HANDMAIDENS, HIERARCHIES AND CROSSING THE PUBLIC–PRIVATE DIVIDE IN THE TEACHING OF INTERNATIONAL LAW

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[This article explores the question of what law students are encouraged to imagine is the role of international law in the global community. It argues that the ability to practise international law as economic and social justice is impeded if the teaching and learning of international law has been experienced as hierarchy. The article focuses on three ways that the teaching and learning of international law can normalise hierarchy and thereby hamper independent, critical, social justice thinking. The discussion draws on a survey of the undergraduate courses offered by Australian law schools in public and private international law in 2000. The article suggests several strategies for making hierarchies transparent and contestable in legal education. It concludes that the promotion of economic and social justice values requires critically rethinking courses in both private and public international law and crossing the public–private divide by re-understanding international legal pedagogy as a hybrid of public and private. Such rethinking will open up the possibility of fairness obligations arising in both spheres.]

CONTENTS

I INTRODUCTION

I want to address the question of what law students are encouraged to imagine is the role of international law[1] today and in the future. In connection with this question, I want to draw attention to the important issue of the assumptions, or values, that are communicated in the teaching of international law. I will argue

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1 I am using the term 'international law' broadly to include the law regulating relationships that are not purely domestic. Arguably, there are very few legal relationships that do not have international dimensions, given the growth of human rights law since 1948 and the globalisation of domestic economies. While these interconnections are increasingly recognised in 'internationalised' domestic curricula, I have maintained a somewhat spurious distinction between international and domestic legal education for the purposes of this discussion. See further David Trubeck *et al*, 'Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of the Transnational Arenas' (1994) 44 *Case Western Reserve Law Review* 407, 408.

that the ability to practise international law as economic and social justice,[2] in the common interest,[3] and consistent with the public principles of 'fairness'[4] and cooperation promoted by the *United Nations Charter*,[5] is impeded if the teaching and learning of international law has been experienced as hierarchy. By hierarchy, I mean practices, doctrines and beliefs that take for granted or normalise the inequalities in power, wealth and status that are reflected in the inequitable global order of today.[6] Hierarchical practices include those shaped by colonialist, nationalist, racist, sexist and hetero-normative ideologies. These economic and social hierarchies are reflected, in many ways, in the normative hierarchies of international law.[7] In particular, I am concerned with the re-conceived hierarchies and deepened inequalities that have accompanied post-

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2 Gerry Simpson describes an analogous ideal when he promotes the teaching of international law as 'an act of imaginative dissent': Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 *European Journal of International Law* 70, 72. Anne Orford, in a similar vein, argues for 'ethical' teaching practices 'which are answerable for the power relations they produce': Anne Orford, 'Citizenship, Sovereignty and Globalisation: Teaching International Law in the Post-Soviet Era' (1995) 6 *Legal Education Review* 251, 252.

3 Bruno Simma and Andreas Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9 *European Journal of International Law* 266, 276. The authors argue that the egoistic self-interested 'Lotus principle' conception of international law is being replaced by an increasingly communitarian conception of international law. See further Bruno Simma, 'From Bilateralism to Community Interest' (1994, vol VI) 250 *Recueil des Cours* 217.

4 Thomas Franck argues that the most important post-ontological question confronting international lawyers is whether international law is 'fair': Thomas Franck, *Fairness in International Law and Institutions* (1995) 7.

5 *UN Charter* art 1 uses the language of cooperation in describing the purposes of the United Nations ('UN'), proposing collective security measures, friendly relations, cooperative solutions to economic, social, cultural or humanitarian problems, and harmonisation actions as the means to the maintenance of international peace and security. Wolfgang Friedmann's view is that international law is in the process of developing from being a 'law of coexistence' to a 'law of cooperation' in the UN Charter era: Wolfgang Friedmann, *The Changing Structure of International Law* (1964). Georges Abi-Saab suggests that post-Cold War economic globalisation has forced legal developments to regress into the earlier tradition of the law of coexistence, halting any further prospects of progress towards a cooperative law of development: Georges Abi-Saab, 'Whither the International Community?' (1998) 9 *European Journal of International Law* 248, 265.

6 Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1983) 32 *Journal of Legal Education* 591. Kennedy's use of the term 'hierarchy' refers to the hierarchy of the legal profession. I am using the term in a broader sense by proposing that legal pedagogy reproduces not only the hierarchies of the legal profession, but also the structural hierarchies of political, economic and social organisation; see also Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (1990) 38.

7 For example, the normative hierarchy between civil and political rights (many of which have achieved a customary, even *jus cogens*, status) and economic, social and cultural rights (largely still soft law) reflects social hierarchies of class, race and gender.

Cold War economic globalisation.[8] These stem at least in part from the insistent prioritisation of private (economic) market values over the civic and redistributive (political) values of public international law.[9]

Contrasting public and private values in this way as an explanatory device is fraught with danger, as many commentators have warned.[10] The main danger lies in over-determining the dualism and treating it as self-evident, which can result in a reification that tends to confirm the divide and foreclose more complex analyses. Dualistic cartographies are, however, difficult to resist because they promise to explain so much. They can provide proponents of one side of a dualism with a ready tool for discrediting the other. However, as I will argue, progressive possibilities do not emerge from the argument over which side of the public–private dichotomy can be relied upon to deliver economic and social justice. Rather they arise from the recognition of the complex interactions between the two discourses in their shifting boundaries and multiple ideological purposes. I will suggest, as a strategy for contesting global hierarchies, exploration of the intersections between the public and private domains of international law in legal education.

However, at the same time as deconstructing the public–private dichotomy, I also believe that the distinction matters, and I therefore rely on it as a framework for my argument. I justify this reliance, first, because of the formal distinction between public and private that has been taken for granted in liberal legal systems.[11] This distinction is reflected, for example, in the different liabilities and immunities attached to private and public bodies[12] and, as feminists have

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8 Adelle Blackett cautions against the reductionism of many analyses of 'globalisation' which, she emphasises, 'encompasses multifaceted, multi-layered and often disjunctive processes'. She warns that the underlying processes of globalisation are widely diverse and not easily charted, which makes policy implications difficult to determine: Adelle Blackett, 'Globalization and its Ambiguities: Implications for Law School Curriculum Reform' (1998) 37 *Columbia Journal of Transnational Law* 57, 64–5.

9 Joel Paul dates the separation of public and private international law to the latter part of the 19th century, in the service of industrialisation, with the evolution of the private law of the market place: Joel Paul, 'Interdisciplinary Approaches to International Economic Law: The New Movements in International Economic Law' (1995) 10 *American University Journal of International Law and Policy* 607.

10 Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387; Frances Olsen, 'International Law: Feminist Critiques of the Public/Private Distinction' in Dorinda Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (1993) 157; Duncan Kennedy, 'The Stages of Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349.

11 Morton Horwitz identifies the reshaping of law around a fundamental separation between public and private spheres with the emergence of the market during the 19th century. One of the goals of this separation was to create a realm that was free from public power. He notes that, in the process, an earlier republican tradition of associating private virtue and public interest was undermined: Morton Horwitz, 'The History of the Public–Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423, 1424.

12 Christopher Stone, 'Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?' (1982) 130 *University of Pennsylvania Law Review* 1441, 1449. In international law, it is the law of state responsibility that distinguishes public from private actions — state responsibility can be attributed only to the former.

pointed out, it is deeply gendered.[13] With few exceptions, public and private areas of law have been taught in separate courses in international (and domestic) legal education, thus neglecting the many interdependencies and hybridities, and leaving the dualism largely unchallenged. Second, I rely on the public–private divide as existing in substance to the extent that the public has been treated as a source of 'fairness' obligations,[14] while the private has been more concerned with the values of liberty. While narratives associated with each sphere have promised outcomes consistent with economic and social justice, my concern is with the promotion of particular social justice values internationally — human rights, labour standards, equitable distribution of the world's wealth and resources, and sustainable development. To date, the affirmation of these values, albeit limited and precarious, has been confined almost exclusively to the public domain of international law.

I want to address, in the context of legal pedagogy, the issues raised by Philip Alston when he drew attention to the apparently myopic response of public international lawyers to the changes in the role and power of the state being wrought by globalisation.[15] The result, in his assessment, is that much of mainstream international legal scholarship remains preoccupied with yesterday's issues and concepts, and is reduced to 'little more than [an] exercise in nostalgia'.[16] The effect of this nostalgia is that international lawyers have served as 'handmaidens'[17] to a form of globalisation that serves the elite interests of global capital, rather than promoting economic and social justice. My question is whether the pedagogy of international law produces more handmaidens of free market expansionism and economic efficiency who are incapable of adopting dissenting critical practices.[18] Or alternatively, whether it trains advocates for international peace and security based on the publicly identified values of friendly and cooperative relations, human rights, and equitable and sustainable solutions to international legal problems.

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13 Hilary Charlesworth highlights the gendered effects of several public–private dichotomies in international law: Hilary Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 243.

14 Stone refers to the attachment of liabilities to public bodies, in circumstances where their private counterparts would be immune, as 'fairness obligations'. He suggests this is because 'what is wanted is that the organization show respect for persons, be even-handed, considerate, tolerant, understanding and empathic': Stone, above n 12, 1449–50.

15 Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 3 *European Journal of International Law* 435.

16 Ibid 447.

17 Shirley Scott observes that Alston's use of the term 'handmaidens' casts international lawyers as out-dated servile attendants of the process of globalisation: Shirley Scott, 'International Lawyers: Handmaidens, Chefs, or Birth Attendants? A Response to Philip Alston' (1998) 9 *European Journal of International Law* 750, 752–3.

18 Alberto Bernabe-Riefkohl notes that legal education has traditionally been responsive to the demands of the market and private fee paying corporate clients: Alberto Bernabe-Riefkohl, 'Tomorrow's Law Schools: Globalization and Legal Education' (1995) 32 *San Diego Law Review* 137, 156.

I do not want to suggest that teachers of international law share a unitary view of the assumptions or values of public international law beyond the common interest goals of the UN Charter. On the contrary, it is important not to shirk the responsibility of educating students in the variety of contending views about the identity of international law and its accompanying values.[19] However, I do commence with two assumptions. First, that critical thinking is essential to the continuing dynamism and effectiveness of both the private and public arenas of international law. Second, that the contestation of social inequalities and economic injustices through law is one means of promoting a more peaceful, secure and accountable international community and, therefore, is an indispensable aspect of international law practice.

