

RIGHTS OF INDIGENOUS PEOPLES INTEREST GROUP NEWSLETTER

Interest Group Highlights

- In April, Dwight Newman of the University of Saskatchewan was elected co-chair of the Interest Group, joining Stefan Kirchner of the University of Lapland in that role.
- The Interest Group will hold a work-in-progress conference on the last day of the 2015 ASIL Annual Meeting. For details see the "Upcoming Conferences & Events" section, p. 6.
- Interest Group members are encouraged to organize panels or presentations on relevant topics, at any location, to be telecast on the ASIL website. If you are interested in organizing such a telecast, please contact Dwight Newman.

The Newsletter

The Newsletter is a place to share information concerning recent developments, scholarship, and other matters of interest to the group relating to the rights of indigenous peoples. Your contributions are welcome and, indeed, essential to the quality and success of this publication. Please feel free to contact the Newsletter Editor, George Foster, Associate Professor of Law, Lewis & Clark Law School, foster@lclark.edu, with any comments, submissions, or items of interest to include. Thanks are due to Jolande Goldberg and Kristen Hite for proposing news items to highlight in this issue. Unless otherwise indicated, all updates and summaries are by George Foster.

Indigenous Rights Developments in 2014

Compensation for Displaced Indigenous Maasai in Kenya

Stefan Kirchner

In the last year and a half, Maasai people in Narasha, in the municipality of Naivasha, Kenya, have been severely affected by a geothermal energy project pushed forward by the Kenyan government. Hundreds of families, including approximately 2,300 people, have been displaced and a number of houses are said to have been burned. Violence against persons and objects was accompanied by the killing of hundreds of animals, thus impoverishing the victims of the forced displacement.

—continued on page 2

INSIDE THIS ISSUE

Interest Group
Highlights

1

Indigenous Rights
Developments

1

Publications & Reports

4

Upcoming Conferences
&
Events

6

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**Rights of Indigenous
Peoples Interest Group**

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Views contained in this publication are those of the authors in their personal capacity. The American Society of International Law and this Interest Group do not generally take positions on substantive issues, including those addressed in this periodical.



Indigenous Rights Developments in 2014 —continued from page 1

One of the ways in which Kenya aims to secure the energy supply of this rapidly growing nation is with geothermal energy with projects in Kenya's Rift Valley Province. While many in Kenya consider the different ethnic groups just that—different ethnic groups—the Maasai identify themselves as an indigenous people. In fact, they are one of the best known indigenous groups in the world. This legal status is a double-edged sword. Their status as an indigenous group may be used to ensure their participation in decision-making processes, but the recourse to the protection of cultural practices cannot justify practices such as the widespread genital mutilation suffered by Maasai girls. Keep in mind that indigenous rights law is not about perpetuating the image of the noble savage, nor is it about paternalistically protecting indigenous peoples like one would have laws aimed at the protection of children. Indigenous rights law is about giving indigenous people a choice and a say in matters which are of concern to them. Maasai in Narasha were offered some compensation but rejected the offer as being too low. On 3 July 2013 a court in the nearby town of Nakuru ordered 205 families to leave their land and ordered the local and county police forces to enforce the eviction. The indigenous Maasai had no say in the matter. In September 2014, the government of Kenya agreed to compensate 120 families with a total of 120m Kenyan Shilling (KES) (approx. US\$ 1.1m), guaranteeing a minimum of 125,000 KES (approx. US\$ 1,380) per family, and plots of land, for the purpose of constructing new houses.

Naivasha is known for the Naivasha Comprehensive Peace Agreement which ended South Sudan's war for independence from Sudan in 2005 and paved the way for the independence of South Sudan in 2011. Today, however, Naivasha stands for forced evictions many Maasai families and for a continuation of old land disputes between different groups, in this case Maasai and Kikuyu, now in the context of geothermal energy.

