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INDIGENOUS RIGHTS

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INTRODUCTION

The attention given to indigenous rights has increased since the approval of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Although it is a soft law declaration and technically not binding, it is the cornerstone of much of the contemporary research on indigenous rights. 4 states that voted in opposition to the UNDRIP—Australia, Canada, New Zealand and the United States—have now endorsed it. Despite the attention it garners, the UNDRIP is not the only international instrument that has been utilized to establish and protect indigenous rights and interests. The regional Inter-American human rights system has also been key in the development and protection of indigenous rights. Another important facet of the UNDRIP is that it took 22 years of drafting effort before it was approved by the United Nations General Assembly. During those 22 years, there were many discussions, debates and analyses over the meaning of rights and principles included in the drafts of the Declaration. Research and scholarship from the pre-Declaration era is helpful in understanding the content of the Declaration. But the approval of the Declaration did not end the controversies over indigenous rights. The post-Declaration era continues to debate and examine the evolving body of indigenous rights. As well, indigenous rights are not simply “human rights” but are a complex set of rights that can impact a broad swath of other legal doctrines. Intersections of indigenous rights with laws regarding economic development, the environment and land claims can give rise to new interpretations and understandings of the impact of indigenous rights. While the 4 “no states” might be what most readily comes to mind when thinking about the location of indigenous peoples, indigenous peoples are in fact scattered throughout the world, including Europe. Research on indigenous rights is not done only from a legal perspective. Indigenous rights cover many different kinds of rights. Some have an emphasis in international law doctrines, such as the right to self-determination and issues about indigenous and tribal sovereignty. Other rights emphasize the importance of culture and heritage, and it can be useful to consider research in other disciplines, including history, political science and anthropology. This article identifies research and resource in related disciplines as well as the legal research and law-based resources. A note about language: American references to indigenous peoples are inclusive of the words “American Indian” or “Indian.” “Indian” is a legal term of art used in federal and state statutes. Indigenous peoples in the United States refer to themselves as “Indians” rather than Native Americans. For these reasons, where appropriate, the article makes use of the terms American Indian and Indian, in preference of Native American. This usage may be confusing to non-American readers and so a clarification is offered.

GENERAL OVERVIEWS AND BACKGROUND

These selections would be useful in gaining a broad understanding on the history of indigenous peoples and the growth of the indigenous rights movement. These selections would be useful at any level of study of indigenous rights—from a casual reader to seasoned scholar. While indigenous rights are a rapidly growing and evolving area of law, the issues addressed in indigenous rights have persisted over time. These publications provide both an important background and overview of indigenous issues and rights as well as a detailed consideration of indigenous history and contemporary developments—linking the current rapid expansion of indigenous rights to the events that contributed to the present-day issues and challenges that confront indigenous peoples. Dee Brown was one of the first authors to provide an account of historical events from an indigenous perspective. Brown [year] makes extensive use of historical documents to give a very detailed recounting of the events from contact with Spanish explorers until the final tragedy of the massacre at Wounded Knee in 1890. Robert Williams, himself indigenous, provides a useful counterpoint in his book which outlines the way in which Western history and thought has conceptualized indigenous peoples (Williams 1999). The book *Black Elk Speaks* (see Neihardt [year]) provides the words of the famed holy man himself, provided through a series of interviews with the writer John Neihardt. Black Elk was a witness to and participant in many of the events of the late 1800s and early 1900's, including the Battle of the Little Big Horn (Custer's Last Stand), and travelled to Europe in a popular Wild West show. Black Elk's perspective provides a rich and necessary understanding of historical fact, as well as providing a compelling indigenous voice and account of these. Anaya 2004 provides a comprehensive description of the development of indigenous rights in international law prior to the approval of the 2007 UNDRIP. Sargent 2011 delivers a concise explanation of the intersection of children's rights and indigenous rights within international law. Lenzerini 2008 provides in-depth coverage of the ways in which international law provides for reparations for breaches of indigenous rights. Miller et al 2008 details the effects of the doctrine of discovery in determining the outcome of indigenous land rights in the four states that voted against the UNDRIP—Australia, Canada, New Zealand and the United States. Engle 2009 places indigenous rights within the international legal framework, with a focus on the interplay of culture and development with the right to self-determination. Williams 1997 provides an insightful discussion on indigenous rights development as part of the evolution of his legal academic career, overcoming protests that an indigenous person was not objective enough to write about indigenous rights. Thornberry 2002 explores the evolution of indigenous rights as a distinct body of law within international law. O'Sullivan 2017 provides fresh insight in evolving indigenous rights in Fiji, Australia and New Zealand by the use of the concept of indigeneity as a political theory and process, rejecting the usefulness of liberal democratic theory.

