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INTERNATIONAL AND COMPARATIVE INDIGENOUS RIGHTS VIA VIDEOCONFERENCING

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I INTRODUCTION

The authors are a team of legal academics who deliver an internationally comparative Indigenous rights course to students in Canada, the United States, Aotearoa/New Zealand and Australia simultaneously via videoconferencing technology. The international universities involved include: University of Ottawa, University of Saskatchewan, University of Oklahoma, University of Auckland, Monash University and the University of Queensland. Situated in six sites in different parts of the globe and in various time zones, teaching together demonstrates the commonality of Indigenous issues. The four countries involved in the course share a similar history of British colonisation and a similar legacy of English common law, yet each country has, in relation to its Indigenous peoples, developed differently from that same origin. The course not only explores similarities and differences in the experiences of the four jurisdictions, but also challenges both students and teachers

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to understand why those differences have occurred. This article introduces and reviews the experience of videoconference teaching in a comparative Indigenous law course. There are two significant aspects to this course on which this article will focus. The first is a review of the dynamics and logistics of teaching and delivering a course by way of videoconferencing to a number of global sites.[2] The second is an analysis of the advantages of an internationally comparative Indigenous law course. The aim of the article is to enable other law teachers to consider the suitability of videoconferencing courses for international and comparative areas of study, and to learn from the authors' experiences of the benefits and difficulties involved in this teaching mode.

II Teaching and Delivery of an Internationally Comparative Indigenous Video-Link Course

The videoconferencing course comprises 10 weekly two-hour seminars, with lecturers presenting material via high-definition video that is projected onto large screens, and facilitating discussion by flicking amongst the six participating universities as needed. In addition to the videoconferencing teaching times, each lecturer has some teaching time with their local class.[3] The changeover from expensive ISDN lines to Voice over Internet Protocol (VoIP) has allowed a growing number of universities to become involved since the course began.[4]

A *The Origins and Development of the Course*

The course taught today grew from a mutual desire of Professor Bradford Morse (University of Ottawa) and Professor Lindsay Robertson (University of Oklahoma College of Law), to teach an

[2] See generally in relation to teaching video-conferencing courses: The Knowledge Network Explorer, *Videoconferencing for Learning* (2009) <http://www.kn.pacbell.com/wired/vidconf/index.html> at 23 December 2009; University of Idaho, *Guide 10: Interactive Videoconferencing in Distance Education* <http://www.uidaho.edu/eo/dist10.html> at 23 December 2009.

[3] The additional class time each instructor has with their own classes varies in accordance with the teaching requirements of the various law schools involved. For example, the non-videoconferencing component in an Australian jurisdiction with a 13-week teaching semester comprises one additional hour with the students for each week of the 10-week videoconferencing component of the class with an additional three weeks of three-hour seminars. In one of the Canadian classes, the non-video-link class time comprises an additional two-hour seminar for each of the 10 weeks of the video class.

[4] Enrolments vary in each of the jurisdictions. Class sizes are generally small. Most jurisdictions have around 20 to 30 students, although one Australian class has around 65 students. This type of teaching works well with smaller classes. The classes are a mix of graduate students (mostly in the North American law schools) and undergraduate students, usually in the later years of the LLB course (in the Antipodean law schools).

Aboriginal law subject together involving Canadian and United States laws.[5] Each had taught a purely domestic law course on Aboriginal legal issues for many years and thought it would be both fun and challenging for them to try a comparative version. They also thought it would be exciting for students to experience a team-teaching and comparative law environment. This comparative Canadian and American Indigenous course was taught for the first time in 2001.[6] Consideration was given to developing an online course but this was rejected in favour of videoconferencing as a more interactive method of involving student participation. Video-link conferencing was chosen as the mode of delivery because this facility was available at both universities, although it had been primarily developed to link classes in satellite campuses. The course grew quickly to incorporate four jurisdictions, with Monash University[7] joining the team in 2003 and Victoria University of Wellington[8] joining the following year. The University of Queensland,[9] University of Auckland[10] and the University of Saskatchewan[11] joined in 2006. The University of Waikato will be joining in 2010.

B *Logistics and Dynamics of Teaching an International Video-Link Indigenous Course*

When the comparative Canadian and American course first started, the universities were using a relatively primitive form of videoconferencing (by today's standards). The latest VoIP system has much higher quality and enables transmission of PowerPoint (PPT) and videos, in addition to the live video-feed from the six classrooms. It is essential for each site to have the appropriate technology installed in the teaching room, and good technical

[5] In 2000, Lindsay Robertson read of the efforts of two legal history professors to teach an online course to students at two law schools. These professors concluded that their effort suffered from the unwillingness of students to interact online. Lindsay Robertson thought to solve the problem of non-participation by allowing the students to see each other through a videoconference course rather than an online course. The distance education staff advised that such a course could be set up to run to a site out of the country, the only cost being the cost of the telephone connection. Lindsay Robertson and Brad Morse then offered the first US–Canadian Indigenous Peoples' Law class in 2001, which was a great success.