Recent Developments concerning Indigenous Rights (January-October 2014): Consultation and Compensation in Focus

Stefan Kirchner

The last months have seen a range of important cases on indigenous rights in a number of countries. It is particularly noteworthy that Supreme Courts in three countries, Canada, Chile and Guatemala, ruled in cases involving the necessary degree of consultation in cases of logging and mining on

indigenous lands. In **Canada's Supreme Court**, indigenous are involved in claims over underrepresentation on court juries in connection with a murder case (the Kokopenace case) in what appears to become an important precedent on the requirements for the composition of juries under Canadian law. In an other case, indigenous plaintiffs won a landmark judgment from the Supreme Court in *Tsilhqot'in Nation v. British Columbia* (2014 SCC 44) in which the Court found that British Columbia had not consulted the applicant First Nation sufficiently in the context of logging operations in their territory. [More details on this case can be found below on p. 3.] Mining continues to be a pressing issue for indigenous peoples in a number of countries. In the last months, indigenous plaintiffs secured greater participation rights in cases decided by the Supreme Courts of both **Chile** and **Guatemala** in cases directed against proposed mining projects by Goldcorp. In Chile, the El Morro mine project was stopped for the third time in as many years while in Guatemala the permit issued for the Los Chocoyos project in Sipacapa was held to be illegal due to a lack of sufficient indigenous participation. In this case, the local Mayan Council of Sipacapa was also recognized by the Supreme Court as a valid representative of indigenous peoples. There are a number of other mining projects in the same region and resistance against them has been going on for some time. In April, a sixteen-year-old girl who had led a youth organisation involved in protests against mining was murdered in the south of the country. Plans by the mining company Beowulf to investigate the viability of a pristine location in the northernmost part of **Finland**, at the Tana river, which forms the border with Norway, has led to concern in both countries over potential pollution. While Norway remains the only Nordic country, apart from Denmark, which has ratified ILO 169, the Finnish government recently announced its intention to ratify the treaty, which has been the object of debates in the country for many years. Across the border in **Sweden**, members of the same indigenous people, the Sámi, have been in a struggle against a mining project in Gallok in the municipality of Jokkmokk. The administration of the province, which is slightly smaller than South Korea, recently decided against the project, although institutions higher up will still have a say in the matter.

Miscellaneous Developments

- New Special Rapporteur on the Rights of Indigenous Peoples Appointed: On May 8, the United Nations

—continued on page 3



Indigenous Rights Developments in 2014 —continued from page 2

Human Rights Council appointed Ms. Victoria Tauli Corpuz of the Philippines to succeed James Anaya as Special Rapporteur on the Rights of Indigenous Peoples. Ms. Tauli Corpuz has long been active as an advocate for the rights of indigenous peoples. Among other things, she served as Chair of the Permanent Forum on Indigenous Issues and is the founder of the indigenous-rights NGO Tebtebba and convenor of the Asian Indigenous Women's Network.

