

RIGHTS OF INDIGENOUS PEOPLES INTEREST GROUP NEWSLETTER

Interest Group Highlights

On Thursday 28 January the RIPIG held a seminar on Indigenous Peoples and International Trade Law. We thank our three speakers, Professor Sergio Puig (University of Arizona), Professor James Hopkins (University of Arizona), and Risa Schwartz (Risa Schwartz International Law) for their insightful comments and engaging presentations. We also pass on our thanks to those who attended.

The Interest Group will be moderating a panel at the upcoming ASIL Annual Meeting (March 24 – March 26, 2021). The Panel will explore Indigenous Peoples participation in International Organizations. We encourage all members to register and attend the panel session.

We remind everyone that members are invited to organize webinars to be hosted by ASIL and this interest group on topics relating to Indigenous peoples' rights. For information on what is involved, please contact the Co-Chairs.

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 essential to the quality and success of this publication. To contribute to an upcoming issue, please contact Harry Hobbs at Hobbs.Harry@uts.edu.au, Ayla do Vale Alves at a.alves@unsw.edu.au, or Bruno Pegorari at b.pegorari@unsw.edu.au.

RIPIG welcomes Bruno Pegorari as newsletter editor. Bruno Pegorari is a PhD candidate and Scientia Scholar at UNSW Law (Sydney), where he researches on Indigenous peoples' rights and remedies in international adjudication. For the last five years, Bruno has been working with Indigenous communities in Brazil on national and international cases.

Indigenous Rights Developments

- [Peaceful Sioux Nation protesters arrested in July at the Mount Rushmore National Memorial face charges in Court](#) (December 19, 2020). On 3 July, around 100 treaty defenders blocked the highway leading to Mount Rushmore National Memorial, where President Trump would speak the following day. The National Guard was deployed and several protestors were arrested. Among those was Nicholas Tilsen, member of the Oglala-Lakḥóta Sioux

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Rights of Indigenous Peoples Interest Group

CO-CHAIRS

Brenda Gunn
Harry Hobbs

EDITORS

Ayla do Vale Alves
Bruno Pegorari
Harry Hobbs

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 —continued from page 1

Nation, human rights activist, and president of the Indigenous-led NDN Collective. On 15 December, the United Nations Special Rapporteur on the rights of Indigenous peoples issued a statement expressing concern over Tilsen's arrest and charges. The next hearing in Tilsen's case is scheduled for 5 March. More information available here: <https://indiancountrytoday.com/news/treaty-defender-rally-was-about-rights-not-trump-MXTgCrxeO0aBpXf-iWD-Xw>

The Statement by the UN Special Rapporteur is available here: <https://news.un.org/en/story/2020/12/1080122>

- United States Representative Deb Haaland picked to become the first Native American to serve as Cabinet secretary (December 18, 2020). Deb Haaland was chosen by President-elect Joe Biden to be the head of the Department of the Interior. Haaland is from the Pueblo of Laguna and Jemez and was one of the first two Native American women elected to Congress in 2018. She had already occupied leadership positions in Congressional Committees and Subcommittees, and has worked as leader of New Mexico's Democratic Party, and as a tribal administrator, among other roles. The choice of Haaland to lead the Department in charge of protecting the country's natural resources, and the lands and rights held in federal trust for Native Americans was celebrated by many Indigenous leaders, advocates and allies, especially due to the role the same agency has previously played in the displacement of Indigenous communities in history and throughout the country. More information available here: <https://indiancountrytoday.com/news/i-ll-be-fierce-for-all-of-us-6ry2p054SE2dELR9BC-ezA>

- The Inter-American Commission of Human Rights issues Precautionary Measure 679-20 (through its Resolution 94/2020) in favour of members of the Munduruku people against Brazil (December 11, 2020). On July 6, 2020, amidst an increase of Indigenous peoples' deaths due to the COVID-19 crisis in Brazil, members of the Munduruku people and others filed a Precautionary Measure claim at the Inter-American Commission of Human Rights (IACHR). The petitioners claimed that the Munduruku were under a public health emergency because of the state's negligence in providing appropriate health assistance during the COVID-19 pandemic. The petitioners alleged that non-authorized

third parties' intrusion to pursue illegal mining and other extractive activities on Munduruku land aggravated the public health emergency already in course. The IACHR acknowledged that, by August 22, 2020, 1,625 members of the Munduruku people (more than 10 per cent of the Munduruku population) had been diagnosed with COVID-19. The IACHR requested that Brazil adopts all necessary measures to protect the Munduruku people's right to health, life, and personal integrity. The Commission stressed that Indigenous peoples are particularly vulnerable to contagious diseases. As such, the state should protect and provide medical assistance in a culturally acceptable way, focusing on the prevention of COVID-19 dissemination among the Munduruku.

