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On the Magic Mountain: Teaching Public International Law

Gerry Simpson*

Abstract

In this essay, the author identifies a malaise in the teaching of international law resulting from a fear of being consigned to the academic peripheries. This fear arises from a sense that international lawyers are deemed not sufficiently like 'real' lawyers by some of our colleagues in the law schools and not savvy enough about global realities according to some international relations scholars. The response to these fears sometimes involves a series of compromises with 'legalism' and 'realism'. The consequences of these compromises include theoretical incoherence and a depoliticization of the subject matter. These theoretical failures drive teachers towards a mode that the author calls 'romantic'. The romantic mode is alluring but superficial and ultimately threatens to further empty international law of political content. The author suggests three possible solutions to these problems. The first is to adopt a more integrated, theoretical approach to the teaching of international law. The second is to embrace a more explicitly political method in which the teaching of international law is capable of being an imaginative act of dissent. Finally, the author suggests a way of teaching context that avoids what is described as the romantic malaise.

Settembrini: The important thing is that above the explicit jurisprudence of national states there rises a higher jurisdiction, empowered to decide between conflicting interests by means of courts of arbitration.

Naphta: Courts of arbitration! The very name is idiotic! In a civil court, to pronounce upon matters of life and death, communicate the will of God to man and decide the course of history! — Well, so much for the 'wings of doves'. Now for the 'eagles pinions' — what about them?

Thomas Mann, *The Magic Mountain*¹

* Senior Lecturer in International Law, Australian National University. I was influenced in the writing of this piece by the contributors to the 1997 Australian International Law Teaching Workshop and by countless students at Melbourne University and the ANU. Philip Alston, Deborah Cass, Greg Carne, Hilary Charlesworth, Ian Holloway, Benedict Kingsbury and Outi Korhonen read early drafts of this paper and each made a number of valuable suggestions.

¹ T. Mann, *The Magic Mountain (Der Zauberberg)* (1929, Eng. transl., 1960), at 383–384.

Part 1. Introduction²

In Thomas Mann's *The Magic Mountain*, set in the early 1900s, the Italian, Settembrini, represents an urbane, bourgeois liberalism that, in the dialogue above, finds its expression in a distilled and prescient legalism. In this passage, Settembrini is attempting to convince Naphta, an avowed realist, that a new cosmopolitan order is about to descend on Europe. This order, he asserts, will be highly administrative with disputes between the great powers settled judicially.³ Naphta dismisses this as nonsense; preferring to describe the coming 20th century as the era of terror where belligerent larger powers will continue to dominate small states and abuse their own citizenry in the absence of mediating legal mechanisms.⁴ The debate takes place in a sanatorium, high in the Swiss Alps, where the patients are being treated for tuberculosis. Indeed, the whole novel is set in this confined environment where institutionalized men and women talk through the great dilemmas of philosophy and international politics while down in the 'flat lands' Europe prepares for war. The ironic sub-texts of the novel are the imminence of the First World War and the implication that virtually none of the patients are cured.

This entertaining and inconclusive conversation between a hopeful, self-righteous legalism and a self-assured, dismissive realism (all situated at high altitude while the real action appears to take place below) will be familiar to anyone who has taught public international law in the academy.⁵ This dialectic and its consequences for the teaching of international law are the subject of this Article.⁶

² This essay is part of a project on old and new cosmopolitanisms in international law. For useful Australian material on the teaching of international law see Crawford, 'Teaching and Research in International Law in Australia', 10 *Australian Yearbook of International Law* (1981–1983) 176; *Idem*, 'Teaching and Research in International Law in Australia', *Australian Law News* (1985) 29; Shearer, 'The Teaching of International Law in Australian Law Schools', 9 *Adelaide Law Review* (1983) 61. For older sources see, also, R. Dupuy, *The University Teaching of Social Sciences: International Law* (1967); R. Edwards, *International Legal Studies: A Survey of Teaching in American Law Schools, 1963–64* (1965); F. Riggs, *International Studies: Present Status and Future Prospects* (1971); L. Wilson, *The Teaching of International Law: An Assessment and Bibliography* (1973); Cheng, Bin, *International Law: Teaching and Practice* (1982), M. Lachs, *The Teacher in International Law: Teachings and Teaching* (2nd ed., 1986); Gregory, 'The Study of International Law in Law Schools', 2 *Am. Law School Review* (1907) 41; Franklin, 'Needed: More and Better Courses in International Law', 4 *Journal of Legal Education* (1952) 326; St J MacDonald, 'An Historical Introduction to the Teaching of International Law in Canada: Pt 4', 21 *Canadian Yearbook of International Law* (1983) 235. For a full bibliography of mainly US sources up to 1984 see Johnson-Champ, 'Selected Readings on Teaching International Law', 18 *International Lawyer* (1984) 197.

³ To a certain extent this legal idealism had already been expressed in the Hague Convention for the Pacific Settlement of International Disputes (1899). See Parry, *Consolidated Treaty Series*, vol. 187 (1979), at 410.

⁴ The full implications of this debate for the structuring of the United Nations system are laid out in Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations', 4 *Transnational Law and Contemporary Problems* (1994) 377, at 377–396.

⁵ This opposition between realism and formalism is explored in Koskenniemi, 'International Law in a Post-Realist Era', 16 *Australian Yearbook of International Law* (1995) 1.

⁶ They are also to an extent the subject of Martti Koskenniemi's, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

The structure of my argument in the essay is as follows. International law teaching is attracted to, and yet simultaneously sceptical of, two poles, which are themselves mutually hostile.⁷ These are legalism (represented by the image of international law as transparent, textual and rule-based) and realism (represented by a state-centred and anti-legal version of international relations theory). Another way of putting this is to characterize international law as a precarious combination of the two academic styles reflected in the disciplines of international politics and doctrinal law (say, contract law). These two disciplines, then, pull us and repel us in about equal measure.⁸

I will suggest that we, as teachers, often find ourselves oscillating between realism and legalism because of our fear of being relegated to the margins. We are deemed not sufficiently like real lawyers by some of our colleagues in the law schools and not savvy enough about global realities according to some international relations scholars. Our response to these fears can be a series of compromises resulting in theoretical incoherence and a depoliticization of the subject matter. These theoretical failures drive us towards a mode I call 'romantic'. The romantic mode is alluring but superficial and ultimately threatens to further empty international law of political content.

I suggest three possible solutions to this malaise. The first is to adopt a more integrated, theoretical approach to the teaching of international law. I argue for this approach in Part 2 (*Rules*). The second is to embrace a more explicitly political method in which the teaching of international law is capable of being an act of imaginative dissent. I make this argument in Part 3 (*Politics*). Finally, in Part 4 (*Romance*), I suggest we rethink our teaching of context in order to avoid what I describe as the romantic malaise.

This essay is meant to be suggestive rather than prescriptive.⁹ This is not supposed to be a definitive account of how to teach or not teach international law, nor is it a 'theoretical' analysis of international law teaching (even though, partly, it is about theory). Nor is it a phenomenology of the classroom (for example, I do not discuss classroom hierarchies and sub-cultures or the experience of students).¹⁰ Instead, it is mostly about my own failures and successes as an educator in international law — these experiences, as well as numerous discussions with fellow teachers, are my raw

⁷ The usage 'international law' in this essay refers to public international law. Many of the claims I make could equally apply to private international law or international trade law but my focus is on the standard courses in public international law. I do not focus for example on the dissemination of international humanitarian law. See 'Teaching Humanitarian Law in Universities and Law Schools', Symposium 31 *American University Law Review* (1981–82) 805.

⁸ Koskenniemi shows how this combination is rarely as stable as perhaps this description suggests. See Koskenniemi, *supra* note 5.

⁹ See, e.g., Johnstone, 'Flexible Law Teaching for the late 1990s', 3(1) *ALTA Newsletter* (1996) 1 (warning against the imposition of a single teaching method).

