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How is Progress Constructed in International Legal Scholarship?

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Abstract

There is a tendency in international legal discourse to tell the story of international law as a story of progress. 'Progress' is a concept which is tied to the process of secularization and Western 18th and 19th century philosophy. It still inspires the debate on international law – despite all setbacks in 'real history'. This article argues that progress narratives in the international legal discourse are constructed by – more or less subtle – argumentative techniques. It highlights four such techniques – four 'bundles of arguments' – which play a key role: ascending periodization, proving increasing value-orientation of international law, detection of positive trends, and paradigm shift-talk. The article offers an explanation of why the progress argument often succeeds in international legal discourse.

Introduction

The idea of progress is omnipresent in international legal discourse. Despite all shortcomings of global 'real life', despite all deficiencies of international law, the general outlook on the development of our discipline remains remarkably optimistic. This is not to say that scepticism of international law has altogether vanished from the debate.[1] However, not even grave violations of most fundamental rules of international law seem to have a major impact on the belief in the possibility of progress. Neither open contempt of international humanitarian law in countless post-colonial civil wars nor the gloomy uncertainty with respect to potential use of weapons of mass destruction is viewed as an expression of the state of the international system in general. Grave breaches of international law are typically perceived as 'deviant behaviour'. The conviction that there is progress in international law and that international law contributes to progress in a general sense is, on the whole, predominant and sets the tone of discussion.

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[1] For a valuable differentiation between an optimistic and a sceptic school and its adherents in international legal theory see Fassbender, 'Optimismus und Skepsis im Völkerrechtsdenken der Gegenwart', 65 *DÖV* (2012) 41.

Reference to progress takes many different forms in international legal scholarship.[2] The creation of new international institutions or the elaboration of new codifications is typically viewed as an instance of progress in international law.[3] Some authors refer to progress when they justify a specific political or research agenda,[4] and some remind us 'not to underestimate' progress in international law.[5] Many texts make only implicit references to progress, though. Some authors argue, for example, that international law is 'inspired' by the project of the Enlightenment, without, however, justifying the reference.[6] Their progress claim is implicit. In our view, international legal scholarship cannot escape the question of progress. We believe that the problem of progress is central to our discipline, for self-conscious daily academic work and, no less, for the discipline's self-perception.

Two recent studies have addressed the topic. Thomas Skouteris, in a study of 2010, concluded that much international legal research follows a 'binary structure' which prejudices the question of progress.[7] The formulation of research topics such as 'from fragmentation to standardization' or 'from absolutism to democracy' creates a bias in favour of progress. Skouteris sees the ultimate aim of such research designs in the wish to keep control over the discourse.[8] He claims also that the introduction of new standards is *per se* treated as progress and that international lawyers must be regarded as 'engineers' of progress.[9] David Koller, in an article published in 2012, suggests giving up the search for 'deep structures' of the international order.[10] Most scholars – so the argument runs – seem to assume a linear development towards progress which is typically expressed in 'from … to' research designs, such as those just mentioned. In Koller's view, the changes of international law could and should be depicted neither as linear progress nor as a circular development.

This article analyses how progress narratives are constructed in international legal scholarship and why (some) progress arguments are successful in the discourse.[11] We are interested in how progress is argued in texts of international legal scholarship and in the conditions of success of such arguments. Which are the typical ways

2 T. Skouteris, *The Notion of Progress in International Law Discourse* (2010), at 6 (with examples).

3 See, e.g., R.A. Miller and R.M. Bratspies (eds), *Progress in International Law* (2008).

4 Pair, 'The New ICC Rule on Consolidation: Progress or Change?', 25 *Emroy Int'l L Rev* (2011) 1061; M. MacGarvin, *Health and Environment in Europe: Progress Assessment* (2010); Pfirter, 'The Chemical Weapons Convention: Progress to Date', *23 Hague Yrbk Int'l L* (2011) 91.

5 D. Thürer, *International Law as Progress and Prospect* (2009), ii, at 1.

6 Dupuy, 'International Law: Torn between Coexistence, Cooperation and Globalization: General Conclusions', 9 *EJIL* (1998) 278, at 284.

7 Skouteris, *supra* note 2, at 219.

8 *Ibid.*, at 222–226.

9 *Ibid.*, at 219.

10 D. Koller, '… and New York and the Hague and Tokyo and Geneva and Nuremberg and … The Geographies of International Law', 23 *EJIL* (2012) 97.

11 Our use of the term 'narrative' needs an explanatory remark. Following the historian Lawrence Stone, we use it as a synonym for a chronologically organized 'story' of the topic of interest with the ambition of coherent description. We do not use it in the sense authors working in the tradition of post-structuralist philosophy do when they seek to discover underlying 'discourse structures'. See Stone, 'The Revival of Narrative: Reflections on a New Old History', 85 *Past and Present* (1979) 3.

to organize arguments in such a way that international law is depicted as a story of progress? Why do we accept certain progress arguments? We shall distinguish, on the basis of an extensive analysis of literature, four 'techniques' which are employed in the construction of progress narratives. We are not concerned with the question whether there *is* progress or not. We will try neither to prove nor to deny the existence of progress. Our concern lies with international legal scholarship's way of dealing with progress.

Our own perspective can broadly be called constructivist. Constructivism is, of course, a term which lends itself to several meanings.[12] Our perspective is strongly influenced by key assumptions of social constructivism which we shall outline briefly here. Social constructivism claims that the social reality we inhabit, including the international sphere, is to a large extent 'socially constructed'; it is constructed by the means of commonly shared knowledge, so-called 'intersubjective knowledge'.[13] Many – though not all[14] – facts of the social world are created by *social practices*: by speech acts, socialization, social learning, regimes of truth, etc. Such practices generate, confirm, and change intersubjective knowledge. They have 'constitutive effects' on the social reality; they create it.[15] A lot of what we perceive or experience as 'social facts' – marriage, money, international law, etc. – is, as the founding fathers of social constructivism would put it, 'reified' (meaning essentialized) intersubjective knowledge.[16]

The international legal discourse takes part in this process of permanent construction and reconstruction of the social reality. It is part of the social practices which furnish the world we live in. It is part of the constant struggle for the right language, of the competition between speech acts which attempt to create essentialized knowledge. To give an example, international lawyers who claim that human rights can only be universal try to create specific intersubjective knowledge.[17] They try to provide it with the status of a social fact, and they have reached their goal when the knowledge (or idea) is commonly shared that human rights can only be universal. In our perception, a constructivist world view has the advantage of being highly sensitive to the process of 'creating' the intellectual world, of the world of ideas which guides us, and it understands the international lawyer as an engaged constructor

[12] For a brief (and still incomplete) survey of the many meanings of the term constructivism see Karber, '"Constructivism" as a Method in International Law', 94 *ASIL Proceedings* (2000) 211, at n. 1. Also illuminating is Pouliot, 'The Essence of Constructivism', 7 *J Int'l Relations and Development* (2004) 319.

