

RIGHTS OF INDIGENOUS PEOPLES INTEREST GROUP NEWSLETTER

Interest Group Highlights

The Rights of Indigenous Peoples Interest Group (RIPIG) will host a Panel Discussion at the 2019 ASIL Annual Meeting (March 27-30), entitled 'The American Declaration on the Rights of Indigenous Peoples 2016: An Advance or Retreat for Indigenous Peoples' Rights? The Panel will take place from **3-4:30pm on Friday March 29**. The location will be advised in the final Program. In keeping with the theme of this year's ASIL AM: 'Law as an Instrument', panelists will include speakers who have worked as advocates for Indigenous peoples' rights in the United Nations and the Organization of American States. A notice will be circulated to RIPIG members once speakers are confirmed. All are encouraged to come along.

RIPIG welcomes Harry Hobbs (University of Technology Sydney, Faculty of Law) as newsletter editor.

Members are invited to organize webinars to be hosted by ASIL and this interest group on topics relating to Indigenous 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 Kirsty Gover at kgover@unimelb.edu.au or Harry Hobbs at Hobbs.Harry@uts.edu.au.

Unless otherwise noted, all items in this issue were authored by Kirsty Gover.

Special thanks to Farrah Ahmed and her students in *Law and Legal Practice in Asia*, Melbourne Law School JD Programme, for authoring the newsletter's item on *Wildlife First v Ministry of Forest and Environment* (Indian Supreme Court, 2019). They are Morgaan Blazina, Delinna Ding, Tristram Feder, Edward Howard, Sailesh Prasad Mukundala, Julia Sheridan, Shilpa Sringer, Andrew Swabey, Charlotte Ward, Bevan Willoughby, Madeleine Wilson and Heli Yoon. Thanks also to Lucy Houghton for her research assistance.

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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

- Japan approves draft law to recognize Indigenous Ainu peoples. News reports dated February 15, 2019 record that a bill recognising Indigenous Ainu peoples has been approved by Japan's Liberal Democratic Party and Komeito Party coalition. The bill is expected to be considered by the Japanese parliament later this year. More information can be found here: https://www.washingtonpost.com/world/asia_pacific/japan-prepares-law-to-finally-recognize-and-protect-its-indigenous-ainu-people/2019/02/15/2c85a0d8-3113-11e9-ac6c-14eea99d5e24_story.html?noredirect=on&utm_term=.fa539d32aed6 and here: <https://www.japantimes.co.jp/news/2019/02/15/national/japan-recognize-indigenous-ainu-people-first-time/#.XGeLra17Fp8>.
- Indian Supreme Court orders the eviction of nearly 1.2 million members of forest-dependent tribal communities (order stayed on February 28, 2019). On February 13, 2019, in response to a petition by Wildlife First, a conservation and advocacy NGO, the Indian Supreme Court ordered an eviction of 1,180,000 people living on forest land *Wildlife First v Ministry of Forest and Environment*, Civ. No. 109/2008, SCC, 13 Feb. 2019. This Order directed 21 states to evict "illegal" forest dwellers whose land rights claims were rejected under the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006*. The Order has sparked passionate responses from both wildlife conservationists and tribal rights groups. The wildlife conservationists claim that many land rights claims are pretextual, and some challenge the constitutionality of the 2006 Act. Tribal rights groups have protested the perceived prioritising of wildlife conservation over tribal rights and have raised concerns about the fairness of the process. The Central government asked that the court modify the Order and as of March 7, the order has been stayed. A further hearing has been scheduled for July 10, 2019. The case is available here: https://www.sci.gov.in/supreme-court/2008/8640/8640_2008_Order_13-Feb-2019.pdf.
- Human Rights Committee hands down two decisions on Finnish Sami Parliament electoral role eligibility criteria: *Sanila-Aikio v Finland* (Decision 1) and *Käkkäläjärvä v Finland* (Decision 2) (February 1, 2019) In Decision 1, Tiina Sanila-Aikio, President of the Sami Parliament of Finland (the Sami Parliament) challenged a series of rulings by the Finnish Supreme Administrative Court

issued between 2011 and 2016. These rulings resulted in the inclusion of 93 people on the Sami Parliament electoral roll, all of whom had been previously found ineligible by the parliament's Election Board. *Sanila-Aikio* claimed that this amounted to an interference by the state party that weakened the effectiveness of the Sami Parliament and constituted a violation of International Convention on Civil and Political Rights (ICCPR) Art. 1 (self-determination), Art. 25 (political participation), Art. 26 (equality before the law) and Art. 27 (minority rights). *Sanila-Aikio's* self-determination claim had been deemed inadmissible by the HRC in 2017, on the basis of the HRC's earlier findings that the committee lacked competence to consider Optional Protocol claims alleging violation of Art. 1, since the Protocol only enables consideration of alleged violations of individual rights (CCPR/C/119/D/2668/2015, decision adopted 28 March 2017, para 8.6). In the admissibility decision, the HRC noted that it was nonetheless able to interpret Art. 1 where relevant to determining whether individual ICCPR rights have been violated (following *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990)). The merits claim addressed 'internal self-determination' as part of the context within which Arts. 25 and 27 were to be interpreted, as per the author's modified petition (para 5.4). Art 26 was not addressed in the HRC's conclusions (6.12).

