CHAPTER 1

Teaching International Law in the 21st Century

Opening the Hidden Room in the Palace of International Law

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1 Introduction[1]

Interest in Teaching International Law (TIL) goes far back in history but appears in an astonishingly discontinuous way.[2] Furthermore, it has a widely diverging meaning and focus. From time to time remarkable studies are published and study groups on this subject are even established, but there is no permanent engagement with this issue. Angles of perspective change continuously; study groups are abandoned notwithstanding promising results they have delivered;[3] the immediate motivation for academics to deal with TIL seems to vary constantly.

The list of publications in this field may be long,[4] but these studies exhibit hardly any common thread, concentrated as they mostly are on specific regional vantage points, on curricular issues of a transient nature, or on moral or ethical pleas which display highly subjective characteristics and are widely divergent in tone and formulation over the years. Some erudite studies when dealing with the "Teacher of International Law" deliver more of a philosophy and a history of international law rather than sort out what the timeless traits

1 Many thanks to Charlotte Ku and to Lucas Lixinski for their comments on an earlier version of this manuscript.

2 As John Gamble wrote in 2007, "the teaching of international law does not seem to be a major interest of professional associations devoted to international law or, for that matter, to most professors who teach the subject". See John Gamble, 'Teaching or Get Off the Lectern: Impediments to Improving International Law Teaching' (2007) 13 ILSA Journal of International & Comparative Law 379.

3 Reference can be made here to the activities of the International Law Association ILA in the period between 1998 and 2010, characterized by the adoption of a series of reports and resolutions. See 'Committees' (International Law Association ILA) <www.ila-hq.org/index.php/committees> accessed 25 October 2021.

4 This is remarked on by Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 EJIL 70, citing in note 2 a series of publications, many from Anglo-Saxon countries.

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of the figure of the IL teacher, of his function, could be.[5] This situation may be puzzling at first sight, as the role of the teacher in developing the discipline of International Law, both as a system and as an academic discipline, has been a very prominent one in the past and continues to be so, though in a considerably modified form in the present. More recently, however, things appear to have changed. In the continuous quest to find new or previously neglected fields of research the area of teaching seems to be something like a hidden room in the palace of International Law studies. Everyone believes they have already been there, but nobody knows how to find its front door, nor how fully to describe its content. In this context, the subject of "outer space" might be easier to deal with than the adjacent field of the theory of teaching.

So we can say that showing interest in TIL may have become fashionable, but it is still hard to structure the tools to address this interest and to see a solid and sustainable foundation behind the relevant utterances and initiatives.

The reasons for this situation are manifold. In what follows, while not pretending to be complete, a first attempt will be made to sort out some of the most conspicuous aspects of this discussion.

It will be shown that one reason for TIL remaining an unwieldy subject is to be found in the fact that at universities pedagogics of law has long been a widely neglected field, and this has even more so been the case for International Law. Academic recognition and institutionalization are surely an important pre-requisite for a discipline to develop and to continue to find followers, be it out of true enthusiasm for the subject or for pragmatic or opportunistic professional reasons.

In a next step, the "Humboldtian dilemma", affecting all university teaching but International Law teaching in particular, will be examined. The unity or symbiosis of research and teaching, the concept of research-based teaching, so deeply entrenched in our understanding of university reality, often meets with

5 See, most prominently, Manfred Lachs, *The Teacher in International Law* (2nd edition, Martinus Nijhoff: Dordrecht/Boston/Lancaster 1987). As regards this book, John Gamble remarked rather caustically: "With all due respect to my friend, the late Judge Manfred Lachs, an expansive approach to teaching such as that advocated in Judge Lachs′ book is not the way to generate sustained interest." See Gamble (n 2) 385. The review by Otto Kimminich in the German journal, "Archiv des Völkerrechts", is more generous: "This book is complex [...] First of all it is a history of international law thinking. But theory and practice cannot be separated. The problem lies rather in combining them and to present their parallel historic development in a meaningful way" (translation by this author). Otto Kimminich attests to the fact that Manfred Lachs succeeded in this task. See Otto Kimminich, 'The Teacher in International Law by Manfred Lachs' (1986) 24 AVR 238.

hard challenges when put to the test in practice.[6] With ever higher demands associated with the position of a university/high school teacher individual teachers might find themselves at first sight between a rock and a hard place if they want to fully satisfy all the ambitions of the Humboldtian model. How can one be a good teacher and an extraordinary researcher at the same time? As will be shown in this contribution, in recent years in the social sciences different approaches have been developed that should make enterprises, service providers, but also the public sector and even higher education more effective. A series of concepts and buzzwords, such as "New Public Management", "Lean Management", or "VUCA", originally developed in other areas of society, may be referred to in this context. And in fact some attempts have already been made also to apply theories of this kind to the teaching of law. Taking advantage of first insights resulting from these studies, we will try to go a step further and to see what could be the consequences for TIL, from the perspective of both the teacher and the university. University teaching operating in a volatile, uncertain, complex,and ambiguous (VUCA) environment has to adapt to these new challenges if it wants to remain relevant and pertinent.

It is true that universities have to adapt to mounting international competitive pressure and they will often pass this pressure on to the teachers. On the other hand, teachers will have to adapt to these pressures and to compromise in order to satisfy in the best possible way the ever-growing demands with which they are confronted. It will be shown that this situation must not necessarily end in conflict: modern high school management is directed at reconciling the interests of the education institutions and those of the teachers in an open and participative process. This presupposes, however, an adequate legislative framework in which such a process can unfold.[7]

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6 In a comment on an earlier version of this text Charlotte Ku formulated this problem as follows: "There seems some implicit assumption that if you are a good researcher, you would be a good teacher. We know, this is not the case. On the other hand, we do want teaching that is evidence and research based, right? In science, the basic courses teach scientific and research methods. We do not have the same kinds of basics in law. It in those basic courses that more consideration is given to teaching. In the U.S. we have the legal writing, analysis, and reasoning courses. Not surprisingly, some of our best and most thoughtful teachers come from that cohort, but they are not generally the law professors we recognize."
Perhaps part of this dilemma can be solved if we adopt a broad notion of "teaching" that also comprises written texts. Many of us might state that they have been strongly influenced by teachers they have never met personally. However, the problem that traditional teaching as such does not get enough academic recognition remains real.

7 As Charlotte Ku pointed out, in the U.S. parents are also very much involved in school governance so that there it is a political and governance framework as much as a legislative one.

In what follows we will try to provide a broad panoply of the resulting questions. First of all, we will show what the situation of teaching IL is in various regions and countries. No comprehensive picture of the situation world-wide can be delivered here, and as far as can be seen no such global studies exist. Nonetheless, the situations portrayed here should be able to show that the teaching of IL takes widely different forms depending on a variety of factors, such as traditions, the relevance of IL as such, or the overall university structure. Different teaching systems have again influenced the meaning and the relevance attributed to IL in various countries, so that the whole perspective has to be a dynamic one.

In law teaching, IL is regularly a discipline apart. In some countries (or at some universities) IL has a rather marginal role. On the other hand, in other situations the relevance of IL is given a very prominent role, at least formally. This stems from the fact that IL has an enormous outreach; it touches upon almost every national legal rule system and it harbors enormous potential for change. As IL teachers contribute to interpreting and also forming IL (in particular also through additional functions, such as those of judges, advisors, and counsels, that they often exercise contemporaneously) they may enjoy considerable power when it comes to conceiving or even creating a better future – bringing national and international legal frameworks more in conformity with broadly cherished values.

As a consequence, the IL teacher has to decide which role to take. Figuratively speaking these roles are placed on a broad spectrum, which, at its vanishing points, has a marginalized faculty member[8] teaching IL as an optional course, and at the other end of the spectrum a teacher having a role akin to that of a prophet, a priest, an "international norm engineer". It will be shown that exaggerations have to be avoided and compromises have to be found. Globalization and intense international interaction between societies, economies, and regulative systems have tremendously boosted the relevance of IL norms. National law and IL are more strongly intertwined than ever. International lawyers have an important mission and can make essential contributions to steering the future of the planet. At the same time, however, they are part of an extremely large community. Meaningful contributions to societal progress can be given only as a result of close interaction within this community and in an interdisciplinary dialogue. To make this possible, universities also have to change

8 See Martti Koskenniemi, 'Commitment and Cynicism' in Jean d´Aspremont and others (eds), *International Law as a Profession* (CUP: Cambridge 2017).

and to foster, in a decisive way, free dialogue, transparency, and international exchange.

This is the main focus of this contribution, which aims to speak not (only) to international lawyers but to universities in general and even society more broadly. In this sense, this contribution is not only "facing inward" but also, and to a considerable extent "facing outward".[9]

2 Pedagogics and IL at Universities

International Law teaching is mostly university teaching, or in any case teaching that takes place in institutions located at the upper end of the educational system (for example, in some countries in "law schools"). In this, International Law teaching is more or less in the same situation as law teaching in general. Therefore, we encounter here a situation that is very similar to top-level teaching in general. While pedagogics is surely an important field of research in humanities, finding its most prominent location at universities, university pedagogics, i.e. the study of university teaching, is a rather latecomer and underdeveloped. The explanation for this may be given by the essence of a principle developed in International Law: "*par in parem non habet imperium*": To give pedagogics the function of structuring the content, to assess the quality of university teaching in other disciplines would be tantamount to introducing a vertical structure in university teaching, with pedagogics placed at the top.[10] True, much has changed in recent years and the growing awareness and search for quality in university teaching has in the meantime opened the door for a pedagogical discussion in all areas of academic activity and for all disciplines. But this discussion is a very prudent, diplomatic one. Pedagogical concepts are not simply accepted and imported from the faculties of pedagogics, but have rather developed in a consensual dialogue, with the academics in the relevant scholarly fields having a strong say in this process. Furthermore, while pressure for rigorous quality management for all academic disciplines is surely strong, we are most probably only at the beginning of a long process. Tradition, the situation of the discipline within the academic system, and the standing of the discipline within the faculty contribute further to determining the importance of pedagogics within that discipline. By all measures, these elements are counter-intuitive for the greater relevance of pedagogics in International Law

9 Many thanks to Lucas Lixinski for inviting me to point out this aspect explicitly.

10 As John Gamble (n 2) 385 wrote, International Law teachers are often suspicious of those offering to help them to teach better.

university teaching. They indicate rather that this importance is much reduced in respect to law teaching in general. In fact, as will be shown in more detail below, International Law in many university and law school systems has a rather reduced importance. It has been integrated into the relevant curricula, if at all, at a rather late stage and it is academically, in this together with law in general, situated rather far distant from pedagogics (differently from, for example, linguistics or history).

Thus, if university disciplines were structured according to their traditional closeness to pedagogics, International Law would most probably be located near the bottom of such a list, with other law disciplines being ranked, if not at the top, somewhat higher. This fact is reflected in the relevant publications in this field. If it is true that the foundation of a journal on the subject is a significant sign of the academic recognition of a discipline (or a sub-discipline),[11] then "Teaching International Law" has not yet obtained full recognition. It could be seen as forming part of a more general subject of "legal education", but even this discipline, judging from the number and influence of the relevant journals on the market, is still in its infancy, with some promising developments in recent years.[12] A series of academic journals of law teaching have

11 In International Law this can be demonstrated very well with reference to the "turn to history" towards the end of the last millennium when, in 1999, the Journal of the History of International Law was founded. In 2001 Martti Koskenniemi's influential "Gentle Civilizer of Nations" was published, and in 2016 the first issue of "Ius Gentium – Journal of International Legal History" followed. The growing interest in "Corporate Social Responsibility" found expression in 2016 in the foundation of the "Business & Human Rights Journal" (which is interdisciplinary but with a legal, and in particular International Law, focus).

12 In 2013, the „Zeitschrift für Didaktik der Rechtswissenschaft" was founded in Germany. Before this journal began publication, the editors engaged in a market survey, looking for journals that would be competitors on the Anglo American market and they found the following titles:

- "The Law Teacher" (GB) edited by the Association of Law Teachers and published by Taylor and Francis (URL: https://www.tandfonline.com/action/journalInformation?journalCode=ralt20). This journal sets out its aim as follows: *"The Law Teacher* is a fully-refereed journal concerned with the teaching of law and issues affecting legal education at all academic levels. Whilst it is the journal of the UK-based Association of Law Teachers, both the Association and the journal are international in outlook and contributions from any jurisdiction are welcome in any section of the journal."
- In the past, also in the US, a journal entitled "The Law Teacher" was published (by the Institute for Law Teaching and Learning). In 2017 its publication ceased, but its previous activities continue in part via the "Law Teaching Blog" (URL: http://lawteaching.org/the-law-teacher/). On the homepage of the Institute for Law Teaching and Learning the aim of this journal (whose archives can still be used) is described as follows: "The Law Teacher encouraged readers to submit brief articles explaining

been founded in recent decades but the relevant market appears still to be a limited one with some journals having already ceased publication after a promising start.[13] As it seems, the market for journals on law teaching issues is a rather difficult one and hardly self-sustaining without strong support from professional institutions (in particular associations of law teachers). While many law journals are also subscribed to by practitioners, no relevant market of such a kind exists for journals on law teaching. If international lawyers are touted as an "epistemic community"[14] this characterization applies to experts on law teaching in an even more pronounced manner.

As for the discipline of international law in particular, as far as can be seen there is no law teaching journal devoted exclusively or predominantly to this subject. Only sporadically do law teaching journals deal with international law issues (in the broader sense). As of yet there are also no chairs of TIL. There can be no doubt that to institutionalize academic research in TIL in such a way would greatly advance this subject.

3 "Research-Informed Teaching" – the "Humboldtian Dilemma"

3.1 *Setting the Stage*

At first sight, one might be inclined to suppose that, of all lawyers, I nternational lawyers should be predestined to deal with didactic matters, as their professional reality is more characterized by teaching activities than is the case for most other lawyers. While this situation has changed somewhat in recent

interesting and practical ideas to help law professors become more effective teachers. The archive of past issues is a resource of teaching ideas and Institute activities."

- The "Journal of Legal Education" (US) is a publication of the Association of American Law Schools (URL: https://jle.aals.org/home/). According to this journal's mission statement, "[t]he primary purpose of the Journal is to foster a rich interchange of ideas and information about legal education and related matters, including but not limited to the legal profession, legal theory, and legal scholarship."
- The "International Journal of Clinical Legal Education" (GB) "addresses the role of clinic as an instrument for civic engagement, access to justice and societal change." (See the homepage of this journal at https://www.northumbriajournals.co.uk/index.php/ijcle/about). Many thanks to Jan-Hendrik Dietrich for making available to me his market study which has been updated here.

13 See the previous note. Alongside "The Law Teacher" (US) the "Journal of Professional Legal Education" (AUS) has also ceased publication.

