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TEACHING INTERNATIONAL LAW AS A MISSION FOR PRAGMATIC IDEALISTS: PAST, PRESENT AND FUTURE

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1. Introduction

Discussion about the 'Future of International Law' is commonplace today. For a law discipline so much oriented towards the future, so riven by a sense of present imperfection and far-reaching hopes for a better future the perception to stand at a watershed where this transition to a new improved reality is imminent to happen must be innate. Thereby, many (if not all) our ideals, which are presently out of reach, should become true. [1] An aspect, often forgotten in this tale, regards the role and the contribution of the teacher of international law (IL) as an interpreter or even an agent of such a change.

The fact, that this perspective has been widely neglected has also, and perhaps primarily, to do with the circumstance, that the aspect of 'teaching' and the figure of the teacher itself have in general received,

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[1] This development would thereby become tantamount to 'realizing Utopia'. In this sense, see Antonio Cassese (ed.), *Realizing Utopia* (Oxford: Oxford University Press 2012).

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in the past, very little attention in IL doctrine, a fact that has begun to be redressed only recently.[2]

It is true that the topic of 'Teaching International Law' (TIL) has been around for quite a long time,[3] but there was much discontinuity in the respective interest so that the teacher of IL continues to be a somewhat mysterious or ambiguous figure. The interest recently awaken for the teacher of IL has made clear that this figure could be key for better understanding some pivotal issues of what makes IL special within all legal disciplines. It can be argued that a collective writing containing a stock-taking of the present IL situation as well as a prospective outlook of what IL could become in the future should at least pay some attention to the teacher. In fact, if we reflect on the present and the future of IL we necessarily have to structure our knowledge about this subject, to develop a theory about its present nature and about the way it will further develop, how it will operate in the future. If we ponder about how IL and its various sub-disciplines should further develop, we express, like it or not, a value judgment. All these intellectual processes hint at elements that are very much present also in teaching and in any case teaching fulfils in this context an important instrumental function.

This contribution starts with a general analysis about the meaning of 'teaching' and continues with an enquiry about the particular motivation of IL teachers: What are the main driving forces behind their efforts, where do they find the main source of inspiration. Particular attention will be given to 'idealism' in this profession. At first sight, in an era of rationality in which we dwell, idealism seems tantamount to ingenuousness, a quest for utopia. It will be argued that such a quest might be an important driving force for the further development

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[2] This author has just sent a voluminous manuscript to the publisher of what will become a book edited together with Giuseppe Nesi (Peter Hilpold and Giuseppe Nesi (eds.), *Teaching International Law* (Leiden: Brill/Nijhoff 2023)). The question could be posed as to what additional insights could be developed here that would justify coming back to this object so shortly after completing the preceding projects. The attempt will be made, to reconnect to the ideas exposed in the book mentioned and to develop the aspect of 'idealism', retained to be so crucial for international lawyers, further.

[3] For a masterly study, see Manfred Lachs, *The Teacher in International Law (Teachings and Teaching)* (Dordrecht: Martinus Nijhoff Publishers 1982), revisited by Bartłomiej Krzan, 'Manfred Lachs and his "Teacher in International Law": The Lessons He Gave Us', in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming). See also the highly interesting collection of writings in Jean d'Aspremont et al. (eds.), *International Law as a Profession* (Cambridge: Cambridge University Press 2017).

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of IL. In IL, the belief in utopia might translate in a substantial outcome, in a material improvement of the legal framework.[4]

Finally, this contribution offers also the opportunity to reflect, in a comprehensive way, about the outcomings of a research project on TIL, a collective writing just sent to the press.[5] In this contribution some thoughts expressed in the respective contributions will be taken up and further developed. In this, specific attention will also be given to Carlo Focarelli's text entitled 'Teaching International Law Today and the Human Person' – somewhat already anticipating the project to which we are contributing now to. It will be shown that the question where IL teaching should aim to depends very much on the broader question, pivotal to the present project, where IL as a whole should be directed to. The judgments when the competent authorities are fixing the IL curricula, when decisions are taken whether to teach IL at all and, if this question is answered in the positive, to which extent such a teaching shall take place, as well as the very basic attitude the teacher should take when facing the material content of his or her teaching and the classes are themselves premised on value judgments referring squarely to a specific vision of IL as a legal order. In that, reflecting on 'Teaching of IL' is reflecting on IL itself.

2. What does teaching mean?

Already the definition of 'teaching' poses a formidable challenge. Or, with other words, there is no cogent meaning we would have to attribute to this concept. It is rather the case that by defining this activity we take a subjective stance that must necessarily also determine the outcome of the inquiry. Broader or narrower approaches can be adopted. 'Teaching' can refer to a class-room situation structured and organised with the help of traditional means. The perspective can also be extended by the inclusion of more innovative tools up to a situation where the teacher as a person passes to the background and may, at the very end of this development, become superfluous and be substituted by machine-learning systems or by artificial intelligence (AI). As will be shown, such a development might take place in

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[4] This proposition was developed by this author in a series of earlier contributions. See, for example, Peter Hilpold, 'Self-determination and Autonomy: Between Secession and Internal Self-determination', *International Journal on Minority and Group Rights*, 24 (2017) 1–34.

[5] See above (n 2).

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the future – and put into question any acquired knowledge about the essence and meaning of teaching.

At a further level, the very content of teaching could be further specified: Should thereby be meant an activity of 'instruction', providing mainly technical skills, or should this teaching activity be primarily seen as an activity of 'education' providing broader social skills and perhaps working also on 'character'? [6]

Next, a decision has to be taken whether an inquiry into a teaching should concern only the final end of a longer 'service chain', i.e. the immediate conveyance of instruction/education to the students or whether also 'upstream', 'preparatory' elements up to the drafting of the curricula should be taken into consideration.

Furthermore, it has to be acknowledged that in the usage of the word 'teaching' the borders between pedagogical activities in the closer sense and research activities are not so clearly drawn. As is well-known, Article 38(1)(d) of the ICJ Statute refers to the 'the teachings of the most highly qualified publicists of the various nations' as 'subsidiary means for the determination of rules of law'. The 'publicists', to be understood as 'learned writers' [7] can give evidence of customary law but also contribute in developing new rules of law. [8]

When the relevant provision of the PCIJ Statute was drafted in 1920, [9] the role of 'learned writers' was surely a much different one than it is today as these writers were mostly members of an elitist caste pertaining to the bourgeois class of European states and Anglo-Saxon countries. [10] While it might be contended that this situation has not changed radically since then, in reality, in many elements it has. The number of 'learned writers' has risen enormously. These academics may still pertain to the privileged groups of their societies but the group of these writers as a whole has become truly universal. [11] With their rise in number the individual influence of these writers has di-

[6] See James Arthur et al. (eds.), *Educating for a Characterful Society: Responsibility and the Public Good* (London: Routledge 2020).

[7] See Michael Akehurst, *A Modern Introduction to International Law* (London: Routledge 1987) 37.

[8] Ibid.

[9] See Alain Pellet, 'Article 38' in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press 2012) 335–9.

[10] For Pellet ('Article 38', 338) the problem that IL literature still comes prevailingly from the North 'and particularly from a handful of countries' persists up to the present days.

[11] We have tried to examine this situation in Peter Hilpold (ed.), *European In-*

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minished. Their individual influence is now less predetermined by their national provenience than by their position in the epistemic community which results from very specific circumstances. As formal and informal qualification processes are manifold and as there is no consensus as to their value and relevance no really 'objective' ranking as to the qualification of these writers can come into being. [12]

On a whole, an extensive meaning of 'teaching' seems to be preferable, also in consideration of the difficulties portrayed when it comes to draw borders between different activities possibly related to teaching.