It was agreed by the parties that in the majority of the Administrative Court cases, the Court had not applied the objective requirements set out in the Sami Parliament Act's s 3, which require that the applicant for enrollment, or his or her parent, or grandparent, learnt the Sami language as his or her first language; was the descendant of a person recognized as Sami in historic documentation; or has a parent eligible to be an elector. The Court had decided the majority of cases with reference only to the applicant's self-identification as a Sami (para 6.7). The Committee specified that ICCPR Art. 27 should be interpreted in light of ICCPR Art. 1 on self-determination and the UN Declaration on the Rights of Indigenous Peoples, and that read this way, Art. 27 'enshrines an inalienable right of indigenous peoples to "freely determine their political status and freely pursue their economic, social and cultural development."' (para 6.8), amounting to a 'right to political participation. . . in



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the context of internal self-determination.’ (para 6.9). It observed that ‘[w]ith respect to dilution of the vote of an indigenous community in the context of internal self-determination, harm directly imposed upon the collective may injure each and every individual member of the community. The author is a member of an indigenous community and all of her claims are related to her rights as such’ (para 6.9).

Further, the Committee was of the view that ‘[p]ursuant to article 25, [. . .] restrictions affecting the right of members of the Sami indigenous community to effective representation in the Sami Parliament must have a reasonable and objective justification and be consistent with the other provisions of the Covenant, including the principle of internal self-determination relating to indigenous peoples’ (para 6.10). Accordingly, the Court ‘infringed on the capacity of the Sami people, through its Parliament, to exercise a key dimension of Sami self-determination in determining who is a Sami’ and that ‘by departing in this manner from the consensual interpretation of the law determining membership in the electoral rolls of the Sami Parliament, the . . . Court’s interpretation was not based on reasonable and objective criteria. Accordingly, the Committee considers that the facts before it amount to a violation of the author’s rights under article 25, read alone and in conjunction with article 27, as interpreted in light of article 1 of the Covenant.’ (para 6.11). Finland is thus required to review the provision to ensure that the eligibility criteria ‘are defined and applied in a manner that respects the right of the Sami people to exercise their internal self-determination, in accordance with articles 25 and 27 of the Covenant’ (para 8). Decision I - *Sanila-Aikio v Finland* (advanced unedited version) can be found here: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FIN/CCPR_C_124_D_2668_2015_28169_E.pdf.

The second HRC decision issued on February 1, 2019, *Käkkäljärvi v Finland* addresses the same series of Court rulings on the eligibility provisions of the Sami Parliament Act. The authors of the communication are 22 Sami persons who are included on the electoral roll of the Sami Parliament. (The claims of three further authors, including two Norwegian Nationals resident in Finland, were deemed inadmissible (para 8.5 and 8.11)). The Committee’s reasoning and conclusions are substantively similar to those in *Sanila-Aikio v Finland*. The Committee notes that ‘the twenty-two authors are members of the Sami indigenous people, and as such

have the right to internal self-determination and to enjoy their own culture and language, including in community with other members of their group’ (para 8.8), and concluded that the conduct of the state ‘amount[ed] to a violation of the author’s rights under article 25, read alone and in conjunction with article 27, as interpreted in light of article 1 of the Covenant.’ (para 9.11). The second decision, *Käkkäljärvi v Finland* (CCPR/C/124/D/2950/2017, Advanced Unedited Version, February 1, 2019) can be found here: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FIN/CCPR_C_124_D_2950_2017_28170_E.pdf.

These important decisions show the continuing tension between self-identification and ‘objective criteria’ used by states to identify Indigenous peoples, and the very uneasy relationship that state definitions have with the criteria used by Indigenous peoples to self-constitute in accordance with their legal and cultural traditions. As noted by the HRC in *Sanila-Aikio v Finland*:

‘Central to the authors’ claim is the idea that ‘a person’s “strong self-identification” as Sami would have been proven by factors that the Court believes relate to a person’s Sami identity but that in fact tell very little about whether the person has any connection with the Sami culture and way of life. The Court has understood the membership in the Sami people as an individual perception, whereas Sami way of life is embodied by its communal structure and common heritage. A Sami is not alone, but is a part of a generational and communal chain of Sami across borders.’ (para 2.11).

- [Human Rights Committee issues recommendations in Optional Protocol case on sex discrimination in the Canadian Indian Act. \(*Mclvor and Grismer v Canada*, Human Rights Committee, Communication No. 2020/2010\).](#) On January 11, 2019, the HRC issued its decision on a communication brought by Sharon Mclvor and her son Jacob Grismer, members of the Lower Nicola Indian Band of the Nlaka’pamux First Nation. Mclvor and Grismer argued that the operation of the Canadian Indian Act discriminated against them on the grounds of sex. The Committee found that authors of the petition had succeeded in showing

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the Canada was in violation of ICCPR Art. 3 (on gender equality) and Art. 26 (equality before the law) 'read in conjunction with article 27' (rights of members of minorities) (para 7.11). The case is the latest instantiation of a long-running series of disputes involving provisions of the Indian Act that differentiate between men and women in the allocation of Indian status, and which affect the capacity of a person with status to pass that status to their descendants. Matrilineal descendants have less chance of passing status to their descendants than those who inherited status through the patrilineal line. The HRC agreed with the authors that 'the continuing distinction based on sex in [. . .] the Indian Act constitute[d] discrimination', and concluded that the 'the authors ha[d] demonstrated a violation of articles 3 and 26, read in conjunction with article 27 of the Covenant' (para 7.11).