More information in Portuguese available here: <http://www.oas.org/pt/cidh/prensa/notas/2020/302.asp>; and <http://www.oas.org/pt/cidh/decisiones/pdf/94-20MC679-20-BR.pdf>

- Australian Parliamentary Inquiry finds mining giant Rio Tinto should pay compensation to the traditional owners of Juukan Gorge in Western Australia (December 10, 2020). The expansion of Rio Tinto's Brockman 4 iron ore mine destroyed 46,000-year-old rock shelters in Juukan Gorge, despite knowledge of the site's cultural significance. The inquiry also called for a moratorium on all mining in the area, as well as several other significant recommendations. Report available here: https://parlinfo.aph.gov.au/parlinfo/download/committees/reportjnt/024579/toc_pdf/NeverAgain.pdf;fileType=application%2Fpdf More information available here: <https://www.abc.net.au/news/2020-12-09/juukan-gorge-caves-rio-tinto-report-handed-down/12967816>
- Canadian government introduces legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples (December 3, 2020). The move fulfils an election promise by the Liberal government to table legislation within the first year of their new parliamentary term. The Bill would require the federal government, in consultation and cooperation with Indigenous peoples, to: take all measures necessary to ensure the laws of Canada are consistent with UNDRIP; prepare and implement an action plan to achieve UNDRIP's objectives; and table an annual report on progress to align the laws of Canada and on the action plan. Indigenous



Indigenous Rights Developments —continued from page 2

leaders welcomed the move but remain cautious.

The bill is available here: <https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading>
More information available here: <https://www.cbc.ca/news/politics/liberals-introduce-undrip-legislation-1.5826523>

- David Yanomami joins the Brazilian Academy of Sciences (December 3, 2020). The Yanomami Leader and Shaman, David Yanomami becomes the first Indigenous member of the Brazilian Academy of Sciences. David Yanomami co-authored (with Bruce Albert) the ground-breaking book *The Falling Sky: Words of a Yanomami Shaman* (Harvard University Press, 2013). More information in Portuguese available here: <http://www.abc.org.br/2020/12/03/novos-membros-da-abc-eleitos/>
- The Australian State of Victoria has recognized the Gunaikurnai peoples' rights to water ownership (November 11, 2020). The Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC) will receive two gigalitres of unallocated water in the Mitchell River, allowing traditional owners to determine how and where water is used for cultural, environmental or economic purposes. The decision recognizes water ownership in a river system for the first time in Victoria's history. More information available here: <https://www.premier.vic.gov.au/water-traditional-owners-victorian-first>; and <https://theconversation.com/victoria-just-gave-2-billion-litres-of-water-back-to-indigenous-people-heres-what-that-means-for-the-rest-of-australia-150674>
- Peru's Ministry of Energy and Mines proposes to replace "free, prior and informed consultation" with "prior agreement" to streamline the licensing of mining projects (November 24, 2020). The bill encourages mining companies and affected Indigenous communities to reach their own agreement on projects, without state involvement, with the aim of reducing consultation periods from 12 months to 6 months. Indigenous rights advocates are opposed to the bill, arguing that it is unconstitutional and that, without adequate safeguards, it will not result in fair and reasonable agreements between companies and Indigenous communities. The bill will be released shortly, allowing refinement by civil society and mining companies. More information available in Spanish here:

<http://cooperacion.org.pe/senor-ministro-acuerdo-previo-no-es-igual-que-consulta-previa/>

More information available in English here:

<https://www.mining.com/peru-new-mining-minister-vows-to-streamline-permitting/>

- Indian State of Jammu and Kashmir to implement Forest Rights law (November 19, 2020). The *Forest Rights Act 2006* aims to recognise the rights of at least 150 million Indigenous and rural people to inhabit and live off about 40 million hectares of forest land. Although passed fifteen years ago, the Act was not implemented in Jammu and Kashmir as the state enjoyed a special status that exempted it from several federal laws. This changed in October 2019 when the Indian government introduced direct rule from New Delhi. Indigenous activists argue that the move will better protect the rights of tribal peoples. More information available here: <https://www.reuters.com/article/india-landrights-kashmir/kashmir-to-enact-indias-forest-rights-law-14-years-on-in-boost-for-nomads-idUSL8N2I529W>
- Mexico's House of Representatives unanimously approves proposal giving Indigenous languages constitutional status (November 18, 2020). The proposal would raise Indigenous languages to the same status as Spanish under the law, imposing an enhanced obligation on the state to preserve, diffuse, and develop the use of such languages. Representative Aleida Alavez Ruiz argues that the constitutional protection of Indigenous languages entails the safeguarding of Indigenous peoples' culture, identity, roots, and their interaction with the rest of Mexican society. A study by the National Institute of Indigenous Languages (Instituto Nacional de Lenguas Indígenas (INALI) shows that there are eleven Indo-American linguistic families in Mexico, with 68 linguistic groupings, and a further 364 variations within those groupings. The measure has been sent to the Senate for consideration. More information available in Spanish here: <http://comunicacionnoticias.diputados.gob.mx/comunicacion/index.php/boletines/aprueba-la-camara-de-diputados-elevar-a-rango-constitucional-las-lenguas-indigenas#gsc.tab=0>
- A Brazilian bill that would legalize mining on Indigenous lands has led to record-high applications for mining and

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Indigenous Rights Developments —continued from page 3

logging licenses despite concerns over its legality (November 13, 2020). Bill 191/2020, signed by President Jair Bolsonaro, seeks to facilitate the exploitation of natural resources on Indigenous lands by permitting activity without the free, prior and informed consent of the affected community. Indigenous activists assert that the bill breaches Article 176 of the Constitution, which imposes special conditions on mining activities on Indigenous territories. However, this has not stopped industry filing over 100 requests for exploration with the National Mining Agency in 2020—a dramatic increase from previous years. Indigenous activists argue that, if approved, the bill will not only lead to increasing rates of environmental destruction, but will also have a tragic impact on Indigenous lands, culture, and survival.

