INDIGENOUS PEOPLES, LAWS AND CUSTOMS IN THE TEACHING OF PUBLIC AND PRIVATE INTERNATIONAL LAW

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Introduction

Of all major subject areas in any outward-looking, contemporary law school curriculum, international law — 'public' and 'private' — has extraordinary potential for embracing, infusing and teaching issues concerning Indigenous peoples and their legal systems. For readers less familiar with these areas of law, *public international law* is a universal system of global law, created by 'states' (countries), which governs and binds all states to common rules of behaviour.[1] It regulates many issues such as world trade, the environmental, military violence, and the use of the oceans, and involves a range of global institutions such as the United Nations.

Private international law, also known as 'conflict of laws', is not a single global body of rules, but refers to the domestic laws of different countries which deal with private law disputes (such as contracts or personal injury) involving foreign elements. For example, imagine that an Australian tourist from Brisbane is injured by a Bulgarian passenger on a French ship in Fijian waters. The tourist then sues for personal injury in a Brisbane court. Australian private international law rules determine which laws should apply, and which courts should adjudicate, in settling these disputes: Australian, Bulgarian, French or Fijian.

For a long time in many Australian law schools, neither public nor private international law was taught as a compulsory subject in the curriculum, with few exceptions.[2] Private international law was even less commonly taught than public international law.[3] Indigenous peoples and their legal systems have made marginal appearances in either branch of law, if at all, and have seldom been treated as compulsory subjects in their own right. Instead, in most law

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[1] It also regulates the behaviour of individuals in areas such as human rights law, international criminal law, and the law of armed conflict.

[2] The history of public international law teaching in Australia has been well charted by Ivan Shearer, 'The Teaching of International Law in Australian Law Schools' (1983) 9 *Adelaide Law Review* 61 and James Crawford, 'Teaching and Research in International Law in Australia' (1984) 10 *Australian Year Book of International Law* 176; Dianne Otto, 'Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law' (2000) 3 *Melbourne Journal of International Law.*

[3] International Legal Services Advisory Council, *Internationalisation of the Australian Law Degree*, June 2004, at 3.2.3.

schools, Indigenous issues have been examined incidentally in other compulsory subjects (such as land or property law, criminal law, and constitutional law), or occasionally in elective subjects (such as human rights law, native title, or specialised courses on Indigenous peoples). Efforts are sometimes made to involve Indigenous people in teaching and learning, though full-time Indigenous law academics remain rare, and Indigenous students are also scarce. More common, perhaps, is the inclusion of documentary or audio-visual materials involving Indigenous authors and people, though such perspectives also remain heavily outweighed by non-Indigenous sources.

Both public and private international law have been historically peripheral in Australian law school curricula, and Indigenous peoples and their laws even more so; instances of the three areas interfacing is more marginal again. Yet, new opportunities are arising to incorporate the teaching of Indigenous peoples, their legal systems and perspectives into the compulsory curriculum. With recent interest in the 'internationalisation' of law school curricula,[4] as a result of the increasingly transnational nature of legal practice and graduate careers, international law courses are more frequently being set as compulsory subjects in law degrees. This raises the potential to include a renewed focus on Indigenous issues in the context of more international law being taught in more law schools, new thinking about what to teach in international law courses, and increasing sensitisation of and awareness by legal academics to Indigenous issues. Doing so requires a convergence of favourable conditions: expertise, coordination amongst teaching colleagues, and institutional will to both reform the curriculum and make space for such issues.

In public international law, Indigenous peoples are central to the historical development of foundational concepts such as acquisition of title to territory, sovereignty, Statehood, colonisation and decolonisation, self-determination, legal personality, and treaty-making. In addition, Indigenous peoples are affected by or play a role in numerous specialised branches of public international law, including human rights, environmental law, law of the sea, intellectual property law, cultural heritage law, economic law, criminal law, and labour law. Sometimes international law has been a surprisingly powerful tool in Indigenous advocacy and claims, while at other times it has brought profound disappointment. Whether an international law of Indigenous peoples per se has emerged, or by contrast general international law applies to Indigenous peoples in particularised ways, is a ripe jurisprudential question which can itself be taught as a theoretical question of some importance in the development (and diversification and fragmentation) of international law as a whole.

Whereas Indigenous issues can readily be seen as relevant to public international law teaching, the area of private international law is less

[4] See generally ibid.

commonly understood to raise Indigenous issues. Nonetheless, in my view the recognition of Indigenous customary laws — that is, 'a body of rules, values and traditions, more or less clearly defined, which were accepted as establishing standards or procedures to be followed and upheld' and which may have continuing force[5] — can be characterised as raising classic 'conflict of laws' issues. First, customary laws in the 'private' law area can be understood as raising legal questions concerning the choice of substantive law (Indigenous or non-Indigenous) applicable to a particular dispute and the persons involved in it (Indigenous or non-Indigenous).