Mclvor and Grismer argued that the Indian Act, as amended in 1985, 2011 and 2017, discriminates on grounds of sex against matrilineal descendants born prior to 17 April 1985, where the circumstances of their grandparents and parents are similar to those of patrilineal descendants. The essence of the authors' claim is that they are not able to pass on Indian status to their descendants in the same way that they would have, had Mclvor been male. The Indian Act operates on the basis of a two-generation cut-off rule, which means that after two generations of marriage between an Indian and a non-Indian, descendants are not eligible to be registered as status Indians. This rule, gender-neutral on this face, is applied against an inter-generational backdrop in which women who married non-Indian men lost their status as Indians (see *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977). Successive amendments to the Act to reinstate women who lost status in this way resulted in the reinstated women effectively 'losing' a generation of status descendants relative to Indian men. Effectively, if a child born before 1985 to a reinstated woman marries a non-Indian, the grandchildren of that woman do not acquire status, whereas in the same circumstances, the grandchildren of an Indian man *would* acquire status.

The 2011 amendments to the Indian Act addressed the status of children in the position of Mclvor's

grandchildren, but this remedy postponed the effects of discrimination to Mclvor's great-grandchildren, and so did not address the injustice that arose from the differential treatment of men and women (and their children) prior to 1985. This 'residual discrimination' was addressed by the Quebec Supreme Court in its 2015 *Deschaneaux* decision (see the Summer 2018 edition of this newsletter) which declared this differentiation between cousins ('the cousins issue') to be in breach of the Charter. The government of Canada responded with a further set of amendments in 2017. The Act can be viewed here: <http://www.parl.ca/DocumentViewer/en/42-1/bill/S-3/royal-assent>. The bill contains a proposed amendment (s 2.1) which would address the 'cousins issue' by permitting all matrilineal descendants of reinstated women to register, dating back to 1869. The amendment effecting the resolution of the 'cousins issue' has not yet come into force, pending the results of a 'collaborative process' initiated by the government. Crown-Indigenous Relations and Northern Affairs Canada has established an Indigenous Advisory panel to assist with consultations, and is to report back to parliament by June 2019 on its findings. Information on the Collaborative Process can be found here: <https://www.aadnc-aandc.gc.ca/eng/1522949271019/1522949383224>.

Canada objected to the admissibility of parts of the complaint, arguing that the impact of the authors' Indian status on their relationships with other members of their communities 'should be attributed to the authors' family and larger social and cultural communities' and not to the State (para 4.4). The HRC noted the authors contention that the discriminatory effects of the State's regulation of Indian status included effects on non-state actors, and that on this basis the Committee was not precluded from examining the claim (para 6.4). The HRC noted that 'a discriminatory distinction between members of the same community can affect and compromise their way of life' (para 7.9), so that in accordance with ICCPR Art. 27 '[p]ositive measures of protection are [. . .] required not only against the acts of the State party itself, [. . .] but also against the acts of other persons within the State party' (para 7.9). The Committee further noted that the ICCPR's 'prohibition on discrimination [. . .] applies not only to discrimination in law, but also to discrimination in fact, whether

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practiced by public authorities, by the community, or by private persons or bodies' (para 7.11). Finally, with respect to Canada's claim that the distinction between the impugned status provisions was justified by the legitimate aim of preserving acquired rights, the HRC concluded that 'the State party has not demonstrated how recognizing equal status for the authors under section 6(1)(a) would adversely affect the acquired rights of others.' (para 7.11). Accordingly, Canada had 'failed to demonstrate that the stated aim is based on objective and reasonable grounds' (para 7.11).

In the result, 'the continuing distinction based on sex in section 6(1) of the Indian Act constitute[d] discrimination, which has impacted the right of the authors to enjoy their own culture together with the other members of their group', meaning that 'the authors ha[d] demonstrated a violation of articles 3 and 26, read in conjunction with article 27 of the Covenant.' (para 7.11). Canada was obliged to ensure that the Indian Act 'is interpreted to allow registration by all persons including the authors who previously were not entitled to be registered [. . .] solely as a result of preferential treatment accorded to Indian men over Indian women born prior to 17 April 1985 and to patrilineal descendants over matrilineal descendants, born prior to 17 April 1985; and [. . .] to take steps to address residual discrimination within First Nations communities arising from the legal discrimination based on sex in the Indian Act' (para 9).

A report prepared by Stewart Clatworthy (September 22, 2017) estimates that the 'cousins issue amendment' (removing the second-generation cut-off rule altogether) could result in a further 50,000 persons becoming eligible for registration, and if the other residual inequities are addressed in a similar way, the figure could approach 86,000. The Clatworthy report can be accessed here: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-BR/STAGING/texte-text/pop_ass_section6_1510356723327_eng.pdf. The HRC's decision (advanced unedited version) is available here: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAN/CCPR_C_124_D_2020_2010_28073_E.pdf.

- The Canadian House of Commons passed Bill C-62: An Act to ensure that the Laws of Canada are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples (May 30, 2018). The Bill is now before the Senate at the Second reading stage. The

Bill provides that the Government of Canada 'must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples' (s 4) and 'develop and implement a national action plan to achieve the objectives of [UNDRIP]' (s 5). The Minister of Crown-Indigenous Relations must submit an Annual report on progress made on these goals (s 6). In September, the Canadian federal government published an 'Overview of a Recognition and Implementation of Indigenous Rights Framework' which confirms that the framework will include a legislative element, which will 'contain statutory principles and impose obligations on the Government of Canada to ensure that the recognition and implementation of rights is the basis of all relations between the federal crown and Indigenous peoples.' The Overview is available here: <https://www.rcaanc-cir-nac.gc.ca/eng/1536350959665/1539959903708>. The current text of the bill is available here: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

- Canadian Supreme Court issues decision on the duty to consult, in which a majority found that the duty is not triggered by the legislative process: Mikisew Cree First Nation v. Canada (Governor General in Council) 2018 SCC 40. On October 11, 2018, the Court handed down its anticipated decision on a claim brought by the Mikisew Cree First Nation of north-eastern Alberta, arguing that the Crown had a duty to consult them on the development of the legislation that could adversely affect their treaty rights. The Court unanimously held that there was no statutory grant of jurisdiction that would allow the Federal Court to review legislative action. The relevant legislation defined 'the Crown' as 'Her Majesty in right of Canada', a definition that did not, in the Court's view, extend to executive actors when they are exercising legislative power, rather than acting in their executive capacity. In a majority of 7-2 the court also held that the legislative process did not trigger the Crown's duty to consult. Five judges held that the Honour of the Crown was nonetheless engaged during the lawmaking process.