I will focus on three ways through which the teaching and learning of international law can normalise hierarchy and thereby hamper independent, critical, social justice thinking: first, in the student–teacher relationship or, put another way, in the lack of student engagement in the act of learning; second, in the assumptions implicit, and perhaps explicit, in the content and structure of survey or foundational courses in international law; third, in the specialisations in international legal education that have developed and, in particular, the diminishing importance of public international law (and therefore 'fairness' obligations) as the private international law[20] of the marketplace expands.

My discussion draws on a survey of the undergraduate courses offered by Australian law schools in public and private international law in 2000.[21] I conclude that the importance of integrating economic and social justice values into both public and private spheres of international law is today more urgent than ever. This integration involves critically rethinking courses in both spheres of law and crossing the borders[22] between public and private realms, thus opening up the possibility of fairness obligations arising in both spheres. In sum, the promotion of economic and social justice values relies on a rethinking of international legal pedagogy in its many dimensions as a hybrid of public and private.

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19 Rosalyn Higgins, 'The Identity of International Law' in Bin Cheng (ed), *International Law: Teaching and Practice* (1982) 27–44.

20 In Australia, the term 'private international law' is generally used to refer to conflicts of law. However, I am using it in a broad sense to include law governing international commercial transactions, whether it concerns the behaviour of states or private economic actors. Therefore I am including the law of multilateral economic institutions in the category of private international law, even though it is public law in the sense that states are its subjects.

21 See below, Table 1, 'Comparison Between the Number of Undergraduate International Law Subjects Offered in Australian Law Schools in 1984 and 2000'.

22 Ruth Buchanan, 'Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place' (1995) 2 *Indiana Journal of Global Legal Studies* 371. Buchanan uses the metaphor of crossing borders to refer not only to the shifting geopolitical boundaries of states, but also to describe her own interdisciplinary and inter-discursive movements in her attempt to describe some of the dynamics of 'globalisation': at 374–5.

II LEARNING RELATIONSHIPS: HIERARCHY OR CRITICAL DIALOGUE?

Although the act, or more aptly the inter*act*ion, of teaching and learning plays a constitutive role in the production of international legal knowledge, it has received little critical attention. Yet, as progressive Brazilian educator Paulo Friere said in the 1960s, it is not possible to learn how to be a democrat when the process of learning is authoritarian.[23] Friere is critical of the 'banking system' of education whereby a teacher's task is understood as 'filling' students by 'depositing' information that is considered by the teacher to be 'true' knowledge.[24] Of course, it must be acknowledged that students are active interpreters in the process of learning and there is not such a linear correspondence between input and output.[25] Nevertheless, the central insight of Friere's 'pedagogy of the oppressed' is that the interaction of learning itself is never neutral or objective. Rather, pedagogy is a political act that needs to be understood as a formative force in how law students come to embody legal practice. If the interaction of learning is hierarchical, as in the practice of the banking educationalist who transfers knowledge as truth and certainty to passive recipients, the later practice of that knowledge by the students will tend to reproduce the hierarchy. This insight is as applicable in the elite context of Western legal education as it is in Friere's context of educating mainly Third World,[26] illiterate, working people. For example, Friere's criticism is echoed in Duncan Kennedy's thesis that legal education in the United States ('US') trains students to service the hierarchies of the corporate welfare state and incapacitates students' ability to adopt alternative practices.[27] In the Australian context, Margaret Thornton has similarly argued that legal education functions as 'technocratic enculturation' which disqualifies other forms of knowledge that do not conform to 'rules rationality'.[28]

Friere describes freedom as indispensable to human fulfilment and promotes teaching–learning as 'the practice of freedom'.[29] Education as freedom occurs through dialogue that involves both student and teacher in a creative endeavour that starts with, and builds on, the everyday concrete knowledge and social realities of the student.[30] The student thus becomes the subject of the act of

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23 Moacir Gadotti, *Reading Paulo Friere: His Life and Work* (John Milton trans, 1994) 18.

24 Paulo Friere, *Pedagogy of the Oppressed* (Myra Bergman Ramos trans, 1995) 56–7.

25 Robin Usher and Richard Edwards, *Postmodernism and Education: Different Voices, Different Worlds* (1994) 219.

26 I use the term 'Third World' in the affirmative sense of unity in the face of European imperialism, and not in the hierarchical sense of a 'less developed' or 'less civilised' world. See also Dipesh Chakrabarty, 'Modernity and Ethnicity in India' in David Bennett (ed), *Multicultural States: Rethinking Difference and Identity* (1998).

27 Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy', above n 6, 601.

28 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996) 76. See also Lani Guinier *et al*, 'Becoming Gentlemen: Women's Experiences at One Ivy League Law School' (1994) 143 *University of Pennsylvania Law Review* 1; Kimberle Crenshaw, 'Foreword: Toward a Race-Conscious Pedagogy in Legal Education' (1994) 4 *Southern California Review of Law & Women's Studies* 33.

29 Friere, above n 24, 29.

30 Ibid 69–74.

learning, rather than a passive consumer. The dialogue created engages the participants (including the educator) in critical thinking whereby knowledge is *discovered* rather than presented as fixed and static, and subjectivity and objectivity become interrelated.[31] Friere's crucial insight is that the dialogic act of learning by re-discovering existing knowledge is not the same as the one-way transference of knowledge that takes place in traditional education. Rather, the act of rediscovering or re-creating existing knowledge can be understood in the same way as the act of producing or creating new knowledge: for both acts, the student's learning must be predicated on critical reflection, curiosity, problematisation, uncertainty and creativity.[32] Where knowledge is simply transferred as uncontestable and certain, learning produces domesticated students who treat the hierarchies of the status quo as immutable, like the hierarchy of banking education's teacher-student relationship. As David Kennedy has observed about his own international legal education during the 1970s, 'rather than criticism and response I learned to practice explanation and justification'.[33] At best, banking education relegates independent and critical thinking to the realm of optional, extra-curricula activity. At worst, critical engagement with international law is seen by banking educationalists as neglecting the task of preparing students for 'real' legal practice.[34] In contrast, where learning is a process of critical (re)discovery and (re)creation, an integrated and ongoing process of social critique and transformation becomes an accepted dynamic of legal education, and it becomes possible for students to understand that law can play a part in achieving a less hierarchical and more equitable world.

These insights can be applied to the various methods that are used to teach international law: case analysis, problem-solving, hypothetical cases, negotiation exercises, Socratic teaching and even 'lecturing' to large classes can all be more or less dialogic. The challenge is how to engage students in discovering for themselves, and in partnership with educators, the main problems and issues of the topic under examination. Without doubt, there has been considerable innovation in the teaching of international law that actively engages students in the process of re-discovering knowledge for themselves — internships and other

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31 Ibid 73. Friere's early term for critical thinking was the Spanish word '*conscietizatacao*' which he used to describe the praxis (thinking and acting) that comes from the interrelationship between subjectivity and objectivity. He later stopped using the term because it was widely misunderstood as subjectivity without objectivity. Howard Lesnick describes the process of *conscietizatacao* as drawing out something that is latent in the student: Howard Lesnick, 'Being A Teacher, of Lawyers: Discerning the Theory of My Practice' (1992) 43 *Hastings Law Journal* 1095, 1097. See also Marlene Le Brun and Richard Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (1994) 40, who describe this as learning that involves a 'qualitative change' in the student's understanding of reality.

32 Gadotti, above n 23, 12–13.

33 David Kennedy, 'International Legal Education' (1985) 26 *Harvard International Law Journal* 361, 372.

34 Commentary by David Westin, 'Roundtable On The Teaching of International Law' (1991) 85 *American Society of International Law Proceedings* 102, 109.

forms of placement,[35] debates[36] and simulations including moots,[37] model UN General Assembly or Security Council sessions,[38] treaty-drafting,[39] and so on.[40] But these learning opportunities are usually extracurricular activities that remain supplementary to classroom teaching of the banking variety, with the notable exception of the course-book by Burns Weston, Richard Falk and Hilary Charlesworth which is entirely based on problem-solving.[41] These authors, in a Friere-like undertaking, consciously set out to test the analytical skills of their students in order 'to develop a critical understanding of the possibilities of international law and thereby engage their creative imaginations'.[42] While the unequal relationship between teacher and student and the continuing preponderance of banking education are largely driven by the demands of large classes and assessment imperatives, the question remains as to how to engage more in dialogical education in spite of these constraints.

The difficulties of creating a dialogic teaching–learning process in the context of international legal education are compounded by the need for students to unlearn their conventional expectations. There is also the further risk that such teaching will be perceived by sceptical colleagues as a confirmation that

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35 See generally Student Editors, '*ILJ* Survey: Curricula, Extracurricular Activities, and Placement Programs in International Law' (1988) 29 *Harvard International Law Journal* 299, 314–16.

36 See generally Christopher Joyner, 'Teaching International Law: Views from an International Relations Political Scientist' (1999) 5 *ILSA Journal of International and Comparative Law* 377.

37 Of 28 Australian law schools, 17 offered participation in the Philip C Jessup International Law Moot Court Competition as an undergraduate subject. The first entry of Australian teams was in 1975. Unfortunately, because of the highly formal requirements of legal argument before the International Court of Justice, it is very difficult for students to incorporate alternative perspectives into this learning exercise, especially during the initial rounds of the competition that involve the majority of students.

38 Barbara Stark, 'What We Talk About When We Talk About War' (1996) 32 *Stanford Journal of International Law* 91, 101–2, reviewing Thomas Ehrlich and Mary Ellen O'Connell, *International Law and the Use of Force* (1993) which includes materials for in-class exercises dealing with the 'law' of the use of force.

39 Timothy L H McCormack and Gerry Simpson, 'Simulating Multilateral Treaty Making in the Teaching of International Law' (1999) 10 *Legal Education Review* 61; Remarks by P H Rohn, 'Reexamination of the Teaching of International Law' (1984) *American Society of International Law Proceedings* 78, 206–7.

40 In the US context, extracurricular activities also include involvement in the International Law Students Association and its various projects (which include the Philip C Jessup International Law Moot Court Competition), participation in student-edited international law journals, and student opportunities sponsored by the American Bar Association Section of International Law and Practice. See Student Editors, above n 35, 305–12. There were 70 international law journals published by US law schools in 1997: John Barrett, 'International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society' (1997) 12 *American University Journal of International Law & Policy* 975, 993.

41 Burns Weston, Richard Falk and Hilary Charlesworth, *International Law and World Order: A Problem-Oriented Coursebook* (3rd ed, 1997). The first two editions were edited by Weston, Falk and Anthony D'Amato.