¹⁰ Some of these issues are taken up in relation to the teaching of torts by James Boyle in 'Anatomy of a Torts Class', 34 *American University Law Review* (1985) 1003. There is also a surprisingly large literature on the teaching of international law. See e.g. *supra* note 2.

material.¹¹ On reflection, I think as an international law teacher, I have, at various times, decontextualized rules (or presented the wrong kind of context) in addition to teaching a truncated version of politics and an often fatally detached theory. This essay reflects on the disquiet I feel when teaching in this manner in a field of law for which I have the greatest affection. I hope it can contribute to a dialogue already begun on these matters.¹²

Part 2. Rules and Ontological Insecurities

A *The Malaise*

International law teaching is partly fear-driven.¹³ Our phobia is a fear of the periphery.¹⁴ This is where we are always being exiled with our glamorous little sideshow, riding on the tails of the law school flagships — constitutional law or property or contract.¹⁵ With some notable exceptions, international law has long been regarded as a boutique or fringe course; interesting but not essential.¹⁶ Even in the much-vaunted interdependent world, international law is regarded as optional. There is general acceptance that the world is global but doubts remain about whether the new global environment is regulated by law or by a law which national or local legal professions will find relevant.¹⁷

Indeed, rather than expanding, international lawyers seem constantly to be on the

¹¹ It is interesting how unself-conscious we are about a task that occupies so much of our intellectual energies and time. As Boyle bluntly puts it, ‘. . . nobody writes about teaching.’ See *ibid.*, at 1003.

¹² See, e.g., Otto, ‘Integrating Questions of Gender into Discussion of “the Use of Force”’, 6 *Legal Education Review* (1995) 219; Orford, ‘Citizenship, Sovereignty and Globalisation: Teaching International Law in the Post-Soviet Era’, 6 *Legal Education Review* (1995) 251; McCorquodale, ‘International Law in the 21st Century’, *Australia/New Zealand Society of International Law Proceedings* (1997) 1.

¹³ There are, of course moments of intellectual confidence and detachment mixed in, e.g., see Michael Reisman’s claim that intellectual property is not a necessary part of the law school curriculum because, ‘If you have a case with an intellectual property component . . . you can probably teach yourself what you specifically need for your case’. See Reisman, ‘The Teaching of International Law in the Eighties’, 20 *The International Lawyer* (1996) 987, at 989.

¹⁴ As Vanderbilt puts it, ‘I think it’s safe to say that not one lawyer in five hundred, possibly not one lawyer in a thousand, has ever even had a course in international law’, in Vanderbilt, ‘The Responsibilities of Our Law Schools to the Public and the Profession’, 3 *Journal of Legal Education* (1950) 207, at 209.

¹⁵ But see the Introduction to ‘Special Feature: The State of International Legal Education in the United States’, 29 *Harvard Journal of International Law* (1988), at 239 where the editors remark, ‘others see the discipline as a victim of its own success; in the course of becoming an accepted part of legal education, international law has descended from its former status as an elevated and elite field of study to join the more humdrum cohort of standard legal subjects’.

¹⁶ The obvious exception in Australia is the compulsory course at the University of Sydney Law School. There are positive developments elsewhere. At the ANU Law School, International Law will become compulsory by 1999 and Melbourne Law School is currently integrating international legal materials into many of its compulsory courses.

¹⁷ Another possibility for international law’s optional status might be due to what Michael Reisman calls ‘curricular inertia’. See Reisman, *supra* note 13, at 987.

defensive, justifying our very existence in a world of scarce teaching resources.¹⁸ This insecurity has a number of interesting consequences.¹⁹ For example, in Australia, we are often delighted when judges take notice of international law. In cases like *Mabo*,²⁰ *Polyukhovich*²¹ and *Teoh*,²² the High Court appears to be confirming our existence and giving us a reason to believe. This is especially so when the Court misapplies or misunderstands international legal doctrine. *Alvarez-Machain* and Justice Bork's dissenting judgment in *Tel-Oren* seem to have a similarly stimulating effect across the Pacific.²³ In our darker moments, though, we wonder if the English High Court of Admiralty had a point when, in 1788, it remarked, mordantly, that, 'A pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him.'²⁴

At a deeper level, this fear of the margins leads us to question the very meaning of the discipline. This can be an intellectually liberating exercise, as I will go on to suggest, but often it leads us down jurisprudential *culs de sac*. The most prominent example of the latter is that dinner-party staple: is international law really law? The pitiless refrain haunts us at every turn.²⁵ When our Law School colleagues or sceptical students ask this question we search our bag of rhetorical tricks for answers. Few of these are as sophisticated or illuminating as Thomas Franck's self-referential theory of legitimacy.²⁶ Thus, we resort to the false analogies between domestic legal institutions and their international counterparts or make reference to murderers who remain unapprehended (rather like the superpowers whose invasions go unpunished). We are perhaps slightly ashamed at these not quite accurate parallels.

The ontological question when posed and answered in this way has the potential to be harmful. The exploration of verification and function within a system is a valuable educative device but it can be damaging and profoundly depoliticizing if more

¹⁸ 'Once again teaching and research in public international law must be constantly justified and defended.' See Gottlieb, 'Remarks', 78 *ASIL Proceedings* (1984) 208, at 212.

¹⁹ Indeed this defensiveness is misplaced, e.g., it appears that international law teachers are better represented, proportionately, in elite schools in the US than in non-elite institutions. See Gamble and Shields, 'International Legal Scholarship: A Perspective on Teaching and Publishing', *Journal of Legal Education*, at 45.

²⁰ *Mabo v. Queensland (No 2)* (1992) 175 CLR 1.

²¹ *Polyukhovich v. Commonwealth* (1991) 172 CLR 501.

²² *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 128 ALR 353.

²³ *United States v. Alvarez Machain* 112 S. Ct. 2188 (1992); Lowenfeld, 'Still More on Kidnapping', 85 *AJIL* (1991) 655; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d. 774 (D.C. Cir. 1984), cert denied, 470 U.S. 1003 (1985).

²⁴ *The Renard*, 1 Hay & M. 222, at 224, I Rose. P.C. (1778) quoted in Verdross and Koeck, 'Natural Law: The Tradition of Universal Reason and Authority', in R. St.J. MacDonald and D. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983).

²⁵ There seems to be a common, if mistaken, belief among students that international law and human rights law are not really law. See, e.g., 'Teaching International Human Rights Law in Law Schools and Universities', *PAIL Institute*, October 1980 quoted in Lillich, 'The Teaching of International Human Rights Law in U.S. Law Schools', 77 *AJIL* (1983) 855, at 856.

²⁶ T. Franck, *The Power of Legitimacy among Nations* (1990).

fundamental questions of values, ideology and culture go unexplored.²⁷ Myres McDougal, writing in 1954, recognized this when he urged international lawyers to move beyond what he called,

traditional exercises in technical formulae for determining what conduct is lawful or unlawful to the much more urgent task of determining and recommending that international law ... which is best designed to promote a free world society.²⁸

McDougal was warning against a particular response to the question of international law's status. That response involves teaching international law in the formalist (or legalist) mode. By giving international law the appearance of the common law, we hope it will be magically transformed into a system with a commensurate degree of certainty and status. We, thus, spend a disproportionate amount of time teaching World Court jurisprudence as compared to, say, the workings of the international postal system or the practice of Asian states or the WTO and tariffs or the operation of international law on the minds of bureaucrats in domestic legal orders.²⁹ This focus occurs, I would argue, because the ICJ is a court and courts are at least superficially law-like regardless of their actual significance in the system. For students this is damaging because it produces bouts of unwarranted enthusiasm ('here is a *World Court*') followed by the cynicism which can arise from the realization that judicial institutions have a relatively modest role in achieving legality within the system ('this means there is, therefore, no international law').³⁰ The very real contribution of the Court is missed altogether.