[13] A proponent of constructivism in the field of international relations, Stefano Guzzini, held that 'constructivism ... is epistemologically about the *social construction of knowledge*, and ontologically about the *construction of social reality*': Guzzini, 'A Reconstruction of Constructivism in International Relations', 6 *European J Int'l Relations* (2000) 147, at 160 (emphasis by the authors).

[14] Not all facts of the social reality are constructed. One can distinguish, following John Searle, between 'brute facts' (physical facts such as, e.g., human mortality) and 'institutional facts' (facts which cannot be appropriately described by mere reference to physical aspects but which require a human institution for their existence, such as, e.g., political authorities, social roles, etc). See Searle, 'Social Ontology and the Philosophy of Society', 20 *Analyse & Kritik* (1998) 143, at 151.

[15] See, e.g., Adler, 'Constructivism and International Relations', in W. Carlsnaes *et al.* (eds), *Handbook of International Relations* (2002), at 95.

[16] See the classical text by P. Berger and T. Luckmann, *The Social Construction of Reality* (1966).

[17] See also J. Searle, *Making the Social World. The Structure of Human Civilization* (2012), at 174.

of social reality. Here, we are interested in how international lawyers engage in the construction of the idea of progress.

The article proceeds as follows: section 1 traces the idea of progress as a cultural and philosophical concept. Section 2 contains an analysis of techniques employed to create progress narratives in international legal scholarship. We shall highlight those four techniques which, according to our analysis, dominate the international legal discourse: ascending periodization, proving increased value-orientation of international law, detection of positive trends, and paradigm shift-talk. For a progress argument to be successful, it relies, as we argue, on strategic, largely uncontested assumptions regarding key social phenomena. Section 3 sheds light on four such strategic assumptions.

1 Progress and International Law

A *What is Progress?*

Progress of international law is not amenable to proof like empirical facts. What, then, is progress?[18] For the purpose of this article, we want to highlight three core elements of the concept. First, statements on progress entail statements of comparison. 'Progress' is, thus, a relative concept. Development A can be qualified as progress only if it is compared with at least one other development, B. Secondly, the idea of progress is linked with assessing the past. Statements on progress are always statements on how we interpret the past, which meaning we attribute to it. Statements on progress are reflections *on* the past, not reflections *of* it. They link our view of the past with our view of the present and the future. 'Progress' is, thus, an interpretive scheme. Thirdly, statements on progress are never neutral. Even if they may appear so on their surface, they express certain values. They are always value-based. They have their own and often hidden agenda.

B *Progress in Socio-Political Contexts*

The idea of progress is used in a variety of contexts. It is typically and intuitively referred to when we talk about new technologies and inventions. In this context, it means 'technological innovation'. The notion is also used in fields where we would not necessarily expect it, for example in the fields of art and aesthetics. Here, it has the meaning of an advancement towards an ideal.[19] Particularly important for our purpose is its use in socio-political contexts. Here, the notion is, interestingly, often employed without further clarification about its content.

The yardstick for measuring social or political progress is far from being clear. How can we assess progress of society or even of the human civilization in general?[20]

[18] For a thorough analysis of the conceptual history see Koselleck, 'Fortschritt', in O. Brunnner *et al.* (eds), *Geschichtliche Grundbegriffe* (1975), ii, at 351.

[19] For the relationship between progress and arts see M. Doorman and S. Marx, *Art in Progress: A Philosophical Response to the End of the Avant-Garde* (2003), at 143.

[20] See the so-called 'Stiglitz-Sen-Fitoussi-Report' of 2009: J. E. Stiglitz *et al.*, 'Report by the Commission on the Measurement of Economic Performance and Social Progress' (2009).

Questions of this kind become central when we talk about progress in the international sphere. We may have an intuition about whether or not there is progress when we are confronted with a specific situation or development, but the question becomes terribly complicated when we need to name criteria to assess a certain development. Should we use Mahatma Gandhi's yardstick according to which the civilizational standard of a society is determined by the situation of the weakest members? Or should the average level be the decisive criterion? These brief remarks may suffice to show that there are many conceptions of social progress which can claim intuitive plausibility.[21]

C *Heritage of the 18th and 19th Centuries*

The idea of progress in history is closely tied to Western modern thinking. The 18th century in particular brought about a specific constellation which is central for our purpose. The century was marked by fast scientific, technological, and social change and the demise of the authority of the theological world view. The religious idea that the course of the world is determined by a transcendent God rapidly lost its persuasive power and gave way to the rise of the modern consciousness that historical situations might be specific or unique. This is referred to as the 'modern consciousness of historicity'. The French revolution reinforced this perception. It promoted the idea that the world can no longer be seen as a place of constant recurrence of the same. The rise of the consciousness of historicity brought about new questions about the direction and the driving forces of history. In this constellation, the modern concept of progress arose. We shall first describe the theoretical options to deal with the question of the direction of history, which is central for our topic, and then briefly look at some particularly influential answers to the question of history's driving forces.

There are four possible ways of modelling the direction of history. Historical change can be interpreted as change for the better (progress), change for the worse (decline), as possessing no determinable direction (contingency), or as following a cyclical pattern. Eighteenth and 19th century philosophy of history and also early sociology mostly gave preference to the progress view. The German philosopher Friedrich Wilhelm Joseph Schelling (1775–1854), for example, held that everything 'which is not progressive' is 'not the object of history'.[22] In the time of the Enlightenment, when history itself became the object of philosophical enquiry, there was an inclination to assume a 'law of progress'. The idea of progress in a way filled the gap of orientation left by the demise of the theological world view. It took on the role of a consoling secular substitute for the abandoned theological interpretation of the world.[23]

[21] On the classical distinction between 'concept' and 'conception' see Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', 21 *Law & Philosophy* (2002) 137, at 150.

[22] Schelling, 'Aus der "Allgemeinen Übersicht der neuesten philosophischen Literatur"', in F.W.J. Schelling, *Works* (1958 [1797/98]), i, at 394.

[23] See, e.g., the statement by the French author Bernard le Bovier de Fontenelle (1657–1757) that it is – irrespective of the reality – beneficial to imagine the future as promising. See Jauss, 'Ästhetische Normen und geschichtliche Reflexion in der "Querelle des anciens et des modernes"', in H.R. Jauss (ed.), *Parallèle des anciens et des modernes* (1964), at 21.

Other views which denied the progress of history also existed, but they remained, on the whole, views of a minority. The old and formerly powerful idea that history follows a cyclical pattern, which had its adherents in almost any age, from Polybius (c. 200–118 B.C.) to Francesco Giuccardini (1483–1540), was no longer appealing against the background of the rapid changes.[24] The idea of history as a contingent process also found adherents, particularly in 19th century historiography. Leopold von Ranke (1795–1886), for example, one of the great historians of the age, held that historical developments, as a whole, are neither progressive nor regressive.[25] He regarded history as fully contingent. The indeterminacy of this position collided, however, with the predominant belief of the age that there are 'laws' of history and the social world as there are laws of nature. The fourth position – that history is conceived of as a process of decline – also found adherents, but it remained the view of a minority, too.