Secondly, in places where Indigenous legal systems persist, it may also be necessary to resolve a choice of 'jurisdiction' question — that is, which body should have the authority to decide the dispute (so to speak, for there will seldom be Indigenous 'courts' readily equivalent to civil or common law institutions). The teaching of Indigenous issues as part of a private international law curriculum can shed light on the diversity of law systems, practice and institutions which may be engaged by that subject, beyond the more typical (and often more straightforward) 'conflicts' arising between different national or sub-national (federal) law systems.

The purpose of this article is to illuminate the points at which Indigenous peoples and their legal systems may be raised in general courses on public and private international law (in Parts A and B respectively). This article is not based on instances of teaching such courses, but is a normative effort to chart how Indigenous issues might be brought to the fore in formulating the *substantive content* of curricula. It is not concerned with the potential range of innovative teaching and learning methods (including clinics, role plays (such as negotiation of a mock 'treaty', or a limited autonomy agreement), field studies, or the role of Indigenous law students and voices) that may be used to deal with that content, nor the kinds of assessment that could measure students' understanding of it, nor ways of evaluating the effectiveness of teaching and learning in a course.[6]

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[5] Australian Law Reform Commission, *Report 31: Recognition of Aboriginal Customary Laws* (1986), [99], see also [100]-[101].

[6] Whether teaching Indigenous issues in international law courses calls for different teaching methodologies and assessment regimes is a separate question for further research. There are many examples of innovative teaching methodologies in specialised courses on Indigenous peoples: see, eg, University of Arizona College of Law ('Indigenous Peoples Law Clinic'; 'UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples Support Team Workshop'; 'Tribal Courts Clinic'); Osgoode Hall Law School ('Intensive Programme in Lands, Resources and First Nations' Governments', involving field visits and legal assistance to tribal communities); University of Toronto ('Advanced Aboriginal Studies', involving participation in an inter-university scholarly event organized by Aboriginal law student associations in Canada, entitled 'Kawaskimhon'); University of Ottawa ('Advanced Aboriginal Law: Current Legal Issues and Their Historical Roots', involving Indigenous community representatives in legal problem discussion); University of Auckland ('Comparative Indigenous Peoples and the Law', involving video-

A. Public International Law

The relatively small number of Indigenous peoples in the many countries where they live belies their significance in public international law. Indeed, Indigenous peoples and their legal systems can be considered across a wide spectrum of issues in the teaching of even the most conventional of public international law courses, given that the interaction between Indigenous and non-Indigenous peoples has been at the coalface of the formation of the modern nation state in quite a few countries. It is possible to introduce and discuss Indigenous peoples not only as a specialised, contemporary substantive topic in international law, but also in teaching the foundational elements of the public international law system.[7]

Here a pedagogical question immediately arises. On the one hand, Indigenous peoples and international law might be taught as stand-alone elective subject, allowing a smaller number of students to specialise in the treatment of and legal issues pertaining to Indigenous peoples. There is an increasing number of specialised courses offered at universities in various countries on Indigenous peoples in international law,[8] comparative law,[9] or a mix of domestic and international or comparative law.[10] Courses are perhaps more common at the postgraduate level, but are also increasing at the undergraduate level.

On the other hand, the position of Indigenous peoples could be taught at all relevant points in a general public international law course, thus 'mainstreaming' Indigenous issues in the curriculum. Doing so necessarily

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linking of students in multiple countries); Sydney Law School ('Development, Law and Human Rights', involving field study of remote indigenous communities in Nepal).

[7] On Indigenous peoples and international law generally, see James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004); Joshua Castellino and Niamh Walsh (eds), *Indigenous Peoples and International Law* (The Hague: Martinus Nijhoff Publishers, 2005); Chris Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993' (1994) 16 *Human Rights Quarterly* 1.

[8] See, eg, New York University Law School ('Indigenous Peoples in International Law'); University of Toronto ('Indigenous Peoples in International Law'); University of New South Wales Law School ('Indigenous Peoples in International Law'); Charles Sturt University Centre for Indigenous Studies ('Indigenous Peoples and International Law and Politics').

[9] See, eg, University of Auckland Law School ('Comparative Indigenous Peoples and the Law'); University of Toronto ('Comparative Indigenous Rights Law'); Sydney Law School ('Clash of Systems: Indigenous Peoples and Law'; 'Indigenous Peoples and Criminal Justice'); University of Newcastle Faculty of Business and Law ('Indigenous People, Issues and the Law').