- Canadian Supreme Court Upholds Claim of Aboriginal Title: On June 26, the Supreme Court of Canada ruled unanimously that the Tsilhqot'in First Nation has aboriginal title to 1,750 square kilometers of land: the first time the Court has upheld a claim of aboriginal title. The case was triggered when the Tsilhqot'in objected to logging on their traditional lands by a private company under license from the Province of British Columbia. The Court held that, in light of the Tsilhqot'in's aboriginal title, the Crown may not authorize logging or other development without consulting with them. It also indicated, however, that development could potentially proceed even without consent, if the project had a "compelling and substantial" governmental objective and was consistent with the Crown's fiduciary duties. A copy of the decision is available here: http://www.fns.bc.ca/pdf/William_en_%28SCC-2014%29.pdf.
- Indigenous Rights Law for the Protection of Pygmy Communities Under Consideration in the Congo: In July 2014, a proposal for a law on the rights of indigenous pygmy peoples was submitted to the National Assembly of the Democratic Republic of the Congo. The draft law is designed to protect pygmy communities from a host of social inequities, including forced labor and various forms of discrimination. The bill was drafted by a group of 50 parliamentarians in collaboration with a local NGO, following consultation with local stakeholders. Source: http://www.un-redd.org/DRC_IP_LegalReforms_EN/tabid/794086/Default.aspx.
- Cross-Border Indigenous Treaty Aims to Restore Bison to the Great Plains: On September 23, several Native American tribes and Canadian First Nations signed a treaty to establish intertribal alliances for cooperation in the restoration of bison (or buffalo) to 6.3 million acres of grassland and prairie habitat under their control. The tribes pledged to work together not only to restore bison to their own lands, but also to promote the cause of the bison more generally and work to renew spiritual connections between their peoples and the bison. Source: <http://indiancountrytodaymedianetwork.com/2014/09/25/bringing-back-bison-us-tribes-and-canada-first-nations-join-forces-sign-treaty-157054>.
- New International Land & Forest Tenure Facility: On September 18, Sweden pledged \$14 million to fund a new body to provide grants and expertise to help indigenous peoples secure rights to their land. This International Land and Forest Tenure Facility will be an independent entity governed by representatives from indigenous peoples, community and civil society groups, donors and business. Sources: <http://uk.reuters.com/article/2014/09/18/us-foundation-climate-forest-land-indige-idUKKBN0HD1DW20140918>; <http://www.ipsnews.net/2014/09/new-fund-to-build-on-unprecedented-convergence-around-land-rights/>.
- Navajo Nation Settles Lawsuit Against United States for Breach of Fiduciary Duty: On September 24, the parties announced that the Navajo Nation and U.S. Government had reached a settlement in a lawsuit initiated by the Navajo in 2006. The lawsuit alleged that the federal government breached its fiduciary duties to the tribe by failing to manage, invest and account for tribal trust funds, including royalties from oil, gas, coal, uranium and other mineral leases on tribal land. The settlement disposes of these fiduciary duty claims but preserves the tribe's right to pursue claims relating to other issues, including water rights claims and liability for environmental or health impacts from uranium mining. Sources: http://www.washingtonpost.com/world/national-security/us-to-pay-navajo-nation-554-million-in-largest-settlement-with-single-indian-tribe/2014/09/24/4dc02cc6-434e-11e4-9a15-137aa0153527_story.html; http://www.nytimes.com/2014/09/25/us/navajos-to-get-554-million-to-settle-suit-against-us.html?_r=0.
- Paraguayan Supreme Court Rejects Constitutional Challenge to Legislation Aiming to Restore Land to the Sawhoyamaxa: On September 30, 2014, the Paraguayan Supreme Court rejected a challenge by cattle-ranchers seeking to block legislation that calls for land that they have been exploiting to be returned to Paraguay's indigenous Sawhoyamaxa community. The legislation is intended to implement a 2006 decision by the Inter-American Court of Human Rights (IACHR) in the case of the *Sawhoyamaxa Indigenous Community v. Paraguay*. In that decision, the IACHR held that the community had been

—continued on page 5

Selected Publications & Reports in 2014

Articles

- Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 Calif. L. Rev. 173
- Aaron Dewitt, *Judicial Review as a Limit to Indigenous Self-Governance*, 77 Sask. L. Rev. 205
- Willem van Genugten, Anna Meijknecht & S. J. Rombouts, *Stateless Indigenous People(s): The Right to a Nationality, Including Their Own*, 19 Tilburg L. Rev. 98
- Kirsty Gover, *When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada*, 64 Univ. of Toronto L.J. 206
- Sam Grey, *Self-Determination, Subordination & Semantics: Rhetorical and Real World Conflicts Over the Human Rights of Indigenous Women*, 47 U.B.C. L. Rev. 495
- Dwight Newman, Michelle Biddulph, & Lorelle Binnion, *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 B.U. Int'l L.J. 449
- Ricardo Pereira & Orla Gough, *Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law*, 14 Melbourne J. of Int'l Law 451
- David Takacs, *Environmental Democracy & Forest Carbon (REDD+)*, 44 Envtl. L. 71