To consider both didactical elements as well as elements of academic research in a comprehensive way is already indicated by the fact that academic teaching of IL takes place almost universally according to the 'Humboldtian' model whereby it is presupposed that the (University) teacher is also a researcher. While this concept surely presents many shortcomings, it still is, at least formally, widely adhered to.

As has already been pointed and will again be emphasised in this contribution, recent technical innovation has further extended the ways teaching can take place and therefore additional elements arise advocating for the adoption of a comprehensive approach.

3. What is teaching aiming at?

3.1. *General considerations*

When we look at the role of the teacher of IL any position taken in this regard will depend on how we define the very aim of teaching in this field. Not even the epistemic community can give an unanimous answer as to this question. As has been aptly remarked, [13] these aims are manifold, depending on the meaning of teaching: these aims can be, for example, providing information, technical training, or as exercise of critique in the sense that students should be prepared to delve deeper into the subject and to deconstruct 'realities' that are

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ternational Law Traditions (Berlin: Springer 2021). See also Arnulf Becker-Lorca, *Mestizo International Law: A Global Intellectual History (1842-1933)* (Cambridge: Cambridge University Press 2014).

[12] This finding can be best exemplified by the fact that there is not even a consensus on which technical measurement an impact factor in the field of IL should be based on. Several factors would be available but those based on citation frequency determined by research engines seem to prevail more and more.

[13] See Carlo Focarelli, 'Teaching International Law Today and the Human Person' in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming).

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presented as a given. These aims can also focus on a reinforcement of existing power structures or be directed at the establishment of a process of communication between teachers and learners, or of reciprocal learning in the way of continuous interaction.[14] At the same time it has also been pointed out that teaching in reality is a combination of all these elements, of course with a different emphasis on one or more of them, depending on the situation.[15]

To use them in combination might not be free of perils; some caveats have to be added. Attributing them equal value might render them purely descriptive and depriving them of much of their explanatory power. Some emphasis on some of these elements might be helpful. On the other hand, care must be taken not to exceed in the opposite direction. Considered and used in radical isolation they might end up in eclectic results, of use perhaps for academic system-building but less for providing comprehensive explanation of real-world situations.

No doubt, these categories overlap and interact, they generalize and they might be prone to over-generalization. In sum, unexperienced recourse to them might provide questionable results.

In fact, this categorization provides useful tools to better understand the very nature of teaching. At the same time, these elements can be helpful to qualify specific situations of teaching, to juxtapose and to compare them, for example in relation to specific geographical areas, historical situations or teaching ideologies. They are themselves, to a certain extent, pedagogical tools.

3.2. *Single aims of teaching*

This said, and always keeping in mind the limits mentioned before, some tentative use can be made of these concepts in order to qualify different situations of teaching in relation to elements that appear to be particularly characteristic for them.

Providing information

Generally, also outside the area of IL, a trend from academic to school-like teaching is bemoaned.[16] This trend has often been ex-

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[14] Ibid.
[15] Ibid.
[16] See Stefan Kühl, 'Verschulung wider Willen: Die ungewollten Nebenfolgen

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plained with the Bologna process,[17] but in reality the roots lie much deeper and relate to the creation of mass universities with steadily rising numbers of students and a staff-student ratio deteriorating continuously.[18] Situations like these generally foster the recourse to didactical methods that are primarily based on the transfer of information. These methods have therefore become most standardised and least personalised. As the mass university is still a reality, this form of teaching is probably still the prevailing one. True, there are differences also within individual countries, even with regard to the same subject as IL. In fact, there are further factors influencing the comprehensive situation. For example, the teaching-staff-student ratio may be of considerable relevance as to the possibility of the teaching staff to establish a more personal contact with students. Furthermore, the situation varies also in relation to the teaching format: general courses held in lecture-type style will generally offer a far-less personal atmosphere than, say, a seminar. Furthermore, it has also to be taken into consideration that starting with the Covid-19 period teaching has radically changed and these changes will only partly be reversible. While it certainly can be said that online teaching was present also before the outbreak of the Covid pandemic,[19] this event evidently provided a boosting effect of unprecedent dimensions form of teaching. Thereby, also mass teaching somewhat changed its face. Depending on the platform used and on the form of interaction practiced, online teaching offers new avenues for interaction and diminishes others, more traditional ones. Image tiles of equal proportions for each participant in a conference, their visualization in a non-hierarchical form (while showing the lecturing room with the teacher in the forefront and the students in a measurable distance from) as well as the students' possibility to have their voice to be heard without the need of additional instruments such as physical micros might help to overcome barriers that are often felt as an expression of hierarchy and therefore as a hindrance to enter into effective communication. On the other hand, the tendency to

einer Hochschulreform' in Nicola Hericks (ed.), *Hochschulen im Spannungsfeld der Bologna-Reform: Erfolge und ungewollte Nebenfolgen aus interdisziplinärer Perspektive* (Berlin: Springer 2018) 295–309.

[17] Ibid.

[18] See e.g. Carol Hagemann-White, 'Einige Erfahrungen und Gedanken über Hochschuldidaktik an der Massenuniversität', *Zeitschrift für Soziologie*, 5 (1976) 80–98.

[19] For most valuable experiences made in this field see Pierre d'Argent, 'Teaching International Law Massively' in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming).

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shut off the camera and to participate only by listening and the lack of any personal contact with the teacher and with other learners might widen the distance between students and teachers. Due to the (relative) novelty of this whole situation there is a considerable dearth of studies in this field. It cannot be excluded that conventional wisdom about mass teaching has to be revisited when this form of teaching takes place on the virtual level.

Technical training v. general education

If we come to interpret the meaning of teaching as technical training again different situations and approaches have to be distinguished. No doubt, the teaching of law has most often a practical finality. This finality is, however, more pronounced in some systems than in others. Sometimes, this end is merely paid lip-service to and in reality the academic system looks with sort of contempt at practice.

Furthermore, it has to be considered that in law education the discipline of IL plays a separate role due to its very nature. This can be evidenced very clearly with regard to the US American law education system. As is well-known, this system is usually considered to be squarely practice-oriented [20] with a JD (Juris Doctor) degree, a professional doctorate degree usually obtained at the end of a three-years program. In international comparison this program appears to be short and lean. As has been stated in literature, [21] education at US law schools is 'highly problem-oriented and technical, relatively untheoretical and inductive'. [22] Nafziger compares this system with the British one which he considered to be 'quite positivistic, rule-oriented and formally descriptive'. [23]

As a consequence, there is small wonder that, given such a basic orientation at US law schools, IL with the limited immediate professional opportunities it offers, receives even less attention. The great internal market of the United States as well as this nation's strength on the political scene further contribute to the general attitude attributing limited relevance to IL teaching compared to the situation say in Europe. Nonetheless, these differences should not be overstated. In fact,

[20] See, for the following, Peter Hilpold, 'Teaching International Law in the 21th Century: Opening Up the Hidden Room in the Palace of International Law' in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming).

[21] See James Nafziger, 'Teaching Public International Law in the United States', *Archiv des Völkerrechts*, 24 (1986) 215–32.

[22] Ibid., 217.

[23] Ibid., 218.

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training at law schools in the US presupposes a preliminary set of studies in another field, so that many entrants already have a BA in the humanities.[24] Furthermore, things seem to change also in that sense that now more emphasis is placed on 'cultural competency',[25] thereby opening up new opportunities for IL courses.

In any case, differences in law education in general and in IL instruction in particular between the US and in Europe are still remarkable.