This focus on judicial institutions is matched by the attention given to texts or formal rules. It may be that we become textualists because our capacity to measure practice is limited. This is a mistake more commonly made by students — the idea that texts are self-validating or, even more optimistically, self-enforcing — but it is tempting for us as teachers, too, to describe and analyse apparently authoritative decisions without inquiring as to their validity or their power. Sometimes we retreat into legalism expounding this rule and that rule, lost in the pleasures of the arcane.

It is hardly surprising that we should emphasize rules. Our definitions of what we do are closely bound up with our allegiance to rules and text-based reasoning. Most definitions of international law found in major textbooks emphasize the rule-based nature of a system. For example, one textbook begins:

²⁷ See D. Otto, 'The International Law Curriculum', paper presented at *Teachers' Workshop*, ANU, 31 May 1997 (on file with author).

²⁸ M. McDougal, *International Law, Power and Policy: A Contemporary Conception* (1954), at 140. McDougal's free world society was perhaps over-reliant on a familiar American constitutionalism. The idea that human dignity could serve as a foundational norm for judging international law was too culturally specific and theoretically abstract to do the work required of it.

²⁹ See Fisher, 'Bringing Law to Bear on Governments', 74 *Harvard Law Review* (1961) 1130.

³⁰ See Falk, 'New Approaches to the Study of International Law', 61 *AJIL* (1967) 477, at 479–480. Falk calls this the mechanical version of functional equivalence. See too David Kennedy recognizing the 'uncomfortable oscillation between enthusiasm and scepticism that I felt as a student of international law', in Kennedy, 'International Legal Education', 26 *Harvard International Law Journal* (1985), at 362.

In simple terms, international law comprises a system of rules and principles that govern the international relations between sovereign states.³¹

This retreat into rules or the acknowledgement of rules as foundational looks outdated nowadays when World Court judges are realists.³² After all, Judge Rosalyn Higgins began her recent Hague Lecture series with the reminder: ‘international law is not rules’.³³

To conclude, as a response to the ‘is international law, law?’ question, legalism is something of a surrender. There are various problems with rules. These have been exhaustively elaborated by generations of scholars.³⁴ They include the following: rules are not self-enforcing; rules are not transparent; the interpretation of rules requires some pre-existing theory of the good life; language is opaque; rules cannot settle concrete cases; there is no clear distinction to be drawn between rules and policy, and so on. These arguments alone should warn us away from submitting to legalism as a response to our existential doubts. However, I believe there is another, more compelling, reason for rejecting the formalist mode as a response to our fear of the margins. Instead of adopting this defensive, mimetic posture we should welcome the possibilities inherent in a discipline that compels self-scrutiny. I outline some of these possibilities in the next section.

B Three Possible Responses

One way to respond to the problem of international law’s existence is to embrace the problem as part of a deep theorization both of the discipline and of law itself.³⁵ In other words, we could use international law to question the category ‘law’ and not the other way round. There is no need for defensiveness. There are at least three ways in which international law’s self-doubt can be used productively. I will briefly outline these three possibilities before making a plea for a more integrated theoretical approach to the teaching of the discipline.

The first possibility is to see international law as an exercise in comparative law at a time when there are few such courses taught in British or Australian universities. The international legal order is a system dramatically different from the standard Anglo-American legal order but not so dissimilar in some respects to customary systems found among indigenous groups. Statements like the following about the uniqueness of indigenous law will sound familiar to the ears of international lawyers:

³¹ M. Dixon, *Textbook on International Law* (1991), at 3.

³² Myres McDougal suggested in 1985 that international lawyers have failed to absorb the lessons of American legal realism. The same lack of recognition can be seen in relation to the more recent work emanating from the critical legal studies school. See McDougal, ‘Comments’, in ‘Special Feature’, *supra* note 15, at 267.

³³ R. Higgins, *Problems and Processes* (1993), at 1.

³⁴ In international law most notably by New Haven and New Stream scholars. For representative views see McDougal, *supra* note 28, at 144 and Cass, ‘Navigating the New Stream’, 65 *Nordic Journal of International Law* (1996) 341.

³⁵ See Berman, ‘Comments’ in ‘Special Feature’, *supra* note 15, at 242: ‘So one flaw as I see it in international legal studies was and is an underemphasis . . . on theory, including what you might call grand theory.’

to the European mind, accustomed as it is to positions of authority . . . this state of ordered anarchy poses a set of intellectual and emotional problems: how do people know what to do? who punishes wrong-doers? how are the weak protected from the strong? . . .³⁶

International law, like much indigenous customary law in Australia and Canada, is horizontally structured rather than hierarchically managed. The sources of law are found as much in practice and custom as in text or form. Thus, instead of asking whether international law is law, the existence of the international legal order can be used to demonstrate how culturally and historically specific is the classic Austinian view of law. Law itself, then, becomes the unstable category. We ask instead whether there is not something peculiar about this particular normative system with its legislation, its judges and its vertical ordering? The study of international law can help us transcend the particulars of our own legal system and its hierarchical structure. Such study would, at the same time, provide an antidote to the increasing specialization and provincialism of much legal study.³⁷

A second possibility is opened up by one of the key criminological and jurisprudential debates in the legal academy; that concerning the relationship between compliance and coercion. Students and teachers alike dwell on an apparently 'hypothetical' question. The questions can be put bluntly. Would we obey the law in the absence of a police enforcement? How much does the threat of enforcement influence our behaviour? What would a legal system look like in the absence of such centrally-directed coercive practices? At least one answer is provided by the study of a system that *does* thrive in the absence of such uniform coercion and punishment; a system which depends on reciprocity and consensus. That system is the international legal order.³⁸

This gap between law in the books and its enforcement in the context of politics (or the gulf between rhetoric and reality) is clearly a problem for the international legal system but it is not a problem unique to international law. The gap exists in virtually every legal order, though it is not much explored in most law school curricula.³⁹ Indeed, this gap and the way it is managed is the focus of much work that falls under the rubric, 'socio-legal studies'.⁴⁰ This gap does pose ' . . . a major intellectual and pedagogical problem'⁴¹ but we can view this dissonance between text and life as a challenge, an opportunity to remake the teaching of international law generally. This would occur by opening up a whole field of inquiry relating to enforcement, the meaning of regulations and the ideologies which elide the gap between rules and their

³⁶ See Hiatt, 'Aboriginal Political Life', in W. H. Edwards (ed.), *Traditional Aboriginal Society: A Reader* (1987), quoted in Clarke, 'Law and Race', in S. Bottomley and S. Parker (eds), *Law in Context* (1996), at 264.

³⁷ This aspiration probably marks me as a tragic comparativist in Gunther Frankenberg's pathology of comparative law types. See 'Stronger than Paradise: Identity and Politics in Comparative Law', 2 *Utah Law Review* (1997), at 266–267.

³⁸ Tom Franck has explored this question in detail in his book, *The Power of Legitimacy*, *supra* note 26.

³⁹ For exceptions see Bottomley and Parker, *supra* note 36; R. Hunter, R. Ingleby and R. Johnstone, *Thinking about Law* (1994).

⁴⁰ Bottomley and Parker, *supra* note 36, at Chapters 4–7.

⁴¹ *Ibid.*, at 191.

invocation. The question constantly posed in international law should be not ‘is this law?’, but instead, ‘is it effective or implemented law?’ There is nothing unusual about international law in this regard. Such a question can be usefully transplanted to virtually any field of study (think of unenforceable contracts or environmental ‘regulation’). International law must continue to engage with and draw on the long-running debate between positivists (law as rules) and the legal realists (law as official behaviour).