[10] See, eg, University of Ottawa ('Aboriginal Peoples and the Law'); Sydney Law School ('Indigenous Peoples and the Law'); Te Piringa (Waikato) Faculty of Law ('Comparative Indigenous Rights Law'; 'The Treaty of Waitangi in Contemporary Aotearoa/New Zealand'; 'Māori and Indigenous Governance'); Melbourne Law School ('Indigenous Peoples, Land and Resources Law'); University of New South Wales Law School ('Indigenous People in the Law'; 'Contemporary Issues in International and Domestic Indigenous Law'); University of Technology Sydney (UTS) Law School ('Indigenous Peoples and the Law'); University of Canberra School of Law ('Indigenous People and the Law').

treats Indigenous issues in less depth than is possible in a specialised course, particularly given that the 'mainstream' curriculum is already overcrowded by the rapid expansion of the subject matter and institutions of international law in recent decades.

Nonetheless, a key advantage of incorporating Indigenous issues into a general international law course is that it brings those issues to the attention of a much wider body of students, particularly as law schools increasingly make international law compulsory. Further, as Dianne Otto observes, '[w]hat 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'.[11] Their omission from a general course would arguably be an instance of how a traditional curriculum may value an 'existing 'order' of hierarchy over economic and social justice'.[12] Their inclusion — both as subjects and objects — can help to challenge the assumptions and accepted power structures inherent in public international law.

The 'mainstreaming' approach better aligns with the United Nations approach to human rights education more generally, in which it is thought preferable to integrate human rights law principles across all substantive areas of law, rather than isolating or quarantining human rights as a discrete (but ghettoised) topic.[13] It is, of course, possible to do both: to pick up Indigenous issues where relevant in mainstream public international law courses, while also providing a specialised elective to allow students with particular interests in Indigenous peoples and laws to further refine their knowledge. The emphasis on Indigenous concerns in international law courses can serve to reinforce and contextualise student learning about such issues when they come across them in other compulsory law subjects, whether land law, constitutional law, or criminal law.

How, then, are Indigenous peoples relevant to the teaching of the spectrum of classical public international law topics? Rather than adding additional topics into already overcrowded curricula, it is possible to draw upon Indigenous examples in illustrating the 'mainstream' topics found within most general international law courses. The experience of Indigenous peoples and their laws can be understood as squarely part of the story of the most basic topics of international law: the acquisition of title to territory, the construction of sovereignty, nations and Statehood, legal personality, treaty-making, and self-determination. In addition, Indigenous peoples are relevant in the teaching of specialised substantive areas of international law such as human rights, environmental law, the law of the sea, intellectual property law, cultural heritage law, economic law, criminal law, and labour law. The following

[11] Otto, above note 2, 46.
[12] Ibid.
[13] UN Plan of Action, *World Programme for Human Rights Education*, New York and Geneva, 2006.

section briefly mentions some of these points of relevance to highlight how Indigenous issues can be infused throughout the teaching of both basic and specialised international law courses.

Concerning the foundations of international law, Indigenous peoples have assumed a central place in the colonial encounters which led to the acquisition of sovereign title to territory, whether by conquest (lawful prior to 1945), (unequal) treaty arrangements between European powers and Indigenous groups (as in New Zealand and parts of Canada and the United States),[14] or even (as in Australia) by 'discovery' and 'occupation' on a legally fictitious presumption of *terra nullius*.[15]

Treaty-making between colonial powers and Indigenous peoples is further relevant to the teaching of international legal personality and its connection to conceptions of sovereignty, since it indicates the relative nature of legal personality and its early conferral on entities other than classic Westphalian States, in contrast to modern treaty law.[16] The recent 'treaty' movement in Australia[17] challenges ways of understanding the treaty concept in international law. Here critical theories become relevant in the deconstruction of the hegemonic and imperial tendencies of early European international law in its relations with Others.[18]

With the development of the post-war United Nations Charter framework and the modern human rights movement, the core issues of sovereignty and title to territory became overlaid by the emergence of the principle of self-determination.[19] The principle was heavily circumscribed by the superior value of *uti possidetis* (privileging the stability of existing territorial boundaries over secession claims in States whose population had already achieved independence),[20] the principle of inter-temporal law (by which the validity of acquisition of title to territory is assessed according to the contemporaneous not subsequent law),[21] and by the restrictive definition of "peoples" as populations subject to colonial control[22] (thus excluding Indigenous peoples who found

[14] Treaty of Waitangi 1840 (between the Māori in New Zealand and the United Kingdom).
[15] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (High Court of Australia).
[16] The 1969 Vienna Convention on the Law of Treaties only recognizes States as legal entities entitled to enter into treaty relations; and circularly, the capacity to enter into treaty relations is a defining characteristic of Statehood; see also 1933 Montevideo Convention on the Rights and Duties of States.
[17] See the collected essays in ATSIC and AIATSIS (eds), *Treaty: Let's Get It Right!* (August 2003).
[18] On the historical treatment of Indigenous peoples by natural law and positive discourses of historical international law, see Anaya, above note 7, chapter 1.
[19] United Nations Charter 1945, art 1(2); see the ICJ's judgment in the *Western Sahara Advisory Opinion* [1975] ICJ Reports 12 for the application of the self-determination principle to the nomadic, Indigenous Saharawi people.
[20] Anaya, above note 7, 107-108.
[21] Recognised in *Island of Palmas Case (Netherlands v US)* (1928) 2 RIAA 829.
[22] Anaya, above note 7, 100-101.

themselves to be minorities in the settler population of newly independent or decolonised States).