With respect to the question of the 'driving forces' of history, a wide range of answers was suggested. Many of these answers had a great impact on Western social and political theory in the 19th and 20th centuries.[26] G.W.F. Hegel argued that nations and states are 'unconscious agents' of progress.[27] He viewed progress as a consequence of the 'law of dialectics'. Early sociology installed grand narratives of progress which influenced later generations of social and political theorists. The works of authors such as Auguste Comte, Karl Marx, Herbert Spencer, and Emile Durkheim are characterized by a shared belief in the progress of history which results from impulses such as an increase of knowledge (Comte),[28] class struggle (Marx),[29] or division of labour (Spencer, Durkheim).[30]

The heritage of the 18th and 19th centuries is still alive today, despite all setbacks in 'real history'.[31] Competing views – for example: that there exist fatal forces resulting from the 'Dialectics of the Enlightenment' – have always been present, but they never became predominant. In particular, the idea of progress has survived, as Jürgen Habermas states, all disasters of the 20th century.[32] It still compensates for losses of purpose, coherence, and values caused by secularization. It is possibly something like

[24] The cyclical concept also found some modern adherents, such as Oswald Spengler and later proponents of cyclical economic theories. The view, however, did not become predominant again. See, e.g., O. Spengler, *Der Untergang des Abendlandes* (The Decline of the West) (1918).

[25] L. von Ranke, *The Theory and Practice of History* (ed. G.G. Iggers and K. von Moltke, 2011 [1854]), at 21.

[26] G. Delanty, *Inventing Europe: Idea, Identity, Reality* (1995), at 90.

[27] G.W.F. Hegel, *Philosophy of Right* (2003 [1820]), at 373, para. 344.

[28] A. Comte, *Introduction to Positive Philosophy* (ed. F. Ferré, 1988 [1830]).

[29] See Marx, 'A Critique of Political Economy', in D. McLellan (ed.), *Karl Marx: Selected Writings* (2nd edn, 2000 [1859]). On Marx's interpretation of history see G.A. Cohen, *Karl Marx's Theory of History: A Defence* (2nd edn, 2001); J. Wolff, *Why Read Marx Today?* (2002).

[30] The work by Herbert Spencer had a significant impact on the Anglo-Saxon liberalism of his age. Emile Durkheim's sociology provided the basis for the powerful 'Durkheim school' in France, which influenced international legal scholars such as George Scelle and sociologists of later generations such as, in particular, Talcott Parsons on whose theory Niklas Luhmann built.

[31] For a contemporary manifestation see, e.g., F. Fukuyama, *The End of History and the Last Man* (1992).

[32] J. Habermas, *The Philosophical Discourse of Modernity* (1987).

a modern myth which is neither necessarily true nor false, but which has developed its 'own truth'.[33] It helps to experience the world as stable.[34]

D *Law and Progress Narratives*

What is the role of law in this development? Law is traditionally attributed a key role in Western progress narratives. The roots of the strategic position of law in society and conflict resolution date back beyond the Enlightenment period. Two factors deserve mention here. First, there is the influence of the highly developed Roman law on the advancement of Western societies and legal systems.[35] Other, non-Western cultures were and still are less law-centred.[36] The second factor contributing to the key role of law builds on the relationship between the individual and God in a monotheistic religion. Here, i.e., in Christianity, Judaism, and Islam, strong rules and abiding by them play a central role. Rule-compliance is essential for the relationship between man and God.[37] Law abidance connects man with God who turns into a punishing God if the rules are not observed. The role of rule compliance in the monotheistic Christian religion was perfectly compatible with the law-centredness of the Roman law-based Western culture.

The Enlightenment could build on this ground. Enlightenment authors elaborated on the close connection between progress and law. Kant held, with far-reaching impact, that progress in history can only be conceived of as 'legal progress'.[38] He suggested an *inextricable* link between law and progress.[39] Kant's idea fits well with the dominant role of law in the Western culture. It provided modern and secular support for what can be called the 'law as progress' view.[40]

[33] R.A. Segal, *Myth* (2007), at 20.

[34] Myths reduce complexity and have a consoling effect, but they also tend to immunize attitudes and meanings against challenges by the 'outside world'. The German philosopher Hans Blumenberg held that myths respond to a deep human fear in a contingent and often disconcerting world: see H. Blumenberg, *Arbeit am Mythos* (2006), at 40.

[35] Wieacker, 'The Importance of Roman Law for Western Civilization and Western Thought', 4 *Boston College Int'l & Comp L Rev* (1981) 257.

[36] The law-centredness of a culture is revealed, *inter alia*, by the significance of legal norms for the process of conflict resolution. Middle Eastern cultures, e.g., rely more on bargaining and have a greater aversion to legal intervention in a conflict than law-centred Western cultures. See, e.g., Abu-Nimer, 'Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities', 55 *Am J Econ and Sociology* (1996) 35.

[37] Jan Assmann states that monotheistic religions sanctify their primary texts – which contain the rules for a good life and the relationship with God – whereas the world 'out there' is downgraded: J. Assmann, *Die mosaische Unterscheidung oder Der Preis des Monotheismus* (2003), at 147.

[38] Kant, 'Idea for a Universal History', in H. Reiss (ed.), *Kant's Political Writings* (2nd edn, 1991 [1784]), at 41. Kant had a specific understanding of the notion 'legal progress' which got lost in the reception process. He regarded 'legal progress' as progressive deployment of natural law. See also *infra* sect. 3A.

[39] Kant himself never pronounced on whether or not there really *is* progress in history. His epistemology is not compatible with such ontological statements. See, in detail, *infra* sect. 3A.

[40] Various objections can be raised against the 'law as progress' view. The problem of 'bad law' will be discussed *infra* in sect. 3B. A further problem can be called the de-solidarization-by-law problem which has recently been described by Axel Honneth. Excessive reliance on law can go hand-in-hand with a degeneration of the sense of solidarity: A. Honneth, *Das Recht der Freiheit* (2011), at 157–172.

Countless works of international law build on the idea of 'law as progress'. Take, for example, Manley O. Hudson's classical work, *Progress in International Organisations*, of 1932.[41] Hudson treated the growth of international organizations as an embodiment of progress. Another more recent example is Malcolm N. Shaw's standard treatise on international law. Shaw writes that in the long march of mankind 'from the cave to the computer' the idea of law has always played 'a central role'.[42] The central idea of Immanuel Kant's philosophy of history, thus, became particularly influential in the international legal discourse.