A third possibility involves an engagement between international law and one of the major liberal projects of the last three decades. This has been defined in the work of John Rawls as the attempt to reach consensus within a radically pluralistic community.⁴² At one time, when societies were relatively homogeneous, law could secure agreement through appeal to fundamental shared values or cultural practices or comprehensive moralities. Now the appeal to procedural values or decision-making processes as legitimating devices has replaced the search for substantive agreement on higher order goals. Rawls, himself, has attempted to find agreement on political principles by devising a thin and, he argues, metaphysically neutral conception of the individual.⁴³ This is a person who is capable of developing a political morality (e.g. a commitment to representative democracy or formal equality) divorced from deep-rooted moral attachments (e.g. a belief in God, a pacifist conscience). Overlapping consensus can be achieved on the question of a community’s political morality in a way that would be impossible in the case of religious doctrines. For Rawls, this figure is central to his project of developing a series of just principles to be applied to public governance given the ‘fact of reasonable pluralism’⁴⁴ concerning moral principles and doctrinal teachings within the community.

This project has become important to liberals in the light of multiculturalism and diversity. International lawyers, of course, have confronted this difficulty for years. The international legal order is the multicultural community *non pareil*. Often, this pluralism has been seen as a problem unique to international law. How can we reach agreement when states and peoples remain so culturally and socially disparate? In one solution to the problem, international law’s dominant tradition, liberal positivism, has relied on a similarly constructed legal person as Rawls’, in this case the metaphysically neutral state.⁴⁵ All states are deemed to have the same public interests — the preservation of sovereignty, the maintenance of a sphere of domestic jurisdiction, freedom from intervention and so on. These interests form the basis for the international legal order. The substantive moral or ideological preferences of these states (e.g. Islam, democracy, patriarchy) are regarded as belonging to a private sphere not relevant to the creation of what Rawls might call an international political morality. Yet, the reality of diversity continues to dog our attempts to create a more

⁴² J. Rawls, *Political Liberalism* (1992).

⁴³ *Ibid.*, at 29–35.

⁴⁴ *Ibid.*, at xviii. Cf. J. Rawls, *A Theory of Justice* (1971).

⁴⁵ Rawls himself seems less keen to transplant this particular individual from the domestic to the international arena. See Rawls, ‘The Laws of Peoples’, in *Oxford Amnesty Lectures on Human Rights* (1993).

genuine international society in which substantive goods are collectively pursued. In any event, our intellectual grappling with the consequences of transnational multiculturalism provide an excellent introduction to the problem of governance (and law) in a liberal state.

C *Some Theory*

The preceding discussion merely demonstrates that international law is endemically theoretical. It is an exercise in legal theory in that it constantly poses a series of fundamental jurisprudential questions. As Rosalyn Higgins puts it: 'there is no separating legal philosophy from substantive norms when it comes to problem solving in particular cases'.⁴⁶ Yet, many courses and case-books treat theory as a discrete topic, detached from doctrinal arguments about sources or treaties or responsibility.⁴⁷ Typically, theory is dealt with in a brief lecture or section on 'the nature of international law'. After this, it recedes rapidly into the background as if these fundamental questions about politics, interpretation and culture could be amputated from the main body of law with no loss of completeness. Feminism, natural law, voluntarism, 'critical legal studies' and 'Third World perspectives' each make cameo appearances at the beginning before politely withdrawing when the genuine doctrinal work begins.⁴⁸ Occasionally, feminism or natural law will be reprised during the discussion of human rights otherwise the quarantine is effectively complete.

This is damaging in three interconnected ways. First, the impression is given that theory and doctrine are separable. This can have deathly consequences for both. Second, since most of these theories are critical, the way they are cabined in the introductory sections reinforces their fringe status. Third, this disassociation of theory and doctrine simply means that some hidden theory is animating the rest of the course or structuring the use of materials in the rest of the text. Even a decision as theoretically innocent as devoting a chapter or section of study to the ICJ is part of a commitment to a sort of legalism (see above). One could just as well decide to drop the ICJ altogether and adopt a more functionalist approach by looking at the regulation of transnational telecommunications.⁴⁹

What is this hidden if pervasive theory? Often, our theory is a mixture of unarticulated formalism (here are the rules, learn these texts), legal realism (texts do not matter, state practice matters), political realism (states are nasty and break the rules), and various forms of cosmopolitanism (states are irrelevant, globalization or human rights or civil society is what counts). If this sounds confusing to us as teachers

⁴⁶ Higgins, *supra* note 33, at 267, quoted in Carty 'Theory of/or Theory instead of/International Law', 1 *EJIL* (1990)181, at 181.

⁴⁷ See Berman, *supra* note 35.

⁴⁸ See Carty, *supra* note 46, at 181.

⁴⁹ 'The functionalist approach is thus no miracle solution, but it affords an important means of by-passing the propogandist atmosphere of political international assemblies, and of bringing the nations together in practical tasks of mutual interest and benefit.' W. Friedmann, *An Introduction to World Politics* (5th ed, 1965) 57, quoted in Falk, *supra* note 30, at 492.

then how must it look to students? I call this theory ‘eclecticism’, even though what I have described perhaps lacks some attributes we associate with the word ‘theory’ and the positive associations we attribute to the word ‘eclecticism’.

The problem is not that international law is sometimes incoherent but that we teach it as if it never is. Students find international law difficult to grasp, not because we are bad teachers or they are unintelligent pupils (two common explanations), but because of the deep flaws in our bifurcated methodologies. Theory is here and law/doctrine is there. Students all too often fall into the gap between the two.

Two possible solutions come to mind. The first is rather obvious and derives from my concern about separating theory and doctrine; that is, to apply a range of conceptual understandings to specific doctrinal areas and not necessarily to those which seem the most hospitable to theory (e.g. the feminist/human rights relationship). Feminist international legal scholarship, for instance, has much to say about the categories of understanding used in the state responsibility field, such as harm, or the implicit division of both global and domestic social life into private and public spheres.⁵⁰ Yet little of this has found its way into textbooks or into courses where tradition dictates a consideration of *Trail Smelter*⁵¹ or *Lac Lanoux*⁵² instead if only to conclude that these decisions no longer reflect legal and political realities (why are these cases important? why do we teach them? Because they *are* cases?). The same might be said of feminist approaches to use of force which provide an interesting alternative to the endless and doctrinally irresolvable debates about the extent of, say, anticipatory self-defence.⁵³

Equally, the various approaches to international law of scholars and states in the developing world have been seriously neglected in recent years.⁵⁴ How many textbooks or courses seriously reflect on the New International Economic Order, for example? The NIEO is most often disparaged as irrelevant and anachronistic yet a study of it would at least challenge the dominance of late-capitalism (or ‘globalization’, the preferred euphemism) in our thinking about international law. It might also introduce some much needed economic context into our discussions. More generally, a small dose of political economy would not go amiss in comprehending the doctrinal categories of international law.

A second strategy involves using theory to take apart and reassemble the argumentative positions found everywhere in international law. Instead of presenting students with a grab-bag of apparently contradictory principles and rules, we should teach them that most of these principles and rules can be arranged into a series of binary sequences. James Boyle describes an outline of this methodology in his 1985

⁵⁰ See Walker, ‘An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law’, 26 *NYUJ Int. Law and Politics* (1994) 173.

⁵¹ *Trail Smelter Arbitration* 3 RIAA 1905 (1941).

⁵² *Spain v. France*, 24 ILR 101 (1957).

⁵³ See Otto, *supra* note 12, at 221.