[6] Also in 2001, Margaret Stephenson, whilst a Visiting Professor at Indiana University School of Law, Indianapolis, USA, developed an Indigenous Rights course comparing the USA, Canada, Australia and New Zealand. From 2002–05, Margaret taught a Comparative Indigenous Rights course in the 'Online' LLM program (University of Queensland).

[7] Led by Melissa Castan and David Yarrow.

[8] Led by Catherine Iorns with the involvement of Claire Charters and Andrew Erueti from 2004–05. Catherine Iorns will rejoin the course in 2010.

[9] Led by Margaret Stephenson.

[10] Led by Nin Tomas, with the involvement of Khylee Quince in 2006–08.

[11] Led by Paul Chartrand for two years and now led by Ruth Thompson.

backup is vital in case of technological glitches. Video-linkages are managed through the host university (generally, the University of Ottawa). Once the equipment in the classroom is activated, the University of Ottawa dials in (similar to making a phone call) and all six classes are connected to the videoconference link. Today, commencing a videoconference session is as simple as an academic instructor activating the video equipment at the lectern desk and the host university dialling in to that classroom.

The logistics of such a course are less simple. Scheduling classes across an 18-hour difference in time zones (over a two-day period), which is then compounded by the impact of daylight saving time changes in some jurisdictions, requires considerable adaptability and creativity. These international classes are live (as opposed to pre-recorded) and must occur simultaneously. North American classes are scheduled for the early evening while Australian and New Zealand classes are scheduled for morning sessions on the next day. Accommodating differences in the various universities' academic calendars is also a challenge as most North American universities commence a teaching semester in early January while Australian and New Zealand universities commence their teaching semester in late February. Accordingly, a compromise commencement for the videoconferencing class is in early February.

Various technical challenges are faced by the teachers of live video-link classes. For example, in most classrooms, the cameras automatically focus on anyone speaking or any loud sounds. This means that the microphones should be activated only in the room where a person is designated as speaker so as to avoid cameras flicking to any unnecessary noise. Forgetting to mute a microphone can produce distracting consequences. (However, at the less technologically advanced sites, the instructor is required to focus cameras and mute microphones, which results in another kind of distraction/challenge.) Also, it is important to remember that every site will always be visible to the other sites, although not in the main frame. The video screen will focus on the speaker; however, all sites remain visible to the others because of a series of small boxes which surround the main picture and display each non-speaking site: it is referred to as continuous presence, or 'Brady Bunch', mode. Additionally, while the technology is generally reliable, when organising for class it is important to factor in the possibility of technical failure or losing the connection. If one site loses the connection it is important to continue the flow of the class while waiting for those who have dropped out to reconnect. It is imperative always to have a contingency plan for class-time in the event of a lost connection.

Coordinating team-teaching in different jurisdictions on different continents requires significant organisation and structure. As is the case in any course, a program of teaching is developed well in advance. The international comparative Indigenous law

program allows each of the four jurisdictions to present one two-hour videoconference class exclusively on Indigenous issues in that jurisdiction to afford students an introductory overview. The remaining six two-hour videoconferencing classes address a series of topics on particular Indigenous issues in depth. These remaining teaching sessions usually allow for equal time to be given to each of the four jurisdictions to focus on their country's perspective as well as to compare the experience on that issue amongst all four nations. Due to the number of jurisdictions and differing instructors, the order of presentation, the timing of presentations and the material to be covered are agreed to in advance of the teaching session. Leadership of the seminars rotates around all instructors. Student participation is not only encouraged but is mandatory in certain sessions.

C *Website for Course Materials and Student Interaction*

The authors have found that a website supporting the course and providing a central reference point for class materials and communications is essential. The course has a password protected website at the University of Ottawa (on Blackboard Vista, which replaced WebCT in 2009). This website is available to all students registered in the specific course offered by their home university. The website contains all assigned readings so that students do not have to purchase any materials, nor are there any logistical challenges in producing and distributing printed material amongst the law schools. This website also includes significant background materials (both of a published and unpublished nature), relevant legislation, video clips, newspaper articles, and web-links. Past student papers are accessible on the website and these provide not only examples for students to obtain a sense of the level expected, but also serve as highly valuable reference documents in their own right for current students undertaking research. Students' research papers complement the growing body of comparative Indigenous research.[12] The website

[12] See, in relation to comparative published books: Anthony Connolly (ed), *Indigenous Rights* (2009); Benjamin Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009); Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008); Peter Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (2005); Barbara Hocking (ed), *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (2005); Paul McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (2004); Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004); Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003); Garth Nettheim, Gary Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (2002); Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (2001);

enables new documents, such as the latest media articles or a last minute PPT presentation, to be loaded at any time — including during the class itself — and be accessed immediately in all six sites.