Turning our attention to Europe it has first to be remarked that the situation on this continent is far from being uniform. Again, the relevance of IL instruction is strongly related to the question as to what extent, in a specific situation, instruction is close to practice. As far as a general assessment in this regard can be made, it may be said that the more an academic system understands itself, in the field of law education, as an instruction system for the practice, the less attention it will pay to IL if there are no other countervailing and prevailing factors working in the opposite direction.

This can best be shown if a comparison is made between the position of IL in German law education curricula on the one hand and Austrian ones on the other. These two German-speaking countries have strong cultural and historical ties and a juxtaposition of these two situations can therefore deliver particularly impressive results. As has been set out by Rüdiger Wolfrum, legal training in Germany has, as a primary goal, to qualify students for the filling of state positions such as those of judges, prosecutors and civil servants.[26] German law faculties, at the same time, usually offer a rather extensive curriculum also in the field of IL but these courses are not mandatory and therefore it can be the case that law students, after a rather long and demanding instruction, become 'fully qualified lawyers' *(Volljuristen)* with little or next to no knowledge of IL.[27]

In Austria, to the contrary, IL is a mandatory subject in legal training at Universities and proof of a respective exam is a pre-requi-

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[24] This fact is emphasised by Bengt Broms, 'International Law in the Law School Curriculum' in Ronald Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff Publishers 1993) 79–89, at 8.

[25] See Rosa Kim, 'Globalizing the Law Curriculum for Twenty-First Century Lawyering', *Journal of Legal Education,* 6 (2018) 905–48, at 930 ff.

[26] See Rüdger Wolfrum, 'Teaching International Law in Germany: Is the Legal Regime on Teaching Still Adequate?' in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming).

[27] Ibid.

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site for the admission to the bar. Law education in Austria is generally much different in respect to the German model which is rather unique in Europe or, as far as can be seen, on a global level. In fact, the combination of theoretical and practical education which characterizes the formation process of lawyers in Germany on their way to becoming a *Volljurist* attributes to this model a note strongly oriented toward the traditional – national – job market for lawyers while the Austrian model appears to be in this more abstract, relying more on book studies and widely separated from a specific job experience. Austrian law students can conclude their studies without ever having seen a court room from the inside or without ever having done an internship at offices of the public administration. Practice orientation does not, however, explain alone this difference of status of IL in these two educational orders.

Without doubt, this different attitude towards IL is influenced also by a strongly different position of both countries on the international scene. In fact, the old experience according to which larger, more powerful countries show less submissiveness towards IL than smaller, less powerful ones, finds here new evidence. Notwithstanding the fact that not even the most powerful country can ignore IL and that also countries like Germany that can be qualified as a great power, though not as a super power, derive their influence, to a very large extent, from being part of IL structures and networks,[28] the perception on the internal national scene might often be a different one in the sense that this dependency from IL is not easily seen. It is also often missed that the reasons why IL is attributed scant importance are often multicausal operating in processes that are largely disguised in front of the public.

A good example in kind has been delivered by Heribert Hirte who has stated that in Germany the judiciary is a self-referential system whose members pay little attention to IL in state examinations for lawyers. The reasons for this situation are intricate and not easy to discern. In fact, Members of the Federal Courts, influencing of course also the attitude of judges at lower instances, are elected by

[28] This recalls the findings by the PCIJ in *S.S. 'Wimbledon'* (*Britain et al. v. Germany)* (1923) PCIJ Series A No. 1, according to which international agreements are not designed to limit but rather to emphasize national sovereignty. On the Germany's attitude towards IL in general, see Christian Tomuschat, 'The Concept of International Law: The German Perspective' in Hilpold (ed.), *European International Law Traditions*, 19–59.

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the German Parliament where closer acquaintance with IL cannot be presupposed.

In European countries of the Latin language area IL enjoys comparatively conspicuous prestige in law curricula. This holds true for Italy, France and Spain, even though the respective law education curricula differ considerably. In these countries the aim pursued is to offer a rather broad general education in law with a comparatively strong focus on subjects such as the theory and the philosophy of law, the history of law and Roman law. International law fits very well with this general education purposes. The implied assumption is that a solid general education provides the best preparation for the future legal profession while it is not the task of the University to furnish a training immediately for the profession.[29]

In educational systems where theoretical preparation and professional training are worlds apart the formation process as a whole becomes lengthy, cumbersome and costly. It is not clear whether such an educational system can be maintained also in the future when the general tendency is to reduce the length of instruction at the backdrop of an international competitive system where some educational systems provide for much more expedited instruction and access to the job market. Should law instruction be reformed it is an open question what will be the future role of IL in these countries' law curricula. As will be shown below, even a strong emphasis on practice does not necessarily imply that IL should have little or no place in such curricula, quite the contrary. In this sense it does not suffice to have to assess what aim is attributed to teaching in general and to IL teaching more specifically. It is at the same time necessary to sort out what special ends teaching is capable to achieve. As will be set out below, it can be argued that the multi-layered effects of teaching and their reciprocal interaction are still not fully understood and should, in any case, be the object of further study.

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[29] For further details on the Italian and the French IL teaching system, see Hilpold, 'Teaching International Law'. As to the status of IL teaching in Spain, see Elena Crespo, 'La docencia en derecho internacional publico tas la implantación del modelo de Bolonia' in Núria Bouza, Caterina García and Ángel J. Rodrigo (eds.) and Pablo Pareja (coordinator), *La Gobernanza del Interés Público Global: XXV Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales Barcelona, 19-20 de septiembre de 2013* (Madrid: Tecnos 2015) 805–33. Many thanks to Isabel Lirola Delgado for this reference.

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Exercise of critique

As a further aim of teaching it was mentioned that thereby the 'exercise of critique' should be fostered and that students should be prepared to deconstruct 'realities' that are otherwise presented as a fact not open to further discussion. Again, this aim needs closer examination. A first impression could be that this aim is generally well-accepted. To form and to enhance the ability of critical thinking appears to be something like a pedagogical mantra that appears not only in the introductory part of curricula but also in the description of the teaching aims of singles courses. As a consequence, it could be assumed that a broad common ground exists in this area on the international level. This impression could be deceiving and this aim may have, to a very large extent, only ornamental nature. First of all, it is not clear what 'critical thinking' exactly means and how it should find expression. Should students thereby be invited to contest the theories and the positions presented by the teachers? Or does it rather mean that students are merely invited to start a discussion or to participate once the discussion has been opened by the teacher? Or does this aim primarily refer to the teacher who should refrain from presenting truths and firm propositions and rather engage in a discursive interaction with the students whereby knowledge should be 'discovered' in a collaborative process? No specific answer can be given to these questions even though they could encapsulate some thoughts that may be useful when conceiving law teaching units. Generally, it can be said that the role attributable to 'critique' (however we might eventually interpret this term) will vary heavily in dependence of the teaching format. A basic introductory course in law at a large University will differ considerably, as to the relevance attributable to elements of 'critique' in respect to, say, a seminar with a small number of students in an advanced stage of their formation.

The space given for debate will vary also from discipline to discipline. If, for example, there exists a rather stable-in-time High Court jurisprudence as to a civil procedural law question, there might be little space for a critique of this jurisprudence, and this critique will have more of a political rather than legal connotation. On the other hand, IL seems really predestined to allow and to request critical debate. No other law discipline is characterised by such a deep ideological, historical and political rift as well as outright conflicts of interests as IL. Therefore, plenty of material for discussion, conflict and contest would be given.

In this context, however, regard has also to be taken of the fact that teaching classes are usually not universal but rather national

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and in that they represent only a segment of the whole international spectrum. Depending on the overall political and cultural situation in the respective country classes will represent the whole spectrum of interests and positions to a greater or a lesser extent. Even in cases, however, where governments do not exercise any influence on the teaching situation, a national bias might come to bear as competing positions in IL discussion often represent diverging national interests.[30]

Furthermore, it has to be noted that critical thinking means different things to different people, across countries but often also within the same jurisdiction. As far as can be seen, empirical studies are lacking in this area but already judging by the meaning attributed to 'critical thinking' by standard textbooks no uniform definition for this concept can be identified.