14 On this concept see Andrea Bianchi, 'Epistemic Community' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law – Contributions to Disciplinary Thought* (Edward Elgar 2018), 251.

decades with international lawyers finding more opportunities for professional engagements outside academia, the reality is still that international lawyers in the stricter sense are mainly active in academia with "temptations" to work outside still being the exception.[15] Of course, as we will see throughout this contribution, the picture of the international lawyer is a varied one, in particular if we adopt a global, encompassing perspective that should provide a portrait of "the" international lawyer. In fact, professional curricula may vary very much regionally and even between countries in the same region.[16] In Europe, the situation is made even more complicated by the fact that some international lawyers are also European lawyers or even specialize exclusively in this field. Due to the far higher integration of national law and EU law and the fact that considerable parts of EU law enjoy direct effect within the Member States,[17] academics acting (part-time or exclusively) in the field of EU law enjoy professional opportunities somewhat more similar to those of "traditional" national lawyers. Nonetheless, as far as an attempt to generalize is possible and leaving aside, at first, the international lawyers within counseling enterprises acting before International Courts and Tribunals, for example in the area of corporate social responsibility,[18] or private persons or NGOs, for example in human rights issues, the typical international lawyer is still the academic who works mainly at a university or a high school/law school. There, he or she is confronted with the "Humboldtian challenge" which will often translate into a "Humboldtian dilemma", i.e. in the need to reconcile teaching and research

15 In her otherwise well written and engaging contribution in the Australian Yearbook of International Law of 2005, Gillian Triggs presents a situation according to which international lawyers now enjoy vast job opportunities. As will be shown below, as a description of a trend by which the national and international spheres overlap more and more and lawyers have thereby to deal more often with international issues, this analysis is surely correct. On the other hand, over-enthusiasm is not warranted in this regard. This is still a painstaking process and the development towards more openness for the international perspective has begun from a very low starting point. And it can hardly be said that in the over one-and-a-half decades that have passed since the publication of the article by Gillian Triggs much has changed in this regard. See Gillian Triggs, 'The Public International Lawyer and the Practice of International Law' (2005) 24 Australian Yearbook of International Law 201.

16 This is, for example, already the case within the European Union, where the status of lawyers, their education, and their professional functions diverge profoundly.

17 See Paul Craig/Gráinne De Búrca, *EU Law, Text, Cases and Materials* (6th edition, 2020).

18 See Peter Hilpold, 'Maßnahmen zur effektiven Durchsetzung von Menschen-und Arbeitsrechten – Völkerrechtliche Anforderungen' in Nico Krisch and others (eds), *50 Berichte der Deutschen Gesellschaft für Internationales Recht, Unternehmensverantwortung und Internationales Recht* (C.F. Müller 2020).

and to be productive or even excel in both.[19] This may explain why many international law academics show considerable unease when writing about teaching or avoid this subject altogether. In fact, the dual role of teaching and doing research (publishing) in international law, that many (but not all) of these academics have to fit into, hides many difficult compromises.

3.2 *What Does "Research-Informed Teaching" Mean?*

The term "research-informed teaching" has a strong positive connotation, and therefore most academics will not dare to challenge this approach openly. In reality, however, this concept has widely different meanings and, depending on which meaning one chooses, the consequences for the teacher in general and for the IL teacher in particular will vary considerably. Further questions arise as to the way this concept is to be implemented in practice. To this end, continuous assessment (of teachers, of university administrations, of curricula)[20] is necessary and this creates further challenges.

As has been set out in literature,[21] the concept of "research-informed teaching" may refer to an updated curriculum, the presence of world-leading experts in the team of teachers, and/or a strong relationship between a department´s research and its study program.

At the same time, universities have to attribute primary importance to the employability of their students,[22] and many universities pride themselves on

19 Of course, there are different understandings of what the characteristic traits of the "Humboldtian University" are. According to a wider, general understanding the "Humboldtian University" consists exactly of binary holistic access to knowledge based on teaching and research. According to a more restrictive view, this term should be more appropriately reserved for the university model of German-speaking countries. See, for example, Alan Scott/Pier Paolo Pasqualoni, 'Invoking Humboldt: The German model' in James Côté and Andy Furlong (eds), *Routledge handbook of the sociology of higher education* (Routledge: London/New York 2016), 211. Here, the more general meaning is attributed to the term. In fact, although there can be no doubt that the Humboldtian University model finds its origin in the German-speaking area, at the same time it has, however, also to be recognized that this model later achieved world-wide acceptance (although with considerable regional nuances).

20 See Justyna Maciag, 'Six Sigma as a Method for Improving University Processes: The Case of the Academic Assessment Process' in Stephen Yorkstone (ed), *Global Lean for higher education: a themed anthology of case studies, approaches, and tools* (Routledge/Taylor & Francis: New York 2020).

21 See Alex Nicolson, 'Research-informed teaching: a clinical approach' (2017) 51 The Law Teacher 40, 41.

22 Ibid., 41.

their high positions in the relevant rankings.[23] Do these aims go together and, if not, how can one reconcile them?

3.3 *The Meaning of "Employability" – with Special regard to TIL*

In fact, as has been said,[24] most law students do not want to become academic researchers, but rather to practice law. Therefore, the added value of research-based teaching is rather to be found in the forming of openness for flexible thinking, continuous learning, continuous updating of legal knowledge becoming rapidly obsolete, for questioning the truth handed down by others, for thinking autonomously. Such a mindset is useful in practice in at least the same way as it is in academic research.

If we apply these criteria to TIL the perspective has again to be refocused. What the "employability" of IL students means has to be considered separately. As shown above, notwithstanding some euphoric analyses and predictions, it appears to be more realistic to be rather cautious as to the job opportunities of academics in IL in a narrower sense. In other words, only a very small number of students can expect to be employed later in the IL area in the proper sense. As to employment in academia, the prospects depend on the status of this subject in the different national law curricula, but also in this context traditional national disciplines such as civil, labor, or criminal law usually offer more promising opportunities. By adopting such a perspective one might at first sight be inclined to guess that universities would be well advised to invest as little as possible in TIL. The fact that very market-and profit-oriented universities also act otherwise gives us a first clue that something essential in these considerations may be missing. In fact, as has become clear from the considerations above, IL is in the meantime influencing and permeating all other disciplines of law. But there is more to this. IL also has a "bridging function" between various disciplines, as underlying IL norms often fulfil a more comprehensive function transcending specific disciplines.[25] Foundations and interrelations that might otherwise be lost thus become transparent. No law discipline is as vast and comprehensive as IL. Notwithstanding the problem of fragmentation,[26] which to a certain extent is real, IL offers a common

23 Like in university rankings in general, differences in the statistical methods, focus, and time horizon of the relevant rankings clear the way for many high or top positions in this field.

24 See Nicolson (n 21) 42.

25 See, for example, WTO law which spans broad areas of economic law, from tariffs to agricultural law, from intellectual property law to the law of services, to name just a few.

26 As to the need to fight against fragmentation and the "thinking in boxes" see also below at para 4.

language and a common understanding for overarching access to various law disciplines. And as to language, the centrality of English as a communication tool[27] is key to the introduction of that language into national law academia in general. If the internationalization of all national law disciplines becomes more and more necessary, the experience gained, the paths followed, and the instruments developed by international lawyers from various countries in their reciprocal communications and exchanges offer invaluable help. IL is regularly best suited for exchange programs like Erasmus, where students attend courses and have exams at universities in EU countries other than their own.[28] Subsequently or in parallel, students and teachers may engage in further academic endeavors in other law disciplines and prepare the basis for a more encompassing transborder professional activity.

Finally, a strong IL focus may considerably enhance the international visibility of a law faculty and strengthen its overall reputation. "Employability", often seen as one of the most important qualifications a university can give its students, is therefore a highly complex issue. With regard to the relevance of IL this issue reveals a pronounced relevance If employability in law professions is measured less on the basis of acquired knowledge (i.e. on a static, quickly outdated element) but on the basis of intellectual flexibility, inter-cultural knowledge, and thinking beyond strict national borders (i.e. a dynamic, process-based element), IL may be a subject that considerably improves the future position of a law student in the labor market.

4 "Lean University Management" and Its Applicability to Higher Education and to TIL in Particular

4.1 *The Growing Competition in TIL*

It goes without saying that these (possible) positive effects do not come about automatically. Their realization depends on the quality of TIL. In other words, it

27 See Christian Tomuschat, 'The (Hegemonic?) Role of the English Language' (2017) 86 NJIL 196.

28 And exchange initiatives like the Erasmus program again increase employability, as several studies suggest. Alongside increasing foreign language skills, the mobility programs improve awareness of other cultures as well as the ability to adapt to new situations. Reference is made in this context to socio-communicative skills such as intercultural awareness, adaptability, flexibility, innovativeness, productivity, motivation, endurance, problem solving abilities, and being able to work productively in a team. See European Commission, *The Erasmus Impact Study, Effects of mobility on the skills and employability of students and the internationalization of higher education institutions* (2014).

will not suffice to offer IL courses. If IL teaching is to have the effects described above, it has also to fulfil the necessary requisites and to evidence the ambition to reach highest standards. As a consequence, TIL may become extremely demanding. TIL at the Humboldtian law faculty requires teachers with a strong research and publication record, and at the same time they have to engage actively in teaching. Teachers have to understand that they are exposed to international competition not only with regard to research but also on the level of pedagogics, and perhaps there is no law discipline in which competition could be keener. In fact, IL curricula may evidence considerable differences in various countries, but these differences are still considerably smaller than in other "national" law disciplines. "Entrance barriers" into this subject are, even if national specifics are considered, far lower than in other fields. As is known from competition theory, differentiation and segmentation of markets lower competition pressure. In this sense, competition in the market for IL teaching and research should be keener than in all other law areas as, at least in principle, such differentiation and segmentation are harder to achieve.[29]

If the law teacher in student-focused pedagogies is now required to convey both knowledge and skills,[30] the exact mix of these competencies may vary from discipline to discipline and, with regard to national disciplines, from country to country. In IL the optimal mix will acquire a considerable degree of homogeneity in a highly competitive process. Unlike their colleagues in national law disciplines, the IL teacher therefore stands in direct competition with other IL teachers potentially on a world-wide level.

On this basis, in a research-informed law faculty with some openness to the international market the pressure on the individual will be considerable. The more the respective faculty is truly open and internationally oriented the less the individual teacher will be able to define what the standards of high-quality teaching in IL are. The teacher is in a similar position to the entrepreneur in a system of perfect competition: the standards and quality elements are widely pre-determined. In order to obtain a competitive edge excellence is required.[31]

29 However, reality is often different. As will be shown below with regard to the European IL "teaching and research market", high segmentation and strong protectionist barriers can be noticed.

30 See Nicholson (n 21) 45.

31 Of course, these considerations operate also in the opposite direction: Within a national university reality somewhat separated from the "global" academic reality (for example for linguistic, political, or geographical reasons) a rather small number of IL teachers might also be able to set their own (low) standards for IL teaching (and research) and influence the career of other IL teachers on the basis of criteria that have less to do with

There are two pivotal players in this game, which have partially divergent perspectives and often conflicting interests: the teacher and the university.

Two questions have immediately to be addressed in this regard:

– How can the IL teacher react or adapt to the challenges described in a somewhat competitive environment?[32]
– How can universities make sure that they fare well in this competition or how may they even be able to excel in this process?

4.2 *The Teacher's Perspective*

As described, the workload of the IL teacher in an internationally oriented Humboldtian law faculty can be enormous. He or she can either fully subscribe to this challenge and show total dedication and commitment or try to compromise and to invest time and energy strategically. While teachers may subscribe wholeheartedly to the ideal of research-informed teaching, eventually they will nonetheless experience the weight of time and resource constraints. Thus, many will be induced to compromise on teaching, to renounce the pleasure of a well-prepared lecture for the sake of long-lasting recognition and appreciation by the epistemic community, or at least for the abstract prospect of such adulation. On this basis, public commitments to the importance of teaching may be a kind of act of redemption soothing a bad conscience. The more emotional such a plea gets, the greater the awareness of past sins and the fear of future ones in this area may be. Emotional pleas as to the value of teaching may, however, also be openly insincere and thereby put to the test the abilities of the teacher as an actor. Teachers may see themselves as compelled openly to commit to a role they cannot or do not want to come up in full.

This situation is exacerbated by two tendencies that stand in mutual conflict but nonetheless appear in parallel. On the one hand, in many countries the teaching load, also as a consequence of economic constraints on education institutions, is continuously rising. On the other hand, publication achievements become measurable also in the field of IL. As contested as the respective algorithms may have been in the past, impact factor measurement becomes ever more sophisticated and reliable and, in the meantime, even very strong academic power structures can no longer provide effective protection against

internationally defined standards of academic merit and more with personal or political affinity, common club membership, or outright nepotism and corruption. They may even be able to steer the careers of their students – most effectively, however, only as far as these IL careers take place nationally.

32 The qualification of "somewhat competitive" appears to be necessary as it cannot be assumed that such a situation will necessarily come about. This will often be the case, but it cannot be claimed that in number they will be in the majority.

these developments. It becomes more and more difficult to auto-certify one´s own academic standing in the field of IL or to let it be certified by a group of connected or dependent colleagues independently of real achievements. Thereby, old academic habits very much present also in the field of IL have to be put in question. While in the past, assessment committees in practice had almost unrestricted freedom in their judgment of academic achievements, in the meantime the jurors risk their own reputation in case of blatant abuses. If, for example jurors attest to the high academic impact to the friend or the friend´s pupil with next to no publications while dismissing the other candidate with a far higher impact this malpractice might now become more easily public than in the past. Persistent feudalistic academic structures may still prevent these tendencies towards more transparency from becoming fully effective and it is often obvious which camps opposition to more objective assessment methods come from. The meaning, function, and scope of university assessment procedures are often misunderstood; they are neither a legitimate tool to enforce university hierarchy nor do they focus only or even prevailingly on teachers. Assessment procedures have rather to be comprehensive, all-encompassing, and the expression of an open, transparent, and cooperative approach involving all relevant stakeholders.

In an international community that is ever more connected, transparent, and dismissive of national academic hierarchies it becomes ever more difficult to conceal deficient achievements by political networking, scheming, and power plays.[33] Increasing the openness and transparency made possible also by modern communication instruments creates more objectivity, thereby intensifying competition and eventually also increasing the pressure on the individual teacher to catch up with rising standards. When academic publication achievements become easier to measure (at least on the basis of some criteria with general recognition) than the value of teaching activities, there is a strong incentive to concentrate on the former. Therefore, also in this perspective, a closer interest in teaching becomes imperative. The Humboldtian university as a holistic knowledge acquisition and instruction institution model is based, as already hinted at, on the idea that teaching and research are of more or less equal importance. Overemphasizing the relevance of only one of these pillars could jeopardize the whole system. If the Humboldtian university is to be preserved it is essential to re-determine the academic standing of teaching,

33 It goes without saying that „academic achievement" is again only partially accessible to objective assessment. And ranking and impact factors have, as already stated, their limits. But they set some barrier to blatant and strident abuse.

and also to this end it is necessary to acquire more knowledge and to develop a common understanding about this activity.

4.3 *The University Perspective – "Lean University Management" and "New Public Management"* (*NPM*)

Universities as institutions evidently have the opposite interest in making sure that the goals and ambitions of the Humboldtian university are adhered to to the utmost extent. At first sight, this can be achieved by control or by incentive. In recent years a new management approach, originally developed for the production sector but subsequently also extended to services, public administration, and eventually also high school teaching, has gained more and more appreciation and could now be considered also for providing more efficacy to IL.