2 Techniques for Constructing Progress Narratives

We shall now analyse how progress narratives are constructed in international legal discourse. Our analysis is based on scholarly legal texts which – explicitly or implicitly – deal with the problem of development in the field of international law.

An examination of this literature shows that progress is argued for with the help of four 'techniques': ascending periodization, proving increasing value-orientation of international law, detection of positive trends, and paradigm shift-talk. The aim of this section is to describe how progress arguments are typically organized or constructed in these texts. The four 'techniques' can be described as more or less subtle rhetorical arrangements in which the progress argument is couched. The empirical basis for progress arguments is, as we will see, often thin. However, we are not interested in whether the techniques are scientifically sound. Our aim is to highlight those which are employed in the discourse. In our view, the success of the progress argument depends neither on the technique applied to convey the message of progress nor on the level of subtlety of the argument. The success of progress arguments, as we argue, is mainly owed to the plausibility of certain 'strategic' assumptions which underlie the argument. We shall first present the techniques and then, in section 3 below, address four of these assumptions.

A *Ascending Periodization*

We call the first technique 'ascending periodization'.[43] Progress narratives can be created by cutting the history of international law into two or more periods and giving the most recent period the most favourable label. The technique sounds simple. The operation of interest here – the creation of a progress narrative – is not always made explicit. It often remains hidden, typically behind the use of 'established' periods which tend to appear as 'objective' units. Established periods seem to reflect the 'reality' of

[41] M.O. Hudson, *Progress in International Organisations* (1932).

[42] M.N. Shaw, *International Law* (3rd edn, 1994), at 1.

[43] On the periodization of the history of international law see Diggelmann, 'The Question of Periodization of the History of International Law', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012), at 997–1011; Butler, 'Periodization and International Law', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011), at 379.

international law's development.[44] Periodizations such as 'the era of the Westphalian state system' or the 'interwar-period', for example, may serve as examples. Periods, however, are not facts. They are suggestions to organize our knowledge of the past, created on the basis of contestable and value-based choices of facts.[45] Their aim is to facilitate the interpretation of the world. They function as 'intellectual working tools'. Periodizations are needed in order to make the amount of information manageable.

The international legal discourse offers many examples of the use of the 'ascending periodization' technique. The distinction between 'classical' and 'modern' international law is illustrative. It divides the history of international law into the periods 'before' and 'after' the rise of the partial ban on the use of force. The use of the label 'modern' for the more recent period automatically downgrades the previous era to 'pre-modernity', even if it is called, somewhat more nobly, 'classical'. The same periodization technique is employed when the history of international law is cut into the periods 'law of co-existence', 'law of co-operation', and 'international law as a comprehensive blueprint for social life', as suggested by Christian Tomuschat.[46] 'Coexistence' is certainly not the worst form of association. It suggests that there is no permanent war and that there exists some form of common interest. 'Cooperation' is, however, already better, refers to a higher level of association and rationality, while 'law as a blueprint for social life' refers to an even more advanced level. A further, rather blunt but telling example is the distinction between the two periods 'Out of the Mists' and 'Into Clear View' suggested by Douglas M. Johnston.[47] The author justifies this periodization by arguing that humanity is capable of learning from the past.

A variant of the technique is the use of the dichotomy old/new. Old/new vocabulary sounds unambitious and less freighted with contested notions than other dichotomies such as modern/classical or modern/pre-modern. Anne-Marie Slaughter, for example, employs the old/new dichotomy in her seminal work, *A New World Order*. There, she elaborates on the idea of 'disaggregated states' which she regards as typical for the new order.[48] She holds that the 'old model' of the international system assumes unitary states – negotiating formal legal agreements with one another – whereas the 'new model' is characterized by intensive interactions of government officials who adopt codes of best practices and work on coordinated solutions to common problems.[49] We are not interested in the accuracy of the description here. The point of interest is the use of the old/new dichotomy. In principle, she does the same as the authors who employ the modern/classical distinction. She suggests a periodization of international law – the time axis is cut into the eras of the old and the new model – and

[44] Established periods owe their privileged status to the fact that they have proved meaningful as timeframes for historiographical work for a relatively long time: Diggelmann, *supra* note 43, at 999–1001.

[45] The German historian Johann Gustav Droysen stated that in history there are no epochs as there are no lines on the Equator and on the meridian circles: J.G. Droysen, *Texte zur Geschichtstheorie* (1972 [1857/58]), at 20.

[46] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *RdC* (1999/2001) 9, at 56.

[47] D.M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (2008), at 143, 321.

[48] A.-M. Slaughter, *A New World Order* (2004), at 12.

[49] *Ibid.*, at 263.

conveys the progress message by the labelling of the periods. The operation becomes fully visible when we consider the alternatives. She could also speak of the 'era of the unitary negotiating state' and of the 'era of the disaggregated state'. These labels are more neutral. The choice of the dichotomy 'old/new' provides a clear spin to her argument. Another author employing the old/new dichotomy is Philip Allot. He describes 'old international law' as the mode of modest self-limitation, whereas 'new international law' is the law of 'universal legislation'.[50]

B *Proving Increasing Value-Orientation*

The second technique is to 'prove' or to point to increasing value-orientation of international law. Authors employing this technique typically 'scan' documents of international law for indications which can be interpreted as expressions of shared ethical convictions.[51] They are interested in value-sensitive legal materials of all kinds – law-making treaties, court decisions, customary law, soft law – and in treating them as indications of progress or as enabling future progress. The technique builds on the idea that value-oriented international law is 'better' law than a morally (seemingly) neutral law. The idea gains plausibility against the background of the experiences with a value-neutral understanding of law in the World War II era. The technique is not necessarily linked with explicit claims of progress. Such claims are implied in the undertaking as such, in the tonality or in the omission of counter-evidence.

One can distinguish two main variants of the technique (which are often combined though). Some authors base their progress argument on the detection of community elements in international law.[52] The base-line of the argument is the idea that the society of states advances towards a universal community, characterized by common values, goals, and interests. The quest for community elements draws on the classical distinction between 'community' and 'society'.[53] Bruno Simma and Andreas Paulus, for example, claim that nowadays there exists a 'real' international community with common values, whereas earlier the notion was used for common interests of the powerful.[54] Simma and Paulus consider the shared interests to be a healthy environment, human rights, economic solidarity, and sustainable development. The second variant of the technique to argue for progress by proving increasing value-orientation is to point to the expansion of human rights. Human rights are treated as universal ethical imperatives whose expansion means progress. Authors employing this approach typically list a number of important human rights instruments, starting with the Universal Declaration of Human Rights all the way to the latest convention, and they point to the increasing influence of human rights in fields formerly unrelated to human rights

[50] Allot, 'The Emerging Universal Legal System', 12 *Int'l L Forum du Droit International* (2001) 15, at 16.