Those limitations on the scope of the traditional principle of self-determination provide fertile ground for interrogation when teaching from a critical perspective that is mindful of the experience of Indigenous peoples, since they help to illustrate the ways in which international rules privilege certain interests and erase others. They also lead into discussion of related law reform and advocacy efforts on the international plane, such as attempts over recent decades to expand the notion of "peoples" to encompass minorities and Indigenous groups within the frontiers of independent States,[23] presenting a challenge to classical notions of State sovereignty and to the statist ethic of international law.

Such reform efforts can be illustrated by recent "soft law" standards such as the limited self-determination right to "autonomy or self-government" embodied in article 4 of the 2007 UN Declaration on the Rights of Indigenous Peoples[24] (and which enables further reflection on the variegated nature of international legal personality).[25] Those emerging standards in turn challenge conventional understandings of property rights as flowing from a unitary sovereign, given that Indigenous control over land is central to self-determination claims. At the same time, it is a lesson in the limits of even the most contemporary law reform: the version of self-determination made available to Indigenous peoples under the UN Declaration is still 'second class', since it does not bring rights of independence and statehood.

Also pertinent are the notorious, underlying conceptual difficulties of defining 'Indigenous peoples', both in differentiating them from 'minorities' and encapsulating the diversity of groups (from colonised peoples in white settler societies; to 'tribals' in Asia who were never colonised by whites but were subordinated to Asian majorities; to black minorities in African states with black majorities). Australian law students' understanding of Indigenous peoples can be broadened beyond the more familiar example of Indigenous Australians to consider the diversity of Indigenous groups and legal experiences elsewhere.

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[23] Ibid, 110-113.

[24] UN Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295 (13 September 2007); see generally Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge, Cambridge University Press, 2007); Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the Declaration on the Rights of Indigenous Peoples and International Law* (Hart, forthcoming); and Claire Charters, Les Malezer and Victoria Tauli-Corpuz (eds), *Indigenous Voices: The UN Declaration on the Rights of Indigenous Peoples* (Hart, forthcoming).

[25] One teaching tool might be to ask students to discuss the self-determination proposal of the Aboriginal Provision Government (APG), established in 1990, which set out a vision for an Aboriginal state with certain governmental functions and international personality.

Indigenous issues also arise at numerous points in many specialised, substantive branches of public international law, aspects of which are sometimes dealt with in general courses. In human rights law,[26] the above-mentioned UN Declaration consolidates and particularises rights as relevant to Indigenous peoples and Indigenous peoples played a central role in its formulation, signalling a thickening of participation in the previously narrow world of international law making by States.[27] Indeed, the role of Indigenous peoples in mobilising and advocating on the international plane is an important part of helping students to understand the nature of international law itself, or as Dianne Otto notes in a wider context, 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'.[28] Such focus highlights the politics inherent in the production of international law.

Whether one characterises Indigenous rights as a specialised new branch of international law, or as a particularisation of general human rights (such as a non-discrimination[29] and so on) is at heart a jurisprudential question, which shares much in common with similar conceptual debates surrounding the notion of women's, children's, disability and minority rights. Yet, the relationship between many Indigenous groups and their traditional lands affects human rights analysis in ways which may not be shared by other sub-groups (such as minorities) with special needs.[30] The teaching of Indigenous rights thus not only engages the study of particular substantive rights (including the complex area of cultural rights[31]), but involves deeper conceptual issues surrounding the construction and integrity of international law regimes as a whole.

The mobilisation of UN and other international fora by Indigenous peoples also presents a productive site for the study of how international political processes and institutions (such as the UN and regional human rights bodies, the UN General Assembly and special mechanisms such as the Permanent Forum on Indigenous Issues and the UN Working Group on Indigenous Populations) are used in the human rights field by particular non-state actors.[32] Likewise, there are numerous examples in national courts of the use of human rights discourse

[26] See generally Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester, Manchester University Press, 2002).
[27] See generally Moana Jackson, 'The Face Behind the Law: The United Nations and the Rights of Indigenous Peoples' (2005) 8 *Yearbook of New Zealand Jurisprudence (Special Issue)* 10.
[28] Otto, above note 2, 43.
[29] See, eg, UN Committee on the Elimination of Racial Discrimination, General Recommendation (XXIII) Concerning Indigenous Peoples, 18 August 1997, UN Doc CERD/C/51/misc.13/Rev.4 (1997).
[30] Anaya, above note 7, 141-148.
[31] Alexandra Xanthaki, 'Indigenous Cultural Rights in International Law' (2000) *European Journal of Law Reform* 343; Anaya, above note 7, 131-141.
[32] See, eg, Anaya, ibid, 217-288.

by Indigenous peoples to advance Indigenous claims.[33] The limits of these processes are also instructive, for the effort to secure human rights for Indigenous peoples involves simultaneous success and failure: some success in attaining normative standards, but often failure in application.