In addition to the chat group and bulletin board functions on the main course website, a 'Google group site' has been created on a separate password protected website, through the University of Ottawa, to encourage increased student interaction and also to provide an opportunity for students to contribute additional information. This latter site allows all participants in the course the opportunity to suggest interesting websites or to post files they would like to share. For example, it allows students to create an individual biographical page with something meaningful in the context of the course. Students may also, as part of a 'regional team', post materials that inform about their region, the issues affecting Indigenous peoples and something of the history behind these issues. The 'Google group site' further enables both academic and student participants to make announcements and to comment on existing web pages, thus affording an opportunity for everyone to participate in activities that provide some context for the class.

D *Advantages for Students*

Teaching international and comparative Indigenous rights through a multi-site videoconferencing medium provides several advantages for students. First, a video-link course offers students a unique method of teaching and a very different learning experience. One of the major advantages of a videoconference course is that it affords students the opportunity for interactive learning. Students are able to engage with all the instructors conducting the sessions and also with other students, both within their classrooms and in the other international classrooms. Importantly, students are encouraged to participate and to discuss relevant matters with the instructors in all jurisdictions during class time. Real-time interaction between learners and instructors is regarded as critical to the success of any distance education model of teaching.[13] The more sophisticated

Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (2000); Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999); Richard Bartlett and Jill Milroy (eds), *Native Title Claims in Canada and Australia: Delgamuukw and Miriuwong Gajarrong,* (1999); Shaunnagh Dorsett and Lee Godden, *A Guide to Overseas Precedents of Relevance to Native Title* (1998); and Richie Howitt, John Connell and Philip Hirsch, *Resources, Nations and Indigenous Peoples* (1996). It is noted that the greater number of comparative published materials are written from a western legal perspective rather than from an Indigenous perspective; that is, from an Indigenous person's point of view of customary law. In an attempt to remedy such shortcoming, in 2004, the Maori staff in the Auckland Law Faculty, introduced *Te Tai Haruru, Journal of Maori Legal Writing* (editor Nin Tomas), the first Indigenous law journal in Aotearoa/New Zealand.

13 See Michael Moore and Greg Kearsley, *Distance Education: A Systems View* (1996).

videoconferencing facilities (at Ottawa and Oklahoma) allow individual students direct access to a microphone controller on the student desktop, while in other classrooms the instructors control the muting and activation of the microphone. The interactive component of videoconference teaching, the authors believe, makes it a preferable alternative to online learning forms of distance education where students work from a book or on a computer with no face-to-face contact with lecturers or other students.[14] All students in the course described in this article have the opportunity of posting materials (eg, recent media coverage of relevant topics) on the web pages for comment by all participants.

Secondly, students have the opportunity to interact directly with students who are taking the course in other countries. Perhaps most importantly, videoconferencing facilitates communication among students at a distance.[15] The course described in this article certainly facilitates the linking of students internationally. It does this in a number of ways: by encouraging student discussion of aspects of the course on the video-link during class time; by listing students' areas of Indigenous interest on the course's Google website; and by encouraging students to collaborate and support each other in individually writing a comparative law paper. Students are thus 'matched' whenever possible based on the common interests in their comparative research papers. This creates an interactive international learning environment. Students frequently initiate informal chats with one another across the sites during the 'breaks' and these discussions have been known to continue informally through personal email accounts, openly through the course website visible to all students and teachers, and in the 'chat rooms' on the websites. The 'chat rooms' are, at designated times, monitored by a former student paid as a tutor by a grant from the University of Ottawa. (By way of anecdote — students are asked to introduce themselves and state their areas of interest in the first class in the course. In the teaching 'break', the students will usually rush to the microphones and search other jurisdictions for students who share their research interests or just to talk to other law students across the borders.) The literature supports the view that video-conferencing technology results in

[14] In relation to the challenges of online learning, see the discussion in Tracey Carver and Tina Cockburn, 'Making Law More Accessible: Designing Collaborative Learning Environments for Physically Remote Generation Y Students' (Paper presented at the Online Learning and Teaching Conference, Brisbane, 2006) <https://olt.qut.edu.au/udf/OLTCONFERENCEPAPERS/index.cfm?fa=displayPage&rNum=3349801> at 23 December 2008.

[15] This is supported in the literature. See Tony Bates, *Technology, E-Learning and Distance Education* (2nd ed, 2005) 7, 187. Moore and Kearsley, above n 13, also regard real-time interaction between students as essential to the success of distance education models.

significant communication in the classroom between teachers and students, and between students and other students.[16]

Thirdly, students have the benefit of the combined international expertise of their instructors. Students are not only learning about Indigenous issues in the different jurisdictions — they are also being taught by an expert, with knowledge of the latest developments, in each jurisdiction. All students have the opportunity to contact (either by email or through the web discussion pages) all members of the teaching team. As students are required (or encouraged) to write comparative research papers, they frequently avail themselves of these opportunities to make contact with the instructors in other countries (and all instructors in the course can attest to this).