42 Ibid vii.

international law is not 'really law'.[43] But the difficulties need to be weighed against the enormous benefits that will flow from students bringing their own perspectives into the learning exchange.[44] They will learn how to represent their own views rather than uncritically emulate what they are taught, which will in turn transform what is conceived to be possible outside the classroom and in the practice of international law. Therefore it is important to develop strategies that will transform students from 'listening objects'[45] into subjects of their own learning. Central to such a transformation is the acknowledgment that legal education is itself a site of struggle over meanings and values. By making the dynamics and effects of banking education more transparent and contestable, dialogue can be encouraged in the classroom. This involves educators identifying their own privileged and often shifting positions in the spectrum of international legal perspectives, acknowledging their own history, politics and cultural location, and encouraging students to do the same by critically questioning the knowledge presented.[46] One aspect of this questioning could usefully be, as Gerry Simpson has suggested, using the international law classroom to question the category of 'law' itself.[47]

Through dialogic teaching students can come to understand that international law is the result of continuous negotiation between a diversity of views and is not the outcome of a predictable, linear, rational process of rule application. In a successfully dialogic classroom a counter-hegemonic effect can be achieved, and students from less powerful groups and communities will be empowered to challenge their erasure by the dominant discourse of international law.[48] A

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43 Simpson, above n 2, 74. Simpson was referring to the question asked by Anthony D'Amato, 'Is International Law Really Law?' in Anthony D'Amato, *International Law: Process and Prospect* (1987) 1. Michael Akehurst also began his textbook, *A Modern Introduction to International Law* (6th ed, 1987), with this question. The question is a reference to John Austin's view that international law was not law 'properly so called'. Peter Malanczuk, who revised Akehurst's text for its 7th edition, takes a different approach by dismissing the old discussion as moot and adopting a more sophisticated approach to the question of what law is: Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, 1997) 5–7.

44 Strategies to help students bring their experience into the classroom include narrative, or story-telling, or 'outsider jurisprudence': Shauna Van Praagh, 'Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education' (1992) 2 *Columbia Journal on Gender and Law* 111.

45 Friere, above n 24, 52–3.

46 It should be noted that it is not uncommon for a less authoritarian approach to be mistaken as a lack of rigour. This view serves to re-legitimate the traditional hierarchy rather than question it: Duncan Kennedy, 'Legal Education as Training for Hierarchy', above n 6, 40; Derrick Bell, *Confronting Authority: Reflections of an Ardent Protester* (1994) 39–40; Taunya Lovell Banks, 'Gender Bias in the Classroom' (1988) 38 *Journal of Legal Education* 137, 143.

47 Simpson, above n 2, 76. Mary Ellen O'Connell also argues that international law offers fundamental jurisprudential insights to law generally: Commentary by Mary Ellen O'Connell, 'Roundtable on the Teaching of International Law' (1991) 85 *American Society of International Law Proceedings* 102, 112–13.

48 There is always the danger that participation will be tokenistic or place too heavy a burden on students from minority race, gender, sexuality or other groups: Guinier *et al*, above n 28, 46; Crenshaw, above n 28, 40–1.

parallel can be drawn between the 'culture of silence' that Friere observes in his dispossessed students[49] and the silencing experienced by many law school students in the context of banking education, which reinforces hierarchies of race, gender, sexuality, indigenousness, ethnicity, class and other tropes of marginality.[50] Breaking this silence disrupts hierarchical knowledge and denaturalises privilege by crossing borders and exposing interdependencies. It can mean the difference between experiencing the discipline as its authors rather than as its victims.[51] I am thinking here of the Aboriginal woman who sat beside me when I was a student of international law, and the unarticulated discomfort that she carried from those classes.

Although giving voice to diversity in the classroom cannot hope to replicate the diversity of perspectives in the international community, the 'globalisation' of legal education has had the effect of populating many more classrooms with students and faculty from around the world,[52] and so the possibilities grow. Dialogical education has the potential to teach students about the significance and value of diverse perspectives, the complexities of comparison and negotiation, and the specificities of history and culture. Through dialogue, comity and mutuality across difference can come to be experienced and valued in the classroom and, as a result, the cooperative practice of international law as economic and social justice becomes imaginable. Teaching as the practice of freedom challenges the hierarchy and competitive performance that drives most contemporary legal education, and opens to question the (private) individualistic values of free market supremacy and economic efficiency that most competitive learning environments take for granted. As Adelle Blackett argues, diversity in the classroom can teach students about the varying realities of globalisation and lead them to 'a greater awareness of the complexity and diversity of the world around them, so that they can see that they too shape and create "globalization", "globalization talk" and alternatives'.[53]

III COUNTERING HIERARCHIES IN THE CURRICULUM CONTENT OF SURVEY COURSES

The law school curriculum also plays a significant role in shaping students' perceptions of the possibilities of international law and thus in the production of

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49 Friere referred to the silence that the Brazilian people had submitted to in response to the authoritarianism of the education system as a 'great illness': Friere, above n 24, 93.

50 Jenny Morgan, 'The Socratic Method: Silencing Cooperation' (1989) 1 *Legal Education Review* 151; Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1988) 40 *Stanford Law Review* 1299; Scott Ihrig, 'Sexual Orientation in Law School: Experiences of Gay, Lesbian and Bisexual Law Students' (1996) 14 *Law and Inequality* 555; Banks, above n 46, 141–2; Crenshaw, above n 28, 49; Guinier *et al*, above n 28, 4.

51 Stephanie Wildman, 'The Question of Silence: Techniques to Ensure Full Class Participation' (1988) 38 *Journal of Legal Education* 147.

52 John Edward Sexton, 'The Global Law School Program at New York University' (1996) 46 *Journal of Legal Education* 329, 331–2; Isaak Dore, 'The International Law Program at Saint Louis University' (1996) 46 *Journal of Legal Education* 336, 339.

53 Blackett, above n 8, 79.

new international legal developments. Historically students have been introduced to international law by way of a survey course that seeks to cover the field, albeit fleetingly. In Australia it is probable that all the early survey courses covered aspects of both private and public international law, but this was short-lived and probably confined to the 19th century.[54] Since then, Australian survey courses have covered only public international law, with the more recent exception of the Sydney University course, where since 1987 roughly equal weight has been given to public and private (in the sense of conflicts of law) international law.[55] While the survey courses were conceived as providing a general introduction to international law, Ivan Shearer expressed his concern in 1983 that they were not always mandated as a prerequisite to undertaking the more specialised international law subjects.[56]

Despite the warnings of Shearer and others[57] that a grounding in general principles of (public) international law is essential for an adequate comprehension of more specialised areas, not many of the specialised subjects offered in Australia in 2000 required the completion of a survey course as a prerequisite. Nevertheless because considerable importance still attaches to the survey courses, I have treated them as indicative of a law school's commitment to the teaching of international law. Therefore, while there were 28 Australian law schools teaching LLB courses in 2000, my study is confined to the 26 that offered an undergraduate survey course in (public) international law (see Table 1).[58] The remaining two law schools, Deakin University and the University of Canberra, have a commercial orientation and only the former teaches any international law subjects at the undergraduate level.[59] The absence of public international law from their curricula perhaps signals another dimension of the demise of the 'public' in international legal education. Although before drawing such a conclusion, I would really need to know how commercial international law is taught at Deakin University because, as my anonymous referee correctly suggested, 'better a private guerilla than a public handmaiden'.

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54 James Crawford, 'Teaching and Research in International Law in Australia' (1987) 10 *Australian Yearbook of International Law* 176, 178; Ivan Shearer, 'The Teaching of International Law in Australian Law Schools' (1983) 9 *Adelaide Law Review* 61, 64.

55 The University of Sydney, *Faculty of Law Handbook* (2000) 8, describes the course as 'an introduction to the general problems, sources and techniques of private international law and public international law and the relationship between these subjects'. *The Faculty of Law Handbook* is available at <http://www.usyd.edu.au/su/exterel/publications/handbooks/lawhbook.html > at 10 December 2000.

56 Shearer, 'The Teaching of International Law', above n 54, 78.

57 See, eg, Ian Brownlie, 'The Problems of Specialization' in Bin Cheng (ed), *International Law: Teaching and Practice* (1982) 109–13.

58 The survey courses cover Charter-related international law, as distinct from the public international law of international economic institutions, although there is some variation in this regard. My study did not include Legal Studies courses, except to the extent that they overlap with LLB teaching like, for example, at Griffith University.

59 At Deakin University, two international law subjects were taught: International Commercial Law and Shipping and Air Transport Law. The LLB curriculum offered at the University of Canberra did not include any international law subjects.

At two Australian universities, the University of Sydney and the Australian National University, the survey course in international law was a compulsory subject in 2000.[60] In several other cases it was one of a group of public international law electives from which students were required to take at least one.[61] In all cases the survey course was offered over a single semester or during Summer School, except at the University of Western Australia where it was a year-long (two semester) course. The vast majority of law schools offered the survey course annually, while it was offered biannually at Monash University and the University of New South Wales, and biennially at Murdoch University. The total nationwide enrolment in these courses in 2000 was roughly 2400 students, from which it can be surmised that at present at least 50 per cent of Australian law students graduate with a general understanding of public international law.[62] This result is in dramatic contrast to the situation in the US, where the 'vast majority of law students … graduate … without any meaningful background in international law.'[63] When translated into enrolments at individual Australian law schools, the figures vary widely from 15–100 per cent of law students, suggesting that the 'culture' of public international law at individual law schools may vary considerably. An even wider variation is evident among US law schools.[64]

What is included and excluded by survey courses, and whether a chosen topic or issue is marginalised or given prominence, sends very powerful messages to students about the values of public international law and its role in domestic and

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60 The University of Sydney's compulsory course commenced in 1987 while the Australian National University made its course compulsory in 1999. International law was a compulsory subject in the early years of Australian law schools, but did not remain so, although it was compulsory at the University of Sydney until 1959. Ivan Shearer notes the 'sorry' record of the University of Adelaide where international law disappeared from the undergraduate curriculum in 1906 and did not reappear until 1958: Shearer, 'The Teaching of International Law', above n 54, 69. In the US context it appears that international law has also usually been offered as an elective rather than a compulsory subject.

61 This was the case at Griffith University and the University of Tasmania.

62 The figure may be considerably higher because students are able to study international law in a wide range of more specialised subjects. However, my survey did not attempt to make this assessment.