Nonetheless, it has also to be acknowledged that there is a current in international legal theory called 'Critical Legal Studies' (CLS) which finds its very essence in 'critical thinking'.[31]

In any case, the CLS approach has found very uneven acceptance with its strongholds in the Anglo-American area, in more recent years perhaps in particular in Australia. In this area, also the approach to TIL has been influenced, to a considerable extent, by the CLS perspective,[32] without, however, creating something like a common basis or even only a common understanding of critical thinking in TIL.

On a whole, it can be said that the aim of fostering 'critical thinking' may often be proclaimed but it is still difficult to find a common denominator for the disparate ideas that seem to stand behind this concept. There is surely some sense of 'truth-seeking' behind this call for 'critical thinking', a Kantian plea to 'dare to use your own rea-

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[30] This is not to deny that especially after World War II and in particular in Western democracies parts of the population (often students) stood up against their governments contesting breaches of IL in their foreign policy. The most glaring example was probably the students protest against US intervention in Vietnam. It is not clear, however, how far this protest can be generalised as to the preparedness of larger parts of the population – even only in Western democracies – to defend universal values in a Kantian cosmopolitan perspective.

[31] For an analysis of this approach see Hilary Charlesworth, 'Current Trends in International Legal Theory' in Sam Blay, Ryszard Piotrowicz and B. Martin Tsamenyi (eds.), *Public International Law: An Australian Perspective* (Oxford: Oxford University Press 2005) 402–11, at 404–6.

[32] For an extensive elaboration on this issue, see Lukas Lixinski, 'Scholarship on the Teaching of International Law: An Overview of the State of the Art' in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming).

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son' [33] but, beyond that, little substantive content can be found in this well-sounding postulate.

Enforcement of existing power structures

The proposition that law teaching in general and the teaching of IL in particular would be conducive to or even aim at the enforcement of existing power structures, seems, at first sight, to bear a rather negative connotation and to be a mere (extremely critical) value judgment but at a closer look it finds confirmation in different elements and there are, of course, also sound reasons for maintaining such a system.

Thus, if it has been stated that legal training in Germany is 'significantly state influenced' and 'tailored to produce qualified candidates for the filling of state positions such as judges, prosecutors and civil servants'; [34] if, then, a further look is taken at the respective selection processes for lawyers, administered by epistemic, self-referential communities, [35] there may be small wonder why the law community, generation over generation, tends to be conservative and strongly sticks to rules and procedures inherited from the past. Already this fact influences also teaching as curricula necessarily have to consider future professional career realities, even if Universities and the judiciary should be organised in a completely separate way. If, however, these institutions are connected as it is the case with the *Staatsexamen* in Germany, this structural conservatism extends directly from the judiciary to the law education system.

It may be interesting to note that the purpose of 'enforcing existing power systems' may have positive or negative consequences on the relevance of the teaching of IL. In Germany, as shown, the effects were negative, further reducing the relevance of IL. In Austria, to the contrary, a long tradition, dating back to the Habsburg Empire, exists according to which the government has been emphasizing TIL exactly to foster its imperial interests. [36] Accordingly, in 1893 the Imperial Act regulating the instruction of Austrian lawyers attrib-

[33] See Immanuel Kant, 'Habe den Mut, Dich Deines eigenen Verstandes zu bedienen' in 'Beantwortung der Frage: Was ist Aufklärung?', *Berlinische Monatsschrift* (1784) 481–94.

[34] See Wolfrum, 'Teaching International Law in Germany'.

[35] See Heribert Hirte, 'Teaching International Law in Germany' in Hilpold and Nesi (eds.), *Teaching International Law* (forthcoming).

[36] See Willibald Posch, 'The Austrian view of the Bologna Process in Legal Education', *European Journal of Legal Education*, 2 (2005) 67–70, at 68. On the role of this monarchy's educational system in general as a tool to enforce and to maintain ex-

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uted a prominent role to IL. This act remained in force in the Austrian Republic until the 1970s. Afterwards, with the growing influence of the Socialist party, Austrian University law was subject to far-reaching reforms whereby hierarchy was reduced and democratic self-government of Universities was enhanced. By the University Act of 2002 (*Universitätsgesetz* 2002), under a conservative government, large parts of these reforms were reversed. Throughout these turbulent periods, however, the prominent role of IL remained unscathed. The similarities in the attitude towards IL in the Habsburg Empire on the one hand and in the Second Republic after World War II on the other might surprise at first glance as the international scenario had, of course, changed dramatically in the meantime. But then there were also important elements of continuity: while being much larger in terms of geographical size and population than its successor, the Republic of Austria, also the Empire, in the second half of the nineteenth century, with its military weakness and its corrupt feudal system, [37] was much dependent on stable international relations that were to be guaranteed by diplomatic means. Good knowledge of IL principles was an essential prerequisite for this policy to succeed. The Second Republic, with its neutrality status factually imposed by the Soviet Union [38] and outside the Western military and economic networks, [39] tried to up the ante by playing an important role as an international mediator and by transforming Vienna in a centre for international meetings and mediation. [40]

Summing up on this point it can therefore be said that law in general and IL in particular can be important tools for the enforcement of existing power structures. The two country case studies on Germany and on Austria bear, however, also evidence to the fact that the way

isting societal structures, see Scott O. Moore, *Teaching the Empire: Education and Loyalty in the Late Habsburg Austria* (West Lafayette, Indiana: Purdue University Press 2020).

[37] A warning was set by the Vienna stock market crash in 1873. See Karl Vocelka, *Österreichische Geschichte* (Munich: C.H. Beck 2005) at 84 ff.

[38] Officially, this imposition was always denied as, formally, Austrian neutrality finds its origin not in the Moscow Memorandum of 15 April 1955 agreed by an Austrian governmental delegation in Moscow with their Soviet counterparts but in the Neutrality Law (*Neutralitätsgesetz*) of 26 October 1955. Substance, however, differs here from form. See Peter Hilpold, 'How to Construe a Myth: Neutrality Within the United Nations System Under Special Consideration of the Austrian Case', *Chinese Journal of International Law*, 18 (2019) 247–79.

[39] Only in 1995 Austria acceded to the European Union.

[40] See Matthias Dahlke, *Demokratischer Staat und transnationaler Terrorismus: Drei Wege zur Unnachgiebigkeit in Westeuropa 1972-1975* (Munich: Oldenbourg 2011) at 65 ff.

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this may happen can take the most variegated forms. While there might be a presumption for IL being particularly suited to strengthen the ruling power, as this discipline represents a mélange of political and legal elements, there may be situations in which recourse to IL would be contrary to the ruling powers' interests.

Furthermore, it has to be remembered that IL has been accused also from a Marxist and a Feminist perspective to be directed at reproducing inequality, either in material terms or in the relationship between the sexes (or both).[41]

3.3. *A stock-taking on the aims of TIL*

Returning now to the different aims that can possibly be attributed to teaching, it seems fair to say that they can hardly be all placed on the same level. They surely do not operate in competition to each other and in several senses they overlap. Even if it often goes unacknowledged the prevailing aim of TIL is most probably to convey information. There might be reciprocal interaction, there might be a more or less pronounced governmental intention to consolidate thereby existing power structures and there might also be the intention and even the practical effect of enhancing 'critical thinking' (in the different senses this concept can be interpreted, as shown) but these additional, ulterior aims and effects are most often hard to measure and to qualify.

