoretical concepts it provides. As a teacher of international law, I regularly consult new textbooks on the search for new approaches I can pass on to my students. Very often, however, I am disappointed. Here we are confronted with a book full of contrasts, but also full of optimism and new ideas. I think it is an ideal source of inspiration for motivated teaching.

Individual Contributions

Introductory Materials:

José E. Alvarez, Foreword: Progress in International Law; *Russell A. Miller and Rebecca M. Bratspies*, Progress in International Law – An Explanation of the Project;

Part One Progress in International Law – A Contemporary Assessment;

Jordan J. Paust, Evidence and Promise of Progress: Increased Interdependence, Rights and Responsibilities, Arenas of Interaction, and the Need for More Cooperative Uses of Armed Force;

Barry E. Carter, Making Progress in International Institutions and Law;

Part Two History and Theory of International Law;

Alexandra Kemmerer, The Turning Aside. On International Law and Its History;

Sergio Dellavalle, The Necessity of International Law Against the A-normativity of Neo-Conservative Thought;

Ed Morgan, Yom Kippur in Hell: The Empty Life of International Law;

Christian Walter, Progress in International Organization: A Constitutional Reading;

Daniel Luker, On the Borders of Justice: An Examination and Possible Solution to the Doctrine of *Uti Possidetis*;

Part Three The Sources of International Law and their Application in the United States;

Karin Oellers-Frahm, The Evolving Role of Treaties in International Law;

Andrew T. Guzman and Timothy L. Meyer, Customary International Law in the 21st Century;

Alex Glashausser, Treaties as Domestic Law in the United States;

Julian G. Ku, The 'Unsatisfactory Condition' of Customary International Law in the United States;

Part Four International Actors;

Florian Hoffmann, In Quite a State: The Trials and Tribulations of an Old Concept in New Times;

⁸ See Wheeler and Egerton, 'The Responsibility to Protect: "Precious Commitment" or a Promise Unfulfilled?', 1 *Global Responsibility to Protect* (2009) 114, at 128.

- Andreas Paulus*, Between Incapacity and Indispensability: The United Nations and International Order in the 21st Century; *Karen Kaiser*, Coordination of International Organizations – Intellectual Property Law as an Example: Can There Be Safety in Numbers?;
- Leila Nadya Sadat*, Individual Progress in International Law: Considering Amnesty;
- Monica Schurtman*, The Challenges of Evaluating NGO 'Success' in Cross-Border Rights Initiatives;
- Russell A. Miller*, Paradoxes of Personality; Transnational Corporations, Non-Governmental Organizations and Human Rights in International Law;
- Jenia Iontcheva Turner*, Transnational Networks and the International Public Order;
- Part Five* International Jurisdiction and International Jurisprudence,
- Cesare P. R. Romano*, Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts;
- Betsy Baker*, The 'Precedential Judge Hudson'? Rivers, Oceans, Equity, and International Tribunals;
- Melissa A. Waters*, The Role of Transnational Judicial Dialogue in Shaping Transnational Speech: International Jurisdictional Conflicts in Hate Speech and Defamation Law;
- Kelly Parker*, Expanding Influence: Regional Human Rights Courts and Death Penalty Abolition;
- Mary A. Bedikian*, Triumph of Progress: The Embrace of International Commercial Arbitration;
- Part Six* The Use of Force and the World's Peace;
- Abraham D. Sofaer*, International Security and The Use of Force;
- Brian J. Foley*, Reforming the Security Council to Achieve Collective Security;
- Margaret E. McGuinness*, Security Multilateralism: Progress and Paradox;
- Petr Válek*, Legality versus Legitimacy and the Use of Force;
- L. Waldron Davis*, The Phantom of the Neo-Global Era: International Law and the Implications of Non-State Terrorism on the Nexus of Self-Defense and the Use of Force;
- Orde F. Kittrie*, Progress in Enforcing International Law Against Rogue States?: Comparing the 1930s with the Current Age of Nuclear Proliferation;
- David Kaye*, Complexity in the Law of War; *Part Seven*: Challenge of Protecting the Environment and Human Rights;
- Stephen C. McCaffrey*, International Organization and the Environment;
- Mayo Moran*, Recourse to International Human Rights: Challenges to the Traditional Paradigm;
- Hari M. Osofsky*, A Right to Frozen Water? The Institutional Spaces for Supranational Climate Change Petitions;
- Amy Sinden*, The 'Preference for Pollution' and other Fallacies, or Why Free Trade Isn't 'Progress' Absent the Harmonization of Environmental Standards;
- María Pía Carazo*, Enhancing Human Rights Protection through Procedure: Procedural Rights and Guarantees Derived from Substantial Norms in Human Rights Treaties;
- Rebecca M. Bratspies*, Reconciling the Irreconcilable: Progress Toward Sustainable Development;
- Penelope E. Andrews*, Incorporating International Human Rights Law in National Constitutions: The South African Experience;
- Li Chen*, The New World Trading System and China;
- William E. Borah*, Appendix: Address at the Inauguration of the William Edgar Borah Foundation for the Outlawry of War;
- Manley O. Hudson*, Progress in International Organization – 'Introduction' and 'The Measure of Progress in International Organization' (Republication).

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