63 Barrett, above n 40, 991. The 1996 American Bar Association (ABA) Survey ('ABA Survey') found that, at most, 37 per cent of students graduated having completed at least one international law course. Barrett indicates that this figure is almost certainly high for several reasons, including the very broad definition of international law adopted by the survey, which included Immigration Law and English Legal History. He also notes that a 1963–64 survey by Richard Edwards found that 30–50 per cent of law students graduated with at least one international law subject, indicating that there has possibly been a decline since then. Barrett concludes that at most US law schools, fewer than 20 per cent of students take a course in international law. The ABA Survey results are reproduced in full as an appendix to Barrett's article. See also Richard Edwards, *International Legal Studies: A Survey of Teaching in American Law Schools 1963–1964* (1965).

64 Barrett found that removing the four highest scoring law schools in the ABA Survey lowers the average percentage of students graduating with at least one course in international law from 37 per cent to less than 32 per cent, and also observed that at most US law schools this figure is lower than 20 per cent: Barrett, above n 40, 993–4.

international affairs. For Weston, Falk and Charlesworth, contemporary international legal problems include

> devastating civil wars in Europe and Africa, gross violations of the most fundamental human rights as well as the continuing oppression of women and other marginalised groups, an increasing divide between rich and poor, and rapid environmental degradation.[65]

Their concerns are similar to those outlined by Alston when he deplored the myopia of international lawyers.[66] His list included the poverty of over a billion people, the malnourishment of 160 million children, the destitution of some 30 million refugees and displaced people, the persecution of minorities, human rights concerns more generally, the problem of regulating the activities of transnational corporations beyond clearly criminal activities, the spread of diseases that remain within national borders, and the diminishing public power of the UN.[67] Alston contrasts his agenda with the priorities identified by trans-governmentalist Anne Marie Slaughter: 'terrorism, organized crime, environmental degradation, money laundering, bank failure, and securities fraud'.[68] Slaughter's list is read by Alston as confirming his view that the present priorities for international law are those determined by Northern states and transnational business interests and that, in this agenda, free market values can legitimately trump other values, including human rights.[69] That is, in the context of economic globalisation, the private values of international commercial law have achieved an invigorated ascendancy over the public fairness values of the UN Charter system.

The question of what *should* constitute a survey course in international law has been agonised over for many years,[70] but the international problems of the late 20th century present new dilemmas. As Richard Falk describes it, at the heart of this new global conjuncture is the problem that the globalisation of capital and the power of market forces 'is proceeding without real accountability, on the basis of organizing the elements of finance and production according to the criteria [*sic*] of efficiency'.[71] Thus the foremost legal issues for today's global community lie at the intersection of the private imperatives of free market

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65 Weston, Falk and Charlesworth, above n 41, vii.

66 Alston, above n 15.

67 Ibid 439.

68 Ibid, citing Anne Marie Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.

69 Alston contends that the means of free market globalisation have themselves taken on the status of values: privatisation, deregulation, reliance on the free market as a mechanism that allocates value, minimal government and minimal international regulation, except with respect to narrowly defined law and order functions: ibid 442–3.

70 See, eg, Richard Falk, 'New Approaches to the Study of International Law' (1967) 61 *American Journal of International Law* 477; Panel, 'Teaching International Relations and International Organizations in International Law Courses: Constructing the State-of-the Art International Law Course' (1993) 87 *American Society of International Law Proceedings* 398.

71 Panel, above n 70, 398 (Remarks by Richard Falk).

globalisation and the public interest in democratic accountability and humanitarian values. The Australian Government's recent antipathetic criticism of the UN human rights treaty committees can perhaps be understood as a part of a global trend away from public interest values.[72]

In the context of Australian legal education, an examination of the prescribed texts for the survey courses in international law gives a strong indication of course content.[73] In most courses, one of two cases and materials compilations was prescribed: either the book by David Harris[74] (in 14 courses) or by Martin Dixon and Robert McCorquodale[75] (in 6 courses). In addition, one or more textbooks were prescribed or strongly recommended. Two textbooks stood out: the book edited by Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi offering an Australian perspective on public international law[76] (in 8 courses) and Ivan Shearer's edition of *Starke's International Law*[77] (in 6 courses). Four other texts were prescribed — those by Michael Akehurst,[78] Martin Dixon[79], Harry Reicher[80] and Malcolm Shaw.[81] It is notable that no course prescribed the problem-oriented course-book of Weston, Falk and Charlesworth.[82]

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72 Minister for Foreign Affairs, Attorney-General and Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Improving the Effectiveness of United Nations Committees*, Joint Media Release, FA97 (29 August 2000). The review found that the UN human rights treaty bodies 'need a complete overhaul' in order, inter alia, 'to ensure adequate recognition of the primary role of democratically elected governments and the subordinate role of non government organizations': at 1. The review was announced by the Australian Government on 30 March 2000. The announcement followed criticism by the Committee on the Elimination of Racial Discrimination of amendments to the *Native Title Act 1993* (Cth) and of mandatory sentencing laws in the Northern Territory and Western Australia, which the Committee warned were racially discriminatory. No terms of reference for the review were ever made public, nor was there any call for public submissions: (2000) 125 *Unity News: Weekly News Summary* 1–2 <http://www.unaa.org.au/news125.html>.

73 This information was made available to me for 25 of the 26 survey courses offered in 2000. Unfortunately, I had no response to my survey from the University of Notre Dame, Australia.

74 D J Harris, *Cases and Materials on International Law* (5th ed, 1998).

75 Martin Dixon and Robert McCorquodale, *Cases and Materials in International Law* (3rd ed, 2000).

76 Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (3rd ed, 2000).

77 Ivan Shearer, *Starke's International Law* (11th ed, 1994).

78 Malanczuk, above n 43.

79 Martin Dixon, *Textbook on International Law* (1990).

80 Harry Reicher (ed), *Australian International Law: Cases & Materials* (1995).

81 Malcolm Shaw, *International Law* (4th ed, 1997).

82 John Gamble reported that the preliminary findings of a 1991 survey of international law teaching in the US and Canada found three texts were used in more than 80 per cent of the courses in the sample: Remarks by John King Gamble, 'Roundtable on the Teaching of International Law' (1991) 85 *American Society of International Law Proceedings* 102, 105. They were Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law: Cases & Materials* (3rd ed, 1993); Noyes Leech, Covey Oliver and Joseph Sweeney, *Cases and Materials on the International Legal System* (1973); and Burns Weston, Richard Falk and Anthony D'Amato, *International Law and World Order: A Problem-Oriented Coursebook*. As Gamble notes, each is quite different in orientation. This contrasts with the similarity of the texts used in Australia.

Judging from these teaching texts, and as Simpson has also observed,[83] contemporary survey courses tend to repeat the structure and topics that have animated international legal education since its inception in the 19th century. The traditional course structure tells a story of colonial territorial acquisition followed by a beneficent process of self-determination,[84] of state-centred consent-based law-making in which all states are equal,[85] and of rules that profess to justly regulate the use of force by legitimating some forms of inter-state violence and outlawing others.[86] In the absence of critical thinking and dissenting perspectives, this traditional narrative normalises the hierarchies of the global community in keeping with the ubiquitous wording of article 38(1)(d) of the *Statute of the International Court of Justice* which recognises only those principles of law accepted by 'civilized nations'. If unquestioned, the classic discourse of European superiority and Third World backwardness sustains the continuing pillage of Third World resources for First World consumption in the name of free trade. It also justifies nuclear weapons for the elite few, fails to acknowledge the structural bias emanating from hierarchies of gender, race, culture, class and sexuality, and overlooks the formal inequalities between states that are constitutionally entrenched within both the UN and Bretton Woods systems. Finally, it ignores US exceptionalism and the more recent Australian version of the same.[87] That is, public law is not necessarily superior to private law in promoting economic and social justice over the interests of private elites, although at least fairness obligations are recognised as having a legitimate place in the public domain.

I am suggesting that the traditional curriculum of public international law values the existing 'order' of hierarchy over economic and social justice. The uncritical endorsement of global hierarchies of power suggests to students that the hierarchies are immutable and, further, that they function in the public interest. As Leslie Bender has argued with respect to the first year law curriculum, the 'hidden message' of the basic international law curriculum is that law's primary role is to defend the reproduction of the status quo, rather than to promote justice.[88] Therefore, whether by design or myopia, at the beginning of the 21st century even the *public* international law curriculum of the survey courses can be read as more aligned with Slaughter's neo-liberal free market agenda than with the public interest agendas of Alston, Weston, Falk and

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83 Simpson, above n 2, 87. Simpson refers to Hirst, 'The Global Economy — Myths and Realities' (1997) 73(3) *International Affairs* 409, for a critique of these models.

84 *Contra* Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social & Legal Studies* 321.

85 *Contra* Surakiart Sathirathai, 'An Understanding of the Relationship Between International Legal Discourse and Third World Countries' (1984) 25 *Harvard International Law Journal* 395.

86 *Contra* Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.

87 See, eg, Minister for Foreign Affairs, above n 72.

88 Leslie Bender, 'Hidden Messages in the Required First-Year Law School Curriculum' (1992) 40 *Cleveland St Law Review* 387, 392–4.

Charlesworth. This alignment of public and private, in the interests of the private, is achieved by leaving the hierarchies and values of the traditional curriculum intact, which serves to legitimate in legal thinking vast disparities in wealth and power. This outcome resonates with Alston's handmaidens analogy of a profession in the service of global capital.

Of course, I am overstating the problem to some extent in order to make my point. Most Australian survey courses include supplementary materials in addition to the prescribed texts, and handmaidens have clearly not selected all of this material. For example, the Flinders University course provides additional materials containing feminist, post-colonial, queer and indigenous perspectives. Further, the supplementary materials used in the public international law course at the University of New South Wales vary depending on the lecturer, not only giving students a choice about the emphasis they want to pursue, but also indicating that there are, legitimately, a diversity of views about what is 'basic'.[89] However, supplementary materials still risk conveying the message that their import is secondary or marginal to that of the main text.

International legal education needs to bring the assumptions and goals of international law into critical focus in order to shift the possibility of economic and social justice from the realms of aspiration to the practice of law. Survey courses must include new and emerging international legal developments, as well as diverse mainstream and critical theoretical perspectives, in order to overcome their myopia in the face of globalisation and ensure critical examination of the values being promoted. The curriculum needs to unsettle the inherited 'givens' of classic international law in order to question its structure, content and underlying assumptions,[90] and open the possibilities of its re-imagination.[91] In the absence of critical reflection, students are not equipped with the skills that will enable them to practise alternatives. Legal educators need to reverse the trend, documented in US law schools, whereby law students' social justice goals are significantly eroded in the course of legal education and

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89 While Harris, above n 74, is used as the common textbook, the focus of the subject 'Public International Law' at the University of New South Wales alternates, depending on the lecturer, between international economic law and natural law foundations, human rights and indigenous peoples, or the use of force and humanitarian issues.