Connected to the rights discourse, and cutting across the self-determination discussion, is the 'right to development'[34] and whether peculiar economic forms or rights (particularly in land) do or ought to flow to Indigenous peoples. Again, there are jurisprudential questions in teaching to do with whether the interests, values or perspectives of certain Indigenous communities can be adequately expressed in the terms of (western, capitalist) economic discourse at all: as Rajagopal writes, there is a particular kind of 'economic thinking that underlies our political discourse of rights' which may not fit 'cultures wherein non-economic assumptions govern lives'.[35]

Paradoxically, bringing Indigenous peoples within a human rights framework casts them as actors in a dominant neo-liberal market economy, reinventing 'traditional' relationships with land as an economic power to exploit natural resources. A human rights approach to Indigenous peoples can thus be critiqued, challenging the narrative that international law brings progress over time. Indigenous perspectives may thus provide important critical insights into the blind-spots affecting seemingly progressive areas of law such as human rights and development.

Indigenous issues may also be highlighted in many other areas of international law. Indigenous rights in, and control over, natural resources is an important aspect of international environmental law[36] and also the law of the sea, and touches further on wildlife law and the protection of biodiversity[37] and endangered species (for instance, in traditional whaling or hunting regimes).[38] Indigenous interests in controlling access to, and exploitation of, genetic resources and traditional knowledge is a significant dimension of international intellectual property law.[39] International cultural heritage law engages

[33] In the *Mabo* case in the High Court of Australia, for instance, the legal fiction of *terra nullius* was overturned in part on the basis of the application of modern human rights norms prohibiting racial discrimination: *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J).

[34] UN Declaration on the Right to Development, in UN General Assembly Resolution 41/128 (1986).

[35] Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, Cambridge, 2003), 200-201.

[36] See, eg, Julian Inglis (ed), *Traditional Ecological Knowledge: Concepts and Cases* (International Development Research Centre, Ottawa, 1993).

[37] Dean Suagee, 'The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity' (1999) 31 *Arizona State Law Journal* 483.

[38] See, eg, International Whaling Commission, 'Aboriginal Subsistence Whaling', www.iwcoffice.org/conservation/aboriginal.htm (last accessed 13 August 2009).

[39] Silke von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd ed, Kluwer Law International, The

Indigenous issues, particularly as regards the ownership, possession and control of cultural property,[40] including repatriation[41] of artefacts and human remains held by museums.

In international criminal law, the forced removal of children as an element of the crime of genocide has triggered much debate in States where such policies were practiced.[42] In the law of state responsibility, past mistreatment of Indigenous peoples may illustrate what the right to legal 'reparations' means in a cross-cultural context.[43] In international labour law, the 1989 International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples marked a watershed in the development of legal regimes specifically dealing with Indigenous peoples, with its preamble recognising "the aspirations of peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages and religions".[44]

Hague, 2008); Chidi Oguamanam, *International Law and Indigenous Knowledge: Intellectual Property Rights, Plant Biodiversity and Traditional Medicine* (University of Toronto Press, Toronto, 2006); Tony Simpson, *Indigenous Heritage and Self-Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2007); Sarah Harding, 'Defining Traditional Knowledge: Lessons from Cultural Property' (2004) *11 Cardozo Journal of International and Comparative Law* 511; David Jordan, 'Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can it Fit?' (2001) 25 *American Indian Law Review* 93; Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22 *UNSW Law Journal* 631; Robert Paterson and Denis Karjala, 'Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples' (2004) 11 *Cardozo Journal of International and Comparative Law* 633; Tamara Kagan, 'Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach' (2005) 63 *University of Toronto Faculty Law Review* 1; Angela Riley, 'Straight Stealing: Towards an Indigenous System of Cultural Property Protection' (2005) 80 *Washington Law Review* 69.

[40] Tony Simpson, 'Claims of Indigenous Peoples to Cultural Property in Canada, Australia, and New Zealand' (1995) 18 *Hastings International and Comparative Law Review* 195; Robert Paterson, 'Claiming Possession of the Material Cultural Property of Indigenous Peoples' (2001) 16 *Connecticut Journal of International Law* 283; Maureen Tehan, 'To Be or Not to Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage' (1996) *15 University of Tasmania Law Review* 273.