The mixture in which these aims will come to bear will depend also from the specific circumstances under which teaching takes place. These circumstances are determined by a number of actors and stakeholders which have to be examined separately – and in their interaction – if the nature of TIL is to be better understood.

4. The stakeholders

4.1. *Introductory remarks*

As the preceding considerations have shown, this contribution, even though formally about 'teaching', ultimately focuses on the

[41] See Lixinski, 'Scholarship on the Teaching of International Law', referring i.a. to Anne Orford, 'Citizenship, Sovereignty and Globalisation: Teaching International Law in the Post-Soviet Era', *Legal Education Review*, 6 (1995) 251–62.

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'teacher'. This does not imply, however, that this inquiry should concentrate solely on this subject. Such a limitation would rather lead to a narrowly circumscribed picture of scant practical or theoretical value. It is assumed here that the role of the teacher, his/her potential, the challenges this figure is confronted with, depend very much from other actors, the social and legal environment, the culture teaching is embedded within. The teacher is only one actor, one stakeholder of many on the teaching scene. It can be revealed already at this point that the basic assumption this contribution is premised upon echoes the belief that the teacher may be a decisive actor being able to give a substantial contribution to the strengthening of a national and an international society based on values such as human rights, peace-orientation and the rule of law. In this, the lawyer is, however, dependent on others and on the specific circumstances allowing this development to happen. The teacher is, therefore, only a part, albeit an important one, of the picture, and for a comprehensive understanding of the situation a broader perspective has to be adopted. This picture shall therefore also consider the greater political and societal situation, University legislation, the instruction and the role of the judiciary. Against this backdrop, already in part analysed above, the role of the international lawyer should gain substance and be better related to the complex reality in which this teacher operates.

The ultimate endeavour of this contribution is to see whether there are specifics to TIL that distinguish this activity from teaching other law disciplines and whether there is a characteristic role for the teacher of IL that is unique to this function. Eventually it shall be examined what could be the future of such a possible role.

4.2. *The teacher of IL*

The 'idealistic', 'progressive' tale of international law and the international lawyer

Any inquiry into TIL has always been and continues to be a confrontation with the figure of the teacher as a person. As will be shown in the following, in a somewhat distanced perspective the question could be posed whether such a figure, to which so many complex functions are attributed, can be identified at all in a somewhat objective fashion. At the end, it might appear that this question is of secondary importance as the picture that should emerge from such an analysis should, first of all, be of a paradigmatic nature. Such an approach not only helps to address some fundamental issues of teaching but it

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reifies a motivational situation that can be of enormous inspirational force and that gives teaching ultimately its particular characteristics.

Regularly, academic inquiries about the 'IL teacher' begin with a somewhat idealistic, if not heroic characterization. The IL teacher may be a 'marginalised person' at the law faculty, [42] but at the same time he or she is portrayed as an unselfish person of an 'unwavering belief in the intrinsic goodness' of his/her work. [43] It is this 'genuine commitment' [44] that is attributed to the IL teacher, an element that makes him or her stand out among all members of the faculty. Of course, it could be argued, that such a qualification, stemming from international lawyers, amounts primarily to a self-eulogy, difficult to put to a practical test. On the other hand, there are elements that could well explain, in many cases, the formation of such a mindset: the lack of 'political' leverage in the faculty (as far as this is really a given, many international lawyers will know cases to the contrary) might prompt teachers to take refuge in a psychological attitude that compensates for the lack of local influence and power with the conviction of acting for a higher goal out of reach for, say, the teacher of commercial law. [45] Furthermore, many of the cornerstones of IL teaching could in effect be seen as an expression of the ultimate challenges for the survival of mankind. Human rights and international environmental law are but two among the most impressive examples in kind.

How can it be explained that such a particular self-portray of international lawyers, to some degree recognised and accepted by the law teachers' community as a whole, has formed out? Along the specific characteristics of this teaching's content mentioned above there are also historical explanations for this development. In fact, two souls (or two traditions) live in international lawyers' chest.

First of all, in IL, traces of natural law, dating back to the very beginnings of this discipline, usually referred to Hugo Grotius, seem indelible. While it might be object of some controversy whether Grotius has effectively been an adherent of the natural law school, there can be no doubt that his writings are permeated by this thinking

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[42] See Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Las as Practice' in d'Aspremont et al., *International Law as a Profession*, 38–66, at 64.

[43] Ibid., 40.

[44] Ibid.

[45] See, in this sense, also David W. Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', *Transnational Law and Contemporary Problems*, 4 (1994) 329–75.

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which he tried to 'secularize' in order to bring it closer to a reality that, already in his acute perception, was ultimately determined, in a decisive fashion, by the combined will of the state community.[46]

The international lawyer with the opposite orientation is often portrayed as the 'positivist' one, in direct contrast to the natural law inspired lawyer. This positivist lawyer is designed as a technocrat, as the counterpart of Auguste Comte's engineer, building up a new, future-oriented fabric of a modern society.[47] In reality, however, the difference between these two positions may be less accentuated than it might appear at first sight.[48] In fact, lawyers of both positions mostly share an optimistic, bright outlook of the future,[49] even if the basis of this optimism is profoundly different: the belief in redemption (for natural law inspired teachers with a religious background), the quest for cosmopolitan justice and humanity (for followers of the natural law position adhering to a metaphysical position) and the belief in natural science and in the forces of human reason as to 'positivists' in the strict sense. One of the most characteristic elements of the 'positivist school' is the belief in 'progress'. For long, international lawyers had no problem in declaring openly this belief.[50] In the meantime, due to the vagueness of this concept and general reluctance as to the use of an over-emphatic language in academic parlance, such an open confession has become rather rare. Nonetheless, also in default of such an outspoken stance, '[i]nternational lawyers almost invariably see themselves as "progressives" whose political objectives appear not merely as normative hopes, but as necessary insights into the laws of historical or social develop-

[46] See i.a. Charles Edwards, 'The Law of Nature in the Thought of Hugo Grotius', *The Journal of Politics,* 32 (1970) 784–807.

[47] See Stephen C. Neff, 'A Short History of International Law' in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press 2018) 3–27, at 13 ff.

[48] As it was said, all lawyers share some mythical belief. See Carlo Focarelli, *International Law* (Cheltenham: Edward Elgar Publishing 2019) Section 1.17: 'There can be no law without a mythic vision, no matter of what kind, whether religious, or atheist, scientific, humanitarian, environmentalist, progressive, and so on.'

[49] Of course, especially the natural law position is extremely rich in variants and many sub-variants contradict each other in an array of aspects. Up to which point, for example, Thomas Hobbes may be qualified as an 'optimist' may be subject to discussion. He surely was not in relation to basic human nature. See i.a. Loren E. Lomasky, 'When Hobbes is an Optimist: Politics Among the Malevolent', *Public Affairs Quarterly*, 28 (2014) 289–315.

[50] Most prominently, Manley O. Hudson, *Progress in International Organization* (Stanford: Stanford University Press 1932).

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ments: globalization, interdependence, democracy, and the rule of law'.[51]

It can therefore be stated that commitment to a 'progressive stance' has mostly not been abandoned among international lawyers, even though this commitment might often be presented in a more modern, 'academically correct' language. In parallel it has to be acknowledged that also in recent times open side-takings in favour of this narrative, rare as they might be, can nonetheless be seen: thus, a voluminous collective writing, structured in a similar way like a manual, has been presented, in the not so distant past, under the title 'Progress in International Law'.[52]

The editors of this book of 2008 manage to express an open commitment in favour of the concept of progress notwithstanding its ambiguities: 'We take it as a given that "progress" is a term fraught with normative ambiguities, built on assumptions about context, perspective and directionality.'[53] They declared themselves as 'not intended to diminish the fundamental critique that progress narratives are inherently slippery and value-laden'.[54]

Notwithstanding these caveats (and a few more set out in the introduction of their book) the editors deliberately decided to stick to this term and not to hide it ashamedly behind more modern terminological clothes.