Fourthly, and importantly, this comparative and international videoconferencing course broadens students' perspectives on how domestic laws in these four jurisdictions have impacted upon Indigenous peoples and how international law in this field is rapidly changing. This is evidenced in the student essays and research papers.[17]

Fifthly, the authors' experience of videoconferencing teaching is that it delivers the desired educational outcomes of learning law for students; for example, not merely teaching legal rules but rather fostering a broader understanding of society, teaching students to be independent learners and to think critically.[18] Achieving such educational outcomes is possible because, in videoconference teaching, students participate in the learning process, rather than simply learning from a teaching process — an approach that is more passive and receptive, such as the traditional 'correspondence' methods of distance learning.[19] Goldring suggests that distance learning can deliver at least similar levels of quality in learning as some on-campus modes of teaching.[20] Furthermore, Bates cites studies which have concluded that videoconferencing improved the quality of communication, increased satisfaction with the course and student motivation and that teaching via videoconferencing was equally as good as teaching face-to-face.[21] In the international comparative Indigenous studies course, students benefit from all of the above as the participating teachers interact with their own students

[16] Bates, above n 15, 7.

[17] Refer to the discussion below on why a comparative and international course.

[18] John Goldring, 'Coping with the Virtual Campus: Some Hints and Opportunities for Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 88, 89, 91.

[19] Goldring, above n 18, 91–2. Goldring suggests that external students operating under the traditional model of distance education, the 'correspondence model', may well have received an academic foundation in law, but not all would have received a broader education.

[20] Goldring, above n 18, 92.

[21] Bates, above n 15, 185.

and, through the videoconferencing, with the other international students.

E *Advantages for Teachers*

Teaching in an international and comparative Indigenous law course by videoconferencing offers a number of benefits for the teachers as well as for the students. First, as the instructors in this course have shared their individual expertise in Indigenous legal issues in their particular jurisdictions, they have become much more familiar and expert with the situations that exist in the other countries. Secondly, team-teaching keeps the content current and topical. For example, when in 2008 the Australian Prime Minister made his apology to members of the Stolen Generations, the video and text of the Australian apology were immediately available for students (on the Ottawa website). Discussions were then able to take place in the very next class.[22] Thirdly, team-teaching in an internationally comparative course creates a collegial network for feedback on each instructor's comparative research in Indigenous issues and improves the potential for future collaborative research by team members. Finally, team-teaching via a video-link course minimises any hiccups with technical failures, as any instructor, with the base of knowledge we have developed in relation to all jurisdictions, can step in to teach the remaining sites if one site drops out. Videoconferencing 'teaching wisdom' suggests that where teaching-team members are from distant geographical locations, they should make every effort to meet face-to-face to interact on occasions other than on the video screen.[23] The team had the opportunity to do this through the extraordinary efforts of Melissa Castan, who obtained a grant to co-host (University of Hawai'i) an International Indigenous Conference,[24] as well as through occasional sabbatical (special studies program) visits amongst colleagues. The authors' experiences have been that meeting face-to-face with teaching colleagues at conferences and visiting the various sites where the classes are conducted have proved to be valuable in creating collegial relationships and are to be recommended for those thinking to establish such a course.

22 Students were able to compare the Australian apology with the United States Senate's apology to Native Americans in 2007 and, later, the 2008 Canadian government's apology to the victims of Indian residential schools.

23 Trish Andrews, *Using Videoconferencing to Support Learning* (Teaching and Educational Development Institute, 2007) 17; Trish Andrews, 'Videoconference Teaching Workshop', Tertiary Education Institute, University of Queensland February, 2007.

24 The Conference was the International Conference on Comparative Federalism and Indigenous Peoples, at the Center for Excellence in Native Hawaiian Law, William S Richardson School of Law, University of Hawai'i, USA, January 2007.

F *Student Feedback on the Course*

The course's learning objectives are, in general terms, to broaden students' outlooks in considering a global perspective on Indigenous laws and to encourage students to develop an understanding of the context in which developments in Indigenous rights jurisprudence have occurred. More specifically, the objectives are:

- To examine the comparative experiences offered by the four nations involved (Canada, United States, Australia and New Zealand) in their relationships with their Indigenous peoples.
- To critically evaluate and assess the performance of institutions and policies in the different jurisdictions.
- To consider developments in relation to Indigenous peoples in the international law arena, particularly the impact of the adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples.[25]
- To raise an awareness of Indigenous legal issues both at home as well as in overseas jurisdictions and to promote greater cross-cultural understanding.
- To provide the legal framework to allow a more detailed development of individual student research interests in relation to comparative Indigenous issues.
- To promote the importance generally of pursuing a comparative approach to any legal topic.

Student feedback supports the view that the course meets these objectives.