90 Dianne Otto, 'Integrating Questions of Gender into Discussion of "Use of Force" in the International Law Curriculum' (1995) 6 *Legal Education Review* 219, 225.

91 In David Kennedy's analysis, the discipline 'discourage[s] scrutiny of what is most in need of reflection and creative study' leaving it 'harnessed to the management rather than the alteration of the international political order': David Kennedy, 'International Legal Education', above n 33, 374.

replaced with more self-interested and business oriented values.[92] There is plenty of anecdotal evidence that this trend occurs in Australian law schools as well. David Kennedy describes this tendency as the 'bureacratization of progressive and expansive aspirations'[93] and, interestingly, also links it to the pressure 'to go private rather than public' in the choice of international legal careers.[94]

In practical terms it must be accepted that it is impossible to comprehensively teach public international law in a single course. As Blackett argues, the challenge is to teach students what they need to know so that they are equipped to learn without being taught, rather than aiming to teach them everything they may ultimately need to know.[95] Therefore, as many have suggested before me, concentrating on sinking 'a few deep shafts' is preferable to attempting to survey the entire field.[96] Thirty years ago the 'covering the field' approach was disparagingly described as 'impressionism' by Falk,[97] and Simpson has weighed in more recently calling it 'the romantic mode' of 'would-be foreign correspondents'.[98] Sinking some deep shafts could be done by focusing in depth on contemporary case studies, like those in the lists of Alston, and Weston, Falk and Charlesworth, which would allow legal problems to be examined in context and from a range of different perspectives. This alternative falls loosely into the category of 'perspectives' courses, which set out to challenge how students think about law, and can thus lead to a greater appreciation of different understandings of law including its social justice potential, and a better grasp of the complexities and possibilities of legal pluralism.[99] A case study approach also lends itself to a dialogic learning environment, as discussed earlier.[100]

Another alternative would be to organise the course around significant dualities or tensions within international law that have been identified by various critical scholars,[101] such as the themes of community and autonomy

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92 See Robert Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (1989) 34–5. Stover's use of the term 'public interest' was consistent with the notion of social justice; Guinier *et al* found that many more women than men have public interest aspirations in the first year of law school but that by the third year, while this aspiration had decreased for both women and men, the drop for women was significantly greater: the women had become more 'like men': Guinier *et al*, above n 28, 40–1. Gidon Gottlieb senses an 'ever more assertive pursuit of utilitarian and lucrative ends by a student body coldly committed to self-interest': Remarks by Gidon Gottlieb, 'Reexamination of the Teaching of International Law' (1984) 78 *American Society of International Law Proceedings* 198, 212.

93 David Kennedy, 'International Legal Education', above n 33, 368.

94 Ibid.

95 Blackett, above n 8, 68.

96 Harold Berman, 'Special Feature: The State of International Legal Education in the United States' (1988) 29 *Harvard International Law Journal* 239, 241. Simpson sees the solution 'in a severe, probably traumatic, narrowing of focus followed by a broadening of perspective': Simpson, above n 2, 89.

97 Richard Falk, 'New Approaches', above n 70, 479–80.

98 Simpson, above n 2, 88.

99 Blackett, above n 8, 67–8.

100 See above Part II.

101 James Boyle, 'Of Ideals and Things: International Law Scholarship and the Prison-House of Language' (1985) 26 *Harvard International Law Journal* 327.

(sovereignty),[102] or of hard law (legal formalism) and soft law (justice),[103] or of apology and utopia.[104] Conceptualising international law as a system of dualities draws on the structuralist linguistic theory of Ferdinand de Saussure[105] and the poststructuralist theory of Jacques Derrida.[106] Both theories explain how meaning in language is created by a dualistic relationship between any particular concept and its 'other'. For example, what we understand as 'community' depends on what we understand as 'sovereignty'. Derrida's insight is that the binaries that create meaning are ordered hierarchically, such that they are not equally valued, so one side of the dualism is dominant and the other is subordinate.[107] The dualisms of language therefore operate as a foundation for the construction of hierarchies in political and economic life, and in law. A border is established that separates the two components of every dualism and conceals the interrelatedness that is crucial to the project of dismantling the hierarchy, as discussed earlier with respect to the dichotomy of public and private.[108] Disrupting dualisms in legal education is an important foundation for critical legal thinking and for reshaping the hierarchies, old and new, of international law. In the context of critically examining the recent processes of globalisation, a survey course concerned with economic and social justice could be organised around deconstructing the dualities of domestic and international, economic and political, local and global, North and South, and of course, public and private.

Another way to utilise dualistic cartographies to question taken-for-granted hierarchies would be to position a course in the spaces at the margins of the dualities or in the tensions *between* them, rather than moving backwards and forwards from one to the other.[109] In practice this could be done by choosing case studies that are physically located in the spaces created between the dualities of globalisation. Ruth Buchanan refers to such localities as 'borderlands' and uses the example of the industrial zones dominated by the *maquiladora* industry along the US–Mexico border as borderland space.[110] She argues that the *maquilas* constitute a potentially transformative site from which

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102 Simma and Paulus, above n 3.

103 In David Kennedy's view, '[w]ithout a sense of *both* the distinctiveness of consent *and* justice and of their inseparability, sources discourse could not reflect both sovereign autonomy and equality': David Kennedy, 'The Sources of International Law' (1987) 2 *American University Journal of International Law & Politics* 1, 28.

104 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

105 Ferdinand de Saussure, *Cours de Linguistique Generale* (2nd ed, 1985). See further Margaret Davies, *Asking The Law Question* (1994) 231–2.

106 See, eg, Jacques Derrida, *Positions* (Alan Bass trans, 1981).

107 Ibid 41.

108 See also Dianne Otto, 'Rethinking the "Universality" of Human Rights Law' (1997) 29 *Columbia Human Rights Law Review* 1, 39–40.

109 Angela Harris argues that the task for Critical Race Theory is to work in the tensions between modernism and postmodernism, rather than opting for one that implicitly involves rejection of the other: Angela Harris, 'Foreword: The Jurisprudence of Reconstruction' (1994) 82 *California Law Review* 741, 744.

110 Buchanan, above n 22, 2.

to analyse the local effects of globalisation and open up its equitable potential.[111] This pedagogical strategy resists dualistic conceptions of public and private by moving into a hybrid zone that has been created by the public for unregulated (private) market forces. The hybrid locality opens new opportunities for analysing how public and private arenas interact, and for theorising the potential for promoting fairness obligations in this interaction.[112]

At the heart of the project of imagining international law as social and economic justice is the problem of the diminishing public power of the UN Charter system and the increasing power of market forces.[113] Morton Horwitz traces an earlier demise of the public to the post-World War II reaction to totalitarianism and in 1982 predicted a bleak future for the public realm, which he saw as sinking into oblivion as private self-interest gained in ascendancy.[114] The end of the Cold War compounded many of these earlier difficulties, prompting strident declarations of the triumph of capitalism and the further demise of the public sphere.[115] Fortunately, however, globalisation has not only benefited egoistic private interests. It has also provided the means for the emergence of many civil society movements and organisations that are intent on promoting public interest agendas.[116] However, in the domain of international law, the borders between the public and the private appear increasingly fortified. Private international law is rapidly developing without apparent reference to economic and social justice. This is leading to a deepening of the public–private divide that is being reflected in international legal education. As I have said, the only survey course in Australia that attempts to cross some of these boundaries is offered at the University of Sydney.[117]

It is crucial that legal educators encourage students to recognise the political implications of the dualisms and boundaries that are constructed by the topics and practices of international legal education, so that the linkages across the boundaries become visible and the hierarchies contestable. In the current climate of economic globalisation, the dominant narratives of both public and private international law erase the linkages between them — between, for instance,

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111 Ibid.

112 See also Dianne Otto, 'Everything is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law' (1999) 5 *Australian Journal of Human Rights* 1, 32.

113 Abi-Saab, above n 5.

114 Horwitz, above n 11, 1427.

115 See, eg, Francis Fukuyama, *The End of History and the Last Man* (1992). Fukuyama argues that the near-universal movement towards the adoption of liberal democratic political institutions and market-oriented economies constitutes 'the end of history' in the sense of the evolution of human societies.

116 Thomas Weiss and Leon Gordenker, *NGOs, The UN and Global Governance* (1996); Richard Falk, 'The Global Promise of Social Movements: Explorations at the Edge of Time' (1987) 12 *Alternatives* 173.

117 The University of Sydney, above n 55. As the course description explains, 'the unit provides an opportunity to consider the implications for Australia of globalisation, from the perspectives of both private and public international law'. There are, however, some other courses that attempt more significant boundary crossings: see discussion below nn 158–66 and accompanying text.

human rights and economic globalisation,[118] economic and social cooperation and international business transactions,[119] resort to the use of force and the policies of international economic institutions,[120] and international labour standards and free trade.[121]

But linkage strategies, while valuable, may also have their limitations, as Sundhya Pahuja argues.[122] They are problematic to the extent that they confirm rather than contest existing borders and, therefore, fail to actually have a transformative impact on the regimes they seek to link. Pahuja, like Buchanan, urges the necessity of examining 'in-between spaces',[123] not only because they challenge the boundaries of the present, but also because they take us beyond the confines of dichotomous thinking to a deeper analysis of the multiplicitous interactions between diverse networks of public, private and hybrid forms of power. As those in the in-between spaces become visible and vocal, the crucial importance of social justice values in all areas of law becomes apparent.

IV COUNTERING HIERARCHIES IN INTERNATIONAL LAW ELECTIVES

Just as the approach and coverage of survey courses shape students' views of the role and potential of international law, so does the range and focus of specialised courses. In 1960, each of the then seven law schools in Australia offered just one (survey) course in international law.[124] The introduction of specialised international law electives, in addition to the survey courses, began with the substantial increases in funding for staff development that occurred during the 1960s.[125] Shearer notes that the first of these was a course in

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118 See generally Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Toward the Harmonization of International Law' (1997) 91 *American Journal of International Law* 663; Panel Discussion, 'Markets and Women's International Human Rights' (1999) 25 *Brooklyn Journal of International Law* 141; Barbara Stark, 'Women and Globalization: The Failure and Postmodern Possibilities of International Law' (2000) 33 *Vanderbilt Journal of Transnational Law* 503.