[51] See, e.g., Thürer, 'Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanken als Kraft der Veränderung?', in D. Thürer, *Völkerrecht als Fortschritt und Chance* (2009), at 29.

[52] For the development and cultural roots of the community-concept see Vogl, 'Einleitung', in J. Vogel (ed.), *Gemeinschaften: Positionen zu einer Philosophie des Politischen* (1994), at 7.

[53] F. Tönnies, *Community and Civil Society* (2001 [1887]).

[54] Simma and Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *EJIL* (1998) 266, at 272.

or to an expansion in the list of protected rights.[55] International economic law and the law of diplomatic relations, for example, are depicted as evolving from human rights-neutral fields of international law to human rights-sensitive areas.[56]

C *Detection of Positive Trends*

The third technique can be called the 'detection of positive trends' technique. It creates progress narratives 'out of the present', out of current or very recent developments and events. Authors employing the technique treat the trends they detect as if they were reliable forerunners of important general developments. The technique employs a relatively modest vocabulary. 'Trend-talk' is not overly pretentious, it creates an atmosphere of the provisional and correctable, appears open to new developments, and avoids speculation about ultimate finalities and objective truths. 'Trend-talk' is a soft and elegant way of creating promising prospects of the future. The vocabulary is borrowed from the discipline of 'future studies' which aims to make predictions on the basis of sociological and economic data.[57]

The technique has become remarkably popular in the international legal discourse. A few examples shall illustrate this. The UN Department of Economic and Social Affairs, for example, holds that there is a 'growing and positive trend' in international law and practice to extend the principle of self-determination to peoples and groups within existing states.[58] The statement combines a trend-claim with a notion we spontaneously associate with progress: the principle of self-determination of peoples. An atmosphere of general progress is created, without being overly explicit. Let us look at a second example. Walter Kälin, former Representative of the Secretary-General on the human rights of internally displaced persons, observes an 'increasing trend' to criminalize the most atrocious forms of arbitrary displacement.[59] From our perspective, it is worth noting that Kälin does not talk about individual developments and events. Instead, he asserts a trend which is a more demanding statement. It includes a modestly and provisionally formulated claim about the future. Ernst-Ulrich Petersmann, to add a further example, recognizes a 'trend' towards judicialization of dispute settlement methods in international economic law.[60] He foreshadows a judicialized future of the international system in general – the vision of many international lawyers. Trend-statements always reach beyond the evidence gathered.

[55] See, generally, for the impact of human rights on international legal discourse Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', 35 *Cornell Int'l LJ* (2002) 355.

[56] See, e.g., Hilpold, 'WTO Law and Human Rights', 10 *Chinese J Int'l L* (2011) 323; Dugard, 'Diplomatic Protection and Human Rights', 24 *Australian Yrbk Int'l L* (2005) 75.

[57] W. Bell, *The Foundations of Futures Studies* (1997); R.A. Slaughter, *Futures Beyond Dystopia: Creating Social Foresight* (2004).

[58] International Expert Group Meeting on the Convention on Biological Diversity's International Regime on Access and Benefit-Sharing and Indigenous People's Human Rights, Jan. 2007, UN Doc. PFII/2007/WS.4/9, New York, at 30.

[59] Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (W. Kälin), Human Rights Council, 5 Jan. 2010, A/HRC/13/21, at para. 70.

[60] Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?', 31 *NYU J Int'l L & Politics* (1999) 753, at 773.

'Trend-talk' has attracted considerable criticism. The critique relates to the cleavage between the modest language and the hidden claims. Trend-language is accused of being dishonest. Neil Walker, for example, denounces 'trend-talk' as a manipulative rhetorical device which lends 'additional gravitas' to particular developments in order to dignify them and to authorize further advancement in the respective field.[61] He considers statements on trends, at best, as informed guesses whose nature is deliberately concealed.

D *Highlighting 'Paradigm Shifts'*

The fourth technique can be labelled 'paradigm shift-talk'.[62] The origin and reception history of Thomas Kuhn's idea need not be discussed here. We concentrate on the role of 'paradigm shift-language' for the present purpose. The desired result – a progress narrative – is achieved by a simple operation: Two or more 'competing paradigms' are isolated to describe the development of international law, and the recently most successful is given the most favourable label. The technique resembles to some extent the 'ascending periodization' technique as labelling is crucial in both. 'Paradigm shift-talk' has, however, the advantage of being more flexible than the 'ascending periodization' technique. The notion of paradigm is relatively undetermined. It can refer to a specific mode of association (society/community paradigms), a level of cooperation (coexistence/cooperation paradigms), to specific conceptual ideas (state-centrism/anthropocentrism paradigms), or to specific value conceptions (particularism/universalism paradigms).

Armin von Bogdandy and Sergio Delavalle, for example, suggest that the theory of international law can be described as a competition between the two paradigms of 'universalism' and 'particularism'.[63] The notion of 'universalism' – as ambiguous as it is – connotes more aspirations of progressivity than the notion of 'particularism'. 'Particularism' sounds old-fashioned in the era of globalization. With such an arrangement of arguments the story of international legal theory can be told as a story of progress – without being explicit in this respect. The technique enables us to tell a story of gradual improvement of international law and nevertheless allows the discussion of 'good' and 'bad' developments. Another example is provided by Cesare Romano's description of the developments in international adjudication. Romano identifies a 'shift from the consensual to the compulsory paradigm'.[64] Evidently, the 'successful' paradigm – 'compulsory jurisdiction' – implies more progressivity than

[61] Walker, 'Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law', *EUI Working Paper LAW No. 2005/17*, at 10, available at: http://cadmus.eui.eu/handle/1814/3 (last visited 6 May 2014).

[62] Thomas Kuhn did not identify paradigm shifts with progress. He regarded paradigms as 'scientific perspectives', connected with a specific scientific world view and as a set of premises and questions. The function of a paradigm is to relieve the scientific community from the need constantly to re-examine its premises, to create a stable framework facilitating everyday scientific work, which he calls 'normal science', see T. Kuhn, *The Structure of Scientific Revolutions* (3rd edn, 2008), at 163.

[63] Von Bogdandy and Delavalle, 'The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on the Premises and Finality of International Law', 2 *Collected Courses of the Xiamen Academy of International Law* (2009), at 45.

[64] Romano, 'The Shift From the Consensual to the Compulsory Paradigm in International Adjudication, 39*NYU J Int'l L & Politics* (2007) 791.

the notion of 'consensual jurisdiction'. 'Compulsory jurisdiction' is used as a sort of synonym for the rule of law, and the idea of the rule of law – as we shall elaborate in section 3B – is intuitively regarded as the categorical opposite of violence. The paradigm shift described by Romano elaborates on a story of progress. A third and prominent example is to speak of a paradigm shift from a 'state-centred approach of international law' towards a 'more inclusive international legal order' or even an anthropocentric approach.[65] Again, the argument plays with the intuitive contrast between two key notions, 'state-centred international law' and 'more inclusive international legal order'. It tells a story of success by giving the recently more successful paradigm the evidently more favourable label.