On the duty to consult, the majority reasoned that the intervention of Courts in law-making processes would be an unlawful incursion contravening the



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constitutional principles of separation of powers and parliamentary sovereignty. Justice Karakatsanis (Wagner C.J. and Gascon J. concurring) held that 'Her Majesty in right of Canada does not extend to executive actors when they are exercising "legislative power"' so that 'the law-making process — that is, the development, passage, and enactment of legislation — does not trigger the duty to consult' (para 32). On the 'Honour of the Crown' issue she held that the principle 'is always at stake in [the Crown's] dealings with Aboriginal peoples' but observed that the duty to consult is 'best understood as a "valuable adjunct" to the Honour of the Crown' (para 26). She acknowledged that non-application of the duty to consult in the law-making process could lead to the inconsistent protection of Aboriginal and treaty rights, depending on the capacity in which the relevant action is taken, and that '[i]t is of little import to Aboriginal peoples whether it is the executive or Parliament which acts in a way that may adversely affect their rights' and that '... permitting the Crown to do by one means that which it cannot do by another would undermine the endeavor of reconciliation, which animates Aboriginal law' (para 44). She pointed however, to the possibility that other doctrines could be developed to give full effect to the Honour of the Crown through review of legislation, including the possibility that it may not be consistent with s. 35 of the Constitution (protecting Aboriginal and treaty rights) 'to legislate in a way that effectively removes future Crown conduct which would otherwise trigger the duty to consult' (para 36) and noting that 'declaratory relief may be appropriate in a case where legislation is enacted that is not consistent with the Crown's duty of honourable dealing toward Aboriginal peoples' (para 47).

Justice Abella (Martin J. concurring) was in the minority on the consultation issue. She held that the Honour of the Crown applies to all government dealings with Indigenous peoples, that '[t]he duty to consult arises based on the effect, not the source, of the government action' (para 55), and that it 'must apply to all exercises of authority which are subject to scrutiny under s. 35, includ[ing] [. . .] the enactment of legislation.' (para 64). She noted that although cases on legislative infringements of s 35 'looked at consultation to determine whether an infringement was justified, it was the process *prior* to the infringement which engaged the honour of the Crown. As a matter of logic, then, the Crown's duty to consult is not dependent on the

finding that an infringement resulted, but is, instead, a component of the Crown's overarching obligation to deal honourably with Indigenous peoples when regulating their rights' (para 67), noting that 'cases which advocate against intrusion into the parliamentary process must [. . .] be read in the context of a duty that is not only a constitutional imperative, but a recognition of the limits of Crown sovereignty itself' (para 88), and concluding that 'an Indigenous group will be entitled to declaratory relief where the Crown has failed to consult during the process leading to the enactment of legislation that could adversely affect its interests' (para 98).

Justice Brown held that 'the entire law-making process — from initial policy development to and including royal assent — is an exercise of legislative power which is immune from judicial interference' (para 117) and that 'none of the actions taken in relation to the development, drafting and introduction of the omnibus bills can be characterized as "Crown conduct" which triggers the duty to consult [instead] the impugned conduct is, in its entirety, an exercise of legislative power (that is, part of the law-making process) and is therefore not executive conduct, to which the duty to consult applies' (para 102).

Justice Rowe (Moldaver and Côté JJ concurring), agreed with Brown J and added the additional observation that an obligation to consult during the law-making process would, inappropriately, require the courts 'to supervise interactions between Indigenous parties and those preparing legislation (and other measures) for consideration by Parliament and by provincial legislatures' (para 149). He summarized the applicable law as follows: 'when legislation has been adopted, those who assert that the effect of the legislation is to infringe s. 35 rights have their remedies under *Sparrow*. Those who assert that government decisions made pursuant to the legislation's authority will adversely affect their claims will have their remedies under *Haida Nation* [. . .] Where new situations arise that require the adaptation or extension of this jurisprudence, the courts provide a means for such development of the law. But, no such requirement has been shown on the facts of this case' (para 159).

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In addition to agreeing on the result, the Court unanimously held that it would be good government practice as a matter of policy to consult Indigenous groups before passing legislation, and all judges reiterated the capacity of Indigenous groups to challenge legislation once enacted for breach of s. 35 of the Constitution, and recalled that a failure to consult will be taken into account in judicial assessments of whether the legislation satisfies the relevant test (set out in *R v Sparrow* [1990] 1 SCR 1075).

This case provides an answer to the question arising in earlier cases, about whether executive actors have an obligation to consult during the legislative process when acting in their legislative capacity. It leaves open some important questions about the scope of the Honour of the Crown principles in matters involving the passage of legislation, and preserves the possibility of challenges to enacted legislation that reflect on the processes by which that legislation was enacted. While an Indigenous group will not be able to challenge legislation on the basis that the legislature had failed to fulfill the duty to consult, other protections may well be recognized in future cases when Aboriginal or treaty rights may be adversely affected by legislation, such as the provision of declaratory relief. The text of the case can be found here: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17288/index.do>.