More information in Portuguese available here: <https://amazonia.org.br/2020/11/com-estimulo-de-bolsonaro-pedidos-para-minerar-em-terras-indigenas-batem-recorde-em-2020/>

More information in English available here: <https://storymaps.arcgis.com/stories/f0954b0a0615405da8b40207a448bc20>
<https://news.mongabay.com/2020/11/brazil-sees-record-number-of-bids-to-mine-illegally-on-indigenous-lands/>

- Indigenous Ecuadorians affected by massive oil spills in the Ecuadorian Amazon continue to seek remedy in court (October 27, 2020). In April, 15,000 barrels of crude oil were spilled, contaminating the Amazon River and seriously affecting the lives of 27,000 Indigenous peoples. These challenges have been exacerbated by the Covid-19 pandemic, which has entered Indigenous communities via contact with oil company workers. Indigenous peoples' attempts to enforce their rights in court have so far been stymied; their case has been suspended twice.

More information available here: <https://americasquarterly.org/article/qa-the-double-crises-in-ecuadors-amazon/>

- Indigenous communities in Colombia call for State action against ongoing brutality (October 24, 2020). The signing of the Peace Agreement between the Colombian government and the Revolutionary Armed Forces of Colombia (FARCs, in Spanish) in 2016, has not ended violence faced by Indigenous peoples in Colombia. Indigenous communities argue that following the withdrawal of FARCs forces, the Colombian govern-

ment, now led by conservative President Iván Duque, failed to meet its obligations to offer adequate protection to Indigenous communities, allowing criminal groups linked to drug trafficking to impose new waves of violence on Indigenous Colombians. Indigenous leaders denouncing the violence have become targets. The INDEPAZ Institute has counted 86 mass killings (where there has been 3 or more deaths), involving both Indigenous and civic leaders, in 2020.

More information available here: <https://www.nytimes.com/2020/10/24/world/americas/colombia-violence-indigenous-protest.html>

- Conflict erupts over treaty rights in Nova Scotia, Canada (October 20, 2020). Two Peace and Friendship Treaties from 1760 and 1761 recognise that the Mi'kmaq have a right to hunt, fish and gather in pursuit of a 'moderate livelihood'. That right was affirmed in the Canadian Supreme Court decision *R v Marshall* [1999] 3 SCR 456, but the Court did not confirm what constitutes a 'moderate livelihood', sparking tensions between Mi'kmaq and non-Indigenous commercial fishermen that have continued to this day. In October 2020, these tensions erupted when commercial fishermen firebombed a Mi'kmaq lobster processing plant and assaulted Mi'kmaq lobster fishermen. The commercial fishermen argued that Mi'kmaq lobstering outside the lobster season threatens their viability. There is no evidence for these claims. The Canadian government condemned the violence.

More information available here: <https://www.nytimes.com/2020/10/20/world/canada/nova-scotia-lobster-war.html>

<https://theconversation.com/nova-scotia-lobster-dispute-mikmaq-fishery-isnt-a-threat-to-conservation-say-scientists-148396>

Note that in November 2020, Membertou and Miawpukek First Nations (both Mi'kmaq communities) purchased Clearwater Seafoods for CAD 1 billion, providing them with a stake in commercial fishing in Nova Scotia.

More information available here:

<https://www.theguardian.com/environment/2020/nov/12/canada-clearwater-seafoods-mikmaq-first-nation-fishing>

- In the Australian State of Western Australia class action launched to recover Indigenous peoples' stolen wages

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(October 19, 2020). Until the 1970s, wages earned by Indigenous workers in Western Australia (and indeed across Australia) were paid to State governments to be held in trust. Failure to provide wages was common: A 2006 inquiry conducted by the federal Parliament found that the practice was so extensive it is impossible to determine how much money is owed. The action in Western Australia follows efforts in other states. In 2019, the Queensland government settled a class action relating to unpaid wages for AUD 190 million. More information available here: <https://www.abc.net.au/news/2020-10-19/wa-government-faces-class-action-over-stolen-wages/12737046>

- United States President Donald Trump signs Savannah Act (October 10, 2020). The Act establishes national law enforcement guidelines between the federal government and American Indian tribes to help track, solve and prevent crimes against Native Americans. The law is named after Savanna LaFontaine-Greywind, a pregnant 22-year-old Spirit Lake tribal member from North Dakota who was killed in 2017. The Act is available here: <https://www.congress.gov/116/plaws/publ165/PLAW-116publ165.pdf> More information available here: <https://www.usatoday.com/story/news/nation/2020/10/11/donald-trump-savannas-act-missing-murdered-native-americans/5964329002/>
- Supreme Court of Canada reserves judgment on whether the Sinixt tribe's treaty rights apply across Canada-US border (October 8, 2020). Richard DeSautel is a United States citizen, a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State and a descendent of the Sinixt Tribe, whose traditional territory is now claimed by Canada and the United States. In 2010, DeSautel was charged with hunting without a license and hunting big game contrary to the British Columbia *Wildlife Act*. DeSautel maintains that he was exercising his constitutionally protected aboriginal right to hunt in the traditional territory of his Sinixt ancestors. DeSautel was successful at first instance and in the British Columbia Court of Appeals. The Canadian state has appealed to the Supreme Court. A decision is expected in early 2021. Case page available here: <https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=38734>