⁵⁴ Sometimes only one writer is chosen as the ‘Third World Perspective’. The growing influence of critical race theory is likely to transform this picture.

article, 'Of Ideals and Things',⁵⁵ while Martti Koskenniemi's revolutionary study, *From Apology to Utopia*⁵⁶ applies a more fully elaborated version of it to a range of doctrinal areas.⁵⁷

One of the paradoxes of Koskenniemi's book is that while it appears more dense and theoretical than, say, Akehurst's *Modern Introduction*⁵⁸ it in fact simplifies or reduces international law to a number of simple oppositions.⁵⁹ For example, sovereignty is converted from an enigmatic and unstable category, baffling to students, to a simple contradiction — a state's freedom of action and a state's right to exclude other states or, to put it more generally, the twin desires of autonomy and community.⁶⁰ The incompatibility of these two positions and yet the way they are maintained simultaneously in argument is revealed expertly by Koskenniemi.

Let me offer an example of this sort of applied theory from the area of jurisdiction. Commonly, the five bases of jurisdiction are taught sequentially from the territorial to the various non-territorial bases (passive personality, universality, nationality, protective). Arranging these bases hierarchically can be quite tricky since more than one state can rely at any one time on any of these grounds for asserting jurisdiction over an activity or person. Attempts to resolve conflicts between different assertions of prescriptive jurisdiction are usually unsuccessful. Students are left with the sense that territorial jurisdiction is decisive in questions of enforcement jurisdiction, while prescriptive jurisdiction is a sort of doctrinal morass where answers are in short supply.

Another way to conceptualize the area is to see jurisdiction as a sovereignty dialectic where there can be no legal resolution to the conflict because sovereignty itself is inherently contradictory. Sovereignty, community, autonomy and equity arguments seem to fall on both sides of each dispute. When the United States extends the jurisdictional reach of its anti-trust legislation so that this legislation operates extra-territorially within Australia (*Re Uranium AntiTrust Litigation; Westinghouse Electric Corp v. Rio Algom Limited*⁶¹) international lawyers generally conclude that 'there are no internationally accepted rules for defining "excessive jurisdiction"'.⁶² Koskenniemi's argument is that no such rules can be derived from foundational *legal*

⁵⁵ See Boyle, 'Of Ideals and Things: International Law Scholarship and the Prison-House of Language', 26 *Harvard International Law Journal* (1985).

⁵⁶ Koskenniemi, *supra* note 6.

⁵⁷ These writers and the New Stream generally were not the first to notice that international law consisted of complementary norms. See McDougal, 'The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System', in H. Lasswell and H. Cleveland (eds), *The Ethics of Power* (1962), 221–240. See, too, Falk, *supra* note 30, at 479.

⁵⁸ P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., 1997).

⁵⁹ 'Ironically, while the new school is unabashedly theoretical, (which perhaps explains why it has been ignored), it also prescribes its own antidote to theory', Bederman, 'Review of *Apology to Utopia*', 23 *NYJ International Law and Politics* (1990) 217, at 218.

⁶⁰ For the view that international law is simpler and more accessible than we, as teachers, suggest, see Kennedy, *supra* note 30, at 362.

⁶¹ 480 *Fed Sup* 1138 (1979) (USDC, Illinois).

⁶² See Reicher and Simpson, 'Sovereignty and Jurisdiction', in H. Reicher (ed.), *Australian International Law* (1995) at 284.

concepts. Here, Australia's sovereignty (the right to exclude other states from its territory) comes into direct and irreconcilable opposition with US sovereignty (the right to legislate against acts which have harmful effects in US territory). The Court in *Re Uranium* knew this when it said: 'it is simply impossible to judicially balance these totally contradictory and mutually negating actions'.⁶³ In order to comprehend why this is true one needs to be armed with a 'theory' of sovereignty. Koskenniemi's is one of the best we have.

D Conclusion

In this part (2. *Rules*) I have discussed international law's compromises with legalism and why the retreat into rules creates more problems than it solves for international lawyers. This legalist approach to teaching international law is seductive because it offers an affirmative answer to the question of whether international law is law. However, I argue that it is the wrong affirmative answer because it mischaracterizes the system. International law is not a rule-based system in the same way that much domestic law is. Therefore to teach it as if it is analogous to domestic law is misleading (2A *The Malaise*). A better way to think about international law is to think theoretically about international law and law generally. I indicate three ways in which a teacher might incorporate this methodology by teaching international law as comparative law, compliance theory and as an exercise in liberal philosophy (2B *Three Possible Responses*). I conclude by calling for a more integrated approach to the teaching of theory that avoids the tendency to distinguish theory from doctrine. In this final section I offer two examples of this approach, though one could think of many others (2C *Some Theory*).

In the next part of the paper, I turn to the compromise with realism and a possible response to our fear of politics.

Part 3. The Politics of International Law

A Embracing Realism

The periphery constantly beckons in our international relations phobias, too. When I teach international law to a seminar group for the first time, I commonly spend the first half hour referring to current newspaper reports. I draw the group's attention to crisis after crisis, piling one on top of the other. The implication is that each crisis has an international law angle. Ireland and self-determination, Tibet and human rights, Rwanda and the use of force, Iraq and sanctions. Here, I make my annual plea for relevance. Yet, ultimately, international law appears everywhere and nowhere in the

⁶³ *Ibid.*, at 289.

pages of these newspapers. There is pathos in its ghostly pleadings — a Polonius pointing accusing fingers at international wrong-doers but unable to act.⁶⁴

Sometimes, in the face of this absence, this fear of the margins, international lawyers simply cave in to a form of sceptical politics or realism, i.e. the state egoism or containment realisms of the once-dominant traditions in international relations.⁶⁵ Here, students (and to a lesser extent academics themselves) learn the language of statesmanship or 'realism' and solemnly enunciate it at every opportunity. To give an example, each year I involve my International Organizations students in a simulation or role play in which they each adopt the position of a state delegate to the Sixth Committee debating the establishment of an international criminal court.⁶⁶ The idea is to get them to think about international law as a process of negotiation, compromise and deferral. The students invariably do too good a job. Their idea of playing a role is to adopt one of two positions — either a jokey state centrism or a conservative posture which mimics existing draft statutes. Remarkably, the classes sometimes end with no change to the Statute recently adopted in Rome. Any idealism the students might have shared is quickly hidden from view.

This class is a great success. Students enjoy and are inspired by it and two of the purposes (getting them to think like state representatives and improving their ability to manipulate doctrine) are achieved. Indeed, the whole exercise resembles the applied international law I favour.⁶⁷ However, another purpose of the class, getting the students to think like critical global citizens, usually is not achieved.⁶⁸ The pull of realism is too great, the absorption of a message that the pursuit of state self-interest is the *modus operandi* of international social life is too complete.

As I have said, international law educators sometimes share a similar tendency. At conferences and in meetings with government officials, we academics, concerned not to appear naive and therefore instantly marginal, do our best to cleanse ourselves of the stain of excessive idealism. This is perhaps because, as international lawyers, we suspect that international law is not central to the policy deliberations of foreign ministries and it is certainly true that some foreign ministries are either disdainful of international law or believe in a version of it which coincides with the government's

⁶⁴ As Barbara Stark puts it, 'When we talk about war . . . we do not talk about law.' See Stark, 'What We Talk about When We Talk about War', 32 *Stanford Journal of International Law* (1996), at 91.

⁶⁵ 'Most political scientists conceive of international law as a "fringe" specialty, well meaning, even noble, but naive and largely irrelevant to the real world'. See Gamble and Shields, *supra* note 19, at 39. See also the figures contained in this article indicating that only 1% of articles found in US political science journals were about international law. At 41.

⁶⁶ This simulation has been developed over a number of years in collaboration with Tim McCormack at the University of Melbourne Law School. It is also the case that in some classes highly imaginative proposals have been made. For a fuller description see T. McCormack and G. Simpson, 'Simulating Treaty-Making' (draft, on file with author).

⁶⁷ See Stark, *supra* note 64, at 102 (describing the many virtues of the role-play model in teaching use of force).