Originally, the concept of "lean production" was developed by Toyota in the mid-twentieth century in Japan.[34] The evident success of this production method led to the creation of an entire "lean management method" which was, step by step, extended to ever broader areas and eventually also to services, public government, and higher education,[35] although in the last field this experiment is at only an "embryonic stage".[36]

At the center of this approach is the attempt to create customer value and to eliminate "waste". While such goals may lead to straightforward consequences in the field of car production, to apply such thinking to the services sector or even to higher education requires a series of adaptations and qualifications.

In their original field of application, Toyota production, lean production and lean management were directed at eliminating three types of inefficiencies: "*muda*" ("wastefulness, uselessness and futility"), *"mura"* (unevenness, non-uniformity, and irregularity"), and *"muri"* ("overburden and excessiveness").[37] These inefficiencies are closely interrelated as, for example, irregularity in the production process may soon lead to an overburden and subsequently to wastefulness.[38] Applied to higher education and TIL in particular, this philosophy

34 Alexander Nicholson/Alireza Pakgohar, 'Lean Thinking in a UK University Law Clinic: A Reflective Case Study' (2020) 27 International Journal of Clinical Legal Education 171, 177 who point out that the term "lean production" was coined by John Krafcik, 'Triumph of the Lean Production System' (1988) 30 Sloan Management Review 41.

35 See Stephan Höfer/Jörg Naeve, 'The Application of Lean Management in Higher Education' (2017) 16 International Journal of Contemporary Management 63.

36 Ibid., 63s, referring to Jiju Antony, 'Lean Six Sigma for Higher Education' (2015) 32 International Journal of Quality & Reliability Management.

37 See Doanh Do, 'What is Muda, Mura, and Muri?' (The Lean Way, 5 August 2017) <https://theleanway.net/muda-mura-muri> accessed 25 October 2021.

38 Ibid.

immediately reveals its limits but nonetheless there is value in it also for this area. The limits are already to be found in the identification of the "customer" for whom value has to be created. One might think in this context first of students, but in reality the benefits of research-informed TIL extend far beyond this group and will eventually concern society as a whole. If and to the extent that research outcomes are to be seen as international public goods, humankind as such can be seen as the customer.

Even more problematic is the concept of "waste". Here, a distinction is made between "obvious waste" and "hidden waste". While such a distinction may work fine, to a certain extent, for the industrial production process ("obvious waste" could be seen in a production process that failed, in the destruction of resources, in the sheer inactivity of collaborators; "hidden waste" relates to internal costs, for example transportation costs from one manufacturing facility to the other, for which the customer is not willing to pay),[39] it is difficult to transpose it to the services sector and even more so to higher education.

For example, it could be said that a failed experiment or an article rejected by a journal creates "hidden waste". On the other hand, a failed experiment may also provide new information and a rejected article may be accepted by another journal or induce the writer to improve it. It is, in any case, important that an internal learning process takes place. Over a certain period, this process must result in tangible output. A researcher who fails all experiments and an academic writer who never gets his papers accepted by a quality journal will have, sooner or later, to bear the consequences in a quality management system. It is even more difficult to identify "hidden waste" in higher education, as this would imply relating research (or, even more so, teaching) output to a specific customer demand defined in exact quantitative terms.

And there are even more hurdles to overcome for applying "lean management" methods to higher education. Any attempt to introduce a lean management approach at a university (and even more so at a law faculty) has to expect resistance using arguments that range from the political ("neoliberal approach") to the cultural ("Americanization of University instruction", "abandonment of the traditional, classical education model which constitutes the basis of our civilization"), and the sociological ("commercialization of instruction").

Endeavors to experiment with such strategies will therefore have to be introduced cautiously, perhaps not even having recourse to the official designation of this strategy. And it should be clear that this is a strategy and not a detailed

39 Ibid.

implementation plan. This way, the lean management strategy, as it has been concretized in recent years, contains a series of elements that are highly valuable for further improving TIL, for making it more effective and successful in an international competitive process. In this context it has been said that lean management as an expression of Top Quality Management in higher education has i.a. to provide for participative management, the development of a clear mission determined by objectives/goals, open communication, the allocation of resources for implementation and top-management support, employment involvement, commitment of leadership, and the mobilization of and efficient communication with the members of higher education institutions.[40]

Such goals can be implemented only if hierarchies are flat, communication is open and transparent, and career paths are based on objective criteria. Unfortunately, in Europe, developments in university legislation in recent years have moved partially in the opposite direction by strengthening hierarchy and making career decisions arbitrary.[41]

Efficiency problems in higher education have been noticed on a world-wide basis. The immediate response has often led to half-hearted reforms, worsening the situation even further. One of these reforms was the introduction of "university autonomy". If such autonomy is introduced while universities still continue to be financed almost exclusively by public contributions and in the absence of a somewhat competitive national university market, the question must arise what the real purpose of such a reform was. The situation worsens further if such reform goes together with the state's withdrawal from quality control and this control is delegated wholly to universities, which may or may not take them seriously.

In such a situation, the concept of "university autonomy", sold to the public as an approach to introducing more efficiency and market orientation, in

40 See Piotr Grudowski/Malgorzata Wisniewska, 'Lean Management Higher Education Institutions. How to Begin?' (2019) 137 Scientific Papers of Silesian University of Technology, Organization and Management 51 (with further references).

41 A hot debate has taken place in Austria as a consequence of the latest amendment of the University law (Universitätsgesetz 2002) according to which academic collaborators can remain at a university for only 8 years. Universities can offer a stable job, but they usually do not. For most academic collaborators no career paths in the academia are foreseen.

See Carina Altreiter, 'Befristete Uni-Stellen: Drei Fehlschlüsse mit gravierenden Folgen' *Der Standard* (23 July).

At the same time, some Universities hire professors "ad personam" with life-time appointments on the basis of token competitions where the "winner" of the procedure is known in advance with his name being registered in the university protocols even before the competition starts.

reality concentrates almost absolute power in the hands of local university leaders who can operate with public funds without assuming any substantive responsibility. University legislation may provide for mandatory assessment.[42] If such assessments have, however, no substantive consequences or if they are again to be decided at the local level, the whole proceeding risks becoming a farce, producing nothing other than additional costs ("obvious waste" according to the lean management terminology).

Even if such a development takes place, it can hardly be alleged that there was abusive intent by the legislator who created these norms. Such developments rather provide evidence of the fact that the particularities of higher education management are often poorly understood, and it is surely not enough to have recourse to business terminology to improve the situation. As shown, such attempts can even worsen the situation. In Germany and in Austria the decisive buzzword has been "New Public Management" (NPM), a well-sounding word that could mean everything and nothing. In Austria it was used to re-introduce hierarchy which had been very much reduced in 1975. In Germany, in the 1970s, university reform did not go as far as in Austria, and this may explain why there was not as much room for a backlash.[43]

A specific "NPM speech" was developed that created a series of euphemisms that cannot withstand closer scrutiny as to their having real substance or their corresponding to real facts.[44] In particular, it is not possible to see how the

42 See, for example, in Austria § 14 Universitätsgesetz 2002.

43 See on these processes Alain Scott/Pier Paolo Pasqualoni, 'Invoking Humboldt – The German model' in James Côté/Andy Furlong (eds), *Routledge Handbook of the Sociology of Higher Education* (Routledge: London/New York 2016), 211.

44 Thus, in Austria, the terms *„Leistungsvereinbarungen"* (performance agreements between the rectors and the government) und *"Zielvereinbarungen"* (target agreements between rectors and faculties) are used, conveying the image of an agreement on performance respecting internal university autonomy. In reality, however, these agreements are very generic, leaving extremely broad areas to the rectors. In Germany, in 2005, an "excellence initiative" (*"Exzellenzinitiative"*) was started which was to provide for extra funding for elite universities in order to catch up with top universities at a world-wide level. Some 15 years later the results are mixed, as the concept of "elite" is not only difficult to define but also culturally contrasted. See Fabian Mader, 'Wie viel Elite verträgt Deutschland?' (ARD alpha, 17 July 2019) <https://www.br.de/fernsehen/ard-alpha/sendungen/campus/exzellenz-initiative-foerderung-zeit-100.html> accessed 25 October 2021.

Scott/Pasqualoni (2016) further refer to the problem of federalism in Germany where federal states vie for such subsidies in a logic of "equal distribution of means" and not primarily on the basis of academic strengths. What is more, by far not all disciplines would be suitable for such an "excellence initiative". For example, the subject here at the center of interest, TIL, would hardly profit from such a concentration of financing in favor of a few selected universities.

"NPM logic" (as far as it exists beyond buzzwords) has in real life improved quality, for example with regard to the selection process of professors in university competitions.[45]

4.4 *A First Stock-Take*

On the whole, these developments evidence that new management methods, proposed for application in higher education, have to be examined in detail as to their real impact on the ground before one has recourse to them to introduce a major paradigm shift in higher education.

While NPM, widely devoid of substantive content and prone to be abused by restorative interests as it is, has hardly been able to make universities more efficient and more competitive, the "lean management strategy" may be a valuable concept that merits closer examination. Again, however, prudence is required. As shown, this new approach is no more than a general strategy and it is applicable to higher education only with many qualifications and caveats.[46] That said, it has to be acknowledged that this approach is based on several ideas and considerations that could enhance the efficiency of any institution including those dedicated to higher education. In particular, if the "lean management approach" advocates flat hierarchies, open communication, and cooperative management methods it will adapt seamlessly to the specific needs of higher education institutions and it will also be the best strategy for

45 Scott/Pasqualoni (n 43) 218 maintain that the way chair appointments were made in Austria in the past may appear "quaint to international readers" as it was the minister for research who made the final decision, choosing the successful candidate from a ranked list (usually of three) drawn up by university internal chair appointments committees. Here, however, it is to be remarked that Austria is a rather small country and the appointment of professors, who thereby became public officials, by a central institution increased transparency and raised the profile of the whole process, thereby making abuses and corruption, at least if they were evident, much more difficult. The minister had to assume political responsibility for his decision (and in particular for any deviation from the ranked list) and in addition this was a legally determined procedure that could be challenged before the Administrative Court in the event of a violation of a law. In contrast, the present appointment procedure takes place exclusively at the local level, with next to no transparency, and the Austrian Courts deny plaintiffs an effective legal remedy – evidently in contrast to Article 47 of the Charter of Fundamental Rights. See Gilbert Gornig/Paolo Piva, 'Zum Feststellungsinteresse übergangener Bewerberinnen und Bewerber im universitären Berufungsverfahren' (2020) 4 Neue@Hochschulzeitung 131.

46 As was said: "[w]e are at a relatively early stage of understanding lean in the sector [of higher education] and a high level of tailoring for lean to meet the unique contexts of individual institutions currently exists." See Steve Yorkstone, 'Lean Universities' in Torbjorn Netland/Daryl Powell (eds), *The Routledge Companion to Lean Management*, (Routledge/Francis & Taylor: New York 2016), p. 5 of manuscript (on file with author).

reconciling university management with academic freedom, a fundamental principle that universities are usually eager to defend vociferously and which is in many countries constitutionally enshrined.

But there are other approaches, too, that could also be extremely useful from this perspective. One of these newer concepts is the "VUCA approach" that offers particularly interesting elements also for TIL.

5 The VUCA Approach

VUCA stands for the following words: Volatility, Uncertainty, Complexity, and Ambiguity. The acronym was coined by the US military and by political analysts in the late 1980s[47] following the fall of the iron curtain and as a consequence of an international environment that had become extremely dynamic and less predictable and is posing ever more unpredictable challenges, both positive and negative. Soon this term was extended also to the world of business in order to design the new international competition framework individual enterprises have to cope with. It describes the prevailing real-world situation politicians and practitioners have to take into account if they want not only to keep up with present challenges but to persist and to excel in the foreseeable future. For a series of reasons, universities also have to deal with this concept. First of all, in the meantime the VUCA concept has found world-wide acceptance both among political analysts and in the business management community. It has become an instrument that is in itself the object of academic studies as it appears to be a valuable tool to cope with uncertainty and rapidly changing challenges in both politics and the business environment. At the same time, however, the VUCA concept reflects some of the main challenges universities as institutions are confronted with in reciprocal international competition. As shown, the integration of universities into the Public Sector has somewhat softened the "competitive stress" these institutions are exposed to, but in the end this may have created only a temporal lull until the relevant pressure fully sets in. Universities are required to develop expertise in order to soften the impact of these challenges or, preferably, to harness these factors and to transform them into elements of success. In other words, those universities which will best cope with these factors and best anticipate their further development will have a decisive competitive edge in the international academic environment.

47 See U.S. Army Heritage & Education Center, "Who first originated the term VUCA (Volatility, Uncertainty, Complexity and Ambiguity)?" (U.S Army Heritage & Educational Center, 07 May 2019) <https://usawc.libanswers.com/faq/84869> accessed 25 October 2021.

It is interesting to note that up to now, as far as can be seen, the VUCA concept has not been the object of closer analysis from the vantage point of IL even though, from a substantive perspective, close relations between these two subjects can be assumed. In fact, VUCA has been conceived on the basis of developments inherently related to or even based on IL. Their identification has gone in parallel with the shaping of a new view on IL[48] that since then has been characterizing the prevailing view of this discipline of law. There is next to no branch of this discipline in which the VUCA criteria would not be able to offer defining elements in any attempt to assess the status quo of the relevant norms. To take only a few examples, reference can be made to the concept of state (see the discussion about the "Islamic State"),[49] the ever-rising role of NGOs,[50] the growing strength of peoples or sub-state entities seeking autonomy or self-determination,[51] and the growing role of artificial intelligence in IL.[52]

It may be argued that the complexity, ambiguity, and rapid changes in paradigms have always been characterizing traits of IL,[53] and it may even be true that in a bipolar world dominated by the East-West conflict it might have been even harder to identify a common core of generally accepted norms with some degree of stability. At the same time, however, this bi-polarity (or tri-polarity, if the "third world" was also taken into consideration) provided some sort of stability when faced with the lack of agreement as to a large set of norms – with the parallel need to agree on some essential norms to make most

48 Of pivotal importance is Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992) emphasizing, however, first of all, the end of the bipolar world and not yet fully anticipating the ensuing instability. For an early stock-taking on these developments in German see Hanspeter Neuhold/Bruno Simma, *Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konflikts?* (Nomos: Baden-Baden 1996). See also Hans-Joachim Heintze/Pierre Thielbörger, *From Cold War To Cyber War* (Springer: Heidelberg 2016).

49 See Christian Tomuschat, 'The Status of the 'Islamic State' under International Law' (2015) 90 Die Friedens-Warte 223 and Anicée Van Engeland, 'Statehood, Proto States and International Law: New Challenges, Looking at the Case of ISIS' in James Crawford and others (eds), *The international legal order* (2016), 75.

50 See, for example, Pierre-Marie Dupuy, *NGOs in International Law – Efficiency in Flexibility?* (Edward Elgar: Cheltenham 2008).

51 See Peter Hilpold, *Kosovo and International Law* (Brill/Martinus Nijhoff, Leiden/Boston 2012) and Peter Hilpold, *Autonomy and Self-determination – Between Legal Assertions and Utopian Aspirations* (Edward Elgar: Cheltenham 2018).

52 See Ashley Deeks, 'Introduction to the Symposium: How will artificial intelligence affect international law?' (2020) 114 AJIL 138.