They rather felt that the 'utility' of this term also in modern IL discussion appeared to outweigh its deficiencies. Like 'idealism' the concept of 'progress' is not suited for 'objective' definition. And nonetheless, both concepts seem to be of considerable value for sorting out what characterises the essence of this discipline for those who practice it.

4.3. *Subjective ideals and objective values and goals: The interrelation*

As shown above, and as could be evidenced with many more examples, an 'idealistic' attitude, explicitly or indirectly undergirded

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[51] See Martti Koskenniemi, 'Between Commitment and Cycnicism', at 39.

[52] See Russell A. Miller and Rebecca M. Bratspies (eds.), *Progress in International Law* (Leiden: Martinus Nijhoff Publishers 2008).

[53] See Russel A. Miller and Rebecca M. Bratspies, 'Progress in International Law: An Explanation of the Project' in Miller and Bratspiels (eds.), *Progress in International Law*, 24.

[54] Ibid.

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with a strong belief in the 'progress narrative' can be widely encountered among member of the experts teaching IL.[55]

Ideals seem often to be utopian as they simply do not reflect material IL. Nonetheless, in IL, the very particular source structure and law creation process bring about a situation where ideals can exert a transformative force and influence as a 'material source' of IL contributing thereby to the formation of corresponding formal sources. Due to the multi-layered norm-creation process in IL and the uncertain contours of law sources and their actual binding character many grey areas show up where ideals, principles and hard law are difficult to distinguish.[56] Teaching based on ideals can exert here considerable transformative power. What originally has been a mere postulate can, over time, evolve into a norm of uncontested legal force.[57] In IL ideals and the purport to make progress, however interpretated, may transform into material reality as basic inspirational forces for international lawyers. Within a normative order characterised by a legal source situation always in fluctuation and with academics as the main interprets of these norms,[58] idealistic thinking may become itself a pivotal driving force for the norm-setting process. As a consequence, it was argued that teaching makes IL real; it helps IL to exist effectively.[59]

Of course, projects of this kind, if effective at all, are of a long-term nature. Principles are heralded by one generation of international lawyers and only future generations may (or may not) harvest the results of these

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[55] Bratspies and Miller ('Progress in International Law', at 23) refer i.a. to Louis B. Sohn, who emphasised the evolutionary but manageable character of IL, and to Myres McDougal for whom a balance between progress and stability in IL was to be found.

[56] A neat separation between 'law' and 'non-law' is often not possible and based on a false dichotomy. The fear, often expressed by international lawyers from continental Europe, that the failure to differentiate between these sources would undermine 'hard law' appears to be unjustified as so-called 'soft law' often, to the contrary, operates as an adjuvant to make hard law work. See Alan Boyle, 'Soft Law in International Law-Making' in Evans (ed.), *International Law*, 119–135, at 135.

[57] See, with reference to the principle of self-determination, Hilpold, 'Self-determination and Autonomy'.

[58] See Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker & Humblot 1984) at 624: '[Doctrine] does only focus on the mere presentation and systematization of the positive legal norm. It can, on the one hand, favour the creation of new legal norms by providing knowledge of their sociological foundations and pre-requisites, and, on the other hand, think further the legal concepts contained in positive norms, and in this way promote the development of international law' (translation from German by this author).

[59] See Pierre d'Argent, 'Teachers of International Law' in Jean d'Aspremont et al. (eds.), *International Law as a Profession*, 412–27, at 418.

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endeavours. International lawyers of the present may content themselves with the prospect of such a success and they have also to take into account possible failure to be attested already during their active period or their life-time achievements to be put into question posthumously. These prospects may require considerable stress-resistance, preparedness to take risks or even the ability for self-deceit. On the other hand, hardly an alternative is available. As has been pointedly remarked, on the personal level, the alternative for the international lawyer would be personal alienation and social nihilism [60] – not really an attractive option!

With some emotional emphasis, the IL teacher could be compared to a priest, a clergyman, a rabbi or to other clerics, [61] and teaching could be seen as a transformative act of the social. [62] Even though not all observers might share such vision and even though not all IL teachers will be animated by such self-perception, such vision might express elements of a mission that can be widely met within this profession and also outside.

This self-identification could be derided, but good reasons have been given why such an attitude should be welcomed. The proposition is that such an approach, subjective and emotional as it may appear at first sight, helps to promote the very ideals that are generally recognised to be mainstays of the IL order itself. While there might be also talk about a 'cynical international law', [63] the position to the contrary seems to be the absolute prevailing one. Even adherents of CLS, when they touch on sore points of dominant doctrine, are regularly animated by the intent to overcome misperception, false representation and outright power abuse, often in favour of sublime ideals, like the fight for the oppressed, the down-trodden, people without political voice. [64] As a consequence, subjective, emotional stances, as aloof as they might appear, end up translating in objective cornerstones of the international legal order. [65]

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[60] See Koskenniemi, 'Between Commitment and Cynicism', 40.

[61] See d'Argent 'Teachers of International Law', 418.

[62] Ibid.

[63] See Björnstjern Baade et al. (eds.), *Cynical International Law?* (Berlin: Springer 2021).

[64] When examining the question 'What is international law for?', Martti Koskenniemi presents a series of answers which refer to values. I.a. he sees this legal order as a 'promise of justice' and hints at a 'Messianic structure to international law, the announcement of something that remains eternally postponed', see Martti Koskenniemi, 'What is International Law For?' in Malcom Evans (ed.), *International Law* (Oxford: Oxford University Press 2018) 28–50, at 48.

[65] As an example in kind, the 'Common Heritage of Mankind' could be mentioned. Originally advocated in particular by third world countries within the ambit

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Compared to other lawyers specialising in national legal disciplines international lawyers are greatly advantaged in the sense that this discipline is less transient. Notwithstanding repeated crises that might even put into question basic achievements of IL,[66] this legal order, also because it is formed by so many actors so that one single country can influence its development only marginally, presents an extraordinary stability and seems to progress in an almost linear way. The fundamental fear assailing national lawyers and expressed so effectively by Julius von Kirchmann that 'only three words of the legislature can destroy whole libraries',[67] is less present with international lawyers. As a consequence, international lawyers may gain the sensation to work on a lasting project outliving their physical existence, a prospect which can be enormously energizing.

Of course, all these elements, as much motivating as they may appear, can come to bear only under specific circumstances that will be examined in the following sections. On the whole, there is a multitude of stakeholders and elements that have to be considered if we want to obtain a somewhat meaningful picture.

4.4. *Other stakeholders and the broader environment*

If we look at the broader environment in which teaching takes place and other stakeholders therein it could be tempting to think, first of all, at the learner. It is true that teaching is always a process of communication and interaction. Teacher and learner are two poles of a rela-

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of the discussion about a 'New International Economic Order', it was eventually included, by an initiative of Malta, in Part XI of the UN Convention on the Law of the Sea. See Rüdiger Wolfrum, 'Common Heritage of Mankind' in *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press 2009).

[66] Such a challenge is surely the war in Ukraine started on 24 February 2022 (or, on another account, already with the Russian invasion of Crimea in 2014) and ongoing at the time when this contribution was written. For some, the Russian aggression was tantamount to putting into question the prohibition of the use of force according to Article 2(4) of the UN Charter, a basic pillar of the whole UN system. This view, however, disregards the strong reaction by (a considerable part of the) Community of states to this violation of IL. With UNGA, Res. ES-11/1 (2 March 2022) UN Doc A/RES/ES-11/1, the Russian invasion was opposed by 141 countries, with only 5 countries voting against this resolution and 35 abstentions. Thus, it can be said, to the contrary, that the prohibition of the use of force has found strong confirmation and this constitutional principle of IL now only awaits being fully implemented also in this case.