⁶⁸ To be fair this purpose is hardly ever fully articulated by me as a teacher. Often, from a legal perspective the students do suggest highly imaginative modifications to the existing draft, modifications which seek to achieve reasonable compromises between antagonistic positions.

foreign policy.⁶⁹ Though, even when government legal advisers pledge obeisance to international law, international lawyers are sceptical. Witness this description by Leo Gross:

The Legal Adviser at the State Department, Abraham Soafer, gave a luncheon talk ... to the effect that every action taken by the Department had been in accordance with international law. He obviously has a very creative, imaginative mind.⁷⁰

We are understandably fearful that politicians do not take us seriously (just as we do not take *them* seriously). However, the solution does not lie in adopting the forms of realism I have described. We have to be careful not to lose sight of the possibilities of international law and international law teaching as dissent in an area where close cooperation with government is personally and professionally rewarding. Government international lawyers are engaged in a fundamentally different exercise to that of academic lawyers and our students. The rationalizing and advising functions central to bureaucratic lawyering should be alien to pedagogical and academic lawyering.⁷¹ This has important implications for the way we teach. It means that the teaching of international law is not just about training future government officials or a new generation of teachers or even global lawyers. It is primarily an attempt to educate ‘ethically aware global citizens’⁷² capable of using international law as citizens in domestic and international contexts.

We live in an era congenial to creative international legal studies: the era of interdependence, a period of fluid international relations. However, we risk leaving the discipline severely deflated and dangerously compromised if we embrace certain forms of realism in preference to an independent, critical intellectual base.

There are, of course, explicitly political, post-realist perspectives out there but these are generally ignored or co-opted. In an example of the latter, the most recent edition of the leading American textbook in international law begins with the momentous announcement that ‘law is politics’.⁷³ But this ‘politics’, it turns out, is a rather predictable beast in the service of common sense rather than radicalism. In the same vein, very few international law scholars deny the applicability of politics to the discipline.⁷⁴ Yet there is still an overwhelming tendency either to teach rules in the abstract or treat politics as if it was some unproblematic category of social life or backdrop called ‘political reality’, constantly infringing on the action, disturbing our good intentions but remaining unexamined. It is not enough to notice that international law is created by states, that states are political and that therefore

⁶⁹ See, e.g., the Australian position on East Timor or the US justification for its haphazard bombing campaign against Iraq.

⁷⁰ Gross, ‘Comments’, in ‘Special Feature’, *supra* note 15, at 247.

⁷¹ But see McDougal’s notion of the *dedoublement fonctionnel*, whereby the decision-maker is ‘alternatively claimant and judge, can serve simultaneously both national and world policies’. Falk, *supra* note 30, at 490.

⁷² See Orford, *supra* note 12, at 252.

⁷³ L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law, Cases and Materials* (3rd ed., 1993).

⁷⁴ A typical example of this is Oscar Schachter’s comment that ‘one must go beyond doctrine and case law into a consideration of the values to seek to promote and the political considerations that influence its development.’ ‘Comments’, in ‘Special Feature’, *supra* note 15, at 273.

international law is political. The more interesting question remains: what or whose politics is it or should it become? This question tends to remain underscrutinized.

B Other Politics

What does all this mean for us as teachers of international law? First, we must recognize that international law is a powerful tool. One does not have to be an aficionado of Foucault to understand that a way of looking at the world which is imbibed annually by thousands of elite students is a powerful rhetorical instrument. Education establishes many of the conditions for our construction of 'the real world' (though the pretence that the two are separable serves some useful ideological ends).

It is all too easy to give in to the imperatives of some preordained reality. In this way we convert eager students from potential global citizens to Hobbesian cynics. International law educators can take a post-realist politics and make it an effective pedagogical resource. Many now agree with the truism that law is politics by other means. But only a rare few seem able to articulate an actual politics that might animate international legal studies.

So, what sort of politics might this be? The politics we might consider teaching can best be illustrated by reference to a series of questions we rarely ask and perspectives we rarely listen to. The student should be forced to engage almost instantly with law's political shadow. What is a community? How are the interests of a community articulated normatively? Is the community all the actors in the system or the most powerful or the most visible? Whose values are dominant in this system? How much can we learn of the practice of, say, the Serbian state, the perspective of the Sudanese government, the Mongolian experience of colonialism? To what extent does this system personally advantage me and my fellow nationals or 'class' allies? These are the sometimes unasked questions of international law.

It is particularly important that we embrace an alternative politics in anticipation of periods of crisis and morbidity in the system. It is during precisely such times that the lawyer as moral agent must inform the practices of the lawyer as professional. It is important to surrender neither to the realist version of politics (usually a sort of cynical statism) nor to the half-digested theories of globalization which, these days, pass for political nous.⁷⁵ There are other politics, other intellectual agendas, out there if we look. These include the politics of radical critique (e.g. feminism, (post-) marxism), the unearthing of fresh histories of our discipline⁷⁶ and the re-engagement with everyday life and institutional informality. Each represents a break with

⁷⁵ For more nuanced views of globalization see I. Clark, *Globalisation and Fragmentation* (1997) and Symposium: The Changing Structure of International Law Revisited, 8 *EJIL* (1997) 3.

⁷⁶ See, e.g., B. Schmidt, *The Political Discourse of Anarchy: A Disciplinary History of International Relations* (1998), Kingsbury, 'Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgement', 92 *AJIL* (1998), at 713–724 and Nathaniel Berman's body of work on nationalism and international law.

international law's (and realism's) commitment to the sovereign actor, the public voice and the abstract state agent.⁷⁷

C The State and Other Politics

All this is not to deny that the state remains important to our understanding of international law as a political enterprise and to our approach to the teaching of international law. The oscillations I describe between legalism and realism ultimately reflect a concerned ambivalence about the role of the state. In legalism⁷⁸ (especially positivist versions) state consent is required to create rules (thus providing certainty) but this consent appears to lack a source of legitimate normative power. The state is thus seen as central to the creation of rules but the legitimacy of states themselves is merely assumed. In the case of the primitive realisms⁷⁹ I have discussed, the rules are disregarded in favour of an overemphasis on an unexplored political reality. This political reality often consists of a series of unpersuasive assertions that states break the rules all the time, that powerful states use and abuse international law, that states are 'self-interested' and that international law somehow reflects the will of these powerful states.

Anne-Marie Slaughter has pointed out that while these traditions seem to be in conflict in fact they each share certain fundamental assumptions. The most obvious sense in which they are cognate is the centrality each accords the state as an abstract, unitary participant in the international system.⁸⁰ Liberal scholars such as Michael Reisman and Thomas Franck have reimaged international law in order to bring it into line with the imperatives of democratic governance.⁸¹ But even here the move from legalism (state consent) and realism (state egoism) to democratic governance (popular sovereignty) continues to privilege the state. For these scholars, the focus of our work should be the internal constitutional workings of the state rather than the externally imposed rules (legalism) or situated interests (realism) which motivate it in other theories. Thus,

The principal source of State preferences and constraints is internal rather than external. The strength and intensity of State preferences, determined as an aggregation of the preferences of individual and group actors represented in a particular state, will determine the outcome of State interactions.⁸²

But the democratic liberal model, too, seems inadequate to the task of understanding the politics of late-capitalism. In the work of these scholars, the state and

⁷⁷ See Kennedy, 'A New World Order: Yesterday, Today and Tomorrow', 4 *Transnational Law and Contemporary Problems* (1994) 329, at 350. 'Lullaby. Let nations rage, Let nations fall. The shadow of the crib makes an enormous cage upon the wall', Elizabeth Bishop, quoted by Salman Rushdie, 'Notes on Writing and the Nation', 25 *Index on Censorship* (1997).

⁷⁸ See Slaughter, *supra* note 4, at 377.

⁷⁹ I use the term 'primitive' to distinguish these behavioural realisms from the 'realisms' represented by people like Hedley Bull or Martin Wight.

