

THE TEACHER IN  
INTERNATIONAL LAW  
(Teachings and Teaching)

Manfred Lachs



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# TABLE OF CONTENTS

I. The Role of Teachings	1
II. Deniers and Utopians	13
III. The Mainstream—a brief survey	29
Introduction	29
1. The Eurocentric Approach	31
2. From the Ancient World to the Age of Grotius	37
3. The Age of Enlightenment	55
4. The Age of Imperial Expansion	68
5. The New Age of the Teacher	90
IV. Transmission of Knowledge	137
1. Teaching—the University	137
2. The Interdisciplinary Approach	150
3. Popular Exposition	162
V. The Impact of Teachings	167
VI. Concluding Reflections	201
Bibliography	211
Documents—Reports	226
List of Cases	227
Index	229

## THE ROLE OF TEACHINGS

In opening these pages, the reader may be in doubt as to what he (or she) may expect to find in them. The title may promise too much and lead to disappointment. I confess myself to have had some hesitation before entrusting my reflections to print. Yet after having dealt with the subject in a brief survey,<sup>1</sup> I have been encouraged by many to do so.

The theme of my reflections is *The Teacher in International Law*: the subject-matter of his teachings, his role in shaping the minds of others—of his immediate audience and, beyond, all who receive his message—the impact he can and should have on the law itself.

The stage he mounts upon is a contemporary one, although much of it is, of course, inherited, transformed and adapted from the past. So is his thought. This background can be ignored only at the risk of depicting a rather bloodless figure, one rootless, artificial, having the mere appearance of being autonomous in time. Thus, in writing of the Teacher of today, one has to revisit his predecessors. But can this journey into history add anything useful to the hundreds of volumes written on the “teachings” and “teaching” of international law? Is there a particular reason for going over the field again?

I felt that a new visit to the world of thought in the field of international law may well be timely as in our day and age we are revisiting so many fields which have been tilled in the past and gleaning some overlooked insights. For teachings of the past are part of history, which in turn has an integrating character leading to the present. It is better not only to understand recent events in terms of the contemporary scene, but also to view them as what they really are—a part of the world of thought as a whole in the dimension of time. But I do not propose to view that world as a

1. Cf. *Teachings and Teaching of International Law*, 151, RCADI, 1976, 3, pp. 163-252.

self-contained, homogeneous entity, an error so frequently committed in the past because it tended to vindicate by reflecting the tastes and intellect of the writer. "Classicists—it has been said—see everywhere the ebb and flow of the classical virtues; bishops write of popes; gentlemen, and those with aspirations, find the concept of the gentry indispensable; generals . . . see the past through a cloud of gunsmoke."<sup>2</sup>

What we face here is part of a wider issue: human thinking, the influence of ideas on man, the power of thought on human action. In all branches of knowledge, this has been a problem which has occupied the minds of theoreticians and practitioners for centuries. But it is not only the process of thoughts: it is also the circumstances in which they are born that are fascinating; thus the origins of man's thoughts at the successive stages of history, their transmission to others, ought to be seen in their true relationship. A thought, born of others within specific dimensions of time and place is given expression, radiates, is appropriated, is eventually found malleable and is transmuted, becoming almost a new thought, and at any stage may act with great power to transform the lives of men. Did not Schoenberg have his actor ask the weighty question: "Do you understand the power which idea has over both word and image?" For obviously it has its impact on events. The many ways and by-ways it follows, the sometimes turbulent journeys it makes in penetrating life, seem an essential guarantee of its vigour and necessity. Therein lies the philosophy of the Teacher.

"Teachings" is, of course, a very wide term, which in its plurality reflects the diversity and individuality of transmitted thought better than the word "doctrine", which, as the most modest Latinist knows, means "what is taught" but is more expressive of its cumulative impact, of the body of accepted notions. "Doctrine" also conveys the sense of an image against which to test and adjust one's perception of reality; or rather, against which reality may be tested and adjusted. Not infrequently it is an image of the ideal which transcends reality—and not only that of today; an ideal that reaches beyond all reality into a "world" which cannot be tested, as it eludes all rationality: the kingdom of belief or faith.