[41] Sarah Harding, 'Justifying Repatriation of Native American Cultural Property' (1997) *27 Indiana Law Journal* 723; Catherine Bell, 'Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate' (1992) 17 *American Indian Law Review* 457.

[42] See, eg, *Nulyarimma v. Thompson* (1999) 165 ALR 621 (involving allegations of genocide against Indigenous peoples by the Australian government); Ben Saul, 'The International Crime of Genocide in Australian Law' (2000) 22 *Sydney Law Review* 527.

[43] See generally Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford, Oxford University Press, 2008); Jeremie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Transnational Publishers: Ardsley, 2006).

[44] *International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples 1989*, adopted by the General Conference of the ILO, Geneva, 27 June 1989, entered into force 5 September 1991; see also Luis Rodriguez-Pinero, *Indigenous Peoples,*

As is evident from the scoping of issues above, Indigenous peoples can appear at the intersection of different regimes in international law, and as such provide a particularly instructive way of teaching students about the multidimensional nature of international law. Thus, a confrontation between an Indigenous group, a multinational corporation, foreign investors, and a national government over extractive industries or commercial plantations on Indigenous lands (from Brazil to Cambodia) may trigger complex disputes involving numerous international law questions. At issue could be questions of self-determination, cultural and land rights, public participation and consultation in development, corporate social responsibility, the role of NGOs, international investment law, world trade law, remedies against state violence, regional human rights mechanisms and UN procedures, and the internal complaints mechanisms of development banks.

In pedagogical terms, a detailed case study example, drawing together these different threads, could help to illustrate how Indigenous peoples are no longer at the periphery of international law teaching, but can be seen as central to understanding the multifaceted complexity of the current law. It is perhaps an instance of the 'sinking a deep shaft' approach to teaching international law, in contrast to attempts to cover the field in more fleeting depth.[45] In my view there is a role for both approaches: survey courses introducing students to the building blocks of the international law system have their place, as do efforts to draw students in to richer, more focused studies of how the system operates in a given context.

B. Private International Law

Indigenous customary laws are not usually seen or dealt with through a prism of private international law, and are seldom taught as such. Law schools tend to mention 'private' customary laws in passing in the context of introductory or jurisprudence courses about the nature and quality of law, in stand-alone courses dealing with particular customary law regimes in various places, in wider legal pluralism courses.[46] Customary laws tend to feature more prominently in domestic 'public' law courses such as the criminal law and

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Postcolonialism and International Law: The ILO Regime (1919-1989) (Oxford, Oxford University Press, 2005).

[45] Harold Berman, 'The State of International Legal Education in the United States' (1988) 29 *Harvard International Law Journal* 239, 241; see also Otto, above note 2, 51.

[46] See, eg, Sydney Law School ('Legal Systems of the Pacific'; 'Legal Pluralism in Southeast Asia'; 'Development, Law and Human Rights'); Te Piringa (Waikato) Faculty of Law ('Nga Tikanga Māori – Māori Customary Law'); Australian National University Law College ('Law and Development in the Contemporary South Pacific'); University of Papua New Guinea Law School ('Customary Law'). There have been calls too for 'indigenous jurisprudence': see Melville Thomas, 'Indigenous Jurisprudence and Legal Education in the 21st Century' (2005) 4 *ISSA Review* 6.

property and land law, where they have been recognised in limited ways under Australian law.[47]

Yet, in principle the recognition and reception of Indigenous customary laws into a dominant legal order *can be* conceptualised according to private international law (or conflict of laws) principles, since it concerns the treatment of 'foreign' legal principles within a dominant local jurisdiction and its forum courts. Customary laws also often involve matters analogous to what the common law describes as 'private law', including 'personal' matters such as marriage, the family, property and 'business' transactions. Indeed, there have been various legislative interventions in Australian jurisdictions which have recognised certain Indigenous practices in the areas of traditional marriages, child care, and distribution of property on death.[48] The courts, however, have been less willing to extend such recognition, in part due to concerns to maintain a unified common law and dismissive judicial attitudes towards the status of Indigenous practices as 'law'. That the culturally-specific private orderings of Indigenous lives remain largely unrecognised by the 'private' international law is an important lesson for students in what matters to 'our' legal system, and what is rendered invisible by it.

Private 'international' law is, of course, a misnomer, since there is no *universal* scheme of conflict of laws, but rather particular domestic law approaches to dealing with cases involving foreign law elements. Most domestic legal orders nonetheless share an underlying principle that the exclusive territorial application of the dominant, local legal order is an expression of legal and political sovereignty. Such sovereignty is only qualified by the sovereign's own acceptance that foreign legal elements ought to be recognised in certain limited cases — whether for reasons of law (as where the state signs a treaty with another state, agreeing to recognise its law in a certain area), reciprocity (because the state expects the same benefit from another state), or comity (that is, because it is 'good manners' to do so, and it is expected).