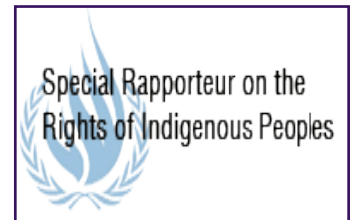
Books

- Sanjay Kabir Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (Oxford University Press).
- Peter Drahos, *Intellectual Property, Indigenous People and Their Knowledge* (Cambridge University Press)
- *Indigenous People in Africa: Contestations, Empowerment and Group Rights* (Ridwan Laher & Korir Sing'Oei, eds., Africa Institute of South Africa)
- Terri Libesman, *Decolonising Indigenous Child Welfare: Comparative Perspectives* (Routledge).

- Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Publishing).
- S. J. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers).

Reports

- [Report of the Special Rapporteur on the Rights of Indigenous Peoples, Human Rights Council, A/HRC/27/52 \(Aug. 11, 2014\)](http://unsr.vtaulicorpuz.org/site/index.php/documents/annual-reports/26-annual-report-hrc-2014): In this first report issued by Ms. Tauli-Corpuz since taking over as Special Rapporteur, she offers preliminary reflections on the status of operationalization of international standards relating to indigenous peoples and her vision for her work as Special Rapporteur. <http://unsr.vtaulicorpuz.org/site/index.php/documents/annual-reports/26-annual-report-hrc-2014>.



- [Rights & Resources Initiative & Indigenous Peoples' International Centre for Policy Research and Education, Recognizing Indigenous & Community Rights: Priority Steps to Advance Development & Mitigate Climate Change \(Sept. 2014\)](http://www.rightsandresources.org/publication/recognizing-indigenous-and-community-rights-priority-steps-to-advance-development-and-mitigate-climate-change/): This report argues that growing pressure for land and resources is threatening the long-term future of communities that

depend on tropical forests for their livelihoods, but that secure local land rights can be a low-cost strategy to secure a sustainable supply, as well as reduce forest carbon emissions. <http://www.rightsandresources.org/publication/recognizing-indigenous-and-community-rights-priority-steps-to-advance-development-and-mitigate-climate-change/>.

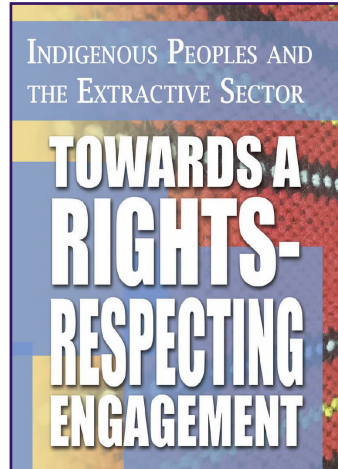




Selected Publications & Reports in 2014

—continued from page 4

- Cathal Doyle & Andrew Whitmore, *Indigenous Peoples & the Extractive Sector: Towards a Rights-Respecting Engagement* (Tebtebba, Indigenous Peoples Links, & Middlesex University, 2014): This report explores developments in the normative framework for indigenous peoples' rights vis-à-vis extractive industries since the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and possible next steps. Among other things, the authors consider the implications of the Post-2015 Development Agenda for the realization of indigenous peoples' rights, argue that the rights recognized in the UNDRIP should feature in the associated Sustainable Development Goals (SDGs), and that these should be premised on recognition of indigenous peoples' self-determination rights. They also consider challenges associated with making this self-determination framework a reality. <http://www.tebtebba.org/index.php/content/322-indigenous-peoples-a-the-extractive-sector-towards-a-rights-respecting-engagement>. ■



Indigenous Rights Developments in 2014

—continued from page 3

wrongfully evicted from its lands in the 1980s in violation of Paraguay's human rights obligation, and called for the government to pay monetary compensation to impacted Sawhoyamaya and restore the land to its traditional owners. Sources: <http://www.theguardian.com/environment/andes-to-the-amazon/2014/oct/07/paraguay-supreme-court-historic-land-ruling>; <http://www.iareporter.com/articles/20141009>.