In the beginning there are the teachers themselves, each standing at his own particular window of time and place, looking out upon a different human landscape. From what he sees each constructs his "theory" in the simplest Greek sense of the term: the "spectacle" presented to his mental eye. This may be a mere arrangement of

2. Cf. *Times Literary Supplement*, 15 Sep, 1972, p. 1057.    ..

material, a construction or explanation of facts and relationships, without value-judgments. But value-judgments are closely linked with "teachings", and "teaching" imperceptibly becomes a kind of advocacy, presenting the disciple with a model view of reality. In the widest sense, "teachings" generally encompass both theory and doctrine and express or connote a certain philosophy—a certain way of "loving knowledge", to adopt the etymological meaning of the word.

Every sphere of human activity possesses its techniques, yet they themselves are reflections of man's thought and cognition—his search for an explanation of events—and their projection. After all, what else, for instance, did Descartes purport to write, in his *Discours de la méthode*, but the description of a technique of cognition. Need I recall that, on removing from himself and refusing to recognize what was not wholly certain and free from doubt, he claimed: "It suffices that in all I reject, I find some reason for doubt."<sup>3</sup> Thus the way led him through the rejection of those judgments which did not pass his test of truth to some "truths" which, having passed this test, were re-admitted. Having established this method, he proceeded to the first conclusion which he thought beyond doubt, i.e., thinking itself: he found himself as *res cogitans*. Thus his very technique was so redolent of a general philosophical outlook that his name has come to stand for an entire school of thought. From methodological and epistemological scepticism he proceeded to what was to be viewed as instinctive knowledge or intuition of his mind.

In entering upon the analysis of the subject, one must bear in mind the distinctions between man's knowledge of himself and of society and his knowledge of nature. Reflections on art, culture, ideology—all the humanities—are essential elements of history and part of our daily lives. Looking back, we have to consider what happened and why it happened, why it happened thus and not otherwise.

Man's knowledge of societies and their mutual relationship has never been a closed book, nor is it one today. What a contrast with natural and fundamental sciences! First the laws of nature appeared as arbitrary as the laws of man: they were the edicts or even the caprices of the gods. But longing for mastery and power over nature was the spur to increasingly methodical investigation, and the domain of know-how was gradually extended. Thus we have the myths of Athena and Hephaistos, but the turning-point is that of

3. Cf. his *Discours de la méthode*, p. 52.

Prometheus who, without divine permission, stole fire and at the same time transmissible wisdom.

That is how Greek mythology saw the beginning of civilization. However, in analysing the history of science we have to go much farther back than ancient Greece, for history also covers much older civilizations of other continents. Whether it was the invention of gunpowder, early mathematics and astronomy, followed by Archimedes with his bath or Newton with his apple, Galileo, Copernicus or Leonardo da Vinci, Arkwright's invention on the generation and transmission of power, Watt with his theory on heat, Carnot who opened the gates to thermodynamics, or to the makers of modern science, an Einstein, Planck, Skłodowska and Curie, or Niels Bohr, the relationship of control predominated in man's dealings with the world surrounding him. The great scientists in physics, biology or chemistry have, through their thoughts being transferred into deeds, begotten an ever greater mastery over matter.

Despite the traditional antithesis between pure research and practical application, the dominant impulse in the natural sciences, avowed or not, has been awareness that understanding the natural world leads to control over it—"one motive became implicit in the other." The thirst for that knowledge which spells physical power thus brought about the revolutions of coal and iron, of electricity, nuclear energy and electronics; the power of man to influence his environment. What is more, the geneticists have found keys to the secrets of life itself and stand on the threshold of biological engineering.

To those who have studied not nature but man, society and relations among nations, no laboratory conditions have been possible, and the thinkers in these domains have been confronted on the whole with intangibles.

The science of man and of society had very fragile beginnings and only gradually developed into an important body of knowledge. It continues to develop as an indispensable aid to survival, one requiring ever more thoroughgoing studies of the past and of the present.

