Foreword: Progress in International Law?

*By José E. Alvarez**

At the time I was invited to write this foreword, Columbia Law School was hosting a symposium, organized by our alumnus, Ambassador Eric M. Javits, the U.S. Permanent Representative to the Organization for the Prohibition of Chemical Weapons (OPCW), to commemorate the Tenth Anniversary of the Chemical Weapons Convention. As befits the theme of this collection of essays, the focus of that symposium was to celebrate *progress* achieved through "effective multilateralism." Panels of distinguished representatives to the OPCW, arms control experts, academics and even a member of the U.S. House of Representatives gathered to distill lessons from one of the few "successful" arms control treaties in existence.

Although his name was not invoked, the spirit of the individual who inspired the essays here – Manley O. Hudson – was very much alive during that gathering. Like Hudson, the international lawyers and diplomats gathered at Columbia shared a normative agenda. They believed that the world and its peoples would be better off – would be healthier, more peaceful, and more prosperous – if chemical weapons did not exist. They believed that they could better achieve their goal through the action of all nations – as opposed to unilateral remedies by a single state or bilateral negotiations among the most powerful states who possessed such weapons. They saw eradication of chemical weapons as a collective action problem that could be *managed* through, among other things, patient discourse, coupled with appropriate sticks and carrots. Like Hudson, they believed in multilateralism, in a rational "scientific" approach to international relations, and in the use of global institutions (including those built with real bricks and mortar). Like Hudson, they argued that the pursuit of international goals such as world peace needed to appeal to national self-interest but was not inconsistent with it. Like Hudson, they sought to convince others that the "sovereign" rights of the United States could be *enhanced* through our country's participation in

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Miller & Bratspies (Eds), Progress in International Law, pp. 3–8.

multilateral institutions. Like Hudson, they sought to make a problem in foreign relations less "foreign" – by making it clear to all that this issue has an immediate and local connection to how (and even to whether) people live.

For those gathered at Columbia, what made the chemical weapons regime a model of progress – the key to its success – were three elements that would have been very familiar to Hudson: universality, sovereign equality, and non-discrimination. At the core of the Chemical Weapons Convention, which now extends to all but a handful of states (North Korea, Syria, Israel, and Egypt being among them), is the conviction that creating and stockpiling these weapons was counterproductive in terms of enhancing the parties' individual or collective military security and presented potentially disastrous environmental consequences. Moreover, unlike the troubled nuclear non-proliferation regime, this arms control effort was a relative success because it did not privilege the position of those who had previously acquired the weapons sought to be banned. On the contrary, all parties to this treaty were obligated to eliminate their chemical weapons. Further, the Convention requires not only a promise not to develop such weapons but a binding commitment, enforced by periodic on-site inspections, to eliminate existing stockpiles. For those celebrating this example of "effective multilateralism," it was not incidental that the regime was built on the possibility of securing reliable information on member states' stockpiles and places of potential manufacture. The regime's effectiveness was based on constructing a viable central institution able to provide collective implementation, neutral verification, and technical assistance. The success of the chemical weapons regime, it was argued, was also premised on its dynamism. Its current and likely future success would turn on that regime's ability to adapt to changing technology, changing threats, and changing perceptions of its legitimacy over time.

Hudson would have recognized all the characteristic tools of compliance used by the chemical weapon regime: OPCW inspections of governments' destruction of their stockpiles; the threat of "challenge" inspections if demanded by any treaty party; criminal sanctions imposed under treaty parties' domestic laws; confidence-building measures such as regular information exchanges; and financial carrots supplied by members to one another to encourage mutual compliance. He would have been fascinated by this treaty regime's capacity to generate distinct and very tangible forms of cooperation among its state parties, including mutual exchanges of technical experts to enhance mutual compliance. Hudson would also have appreciated the emerging forms of cooperation connecting the chemical weapons regime to other forms of multilateralism, including the complementary roles performed by the Security Council and the Non-Proliferation Security Initiative, a coalition of the willing led by the United States. He would have been encouraged by how the OPCW has promoted forms of inter-state and

inter-organizational cooperation that suggest the tentative beginnings of global governance without world government.

Hudson, who struggled with securing United States participation in world institutions, also would have appreciated hearing about how the United States was persuaded to ratify the Chemical Weapons Convention treaty – despite scholarly arguments back in 1997 that the regime or its inspections would violate our Fourth Amendment guarantee against unlawful searches and seizures, constitute an unconstitutional delegation of law-making or enforcement power, or intrude on the residual Tenth Amendment rights of states of the United States. In all likelihood, Hudson would have been delighted to hear how treaty proponents shrewdly overcame such qualms by, among other things, including a national security exception (permitting the President to deny an inspection on such grounds, not as an illegal reservation to the treaty but presumably as a basis for legal termination of U.S. participation).