119 See generally Brad Kieserman, 'Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act' (1999) 48 *Catholic University Law Review* 881.

120 See generally Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443.

121 See generally Jennifer Johnson, 'Public–Private Convergence: How the Private Actor Can Shape Public International Labor Standards' (1998) 24 *Brooklyn Journal of International Law* 291; Panel Discussion, 'Recent Development: The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements' (1997) 12 *American University Journal of International Law & Policy* 815.

122 Sundhya Pahuja, 'Trading Spaces: Locating Sites for Challenge within International Trade Law' (2000) *Australian Feminist Law Journal* (forthcoming, copy on file with author). Pahuja argues, using the example of linking human rights and international trade agreements, that the result is often side agreements that do not challenge the conceptual separation of the two areas.

123 Ibid. Pahuja borrows the term 'in-between' space from Homi Bhabha, *The Location of Culture* (1994) 1.

124 Crawford, above n 54, 184. One university in each state and the Australian National University had a law school.

125 Shearer, 'The Teaching of International Law', above n 54, 77.

international organisations offered by the University of Sydney in 1961.[126] According to James Crawford's 1984 survey, each of the 11 Australian law schools operating at that time[127] offered a survey course and, between them, a total of 17 specialised courses at the undergraduate level.[128] That is, besides offering a basic course in public international law, law schools were offering an average of 1.5 additional international law electives, although they were not all offered every year.[129] In 2000 the 26 Australian law schools in my study offered a combined total of 185 international law electives at the undergraduate level, in addition to the survey course (see Table 1). This means that, on average, law schools in 2000 offered an additional seven specialist international law electives or, including the survey courses, an average of eight international law options for students to select from. This result indicates a rapid growth in international law electives since 1984, concentrated mainly in the 1990s, which, I have no doubt, is also reflected at the post-graduate level, although my study did not include this level.[130] While it should be kept in mind that not all of these subjects are available to students every year, these figures represent a significant development in international legal pedagogy. This result compares favourably with the ABA Survey that 90 per cent of US law schools offered five or more international law courses.[131]

However, comparing the two surveys (Crawford's and my own) in this way is somewhat misleading. Crawford excluded courses in conflicts of law and international trade law (those courses 'with an emphasis on private and commercial relations'[132]), although he notes that most Australian law schools did offer courses in these two areas in 1984.[133] Also, Crawford did not include comparative courses or subjects offering international mooting participation in his survey, while I did. But even accounting for these differences, it seems safe to say that the number of specialised undergraduate courses in international law has at least doubled between 1984 and 2000, at the same time as the number of law schools has itself more than doubled. This still represents a significant surge of interest in international law at the undergraduate level.

Using Crawford's 1984 categories as a starting point, I have grouped the 185 international law electives into 17 categories (see Table 1), which give an indication of general trends, although many of the categories are not watertight. For example, there are obvious overlaps between conflicts of law and

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126 Ibid.

127 Crawford, above n 54, also included LaTrobe University's Legal Studies course in his survey, although it was not part of an LLB programme. Therefore his survey actually covered 12 institutions.

128 Ibid 197–201. Note, Crawford's chart includes undergraduate and postgraduate courses, and the Legal Studies course offered at LaTrobe University: at 183–4.

129 Ibid 184.

130 Crawford's survey did include postgraduate courses. He found there were 15 postgraduate courses in international law offered in 1984: ibid.

131 Barrett, above n 40, 992.

132 Crawford, above n 54, 183.

133 Ibid 201.

international commercial law, between international commercial law and international trade and economic law, and between comparative law and Asian, Pacific or European legal systems. In fact, what became clear in my attempts to group them was that the category of 'international law', as well as its specialist sub-categories, was considerably porous. While I have taken a broad approach by including both public and private areas of international law, which some may consider over-inclusive, the better view is that it is rather less than comprehensive. By not including courses in domestic law that have been 'internationalised', in the sense that they include aspects of international law for comparative or other purposes,[134] I have under-represented the reach and importance of international law in legal education today. Increasingly, international law has implications for most, if not all, areas of domestic law, which necessitates a major rethinking of the way in which its domestic application is theorised.[135]

However, getting back to comparing the two Australian surveys, if Crawford's assertion is accepted — that conflicts and trade law electives were offered by most law schools in 1984 — a comparison with his chart reveals that the growth has taken place in four main areas: Asian or Pacific law (26 courses); international commercial or business law (17 courses) (as distinct from international trade law); European Union law (10 courses); and international environmental law (eight courses). The conclusions that can be drawn from this outcome are highly speculative because my survey was not qualitative. This means that the 'private guerillas' could not be identified. However, my speculation is that the new specialisations are primarily concerned with aspects of private international law — that is, law concerned with commercial transactions between private, public and hybrid entities. This can safely be said about the courses grouped together in the category of international commercial or business law. However, I think that free market globalisation also accounts for the rapid growth in courses concerned with Asian or Pacific legal systems, the increased interest in European law and the development of courses concerned with international environmental law.[136] While these three categories cannot be safely categorised as singularly concerned with the promotion of private values,

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134 W Michael Reisman emphasises that a different approach to law is required to prepare students for practicing law in a globalised world. One of the changes he promotes is that courses must be built on the notion of a comprehensive transnational legal system rather than, as traditionally, on the notion of an autonomous national legal system: W Michael Reisman, 'Designing Law Curricula for a Transnational Industrial and Science-Based Civilization' (1996) 46 *Journal of Legal Education* 322, 327.

135 Karen Knop suggests that theories of comparative law have much to offer in understanding the domestic interpretation of international law and its potential to 'legitimate international law through a process of particularization and justification': Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501, 535.

136 There were no international environmental law courses offered in 1984 as part of an LLB curriculum. However, Crawford does note that international and comparative environmental law and policy was offered in the department of Legal Studies at LaTrobe University: Crawford, above n 54, 199.

and some courses within them might be better described as public–private hybrids, my considered guess is that private values predominate. While Australian law schools have retained a significant commitment to teaching public international law, as evidenced by the survey courses and by 80 per cent of law schools offering human rights law (up from 54 per cent in 1984), my study suggests that this commitment is overshadowed by an increasing emphasis on private values in international law. If all of the 185 specialised courses are grouped into public–hybrid or private–hybrid areas of international law, 124 or 67 per cent cover primarily private international law topics. That is, most of the growth since 1984 has been in areas of private–hybrid international law which again tends to confirm Alston's theory that international law is being employed to serve the elite interests of market expansionism, rather than to promote the public values of human rights and equity.[137]

A similar development has taken place in US law schools, although it appears to have occurred earlier than in Australian law schools. John Barrett observes that one of the greatest areas of growth in the period between the 1963–64 Edwards Survey[138] and the 1996 ABA Survey[139] was in the number of international business law courses offered.[140] While the 1963–64 survey revealed that 21 per cent of law schools offered international business law, this had risen to 91 per cent in 1996. The student editors of the *Harvard Journal of International Law's* 1988 symposium on international legal education note that the growth in private and transnational law was mostly a product of the 1960s, although they also acknowledge that this expansion continued during the 1980s.[141] They observe, quoting Detlev Vagts, that '"international law" has become privatized and domesticated to such an extent that one might validly ask … whether there actually are any international lawyers any more'.[142] By this they mean that the commercial practice of international law has demanded specialisation along the same lines as domestic legal specialisations — tax, antitrust and litigation, for example — which has made a nonsense of the notion of an 'international lawyer' in any comprehensive sense.[143]

My point is to question the messages that are conveyed to students by the diminishing pedagogical space devoted to public international law and the increased attention directed to the private law of commercial transactions. David Kennedy has observed that as a Harvard student in the 1970s he understood that the international law subjects offered were arranged along a soft–hard continuum, from Public International Law and International Legal Process

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137 Alston, above n 15.
138 Edwards, above n 63.
139 ABA Survey, above n 63.
140 Barrett, above n 40, 992.
141 Student Editors, above n 35, 300–1.
142 Ibid 300. See also Detlev Vagts, 'Are There No International Lawyers Any More?' (1981) 75 *American Journal of International Law* 134.
143 Vagts, above n 142.

through to Transnational Law and International Business Transactions.[144] While some other students adopted a less nuanced graduation, in that they merely distinguished public from private, Kennedy maintains that they all 'knew' that the former was marginal and the latter was linked to employment in 'real' legal practice.[145] Although I think that Australian law students have somewhat differently valued public international law in the past, I fear that Kennedy's observations have become more apt in the current Australian political climate. Crawford noted in 1984 that one factor prompting the proliferation of specialised electives in Australia was the pressure that students felt to take subjects that were considered 'useful for professional purposes (especially the commercial law and taxation subjects)'.[146] But he also noted the parallel development of more specialised public international law electives, like human rights and humanitarian law, which he linked to growing domestic interest in these areas.[147] Therefore it is probable that the stigmatisation associated with the 'public' in the context of US legal education was not replicated in Australia. However, given the more recent dismantling of the domestic public sector in Australia, where privatisation, deregulation and decreased social spending are being pursued at the behest of free market economic policies,[148] it is hardly surprising that Australian law students are coming to view the public with increased scepticism. But how much should legal education bend to suit the political exigencies of governments and markets, and how much should it be shaped by the more enduring values associated with educating for international citizenship?

A partial resolution of these concerns may be achieved by making the survey courses in public international law a prerequisite for the study of the more specialised options. While this course of action has been suggested before, its advocates have been motivated largely by concerns about the quality of international legal education and its coherence.[149] For example, Myres McDougall has argued that specialisations are a nonsense without understanding the overall community process because they are only sub-parts of the process.[150] Others, like Mary Ellen O'Connell, have urged that international law should be a required course because of the more general jurisprudential importance of the subject.[151] While I have a great deal of sympathy for these arguments, my view of the advisability of this approach is predicated on a critical rethinking of the content and didactic method of the survey course, along the lines that I have already discussed. However, I would also argue that this strategy is insufficient

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144 David Kennedy, 'International Legal Education', above n 33, 366.