Student responses, as reflected in student surveys, have been consistently positive about the videoconferencing experience and students report that they enjoy this course. Student surveys undertaken at the various universities reflect student satisfaction with both the course itself and the mode of instruction.[26] Responses include the following comments, as representative of the international cohort of students:

- 'This was one of the best courses I've done for a long time: revolutionary to say the least.'
- 'Fantastic videoconference course. It was great to be connected to students on the other side of the world. It was great to be taught by instructors, in each jurisdiction, who were experts on legal Indigenous issues.'
- 'It was interesting to get a more global perspective on Indigenous legal issues. The course has definitely widened my interest in this area of the law.'

[25] Resolution UN, GAOR, 61st sess, 295 (2007).

[26] For example, student surveys from the University of Queensland class have ranked student satisfaction with the course as high as 4.83 out of a maximum of 5. The student comments in the text above were taken from surveys undertaken at the University of Auckland, University of Ottawa and University of Queensland in 2008.

- 'The opportunity to videoconference with universities abroad and international aspects was excellent, and unlike any learning format I had ever participated in. The comparative perspective also greatly enhanced my understanding of the Australian native title component and improved my analytical skills. I hope this innovative format continues and is expanded to other courses.'
- And from an international exchange student in Australia: 'I would like to express my thanks and appreciation. As a United States student studying abroad, I was initially apprehensive about law school in Australia. However, your class enabled me to feel very comfortable in the Australian legal education system. I learned invaluable lessons about the role of the Indigenous peoples within the Australian legal system and Australian culture as a whole. I am deeply appreciative of the exposure to the teachings of the videoconference professors, the understanding of native title, and lessons regarding Indigenous cultures in Canada, New Zealand, and the United States that I learned in your class. Thank you for a wonderful semester.'

III Why an Internationally Comparative Indigenous Law Course is Relevant

A *Why a Comparative Course?*

The international comparative Indigenous law course seeks to provide a comparative and critical study of Indigenous laws and rights jurisprudence in four countries (Canada, United States, Aotearoa/New Zealand and Australia) and also to consider an international perspective on Indigenous rights. A comparative approach to the study of Indigenous rights is justifiable for a number of reasons,[27] many of which have been noted by Havemann.[28] In general terms, comparative studies broaden our knowledge of what transpires in other places, thus avoiding ethnocentrism. Undertaking comparative studies allows for an assessment of the performance of policies and institutions in the different jurisdictions and a determination of factors that contribute to the success or failure of such institutions and policies. In light of these comparisons, we can each re-examine our own nation's context. A comparative study allows for the identification of common themes in the different jurisdictions and it also enables a study of the limits of those generalised themes. Further, such a study can facilitate the identification of the variables

[27] For an excellent discussion of the value of comparative Indigenous analysis (particularly in relation to Indigenous title to land) see Young, above n 12, ch 3. See also Donald Denoon, *Settler Capitalism: The Dynamics of Dependent Development in the Southern Hemisphere* (1983) 8: '[o]nly one analytical method is to be found anywhere in the social sciences: the comparative method'.

[28] Havemann, above n 12, 2–3.

and other contextual factors that produce different developments in the respective jurisdictions. For example, what differences do treaties make? Why does Australia not have Indigenous treaties despite so many historical commonalities with the other countries and a shared common law system? What is the impact on Indigenous policies arising from the different constitutional frameworks of each country? How does federalism affect Indigenous affairs? A comparative study can also provide an understanding of the context for developments in the different jurisdictions that assists in the analysis of policy, in suggesting potential reform measures, and in anticipating future developments and interpretations of the law.[29]

Undertaking a comparative study of Aboriginal rights jurisprudence reveals a shared foundation in early international policies. It further demonstrates that domestic legal principles in each of the four jurisdictions have not occurred in isolation but against a background of global influence and exchange.[30] To comprehend and understand contemporary laws regarding Indigenous rights today requires an understanding of both their historical background and the development of Indigenous rights jurisprudence in the international arena. Imperial powers sought justification for the colonisation of foreign lands, and international legal policies and principles were invoked to justify the colonisation of North America, Aotearoa/New Zealand and Australia.[31] Variations of these principles were known as 'Doctrines of Discovery, Continuity and Settlement'. Contemporary jurisprudence concerning the recognition of Indigenous land rights has evolved from these early international law doctrines and from the ideology of settlement (and cession).[32] Even in recent decades, courts in the United States, Canada, Aotearoa/New Zealand and Australia have continued to review questions regarding colonisation, discovery and settlement, and Aboriginal land rights.[33] The jurisprudence of Indigenous rights had its origins in the United States, commencing

[29] Ibid 2–4.

[30] See Young, above n 12, 41.

[31] David Getches, Charles Wilkinson and Robert Williams, *Cases and Materials on Federal Indian Law* (5th ed, 2005) 1–37; Bob Miller and Jacinta Ruru, 'An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand' (2009) 111 *West Virginia Law Review* (forthcoming); and Kent McNeil, *Common Law Aboriginal Title* (1989) 244, 301; Margaret Stephenson (ed), *Mabo: A Judicial Revolution* (1993); Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009).