The world of ideas has, of course, featured continuous currents and counter-currents of which the identifiable origins reach back well beyond the recognized exponents of definite theories. The great names likewise have owed much to their predecessors; Aristotle to Plato (though he opposed him), Cicero to the Greek eclectics, Aquinas to Aristotle, Descartes to the Scholastics, the early materialists to Democritus and Lucretius; so we may trace the development of ideas from ancient times through mediaeval



theocentrism to the Renaissance. This brought the dawn of anthropocentrism in Europe; the dichotomy between the "human world" and the "real world". A new dialogue on man's place in the surrounding world permeated the Renaissance—was he part of it, or, as some suggested, autonomous?—creating an abyss between intellectual and everyday life. Enlightenment was the obvious consequence of the great strides in science, man acquiring greater control over nature, and changing the social environment. The Age of Enlightenment forced man to face essential dilemmas and at the same time seek responses to them through wisdom and reason. This rationality went hand in hand with the confirmation of the experimental method in the natural sciences: the one sought to release man from intellectual bondage, the other to make nature his servant and not his master.

Romanticism, with its cult of individuality, nostalgia and solitarism, which, as a contemporary philosopher put it, "cracked the backbone of European thought" was a reaction both to the industrial revolution and to the hyper-rational, demagogic civilization which the heirs of the Enlightenment had sought to introduce.<sup>4</sup> It gave rise to a concept of spirit as a non-individual phenomenon, an idealistic philosophy which tried to plot the course of nature and history by emphasizing the progress of nations and races. (Here Herder's contribution and that of Hegel—though he was obviously no romantic—were essential.) This outlook held its own even through the period of positivism, the two forming frequently a highly destructive coalition. Finally, as no longer a continent but the world became the stage, there dawned the scientific, social humanism which has ended by pervading all the social sciences.

This brief reminder (in which old Europe remains the main actor) indicates the decisive stages of historical development. Thus history has been made: man's thoughts and ideas have been an integral part of it and have had great impact on its development.<sup>5</sup>

Value systems and doctrines have influenced events, taking part in the multi-causal and all-embracing processes reflected on history's

4. Mention may also be made of Historism—in turn again a short-lived reaction to Enlightenment. Its essence was "the substitution of a process of individualizing observation for a generalizing view of human forces in history." Cf. F. Meinecke, "Historism: the Rise of a New Outlook", London, 1972. But its main weakness was its reduction of history to a spiritual phenomenon without impact on political events. It was rightly pointed out that it "sowed seeds of nihilism." Meinecke himself admitted that it was "a snake that bites its own tail."

5. Hegel claimed: The French Revolution meant the recognition that "thought ought to govern spiritual reality."

pages. The stage has now been reached "at which a dialogue of men of various times and various countries becomes possible and important."<sup>6</sup>

I am personally averse to the holistic approach to history. For the history of the teachings of international law cannot be divorced from that of the social sciences as a whole. Nevertheless, my present purpose is confined to revisiting this limited sphere of thought.

In the first place we may note, with regard to both the law as a whole and to international law in particular, that there was a time when the reality of the subject-matter was in doubt; the state of *skepsis* antecedent to all rational cognition.

Yet it was an early historical necessity within the wider framework of all that concerned the individual and society that law should gradually have taken its place, though it was not as simple as Hesiod wanted us to believe: Dilse, the daughter of Zeus, having been sent to men to offer them "nomos".

As a creature of man, law cannot be studied like a fact of nature.<sup>7</sup> It is what we make it, and it is not there to be studied until it is made. Only later, while its first notions were ripening, did law begin to attract the attention of the philosophical. Here as elsewhere, man's yearning and curiosity has led him to search for a better understanding of the subject and an inkling of the trend of its development into the future.

It is a matter of historical record that the first rules were born "like the works of architecture of old ages—without methodologists."<sup>8</sup> Thus, in the early stages, reflection on law was part and parcel of philosophical contemplation. Only gradually was it detached, and schools of thought were slow to develop in the sphere of law. Even when legal theory and doctrine began to take shape, the inter-relations of different societies were seldom considered in terms of law. Even giants among the thinkers made little direct contribution in this respect; later, indeed, some of their thoughts bore fruit in the systematic work of others who made the "law of nations" their concern, but many were left in oblivion.