⁸⁰ Slaughter, *supra* note 4, at 377.

⁸¹ See Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46. For a critique see Simpson, 'Imagined Consent', 15 *Australian Yearbook of International Law* (1994) 120.

⁸² See Slaughter, *supra* note 4, at 398.

international law have been rehabilitated by a commitment to some form of democracy. Yet, if globalization theorists are right, the rehabilitation of the state through democratic governance theory coincides with its incipient demise as a form responsive to democratic stimulus.⁸³

D Conclusion

Ultimately, some international law teaching remains shackled to an old politics; gesturing to globalization here, democracy there, but all taught according to a series of 19th century categories — territory, recognition, statehood, treaties, state responsibility. These categories and divisions are almost entirely built on the now outdated models of territorialization and classical capitalism.⁸⁴ Do these categories have any purchase in the era of supraterritoriality where ‘the scale of economic activity no longer corresponds to the territory of the nation-state’?⁸⁵ Most international law textbooks and courses are likely to spend much more time and space on the *Island of Palmas* definition of sovereignty (now more or less superseded) than on whether multilateral institutions can bring the world’s wholesale foreign exchange markets (currently involving the exchange of \$1,230 billion per day) under any sort of control using international law.⁸⁶ These misallocations of energy condemn us to the margins we most fear.

Meanwhile, we console ourselves that we have embarked on an unending quest to modernize and update international law. We seem perpetually on the brink of creating the ideal institutions if only states had the will. The law is most often seen as the tool of progress — an international criminal court, a new human rights treaty, better arms control agreements or fresh environmental treaties.⁸⁷ Yet, the world does not seem to be improving very quickly or at all and we appear to be unable or unequipped to explain this dissonance to our students.

Part of the reason for this is that for all our progressivism we inject relatively little utopianism into our teaching. Writing ‘possible histories of the future’⁸⁸ (in Richard Falk’s delicious phrase) does not feature in much of our scholarly endeavours. Students are left feeling that the present system is immutable not because we tell them it is so but because we rarely suggest alternatives. The vitality of our discipline depends on those ‘voices that go against the grain’.⁸⁹ Ironically, these principles were stated succinctly 30 years ago by the doyen of post-war American realism, Hans Morgenthau, when he reminded international relations scholars that ‘it is a legitimate and vital task for a theory of politics to anticipate drastic changes in the structure of

⁸³ See, e.g., S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996).

⁸⁴ For a critique of these models see Hirst, ‘The Global Economy — Myths and Realities’, 73(3) *International Affairs* (1997) 409.

⁸⁵ *Ibid.*

⁸⁶ Scholte, ‘Global Capitalism and the State’, 73(3) *International Affairs* (1997) 427, at 433, citing *The Financial Times*, 11 March 1996, at 1.

⁸⁷ See Kennedy, *supra*, note 77, at 370.

⁸⁸ See Falk, *supra*, note 30, at 487.

⁸⁹ See Der Derian, ‘Introduction: Critical Investigations’, in J. Der Derian (ed.), *International Theory: Critical Investigations* (1995), at 9.

politics and in the institutions which must meet a new need'.⁹⁰ Instead, the perpetual defensiveness described in Part 2 has resulted in a suspicion of all brands of 'idealism'.

The tendency has been not to embrace these possibilities but to instead escape the seductions of legalism and realism by operating in a mode I call 'romantic'. In the next section I describe this mode and its deficiencies and I suggest a possible way of redeeming our teaching of social and political context (4. *Romance*).

Part 4. Context: The Romantic Mode and its Redemption

Hans Castrop: *The atmosphere up here is so international. I don't know who would find more pleasure in it — Settembrini for the sake of the bourgeoisie world-republic, or Naphta for his hierarchical cosmopolis. As you can see I kept my ears open; but then even so I found it far from clear. On the contrary the result was more confusion than anything else.*⁹¹

For anyone who has ever gazed lovingly at a map of the world or twirled a globe around in the half-light, international legal study is the travelogue made law. From Kinshasa to Managua, from Goa to Entebbe we travel the earth entranced by a discipline with connections to such exotic locations. Municipal law lacks the obvious glamour of its international equivalent. In our fictions (exams, case studies, simulations) we exchange the contractual travails of 'Mr Black of Whitehills' for the global histrionics of the state of Atlantis in its titanic struggle with neighbouring Kokomo, not to mention the perennial problems with the indigenous Beshini. (The model for this sort of role playing is of course the Jessup International Law Moot, of which more in a moment.⁹²)

But there are dangers. If journalists are failed authors (in C. P. Snow's phrase), then international lawyers are surely would-be foreign correspondents bringing back to students news of events in distant places. There is no need for passports and air-tickets in this world, far less flak jackets and jeeps. Instead, we have a couple of paragraphs of description in the relevant textbook on the 'Situation in the Congo' or the 'Korean War'. Thus do we become worldly travellers pronouncing on the fate of unknown millions. Richard Falk described this form of teaching as 'impressionism'.⁹³ For the students, as for Thomas Mann's young hero, the atmosphere is international but the result is confusion. A memorable world of dreams, nightmares, hurts and hopes are thinned out and boxed in until they cease to be meaningful, much less inspiring.⁹⁴

Self-determination, an area in which I teach, is often taught in this romantic mode. Small nations in faraway places, of which we know little, seek independence. Everything is placed in a box called decolonization or secession. The history, politics

⁹⁰ Morgenthau, 'The Intellectual and Political Functions of Theory (1970)', in *ibid.*, at 51.

⁹¹ Mann, *supra* note 1, at 386.

⁹² Brown, 'The Jessup Mooting Competition as a Vehicle for Teaching Public International law', 16 *Canadian Yearbook of International Law* (1978) 332.

⁹³ Falk, *supra* note 30, at 487.

⁹⁴ See Koskeniemi, 'Book Review of G. Evans, *Cooperating for Peace*', *Australian Yearbook of International Law* (1995).

and cultural contexts in which self-determination movements operate are often left untouched. And yet these contexts define the topic. Without them it becomes by turns a fruitless search for a theory of self-determination, an exercise in textual analysis divorced from practice and experience or a well-intentioned wringing of hands in distress at the evil of states.⁹⁵

International lawyers face a familiar difficulty in confronting these contexts. Too broad and we end up with a theory of everything taught by the teacher as dilettante. How much can an international law academic reveal about the history, anthropology or sociology of dozens of states, nations and regions? On the other hand, a narrow legalistic focus will founder on a lack of explanatory power. The solution lies in a severe, probably traumatic, narrowing of focus followed by a broadening of perspective. This seems preferable to the opposite where we aim for coverage — Somalia, Yugoslavia, Lockerbie, Biafra — but sacrifice depth and understanding. Recognition of the need to intensify our coverage rather than broaden it is no new thing. Forty years ago, Myres McDougal entreated us to describe ‘trends in decision, in terms of effects upon values and the identification in the greatest degree possible of the variables, predispositional and environmental, that effect particular decisions’.⁹⁶ It is quite impossible to live up to this injunction while also insisting on coverage of numerous incidents. What can and must be covered, of course, are the basic doctrinal categories and textual landmarks of the international law scene. Confining ourselves to a handful of case studies liberates us to employ and manipulate these rules and doctrines in meaningful contexts.

So, the romantic mode can be redeemed only by a difficult and time-consuming engagement with context.⁹⁷ Instead of touring we should perhaps live (intellectually) in a place for a semester. This would involve studying one or two cases in real depth, making the facts known to students and bringing out the multiple contexts within which a certain case is approached and understood using international law. The war in the former Yugoslavia is an obvious example of how this might be achieved.⁹⁸ Here, we can spend time on the historical conditions which led to the break up of the former Yugoslavia instead of positing an untheorized national enmity as the sole reason for its demise. This would partly alleviate international law’s ahistoricism, cleverly exposed by Anne Orford in her recent essay, ‘Locating the International’.⁹⁹ This method would teach international law students that ‘disputes’ do not arise from nowhere, pre-existing, offering themselves up for legal resolution. For example, this

⁹⁵ Needless to say, this romantic mode is deeply unsatisfying. David Kennedy takes it to a knowing, logical conclusion in the essay ‘Autumn Weekends’, a jaunty tale of cripplingly ironic supersophistication at a human rights conference. See Kennedy, ‘Autumn Weekends’, in A. Sarat and S. Kearns (eds), *Law and Everyday Life* (1993).