3 Strategic Assumptions Underlying Progress Arguments

In the previous section we showed in which forms, by which techniques, progress arguments are presented in international legal discourse. In this last section, we will argue that the success of the progress arguments relies on several 'strategic assumptions'.[66] 'Strategic assumptions', as we understand them, can be described as widely accepted intersubjective knowledge with the status of *prima facie* truths. They are commonly shared knowledge which helps to reduce the complexity of the world. Such assumptions support progress claims by means of their *prima facie* plausibility. 'Strategic assumptions' are important but often undiscussed elements or even pillars of progress arguments. To give an example, the claim that there is a 'positive trend' towards judicialization discussed in section 2C derives its plausibility from the underlying strategic assumption that law and violence (understood as brute force) are opposites. There are evidently good arguments for making this assumption (e.g., historical examples, ethical reasoning), which is why the assumption is widely accepted. The assumption, however, is not 'true' in a strict sense. There exists counter-evidence which is not reflected in it (e.g., that a judgment may sometimes itself be considered 'cruel' or counter-productive). The aim of the following section is to highlight four particularly important strategic assumptions in progress narratives in the international legal discourse. Our list, of course, does not and cannot claim completeness.[67]

[65] See, e.g., Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', 4 *EJIL* (1993) 447.

[66] The question why an argument, including the progress argument, wins or loses in the international legal discourse is a complex issue. This article focuses on background meta-narratives which we consider particularly important with regard to the success of progress arguments. We recognize, though, that the outcome – winning or losing an argument in the legal discourse – also depends on other factors such as context, culture, language, or ideology, to name a few. These factors have been analysed in, e.g., the theory of narrative or theory of ideology. The authors are grateful to an anonymous reviewer for clarifying this point.

[67] In our view, the list of assumptions cannot be complete for the following reason: it depends on the author of a progress claim (in the form of one of the described techniques) which part of widely shared intersubjective knowledge he uses as a 'strategic' assumption. Thereby, with this choice, he also works on the reification of this part of intersubjective knowledge. In our view, there cannot be a 'theory of progress assumptions' which would allow one to draw up a complete and unchangeable list of progress assumptions, as the choice of an assumption is itself part of the process of construction of the social world.

A *Predominance of Positive Forces in History*

The first strategic assumption is the idea of overall predominance of positive forces in history. We touched upon this issue in a general fashion in section 1C where we traced the roots of this idea to 18th and 19th century philosophy of history and where we identified it as long-term heritage of this era in Western thinking. We explained its character as modern myth in the West and pointed to the fact that it is to some extent 'impregnated' against negative counter-evidence.

At this point, we focus on the specific role of the idea of positive forces in history as a strategic assumption in the international legal discourse. We consider it necessary, in this context, to expose briefly the contribution of Kant's work to this role. It is particularly important for our purpose as Kantian thinking prominently influences international legal scholarship to this day, for instance, in the discourse on global constitutionalism.[68] In order to understand this influence properly, we have to look briefly at the Kantian philosophy of history. Kant was essentially concerned with the relationship between history and rationality. He argued that history can be *understood* as a rational process,[69] as a process of gradual fulfilment of the demand for individual liberty and, ultimately, world peace.[70] This is the so-called 'Kantian teleology' in history. It needs to be emphasized that Kant did not claim that history *is* progress. He did not say that there really is predominance of positive forces in history, as the title of this section might suggest. Such ontological statements would have been incompatible with his epistemology.[71] Nevertheless – because of the connections he explored between history, rationality, progress, and law – he was given the role of a sort of crown witness for the idea of progress in history. The 'history as progress' view was *attributed* to Kant, as was the 'law as progress' view as he was particularly concerned with the connections between law and rationality.[72]

The 'Kantian teleology' – in the form of this vulgarized Kant interpretation – was particularly attractive for the discipline of international law. It provided a secure ground for confidence in the positive forces and law in particular. It influenced countless works of international legal scholarship in the 19th and 20th centuries which understood history, on the whole, as progress. German 19th century positivism, for example, should be understood against the background of the consoling message of

[68] See, e.g., C. Schwöbel, *Global Constitutionalism in International Legal Perspective* (2011), at 76.

[69] See Kant, *supra* note 38, at 47.

[70] Kant regarded the advancement of individual liberty and, ultimately, world peace as a consequence of man's anthropological condition. He saw an antagonism at work: human beings need to come together in society, but at the same time they resist it and thereby threaten its stability and continued existence. This constellation helps to produce a law-governed society which channels the antagonistic aspects of man. The condition of man leads him to develop his capacities, to accept rules and institutions that govern his 'unsocial sociability': see *ibid.*, at 44.

[71] Kant regarded the French Revolution as a sign of the adequacy of his thought on history, though.

[72] This leads us to an interesting insight: Kant's influence on the international legal discourse is – at least partly – due to an over- or even misinterpretation of his work. The topics he treated and the way he combined ideas predestined his thought for the role it is accorded in international legal scholarship today. He never 'really' said, however, what many of his readers read into his remarks on the relationship between history and rationality.

the 'Kantian teleology'.[73] It is perfectly in line with the idea of the existence of a hidden plan of self-deployment of rationality in history in the form of law. Some authors make open reference to this idea. Hans Kelsen, for example – in a comment which is admittedly not typical for his work in general – stated that underneath the 'technical development' of law, there is a tendency of centralization with the 'ultimate goal' of the emergence of a 'world state'.[74] Kelsen is not known for historical speculation, but he seems to assume that there is a kind of determinism at work which ultimately realizes world peace through a world state. The 'Kantian teleology' continued and still continues to influence international legal discourse.[75] The 'from … to' literature, for example, breathes its spirit, and formulations such as 'from Nuremberg to the International Criminal Court' or 'from Humanitarian Intervention to the Responsibility to Protect' are in line with it.[76] The idea is also engraved in the inclination to treat 'bad' developments as exceptions to positive general patterns. Also, philosophical accounts of global governance, such as Jürgen Habermas' project of a 'political constitution for the pluralist world society', rely on positive forces in international relations pointing to the need for deeper political integration.

Progress arguments – making use of the techniques we described in section 2 – rely in one form or another on the assumption of positive forces in history. The techniques do not convince 'as such'; they themselves do not 'justify' the progress argument. Progress arguments, in our view, owe part of their success to the fact that they can build silently on the widely shared assumption that – on the whole and despite all setbacks – positive forces are predominant in history. Progress arguments using the technique of 'ascending periodization' seem especially to rely on this background assumption.

B *Law and Violence as Opposites*

The second strategic assumption is that law and violence are natural opposites. The essence of the assumption is: law is the opposite of violence, and violence the consequence of the absence of law. In other words, the two phenomena are treated as if they were categorically distinct. There is a direct line from this idea to the idea that juridification is automatically associated with progress.