145 Ibid 367.

146 Crawford, above n 54, 185.

147 Ibid.

148 See, eg, Linda Hancock (ed), *Women, Public Policy and the State* (1999).

149 Shearer, 'The Teaching of International Law', above n 54, 78; Crawford, above n 54, 185; Vagts, above n 142, 136–7.

150 Remarks by Myres MacDougal, 'Roundtable on the Teaching of International Law' (1991) 85 *American Society of International Law Proceedings* 102, 121.

151 Commentary by O'Connell, above n 47, 112–13. Simpson, above n 2, 76–7, makes a similar point.

by itself and that the specialised courses must be rethought so that the boundaries between public and private are contested and traversed, and the hybrid spaces explored. This rethinking would not be achieved by simply mandating the prior completion of a survey course.

The rethinking involved also requires something more than encouraging students to identify linkages and interconnections between public and private realms. As feminist analyses of the gendered split between the public (of politics and economics) and the private (of the domestic or household) have revealed, the public–private 'divide' is an *interaction* of contested boundaries and competing agendas.[152] The danger of relying too heavily on the distinction to explain women's exclusion from public spheres is that the two spheres become reified,[153] as I suggested earlier.[154] For example, locating women's marginality in the privacy of motherhood and the domestic realm led, understandably, to strategies that sought to expand the public to be more inclusive of the private sphere.[155] These strategies tended to foreclose the possibility of also utilising opportunities for women's advancement in the private sphere. They also tended to reinforce the erasure of women's existing participation in the public sphere, as illustrated by Shelley Wright's example of women's development projects.[156] She observes that many development projects supported by international financial institutions have ignored the central role of women in the agricultural and market economies because too much reliance has been placed on the Western construct of the gendered public–private divide, which erases the presence of women in public spheres.[157]

In the same way, theorising the public–private divide in international law as a coherent and stable boundary that, for example, helps to explain the growing gap between the rich and the poor in the context of globalisation, brings with it the dangers of reification. If the duality is not disrupted, there is the very real possibility that the threats to economic and social justice presented by globalisation will be misunderstood, and the potential of private international law to promote social justice values will remain unexplored. Crawford in 1984 noted the irony that while law schools were busily developing separate courses in private and public international law, the links between private and public were

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152 Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) 56–9.

153 Karen Engle, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights' in Dorinda Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (1993) 143, 148–9.

154 See above n 10 and accompanying text.

155 Rebecca Cook, 'Accountability in International Law for Violations of Women's Rights by Non-State Actors' in Dorinda Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (1993) 93.

156 Shelley Wright, 'Interdisciplinary Approaches to International Economic Law: Women and the Global Economic Order: A Feminist Perspective' (1995) 10 *American University Journal of International Law and Policy* 861.

157 Ibid 870–1.

becoming closer.[158] Yet the separation has been maintained and even consolidated, as my study illustrates. The artificiality of the public–private compartmentalisation and the private interests that it serves are cleverly illustrated by Pahuja's analysis of the debate in international trade law about what constitutes a 'subsidy'. As she argues, the debate exposes the myth of the (private) market's neutrality and forces trade theory into the (public) politics of labour regulation.[159] This in turn opens the potential for labour standards to be integrated into international trade law and thus creates new spaces where economic and social justice can be promoted. While earlier feminist work was largely concerned with bringing the private into the public realm, Pahuja's example is a timely reminder that there is also the prospect of locating the public in the so-called private. In sum, it needs to be recognised that theorising the public and private spheres of international law as autonomous, hampers our ability to understand and address the full complexity of international legal problems.

Therefore, in order to equip students with the skills to pursue economic and social justice in their practice of international law, educators need to critically rethink the pedagogical boundaries that separate the public and the private in their many manifestations. This includes boundaries between human rights and trade law, between international peace, security and economics, between international citizenship and private entrepreneurialism, and between the international and the domestic spheres. Such rethinking will bring diverse and competing conceptions of globalisation into international legal education and promote more complicated analyses of the many intersecting elements that shape global legal regulation.[160] Legal pedagogy needs to respond not only to the demands of the corporate sector, but also to the growing demand for legal assistance from those whose livelihoods and living standards are threatened by market-driven globalisation.[161]

In addition to the efforts of the private and public guerillas, new courses dealing with globalisation are traversing some of the traditional borders of international legal education. In 2000, the Faculty of Law at the Queensland University of Technology introduced a compulsory first year unit called 'Laws and Global Perspectives'. The course sets out 'to introduce and explain the fundamental structures, principles and vocabulary of Comparative Law, Public International Law and Private International Law; and examine their relevance to contemporary legal practice and legal thinking'.[162] The course objectives include

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158 To illustrate his point, Crawford refers to the increasing use of uniform conventions to regulate matters of private international law, particularly in the area of international trade, like those developed under the auspices of the Hague Conference on Private International Law: Crawford, above n 54, 178–9.

159 Pahuja, above n 122, 18.

160 Blackett, above n 8, 72.

161 Bernabe-Riefkohl, above n 18, 158–9.

162 Queensland University of Technology, *Handbook 2001*, 'LWB144 Laws And Global Perspectives' <http://www.qut.edu.au/publications/hbk_current/units/LW/LWB144.html> at 10 December 2000.

locating the Australian legal system within an international context, and critically analysing the different value systems that underlie legal authority in selected legal systems. The two examples of 'race' and 'the family' are used to help students think critically in a cross-cultural context. Further, in 2001, Pahuja and Buchanan will teach an elective called 'Globalisation and the Law' simultaneously at the University of Melbourne and the University of British Columbia.[163] The course will 'consider the changing role of law (both domestic and international) in the global economy'. Its modules include 'trade and non-governmental organisations, human rights law and counter-hegemonic globalisation', and 'immigration'.[164] These courses not only question the boundaries between public and private that I have been discussing, but also recognise the increasingly porous nature of the borders between domestic and international law.

A different but related example of refusing the compartmentalisations of traditional legal education is a subject called 'Australian and Asian Jurisprudence' offered at Griffith University.[165] It is a compulsory fourth year subject for students who combine law with a number of Asian studies and language degrees. The subject is designed to help students integrate their legal knowledge with the knowledge they have acquired in other disciplines. Students are expected to cross disciplinary boundaries in their exploration of Asian jurisprudence, and to apply the full range of their knowledge in the specific context of their preferred Asian jurisdiction. Similar developments, which challenge students to think across traditional boundaries, are also apparent in new subjects offered by some US law schools. Alberto Bernabe-Riefkohl identifies three such courses that are 'global in interest and practicality': 'Law, Conscience and Non-Violence' (Georgetown University); 'Legal Activism' (George Washington University); and 'Gender, Cultural Differences and International Human Rights' (American University).[166] These courses all challenge students to understand law in the plural and dynamic context of globalisation, while also drawing attention to the specific local legal problems that emanate from these multiple processes. They emphasise law's role in promoting social change and the importance of its responsiveness to social and economic injustice.

In addition to spawning a proliferation of private international law electives and efforts to internationalise domestic curricula,[167] globalisation has opened a

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163 University of Melbourne, *Handbook 2001*, '730-446 Globalisation and the Law' <http://www.unimelb.edu.au/HB/subjects/730-446.html> at 10 December 2000. The subject will be taught using multi-media. Ruth Buchanan also teaches a course at the University of British Columbia called 'The Regulatory Impact of Globalization'.

164 University of Melbourne, '730-446 Globalisation and the Law' above n 163.

165 Griffith University, *Subject Guide*, 'LAW4062: Australian and Asian Jurisprudence' <http://passerver2.ua.gu.edu.au/STIP/STIPSubjLimiter_el.html> at 10 December 2000.

166 Barnabe-Riefkohl, above n 18, 155.

167 Barrett canvasses the advantages and disadvantages of this approach, and also mentions that an ABA project to prepare materials for internationalisation of the domestic curriculum is under way: Barrett, above n 40, 997–9.

market in legal education itself. Australian and US law schools are eager to export their courses,[168] which means exporting the values that those courses encapsulate as well.[169] Thus, absent critical interrogation, international legal pedagogy has an *expanding* potential to uncritically reproduce the global hierarchies of the present. On the other hand, globalisation brings students and legal educators from around the world into Australian and US classrooms, which has opened the real possibility of making domestic international legal education truly multinational and inclusive. Both of these movements, outwards and inwards, open new opportunities for furthering the social justice possibilities of globalisation in legal education. At the same time as students learn about negotiating international contracts, they can consider how those same contracts relate to legal principles that promote public interest and social justice values. Similarly, at the same time as students learn about state responsibility for the promotion and protection of human rights, they can consider the role that international law could play in holding private actors accountable for human rights violations. When such intersections are considered by a diverse group of students who are empowered by dialogic education, the possibility of alternative practices must surely become a central dynamic of legal education.

The pedagogical challenges of globalisation are only partially met by introducing a few new electives. It is also necessary to rethink existing specialisations in international law to ensure that border crossings are promoted and explored in all areas of international legal education. The classroom is a site where the persistent global hierarchies of power and privilege can be questioned, dualisms can be challenged, and alternatives to the profit maximisation of global capital can be canvassed. In particular, this means drawing attention to the intersections of public and private domains of law, which will help to collapse the dualism and open the possibility of the integration of fairness obligations into private as well as public areas of law. As Buchanan suggests, we need to shift the focus from the borders to the borderlands, and insist that globalisation can be achieved equitably: that it can 'create benefits, rather than hazards', for those people who live in the borderlands.[170]

V CONCLUSION

The pedagogy, curriculum, and specialisations of international legal education help to shape the values and assumptions by which students come to imagine the role of international law and embody it in their future practice. As the globalisation of capital deepens the North–South disparities in wealth and power, the cooperative aspirations of the UN Charter become increasingly important and

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168 John Attanasio, 'The Globalization of the American Law School' (1996) 46 *Journal of Legal Education* 311, 312.

169 David Clark proposes that the US is the ideal place for situating 'global' law schools, with little apparent awareness of the hegemonic potential of his proposal: David Clark, 'Section III: Transnational Legal Practice: The Need For Global Law Schools' (1998) 46 *American Journal of Comparative Law* 261, 261–4.

170 Buchanan, above n 22, 393.

the need to practise international law with economic and social justice in mind becomes more urgent. Yet public international law, with its obligations of fairness and equity, has become increasingly marginalised as specialist courses in private-oriented international law have proliferated. The result is that international legal education risks prioritising the values of global capital, over the values of human rights and equity, in the imagination of students. This shift towards private values relocates primary responsibility for wealth redistribution, labour standards, human rights and sustainable development from the public sphere to the private sphere of the marketplace. The disastrous result, readily apparent in the widening gap between the rich and poor globally, has been slow to be reflected in new developments in legal education. Most new developments have been propelled by the demands of prospective corporate employers, rather than by the need to educate students as critical and active international citizens who are attentive to the plight of those in globalisation's borderlands. Contemporary legal education thus risks producing myopic international lawyers, as Alston has warned, who will serve as handmaidens to the elite interests of global capital.