More information available here: <https://ablawg.ca/2020/01/20/whose-sovereignty-is-it-anyway-the-borders-of-aboriginal-rights-along-the-sovereign-borders-of-canada/>

First Instance decision available here: <https://www.canlii.org/en/bc/bcpc/doc/2017/2017bcpc84/2017bcpc84.html>

Court of Appeal decision available here: <https://www.canlii.org/en/bc/bcca/doc/2019/2019bcca151/2019bcca151.html>

- New Caledonia narrowly votes 'No' to Independence from France (October 4, 2020). The referendum was the second to be held under the Nouméa Accord, following a similar poll in 2018. This time, support for independence reached 46.7%, an increase from 43.3% recorded in 2018. Support for independence was greatest among the indigenous Kanak people, who comprise about 40 per cent of the territory's population. More information available here: <https://www.bbc.com/news/world-asia-54410059>
- Inter-American Court of Human Rights finds that Argentina denied Indigenous communities their right to communal property, a healthy environment, adequate food, water, cultural identity, and judicial protection (February 6, 2020). In *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, Indigenous community members from the Lhaka Honhat Association sued Argentina on behalf of 132 Indigenous communities alleging several violations of the *American Convention on Human Rights*. The Court held that Argentina's failure to prevent and protect the Indigenous applicants from years of illegal logging, introduced livestock and fencing, caused environmental degradation and violated their 'interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water' as protected under the ACHR. The Court ordered Argentina to grant title to the 132 Indigenous communities and resettle the Creole populations, along with their fences and livestock, away from the Indigenous lands, within six years. Decision available here: https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf More information available here: <https://gnhre.org/2020/04/10/lhaka-honhat-association-vs-argentina-the-human-right-to-environment-in-the-inter-american-court/> ■

Recommendations from UN and Treaty Bodies

Human Rights Committee (HRC)

In its 129th Session (29 June 2020 – 24 July 2020), the Human Rights Committee adopted General Comment No 37 (GC 37) on the right of peaceful assembly (Article 21). As part of the General Comment, the Committee stated that 'States must ensure that laws and their interpretation and application do not result in discrimination in the enjoyment of the right of peaceful assembly, for example on the basis of (...) indigenous or other status (...)' (CCPR/C/GC/37, para 25).

In its 130th session (12 Oct 2020 - 06 Nov 2020), the Committee noted that 'due to COVID-19, the examination of the states parties' reports (constructive dialogues) will be postponed to the 2021 future sessions'.

Committee on the Elimination of Discrimination against Women (CEDAW)

In its 77th session (26 Oct 2020 - 5 Nov 2020), the Committee noted that 'due to prevailing circumstances, the State party reviews have been postponed to 2021'.

On 6 November 2020, CEDAW adopted General Recommendation No. 38 (2020) (GR-38/2020) on trafficking in women and girls in the context of global migration. In GR-38/2020, the Committee urges states to address and eliminate the root causes of trafficking and sexual exploitation of women and girls in the context of global migration (CEDAW/C/GC/38, para 18). Where addressing the socio-economic justice root causes, the Committee states that 'women and girls most vulnerable to being trafficked belong to marginalised groups whose life experience is marked by serious rights deprivation. These include: women and girls living in rural and remote areas, indigenous and ethnic minority communities (...)' (CEDAW/C/GC/38, para 20).

Committee on the Elimination of Racial Discrimination (CERD)

In its 101st session (4 – 7 August 2020) and 102nd session (16 Nov 2020 – 24 Nov 2020), the Committee postponed the examination of States parties' reports due to COVID-19.

In its 102nd Session, CERD approved General Recommendation No. 36 (GC-36) titled 'Preventing and Combating Racial Profiling by Law Enforcement Officials'. In GC-36, CERD expressed its concern with 'the

continuous practice of racial profiling by law enforcement officials, targeting in particular specific groups, such as (...) Indigenous Peoples' (CERD/C/GC/36, para 6). The Committee also recognized that Indigenous peoples and other specific groups 'are the most vulnerable to racial profiling' (CERD/C/GC/36, para 11).

During this session, CERD also approved the opinion on the Communication No. 54/2013 submitted by Lars-Anders Ågren et al (represented by counsel, Mattias Åhrén, head of the Human Rights Unit of the Saami Council) against Sweden. The victims, all members of the Vapsten Sami Reindeer Herding Community, claimed that Sweden had breached article 5(d)(v), article 5(a), and article 6 of the Convention.