- World Bank Inspection Panel registers requests for inspection submitted by Santhal and Ho tribal community members from a village in Jharkhand, India (November 5, 2018 and December 18, 2018). The two requests will be considered together. The requesters seek inspection of the India Rural Water Supply and Sanitation Project for Low Income States (Project ID P132173), and specifically the proposal to build a water treatment plant on their community land. They claim that the land has historical and cultural significance as the site of an ancestral sacred grove and burial grounds. They contend that they may lose access to community resources and medicinal herbs, express concern over the environmental impacts of plant, and argue that the environmental and social assessment was insufficient, and did not include consultation in local languages. They argue that they do not require piped water and that they will

become impoverished if required to pay for water after the proposed plant is built. The requesters have asked for confidentiality and raised concerns about retaliation. The notice of registration for the first request can be found here: <https://inspectionpanel.org/sites/inspectionpanel.org/files/cases/documents/128-Notice%20of%20Registration%28English%29.pdf>.

The notice of registration for the second request can be found here: <http://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/129-Notice%20of%20Registration%28English%29-18%20Dec%202018.pdf>.

- Inter-American Court of Human Rights delivers judgment on Xamán Massacre Case: *Coc Max et al. (Massacre of Xamán) v. Guatemala*, Series C No. 356. On August 22, 2018, the Inter-American Court of Human Rights issued its judgement in *Coc Max v Guatemala*. The case concerned the 'Xamán massacre' carried out by members of the Guatemalan Armed Forces on October 5, 1995 in which 11 members of the Indigenous Q'eqchi', Mam, Q'anjob'al, Ixil and K'iche people were killed, and 29 were injured. In 2004, 14 military personnel were tried and convicted of extrajudicial execution and grievous bodily harm, and arrest warrants were issued for a further 11 people, who remain at large as fugitives. The case had been heard by the Inter-American Commission in 2016 (IACHR, Report No. 28/16, Case 11.550, available here in English: <http://www.oas.org/en/iachr/decisions/court/2016/11550fondo.en.pdf>).

In its arguments to the Court, Guatemala assumed institutional responsibility for the incident, but clarified that this did not mean that it has accepted 'international responsibility' in the sense of admitting a failure to comply with an international obligation (para 71, and footnote 10). The State further argued that the judicial proceedings it had carried out exempted the State from responsibility to conduct further investigations, and ensured that it was not in violation of rights protected by the American Convention on Human Rights.

The Court found that Guatemala had violated Convention Art. 8(1) (right to a fair trial) and Art. 25(1)

Recommendations from UN and Treaty Bodies

Human Rights Committee (HRC)

The Human Rights Committee made recommendations relating to indigenous peoples' rights in its Concluding Observations on state periodic reports at its 122nd session (Mar 12 – Apr 6, 2018), including with respect to El Salvador (CCPR/C/SLV/CO/7, paras 6, 9-10, 37 and 41-43); Guatemala (CCPR/C/GTM/CO/4, paras 8-10, 36, 38-41) and Norway (CCPR/C/NOR/CO/7, paras 14-16, 36-37) and at its 124th session (Oct 8 – Nov 2, 2018) including with respect to Belize (CCPR/C/BLZ/CO/1/Add.1, paras 45-46).

Committee on the Elimination of Racial Discrimination (CERD)

The Committee on the Elimination of Racial Discrimination made recommendations relating to indigenous peoples' rights in its Concluding Observations on state periodic reports at its 95th Session (April 23 - May 11, 2018), including with respect to Nepal (CERD/C/NPL/CO/17-23, paras 22, 25-26); Peru (CERD/C/PER/CO/22-23, paras 5, 7, 12 - 35, 38 - 41 and 49); and Sweden (CERD/C/SWE/CO/22-23, paras 16-17); at its 96th Session (Aug 6 – 30 2018), including with respect to Japan (CERD/C/JPN/CO/10-11, paras 16-18, 25-26) and at its 97th session (Nov 26 – Dec 14, 2018) including with respect to Honduras (CERD/C/HND/CO/6-8, paras 14-21, 23-26, 30-41) and Norway (CERD/C/NOR/CO/23-24, paras 5, 21 - 22 and 35).

Committee on Economic, Social and Cultural Rights (CESCR)

The Committee on Economic, Social and Cultural Rights made recommendations relating to indigenous peoples' rights in its Concluding Observations on state periodic reports at its 63rd Session (Mar 12 - 29 2018), including with respect to Bangladesh (E/C.12/BGD/CO/1, paras 15-16 and 69); the Central African Republic (E/C.12/CAF/CO/1, paras 21-22 and 39-40); Mexico (E/C.12/MEX/CO/5-6, paras 12-13, 18, 20, 24, 45-46, 65-68 and 76) and Aotearoa-New Zealand (E/C.12/NZL/CO/, paras 4, 8-13, 23-24, 27, 34, 37-40, 44-45, 48-49); and at its 64th Session (Sep 24 - Oct 12 2018), including with respect to Argentina (E/C.12/ARG/CO/4, paras 12, 16-21, 25, 46, 62-64 and 68) and South Africa (E/C.12/ZAF/CO/1, paras 10, 12, 14-15, 74).