The assumption is fuelled by many classical works of the liberal tradition of political philosophy.[77] Thomas Hobbes and John Locke, to name just two, both argued that it

[73] See, e.g., J.C. Bluntschli, *Das Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (1868), which is based on German 19th century positivism's belief in the civilizing and progressive character of positive law. The work traces the idea to contemporary international law as if it were a coherent system. It became the standard treatise of the late 19th century on international law.

[74] H. Kelsen, *Pure Theory of Law* (2002 [1960]), at 328.

[75] Koskenniemi, 'On the Idea and Practice of Universal History with a Cosmopolitan Purpose', in B. Puri *et al.* (eds), *Terror, Peace, and Universalism: Essays on the Philosophy of Immanuel Kant* (2006), at 3, 122.

[76] Koller, *supra* note 10, at 99, n. 2; at 100, n. 6.

[77] See Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International-Law's Past', 22 *Leiden J Int'l L* (2009) 251, at 253.

is positive law which protects man from the violence of the state of nature,[78] and the assumption indeed expresses some evident truth. However, it suffers from blind spots which are of interest here. There is the grave problem of 'bad law'. Law can be the cause of violence, and interpretations of law can be elaborated justifications for brute force.[79] The *uti possidetis* principle, for example, which was the guiding principle for the determination of borders in the decolonization process, caused a number of violent conflicts.[80] The *ius ad bellum* of the pre-World War I era contributed to a climate prone to military proliferation and war.[81] Martti Koskenniemi underscores this blind spot of the 'law as progress' view and asserts that it is hardly possible to believe that international law is automatically or necessarily an instrument of progress; international law, he writes, provides resources 'for defending good and bad causes, enlightened and regressive policies'.[82] To put it another way, law can, as Jacques Derrida pointed out, itself be a form of violence.[83]

In international legal scholarship, we encounter the assumption in a variety of ex- and implicit, of subtle and raw forms. We find, for example, widely accepted formulations such as 'peace through law'[84] or 'speaking law to power'.[85] Both play with the dualism law/violence; they regard law as the natural remedy for violence. More implicit use of it is made, for example, when the expansion of international law is treated as a welcome development.[86] The discourse on global constitutionalism is a pointed example. It has a tendency to expect progress from pushing back power politics in favour of legal solutions.[87]

Progress arguments made with the help of the techniques we described in section 2 rely on this assumption when they treat the expansion of the regulatory reach of international law *per se* as progress – regardless of its content. The claim of a paradigm shift from 'consensual' to 'compulsory' adjudication in international legal dispute

[78] For Hobbes, state-institutionalized law is the solution to the problem which results from a decentralized right of the individual to resort to physical force to defend himself; for Locke positive law protects man's 'natural rights'. See W. Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (1996).

[79] R.M. Cover states that interpretation – especially by courts – is a social practice which often leaves behind victims whose lives have been violently interfered with: Cover, 'Violence and the Word', 95 *Yale LJ* (1986) 1601.

[80] Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', 90 *AJIL* (1996) 590.

[81] J.T. Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981).

[82] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 613.

[83] Derrida, 'Force of Law', in D. Cornell *et al.* (eds), *Deconstruction and the Possibility of Justice* (1992), at 3.

[84] H. Kelsen, *Peace through Law* (1944).

[85] Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', 1 *Chicago J Int'l L* (2000) 1; Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', 14 *EJIL* (2003) 241; Koh, 'Is there a Role for Law in a World Ruled by Power?', in H. Hestermeyer (ed.), *Coexistence, Cooperation and Solidarity* (2012), ii, 1235.

[86] That the expansion of international law is, in principle, a positive development is a thread underlying the ILC Report on Fragmentation: see Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., 1 May–9 June, 3 July–11 Aug. 2006, P 9, UN Doc. A/CN.4/L.682 (13 Apr. 2006).

[87] Peters, 'The Merits of Global Constitutionalism', 16 *Indiana J Global Legal Studies* (2009) 397, at 407, esp. 409 (arguing that the 'constitutionalist agenda' is not to minimize international politics but to formulate a reasonable alternative to 'power politics').

settlement is an example. The focus is exclusively on the law's regulatory ambition and treats its increase *per se* as progress.

C *Rationality through Institutionalization*

The third strategic assumption is that a higher level of organization of the international system automatically increases its rationality. It is obviously closely related to the second assumption of law and violence as natural opposites, even if the two do not coincide. The catchphrase for the essence of this assumption is 'rationality through institutionalization'.

Institutionalization in this sense can take many forms. There are formal ways of institutionalization, typically through law and hierarchies, and informal ways, for example in administrative networks.[88] The call for higher levels of organization and more institutions is omnipresent in the international legal discourse, as anyone familiar with international legal literature knows. The view is based on the belief that international institutions are in a privileged position to advance community interests and produce efficiency gains.[89] The classic example is the foundation of the Universal Postal Union (UPU) in 1874.[90] Institutionalization in this case solved the problem of international mail. States have an interest that mail can be sent from one country to another, but they have to make sure that services in both the originating and the destination country are paid for. The solution is that all international mail requires the stamps only of the originating country. The destination country waives compensation, but keeps the payment in the cases in which it is itself the originating country. The efficiency gains in the example of the Universal Postal Union are evident. Michael Barnett and Martha Finnemore hold even that there is a sort of 'normative bias in favor of international organizations'.[91] They help states cooperate and peoples overcome oppressive governments, spread good norms, and articulate a spirit of progress and enlightenment. In the liberal perspective, international organizations are viewed as essential for progress. There is, however, growing criticism. Cooperation in international institutions often suffers from significant deficits.[92] Fragmentation of international law – lack of formal coordination and hierarchy among different functional institutions and their

[88] For an overview see Simmons and Martin, 'International Organizations and Institutions', in Carlsnaes *et al.* (eds), *supra* note 15, at 192. The following articles are considered classics: Kehoane, 'International Institutions: Two Approaches', 32 *Int'l Studies Q* (1988) 379; Stein, 'Coordination and Collaboration: Regimes in an Anarchic World', 36 *Int'l Org* (1982) 299; Abbott and Snidal, 'Why States Act through Formal International Organizations', 42 *J Conflict Resolution* (1998) 3. On international administrative networks see Slaughter, *supra* note 48.

[89] See, generally, A. Guzman, *How International Law Works* (2008), at 121–129.

[90] See Guzman, 'Against Consent', 52 *Virginia J Int'l L* (2012) 747, at 756.

[91] M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004), at ix.