53 By the way, it has also been argued that VUCA elements have also always been there in the modern business world. See Michael Skapinger, 'The empty consolation of 'Vuca' and other buzzwords' *Financial Times* (23 October 2018).

essential forms of interaction possible. The VUCA concept would therefore hardly fit into the pre-1989 world, notwithstanding the fact that disagreement and ambiguity had been there since the earliest days of the UN era. For the present world order VUCA provides, instead, a sort of explanatory framework. Though it may be criticized as tautological and simple, it still provides a map with some pivotal elements allowing one to better understand the present IL order. And for the purposes here at the center of interest, it might be useful also to rethink TIL. In the past, it was often strongly knowledge-based so that it was most often "traditional knowledge" drawn from established textbooks. If actual practice did not (or did no longer) correspond to theory, practice was "wrong" or misguided. VUCA, on the contrary, shows that acquired wisdom and purportedly established rules have to be continuously re-examined, and values and central norms of IL, such as the prohibition of the use of force or human rights provisions, need continuous re-affirmation and control of the forces that could undermine them. As to the detection and designation of "ambiguity", the Critical Legal Studies (CLS) approach has somewhat anticipated VUCA.[54]

Some studies have already examined the effects of VUCA on high school education:[55] They have shown that students have to be taught not only to be repositories of knowledge but to deal efficiently with knowledge so that graduates become "independent thinkers, problem solvers, and decision makers".[56] As a consequence, knowledge (as a static element) and dealing with knowledge (knowledge acquirement, selection, elaboration, and assessment) are intertwined,[57] and both have to be given equal attention at universities. As regards TIL, where the wealth of pertinent knowledge is enormous and where at the same time the international framework is subject to relentless change, this challenge is even greater. It has been said that an education system is needed "where students are rooted in content knowledge but also provided

54 On CLS in the field of IL see David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wis Int'L. L.J. 26; See also Anthony Carty, *The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press: Manchester 1986) and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press: Cambridge 1989).

55 See Poh-Sun Seow/Gay Pan/Grace Koh, 'Examining an experimental learning approach to prepare students for the volatile, uncertain, complex and ambiguous (VUCA) work environment' (2019) 17 The International Journal of Management Education 62.

56 Ibid., 62, with reference to Elena Silva, 'Measuring skills for 21st-century learning' (2019) 90 Phi Delta Kapan 630.

57 Ibid.

with 'hands-on learning that mirrors real-world problems and work opportunities in an interdisciplinary way'".[58]

And even more so it becomes extremely important to avoid excessive fragmentation of IL, also in regard to teaching. To "think in boxes" (human rights, environmental rights, UN law, international economic law, and so on) creates the risk of losing sight of the basic ideas undergirding IL and could stand in the way of its further development towards a somewhat coherent order where the lawyer can see law as "enlightenment as responsibility" in the Kantian sense.[59]

This plea for a broader perspective and even interdisciplinarity applies surely to law studies in general, but it seems to be relevant for IL in a particularly pronounced manner. Interdisciplinarity has always been of extreme value for TIL. One might refer to the importance of history for understanding IL's basic developments,[60] to the necessity of economic knowledge to judge questions of International Economic Law appropriately,[61] or to the close relationship between IL and international politics.[62] In the VUCA world it becomes pivotal to understand the broader framework and to prepare for flexible change. From

58 See Seow/Pan/Koh (n 55) 63, referring to "The Economist Intelligence Unit Limited, 2015". See also, in a similar vein, Otto Kimminich, 'Teaching International Law in an Interdisciplinary Context' (1986) 24 AVR 143.

59 See Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 EJLS 8. See also, more recently, in a similar vein Anthony Carty, 'International law and nervous states in the age of anger, the collapse of legal formalism and a return to natural law' in Rossana Deplano/Nicholas Tsagourias (eds), *Research Methods of International Law* (Edward Elgar: Cheltenham 2021), 180, emphasizing "individual judgment". As will be revealed towards the end of this contribution, this position is, however, also not without its problems, in particular if this "individual judgment" is made in an exclusively unilateral way.

60 For a recent contribution with ample reference to literature on the "turn to history" see Matilda Arvidsson/ Miriam Bak McKenna, 'The turn to history in international law and the sources doctrine: Critical approaches and methodological imaginaries' (2020) 33 LJIL 37.

61 I have dealt extensively with this question in Peter Hilpold, *Die EU im GATT/WTO-System* (Nomos Verlag 2019).

62 See Anne-Marie Slaughter/Andrew Tulumello/Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 AJIL 367 who refer to a growing number of cross-citations between the fields of IL and international politics (p 367, note 2).
For a recent analysis of this relationship see Filipe dos Reis/Janis Grzybowski, 'The matrix reloaded: Reconstructing the boundaries between (international) law and politics' (2021) 34 LJIL 547. Manfred Steger 'What is Global Studies' in Mark Juergensmeyer and others (eds), *The Oxford Handbook of Global Studies* (OUP: Oxford 2019), 3, points out that in the United States alone Global Studies now encompass approximately 300 undergraduate and graduate programs. Ibid., 5.

a VUCA perspective it is essential to keep this subject meaningful, of practical relevance.

More and more universities are now in the process of introducing chairs for "Law and information technology (IT)". This appears to be an overdue step, but at the same time care must be taken not to create an isolated subject detached from the other sub-disciplines of law. IT law – with all its possible present and future ramification up to the integration of AI – has rather to be an integral part of all areas of law, and of TIL in particular. In other words, It would make little sense to create another, separate branch of legal research, but all legal sub-disciplines have to fully embrace all relevant aspects of IT.

There can be no doubt that by accepting this new reality that, by the way, has been in the offing for decades university teaching will change profoundly. In relation to TIL the question has to be posed whether classroom teaching in weekly units of 90 minutes as is common at European universities still makes sense, in particular if the lecture consists exclusively of a summary of an IL manual with some additional explanations. To be clear, the conveyance of knowledge will always be an important part of university instruction, especially in the area of TIL, and this form of teaching will most often be "frontal". As was said not long ago, "[F]rontal teaching remains the backbone of offline higher education taught programmes and one of the most effective methods for the transmission of knowledge".[63] In a reality characterized by an oversupply of information and in which information selection and processing are the critical capacities, some expert guidance helping to create the foundations on which further expertise can be based will always be a basic service to be provided by university teaching. The challenge will, however, be to flexibilize this activity with the greater and earlier active involvement of students in this information gathering, selection, and assessment process.[64] The transitional period of the COVID-19 shutdown in physical university teaching has provided an unprecedented opportunity to experiment with new teaching tools in virtual classrooms.[65] The experiences gained in this very particular VUCA

63 See Tarcisio Gazzini, 'A Fresh Look at Teaching International Law – A Few Pedagogical Considerations in the Age of Communications' (2016) 29 LJIL 971.

64 At the business faculties of some universities that have already adopted the VUCA approach such innovative teaching approaches are already in the process of being tried out. See Seow/Pan/Koh (n 55).

65 It is true, that even in the pre-COVID-era university courses, often called as "massive open online courses" (MOOCS), were delivered online. These courses did not always fulfill expectations. See Yorkstone (n 46) 4 of the manuscript, on file with the author. But the COVID period, with its broadly based new experiences and many technological breakthroughs certainly changed the factual situation.

situation should continue and experimented with further in the broader, general VUCA situation representing the post-Covid-19 period.

On the whole, the VUCA model, especially when applied to TIL, confirms pivotal insights gained by the lean management approach and by the experiences had during the COVID-19-pandemic: In a volatile, uncertain, complex, and ambiguous teaching and research environment traditional university hierarchies – unless they are strictly merit-based and permanently assessed – have lost most of their justification, they risk becoming ludicrous. Attempts, as can be noted in some European countries, to even strengthen university hierarchy and to reverse the reforms of the last century are going in the opposing direction to what taking VUCA into consideration would suggest.

And there is yet another aspect that links VUCA to IL: IL is known to be a subject of particular complexity.[66] Even if the student of today will become the lawyer of tomorrow, having little or nothing to do with IL (however improbable this might be), studying IL prepares for any complexity a lawyer will inevitably be confronted with. In this sense, studying IL also has an instrumental function; it prepares students for a VUCA situation that is characterizing the lawyers' reality in an ever more extensive way.

6 Different Country Situations

6.1 *The Slow Development from Insular Thinking towards Globalization*

This slow but relentless move from insular thinking with sporadic references to International Law to a true globalization of the education program (of at least some prominent law schools) has been described as a process whereby legal education passed from internationalization to transnationalization and was eventually transformed into globalization.[67]

Within this picture, the period of "internationalization", characterized by sporadic, albeit increasing contacts with International Law, lasted until about the end of WW II. It was Philip Jessup who in the 1950s introduced the concept of "transnational law",[68] intended to overcome the national/international divide for the concept of "transnational law" which should cover "all law which regulates actions or events that transcend national frontiers".[69] The perspective

66 See Michael Reisman, 'The Teaching of International Law in the Eighties' (1986) 20 The International Lawyer 987.

67 See Simon Chesterman, 'The Evolution of Legal Education: Internationalisation, Transnationalisation, Globalization' (2009) 10 German Law Journal 879.

68 Philip Jessup, *Transnational Law* (1956).

69 See Chesterman (n 67) 881.

was thereby considerably broadened and awareness raised of the fact that everyday legal reality was determined by developments coming from abroad to a far greater extent than hitherto admitted.[70] In this development, "globalization", starting towards the end of the last century and best epitomized by the creation of the World Trade Organisation (WTO) in 1995, would be the last step in a process of the continuous reshaping of international relations between national jurisdictions which could first be seen as "archipelagos", then develop into a patchwork, and finally present themselves as an intertangled web.[71] Of course, this periodization is nothing more than an abstract model, perhaps apt to give a glimpse of a broader development but hardly suited for strict categorization and to be transferred lock, stock and barrel, to practice. It has also to be further qualified in relation to the situation in different countries and in different regions. This study concentrates on the United States and then, in particular, on the situation in Europe with which this author is most familiar. Notwithstanding these geographic limitations, this author hopes that some relevant insights into theory and practice of TIL resulting from these surely influential academic realities, may be gained.

6.2 *The Situation in the US*

In this study, it has repeatedly been shown that the situation of teachers and teaching varies considerably on a global scale. Law teaching in general is closely related to specific country situations, depending on which "legal family" or "legal tradition"[72] a specific normative system pertains to. At first sight it may be surprising that this holds true even more so as far as International Law is concerned. While international law is in principle and ontologically a unitary order of a uniform nature, on a global level we have, first of all, to reckon with the fact that at the academic level there are different national and

70 As Jessup wrote in 1956: "We may find that some of the problems that we have considered essentially international, inevitable productive of stress and conflict between governments and peoples of two different countries, are after all merely human problems which might arise at any level of human society – individual, corporate, interregional, or international." See Jessup (n 68) 16.

71 For this impressive picture see again Chesterman (n 67) 883.

72 On the concept of „legal families" and "legal tradition" see Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann/Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006). This author points out that the concept of the "legal families", while still in use, is in decline as it is closely associated with the idea of legal nationalism. See also Peter Hilpold, 'What Are and to What Avail Do We Study European International Law Traditions?' in Peter Hilpold (ed), *European International Law Traditions* (Springer: Cham 2021).

regional traditions of and approaches to IL.[73] The political strength and influence of individual countries further contribute enormously to determining their political attitude towards international law, and their preparedness and need to rely on this order to pursue and to implement their goals on the international scene.

For international law teachers these are facts they cannot influence directly; they have rather to accept them as they are. Only by moving into another jurisdiction may they encounter a situation that is perhaps more suitable for them.[74] For a variety of reasons, most often such mobility will not be possible to achieve: Language barriers, private personal relations, professional networks the teacher is already involved in, but also protective measures by other university communities against "foreign" teachers can hinder mobility considerably.[75]

To move from the anecdotal, extensive surveys have been undertaken that should offer a more representative picture of the teaching of international law in the various jurisdictions. The results of these surveys do not lend themselves to an over-simplistic reading; they have rather to be interpreted as context-based in the sense that the role of international law teaching is strongly dependent on a variety of elements, first among them being the structure of legal education as such. It has further to be remarked that to this day no comprehensive world-wide study of the teaching situation in IL has been available.[76] The picture is therefore not complete, but more and more puzzle pieces show up.[77]

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73 See Peter Hilpold (ed), *European International Law Traditions* (Springer: Berlin/Heidelberg 2021) and Anthea Roberts, *Is International Law International?* (OUP: Oxford 2017).

74 Such reasoning is inspired by thoughts developed in the field of fiscal federalism, a theory based on a large number of different fiscal settings which would be optimized by mobile taxpayers looking for an optimal mix. See Peter Hilpold, *Italienisches Steuerrecht* (Facultas: Vienna 2017), referring to Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 Journal of Political Economy 416.

75 As will be shown below, even within the European Union the mobility of high school teachers faces substantive barriers, notwithstanding the basic freedom of free movement in accordance with Article 45 TFEU. See Gilbert Gornig/Paolo Piva, 'Freizügigkeit der Hochschullehrer in der EU – der Problemfall Österreich' (2020) 31 EuZW 469.

76 See Ryan Scoville/Milan Markovic, 'How Cosmopolitan are International Law Professors?' (2016) 38 MichJIntL 119: "Much [...] remains unknown" (ibid., 122). As the authors remark, the much-praised study by Anthea Roberts, *Is International Law International?* (OUP: Oxford 2017) had also to concentrate on a handful of countries and schools. Ibid.

77 For an early attempt to undertake a somewhat more comprehensive survey see Bin Cheng, *International Law: Teaching and Practice* (Stevens & Son: London 1982). Many elements of this study are now out of date but they are nonetheless interesting in a historical perspective. Somewhat closer to the present is the (shorter) study by Bengt Broms, 'International Law in the Law School Curriculum' in Ronald Macdonald (ed), *Essay in Honour of Wang*

Many of the relevant studies refer to the United States, and it is American lawyers themselves who have repeatedly taken an interest in the relevance of international law teaching, starting from early in the 20th century and in concomitance with the growing importance of the American legal system on the international scene. This rising weight, being again the consequence of the augmented role of the US on the political, economic, and military level, made it unavoidable to address the question of what role international law should be given in teaching.

In these studies from early on, the surprisingly limited relevance of international law in the curricula of US law schools was attested to. On the one hand, this was surely the result of isolationist tendencies arising in the US after WW I. The most decisive element lies, however, surely in the specific structure of US law school curricula, providing for rather short and condensed instruction if compared with, say, most countries in continental Europe. Six 14-week periods over three years, being the rule for the formation of lawyers in the US,[78] leave little space for subjects that may not be strictly necessary for the bar examination and for the later exercise of the profession of lawyer.[79] In this, law school curricula, relying on the indications of the American Bar Association (ABA), have shown continuity for over a century.[80]

When, towards the end of the last century, the American Society of International Law (ASIL) started to take a closer look at this issue, TIL in the United States again stood at the forefront. From the survey conducted under the direction of Professor John Gamble a dire picture emerged. The role of International Law was rather a marginal one.[81]

Tieya (Kluwer/Martinus Nijhoff: Dordrecht/Boston 1993), 79, comparing the situation in France, the United Kingdom, the United States, and Finland.