Committee on the Rights of the Child (CRC)

The Committee on the Rights of the Child made recommendations relating to indigenous peoples' rights in its Concluding Observations on state periodic reports at its 77th Session (Jan 15 - Feb 2 2018), including with respect to Guatemala (CRC/C/GTM/CO/5-6, paras 3-4, 6, 13, 15-16, 19, 22, 32-33, 35, 38, 52-43); Panama (CRC/C/PAN/CO/5-6, paras 14-18, 24, 28-29, 32-33, 36); Sri Lanka (CRC/C/LKA/CO/5-6, paras 16 and 40); at its 78th Session (May 14 – June 1 2018), including with respect to

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(right to judicial protection) to the detriment of the injured persons, their next of kin, and the next of kin of the deceased persons (para 98) and was in violation of Articles 4(1) and 5(1) (rights to life, and to integrity of the person) along with Art. 19 (rights of minors) read in conjunction with Art. 1(1) (Non-discrimination) (para 120). The Court ordered Guatemala (inter alia) to: continue the actions necessary to conclude the investigation of the massacre and apprehend the 11 fugitives; to provide free and immediate psychological or psychiatric treatment to the victims (para 155); to carry out a public act of acknowledgment of responsibility, in the

presence of senior state officials and victims, within one year of the judgment (162-163); to establish a Health Center in the Community, providing access to basic health services and respecting the use of traditional medicines and healing practices (para 166-167); to extend and pave the road from the highway to the community (para 171); and, to pay compensation to victims and their families in accordance with the Court's orders (paras 185-190). The judgment can be found here (only in Spanish): <https://www.refworld.org/es/docid/5bc0f2044.html>. ■



Recommendations from UN and Treaty Bodies —continued from page 8

Argentina (CRC/C/ARG/CO/5-6, paras 10, 14, 16, 18-19, 32, 34-37) and Norway (CRC/C/NOR/CO/5-6, paras 21-32-33); and at its 79th Session (Sep 17- Oct 5 2018), including with respect to El Salvador (CRC/C/SLV/CO/5-6, paras 13, 41 and 47).

Committee on the Elimination of Discrimination Against Women (CEDAW)

The Committee on the Convention on the Elimination of All forms of Discrimination Against Women made recommendations relating to indigenous womens' rights in its Concluding Observations on state periodic reports at its 69th session (Feb 19 - Mar 9 2018) including with respect to Chile (CEDAW/C/CHL/CO/7, paras 14-15, 19, 21, 24-25, 28-31, 34); Fiji (CEDAW/C/FJI/CO/5, para 55) and Suriname (CEDAW/C/SUR/CO/4-6, paras 9-12, 20-23, 31, 34-36, 38, 43-47 and 52); and at its 70th Session (Jul 2 - 20 2018), including with respect to Australia (CEDAW/C/AUS/CO/8, paras 11-13, 23, 30, 35-36, 39-42, 46, 49-52 and 56); Mexico (CEDAW/C/MEX/9, paras, 11-14, 19-20, 30, 34-35, 37-41, 43-46, 51-52) and Aotearoa-New Zealand (CEDAW/C/NZL/CO/8, paras 13-14, 25-26, 29, 31-34, 37-40, 43); and at its 71st (Oct 22 - Nov 9 2018), including with respect to Congo (CEDAW/C/COG/CO/7, paras 38-41 and 46-47) and Nepal (CEDAW/C/NPL/CO/6, paras 18, 20-21, 24-25, 27, 29, 32-33, 39-41).

Committee on the Convention on the Rights of Persons with Disabilities (CRPD)

The Committee on the Convention on the Rights of Persons with Disabilities made recommendations relating to indigenous peoples' rights in its Concluding Observations on state periodic reports at its 19th session (Feb 14 - Mar 9 2018) including with respect to Nepal (CRPD/C/NP/CO/1, paras 7-8, 13-14, 19 and 39-40); and at its 20th Session (Aug 27 - Sept 21 2018), including with respect to the Philippines (CRPD/C/PHL/CO/1, paras 10, 12 and 46). ■

Selected Publications & Reports

Books

- Mary Baleva, *Regaining Paradise Lost: Indigenous Land Rights and Tourism: Using the UNGPs on Business and Human Rights in Mainstreaming Indigenous Land Rights in the Tourism Industry* (Brill Nijhoff, 2018).
- Neyooxet Greymorning (ed.), *Being Indigenous: Perspectives on Activism, Culture, Language and Identity* (Routledge, 2019).
- Jennifer Hendry and Melissa Tatum (eds.), *Indigenous Justice: New Tools, Approaches, and Spaces* (Palgrave MacMillan, 2018).
- Mark Hickford and Carwyn Jones (eds.) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (UBC Press, 2018).
- Maria Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity* (Brill Nijhoff, 2018).
- Lee Swepston, *The Preparatory Documents of the Indigenous and Tribal Peoples Convention, and Its Development through Supervision Vol 2: Human Rights and the Technical Articles* (Brill Nijhoff, 2018).
- Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez, *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (Centre for Aboriginal Economic Policy Research, 2018).
- Linzhu Wang, *Self-determination and Minority Rights in China* (Brill Nijhoff, 2018).

Articles and Chapters

- Sylvanus Barnabas, 'Abuja Peoples of Nigeria as Indigenous Peoples in International Law' 25(3) *Int J M & Group Rights* (2018).
- Marijke Bassani, 'International Cultural Heritage Law and World Heritage Listing: A Vehicle for "White Control of Indigenous Heritage"?' 22(2) *Santander Art and Culture Law Review* (2017).
- Ashleigh Breske, 'Politics of Repatriation: Formalizing Indigenous Repatriation Policy' 25(03) *Int. J. Cult Prop* (2018).