[32] See Greg Marks 'Sovereign States vs Peoples: Indigenous Rights and the Origins of International Law', [2000] *Australian Indigenous Law Reporter* 1.

[33] In the High Court of Australia: *Mabo v Queensland (No 2)* (1992) 175 CLR 1; in the Supreme Court of Canada: *Calder v Attorney-General of British Columbia* [1973] SCR 313; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Guerin v The Queen* [1984] 2 SCR 335; in the New Zealand Court of Appeal: *Attorney-General v Ngati Apa* [2003] 3 NZLR 643; *Te Runanganui o Te Ika Whenua* [1994] 2 NZLR 641; and in the US: *City of Sherrill v Oneida Indian Nation of NY*, 544 US 197 (2005).

with a trilogy of Supreme Court decisions by Chief Justice Marshall in the 1820s and 30s involving determinations of Indian title and Native American tribal sovereignty.[34] Indigenous jurisprudence emanating from the early United States decisions has provided a basis for the formulation of substantial aspects of Indigenous land tenure doctrines in all four jurisdictions and, as Young argues, this has resulted in the internationalisation of Indigenous land rights.[35] These fundamental principles have been referred to by Canadian courts in the development of Aboriginal title and by the Aotearoa/New Zealand courts in relation to Maori rights.[36] The United States, Canadian and New Zealand Indigenous jurisprudence has certainly influenced the development of native title law in Australia;[37] although, more recently, Australian courts have become less inclined to refer to overseas doctrine and more dismissive of the comparative jurisprudence.[38] Contemporary courts in Canada and Aotearoa/New

[34] *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worchester v Georgia*, 31 US (6 Pet) 515 (1832). For a groundbreaking reconsideration of the extraordinary background to the *Johnson v McIntosh* case, see Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (2005).

[35] See Young, above n 12, 36. For example, Kirby J stated in *Commonwealth v Yarmirr* (2001) 184 ALR 113, 197–8: '[t]he recognition of the rights to land and to waters and fishing resources of Indigenous peoples is now an international question. It is one that concerns, but is not confined to, the several nations settled at one time under the British Crown'.

[36] In Canada see, eg, *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 1 FC 487 at 545, where Mahoney J noted the 'value' of these American cases to the Canadian courts; *Guerin v The Queen* [1984] 2 SCR 335, where Dickson J viewed *Calder v British Colombia (Attorney-General)* [1973] SCR 313 as consistent with the 'leading American cases' of *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823) and *Worcester v Georgia*, 31 US 515 (1832). In New Zealand, see *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 691; *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, 680. See the discussion in Young, above n 12, 40.

[37] For example, in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, the Court cited *inter alia*: the Canadian cases of *Calder v British Colombia (Attorney General)* [1973] SCR 313; *Guerin v The Queen* [1984] 2 SCR 335; *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 AC 46; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 1 FC 487; *R v Sparrow* [1990] 1 SCR 1013; *R v Van der Peet* [1996] 2 SCR 507; the US Supreme Court decisions in *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Tee Hit-Ton* 348 U.S. 965 (1955); the New Zealand cases of *R v Symonds* (1847) NZPCC 387; *Re The Ninety-Mile Beach* [1963] NZLR 461.

[38] See the discussion by Richard Bartlett, 'Australia's Museum Mentality' in Bartlett and Milroy, above n 12; and see Young, above n 12, 33. See also *Fejo v Northern Territory* (1998) 195 CLR 96, 148–50; *Yanner v Eaton* (1999) 201 CLR 351, 402. Some exceptions exist: see, eg, *Ben Ward v Western Australia* [1998] FCA 1478; see also *Western Australia v Ward* (2002) 213 CLR 1, [567] where Kirby J, when referring to certain native title concepts of recognition and extinguishment, noted that the court should 'as far as it is possible … take into account relevant analogous developments of the common law in other societies facing similar legal problems'.

Zealand have referred to the Australian jurisprudence on native title.[39] Direct interaction among the members of the highest courts in each of these nations in recent years may further nurture this proclivity.

An additional important reason to adopt an international and comparative approach to Indigenous issues is that the *Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly in September 2007.[40] With the adoption of the Declaration, it is likely that the standards it enunciates as universally accepted ones will influence Indigenous rights worldwide and will ultimately lead to the further internationalisation of such rights.[41]

B *Commonalities and Differences in the Four Comparative Jurisdictions*

All four jurisdictions possess many basic commonalities which provide a platform for comparisons. For example, all countries share similar histories of colonisation and settlement.[42]

Identifying significant differences of comparative relevance in the various jurisdictions is important in any comparative study. Some of the challenges of comparative analyses include understanding which differences are of real importance and what triggers those distinctions; assessing the effect that these differences have on the development of divergent Indigenous laws and policies; and the potential impact that these differences may have on future developments. For example, Indigenous peoples in Canada (First Nations, Inuit and Métis peoples), Australia (Aboriginal peoples and Torres Strait Islanders) and in the United States (Native Americans) all exhibit multiple languages, cultures and political styles; but in Aotearoa/ New Zealand, the Maori are one people (although they comprise

[39] For example, in Canada, see *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 258; in New Zealand see *Attorney-General v Nagati Apa* (2003) 3 NZLR 643 (Court of Appeal).