78 See Reisman (n 66).

79 See in this sense Edwin Dickinson, 'Teaching of International Law to Law Students' (1923) 17 Am.Pol.Sci-Rev. 464, 465.

80 See Rosa Kim, 'Globalizing the Law Curriculum for Twenty-First-Century Lawyering' (2018) 67 Journal of Legal Education 905, 907. Little more than a century ago, in 1921, the ABA first recommended that admission to practice be linked to the completion of a degree program. See Chesterman (n 67), with reference to James White, 'Rethinking the Program of Legal Education: A New Program for the New Millennium' (2000) 36 Tulsa 397, 400.

81 See John Gamble, *Teaching International Law in the 1990s, Survey of Academic International Law Project of the American Society of International Law under the sponsorship of the Ford Foundation* (1993).

Only a few years before, a renowned US-American IL teacher compared the teaching of IL in the US with that in Great Britain:[82] "While the British approach is quite positivistic, rule-oriented and formally descriptive, the American approach tends to be more process-oriented and contextual".[83] According to Professor Nafziger, IL teaching at US law schools is "highly problem-oriented and technical, relatively untheoretical, and inductive"[84] with a "tendency to diminish the importance of a broad educational background for aspiring international lawyers".[85]

In subsequent years, slowly and mostly inadvertently, some changes oriented towards a broader internationalization of lawyers' instruction have taken place. First of all, since 2015 the amended ABA Standards and Rules of Procedure for Approval of Law Schools have referred to a new "cultural competency" law schools may adopt as a learning outcome.[86] As has been noted,[87] this "cultural competency" could be used as a vehicle to "internationalize" and "globalize" the law schools' curricula. On the more practical level, school curricula were partly adapted in the sense that International Law or Comparative Law or Transnational Law courses were introduced.[88] In other cases, topics traditionally considered as national were supplemented by some international (comparative or transnational) elements.[89]

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82 See James Nafziger, 'Teaching Public International Law in the United States' (1986) 24 AVR 215.

83 Ibid., 216.

84 Ibid., 217.

85 Ibid., 218. An interesting trait of US law school education, perhaps also worth being considered outside the US, is that access to these studies requires a preliminary set of studies in another field. As Bengt Broms (n 76) 83 remarks, often "entrants to a law school in the United States have a BA in the humanities before entry." Without doubt, such preparation can considerably broaden the perspective of law students.

86 See Kim (n 80) 930ss.

87 Ibid.

88 Ibid., 925ss.

89 Building on this experience Kim (n 80) 947, proposes to create law school that should to do all or the combination of the following in order to globalize the curriculum: "1) Require one course on international, comparative, or transnational law or co-curricular activity for graduation; 2) Expand the menu of skills-focused courses integrating global issues; 3) Encourage faculty development and collaboration on globally focused teaching and scholarship; and 4) Facilitate student engagement with global perspectives in and out of the classroom." In 2000, Philip Trimble drew a fairly optimistic picture of the process the author noticed in the US, according to which international law was to be introduced into the whole domestic law curriculum. Most probably, this vision was too optimistic. See Phillip Trimble, 'The Plight of Academic International Law' (2000) 1 Chic.JIntL 117. For more details about the present-day situation in TIL in the US see Charlotte Ku, U.S. Approaches to Teaching International Law in a Global Environment, in this volume, 82.

From a European perspective all these measures appear to be appallingly limited, and the resulting picture will in many cases stand in clear contrast to the enthralling image of the "Invisible College" conjured up by Oscar Schachter,[90] according to which the community of international lawyers, primarily formed in the United States, would constitute a loosely organized but nonetheless highly effective, influential, and well-coordinated community. One might ask where on earth the members of this community might have been educated if TIL in the US still has only such a comparatively small relevance?

This apparent contradiction can be resolved if we consider that the US law school market is highly segmented with a broad instruction program that caters for pre-eminently national needs and a smaller, highly specialized instruction segment that attracts primarily foreign postgraduate LL.M. students. These programs are often of outstanding quality and peer-certified reputation;[91] for the law schools where these courses have been instituted, and for the US economy as a whole they are, however, also important revenue-generating tools.[92] Hopes that such international programs could have cross-fertilizing effects in the sense that they could spread the globalization idea to students of national J.D. programs have not yet materialized.[93]

90 See Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 Northwestern University School of Law Review 217.

91 For a ranking of these schools see US News, Best International Law Programs, 2021, 'Best International Law Programs' (U.S. News, 24 June 2021) <https://www.usnews.com/best-graduate-schools/top-law-schools/international-law-rankings> accessed 25 October 2021.

92 This became clear when former US president Donald Trump in 2017 considered introducing restrictive immigration and travel measures for foreign students. See Paul Caron, 'President Trump Threatens Law Schools' $350 Million Revenue From Foreign LL.M. Students' (TaxProf Blog, 25 October 2021) <https://taxprof.typepad.com/taxprof_blog/2017/04/president-trump-threatens-law-schools-350-million-revenue-from-foreign-llm-students.html> accessed 25 October 2021. "The advanced law degree programs bring in about $350 million annually to the more than 100 U.S. law schools that offer them, with around 10,000 foreign students coming here each year to pursue an LL.M."

93 See Kim (n 80) 946: "interaction among international students and U.S. J.D. students tends to be minimal". Another problem affecting the US university system is the strong divide between "elite universities" and "other universities". There are several, rather expensive, universities of the former group that are very well renowned (also) for their IL courses. Broader access to high-quality courses (or courses that are deemed to be such), not just in the field of IL, is currently a hotly debated issue in the US. See Michael Sandel, *The Tyranny of Merit* (Penguin Press 2020). If Sandel's main contention that access to elite universities is both hereditary and a basic pre-requisite for social advancement were to prove true (at least as a tendency), this would be problematic in general and really serious for IL education in view of the influential positions often obtained by academics educated in this field.

6.3 *The Situation in Europe*

The situation in Europe appears to be extremely heterogeneous, a fact that is all the more surprising in view of the rather narrow geographic borders within which these different approaches are pursued. Different national approaches to international law (for example between the civil law and the common law areas or between Latin countries and German-speaking countries as well as within the German-speaking area) can offer a first explanation for this situation, as can a highly segmented and often extremely protectionist academic reality.

As is obvious, it is not possible here to undertake a comprehensive country-analysis covering all European states,[94] and any selection must therefore be to some extent subjective. Nonetheless, it will be shown that even from the examples chosen a series of conclusions of general application, even beyond Europe, can be drawn.

As for the German-speaking area, the situation with regard to the relevance of international law in university law curricula differs widely between Germany, Austria, and Switzerland. In Germany, international law is not a mandatory subject in the university law curriculum. A law student can complete his/her studies and become – after having acquired some practical experience – a "fully qualified lawyer" (*"Volljurist"*) without having had to study international law as an in independent subject.[95] It is possible to write a dissertation on international law, but the "second dissertation" ("habilitation", *"Habilitationsschrift"*), which qualifies one to teach international law at German universities (as well as at Austrian and Swiss universities) and to apply for a professorial post at

94 See also the contribution by Scoville/Markovic (n 76), cited above, which refers to the study "Who Studies International Law? A Global Survey", of 2015, by one of the two authors named, Robert Scoville. This study has a more limited focus as it concentrates on the question in which regions of the globe international law training is compulsory. The author admits that there is no exhaustive answer even to this rather specific question due to the lack of comprehensive data.

95 The subject touching international and European law in the most immediate way is probably "Staatsrecht III", that is mandatory in most German Bundesländer. As Walter Rudolf wrote in 1986, this situation dates back to the beginnings of the 1970s, when German federal law distinguished between compulsory and optional subjects in the law curricula. IL was not mentioned in the former group as an independent compulsory subject. See Walter Rudolf, 'Die Lehre staatsrechtlicher Bezüge zum Völkerrecht (1986) 24 AVR 163. In this context a "provincial law curriculum" or a "celebrated modernism that is in reality introverted" was spoken of. See Rudolf Bernhardt, 'Vom Provinzialismus deutscher Juristenausbildung' (1971) JZ 581. Michael Reisman qualified optional international law courses as „cosmetic" or „boutique" courses. See Michael Reisman, 'The Teaching of International Law in the Eighties' (1986) 20 The International Law 987.

these universities,[96] has again to focus in practice on issues of public (German) law as there are next to no chairs for international law at German universities. International law is usually presented as no more than an appendix in the job description vacancyies of public law and IL. Competitions for chairs dedicated (*inter alia*) to international law are further biased in favor of applicants who have studied in Germany. One reason for this lies in the fact that law professors from German Universities have to sit in lawyers' examination commissions (*"Staatsexamen"*) where expertise in national law is primarily required. Professors coming from abroad and not having themselves taken both "state examina" would not only often lack the technical expertise to examine German national law but would not even be allowed to do so as they lack the qualifications for becoming judges in Germany in accordance with the "German Judge Law".[97]

Consequently, the burden of these examination activities in the *"Staatsexamen",* often considered to be rather painstaking, would shift to the members teaching national law subjects.[98] The specific German recruitment process for international law teachers and the institutional combination of international law with public law, with the former in a subsidiary role to the latter, necessarily also influences how international law is understood and taught in Germany. As a consequence, these elements have strongly favored not only the affirmation of the "Constitutional International Law Theory" in this country but also, in a further escalation, the claim that German Legal Scholarship could fulfill a hegemonic role on an international level.[99] The self-perception

96 In theory, such a qualification is not strictly necessary, as other, "equivalent" qualifications can also be offered when applying for such a post. In reality, however, such qualifications have next to no relevance in competitions for such jobs. The Italian University Council (Consiglio Universitario Nazionale) in General Opinion n. 13 of 18 December 2012 expressed a negative opinion as to the possibility to recognize German habilitations in Italy automatically. The reason for the rejection of such a claim was found in the fact that in Germany habilitations are granted by universities (in Italy, l´equivalent, "l´abilitazione", by a central commission), there is no limitation as to the validity (in Italy, at that time, "l´abilitazione" had a validity of four years, now nine) and German habilitations do not distinguish between full professors and associate professors, as "l´abilitazione" does in Italy. At the same time, this Opinion emphasizes the need to create a European university space.

97 See Heribert Hirte, 'Grußwort' in Stephan Hobe/Thilo Marauhn (ed), *Lehre des internationalen Rechts – zeitgemäß?* (C.F. Müller, 2017) referring to § 5 Deutsches Richtergesetz (DRiG).

98 Ibid.

99 This discussion can be traced back to Carl Schmitt´s writing: Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* (Tübingen 1950) and was reintroduced by Armin von Bogdandy in 2021 on the "Verfassungsblog". See Armin von Bogdandy, 'German Legal

of playing a hegemonic role will also influence the way in which international law is taught and eventually how national law is applied to international relations.[100]

In Austria, IL has traditionally had a far greater role both as a teaching subject and on the subsequent professional level. In fact, in all Austrian universities in which studies in law are offered (Vienna, Innsbruck, Graz, Salzburg, and Linz) international law is a mandatory subject. Subsequent professional qualification as a judge, a public prosecutor, a lawyer, or a notary demands evidence of the passing of such an exam as a prerequisite for accession to these professions. The problems and peculiarities of the Austrian university system in general and of law instruction in particular have immediate effects also on instruction in international law. As has been said,[101] the instruction of Austrian

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Hegemony? (Verfassungsblog, 05 October 2020) <https://verfassungsblog.de/german-legal-hegemony/> accessed 25 October 2021.

Joseph Weiler, however, flatly rejected claims of the superiority of German legal scholarship in a way that might sound disrespectful to the ears of some German lawyers but which, in the end, is not easy to counter: *"Hegemony of German legal scholarship or doctrine perhaps? With the exceptions of some scholarly islands within, say, Spain or Italy, the mainstream of that scholarship is barely known and cited outside Germany and the only contemporary German legal scholars widely admired and referred to outside the Fatherland are for the most part that generation of "Americanized" scholars* (*meaning mostly those who did an LL.M at Harvard, or Yale or Columbia etc – a fact they never fail to mention in signing any letter or article*) *writing in English. It's not because German legal scholarship is defective in any way; quite the opposite. Its only "vice" is that it's in German. Likewise, it is not as if all English or American legal scholarship is so breathtaking to explain the attention it gets. But it has the "virtue" of being in English. If you want to talk of Legal Hegemony, put in first place the English Language."* See Joseph Weiler, 'Mirror Mirror on the Wall – Who is the Most Beautiful of All? Legal Hegemony or Legal Hubris?' (Verfassungsblog, 10 October 2020) <https://verfassungsblog.de/mirror-mirror-on-the-wall-who-is-the-most-beautiful-of-all/> accessed 25 October 2021.

100 Consequently, conflicts in relations with other jurisdictions may become unavoidable. One recent example concerns the PSPP judgment of 5 May 2020 of the German Constitutional Court. The psychological circumstances behind this case were analyzed in ironic exaggeration by the CMLRev´s Editorial Board as follows: "This is […] a strongly-worded decision delivered with all the confidence of members of an institution that would very comfortably accept the compliment of being *primus inter pares* among constitutional courts in Europe and, come to think of it, well beyond".

See Editorial Comments, 'Not mastering the Treaties: The German Federal Constitutional Court's PSPP judgment' (2020) 57 CMLRev 965. On this judgment see also Peter Hilpold, 'So long „Solange"? The PSPP judgment by the German Constitutional Court and the conflict between the German and the European "popular spirit"' in John Bell (ed), (Cambridge Yearbook of European Legal Studies 2020).

101 See Willibald Posch, 'The Austrian View of the Bologna Process in Legal Education' (2005) 2 European Journal of Legal Education 67, 68.

lawyers was regulated until the 1970s by an Act dating back to 1893, and therefore to the Austro-Hungarian Empire. This Act was primarily directed at producing lawyers who would defend the legitimacy of the Hapsburg Empire.[102] This basic philosophy went hand in hand with a strong emphasis on history and special regard for this country´s international position. To a certain extent, these circumstances gave particular weight to the subject of international law. However, it also had the consequence that considerable, if not excessive, importance was attributed to specific Austrian interests in international law. Thus, in Austrian universities particular attention was paid to neutrality studies, often ignoring the much reduced, if not generally vanishing, importance of this concept in general international law.[103] A conspicuous number of Austrian international law professors obtained tenure by presenting monographs on neutrality.[104] As for the teaching of European Law, for a long period Austrian law faculties were disadvantaged due to that country´s rather late accession to the European Union in 1995. As was analyzed elsewhere,[102] European law has in many fields of the Austrian legal reality remained an alien element, not really understood and appreciated even by high-ranking officials. Since the mid-1970s a series of university reform Acts has led to new orientations that have, directly and indirectly, influenced the overall normative (and practical) setting of teaching at Austrian universities. While the University Organization Act of 1975 ("*Firnberg-Refom*", OJ 1975/258) introduced a modern, liberal university structure with co-decision procedures involving students and younger teachers, the reform of 1993 ("Busek-Reform", OJ 1993/805) signaled the start of some counter-reforms, even though the overall setting remained a progressive one.[105] The University Reform Act of 2002 ("*Universitätsgesetz UG 2002*", OJ

102 Ibid.

103 See, extensively, Peter Hilpold, *Solidarität und Neutralität im Vertrag von Lissabon* (Nomos: Baden-Baden 2010).

104 Ibid.
In hindsight, of particular interest in this context is the contribution by Konrad Ginther, who held the chair of international law at the University of Graz for quite a long period (1969–2002) and who writes in his contribution to Bin Cheng (ed.), 1982, A Note on the Teaching of International Law in Austria, pp. 199–200 (200) that in Austria "there is nowadays a growing acceptance of a pluralistic approach in teaching and research of international law in so far as distinctive features of a 'Western', 'Soviet' and 'Third World' approach (dominant perspectives) are concerned". See Konrad Ginther, 'A Note on the Teaching of International Law in Austria' in Bin Cheng (ed), *International Law: teaching and practice* (London: Stevens 1982), 199.