[92] Fischer-Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan J Int'l L* (2003–2004) 999; Kaiser, 'Coordination of International Organizations – Intellectual Property as an Example: Can There Be Safety in Numbers?', in Miller and Bratspies (eds), *supra* note 3, at 315.

normative systems – is a source of serious problems.[93] The international order suffers from a lack of efficiency due to ambiguous boundaries and overlapping activities of international institutions.[94] As a matter of fact, the current system with its many overlapping regimes entails high transaction costs for international legal bodies which must try to reintegrate or rationalize the legal order. Just take the endless debate on the relationship between actions of the UN Security Council and human rights, generally known as the 'Kadi debate'.[95] Armin von Bogdandy observes that nowadays many 'acknowledge that more international law and more international institutions are not always the answer, but may … be part of the problem'.[96] Eyal Benvenisti and George W. Downs argue even that fragmentation is an obstacle to a more egalitarian international system.[97]

The rationality through institutionalization assumption regularly underlies progress arguments employing the technique of 'ascending periodization': For example, the progressivity of international law after World War I is often alluded to by reference to the increase in the degree of institutionalization.

D *Progressive Language Contributes to Progress*

The fourth strategic assumption is that language is a central means of creating progress. The essence of this assumption is that suggestions of new doctrinal ideas, concepts, or methods are often based on the belief that language is a key means to shape and pre-structure 'reality'. As outlined in the introduction, this assumption is fully in line with the social constructivist position to which we subscribe.

Many authors treat language as a key instrument to shape and change 'reality'. Take, for example, the famous book, *Sovereignty as Responsibility: Conflict Management in Africa*, edited by Francis Deng and published in 1996.[98] It was an attempt to redefine, to reshape the concept of sovereignty. It triggered a development which led to the formulation of the 'Responsibility to Protect' which is about to transform the concept of state sovereignty, at least to some extent. Another example is the rise of the notion 'soft law'. The attempts to establish and promote the concept of 'soft law' can be understood as attempts to broaden the reach of the international legal discourse. Non-binding rules could now be treated as 'quasi-legal rules' or 'not yet law'.[99] A third

[93] Fragmentation is the consequence of the lack of unity of international law. In H.L.A. Hart's terminology, there is no international rule of recognition. For Hart international law, therefore, is not a 'system', but a 'set' of rules: see H.L.A. Hart, *The Concept of Law* (1998), at 234. From the vast literature on the problem of fragmentation see Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002) 553.

[94] *Ibid.*, at 595.

[95] See, e.g., Diggelmann, 'Targeted Sanctions und Menschenrechte. Reflexionen zu einem ungeklärten Verhältnis', 17 *Swiss Rev Int'l & European L* (2009) 301.

[96] Von Bogdandy, Book Review of Emmanuelle Jouannet, Hélène Ruiz Fabri, and Jean-Marc Sorel (eds), *Regards d'une génération sur le Droit International*, 20 *EJIL* (2009) 919, at 920.

[97] Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Standford L Rev* (2007) 595, at 599.

[98] F. Deng (ed.), *Sovereignty as Responsibility* (1996).

[99] On 'soft law' and the increase of fields of activity for international lawyers see d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19 *EJIL* (2008) 1075, at 1088.

example is the concept of the 'constitutional treaty' which was designed, but ultimately discarded, as the document founding the European Union legal order. As Jürgen Bast has argued, the coupling of 'constitution' and 'treaty' had the effect of creating a 'not yet rationale'.[100] Political sectors of EU law which the 'constitutional treaty' had not yet subjected to the 'community method' (which, *inter alia*, relates to lawmaking and enforcement powers) were thereby placed under pressure and the expectation also to subscribe to the progressiveness of the standard 'community method'.[101] The example of the 'constitutional treaty' shows that language – in this case the concept of a 'constitution' – is considered to be able to imbue a present state of legal affairs with a progressive 'spin'. '*Avant-garde*' movements typically employ new '*avant-garde*' language with the ambition thereby to alter our perception of the world. The assumption is that the struggle for the 'right terminology' is also a struggle for the 'right reality'. Global constitutionalism is an approach which typically works with this assumption. It can be seen as an attempt to challenge and gradually replace traditional concepts of international law and to establish a new view on international relations.[102] It typically seeks to replace sovereignty-based understandings of international law with a new understanding which challenges many 'classic' institutions of international law, such as state immunity and consensus-based law-making etc. Constitutionalist language is biased language which gives preference to 'new' institutions such as, for example, individual criminal responsibility and a strengthened role for international *ius cogens*.[103] To expect progress from using progressive language seems, in general, a widely made assumption which also fuels projects such as 'global administrative law'.[104]

The assumption that progressive language contributes to progress is arguably the most central assumption in progress arguments on international law. In our view, the eminent role of progressive language in accounts of progress cannot be overestimated. Progress is 'created' in a strong sense of the term when a progressive label is assigned to the present period of international law ('ascending periodization'). The more the language of human rights is engraved in international documents, the more easily the progress argument relying on increased value-orientation will be made. The same is true for the techniques which convey the progress argument by pointing to positive trends or paradigm shifts. These trends and paradigm shifts are 'made' and confirmed by employing progressive language. In this way, progressive language stabilizes progress narratives and reifies progress.

Concluding Remarks

In this article, we analysed how progress is constructed in international legal scholarship and why these constructions are (sometimes) successful. We argued that there is

[100] Bast, 'The Constitutional Treaty as a Reflexive Constitution', 6 *German LJ* (2005) 1433.

[101] *Ibid.*, at 1450–1451.

[102] Diggelmann and Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism', 68 *ZaöRV* (2008) 623, at 645–646.

[103] *Ibid.*

[104] See, prominently, Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contemporary Probs* (2005) 15.

a bundle of established and accepted 'techniques' in the international legal discourse to create progress narratives, and we described four such techniques in detail: ascending periodization, proving increased value-orientation of international law, trend-talk and the paradigm shift technique. We showed how these techniques fit into the Western tradition of thinking. The intellectual roots of these techniques can be found in 18th and 19th century Western thinking and in the Western topos that law plays a key role in progress. We argued that the success of progress arguments is neither due to (contestable) empirical findings, nor due to the application of the – more or less subtle – techniques to convey the message of progress of international law. Instead, the success of progress arguments relies on strategic assumptions about key social phenomena (such as 'law' or 'institutions'). These assumptions, too, are well rooted in Western philosophical thought.

In our view, the inclination to create and accept progress narratives of international law has become more intense in the last decade. In the 1990s and early 2000s, international legal theory seemed more concerned with critical thought than today. The discipline faced the challenges of deconstructivism and the critiques inspired by feminist and Marxist thought. Applying the ideas and concepts of the critical legal studies movement to international law was *en vogue*. In other words, the discipline seemed more inclined to deal with inconvenient questions. Meanwhile – even though hardly any of these critical approaches would claim that their mission has been completed – the critical approaches lost ground.

We doubt that this is due to a significantly better state of world affairs. We regard it mainly as the result of the long-persistent influence of the described heritage of 18th and 19th century philosophical thought which has in a way impregnated Western thinking and therefore survives less long-living intellectual trends.