The Committee found Sweden responsible for granting three mining concessions on Vapsten Sami traditional territory without the reindeer herding community's consent and without considering whether the appropriation of traditional territory violated the petitioners' land rights. The Committee concluded that the rights of the members of the Vapsten Sami Reindeer Herding Community under Article 5(d)(v) of the Convention had been violated (CERD/C/102/D/54/2013, para 6.22). Nevertheless, the Committee found that Sweden had not violated the community's right to equal treatment before domestic tribunals, as 'the petitioners did not sufficiently substantiate their claim under Article 5(a) of the Convention' (CERD/C/102/D/54/2013, para 6.24). Finally, the Committee found Sweden responsible for violating the Community's right to adequate protection and remedies under Article 6 of the Convention (CERD/C/102/D/54/2013, para 6.29).

The Committee recommended that Sweden revises 'the mining concessions after an adequate process of free, prior and informed consent'; and amends its legislation, so it can reflect the status of the Sami as Indigenous peoples and their rights (especially regarding land, resources, and free, prior and informed consent) (CERD/C/102/D/54/2013, para 8).

Committee on Economic, Social and Cultural Rights (CESCR)

In its 68th session (28 Sep 2020 - 16 Oct 2020), the Committee noted that 'due to prevailing circumstances, the State party reviews have been postponed'.



Book Reviews

- Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020), review by Harry Hobbs.

For over a decade, Australians have debated amending the Constitution to 'recognize' Aboriginal and Torres Strait Islander peoples. Many proposals have been considered, including a racial non-discrimination clause, a preamble, and even official acknowledgment and support of Aboriginal languages. In 2017, following 18 months of deliberation and dialogue in urban and regional centers across the country, Aboriginal and Torres Strait Islander peoples explained how they would like to be recognized. The groundbreaking Uluru Statement from the Heart called for an Indigenous representative body empowered to speak to the Australian Parliament, and a Makarrata Commission to supervise a process of treaty making and truth telling about Australia's colonial past. Despite polling indicating community support, the Australian government dismissed the proposals.

In *A First Nations Voice in the Australian Constitution*, Morris makes the case for the first of the three Uluru Statement reforms in a distinctive manner. Although clearly a legal text, Morris is focused on the politics of constitutional reform in Australia as it relates to constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The questions that motivate her analysis are therefore primarily political rather than legal: why is reform necessary? Is this proposal politically viable? And, how can constitutional drafting improve a proposal's likelihood to succeed in a referendum? Her answer is clear. An Indigenous representative body—a First Nations Voice—is consistent with both Australian legal and political traditions and generations of Aboriginal and Torres Strait Islander activism. The book is strongest when exploring the history of that activism and examining Australia's constitutional culture. To do this, Morris also considers mechanisms designed to empower Indigenous peoples adopted by comparative countries. Her analysis of treaty relationships in Canada, reserved seats for Māori people in Aotearoa New Zealand, and the Sámi Parliaments in Norway, Sweden and Finland complement her Australian study and expand the book's audience. Perhaps most significantly, while she outlines the advantages of each model, her international study furthers her own view that in Australia, an Indigenous representative body offers the best prospects for Indigenous empowerment. This is a clear and compelling book that should be read by anyone interested in law reform and Indigenous peoples' activism.

Discount Price: £48. Order online at www.hartpublishing.co.uk – use the code UG6 at the checkout to get 20% off your order.

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Committee on Migrant Workers (CMW)

The Committee's intersessional period runs from 9 July 2020 to 26 February 2021. No session has been held since the last edition of the newsletter.

Committee on the Rights of the Child (CRC)

No new concluding observations relating to Indigenous peoples' rights in the Committee's 84th session (2 Mar 2020 – 6 Mar 2020). In its 85th session (14 Sep 2020 – 1 Oct 2020), the Committee noted that 'due to prevailing circumstances, the State party reviews have been postponed'.

Committee on the Rights of Persons with Disabilities (CRPD)

In its 23rd session (17 Aug 2020 - 4 Sep 2020), the Committee noted that 'due to COVID-19, all constructive

dialogues with the States parties scheduled for this session have been postponed to future sessions'.

Human Rights Council

On 6 October 2020 during its 45th Session (14 September–7 October 2020), the Human Rights Council adopted Resolution 45/12 on 'Human rights and indigenous peoples' (A/HRC/RES/45/12). In the Resolution, the Council welcomes progress and acknowledges the work of UN bodies on Indigenous peoples' rights. The Council also encouraged states 'to give due consideration to the rights of indigenous peoples and the multiple and intersecting forms of discrimination faced by indigenous peoples and individuals, including potential setbacks and aggravated barriers caused by COVID-19' (A/HRC/RES/45/12, para 19). The Resolution is available here: https://digitallibrary.un.org/record/3888350/files/A_HRC_RES_45_12-EN.pdf ■

Book Reviews —continued from page 7

- Grant Christensen and Melissa Tatum eds, *Reading American Indian Law: Foundational Principles* (Cambridge University Press, 2020), review by Harry Hobbs.

Many, if not all, textbooks focus on case law and statutes. This makes sense. The body of law made by judges and statutes adopted through the legislative process are both afforded an equal footing under the common law (albeit with statutes given priority); lawyers need to understand both to practice effectively. Scholarship or academic writing, by contrast, is not law. Nonetheless, as the editors of this welcome volume identify, scholarship is a critical part of legal thinking. The best academic writing can serve lawyers and courts by helping to elucidate or reconcile contradictory authority. It can assist lawmakers by highlighting problems in existing law and proposing legislative or regulatory solutions. It can also help scholars by challenging assumptions and provoking new ways of thinking about the law.