[67] See Julius von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft: Ein Vortrag, 1848 gehalten in der juristischen Gesellschaft zu Berlin* (1848) at 29.

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tional situation in which positions can also change in the sense that teachers become themselves learners. Teachers regularly not only adapt their communication to the needs and the behaviour of the learner, but they may become recipients of substantive information from the learner. Most often, however, this interaction is not one between equals but of a hierarchical nature, where the substantive information flowing from the teacher to the learner is by far more extensive than that going in the other direction. Such teaching situations can assume a myriad of forms and it appears to be hardly possible to structure them in such a way as to conceive a general model covering them all. Therefore, the most common situation of TIL, the one between a teacher and University/ law school students shall be singled out. Again, it will be far easier to conceive an abstract model of the teacher than of the student, as the latter's knowledge, maturity and personal perspectives will vary enormously depending, first of all, of the stage of the formation process. What is more, the position University law and University regulation attribute to students will have considerable influence on their behaviour in the teaching process. For example, a strictly hierarchical University system that disregards participation and effective co-decision in the University structure will be conducive to a mentality according to which students should rather assume a passive attitude within teaching and become active only at the moment of the examination when they have to reproduce knowledge they had to 'consume' before in a mostly acritical way. The broader the rights granted to them are, the more they can influence the teaching process (for example through a meaningful, serious teacher and institution assessment process), the more their role develops from that of a passive subject to an actor endowed with the ability to form the education process. In view of the fact, however, that the teacher will (nearly) always have an information and formation advantage, even granting the most generous and progressive participatory rights will almost never create a learning process between fully equal subjects. Only in highly advanced teaching circumstances an environment can be created that comes near to such a situation of equality.

Hierarchy, or more liberal approaches in teaching, often reflect a more general societal situation in which Universities operate and, again, such a climate can influence TIL to a very large extent as, ultimately, teachers themselves will see their options enlarged or restricted, depending on the degree of academic freedom they enjoy.

The personal character and attitude of the teacher, as analysed above, might be important but they will become fully relevant only if some basic academic freedom is guaranteed. Academic freedom is

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part of the overall legislative and cultural framework in which the teacher operates.

If we think at authoritarian regimes, there we usually encounter repressive patterns also with regard to academia and this repression might even be accentuated in relation to disciplines where political elements are of greater relevance, a typical case in IL. In this context, we need not necessarily refer to an outright dictatorship. Some anti-democratic tendencies suffice to have considerable repercussions on academic teaching in general and TIL in particular. [68] In this sense, not only University administration but politics in general become stakeholders in the teaching process, at least indirectly. [69] Ideological orientations of some lasting nature will usually find reflection in the University organization legislation with which a tangible framework is set that circumscribes the baseline of academic freedom. [70]

Perhaps all these elements go widely unnoticed or are somewhat downplayed if studies on the role of teachers are undertaken but they are still there and they may even play a decisive role for understanding the overall environment in which the teacher operates and which determines his role at least as much as he or she can influence and form this broader situation.

If the role of the teacher of IL is assessed as to his or her role in promoting basic values and forming the central tenets of a liberal society, regard must therefore be taken of this situation in which this teacher operates. The dimension of his or her contribution, the potential that is open to him or her, manifests its relevance therefore never in absolute terms but only in relative ones.

In other words: teachers exert their role within specific environments that may differ considerably from country to country, even in

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[68] See *European Commission v. Hungary* (2020) ECLI:EU:C:2020:792, where the ECJ stood up against a creepy process of infringement of academic freedom, emphasizing that this freedom is guaranteed not only by Article 13 of the Charter of Fundamental Rights but also, at least indirectly, by Article 10 ECHR on the right to freedom of expression.

[69] For an extreme situation, see Maria Issaeva, 'A Quarter of a Century on from the Soviet Era: Reflections on Russian Doctrinal Responses to the Annexation of Crimea' in Wladyslav Czaplinski et al. (eds.), *The Case of Crimea's Annexation Under International Law* (Warsaw: Wydawnictwo Naukowe Scholar 2017) 155–79. Issaeva furnishes a critical picture of the Russian International Law academia characterised by the dominance of a hierarchical, closed and self-complacent academic society, elements, however, not unknown also to Western International Law academic societies.

[70] For a more extensive examination of these aspects, see Peter Hilpold, 'Teaching International Law'.

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culturally or politically relatively homogenous regions such as the European one. Comparisons between different continents appear to be even more difficult.

Nonetheless, to a certain extent, with the exclusion of strict authoritarianism or outright dictatorship, the IL teacher can nearly always take an active role in influencing the teaching situation and the outcome of the teaching process.

The foregoing should have made clear that academic freedom is the decisive factor for teachers – not only in the field of IL – to make a difference through their professional activity. It is perhaps interesting to note that this freedom, most recently during the Covid-19 pandemic, has come under strain not only by repressive measures of authoritarian regimes, but also by controversies within the academic community and its penumbra, often carried out in strident tones. It has been deplored that reputational capital, academic titles and the positions they normally entail, have been abused to advocate extreme ideas and even to oppose mainstream academic discussions so urgently needed in the days of the most urgent crisis. As a result it has been suggested to adopt restrictive measures in order to counteract such excesses in the future: 'Academic freedom presupposes that participation in the discussion happens on the basis of sufficient knowledge of the disciplinary subject and its methods. To argue outside one's own subject of qualification means to opine but not to discuss academically.' [71]

At first sight, such a proposition looks sound. At a closer look, however, the question will arise as to who should be competent to decide about the qualification enabling to participate in this discussion, and on what criteria. It was contended that the question of what persons say in the academic discussion is not the real problem but rather that individuals could be hindered to participate by the structure of this discussion process and by the concentration of academic power. [72]

It should not be overlooked that the – noble – intent to preserve academic freedom by the exclusion of those who seem not to be part of an epistemic community but appear to obstruct the relevant discussion, could easily be abused as an argumentative tool to undermine this discussion altogether. The better solution will most probably be to allow the voicing of any opinion, as long as it does not *per se* con-

[71] See Klaus-Ferdinand Gärditz, 'Wehrhafte Hochschulen und Wissenschaftsfreiheit', *Verfassungsblog* (23 October 2022) available at verfassungsblog.de/wehrhafte-hochschulen-und-wissenschaftsfreiheit (translation by this author).

[72] Ibid., see contribution by Pyrrhon von Elis.

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stitute, either in tone or mode, an illegal act. Academic institutions have rather to be strengthened in such a way as to become more resilient also in the face of controversies as those experienced recently.

In sum, not even the direst moments in the academic discussion during the Covid-19 pandemic furnish justifications for a limitation of academic freedom, in whatever form they may be presented, but rather corroborate the need for its comprehensive protection.

5. Conclusions

The aim of this contribution was to sort out what is the specific role, if any, of the IL teacher, in view of the widely held perception that this role is special, if not unique. Many euphoric pronouncements can be encountered in literature in this regard but at the same time also doubts and delusions.

It was attempted to approach this question by further defining and differentiating the cornerstones of this discussion. It turned out that the basic issue, considered in all its ramifications, would be by far too complex to be addressed comprehensively in this place. There would also be the danger of comparing the incomparable. Nonetheless, it was considered that already the creation of transparency as to the multitude of dimensions in which teaching of IL takes place, of which teaching consists and in which the teacher can operate, may sensitise as to the complexity of the whole discussion.