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- Mark Brown, 'An Unqualified Human Good: On Rule of Law, Globalization, and Imperialism' 43 *Law & Soc. Inquiry* 1391 (2018).
- Monica Burman and Eva-Maria Svensson, 'Women's Human Rights in the Governance of the Arctic: Gender Equality and Violence against Indigenous Women' 9 *The Yearbook of Polar Law Online* (2018).
- Christina Crawford, 'Can The International Human Rights Framework Improve the Rights of Indigenous Australians?' 2(1) *Emerging Scholars in Australian Indigenous Studies* (2018).
- Mario Delgado, 'Exploring the Connection between Indigenous Peoples' Human Rights and International Environmental Law' 9(2) *Revista Chilena de Derecho y Ciencia Política* (2018).
- Lara Domínguez, 'Litigating Indigenous Peoples' Rights in Africa: The Impact of Convention 169' 25(4) *International Union Rights* (2018).
- Dieter Dörr, 'Biopiracy and the Right to Self-Determination of Indigenous People' 53 *Phytomedicine* (2019).
- Jessika Eichler, 'Neo-extractivist Controversies in Bolivia: Indigenous Perspectives on Global Norms' *International Journal of Law in Context* (Online, 2018).
- Jérémie Gilbert and Corinne Lennox, 'Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development' 23(1) *Int'l J. Human Rights* (2019).
- Samantha Graham, 'The Continuing Struggle: Exploring the Extent of Indigenous Rights in the Modern Age' 4 *J. Glob. Just. & Pub. Pol'y* 1 (2018).
- Paul Harpur and Michael Stein, 'Indigenous Persons with Disabilities and the Convention on the Rights of Persons with Disabilities: An Identity without a Home?' 7(2) *Int. Human Rights L. R.* (2018).
- Noelle Higgins, 'Creating a Space for Indigenous Rights: The Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' 23(1) *Int'l J. Human Rights* (2019).
- Harry Hobbs 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia,' 23(1) *Int'l J. Human Rights* (2019).
- Kamrul Hossain, Hiroshi Maruyama and Leni Charbonneau, 'Indigenous Peoples' Right to Traditional Fishing: International Human Rights Framework and Domestic Regulations in Japan', 6 *Current Developments in Arctic Law* (2018).
- Daniel Huizenga, 'Articulations of Aboriginal Title, Indigenous Rights, and Living Customary Law in South Africa' 27(1) *Social and Legal Studies* (2018).
- Sue Jackson, 'Indigenous Peoples and Water Justice in a Globalizing World' in Ken Conca and Erika Weinthal (eds.) *Oxford Handbook of Water Politics and Policy* (Oxford, 2018).
- Ademola Jegede, 'Protecting Indigenous Peoples' Land Rights in Global Climate Governance', in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds.) *Routledge Handbook of Human Rights and Climate Governance* (2018).
- Daniel Joyce, 'Understanding the Myall Creek Massacre in the Terms of International Criminal Law' 5 *Law & History* (2018).
- Shashi Kumar, 'Indigenous People in South Asia and International Law', in J. L. Kaul and Anupam Jha (eds.) *Shifting Horizons of Public International Law* (Springer, 2018).
- Rasmus Larsen and Laisa Raitio, 'Implementing the State Duty to Consult in Land and Resource Decisions: Perspectives from Sami Communities and Swedish State Officials' 10 *Arctic Review on Law and Politics* (2019).
- Frederico Lenzerini, 'Implementation of the UNDRIP Around the World: Achievements and Future Perspectives - The Outcome of the Work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples' 23(1) *Int'l J. Human Rights* (2019).
- Ruwadzano Makumbe, 'An Alternative Conceptualization of Indigenous Rights in Africa Under the International Human Rights Law Framework', 3 *Deusto Jnl of Hum. Right* (2018).



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- Mariana Monteiro de Matos, 'Cultural Identity and Self-determination as Key Concepts in Concurring Legal Frameworks for the International Protection of the Rights of Indigenous Peoples', in Evelyn Lagrange, Stefan Oeter and Robert Uerpmann-Witzack (eds.) *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer, 2018).
- Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America' 31(4) *Leiden Journal of International Law* (2018).
- Dominic O'Sullivan, 'Between Indigenous Paramountcy and Democracy: How Differentiated Citizenship and the UN Declaration on the Rights of Indigenous Peoples Could Help Fijian Self determination' 64(1) *Australian Journal of Politics and History* (2018).
- Jeremy Patzer, 'Indigenous Rights and the Legal Politics of Canadian Coloniality: What is Happening to Free, Prior and Informed Consent in Canada?' *Int'l J. Human Rights* (2019).
- Heike Schroeder and Nidia González, 'Bridging Knowledge Divides: The Case Of Indigenous Ontologies of Territoriality And REDD+' 100 *Forest Policy and Economics* (2019).
- Jessica Shadian, 'Navigating Political Borders Old and New: The Territoriality of Indigenous Inuit Governance' 33(2) *Journal of Borderlands Studies* (2018).
- Thomas Sikor, Poshendra Dhungana and Gyanu Maskey, 'Brokering Justice: Global Indigenous Rights and Struggles Over Hydropower In Nepal' *Canadian Journal of Development Studies* (Online, 2018).
- Liubov Sulyandziga, 'Indigenous Peoples And Extractive Industry Encounters: Benefit-Sharing Agreements In Russian Arctic' 18 *Polar Science* (2018).
- Lee Swepston, 'The Adoption of Convention 169: Unions and Indigenous Peoples' Involvement' 25(4) *Indigenous Peoples & Trade Unions* (2018).
- Amy Schwebel 'International Law and Indigenous Peoples' Rights: What Next for the Chagossians' in Stephen Allen and Chris Monaghan (eds.) *Fifty Years of the British Indian Ocean Territory* (Springer, 2018).