Commencing from the sound position that 'scholarly contributions are as fundamental for the study of Indian law as many cases or statutes' (p 1), this valuable textbook collects and explores the sixteen 'most impactful' articles on American Indian law published between 1985 and 2015. As the editors' note, this period has seen a tremendous burst of activity. In those thirty years some 3,345 articles dealing with Indian law were published in American law reviews. It is simply not possible to stay abreast of this critical and wide-ranging scholarship. This collection therefore fills an important lacuna.

The collection is divided into four parts of four articles. Part I examines how courts have dealt with the legal fictions and political realities that are raised when forced to deal head on with the challenges of colonialism, including in particular questions of sovereignty, legal pluralism and race. Part II focuses on an underlying issue confronted by all Indigenous peoples seeking domestic remedies; the legitimacy of federal courts making decisions over sovereign peoples without regard to their voices and traditions. In Part III, the editors have chosen articles that explore the nature of tangible and intangible property. Part IV concludes by addressing the nature of law itself and the potential for misunderstandings in disputes between sovereigns.

Readers may quibble with the methodology adopted by the editors, but it is difficult to imagine a better repre-

sentation of foundational legal scholarship on American Indian law. Each article has been condensed in certain parts for brevity and in order to focus on the major claims made. Each concludes with a series of questions and provocations authored by the editors, to assist both students and instructors hoping to enhance their understanding of the field. It is an excellent book for undergraduates and graduate students, as well as professors looking for an introduction to major scholarship on American Indian law.

- Hillary Hoffmann and Monte Mills, *A Third Way: Decolonizing the Laws of Indigenous Cultural Protection* (Cambridge University Press, 2020), review by Ayla do Vale Alves.

The "first way" of Indigenous cultural preservation took place before the arrival of European colonizers, when Indigenous peoples in the Americas were free to practice and develop their cultures according to their own values. A "second way" came with colonization, the imposition of European legal traditions, oppression, assimilation, and promotion of the idea that Indigenous peoples were culturally inferior. Indigenous peoples struggled in their efforts to preserve their cultures in face of the State's powers, Eurocentric legal theories and policies directed to the decimation of tribal cultures. This "second way" has been dictating the protection of Indigenous' cultural rights for a long time, and even with the creation of laws seemingly favorable to Native cultural protection, the remaining conception of Indigenous cultural inferiority has prevented such laws from being effectively applied to safeguard Indigenous cultures.

What this book argues is that things are finally changing. Now a "third way" is possible. In building this argument, the authors combine a comprehensive analysis of domestic legislation affecting Indigenous culture in the United States, with a thorough historic account of how the federal laws of the country sought to subjugate, assimilate and steal from Indigenous peoples.

The initial chapters bring a detailed examination of important cases involving Indigenous culture to showcase the oppressive jurisprudence of the "second way", exploring, for instance, the Fort Peck Reservation's struggle to bring the bison herds back to their lands, and the Cherokee diaspora, among other



Statements and Reports

- United Nations Special Rapporteur on the rights of Indigenous people notes that land-grabbing in Asia displaces Indigenous peoples and destroys environment (September 8, 2020)
Media release available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26213&LangID=E>
- United Nations experts call on the United States to respect the rights of an Indigenous leader charged in connection with a peaceful demonstration against President Donald Trump's political rally at Mount Rushmore (December 15, 2020)
Media release available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26611&LangID=E>
- United Nations experts urged Mexico against making further budgetary cuts to programmes dedicated to preventing and supporting women who are victims of violence, as well as maternal, sexual and reproductive health (October 16, 2020)
Media release available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26391&LangID=E>
- United Nations Special Rapporteur on the rights of indigenous peoples argues Indigenous peoples must be included in responses to covid-19 (October 12, 2020)
Media release available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26374&LangID=E>
- United Nations experts call for halt to mining at controversial Colombia site.
Media release available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26306&LangID=E>
- United Nations Special Rapporteur on the rights of Indigenous peoples addresses the 45th session of the Human Rights Council.
Address available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26294&LangID=E>
- United Nations Special Rapporteur on the rights of Indigenous peoples addresses the 75th session of the General Assembly.
Address available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26390&LangID=E>
- United Nations Deputy High Commissioner for Human Rights opens panel discussion on the rights of indigenous peoples (September 23, 2020)
Address available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26285&LangID=E>
- Human Rights Council holds annual half-day panel discussion on the rights of Indigenous peoples with a focus on the protection of Indigenous human rights defenders (September 23, 2020)
Details and webcast available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26288&LangID=E> ■

Book Reviews —continued from page 8

interesting examples of the battles Indigenous communities have been waging to protect their culture. Chapter 5 examines each of the federal laws applicable to Indigenous cultural heritage protection, such as the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA), and others. From Chapter 6, the authors begin to explore the "third way", highlighting the importance of taking Indigenous perspective into account in order to shift the oppressive trends in jurisprudence so that tribal, state, and federal law can

be interpreted and applied in mutual consideration, and with a view to protect and support Indigenous cultures and cultural objectives. Examples brought forward in Chapter 7 of tribes' and states' efforts to eliminate historically oppressive legal trends and innovate in cultural protection in the United States demonstrate that the change is underway. With this empowering tone, this book is a very useful resource for those seeking to promote Indigenous-driven cultural preservation projects and interests. ■