6. B. Suchodolski, *The Development of Modern Philosophy of Men*, (in Polish), Warsaw, 1967, p. 827.

7. All references to the "laws of nature" are inherently theocentric, as they implicitly connote a natural order obedient to divine ordinances. To suppose a *natural* relation of cause and effect in the operation of human laws on the subjects thereof would be to erect the metaphorical use of the word "law" into its primary meaning.

8. F. Longchamps, *Sur les problèmes de la connaissance du droit*, (in Polish), Wrocław, 1968, p. 7.

This can easily be explained. For centuries human communities managed to exist and co-exist in conditions of isolation or spasmodic contact, hence their autonomy (only occasionally competitive) without any elaborate set of rules to guide their mutual relationship. Here then lies the reason for this slow development.

Once the study of law in closed societies became established, the "law of nations" began to be considered philosophically as a self-contained domain. This aroused the typical doubt attaching to new fields of enquiry. The last centuries have shown us with what dubiety, as well as enthusiasm, new sciences tend to be received—among them psychology, anthropology, criminology, sociology, cybernetics, ecology. Some achieve the respected but relative autonomy which rewards the indispensable, others gain the limited credence accorded the empirically useful, while others again are unable to sustain their pretensions and fall by the wayside like the doctrines of the ancient augurs. Whatever the origin of other new sciences, it is invariably a new twig on a larger branch, or a new branch on the tree of general philosophy rooted in man's perception of the world.

While the body of law was growing, men of law were continuously engaged in the study of it: as it "was" and as it "ought to be". They conveyed their thoughts to others. Thus the central figure in its past is THE TEACHER. (Some disliked the term "professor": "... beside the absurdity of the appellation," Sir Henry Maine is reported to have said, "I think it helps to make people associate me exclusively with the class of purely speculative thinkers.")

These teachers have ranged from the type of Socrates—orally expounding their thoughts in the agora, and later at universities—to those who convey their thoughts to print and spread their ideas by writing. Thus the didactic element is essential to my theme. There is the importance of, on the one hand, "teachings" on international law and its evolution and, on the other hand, the continuous process of "teaching". The two of course interpenetrate and form a vast topic.

In studying the teachings of international law, we have to bear in mind all three currents—theory, doctrine, and philosophy—which flow into one estuary. Descending from this very general concept into a more limited domain, there is something very specific about international law in one or two of its more important aspects. This is so, notably, in the case of conventional law: for centuries governments have entered into agreements on particular subjects without endorsing the name of any general philosophy. It may therefore be

of interest to ask at the very outset: is international law conceivable without "teachings" or without doctrine?<sup>9</sup> Can it imaginably be reduced to a matter of technique both in the epistemological and ontological sense?

To start with a simple illustration taken from everyday practice. Two States may succeed in drafting a treaty as a matter of pure technique, only to find that the technique of its interpretation is a matter of hot dispute. Thus the technical excellence of the arguments of a party was undermined by a challenge to the validity of the principles he defends. In such dilemmas "teachings" have proved essential for understanding and have indeed been adduced in evidence. They were needed because they indicated directions: like charts and compasses, they may not necessarily take the navigator to a safe harbour but at least they assist him to steer in the direction of his choice.

In the course of time, therefore, "law" and "teachings" have become so closely interwoven that it is at times not easy to distinguish between the object of the study and its creation. "Teachings" have evolved with "law", almost becoming inherent in it. In analysing law, explaining its birth and development, and seeking its improvement, the Teacher almost "intervenes" in its operation.<sup>10</sup> There is a continuous interaction and feedback operation. Here, *inter alia*, lies the importance of his work. Admittedly, the Teacher, as such, is not a legislator nor a law-maker. To become one he must wear a different gown, be vested with special authority. Yet in the process of time his writings, while not considered as sources of law, have been recognized "as subsidiary means for the determination of rules of law."<sup>11</sup> Thus the Teacher has been an active element of history: influencing law-making, decision-making, and the application of the law. Though frequently invisible, his impact has been of no mean importance. Hence this study.

The study of man's ideas on law as on other aspects, other chapters of the humanities, may take two approaches. One, which may be called the pluralistic approach, shows the whole wealth and variety of views on the subject. The other involves the acceptance of a definite point of view and the viewing of others from this particular perspective. Yet, whatever philosophy one enquires into, it is

9. W. Preiser, "Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode", *Sitzungsberichte der wissenschaftlichen Gesellschaft an der J. W. Goethe-Universität, Frankfurt*, vol. 2, no. 2, 1964, pp. 48 ff.