[40] Resolution UN, GAOR, 61st sess, 295 (2007).

[41] See generally James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004); Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007); Joshua Castellino and Niamh Walsh (eds), *International Law and Indigenous Peoples* (2005); Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998); Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004).

[42] See generally Havemann, above n 12; Dorsett and Godden, above n 12, 1–48; Young, above n 12, 34–7.

distinct tribal groupings or iwi).[43] Generally, the differences among the Indigenous peoples themselves (in relation to the development of state law and policy) are less significant than their similarities, such as their relationships with their traditional lands, their oral histories and their small-scale social groupings.[44]

Understanding the different constitutional contexts of all jurisdictions is also essential in a comparative analysis of Indigenous rights.

Against this appreciation of key commonalities and differences in the comparative countries, a 'thematic' review of comparative Indigenous jurisprudence can then be undertaken. How this might occur is discussed below.

C *Themes and Methodology of Comparisons*

In any comparative study, Havemann suggests that choosing 'units of comparison and contrast' that are operationally or broadly equivalent is essential.[45] The methodology adopted in the videoconferencing course was to allocate a two-hour session to each jurisdiction, by way of introduction, early in the course to provide some background and general context for later comparisons and discussion. Adopting this methodology restricts the number of thematic 'units of comparison and contrast' that can be covered directly in depth in the 10-week videoconferencing part of the course; however, the authors have found that the 'introduction' given for each jurisdiction at the beginning of the course has worked well and, for the most part, the introductions incorporate aspects of the thematic issues.

The general overview 'introduction' for each nation is usually presented through a comparative lens with frequent references to the other countries, and especially those already analysed in detail in prior sessions. Most students undertaking this course have some familiarity with the legal aspects of Indigenous peoples' rights in their own jurisdiction, so this part is generally for the benefit of international students. It also serves as an important refresher for the students from that country, and places their existing knowledge

[43] Havemann, above n 12, 6. In relation to Aotearoa/New Zealand, see Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle without End* (1990); Michael King (ed), *Te Ao Hurihuri* (1975); Te Puni Kokiri, *He Tirohanga a Kawa ki te Tiriti o Waitangi* (2001); Mason Durie, *Te Mana, Te Kawanatanga — The Politics of Maori Self-Determination* (1998); Rev Maori Marsden and Te Aroha Henare, *Kaitiakitanga: A Definitive Introduction to the Holistic Worldview of the Maori* (1992). In relation to Australia, see Peter Sutton, *Kinship, Filiations and Aboriginal Land Tenure* (2003), in relation to Canada, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (2002) and for the United States see Felix Cohen, *Felix S Cohen's Handbook of Federal Indian Law* (2005).

[44] Young, above n 12, 34–6; Getches, above n 30, 414.

[45] Havemann, above n 12, 3; see also Mattei Dogan and Dominique Pelassy, *How to Compare Nations: Strategies in Comparative Politics* (2nd ed, 1990).

in a comparative context. For example, the introductory sessions on Indigenous law in the United States and Canada both include discussion regarding:

- powers issues, tribal or Indigenous jurisdiction, treaty making, economic development.

Introduction to Indigenous law in Australia includes:

- History/demography, settlement doctrine/dispossession, lack of treaty making, constitutional powers, *Racial Discrimination Act 1975* (Cth), native title and statutory title/land holdings.

Introduction to Indigenous law in Aotearoa/New Zealand includes issues of:

- Sovereignty, the *Treaty of Waitangi*, European settlement, dispossession and subjugation.

These broad headings allow for a general discussion of the historical development of Indigenous rights in the various jurisdictions. They also enable the incorporation of the constitutional context of each jurisdiction as well as other issues such as criminal justice issues involving Indigenous peoples, the trust/fiduciary obligations owed by the settler society to Indigenous peoples, and specific issues such as residential schools in Canada and Stolen Generations in Australia. Furthermore, they allow for the incorporation of current developments in relation to Indigenous issues in each jurisdiction, such as the 2007 government 'intervention' in the Northern Territory in Australia and the 2008 apologies from the Australian and Canadian Prime Ministers.

In selecting topics as 'units of comparison' for the balance of the teaching time in the course described here, the authors have attempted to identify broad areas of strong interest in all four countries and then to compare these issues across the jurisdictions. The authors' approach to selecting units of comparison is flexible and the selection is reviewed regularly and incorporates feedback from students regarding subjects of particular interest. Themes for comparison and contrast are continually under consideration as potential areas for in-depth study for future years. This focus when discussing these topics allows for the introduction of Indigenous issues of currency, the latest court decisions, legislation or government initiatives as well as media reports from any of the countries, including events arising on the day the common class is conducted.