105 See Christian Burtscher/Pier-Paolo Pasqualoni/Alan Scott, 'Universities and the Regulatory Framework: The Austrian University System in Transition' (2006) 20 Social Epistemology 241, 246.

2002 I 120) achieved a radical U-turn back to an authoritarian university structure. Co-decision procedures were abolished and University Rectors obtained enormous power, including with regard to the appointment of professors.[106]

The new University Act was understood as a reaction to the previous system of democratic governance, which was held responsible for all the shortcomings of university reality.[107] De-democratization should be the antidote to all these problems.[108] Using grand-sounding rhetoric, it was stated that the Anglo-American model should be copied and Ivy League-type universities created ("Weltklasse-Universität") – but under Austrian conditions and with limited means.[109] The Rector's wide-ranging power to choose university teachers was designed to give utmost expression to hierarchy and to the "manageability" of employees.[110]

In truth, many important teachers and teachings of international law have come from Austria, in proportion perhaps many more than could be expected from a country of this size.[111] Often, however, their academic contributions have emerged from situations of exile, of external and inner emigration, while

106 While the government predicted "World Class Universities" ("Weltklasse-Universitäten"), experienced observers were more cautious and the first assessments of this reform seem to describe very effectively the situation up to today: "These radical changes have caused, and are still causing, a feeling of enormous frustration among the junior members of the law faculties, and prevent many of them from active participation in a new discussion of curriculum reform". See Posch (n 101) 68.

107 See Pier-Paolo Pasqualoni, 'Österreichische Universitäten im Spiegel der Geschichte – Fallstricke einer Reform der Reform' in Österreichische HochschülerInnenschaft/Paulo Freire-Zentrum (eds), *Ökonomisierung der Bildung* (Mandelbaum: Vienna 2005).

108 Ibid.

109 See Burtscher/Pasqualoni (n 107) 251ss. The authors anticipated were sharp-mindedly that this reform was bound to fail: "Good rhetoric does not necessarily produce good governance".

110 Still open is the question to what extent this reform is compatible with EU law, in particular as far systematic ad personam appointments or the denial of any judicial standing of candidates from other EU countries who have been discriminated against is concerned. See, extensively, Gilbert Gornig/Paolo Piva, 'Freizügigkeit der Hochschullehrer in der EU – der Problemfall Österreich' (2020) 31 EuZW 469 and Gilbert Gornig/Paolo Piva, 'Universitäre Berufungsverfahren – eine rechtliche Kritik' *Wiener Zeitung* (Wien, 28 May 2020) 13. See also Waltraud Radau, 'Berufungspraxis in Österreich' (2019) 26 Forschung & Lehre 932 and Gilbert Gornig/Paolo Piva, 'Zum Feststellungsinteresse übergangener Bewerberinnen und Bewerber im universitären Berufungsverfahren – Zugleich eine Replik zu Schweighofer' (2020) 2 N@HZ 48.

111 See Heribert Koeck, 'The ´Austrian School of International Law´: The Influence of Austrian International Lawyers on the Formation of the Present International Legal Order' in Peter Hilpold (ed), *European International Law Traditions* (Springer: Heidelberg 2021).

tenured chair-holders celebrated (local) authority, soon falling into oblivion when they reached retirement age.

In Switzerland, also a country with a strong international law tradition, the situation is somewhat more complicated. At first sight, there ideal preconditions seem to be given to enable International Law teaching to flourish. In this country high-quality academic research in the field of international law has a long pedigree. Switzerland is home to important international institutions and the country, being on the one hand rather small in size and population and on the other extremely internationally oriented, must rely heavily on international law to protect and further its interests. And, in fact, nobody can deny that Swiss universities offer a rich panoply of international law courses. At the same time, however, it has been bemoaned that a solid basic instruction in international law is not guaranteed for all law students.[112] According to experts in this field, compulsory training in international law would be needed on a more general basis as early as at the level of bachelor programs.[113] Furthermore, inadequate training of lawyers in English legal terminology, as well as a lack of transparency in the University curricula as to quality and dimension of international law training at the various Swiss universities, was criticized.[114]

In many senses the situation in France is also peculiar, if it is often said that the teaching of international law is of particular importance for smaller countries. The case of France demonstrates that larger European countries may also attribute considerable importance to this subject. As a subject of academic research, IL has been influenced to a considerable extent by French contributions.[115] This influence may have been declining for decades, in particular due to the reduced standing of French both as the lingua franca in international relations and as an academic language for IL, with many international experts in this field no longer reading French texts.[116] Nonetheless French continues to be relevant in IL, in particular in proceedings before international courts.[117] This may be one of the factors (together with the circumstance that

112 See Andreas Ziegler, 'How global should legal education be? Recommendations based on the compulsory teaching in international aspects taught at Swiss law schools' (2020) 1 European Journal of Legal Education 49.

113 Ibid.

114 Ibid. See also Andreas Ziegler, 'Die Entwicklung der Völkerrechtslehre und –wissenschaft in der Schweiz – eine Übersicht' (2016) 26 SZIER 21.

115 See Andrea Hamann, 'The French Tradition of International Law' in Peter Hilpold (ed), *European International Law Traditions* (Springer: Berlin/Heidelberg 2021), 137.

116 As is well known, this situation is even worse with regard to German or Italian texts.

117 See Tomuschat (n 27) 205.

international law generally has a strong position in Latin countries) leading to the prominent curricular position of international law in France. A recent study has, however, shown that this strong position may be only seemingly apparent.[118] In bachelor law studies, international law is, depending on the university, not always compulsory. It is taught, in any case, only in a restricted number of hours and separately from other subjects.[119] Masters' studies in law often offer a rich panoply of specialization courses, but in this context the criticism has been raised that thereby the instruction becomes diffuse, overburdened with detail, and, in particular if the basic course has been avoided, soon obsolete.[120]

International law is of considerable relevance also in Italian law studies. Many globally renowned international lawyers have come from Italy, and without doubt this is also the immediate consequence of the high status the subject of IL has for long enjoyed in Italian university curricula.[121] With regard to teaching in the narrower sense, one of the most characteristic features of the Italian teaching reality has for long been the close connection between public and private international law. Academics having to teach both subjects certainly operate in a very specific environment, with both disciplines reciprocally

118 See Andrea Hamann, 'Die Lehre des Völkerrechts in Frankreich – Überblick und Beobachtungen' (2017) 48 BDGIR 123. On the French University system (with particular reference to the law area) see also Dorothée Perrouin-Verre and Samuel Fulli-Lemaire, ´Career Paths into Legal Academia in France´ (2020), 84 RabelsZ 299.

119 Ibid.

120 Ibid.

121 There is some, but not very much literature about TIL in Italy. See, for example, with regard to the "earlier years", Giuseppina De Giudici, 'A cavallo dell'Unità d'Italia. L'insegnamento del Diritto internazionale a Cagliari e l'adesione alla cosiddetta Scuola italiana, in Annali di Storia delle università italiane' (2020) 2 Luglio-Dicembre 213 and Amadeo Giannini, 'Il diritto internazionale in Italia (1851–1948)' (1948) 3–4 15 Rivista di Studi Politici Internazionali 377. For the first years after WW II see, i.a., Manlio Udina, 'Der Beitrag der italienischen Doktrin zur gegenwärtigen Theorie des Völkerrechts' (1969) 29 ZaöRV 331 and Mario Panebianco, 'Tradition und neue Tendenzen in der italienischen Völkerrechtslehre nach 1945' (1987) 25 AVR 387. For the period leading to the present day see Antonio Cassese, in: Cassese, S. (ed.), *Guida alla Facoltà di giurisprudenza* (Il Mulino: Bologna 1994). See also Giulio Bartolini, *A History of International Law in Italy* (OUP: Oxford 2020) as well as Antonio Cassese, Il diritto internazionale in Italia (il Mulino: Bologna 2021). Most recently see also the conference organized by the President of the Italian Society of International Law, Professor Pasquale De Sena, Il ruolo del Diritto internazionale e del Diritto dell'Unione europea nella formazione universitaria e post-universitaria, in Italia: spunti per una riflessione, 17 June 2021, https://www.youtube.com/watch?v=fuFbz-X3aqI, video transcript on file with the author (in the following cited as "SIDI conference June 2021").

influencing their respective academic perspectives. As was said, this close connection between public and private international law is often considered, outside Italy, as an "oddity" or "recognized trademark" of Italian academia.[122] In most other countries after WW I, the teaching of and the research into IL "broke apart institutionally and ideologically and started to develop through their own, autonomous channels".[123]

It was said that this model of teaching and research could again become modern and that the Italian system, prominent for having preserved this unity, could be an example of this.[124] While an explicit return to the "unitary approach" as it is practiced, at least formally, in Italy is rather unlikely – the autonomy of these two disciplines is far too developed – the "Italian tradition" may nonetheless have significantly influenced the present international discussion. It is probably no coincidence that the "Global Administrative Law" (GAL) approach presented below finds qualified support in Italian academia and has been developed to a considerable extent by Italian lawyers. As will be shown, this approach bridges the divide between these two disciplines (and many others) without needing to eliminate the high dogmatic fences that have come to fragment law academia.

What is most awkward in the present situation of IL teaching in Italy is the apparent contradiction between the unitary approach, combining both private and public IL, on the one hand and the highly fragmented situation of research and teaching in this area on the other. In fact, it is not just that most international lawyers in Italy specialize in either the private or public elements of this formally comprehensive discipline. It has rather to be considered that even within these sub-disciplines a further fragmentation has taken place. In the meantime, European Union law as a teaching subject has emancipated itself from that of IL and has been attributed separate teaching hours, separate chairs, separate competitions, and an independent professional organization (Associazione Italiana Studiosi del Diritto Europeo – AISDUE), while in the past the "Società Italiana di Diritto Internazionale e del Diritto dell´Unione Europea" (SIDI) exclusively represented both teaching subjects: IL and EU law. This separation is often not very practicable, with many areas of overlap still in

122 See Pietro Franzina, 'The Integrated Approach to Private and Public International Law – A Distinctive Feature of Italian Legal Thinking' in Giulio Bartolini (ed), *A History of International Law in Italy* (OUP: Oxford 2020), 262.

123 See Martti Koskenniemi ´Nationalism, Universalism, Empire: International Law in 1871 and 1919' (University of Helsinki,) 15, available at https://fdocuments.in/document/nationalism-universalism-empire-international-law-in-.html, cited by Franzina, p. 263.

124 See Franzina (n 122) 282.

place. A further problem concerns the difficulties in separating European Law and IL from constitutional law. Without doubt, these are independent academic disciplines, but the attempt to separate them also creates considerable institutional problems due to the abovementioned many areas of overlap.[125] The alternative would be to create chairs with broader job descriptions, as happens – in a very pronounced way – in Germany. The advantage of this alternative would lie in the opportunity for the teacher to specialize according to his/her preferences and the needs of the respective university without being in danger of entering into competence conflicts with colleagues. The drawback of the "German model" lies, however, in the need to prepare a "habilitation thesis" covering a very broad theme (focused regularly on public law), and in fact that specialization in IL is possible only at a rather late stage of the academic curriculum. Furthermore, according to the German model, international lawyers have usually to continue to dedicate part of their working time to public law.

6.4 *Some Common Challenges for International Law Curricula in Europe (and Beyond)*

Many of the problematic aspects of international law in general and of international law curricula in particular in the various European jurisdictions examined may be, in the specific connotation described, typical for the country situations analyzed. At the same time, however, many of them are also, to a certain extent, expression of problems assailing TIL in general.

This starts with the question whether the subject of international law should be made compulsory even for basic law instruction. It has been rightly observed that a positive answer to this question by representatives of the community of international lawyers may not in any way be decisive, as these advocates for an enhanced role for IL are arguing *pro domo* or are at least not unbiased.[126] Nonetheless, as has been shown throughout this contribution, there are strong arguments in favor of such compulsiveness that should convince any neutral decision-taker.

Similar questions may arise in regard to the issue of how many teaching hours should be dedicated to international law and how those teaching hours should be distributed between compulsory and optional classes. Offering a wide array of optional classes on international law subjects (or sub-subject) like investment arbitration, WTO law, International Competition Law,

125 The ensuing "competence problems" were addressed at the "SIDI conference" of June 2021 (n 121).

126 See Hamann (n 118) 124.

International Criminal Law, International Environmental Law, etc. is appealing. By being offered such classes, further students can be enthused by international law, they can imagine specific professional opportunities, law studies as a whole at the university in question can be rebranded as innovative, future-oriented, and modern. In a certain sense, such specialization takes note only of developments taking place in the legal arena, if we refer to the buzzword of "fragmentation".[127] The fragmentation debate, however, has also revealed the perils of accepting such a continuous further sub-division of the subject. The overall connecting lines between these subjects and the coherence of the system itself may get lost. The same may be true as regards common "legal language" (for example, if general principles are looked for). If dealing, for example, with WTO law, students will be confronted earlier than expected with questions, say, of treaty interpretation or state responsibility to be addressed from the viewpoint of general international law. Sound preparation in that area will therefore be indispensable for any attempt to deal with the special fields of international law indicated.[128]

To focus on "trendy subjects", the attempt continuously to adapt international law curricula to the specific needs of professional activities at the time, which seem to be highly profitable, may therefore be a risky policy. One might remember the popularity of WTO courses in the immediate aftermath of the creation of the WTO, enthusiasm that declined sharply when it became evident that the Doha Round (originally set to be completed in 2005) had ended in failure. International investment arbitration offered no stable shelter for

127 As is well known, the relevant discussion started with the famous statement by the President of the ICJ, Gilbert Guillaume, before the UN General Assembly on 30 October 2001. It continued intensively within the ILC and by the publication of detailed studies by this commission (Study Group of the ILC, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (13 April 2006) with appendix: Draft conclusion of the work of the Study Group, U.N. Doc. A/CN.4/L.682/Add.1 (2 May 2006); Study Group of the ILC, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (18 July 2006). The results of these studies were somewhat inconclusive, and the discussion dragged on despite a series of attempts to declare it closed. The perception that the underlying problems linger on however persists.