10. Cf. F. Longchamps, *op. cit.*, pp. 14 and 15.

11. *ut infra*.

necessary to go into its very essence. "No impartial man," claimed a great philosopher, "could refuse that this latter type of historical work has greatly benefited the history of philosophy."

There is, however, a constant temptation, both for those who participate in this necessary dialectic and for those who seek to interpret it—all driven by the thirst for orderliness—to be over-schematic, so that not all the contradictions said to distinguish different schools of thought are real: some are only apparent, or merely terminological. This temptation, I trust, will be reduced in the present context. Mine will be a brief summary for I do not propose to present a comprehensive analysis of the "teachings" of international law throughout history—this has been done from time to time by well-known jurists.<sup>12</sup> All I now intend to do is to project what I might call a panorama in which the state of those "teachings" at a given time is represented by the Teacher then expounding international law according to his lights. However, my purpose here is not to present a complete collection of portraits of those who have contributed to our science, though it would be fascinating to play the Cicerone in this international gallery where the great diversity of colours would complement, set off or clash with one another, reflecting the varieties of vision and temperament. I will pause at certain portraits to expound the significance of the sitter in his historical frame. Nevertheless, of none, not even of my heroes, could I say: "this man made law", though he may have contributed to its making; he may be one of "the most highly qualified publicists of various nations."<sup>13</sup> This in itself is no mean status, for without them the law would certainly not be what it is. My purpose is to examine their functions, and those of their teachings and to see why this is so.

12. There is vast literature on the subject, and some earlier works include: Oempteda, *Litteratur des gesammten sowohl natürlichen wie positiven Völkerrechts*, 1785; Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe from the times of the Greeks and Romans to the Age of Grotius*, 2 vols., London, 1795; Henry Wheaton, *History of the Law of Nations in Europe and the Americas*, English ed., 1845; Holtzendorff, *Handbuch des Völkerrechts*, 1888; and more recently, Nys, *Le Droit international*, 3 vols., Brussels, 1912, and a series of others, including the study by A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed., New York, 1954; cf. also C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (16th, 17th and 18th centuries), Oxford, 1967, and *The Afro-Asian World and the Law of Nations*, 123 RCADI, I, 1968, pp. 117-214; G.D. Tunkin dwells on the subject in his *Theory of International Law*, (in Russian), Moscow, 1970, (in English), London, 1974.

13. In his field Thucydides hoped that his work would prove to be "a possession forever".

But before doing so, I wish to recall that legal science is, of course, an offshoot of the social branch on the tree of knowledge, and there is a long tradition of philosophers who have put forward their teachings on law in the framework of a general approach to man and society. Others, the archetypal specialists, have not wished to stray beyond the confines of law itself. The same distinction may be observed in teachings on international law. There are no automatic value-judgments to be inferred here: it is, as we all realize, a question of temperament, approach and method. But it is obvious that the specialist has accepted the reality and validity of his subject-matter and, frequently immersed in detail, tends to overlook fundamental questions.

Useful as the contribution of specialists has been, it does not place the role of law and its development in its ultimate perspective. A wider view was necessary, and it has been provided by certain figures of great stature whose work is linked with that of the general philosophers, the theorists of society as a whole.

In analysing the teachings of international law one should, of course, try to explain how the different views expressed in them were born, have grown and changed. This process goes on under what has been figuratively described as the "thinking cap", which some have seen as an "enchanted piece of head-gear." It has been suggested that crucial evolutions in thought amounted in fact to "putting on a different kind of thinking cap."<sup>14</sup> But does this cap appear *ex nihilo* or *ex nemine*? Is it the man himself who "weaves, cuts, shapes and stitches" it? There is, in fact, much more to it than that. For man is not born in a vacuum; he grows and matures within a certain surrounding which leaves decisive traces on him. Though it was rightly claimed by some physical scientists that: "While it cannot be denied that the choice of scientific theories is influenced by other factors, the individual plays an important role in its formulation."<sup>15</sup>

"L'histoire démontre", it has been said, "que les grands savants furent beaucoup plus fils de leur époque que ne le pensent les faiseurs de livres populaires et de vie romancées."<sup>16</sup>

This applies to all, even those who took very extreme views, for they too were inspired by the realities in which they lived. To some

14. Cf. H. Butterfield, *The Origins of Modern Science 1300-1800*, London, 1949, p. 1.

15. Cf. J. E. Mamczur, "The Problem of Choice of Theory", comments on *The Development of Physics*, (in Russian), Moscow, 1975, p. 38.