Selected Publications & Reports

Books

- Anindya Bhukta, *Legal Protection for Traditional Knowledge* (Emerald, 2020)
- Angela Cameron, Sari Graben and Val Napoleon (eds), *Creating Indigenous Property: Power, Right, and Relationships* (University of Toronto Press, 2020)
- Morad Elsana, *Indigenous Land Rights in Israel: A Comparative Study of the Bedouin* (Routledge, 2020)
- Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021)
- Hillary M. Hoffmann and Monte Mills, *A Third Way: Decolonizing the Laws of Indigenous Cultural Protection* (Cambridge University Press, 2020)
- Karen Jarratt-Snyder and Marianne O. Nielsen (eds), *Traditional, National, and International Law and Indigenous Communities* (University of Arizona Press, 2020)
- Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020)
- Mariana Monteiro de Matos, *Indigenous Land Rights in the Inter-American System: Substantive and Procedural Law* (Brill, 2020)
- Timo Koivurova, Else Grete Broderstad, Dorothée Cambou, Dalee Dorough and Florian Stammer (eds), *Routledge Handbook of Indigenous Peoples in the Arctic* (Routledge, 2020)
- Laura Rademaker and Tim Rowse, *Indigenous Self-Determination in Australia: Histories and Historiography* (Australian National University Press, 2020)
- Stephen Barclay and Michalyn Steele, 'Rethinking Protections for Indigenous Sacred Sites' 134 *Harvard Law Review* (forthcoming, 2021)
- Bethany Berger, 'McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries' *Pennsylvania Law Review (Online)* (forthcoming, 2021)
- Bryan Birtles, 'Another Inappropriate F Word: Fiduciary Doctrine and the Crown-Indigenous Relationship in Canada' 9(1) *American Indian Law Journal* 1-19 (2020)
- Kristen A. Carpenter and Alexey Tsykarev, '(Indigenous) Language as a Human Right' 24:1 *UCLA Journal of International Law and Foreign Affairs* 49-132 (2020)
- Claire Charters, 'The Relevance of Te Tiriti O Waitangi in the Covid-19 Era' 9(4) *MAI New Zealand Journal of Indigenous Scholarship* 17 (2020)
- Jonodev Chaudhuri, 'Reflections on *McGirt v Oklahoma*' 134 *Harvard Law Review Forum* 82 (2020)
- Eden HB Chua, 'Federalism and Indigenous Peoples in Sarawak: The Malaysian Federal Court's Judgments in *Sandah (No 1) and (No 2)*' [2020] *Singapore Journal of Legal Studies* 341-357 (2020)
- Don Couturier, 'Judicial Reasoning Across Legal Orders: Lessons from Nunavut' 45:2 *Queen's Law Journal* 319-352 (2020)
- Mark Cowan, 'Taxing Cannabis on the Reservation' 57(4) *American Business Law Journal* (2020)
- Seth Davis, 'Tribalism and Democracy' 62 *William & Mary Law Review* 431-486 (2020)
- Michael Doran, 'The Equal-Protection Challenge to Federal Indian Law' 6(1) *University of Pennsylvania Journal of Law and Public Affairs* 1-74 (2020)
- Nancy Doubleday, 'Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law' 17:2 *Denver Journal of International Law and Policy* 373-393 (2020)
- Karen Drake, 'Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation' 48(4) *Federal Law Review* 570-585 (2020)

Articles and chapters

- Justin W. Aimonetti, "'Magic Words' and Original Understanding: An Amplified Clear Statement Rule to Abrogate Tribal Sovereign Immunity" 47(4) *Pepperdine Law Review* (forthcoming, 2020)
- Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' 48(4) *Federal Law Review* 529-542 (2020)