- *Indigenous Rights Bill Adopted in Indonesia & Under Review by Ministries*: Buoyed by a 2013 ruling by the Indonesian Constitutional Court invalidating the state's claim to millions of hectares of customary forest land, indigenous groups in Indonesia have been pressing for the enactment of a Law on the Recognition and Protection of the Rights of Indigenous Peoples that would formally codify and clarify their customary land rights. The country's House of Representatives has approved a draft law, and this summer President Susilo Bambang Yudhoyono appointed four ministries to review the bill and work with a special committee of the House of Representatives to finalize it for enactment. Progress has been slow, however, reportedly due to opposition to the bill by the Ministry of Forestry. Sources: <http://news.mongabay.com/2013/0517-indonesia-customary-forest.html>; <http://www.aman.or.id/en/2014/10/06/responding-to-the-failure-of-the-house-of-representatives-and-government-to-enact-the-bill-on-the-recognition-and-protection-of-indigenous-peoples-rights-2009-2014/>. ■

YOUR SUBMISSION COULD BE HERE: THIS NEWSLETTER DEPENDS ON MEMBER CONTRIBUTIONS.

Consider submitting a news item, an update, a short comment piece, information about a recent publication, etc., for a forthcoming issue. To do so, contact the Newsletter Editor, George Foster, at foster@lark.edu.



Upcoming Conferences & Events

- Federal Bar Association's **16th Annual D.C. Indian Law Conference**, November 14, 2014, Washington, D.C. <http://www.fedbar.org/Education/Calendar-CLE-events/16th-Annual-DC-Indian-Law-Conference-.aspx>. Among the issues to be covered are the federal trust responsibility, environmental law and tribes, and energy development.
- University of Oregon's **3rd Annual Climate Change & Indigenous Peoples Conference & Student Symposium: Environment, Culture and Indigenous Sovereignty in the Americas**, December 2-3, 2014, Eugene, Oregon. <http://ccip.uoregon.edu/>
- **Contemporary Issues in Federal Indian Law and Their Overlap with Your Field**, February 7, 2015, Stanford Law School. This daylong conference will look at current issues in Indian Law through the lens of other legal fields, including environmental, human rights, and criminal law. <https://www.law.stanford.edu/event/2015/02/07/contemporary-issues-in-federal-indian-law-and-their-overlap-with-your-field>.
- **16th Annual World Bank Conference on Land & Poverty**, March 23–27, 2015, World Bank Headquarters, Washington D.C. Among the issues to be discussed are: land tenure and climate-smart land use; large scale land-based investment; scalable approaches to improving tenure security and their impacts; advances with securing and protecting land rights from a gender perspective; and tenure security in conflict states and resource rich economies. <http://www.worldbank.org/en/events/2014/08/06/land-conference2015>.
- Federal Bar Association's **40th Indian Law Conference: The Indian Self-Determination Era: Strengthening Tribal Sovereignty**, April 9-10, 2015, Scottsdale, Arizona. Among the issues to be discussed are: tribal stewardship and climate change; tribal agricultural sovereignty; and self-determination and indigenous rights.
- **ASIL Rights of Indigenous Peoples Work-in-Progress Conference**, Saturday, April 11, 2015, at George Washington University in Washington, D.C. This conference will be held after the conclusion of the 2015 ASIL Annual Meeting at a time to be announced. Presenters will include Dwight Newman, Stefan Kirchner, George Foster, and Ibironke Odumosu-Ayanu, each of whom will discuss a current project involving indigenous rights. All interest group members are invited and encouraged to attend. If you plan to do so please RSVP in advance to foster@lclark.edu.
- **14th Session of the UN Permanent Forum on Indigenous Issues**, April 20 to May 1, 2015, UN Headquarters, New York. <http://undesadspd.org/indigenouspeoples.aspx>