And Hudson would not have been terribly surprised by the remaining challenges identified for this example of multilateralism's progress: the prospect that parties to the Chemical Weapons Convention are not likely to achieve its goals by the "final" deadline of 2012, that certain states remain outside that treaty's strictures and are unlikely to join, that the regime remains a state-centric device ill-suited to the hazards of non-state terrorists, or that some parties to the regime suspect that others have not fully and honestly complied with its terms despite all the confidence-building measures in place.

The participants at the Chemical Weapons Symposium in late 2007 echoed most of the assumptions that have characterized international lawyers throughout the 20th century. Hudson's fellow travelers also believed in the value of universal participation. They also trusted in technocratic expertise and the promise of neutrality achieved through the work of international civil servants. They believed it was possible to establish institutional forms for governing the world without encountering predictable resistance to world government. They shared a faith that power-oriented diplomacy could be displaced by rule-oriented behavior and even, in some cases, by rule-oriented adjudication. Progress through law was possible, they thought, because lawyers acted on the basis of rational compromises, were attentive to fact over emotion, and relied on delimited, neutral forms of discourse. Progress through law, although not inevitable, was likely, they believed, because increasing conditions of interdependence made states turn to law out of functionalist necessity. They predicted and relied upon the emergence of virtuous circles. They contended that the turn to legal rules would require international institutions to implement them and that this inexorably would lead to forms of "constitutionalization" since the charters of these institutions needed to be interpreted flexibly and teleologically. For Hudson's colleagues, the normative values pursued through law were beneficial, interdependent, coherent. It was possible

to pursue peace *and* economic development, encourage respect for civil, political, *and* social and economic rights, dismantle colonialism *and* encourage free markets and trade. Achievement of all of these goals, after all, was dependent on the construction of the international *and* national rule of law – and there was nothing inconsistent about pursuing the rule of law at the global and the local level, especially with respect to democratic states.

As I have suggested elsewhere,[1] particularly as we have moved into this century and gained insights into the horrors of the former century, more of us have become quite skeptical of one, more, or even every one of these premises and assumptions. International lawyers no longer regard universal participation in law-making as an unalloyed virtue—not in an age where the proliferation of legal actors and subjects extends to Multi-National Corporations (MNCs) engaged in forms of self regulation, "unaccountable" Non-Governmental Organizations (NGOs) (often from the West) claiming to represent "international civil society," or foreign investors securing rights at the alleged expense of public values through international arbitration. Trust in technocratic experts and in international civil servants has been sorely tested by the repeated ineptitudes, frauds and even criminal acts committed by some of them. Confidence in the value of multilateral forms of legal discourse and its adjudicative fora has been undermined by questions about whether any of these venues, from the ILO to the WTO appellate Body, have really leveled the playing field between North and South – or merely "laundered" the interests of the former or enhanced the power of international bureaucrats at the expense of the interests of most of the peoples of the world. The once touted virtues of international organization – its vaunted capacity to secure the benefits of centralization and independence – are increasingly questioned, amidst robust post-modern doubts about the law's neutrality. The contemporary international lawyer's faith in Grotian progress has been displaced by occasionally severe existential doubts.

The essays in this collection are the product of Manley Hudson *and* of those who have since deconstructed the "progress narrative" that he embodied. Despite its title, this book is not a celebration through rose-colored glasses of international law's "progress" in achieving its ample normative aspirations for the betterment of humankind. It is, instead, an accounting of international law through the lens of the progress narrative that has, for better or worse, characterized much of modern international law and those who write about it. While some essays in this collection are indeed celebratory in tone, others are ambivalent about the

[1] José E. Alvarez, *International Organizations, Now and Then*, 100 American Journal of International Law 324 (2006).

institutions or norms described and still others downright dyspeptic in portraying the foibles of international lawyers and their work.

The rich and diverse contributions in this book reflect, as Russell Miller and Rebecca Bratspies suggest in their introduction, the singular uncertainties and contradictions that mark our times. We are no longer sure what "progress" in international law entails. We are no longer as sure, as were many in Hudson's day, whether we need or want *more* international law or institutions. We are no longer certain that "international" necessarily means supra-national in terms of effect or whether we can better achieve our goals through forms of "democratic experimentalism" in our regulatory frameworks or deploying "margins of appreciation" by our dispute settlers. We are no longer of one mind about when we ought to seek global harmonious rules over more contextually sensitive regulation, even at the expense of "fragmentation." We are sometimes confused about whom ought to participate in international law-making processes (NGOs? MNCs? Other IOs? Individuals? International civil servants?) and for what purpose. And we are increasingly aware of the frailties of our prescriptions; it is quite likely that remedying international law's "democratic deficits," for example, may only exacerbate inequalities among nations.

And yet, it is striking that international law remains one of the few legal fields where something as ambitious as this – a thorough mapping or cataloguing of current conditions, doctrines, and theoretical frameworks – is even attempted. That all the contributors to this book, despite the striking differences among them in their attitudes toward Manley Hudson's progress project, were enticed to participate in this effort suggests that at some level, all of them still believe that progress in international law is achievable—or at least worth pursuing.

This fine collection poses that challenge, and in its near-comprehensive breadth, provides the raw material for another generation's imagining the progress of international law.