At the same time, even if our understanding as to the complexity of the teaching reality is continuing to grow and to mature, this circumstance should not prevent us from an analysis focusing on the IL teacher in his closer-circumscribed fashion, in a somewhat standardised or simplified picture as it is so common in literature. The teacher remains the decisive actor, the focal point of the most important ideals developed in the area of teaching. Acting this way presupposes setting some pre-conditions so to make such an analysis possible.

Such an analysis has to be developed by reference to a somewhat paradigmatic teacher figure, in a somewhat liberal democracy, characterised by some degree of academic freedom, where teaching takes place in 'traditional circumstances', i.e. in an environment in which the teacher has some discretional power to act.

It is for such a standardised situation which still can claim considerable practical relevance, that academic freedom continues to be the key variable for teaching to remain a possible factor of social change and progress as defined above. As has been exposed elsewhere more

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extensively,[73] academic freedom requires a legal setting and an organization of Universities based on a complex system of check and balances that rewards independent, future oriented research in a climate of openness towards the exchange of ideas.

As teaching (and doing research) has to be considered a privilege,[74] and as it is associated with considerable costs for society, mechanisms have to be in place that can assure that this privilege is not abused, for example by plagiarism, blatant inactivity and outright corruption. 'Self-cleaning' capacities of Universities have to be created that may effectively countervail such tendencies and, at the same time, assurances have to be set in place to avoid these mechanisms becoming themselves tools for abuse – a difficult balancing act. As has been set out above, the Covid-19 pandemic has led to new challenges for academic freedom but on a whole it seems that academic freedom has ended up strengthened, not weakened by this crisis.

As of yet, it is not sure where technological developments will lead us to in the field of TIL. Up to this moment, these improvements have to be qualified, most probably, as very beneficial for teaching, defined in a larger sense, comprising also research.[75] It is unsure, of course, whether also future developments will have to be interpreted in this sense, whether they will, for example, bring about more standardised teaching tools, but eventually also creating a situation of uniformity. Artificial intelligence could lead to a completely new situation with the elimination of the human factor in teaching or locating it at a much different place – if this intelligence is conceived and brought to life. Maybe we are in a situation of transition and at an endpoint of a millennial development. Never before teachers of IL had at their disposal such a wealth of information and knowledge and never before has it been possible to manage these data so effectively by technolog-

[73] See Hilpold, 'Teaching International Law'.

[74] See d'Argent, 'Teachers of International Law', 422. As René-Jean Dupuy told to Antonio Cassese: 'Teaching has brought me extraordinary joy. I always went up to the lectern feeling an intense happiness', see Antonio Cassese, *Five Masters of International Law: Conversations with R-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter* (London: Bloomsbury Publishing 2011) 269.

[75] Teachers of IL, working before computer technology had become operative and widely available, routinely deplored the 'sheer growth in bulk of significant thought'. See Julius Stone, *Of Law and Nations: Between Power Politics and Human Hopes* (Getzville, New York: William S. Hein & Co. 1974) 260. Modern technology has, in the meantime, improved working conditions for IL academics (as well as for academics in general) up to a point where, notwithstanding a continuing exponential increase of knowledge, automatised knowledge administration, made working conditions better than any time before in history.

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ical instruments. In many countries, academic freedom has benefitted hugely from a positive development of the overall democratic system. Nonetheless, democracy is never fully safe and guaranteed,[76] and the same is true for academic freedom.[77] Perhaps the idealistic vision of an IL teacher as developed and which can be found in many recent studies,[78] remains a transient experience typical of an epoch in which the belief in values and in 'progress' (however called and defined) was still alive, while the future may show a different picture. While the prospect appears to be mixed in view of recent experiences, the belief in these values and in ongoing improvements as to the overall societal situation also through the contribution of TIL remains important. Perhaps it constitutes an illusion, but it is a fruitful illusion to have as an alternative only to personal alienation and despair or nihilism.[79] Notwithstanding all the doubts and hesitancies the self-imposition of an illusionary attitude may generate in rational, sensate people in general, and in academics in particular, it becomes a choice endowed with so many tangible benefits that it is eventually to be qualified also as rational the same way as a strictly rational thinker such as Immanuel Kant and Karl Popper have qualified optimisms as a (moral) duty.[80]

Turning back to the introductory question, therefore, it can be stated that, for the present as well as for the foreseeable future, an idealistic attitude aiming at the realization of some basic, universally recognised principles such as the protection of human rights, as well as the principles enshrined in the Charter of the United Nations and in (nearly) universally accepted international instruments, remains an ambition characterizing great parts of the profession here at issue. While the basic attitude of international lawyers is surely positivist-pragmatic, idealism is often the driving force that endows them with an elitist attitude that

[76] For recent declines, see Freedom House, 'Freedom in the World 2021: Democracy under Siege' (2021).

[77] As the Academic Freedom Index 2022 reveals, also academic freedom has declined in recent years, see Friedrich-Alexander-Universität Erlangen-Nürnberg, 'Academic Freedom on the decline' (3 March 2022) available at www.fau.eu/2022/03/03/news/research/academic-freedom-on-the-decline. For a specific case study, see i.a. Andrew Ryder, *The Challenge to Academic Freedom in Hungary: A Case Study in Authoritarianism, Culture War and Resistance* (Berlin: De Gruyter 2022). It has also to be considered that technological developments augments possibilities to control teachers in an attempt to limit their academic freedom.

[78] For an extremely inspiring and motivating study in this sense, see Cassese, *Five Masters of International Law*.

[79] See Koskenniemi, 'Between Commitment and Cynicism, 40.

[80] See Karl Popper, 'The History of Our Time: An Optimist's View', *World Affairs*, 149 (1986-87) 111–19.

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may compensate for the lack of material perks more easily available in other law (sub)disciplines. This idealism seems to prevail also with lawyers who see themselves as rationalists, and both visions are often not neatly separable. Idealism can become a rational option even for writers who perceive that the most motivating ideals lack rational foundations.[81] The true art seems to be to recognize this 'dreamwork component' of the international lawyer's work as part of the avenue towards objectivity.[82]

Whether such a role for the international lawyer can also survive in the more distant future is uncertain in the same way as it is uncertain what destiny will have the legal profession in general and the law teacher (also in other fields of law) in particular.

There is the prospect that legal services will be rendered more and more in an impersonal, automatised way. Teaching will, most probably, not be exempted from this development. In this process, for the next future, the human factor will not disappear altogether but assume a different role. Whether, in teaching, human intelligence is fully substitutable by an artificial one remains to be seen. In the most dystopian perspective, even values, their application and even their conception, could become the outcome of a programmable algorithm, idealism perhaps an act of self-deceit. As shown, the teacher of IL, acting in a situation of academic freedom and motivated by ideals as he or she traditionally often is, can fulfil an important role in the further development of democratic societies. It is not sure whether this role can be preserved in a further automatised teaching situation, where the human component is reduced to a minimum, whether it will be steered centrally or will disappear altogether.[83]

In any case, even if such a situation should become true, this will not happen today and not tomorrow. Moreover, in view of all the limits of the human existence, with the concept of existence being terminal for any living subject, a consoling perspective opens up that the idealism-borne teacher is here to stay, and to remain relevant, for those living today, at least for the time being and for some time to come.

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[81] This holds even true for the role of religion in an international lawyers personal and academic life. Impressive is what Antonio Cassese states in this regard: '[Religion] can be of great psychological help in life. For those, like the present writer, who are radically secular, life can be more troublesome', Cassese, *Five Masters of International Law*, 268.

[82] In this sense, see Stone, *Of Law and Nations*, 256.

[83] Really dystopic would be a situation in which automatised learning should be directed at forming 'character', a task some experts believe to be the primary goal of (traditional, human-based) education (see above n 6).

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