128 Andrea Hamann cited in her contribution of 2017 (n 115) 132 the following statement by Robert Jennings which comes straight to the point: "in many universities there are courses in trendy, or politically correct aspects of international law – such as, now, the environment, or human rights; though what those subjects will be in five years' time on, one can only guess, for trendiness by definition changes rapidly". See Sir Robert Jennings, Letter to St. John Macdonald, 15 July 1993, Annuarie de l'Institut de Droit International 67-I (1997), pp. 128–129.

those of the WTO community who attempted to change direction when it became apparent that these institutions and procedures were being met with more and more resistance by states and anti-globalization forces.[129]

6.5 *A Common European University Space?*

As Europe is losing clout in the competition for international knowledge, the idea of fostering the creation of a European university space sounds appealing. Such a space would not be tantamount to the harmonization or reciprocal merger of existing university structures. Competition remains essential for academic excellence in Europe. Such a common space would, on the contrary, even enhance competition, but at the same time allow for more cooperation and for a more efficient investment of resources. In reality, however, such European university space does not seem to be in reach, and this has become particularly clear in the field of international law.

The first issue, we have to deal with here, is the material content of international law teaching. There is little common ground on what should be the basis of an introductory course in international law. This becomes apparent, for example, if law students from, say, a continental European state with no access to the sea take an international law course in another European state with a strong maritime tradition while participating in an Erasmus exchange program. While the students at home had to study the sources of law, human rights, state immunity, and state responsibility, the Erasmus student may return having passed an exam primarily on every detail of the law of the sea. In teaching, perhaps even more so than in research, the question whether international law is really international[130] is of particular importance.

The construction of a European university space in international law is hindered even more by high barriers to the movement of university teachers, also in the field of international law.[131] Some may find justifications for such barriers in history or traditions; others may qualify them as openly protectionist. But in any case, they are often not compatible with pivotal law provisions, in particular with the rules on the free movement of workers in accordance with Article 45 TFEU. In Germany, attaching IL to German Public Law has the evident effect that foreign candidates and candidates without a "habilitation" also

129 In part they have become victims of their own success and efficiency, as they lay open the deficiencies of national judicial systems. For an up-dated stock-take on the relationship between arbitration and EU Law see José Mata Dona/Nikos Lavranos, *International Arbitration and EU Law* (Edward Elgar 2021).

130 See Anthea Roberts, *Is International Law International?* (OUP: Oxford 2017).

131 See Gilbert Gornig/Paolo Piva, 'Freizügigkeit der Hochschullehrer in der EU – der Problemfall Österreich' (2020) 31 EuZW 469.

in German Public Law have next to no chance of being considered for a chair in IL at a German university. However, due to the limited importance of international law in German law curricula, the fact that next to no separate international law chairs are provided for can legally be justified. In Austria the main legal problems arise from the fact that candidates applying for a post at an Austrian university have no effective legal remedy in the event of discrimination,[132] with the exception of in the limited cases set out in Article 19 TFEU.[133]

In Italy, after a long experience with cases that have been intensively discussed in the media and have also led to criminal investigations, sophisticated selection mechanisms have been conceived which, however, do not seem to have reached a definitive stage. Central qualifications commissions (*"abilitazione nazionale"*) have been set up whose members are selected by lot. The qualification awarded by these commissions enables successful candidates to apply for a post as an ordinary professor (*abilitazione di prima fascia*) or as an associate professor (*abilitazione di seconda fascia*). Discussions about this system, which continues to be reformed, are ongoing.[134]

132 Here the problem arises how such a situation could be reconciled with Article 47 of the Charter of Fundamental Rights.

133 And also in these cases protection is very limited, as labor contracts concluded in violation of these guarantees are not rescinded but the victorious plaintiff is rather awarded a little compensation.

134 According to a study presented by Emanuele Bajo of 2018 for the "Economic Finance and Economics of Financial Intermediaries" sector there was no difference between the academic impact of candidates that were successful and those who were not, but that candidates of the latter group were in significant number "non-integrated" into the system, for example because they were working abroad. See Emanuele Bajo, 'Commissioni e merito' (il fatto quotidiano, 17 June 2018) <https://www.ilfattoquotidiano.it/2018/06/17/universita-quando-labilitazione-non-e-sinonimo-di-merito/4429044/> accessed 25 October 2021. The ministry for Universities and Research in early 2021 tried to introduce restrictions as to the languages in which candidates could present their research. Candidates undergoing the assessment procedure with written work that was neither in Italian nor in English were required also to file a sworn translation by a certified expert, thereby making access to the *"abilitazione" f*or candidates from abroad in many cases also economically unfeasible. Decreto direttoriale 26 February 2021, Article 2 para 4 b). After an outcry by experts in leading national newspapers, this measure had to be withdrawn and the relevant provision was repealed. See decreto direttoriale 5 March 2021, n. 589 "rectifying" art. 2 para. 4 b of the decreto direttoriale of 26 February 2021, n.553 cancelling the reference to the languages in which publications are accepted. On the criticism that prompted this step back see, for example, the contribution by Gian Antonio Stella, in: Corriere della Sera. See Gian Antonio Stella, 'Università, lo strapotere dell'inglese nei bandi: la follia delle traduzioni giurate' *Corriere della Sera* (4 March 2021). Originally, the assessment commissions had also to include members from abroad. This provision was repealed. A further attempt to internationalize Italian universities and to foster merit found expression in a plan to hire 500 renowned professors from Italy and from abroad (*"super-professori"*), to

6.6 *Moving from the "Archipelago" to the Global Level – with a Particular Eye on "Global Administrative Law – GAL"*

The "archipelago perspective" probably currently cohabits with "patchworks" of situations determined by International Law and other situations that appear to have "globalized" characteristics. The "national eye" on everyday legal realities is surely by far the dominant one. The typical practical lawyer still sees himself as a technician prevailingly operating in the national sphere, and this has necessarily to find expression in law school (or university) curricula if they want to respond to the needs of students and professional practice.[135]

Autonomy, rather than dependence or even interdependence, still mainly characterizes the self-perception of national legal orders, of their authors in the Parliaments (as far as democracies are concerned), and of their administrators and executors in the Governments as well as in the broader administration. National pride is often firmly grounded on an idea of national self-determination that emphasizes the uniqueness, if not the superiority, of national traits.

Nonetheless, things are slowly changing.

In fact, nowadays, there are also lawyers dealing principally or even exclusively with International Law on a professional basis. They are probably not as numerous as some euphoric studies may suggest, but they exist. They may not be increasing in number as rapidly as some commentators might declare or hope, but nonetheless their number has been rising over the years.

Furthermore, the above analysis has made clear that any assessment in this field has to consider that situations vary considerably from country to country, depending on a variety of elements among which the size of the "national", the "internal" markets stands out. Confronted with a sizeable internal market for

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be selected by internationally renowned academics without having to undergo an Italian *"abilitazione"* and selection procedure. See Gianna Fregonara, 'In arrivo le norme sui 500 super-prof. Il premier sceglie i „reclutatori"' *Corriere della Sera* (08 October 2016). This plan was abandoned after strong opposition, in particular from universities. For an overview of the recruitment system in Italian universities (with particular reference to the law sector) see also Francesco Paolo Patti, 'Career Paths into Legal Academia in Italy' (2020), 84 RabelsZ 324.

135 As was well observed by Florian Hoffmann, "Although today's global knowledge exchange makes it increasingly possible to reach intellectual horizons beyond the methodological traditions of one's respective locality, language and (legal) culture, it is the deeply vested expectations of colleagues and students within a specific curricular tradition as much as the teacher's own cognitive horizon that limit the actual choice of teaching method." See Florian Hoffmann, 'Teaching general public international law'in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014), 349, 356.

legal assistance and advice like the US one, it stands to reason that lawyers will set a corresponding professional focus on internal law. In small countries like, say, Luxembourg or Liechtenstein, whose economies are far more dependent on international and transnational issues, foreign law expertise has far greater weight.

The situation of the European Union is again unique. EU law, being neither foreign law nor national law in the stricter sense but rather an additional layer of law, in part endowed with direct effect, in part representing an important reference for the interpretation of national law, and in part already transposed into national law as a matter of principle, can no longer be ignored by any lawyer. It has therefore to be part and parcel of everyday legal reasoning and everyday legal practice. Consequently, it has to constitute a mainstay of legal instruction. However, the reality is often quite different.[136]

Globalization is on its own a term with rather uncertain contours. It has long been associated with the factual situation of international markets integrating beyond traditional borders and norm. The law of globalization is considered to have predominantly an International Law character and to be directed at regulating the international economic liberalization process.[137] In recent years, however, a different perspective has arisen which no longer focuses on the legal nature of individual norms characterizing the globalization process, but rather emphasizes their function as the administrative framework of a highly integrated world: Global Administrative Law (GAL). This new approach transcends traditional borders and categorizations. It was said that GAL is not just global, as it also integrates national and local norm-setting and activities; it is not only administrative (at least in the traditional, national sense) as it also includes elements that, according to the traditional perspective, would be qualified as private or constitutional; it is not only law (again according to a traditional, perhaps widely overridden conception)[138] as it also takes into

136 As this author has demonstrated in another study, knowledge of EU law in Austria, after more than 25 years of EU membership, is appallingly low, on both the higher professional and societal levels. See Peter Hilpold, 'Ringen um europäische Werte – Österreich in der EU' in Peter Hilpold/Heinrich Neisser/Walter Steinmair (eds), *Rechtsstaatlichkeit, Grundrechte und Solidarität in Österreich und in Europa – Festgabe zum 85. Geburtstag von Professor Heinrich Neisser, einem europäischen Humanisten* (Facultas: Vienna 2021).

137 For a recent comprehensive study of the phenomenon of globalization see Mark Juergensmeyer and others, *The Oxford Handbook of Global Studies* (OUP: Oxford 2019). On the development of the concept of globalization see in particular the introductory chapter by Manfred Steger, 'What is Global Studies' in Mark Juergensmeyer and others (eds), *The Oxford Handbook of Global Studies* (OUP: Oxford 2019), 3.

138 On the normative power of "soft law" according to a global governance approach see Armin von Bogdandy/Philipp Dann/Matthias Goldmann, 'Developing the Publicness of

consideration soft law and standards.[139] In the more distant past, dissatisfaction with the status (or the traditional understanding) of IL teaching had already led to the plea to override the classic sub-division of legal subjects so as to find the appropriate space for international law, which is in some ways different from all other (national) legal subjects.[140] Especially in business law this necessity was strongly felt. This approach was, however, far more successful in the United States than in Europe. In Europe the attempt was made to adopt a more extensive view of IL and to consider also measures taken by private actors as far as they can be of relevance on the international level. GAL would enlarge this perspective in an even more comprehensive way as it allows one to adopt a fresh view of norm-setting, unconditioned and unrestricted by a source theory based on Article 38 of the ICJ Statute which is no longer able to respond fully to modern needs and reality.[141]

The challenge is to develop an approach that is able to comprehend, to describe, and to analyze "the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees."[142]

It is not yet clear whether GAL will become an autonomous legal discipline, a sub-discipline of IL, or simply a new perspective adopted by some lawyers in order to take a new look at IL issues in a profoundly changed international environment. In any case, it is clear even now that norm-setting in the international

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Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 German Law Journal 1375.

139 See Sabino Cassese, 'Global administrative law: where do we stand?', in Philippe Cossalter/Gilles Guglielmi (eds), *L´internationalisation du droit administrative* (2020), 53. For a recent discussion concerning the legal quality of soft law see Peter Hilpold, 'Opening up a new chapter of law-making in international law: The 2018 Global compacts on Migration and Refugees' (2021) 27 European Law Journal 1.

140 See the „transnational law" approach conceived by Philip Jessup, *Transnational Law* (Yale University Press: New Haven 1956).

141 This does not, of course, mean that Article 38 would no longer fulfill its original function as the primary reference point for the identification of the sources of IL. It needs, however, a series of qualifications and re-interpretations. For a view of Article 38 that is generally positive see i.a. Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (OUP: Oxford 2010), 95.

142 See Benedict Kingsbury/Nico Krisch/Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 16.

reality has undergone thorough modifications, so that the tools developed by traditional IL, almost exclusively centered on the state, meet with the greatest difficulties when trying to deal with this new reality and to explain it. While the state as the primary actor in IL, contrary to many speculations in the past, is still there, it is no longer the monolithic, black box-like unit.[143] Globalized administrative regulation takes the most varied forms where the state remains a prominent actor, but its sub-parts, larger conglomerations of states, their citizens, as well as public and private institutions, to name only a few, are also active norm-setters.[144]

The wide recognition and respect GAL enjoys reflects the fact that this approach is able to consider a far broader spectrum of phenomena that we intuitively associate with the IL order but are difficult to grasp and to explain satisfactorily using traditional IL concepts and tools. Sooner or later these developments will have consequences on the level of teaching, too. At the moment GAL is rather a research subject for senior academics and taught, if at all, in a very limited form: Teachers may make some cursory remarks on GAL in general IL or administrative law courses or will teach GAL in advanced optional courses for a small group of students specializing in the field. In the future, however, this may no longer suffice if teaching in this area is to remain pertinent.

7 The Teacher's Role in Constituting and Developing IL: Promise and Prospect

A closer examination of the teacher´s role in this branch of law inevitably leads us to basic questions about the nature of IL, its sources and the methodology to apply to assess its meaning appropriately. But this process also works the other way round. Any inquiry into the meaning and the nature of IL will end up with, or at least lead to, a close encounter with the teacher. In no legal discipline does the lawyer play such a prominent role, and at the same time,

143 See Sabino Cassese, *Global Administrative Law* (Edward Elgar: Cheltenham 2021).

144 Kingsbury/Krisch/Stewart (n 143) 20 distinguish five main types of globalized administrative regulation: "administration by formal international organizations; administration based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental private arrangements, and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine but we propose this array of ideal types to facilitate further inquiry".

nowhere is he the addressee of so much hope, of such high expectations, of so much delusion. The widespread confusion about the teacher´s role and function is associated, first of all, with the enormous changes in the environment in which the teacher has operated over the centuries. These changes have not always been fully realized in the language in which the international lawyer is addressed and are not reflected in the images of the relevant role lawyers themselves and the broader society have in mind.

The law-creating function of the old masters like Vitoria, Grotius, Pufendorf, and Vattel was surely far more pronounced than those of modern international lawyers, as famous and "authoritative" as they may be. Of the many circumstances conducive to this diminishing relevance the most obvious are the enormous rise in the number of academics teaching IL, the loss of the unity of perspective following the end of the Eurocentric approach to IL, and the ever-rising role of treaties as against that of customary IL. The identification of customary IL norms not only requires enormous expert knowledge; it also leaves considerable leeway for individual, competent assessment. The result will be more or less authoritative depending on the name(s) of the experts doing the relevant norm identification act.

When the Statute of the International Court of Justice was drafted back in 1920, "the teaching of the most highly qualified publicists of the various nations" was included in Article 38 paragraph 1 (d) of the Statute as "subsidiary means for the determination of the rules of law". And it was speculated afterwards whether the drafters of this provision included themselves in the "elite professional category they referred to".[145] In 1920, this formulation was a nod to an elitist thinking that by then was already somewhat awkward but still acceptable. In these days, few would believe that such a ranking among IL academics could be feasible or even make any sense. Nonetheless, it deserves preservation as evidence of the past role of individual teachers, who have hitherto influenced the main traits of this order. At the same time it can be seen as an incentive to strive for excellence. While it will not be possible to create a consensual ranking of IL teachers based on their qualifications, this formulation can be seen as a plea for quality, as an invitation to a keen competition of ideas and arguments in this field.