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- Kim M. Economides, Aaron Timoshanko and Leslie S. Ferraz, 'Justice at the Edge: Hearing the Sound of Silence' 41:1 *Adelaide Law Review* 39-85 (2020)
- Shea Esterling, 'Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples' 28(1) *International Journal of Minority and Group Rights* 1-26 (2021)
- Karen Fisher and Meg Parsons, 'River Co-Governance and Co-Management in Aotearoa New Zealand: Enabling Indigenous Ways of Knowing and Being' 9:3 *Transnational Environmental Law* 455-480 (2020)
- Katherine Florey, 'Toward Tribal Regulatory Sovereignty in the Wake of the Covid-19 Pandemic' 63(2) *Arizona Law Review* (forthcoming, 2021)
- Carter Fox, "'One Person, One Vote": Navajo Nation v San Juan County and Voter Suppression of Native Americans' 9(1) *American Indian Law Journal* 20-40 (2020)
- Jérémie Gilbert, 'Indigenous Peoples and Litigation: Strategies for Legal Empowerment' 12(2) *Journal of Human Rights Practice* 301-320 (2020)
- James Grijalva, 'Ending the Interminable Gap in Indian Country Water Quality Protection' 45:1 *Harvard Environmental Law Review* (forthcoming, 2020-21)
- Kirsty Gover, 'Legal Pluralism and Indigenous Legal Traditions' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020)
- Harry Hobbs and Stephen Young 'Modern Treaty Making and the Limits of the Law' *University of Toronto Law Journal* (forthcoming, 2021)
- Harry Hobbs, 'The Road to Uluru: Constitutional Recognition and the UN Declaration on the Rights of Indigenous Peoples' 66(4) *Australian Journal of Politics and History* 613-632 (2020)
- Kris Inwood, Evan Roberts, "Indians are the Majority of the Prisoners"? Historical Variations in Incarceration Rates for Indigenous Women and Men in British Columbia' 59:3 *The Howard Journal of Crime and Justice* 350-369 (2020)
- Sital Kalantry and Nicholas Koeppen, 'Indigenous Peoples Living in Voluntary Isolation During COVID' 68 *UCLA Law Review Discourse* (2020)
- Charis Kamphuis, 'The Transnational Mining Justice Movement: Reflecting on Two Decades of Law Reform Activism in the Americas' 57 *The Canadian Yearbook of International Law* 286-352
- Elizabeth Macpherson, Julia Torres Ventura and Felipe Clavijo Ospina, 'Constitutional Law, Ecosystems and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects' 9(3) *Transnational Environmental Law* 521-540 (2020)
- Monte Mills, 'Beyond the Belloni Decision: *Sohappy v. Smith* and the Modern Era of Tribal Treaty Rights' 50:2 *Environmental Law* 387-414 (2020)
- Felipe Kern Moreir, 'The Fishing Rights of Indigenous Peoples in the Context of the Global Governance of the Seas' 34:1 *Ocean Yearbook* 136-163 (2020)
- Julian R Murphy, 'Legislating in Language: Indigenous Languages in Parliamentary Debate, Legislation and Statutory Interpretation' 43:3 *University of New South Wales Law Journal* 1006-1040 (2020)
- Yuko Osakada, 'An examination of arguments over the Ainu Policy Promotion Act of Japan based on the UN Declaration on the Rights of Indigenous Peoples' *International Journal of Human Rights* (forthcoming, 2020)
- Erin O'Donnell, Anne Poelina, Alessandro Pelizzon and Cristy Clark, 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' 9:3 *Transnational Environmental Law* 403-427 (2020)
- Yuko Osakada, 'Indigenous Peoples as Actors in International Law-Making: Focusing on International Environmental Law' in Karen Scott, Kathleen Claussen, Charles-Emmanuel Côté and Atsuko Kanehara *Changing Actors in International Law* (Brill, 2020) 101-129
- Tehtena Mebratu-Tsegaye and Leila Kazemi, 'Free, Prior and Informed Consent: Addressing Political Realities to Improve Impact' (Columbia Center on Sustainable Investment, October 2020)



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- Robert Miller, 'McGirt v Oklahoma: The Indian Law Bombshell' *Federal Bar Association Journal* (forthcoming, 2021)
- John Minode'e Petoskey, 'International Traditional Knowledge Protection and Indigenous Self-Determination' 6(1) *The Indigenous Peoples' Journal of Law, Culture and Resistance* 117-138 (2020)
- Bruno Pegorari, 'Indigenous Peoples, Consent and Rights: Troubling Subjects by Stephen Young, Oxford and New York, Routledge, 2019, 276 pp., AUD\$ 228.06 (hardback), ISBN 978-0-367-34462-7' *Australian Journal of Human Rights* 1-5 (forthcoming, 2021)
- Deva Prasad M, Suchithra Menon C, 'Indian Forest Rights Legislation: Significance of Recognizing the Legal Pluralism for Indigenous Peoples Rights' 41:1 *Statute Law Review* 78-77 (2020)
- Malayna Raftopoulos and Joanna Morley, 'Ecocide in the Amazon: the contested politics of environmental rights in Brazil' 24(10) *International Journal of Human Rights* 1616-1641 (2020)
- Elizabeth Reese, 'The Other American Law' 73 *Stanford Law Review* (forthcoming, 2021)
- Neil Renwick, Darren R. Reid, Jorge Alejandro Santos and Leonel Piovezana, 'Indigenous People and The Sustainable Development Goals in Brazil: A Study of the Kaingang People' 36(4) *Journal of Developing Studies* 390-414 (2020)

Upcoming Events

Australian Institute for Aboriginal and Torres Strait Islander Studies, *National Native Title Conference and National Indigenous Research Conference*, May 31 – June 4, 2021.

<https://aiatsis.gov.au/2021-summit>

- Andrew Robinson, 'Governments must not wait on courts to implement UNDRIP rights concerning Indigenous sacred sites: lessons from Canada and *Ktunaxa Nation v. British Columbia*' 24(10) *International Journal of Human Rights* 1642-1665 (2020)
- Jason Robinson, 'Indigenizing Grand Canyon' *Utah Law Review* (forthcoming, 2020)
- Alexander Tallchief Skibine, 'The Tribal Right to Exclude Non-Tribal Members from Indian-Owned Lands' *American Indian Law Review* (forthcoming, 2020)
- Mihnea Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' 9:3 *Transnational Environmental Law* 429-453 (2020)
- Ann Tweedy, 'Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"? 37(3) *Georgia State University Law Review* (forthcoming, 2021)