A selection of units of comparison on a thematic basis includes the following:

- The acquisition of sovereignty by colonial powers under the Doctrines of Discovery, Continuity, Settlement, Conquest and Cession and the recognition (including the very late recognition in Australia) of Indigenous land rights.
- An analysis of Aboriginal title/Indian title/Native title/Maori title — in terms of the source of title that is recognised by the common

law (occupation of land or laws and customs), elements of required proof, the key content of title, susceptibility to extinguishment, and also compensation for the loss of traditional lands.

- The recognition of Indigenous customary law. How Indigenous customary laws are recognised (or not) in the different jurisdictions could be considered here, as their experiences differ and continue to evolve.[46]
- Indigenous self-determination and residual sovereignty. In the United States, Indian tribes retain inherent powers of self-governance that are circumscribed with the status of 'domestic dependent nations'.[47] In Canada and Australia, no formal recognition of Indigenous sovereignty has been accorded by the courts; however, Indigenous governance rights can be found in many Canadian treaties and are implied in several leading cases. Sovereign rights of the Maori of Aotearoa/New Zealand are to be found in the *Treaty of Waitangi*.
- Treaty rights (including historical treaties in North America and the *Treaty of Waitangi* in Aotearoa/New Zealand) and modern treaties and Indigenous agreements (particularly in Canada, Aotearoa/New Zealand and Australia).
- Self-governance and jurisdiction.
- National government–Indigenous relationships.
- Fiduciary duties in Canada and Aotearoa/New Zealand, and the trust doctrine in the United States, contrasted with the absence of any recognition of fiduciary or trust obligations in Australia.
- Indigenous intellectual property and cultural heritage.
- Residential schools in Canada, Native American boarding schools in the United States, Church Schools in Aotearoa/New Zealand and Stolen Generations in Australia.
- Economic development and natural resources on Indigenous lands.
- Criminal law and Indigenous peoples.
- The relationship between individual human rights and collective Indigenous rights.
- International law and Indigenous peoples, including the United Nations Declaration on the Rights of Indigenous Peoples as well as other international developments and how the respective countries have responded to these developments.

[46] For a recent Canadian example of federal legislation recognising 'First Nations legal traditions and customary laws', see *An Act to Amend the Canadian Human Rights Act*, SC 2008, c 30. The conversion of customary Maori land tenure in Aotearoa/New Zealand to alienable fee simple is another example of what could be reviewed here.

[47] *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831).

IV Conclusion

A comparative international study of Indigenous rights enables both the identification of the basic consistencies in the substantive legal principles and the identification of differences in interpretations and divergences in the development of the law and national government policy in the four jurisdictions. Potentially the comparative approach allows us to learn about the effects and the impacts of policy and direction as well as about errors and successes in other jurisdictions. Further this approach enables us to avoid mistakes made in the other jurisdictions and also to consider adapting positive experiences from abroad as potential precedents to pursue in our own jurisdiction. Undertaking a comparative study of Indigenous rights affords a better understanding of the development of Indigenous jurisprudence in one's own jurisdiction. For those interested in Indigenous rights and title in their own country, it is important to have an appreciation of the comparative jurisprudence as well as parallel legal developments, not only to understand more fully the foundations of these principles and their historical developments, but also to predict what can possibly be achieved in the future.

Videoconferencing technology has been integral to the development of the authors' comparative international Indigenous study as it makes real-time interaction and team-teaching possible. The international and comparative Indigenous rights course demonstrates that this technology can be used successfully for a comparative international course taught in different parts of the world where appropriate 'units of comparison and contrast' exist. The authors have found that one of the essentials of teaching a course with global sites is to have a shared course website, particularly for student access to teaching and research materials, but also for ease of student interaction with both teachers and other students away from the classroom. Within the classroom, the advantage of the combined video and web technology is that it allows for face-to-face teaching that promotes engagement and interaction between students and instructors and also between students themselves. The authors' experience has been that the challenges in logistics and organisational dynamics of teaching across different time zones, in different hemispheres, and to different groups of students with very diverse backgrounds can be overcome with appropriate planning and goodwill. The course discussed in this article has provided an extremely positive experience for students and also for the teaching team. In the authors' experience, the use of this technology for the purpose of teaching and learning across borders promotes the internationalisation of the curriculum for the institutions involved. The use of this technology affords students an opportunity to learn in a 'virtual overseas classroom' without having to leave their home institutions.

Nothing about videoconferencing technology is unique to Indigenous courses. This technology exists at most universities today and could be used for any area of study that would benefit from an international or comparative approach. After the initial establishment of the videoconferencing facilities, a video-linked course is not difficult to implement. The authors encourage others to utilise the videoconferencing technology in their comparative and international teaching.