Classically, at the international level, the most frequently recognised 'foreign' law systems are those associated with foreign States (as understood in the public international law sense), whether unitary or comprised of federal components. Within some federal States, private 'international' law principles are also often extended to deal with inter-national 'conflicts' between different sovereign legal orders within the federation. In federations, the division and allocation of sovereignty between different levels of government (and their legal systems) stems from some expression of original intent through a constitutional settlement. In both cases, it is a misnomer to describe such matters as true 'conflicts' of different law systems, since private international

[47] See ALRC, above note 5, chapters 5 and 6.
[48] Ibid, chapter 6.

law principles are designed precisely to avoid conflicts arising: the law gives answers to which legal systems (laws and courts) should apply in a given case.

Conceptually, however, private international (or intra-national) law need not be limited to the recognition of the formal legal orders or hierarchies of foreign states or federal government structures. Private international law principles are theoretically capable of dealing with any cases involving elements from more than one law system, including Indigenous customary law systems. That is true regardless of whether a matter involves a federal State recognising Indigenous customary laws within its own territory; or a foreign State recognising another State's Indigenous customary laws; or one Indigenous customary law system recognising another customary law system. All that matters is the act of recognition — that is, whether the legal jurisdiction applying its private international law rules accepts, according to its own rules, that Indigenous customary laws *count* as foreign legal systems that the law should recognise.

Significantly, whether a forum State recognises Indigenous practices in a foreign State as a customary law system would be a question of classification for that forum State and need not depend on recognition of the those practices as customary law in the Indigenous people's own State. For instance, it would be perfectly possible for the New Zealand courts to apply the substantive Indigenous law of a particular community to a dispute, even in circumstances where Australian law refused to recognise such law.[49]

In some federal systems such as Australia, debate about the recognition of Indigenous customary laws in the dominant common law system has often focused on controversial areas such as the criminal law and its punishment policy. Strictly speaking, 'private' international law by definition does not concern public law areas such as the criminal law, for reasons related to sovereignty and public policy. Public law is regarded as a sensitive expression of local political sovereignty[50] and hence it is thought undesirable to displace local public law in favour of foreign public law, in contrast to the policy interest in vindicating private rights to benefit individuals.

In practice, foreign public law *is* enforced in various ways where the express consent of sovereign governments is obtained. For example, a bilateral treaty, such as a prisoner transfer agreement, may provide for one State to enforce the sentence of a foreign criminal court. There are, of course, complex jurisprudential debates in the common law about the conceptual integrity of the distinction between public and private law and the judicial enforcement of one but not the other. Putting such debates aside for present purposes, the ongoing insistence on the preservation of the distinction ensures that the recognition of Indigenous customary laws through private international law principles is only

[49] On the recognition of Indigenous customary law in Australia, see ALRC, above note 5.
[50] *Government of India v. Taylor* [1955] AC 491*; A-G (NZ) v. Ortiz* [1984] AC 1 (Lord Denning MR*; A-G (UK) v. Heinemann Publishers Australia* (1988) 165 CLR 30.

possible in 'private' law areas such as family law, property, tort, contract and succession.

A special difficulty concerning the public/private distinction as developed in the common law arises in relation to recognising Indigenous 'private' law. While it is hard to generalise, in many Indigenous legal systems there may not be any direct equivalence between private (or indeed public) law areas of the common law and relevant Indigenous legal concepts, complicating the application of a conventional private international law analysis. First, relegating crime to the realm of 'public' law thus excluding it from private international law analysis, may not reflect the lived experience of Indigenous communities, where no such separation may be apparent.

Secondly, there is, for instance, no classic Indigenous law of tort or contract in the common law sense, and it is therefore more difficult for a NSW court to apply whatever relevant Indigenous customary laws to govern a tort claim than it is to apply (marginally different) English tort law. Legal concepts, methodology, reasoning, and protected interests may well be different. In addition, some Indigenous law systems emphasise communal, collective or group interests over individual interests, further complicating the analysis. It should be noted, however, that essentialising Indigenous peoples as exclusively defined by collective interests is as dangerous as failing to recognise the collective dimensions of many individual claims.

These problems of translation — that is, how one legal system is to understand the concepts of another — are not, however, insurmountable obstacles to the productive application of private international law principles so as to better adjudicate and resolve disputes involving Indigenous peoples. As in private international law generally, the existence of 'foreign' (that is, customary) law may be regarded as a matter of fact to be proved in evidence by the party seeking to rely upon that law[51] (as in Solomon Islands, Kiribati, Tuvalu and Vanuatu).[52]

Accordingly, just as certain kinds of evidence is relied upon to prove native title claims and associated questions of Indigenous law, so too could Indigenous peoples adduce evidence of how Indigenous customary laws would approach a tort- or contract-like claim. That, of course, may require judicial sensitivity to different forms of evidence, but also flexibility in the assessment of which Indigenous law principles should be regarded as equivalents to the classic areas of private law in the common law. As within the Australian federation, some legal systems (such as Tuvalu and Kiribati) provide by statute for judicial notice to be taken of foreign (customary) law by reference to certain

[51] *Bumper Development Corporation v. Commissioner of Police of the Metropolis* [1991] 1 WLR 1362.
[52] Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (Routledge, London, 2008), 58.

specified authentic statements of it.[53] It would be relatively easy, for instance, for the common law to recognise Indigenous marriages.