While hierarchies of privilege will no doubt always exist in one form or another, the question is how to make them transparent and contestable, so that students are able to recognise that they are not immutable and to see the possibilities for challenging and shifting them. I have made several suggestions. The first is to use dialogic teaching methods, which enable students to become subjects of their own learning, to value diversity and pluralism, and to feel empowered to participate in the shaping of 'globalisation'. The second is to re-design the curriculum of survey courses in international law so that the classical pedagogical 'givens' are disrupted and new spaces for critical engagement with legal doctrine and practice are created, with a view to shifting the possibility of economic and social justice from aspiration to practice. Third, I suggest that the deepening division between public and private international law in legal education, evident in the proliferation of private international law electives, needs to be transformed. This transformation involves refusing the dualistic public–private separation — crossing the borders, as it were — and making room for hybrids of public and private international law by recognising the complex interactions between them. By reconnecting international law, and those who study it, with the values of economic and social justice, students will come to understand that the dualisms of classic international law prevent them from addressing current international legal problems in their full complexity. By integrating private and public concerns, international lawyers of the future will be better equipped to recognise and respond to calls for legal assistance from those in the borderlands. This result is in keeping with the spirit of the Universal Declaration of Human Rights: [171]

> Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It

[171] GA Res 217A, 3 UN GAOR (183rd plen mtg), UN Doc A/Res/217A (1948) art 26.

shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

TABLE 1

COMPARISON BETWEEN THE NUMBER OF UNDERGRADUATE INTERNATIONAL LAW SUBJECTS OFFERED IN AUSTRALIAN LAW SCHOOLS IN 1984 AND 2000*

Area of Law	*Number*		*Specific Subjects Offered in 2000*	
	1984	*2000*		
Public International Law	11	26	All Australian Law Schools† offer survey courses in public international law, except for Deakin University and the University of Canberra which have a primarily commercial orientation.	
Advanced Public International Law	2	9	ANU	International Dispute Resolution
			Griffith	International Litigation
			JCU	Lauterpacht Research Centre
			UAdel	Selected Issues in International Law
			UMelb	Current Issues in International Law
			UNSW	Legal Regulation of the Use of Force
			USyd	Advanced Public International Law
			UTas	Advanced Public International Law
			UOW	International Law & Diplomacy
Comparative Law (not Asian-specific)	0	15	Bond	Comparative Commercial Law
			JCU	Comparative Law
			Macquarie	Comparative Law
			Monash	Comparative European Legal Systems
			UMelb	Comparative Constitutional Law
			UNSW	Comparative Law
			UND	Comparative Constitutional Systems
			UQ	Comparative Law
			USyd	Comparative Law; International Comparative Jurisprudence
			UTas	Comparative Law
			UTS	Comparative Law A & B
			UWS(M)	United States Legal System
			UWS(N)	Comparative Law
			UOW	Comparative Studies in Law

* The data was collected from Law School course catalogues available through internet university handbook entries, and checked directly in all cases except Notre Dame University Australia: my attempts at making contact with this university failed.

† Australian National University (ANU); Bond University (Bond); Flinders University (Flinders); Griffith University (Griffith); James Cook University (JCU); LaTrobe University (LaTrobe); Macquarie University (Macquarie); Monash University (Monash); Murdoch University (Murdoch); Northern Territory University (NTU); Queensland University of Technology (QUT); Southern Cross University (SCU); University of Adelaide (UAdel); University of Melbourne (UMelb); University of Newcastle (UN'castle); University of New England (UNE); University of New South Wales (UNSW); University of Notre Dame Australia (UND); University of Queensland (UQ); University of Sydney (USyd); University of Tasmania (UTas); University of Technology Sydney (UTS); University of Western Australia (UWA); University of Western Sydney Macarthur (UWS(M)); University of Western Sydney Nepean (UWS(N)); and University of Wollongong (UOW).

Area of Law	***Number***		***Specific Subjects Offered in 2000***	
	1984	***2000***		
European Law and EU Law	0	10	Bond	European Law
			Macquarie	European Law & Institutions
			Monash	Comparative European Legal Systems
			UMelb	European Civil Law & Impact of the EU
			UNSW	EU: Economic & Trade Law; EU: Institutions & Legal Systems
			UQ	European Union Law
			UTas	Law of the European Union
			UTS	European Community Law
			UWS(M)	European Union Law
Asian and Pacific Law	0	26	ANU	Japanese Law; Law & Society in South East Asia; Issues in Contemporary Asian Law
			Bond	Pacific Legal Systems
			Flinders	Comparative Aspects Malaysian Law; Law & Culture in China
			Griffith	Australian and Asian Jurisprudence; Development & Law in the Asia-Pacific; Chinese Law
			Monash	Pacific Comparative Law
			NTU	Indonesian Law; Law & Society (Malaysia)
			QUT	Asian Legal Systems
			UMelb	Issues in Chinese Law; Land, Race & Law in South East Asia; Law & Civil Society in South East Asia; Law & Labour Relations in East Asia; Law & Society in China; Law & Society in Japan; Law & Society in South East Asia
			UNSW	Legal Institutions in Post-Mao China; Law & Politics in Post-Mao China; Pacific Islands Legal Systems
			UQ	Asian Legal Systems
			USyd	Chinese Law & Legal Systems
			UWS(M)	Asian Laws & Cultures
			Note: many of these are also comparative subjects	
International Humanitarian Law & Related Subjects	2	3	SCU	International Criminal Justice
			UNSW	International Humanitarian Law
			UWA	International Humanitarian & Refugee Law

Area of Law	***Number***		***Specific Subjects Offered in 2000***
	1984	***2000***	

(International) Human Rights Law	7	20	ANU	International Law of Human Rights
			Flinders	Womens Rights & International Human Rights
			JCU	Human Rights Law
			LaTrobe	Human Rights Law
			Macquarie	International Human Rights Law
			Monash	International Human Rights
			Murdoch	Human Rights in the Asia-Pacific Region
			SCU	Human Rights
			UAdel	Human Rights: International and National Perspectives
			UMelb	Human Rights Law
			UNCastle	Human Rights Law
			UNE	Human Rights
			UNSW	Human Rights Law
			UND	Human Rights
			USyd	International Human Rights Law; Philosophy of Human Rights
			UTas	Human Rights
			UTS	Human Rights
			UWS(M)	Human Rights Law
			UWS(N)	Human Rights Law
Conflict of Laws (often referred to as Private International Law in Australia)	0	21	ANU	Conflict of Laws
			Bond	Conflict of Laws
			Flinders	Conflict of Laws
			JCU	Conflict of Laws
			Macquarie	Conflict of Laws
			Monash	Conflict of Laws
			NTU	Conflict of Laws
			QUT	Private International Law
			UAdel	Conflict of Laws
			UMelb	Private International Law
			UNCastle	Conflict of Laws
			UNE	Private International Law
			UNSW	Conflict of Laws
			UND	Conflict of Laws
			USyd	Private International Law
			UTas	Conflicts
			UTS	Conflict of Laws; Advanced Conflict of Laws
			UWA	Conflict of Laws
			UWS(M)	Conflict of Laws
			UWS(N)	Conflict of Laws

Area of Law	*Number*		*Specific Subjects Offered in 2000*	
	1984	*2000*		
International Business and Commercial Law	0	16	Bond SCU UAdel LaTrobe Monash UAdel UMelb UNSW UQ UWS(M) UWS(N) UOW	Comparative Commercial Law International Business Law Comparative Corporations Law International Business Law International Business Transactions Comparative Corporations Law & Theory Commercial Law in Asia Asian Legal Systems & Business Law International Arbitration Commercial Law International Business Law Aspects of International Information Technology Law; International Business Transactions; International & Comparative Employment Relations; International Finance & Investment Law Foreign Investment Law in China; International Trade Law
International Economic Law and International Trade Law	7	14	ANU Bond Griffith Macquarie UMelb UNE UNSW UND UTas UTS UWA UWS(N)	International Trade Law International Trade & Business Law International Trade Law International Trade & Finance International Trade Law; International Trade & Economic Organisations International Trade Law International Trade Law Indian Pacific Trade Law International Trade International Economic Law; International Trade Law International Trade Law International Trade Law
International Institutions Law	5	3	Bond Macquarie Monash	Law of International Institutions Law of International Institutions International Organisations
International Environmental Law	0	8	ANU Monash Murdoch UAdel UNE UNSW UOW	Environmental Law International Environmental Law Environmental Law & Litigation International Environmental Law International Environmental Law Environmental Law International Maritime Environmental Law; International Environmental Law

Area of Law	***Number***		***Specific Subjects Offered in 2000***	
	1984	***2000***		
Law of the Sea	4	4	ANU	Law of the Sea
			UTas	Law of the Sea; Antarctic & Southern Ocean Law
			UOW	Law of the Sea
Jessup Moot	0	17	ANU	Jessup Moot
			Bond	Jessup Moot
			Griffith	Jessup Moot
			JCU	Jessup Moot
			Macquarie	Jessup Moot
			Monash	Jessup Moot
			QUT	Jessup Moot
			UAdel	Jessup Moot
			UMelb	Jessup Moot
			UNSW	Jessup Moot
			UQ	Jessup Moot
			USyd	Jessup Moot
			UTas	Jessup Moot
			UTS	Jessup Moot
			UWA	Jessup Moot
			UWS(M)	Jessup Moot
			UWS(N)	Jessup Moot
Other International Law Moots	0	5	ANU	Rousseau Moot
			Griffith	Vis International Arbitration Moot
			Monash	Vis International Arbitration Moot
			UQ	Vis International Arbitration Moot
			UWS(M)	Manfred Lachs Space Law Moot
Maritime and Shipping Law	0	8	Bond	Maritime Law
			Monash	Maritime Law
			Murdoch	Maritime Law
			QUT	Maritime Law
			UMelb	Maritime Law
			UQ	Maritime Law
			UTas	Maritime Law
			UWA	Maritime Law
Air and Space Law	5	2	Monash	Air Law
			UWS(M)	Space Law
1st Year Subjects	0	2	QUT	Laws & Global Perspectives
			UAdel	Introduction to International Law