145 See Pierre d'Argent, 'Teachers of International Law' in Jean d´Aspremont and others (eds), *International Law as a Profession* (CUP: Cambridge 2017), 412, pointing out that in 1921 7 out of 11 judges elected to the PCIJ had a very strong academic professional background. In 1946, when the first judges were elected to the International Court of Justice this proportion rose to 11 out of 15. Ibid.

Furthermore, Article 38 para. 1 (d) of the PCIJ Statute (and now the ICJ Statute) marks a compromise: it attributes considerable value to the teachings of international lawyers without elevating them to sources of IL in the formal sense.[146] The "determination of the rules of IL" remains an essential exercise for this order to be effective. As has been said, law in general and IL in particular is "what the generality of its recipients ′believe′ it to be.[147] In this "belief system" teachers of IL have been compared to priests, clergymen, rabbis, imams, or other clerics.[148] If no scientific method were available that would tell us what is the ultimate truth in law: if "legal sciences" cannot even deliver a uncontestable judgement on which of the many conflicting interpretations of IL is the "definite", the "right" one, we have to have recourse to someone who is vested with the authority to decide. It is not only the precariousness and the sketchiness of the international judiciary system that makes the academic teacher of IL so precious as the final arbiter. His lasting aura of enlightenment inherited from the past, his belief, implicit though it may be, of being in touch with the metaphysical, buttresses the international order at the many spots where contradictions and deficiencies risk undermining its authority. The teacher is asked to mend a system continuously anew which is characterized by an often chaotic and inconclusive practice. Teachers have to find a lasting, if not perennial, structure in acts that otherwise could be interpreted as an expression of crude power or mere contingency. As has been said, "belief and hope are a vital part of any law and ultimately sustain justice as the engine for making and unmaking law".[149] The teacher helps to devise techniques of

146 As was shown in the literature, there are many elements indicating that the ICJ relies heavily on scholarly teaching but almost never cites these writings (individual opinions being an exception to this rule). See Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice* (CUP: Cambridge 2021). A good explanation for this attitude of the ICJ (and of other international tribunals) is given by Gleider Hernández, 'The Responsibility of the International Legal Academic' in Jean d′Aspremont and others (eds), *International Law as a Profession* (CUP: Cambridge 2017): "When a scholarly argument is borrowed by an international tribunal, it is rarely acknowledged explicitly, perhaps to avoid accusations of embracing certain policy preferences. It is also rarely acknowledged out of a desire not to elevate or privilege certain individuals or ′to distribute good or bad marks′". Ibid., with reference to Allain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edition, OUP: Oxford 2012).

147 See Carlo Focarelli, *International Law* (Edward Elgar: Cheltenham 2019).

148 See d′Argent (n 145) 418.

149 See Focarelli (n 147) 19.

argumentation vested with the semblance of persuasiveness[150] whereby he or she has to overcome the contradictions of a norm-creating process based both on egoistic state behavior and on values constraining this behavior.[151]

The challenge that the international lawyer has to be value-guided is omnipresent in literature, most obviously as a device to avoid IL becoming an amoral set of rules justifying the vile egoism of the powerful who are not content with oppressing the weak but, in their viciousness, are even looking for a moral justification for their abjection. One example of an attempt to reconcile value-orientation with practice-based positivism is the creation of the figure of the "critical positivist" international lawyer.[152]

That lawyer should adopt basically a positivist approach when looking for international norms and interpreting them. In cases of conflict and indeterminacy he would, however, be empowered to base his judgement on "universal principles of the world community", for example the pursuit of peace, the protection of human rights, or the realization of democratic governance.[153] This approach has been criticized, first of all, because it does not provide any justification for proclaiming the principles stated to be universal.[154]

Both the "critical positivist" approach and the criticism voiced against it need some differentiation. To see in the "pursuit of peace" and the "protection of human rights" pre-eminent values is to some degree justifiable in view of the jus cogens character of the prohibition on the use of force and of at least the core area of human rights.[155] The value of a participative government structure is also more and more recognized; the disruptive effects of authoritarian systems in particular in the field of human rights is also contestable. It

150 See Martti Koskenniemi, 'Methodology of International Law' (2007) MPEPIL online ed <http://www.csil.cn/upFiles/files/International%20Legal%20Theory%20and%20Doctrine.pdf> accessed 25 October 2021.

151 See Martti Koskenniemi, *From Apology to Utopia* (CUP: Cambridge 2006).

152 See Antonio Cassese, *Five Masters of International Law: Conversation with R.J.-Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter*, (Oxford and Portland, Oregon: Hart 2011) at 258.

153 See Antonio Cassese, *Five Masters of International Law* (First edition, Bloomsbury Publishing 2011). In "Realizing Utopia" (Oxford: OUP 2012) Cassese writes about his pursuit of the creation of a "realistic utopia". Ibid., p. xxi.

154 See Gleider Hernández, 'The Responsibility of the International Legal Academic – Situating the Grammarian Within the 'Invisible College'', in Jean d'Aspremont and others (eds), *International Law as a Profession* (CUP: Cambridge 2017).

155 See James Crawford, *Brownlie's Principles of Public International Law* (OUP: Oxford 2019), referring to the prohibition of the use of force in Article 2(4) of the Charter, of genocide, of crimes against humanity (including systematic forms of racial discrimination), and the rules prohibiting the slave trade.

would, however, be misleading to look for a neat border between "common" IL norms and "higher-ranking" rules, to search for a clearly determined substantive content for jus cogens.[156] As has been rightly remarked in the literature,[157] the most important value of the acceptance of higher-ranking norms lies in the promotional force of such a belief. The value of these norms is therefore to be found less in a static weighing and balancing of existing IL norms according to their purported greater or lesser impact and importance. It is rather the dynamic aspect that counts, the influence this concept can exert on the further norm-creation and interpretation process.[158] Interpreted in this way, belief in higher-ranking norms and the struggle for their further consolidation brings the "critical positivist" approach best in line with the constraints and the potential of the existing IL order. Thereby, the role of the international lawyer as a teacher is also highlighted. In fact, as has also been underscored in literature,[159] emphasizing the promotional role of jus cogens is closely connected with its educational function.

Seen from a general, abstract vantage point, these considerations might imply a very important role for the teacher, the researcher, the "publicist" of IL. So, the international lawyer is really on the front line when suggestions for a "better" international order are to be made? Is he/she really the "priest" we have to pin all our hopes on? Here again, further qualifications are needed. "The" international lawyer does not exist. There are the judge, the teacher, the practitioner, the litigant, the advisor for governments, corporations, NGOs, to name only a few. And then there is the international lawyer who plays two or more of these roles. More often than not, it is exactly the teacher who wears one or more of these additional hats. Whether IL teachers can really play the leading role many attribute to them will not only depend on their "internal" independence and autonomy as individuals but to a considerable degree also on external circumstances. The position of the teacher/international law publicist

156 On the shortcoming of the „substantive view" in discussions about jus cogens see Robert Kolb, 'Peremptory Norms as a Legal Technique Rather than Substantive Super-Norms' in Dire Tladi (ed), *Peremptory Norms of General International Law* (*Jus Cogens*) (Brill/Martinus Nijhoff: Leiden/Boston 2021). See also Olivier Corten/Vaios Koutroulis, 'The Jus Cogens Status of the Prohibition on the Use of Force' in Dire Tladi (ed), *Peremptory Norms of General International Law* (*Jus Cogens*) (Brill/Martinus Nijhoff: Leiden/Boston 2021), 629, citing Ian Brownlie, who compared jus cogens with a vehicle that "does not often leave the garage", and Prosper Weil who compared this concept with a "Rolls Royce that her owner polishes and maintains lovingly but never drives". Ibid., p 631.

157 See Carlo Focarelli, *Trattato di Diritto Internazionale* (Giuffré: Milan 2015).

158 Ibid.

159 Ibid., p 540.

who also plays the role of a government advisor is often discussed. Certainly, examples can be found of renowned international lawyers who have played this role subsequently[160] or even contemporaneously[161] to that of teaching and who represent paradigmatic intellectuals neatly keeping these roles separate. In other cases, however, this works less well, and in some cases there is not even the appearance of such intent (of separation and autonomy). In law practice lawyers are often faced with a problem that may become relevant also for teachers/advisors. Those in situations of conflicting roles and interests are not willing to take notice of this incompatibility as they feel they can move from one role to the other with their integrity unscathed.[162] Thereby, they not only often overestimate their individual autonomy, but, even more basically, ignore the damage they do to their role(s) through the objective appearance of partiality. There is the risk that the advisor becomes "less […] the wise oracle of the international, and more […] an entrapped tin soldier bowing to bureaucratic edict".[163]

Should this analysis be seen as a plea to IL teachers to concentrate on their role as teachers (and researchers) and resist the temptation to be active also in other fields in order to defend their integrity? There are valid arguments for accepting "several hats", for a "cross-over" approach. Thus, there may be egoistic motivations, such as that related to the contention that teachers´ wages are too low. Or it may be said that teachers may be motivated by extraordinary self-esteem to accept other jobs too as they feel that their talent would otherwise be (partly) wasted. And then there are more sober considerations such as that the quality of teaching can profit greatly from experience as practitioners and that it is also in the interests of students that their teachers now and again leave the "ivory tower".

On the whole, any final verdict on the role an individual teacher can fulfill will essentially depend on the circumstances of the situation in question. Of decisive importance will be what degree of autonomy the individual institution in which the international lawyers works is prepared to grant/is used to granting. In an authoritarian regime, international lawyers will have scant influence on the overall development of their country´s attitude to IL unless

160 As is well known, Martti Koskenniemi and Philip Allot were previously government advisors before becoming professors.

161 See, for example, Sir Michael Wood.

162 See Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 NULR 217.

163 See for this formulation Mattew Windsor, 'Consigliere or Conscience? – The Role of the Government Legal Advisor' in Jean d´Aspremont and others (eds), *International Law as a Profession* (CUP: Cambridge 2017) 355, 388.

those lawyers are extremely adept at pushing their agendas without endangering their careers, freedom, or lives. The more a liberal attitude, sensitive to academic freedom, prevails, the more lawyers will develop their role autonomously. Also the climate in which government advisors are working is very different from country to country, with some countries seeing in the advisor a legal expert called on to wrap a pre-determined political decision up in a legal dress that makes it more "sellable" to an internal and an external audience. Other countries have a historic tradition of asking sincerely for independent advice which should then flow into the political decision-making process. The borders between these groups of states are, however, fluid and not always stable over time. In any case, a great deal of prudence is necessary here.

For teachers who also work as advisors to private companies or as counsel to law firms the danger of compromising their independence will be most often less pronounced or, if it exists at all, it will concern specific areas where they could abstain from assuming the role (also) of promotors of law change.

At the end, of decisive importance will be the institutional independence the university/research institution is willing and able to grant to the academic. The word "autonomy" is often misleadingly used in this context. If local universities are independent of governmental control but governed by autocratic institutions without effective control or controlled again by local political forces, then the teacher will hardly enjoy meaningful autonomy. As set out in this contribution, real academic freedom requires a complex system of checks and balances that rewards independent, future-oriented research in a climate of openness to the exchange of ideas. At the same time, these institutions have also to be prepared to take effective measures against academic abuses and lasting unproductivity. What in some regions have been hailed as the "self-cleaning" capacities of universities ("*Selbstreinigungskräfte der Universitäten*") have to operate effectively and forcefully, and to this end both a fostering of talent and strong and genuine competition have to be achieved.

But what of the individual responsibility of international lawyers? Whatever the external circumstances, in most cases a core area will remain where they will have the chance to act autonomously, where their individual will is decisive. On what basis should they act?

Lately it has been argued that the international lawyer should not look for an "already existing consensus among ´reasonable international lawyers´, a kind of ´soft law´ contractarianism", but an individual judgment is needed which could also be isolated and very costly professionally.[164]

164 See Anthony Carty (n 59) 201, citing, with regard to the "consensus among reasonable international lawyers", Klaus Kreß, *The Crime of Aggression* (CUP: Cambridge 2017).

It is true that the responsibility of the international lawyer is, in the end, an individual one. Past experience of injustice has shown that the individual cannot avoid accepting this responsibility, and even in the cruelest dictatorial regimes like those of fascism in the first half of the 20th century there have been individuals who stood up against terror and oppression. But overemphasizing the role of the individual gives rise, at the same time, to risks that are too great. First of all, there is the danger of pretending too much, of overburdening the individual. Heroes are an important element of society, but they will always constitute a small minority. And a heroic, self-sacrificing attitude can never be pretended. Furthermore, there is the risk that the individual (or a small group of individuals) may misjudge a situation and will, maybe motivated by the best intentions, feel legitimized in imposing his/her will on others, or even on society as a whole. Eventually, in extreme situations these "best intentions" could come close to dictatorship or may serve as a justification for oppression, the violation of rights, or even terrorism. Dialogue with "reasonable international lawyers", on the basis of a "common language" building a platform for some agreed fundamental values,[165] can therefore be an important remedy for such excesses as it may provide direction and correct aberration. The great achievements of civilization, the conviction that the protection of human rights and the prohibition on the use of force without doubt enjoy strong support within the "invisible college" of international lawyers in its world-wide network. There is ample space for the individual international lawyer to contribute within this network to a further improvement in these achievements, but this should happen in dialogue and not unilaterally. The individual international lawyer is only one, though an important, element of a broader system. In order to make his/her work effective, it is essential to fight for academic freedom and the further strengthening of the rule of law in the broader society and also transnationally.

The teacher of IL should, of course, avoid becoming a "tin soldier", however enticing money and "institutional rewards" (such as administrative or political power) may be. Nor is it realistic to aspire to becoming a "priest" of IL. The academic audience may revere some outstandingly successful academics as saints. As long as they do not identify with this label attributed to them by others or openly compete for it, teachers "sanctified" this way can, however, always decline responsibility for this attribution by others. The most meritorious approach would probably be to aspire to a role as a "considerate reformer" attempting, in dialogue with the broader scientific community, to defend and further to develop the values that have become characteristic of this branch of

165 See in this sense also Manfred Lachs (n 5) 228.

law. As was pointed out already at the beginning of this essay, IL and national law now interact closely; in many cases it is no longer possible to tell them apart. At the same time, the great challenges of our time, such as the environment, human rights, and regional conflicts, require answers from IL, to be found in dialogue, not just within the community of international lawyers, but in a truly interdisciplinary fashion. International lawyer stand at the forefront of this, but not as individuals pretending to have better insight or to know the truth. International lawyers have rather to cooperate beyond borders and to operate also as mediators across national perspectives of IL. International lawyers have also to be humble enough to understand that the values they are fighting for are not theirs but those of the community – national and international – of which they are part.[166] To manage this dialogue, to ensure its transparency, continuously to call to mind the basic achievements in this process as they have been enshrined in the Charter of the United Nations and in the core international human rights instruments – these are tasks that are challenging and rewarding enough!

Eventually these endeavors should open the "hidden room of International Law" to the broader public. so that it can be transformed from the gathering place of the aristocratic few to the meeting, debating, and decision-making forum of the informed and responsible democratic public.

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166 By the way, also in this context international lawyers will have to struggle to find appropriate compromises. In fact, the "community values" to be pursued will differ considerably depending on the question whether a communitarist or a cosmopolitan perspective is adopted.

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