16. Cf. R. Hookyaas, *L'histoire des sciences, ses problèmes, sa méthode, son but*, Coimbra, 1963, p. 26.

—the deniers—the prevailing lawlessness offered no evidence of any rule of law among nations: they were unable to find in it even rudimentary elements of an order; they backed their views by what they thought were lessons of the past and projected both into the future.

At the opposite extreme were the Utopians who treated the subject-matter as future reality and thus drew attention to the poverty of existing realizations: the sad reality required a remedy, but one so radical that it had no roots either in the past or in the present.<sup>17</sup> “Le mal est si grand,” it was said of the Renaissance, “que l’appel à la méthode utopique s’impose aux meilleurs auteurs.”<sup>18</sup> These words may equally be applicable to other periods of history.

17. There have been many attempts to place utopias within the framework of definable notions. I do not propose to go into a philosophical enquiry on the subject. It may suffice to recall that some, like Lamartine, claimed that: “Les Utopies ne sont souvent que des vérités prématurées.” Others, e.g., Mannheim, suggested that “a state of mind is utopian when it is incongruous with the state of reality within which it occurs.” “What in a given case appears as utopian, and what as ideological, is dependent, essentially, on the stage and degree of reality to which one applies this standard.” His denial that they were ideologies amounted to an epistemological utopia, to an attempt to save knowledge by going beyond philosophy. Cf. K. Mannheim, *Ideology and Utopia*, London, 1952, pp. 173, 176–177.

18. P. Mesnard in *Les utopies à la Renaissance*, Brussels, 1963, p. 87.





## Chapter II

### DENIERS AND UTOPIANS

I propose to deal with these first. This should clear the ground and at the same time permit a glimpse of the projected panorama within a fitting framework. On either side one finds outstanding thinkers.<sup>1</sup> Among the deniers whose influence has been curiously effective in shaping the course of doctrine stands the famous author of *The Prince*.

That famous Florentine has been severely judged in the five hundred years since his death. Diderot suggested in the *Encyclopédie*: “*Machiavellisme*: une espèce de politique détestable qu'on peut rendre en deux mots par l'art de tyranniser, dont Machiavel le Florentin a répandu les principes dans ses ouvrages.” Bynkershoek was to say: “Si les nations veulent se soumettre à cette bête . . . qui s'appelle raison d'Etat il sera inutile de raisonner sur le droit international.”<sup>2</sup> Even Frederick the Great exclaimed: “J'ose prendre la défense de l'humanité contre un monstre qui veut la détruire.” Yet a more circumspect approach seems justified. Not only had the life of Machiavelli (as Chief of the Chancellery and diplomat) been a failure, but the Italy he lived in was a region of disaster and disunion. He felt that the country could only be pulled together through the ruthless action of an individual: the ruler. He consequently claimed in his *Discorsi* that matters essential to the State were not to be subjected to tests of morality or righteousness; but once the unity of the State is established, the power should be vested in the people.<sup>3</sup> He may be viewed as having written for the

1. “Parmi ceux que nous pourrions d'ores et déjà rappeler ‘les négateurs du droit international,’ nous trouverons des philosophes éminents et des juristes consommés,” A. Truylol y Serra, *Doctrines contemporaines du Droit des gens*, RGDI, vol. 54, 1950, pp. 372 ff.; cf. also G. A. Waltz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner*, Stuttgart, 1930.

2. Cf. Bynkershoek, *Quaestionum juris publici*, French trans., Leyden, 1737, vol. 2, chaps. 25-30.

3. He wrote in his *Discorsi*: “J'enseigne ici à ceux qui eux sont curieux comment on acquiert le pouvoir et comment on peut s'y maintenir . . .”