⁹⁶ McDougal, *supra* note 57, at 141.

⁹⁷ See Stark, *supra* note 67, at 95 (explaining why the engagement with context has to be frustrating in order to be effective). But see also Frankenberg, *supra* note 37, at 268, on the tragic choice between going native (the impossibility of immersion) and not going native (the probability of imperial projections).

⁹⁸ *Ibid.*, at 110.

⁹⁹ Orford, ‘Locating the International: Military and Monetary Interventions After the Cold War’, 38 *Harvard International Law Journal* (1997) 443.

method would permit us to explore how legal techniques have been deployed in the past,¹⁰⁰ how law might have contributed to the conflict¹⁰¹ and how concepts such as ‘nation’, ‘state’ and ‘government’ are often arbitrary categories of understanding. It would also permit an exploration of the experiences of oppression — when was the last time we heard a refugee ‘speak’ in an international law textbook or in the contents of a lecture?¹⁰² Most of all, students would immerse themselves in a case study. Time spent teaching a new set of mostly misleading, partial and superficial facts could instead be spent interrogating the same set of ‘facts’ and applying a wide range of international law techniques and methods to these facts in order to bring out certain fundamental legal problems.¹⁰³ Harold Berman made the point in 1988:

I am troubled by the widespread notion that all you need is breadth as in a survey. Often it is better to sink a few deep shafts than to survey the whole field.¹⁰⁴

The merit of this methodology can be fully appreciated when we consider the success of the Jessup Moot Competition.¹⁰⁵ Here, students focus on one fictional problem involving many international law issues. These students analyse the case intensively for a semester. It is clear that this results in a capacity to analyse a range of international legal problems at a high level of sophistication. This depth of study is universally regarded by students as invigorating and inspiring. This can be contrasted with the occasional outbreaks of apathy when teaching in the romantic mode.

Despite its successes the Jessup Moot is a rather artificial exercise and one which rewards a sort of indulgent competitiveness as much as beneficial collaboration. It seems to me the virtues of the Jessup (close study, collaboration, application), without some of its failings, are to be found in what one might describe as clinical international legal education and that clinical legal education is *one* way to make good on my claims about context and depth.

What would this look like? This sort of study probably works best in human rights law where clinical programmes can be established with the potential to lead to real

¹⁰⁰ See, e.g., Berman, “‘But the Alternative is Despair’: Nationalism and the Modernist Renewal of International Law”, 106 *Harvard Law Review* (1993) 1792.

¹⁰¹ See Orford, *supra* note 99.

¹⁰² I would not wish to underestimate the dilemmas, both moral and pedagogical, to be faced in adopting this approach. Teaching human rights law seems particularly fraught from the perspective of context. Here, teachers find themselves having to confront the appalling realities of a world in which human rights abuses occur on an industrial scale accompanied by the increasingly perverse uses of technology. How do we as teachers document such suffering? Should we? These questions must confront any sensitive teacher of the subject. The dangers of a lapse into voyeurism should be obvious. Teachers should be wary of relentlessly inflicting evidence of human rights abuses on students. I have no answer to this problem other than to recognize it.

¹⁰³ Falk calls this the ‘phenomenological’ approach. See Falk, *supra* note 30, at 488.

¹⁰⁴ Berman, *supra* note 35, at 241.

¹⁰⁵ I am not concerned here with some obvious benefits of competing in the Jessup. These include the development of moot skills and advocacy skills generally, the cross-fertilization of ideas inherent to an international competition. See, e.g., Brown, *supra* note 92.

litigation.¹⁰⁶ Models exist in the United States, most notably Harold Koh's Haitian Refugee Clinic at Yale.¹⁰⁷ The fruits of this sort of legal education would be seen in a greater use of international law to make progressive claims in domestic courts.¹⁰⁸ This is a relatively under-utilized possibility in Australia but the Optional Protocol Network, the Toonen communication¹⁰⁹ and the use of international law in the claims of indigenous Australians¹¹⁰ provide examples of possible avenues for exploration.¹¹¹ In the United Kingdom, the increased meshing of the British legal order with the European system of human rights should lead to similar opportunities for such work.

Clinical international legal education, then, is *an example* of a contextual method which promises a re-engagement with ethics and practice as well as a departure from the routines of formalism, realism and romance. Of course, it is only one such method. What I have advocated in this essay are teaching methods that are most of all self-reflective and self-critical. More substantively, I have argued for a public international law pedagogy whose links to comparative law, legal philosophy and political philosophy become a source of great creativity (Part 2), a discipline that takes its own rich and multipolar theoretical tradition seriously and one that encourages the dissenting ideas in world orders old and new.

5 Conclusion

This essay has traced a certain malaise in the teaching of international law. The experiences I have described will not be familiar to everyone and cannot be proved empirically. I can only appeal to a shared sense of purpose and doubt. I have attempted to describe how the persistent existential doubts resulting from our occupancy of a borderland between international relations and national law has engendered a certain defensiveness which has resulted in three unsatisfactory modes. These are legalism (the retreat into rules), realism (the retreat into statist politics) and romance (the temptation to teach international law as the converse of a holiday brochure — brief illustrations from places we would not want to visit). Each of these modes threatens our, already tenuous, link with the thousands of stories about what is going on in the world.

The various alternatives I have explored basically involve a re-theorization and

¹⁰⁶ See for a general discussion, Lillich, *supra* note 25, at 145–151. Human rights law is too often and wrongly viewed as a soft option among students. It promises a certain combination of moral superiority and the absence of too much black letter law. Delivering on this promise is fatal to the entire project. It is perhaps time to reattach human rights law to the subjects with which it has natural affinity, e.g., civil liberties, civil litigation, administrative law and constitutional law. These clinical programmes are one obvious way to do this.

¹⁰⁷ See Koh, 'Transnational Public Law Litigation', 100 *Yale Journal of International Law* (1991), at 2347.

¹⁰⁸ It is extremely difficult to do this since it requires the sort of general expertise and ability to synthesize that most of us do not possess. However, it is a worthy aspiration. See Lillich, *supra* note 25, at 859.

¹⁰⁹ See *Toonen v. Australia*, No 488/1992. UN Doc CCPR/C/50/D/488/1992, 4 April 1994.

¹¹⁰ See, e.g., *Kruger v. Commonwealth* 146 ALR 126.

¹¹¹ See, also, *Limbo v. Little* (1989) 65 NTR 19 (in Australia), *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) and *Kadic v. Karadzic* 70 F.3d 232 (1995) (in the US), *Shimoda v. The State* 32 ILR at 626 (in Japan).

politicization of international law. The interpenetration of micro-practice (e.g. clinical legal education) with macro-understandings (e.g. critical theory¹¹²) strikes me as a quite auspicious alternative to the modes I disparage in the essay and represents an alternative to international law as a series of doctrines detached from practice, history and the dynamics of contemporary global capitalism.¹¹³

¹¹² The work of Andrew Linklater (in international relations), Roberto Unger (in legal theory) and Martti Koskenniemi (in international law) comes to mind here.

¹¹³ Martti Koskenniemi seems to be suggesting that we should embrace this opposition 'by developing a professional culture that would be characterised by a constant movement between distance and intimacy, reflexion and engagement'. Koskenniemi, *supra* note 5, at 19.