In fact, there are numerous examples where radically different legal systems are recognised and applied within the framework of a dominant legal order. One need only think of the recognition of customary and/or religious law to govern certain private law matters within many Asian, African and Pacific Island States. Sometimes the relationship of dominance and sub-ordination between different legal orders is surprisingly inverted. For instance, in Kiribati, Tuvalu and Solomon Islands, customary laws prevail over common law and equity, but are subject to inconsistent legislation and constitutional law.[54]

In some countries, such as Kiribati and Tuvalu, there are even private international law rules which resolve conflicts between competing customary laws and which may lead to the application of custom or common law as modified to do justice in the case.[55] Interestingly, that may thus result not in a choice between two possible law systems, but instead in the judicial creation of a third, hybrid law applicable in the particular case.

Recognition of customary laws may be subject in the usual private international law way by forum public policy exclusions (as defined by the dominant legal order),[56] as in Kiribati and Tuvalu where custom is set aside if it 'would result, in the opinion of the court, in injustice or would not be in the public interest'.[57] In Vanuatu and Solomon Islands, customary laws on the rights of fathers to custody of children have not been upheld for policy reasons, even though such custom was not inconsistent with statute or constitutional law.[58] Contemporary international human rights standards could provide some minimum benchmarks in determining the scope of public policy exclusions,[59] subject to appropriate cultural sensitivity in their application to particular Indigenous practices.

In sum, rules on the recognition of Indigenous customary laws may provide fertile ground for the teaching of the diversity of law systems encompassed by private international law principles. This issue requires teachers and students alike to challenge the received wisdom on what 'counts' as a legal system

[53] Ibid, 59.
[54] Ibid, 51-53.
[55] Ibid, 61.
[56] *Loucks v. Standard Oil Co of New York* 120 NE 198 (1918) (Cardozo J), where forum public policy would exclude a foreign law which violates a fundamental conception of justice or morality as understood in the general community.
[57] Laws of Kiribati Act 1989, Sch 1, para 2; Laws of Tuvalu Act 1987, Sch 1, para 2.
[58] Corrin and Paterson, above n52, 60.
[59] *Oppenheimer v. Cattermole (Inspector of Taxes)* [1976] AC 249, per Lord Cross: "a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as law at all." Lord Cross also stated: "it is part of the public policy of this country that our courts should give effect to clearly established rules of international law".

recognised for the purpose of resolving conflicts of laws. If Indigenous laws are not seen by mainstream lawyers, courts and legislatures as legal systems, then by definition there can be no conflict of laws where there is no visible law. The invisibility of Indigenous customary laws to private international law is itself a vital lesson for students: how 'our' legal system classifies 'others', and refuses to classify some at all, signals the continuing power of dispossession embedded in the dominant legal system.[60]

Conclusion

While it may be administratively tempting to compartmentalise the teaching of Indigenous peoples and Indigenous legal issues into a discrete specialised subject, it is clear that it is both possible and productive to integrate Indigenous issues into classic areas of the modern curriculum such as public and private international law. Such integration not only highlights the significance of Indigenous issues and the impact and operation of mainstream legal subjects upon them, but also provides fruitful opportunities for reflection upon — and interrogation of — the history, formation, doctrine, concepts and values embedded in international law itself.

In private international law, Indigenous issues can helpfully illustrate both the diverse scope of conflict of laws principles and their capacity to reconcile divergent law systems, while simultaneously indicating the limits of functional equivalence between very different law systems. In public international law, Indigenous issues are central to the story of the development of foundational concepts, while at the same time cutting across numerous specialised branches of international law and raising key jurisprudential questions about the nature of those branches and the interests served (or not) by them.

This article demonstrates that it is indeed possible to take what is often thought of as marginal or peripheral in mainstream teaching practice and to move it squarely to the centre of good, contemporary teaching. In the long run, as law students graduate and enter the legal profession, that in turn may gradually come to change attitudes among lawyers and law-makers about what is legally possible — both in accommodating Indigenous concerns so far as possible within the existing law, and stimulating reform where the existing law silences or represses.

[60] That is not to say that bringing customary laws within the dominant common law is unproblematic. That too is a different hegemonic exercise, where customary laws would likely not be permitted to reciprocally extend their own 'private international law' rules to deal with other legal systems.