Statements and Reports

- On February 1, 2019, the United Nations launched the 2019 International Year of Indigenous Languages, as enacted by the UN General Assembly in 2016 ((A/RES/71/178) in response to a recommendation of the UN Permanent Forum on Indigenous Issues. News report available here: <https://www.un.org/development/desa/indigenouspeoples/news/2019/01/launch-iyil/>.
- UN rights experts expressed concerns over the jailing of an indigenous leader and human rights defender in Guatemala following opposition to a hydro-electric dam project (December 20, 2018) News report available here: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24031&LangID=E>.
- United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz provided an *End of Mission Statement* following her visit to Ecuador (November 29, 2018). The Statement is available here: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23864&LangID=E>.
- The Human Rights Council adopted its *Resolution on Human Rights and Indigenous Peoples* (A/HRC/39/L.18/

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- Myra Tait and Kiera Ladner, 'Economic Development Through Treaty Reparations in New Zealand and Canada' 33 *Can. J.L. & Soc.* 61 (2018).
- Ana Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights' 25(03) *Int. J. Cult Prop* (2018).
- Krushill Watene and Roger Merino, 'Indigenous Peoples: Self-determination, Decolonization and Indigenous Philosophies' in Jay Drydyk and Lori Keleher (eds.) *Routledge Handbook of Development Ethics* (Routledge, 2019).
- Claire Wright, 'Expanding Extractive Industries, Contracting Indigenous Rights? Gains, Setbacks, and Missed Opportunities in Latin America' in Alison Brysk and Michael Stohl (eds.) *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar, 2018).
- Stephen Young, 'The Self Divided: The Problems Of Contradictory Claims To Indigenous Peoples' Self-Determination In Australia' 23(1) *Int'l J. Human Rights* (2019)



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- Rev.1, 27 September 2018). The resolution is available here: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/L.18/Rev.1.
- The Expert Mechanism on the Rights of Indigenous Peoples submitted its study: *Free, prior and informed consent: a human rights-based approach* (A/HRC/39/62) to the Human Rights Council at its 39th Session (September 10-28, 2018). The Study is available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement>.
 - The Special Rapporteur on the Rights of Indigenous Peoples reported on her visits to Mexico and Guatemala to the Human Rights Council: *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Mexico* (A/HRC/39/17/Add.2, June 28, 2108) available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/192/94/PDF/G1819294.pdf?OpenElement>. *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to the Guatemala* (A/HRC/39/17/Add.3, August 10, 2018), available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/246/43/PDF/G1824643.pdf?OpenElement>.
 - The Special Rapporteur on the Rights of Indigenous Peoples submitted her report: *Main conclusions and recommendations of the "Working Meeting on Rules of International Law on the Human Rights of Indigenous Peoples in Voluntary Isolation and Initial Contact in the Amazon and the Gran Chaco: Review and Proposals for Action* to the Human Rights Council on February 28, 2018 (A/HRC/39/17/Add.1 Advanced Unedited Version, in Spanish). The Report is available here: <https://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.39.17.Add%201.docx>.
 - *The Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes* presented her report to the Human Rights Council (A/HRC/36/41, July 20, 2017). The report considers the situation of Indigenous peoples. The report is available here: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/41.
 - The Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, presented her report: *Report of the Special Rapporteur to the General Assembly on the Rights of Indigenous Peoples* to the UN General Assembly (A/73/176, July 17, 2018), available here: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/176.
 - The United Nations High Commissioner for Human Rights presented her report to the Human Rights Council: *Report of the United Nations High Commissioner for Human Rights on the Rights of Indigenous Peoples* (A/HRC/36/22, July 6, 2017). The report is available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/182/84/PDF/G1718284.pdf?OpenElement>.
 - Guatemala: UN experts welcome court ruling that Ixil Mayans were victims of genocide and urge the State to prosecute and punish the perpetrators. A news item is available here: <https://www.aljazeera.com/news/2018/09/guatemala-military-carried-genocide-court-rules-180927145730845.html>.

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Upcoming Events

- 12th Annual Polar Law Symposium, Institute for Marine and Antarctic Studies, Hobart, Australia, December 1-2 2019.
- *Sixth Biannual Ethnicity, Race, and Indigenous Peoples' Conference*, Gonzaga University, Spokane, September 12-14, 2019 www.gonzaga.edu/ERIP.
- *AIATSIS National Indigenous Research Conference*, hosted by The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Queensland University of Technology, QUT Gardens Point campus, Brisbane, July 1-3, 2019. The Theme of the Conference is *Research for the 21st Century*.
- *Canadian Bar Association Aboriginal Law Conference*, June 19-21, 2019, Banff. Themes include the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Canada's Constitutional Framework, a framework for reconciliation versus a public relations scheme, Free, Prior and Informed Consent, lands, resources and UNDRIP, and UNDRIP and the rise of international human rights.
- *Annual Conference of the Native American and Indigenous Studies Association (NAISA)*, The University of Waikato, Hamilton, Aotearoa-New Zealand June 26-29, 2019 <https://naisa2019.waikato.ac.nz/>.
- *Federal Bar Association 44th Annual Indian Law Conference: Tribal Rights on Trial - Indian Law in the Trump Era*, Sandia Resort and Casino, Albuquerque (April 11-12, 2019).
- *2nd Annual Anishinaabe Racial Justice Conference*, Keweenaw Bay Indian Community, Baraga (May 24-26, 2019) nativejustice.org/conferenceproposal.
- *18th Session of the United Nations Permanent Forum on Indigenous Issues: Traditional knowledge: Generation, transmission and protection*. UN Headquarters, New York (April 22-May 3, 2019).
- *Implementing The United Nations Declaration on the Rights of Indigenous Peoples Conference*, University of Colorado Law School, Boulder (March 15-16, 2019).
- *23rd Annual Tribal Law & Government Conference: The US Supreme Court and the Future of Federal Indian Law*, University of Kansas School of Law, Lawrence (March 8, 2019).