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[au: Please also specifically and directly introduce/contextualize Anaya 2004, Sargent 2011, Lenzerini 2008, Miller et al. 2010, Engle 2009, Williams 1997, and Thornberry 2002. (Keep in mind that this commentary should discuss the specific works, rather than the authors, as much as possible.)]

Brown, Dee. *Bury My Heart at Wounded Knee: An Indian History of the American West*, Henry Holt and Company, Vintage 1991. [au: Please pick a specific version/publication year to cite here - 1970?]

This very important book provides an in-depth historical analysis of the fate of American Indian tribes from the days of first contact with European explorers and settlers to the tragic massacre at Wounded Knee, South Dakota in 1890. It was one of the first to consider historical events from the perspective of indigenous peoples.

Neihardt, John G. *Black Elk Speaks*, University of Nebraska Press. [au: Please pick a specific version/publication year to cite here - 1961?] State University of New York Press, 2008.

This book details the life of Black Elk. It provides a rich detail on his life events during the "Indian Wars" in the 1800's, and the movement of his people to confinement on reservations and the hardships endured there.

Anaya, S. James. *Indigenous Rights in International Law*, Oxford University Press, 2004.

This book offers a very helpful insight into international law principles and the international law system, as well as on the development and background on indigenous rights. It should be noted that this was published before the approval of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 and therefore some of the information is dated.

Sargent, Sarah. 'Indigenous Children' in Trevor Buck (ed) *International Child Law* (2011, 2nd edition, Routledge Publishing)

~~This chapter covers the rights of indigenous children in international law, focusing on the United Nations Convention on the Rights of the Child and intersections and potential conflicts with the United Nations Declaration on the Rights of Indigenous Peoples. The material is suitable for undergraduates as well as post-graduate students. The chapter and the entire book are useful as both a textbook and for research.~~

Lenzerini, Federico, ed. *Reparations for Indigenous Peoples: International and Comparative Perspectives*, (Oxford University Press, 2008).

An impressive and comprehensive collection of essays that cover a wide range of topics. The focus on reparation captures an important element of the UNDRIP, making this very much a cutting-edge book. It may be too complex for undergraduates but would be suitable for post-graduates and as a research resource.

Robert J Miller, et al. *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*. (OUP Oxford, 2010)

The "doctrine of discovery" has been used to justify European settler claims to indigenous lands. This book discusses the use of the doctrine of in the English colonies of Australia,

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Canada, New Zealand and the United States (which are also the four states that voted to oppose approval of the UNDRIP). This might be too complex for undergraduates but would be a very useful research resource for post-graduates.

Karen Engle, 'Indigenous Rights Claims in International Law: Self-Determination, Culture and Development', in *Routledge Handbook of International Law* (David Armstrong ed., London: Routledge, 2009)

This chapter provides an excellent overview as well as detailed analysis of the location of indigenous rights in international law. This chapter would be suitable for both undergraduates and postgraduates.

Robert Williams, 'Vampires Anonymous and Critical Race Practice' (1997) 95 *Michigan Law Review* 741

This details the experience of an American Indian law professor. It also explains the use of Critical Race Practice, an outgrowth of Critical Race Theory. This is a must-read article for anyone interested in not only an ivory-tower consideration of indigenous rights, but what the application of legal theory and practice mean to the everyday lives of indigenous peoples.

Patrick Thornberry, 'Minority and indigenous rights at the end of history' (2002) 2(4) *Ethnicities* 515

This provides an excellent juxtaposition of minority and indigenous rights in international law, alongside the developing human rights canon. It provides a thorough examination of the issues raised in the development of indigenous rights as distinct from minority rights, and shifts in international law that slowly begin to discard assimilative principles in legal instruments.

Robert Williams, Jr, *The American Indian in Western Legal Thought: The Discourse of Conquest* (Oxford University Press, 1999)

This unique book provides effective analysis of the way in which indigenous peoples have been viewed through Western eyes and the devastating consequences of these conceptions for indigenous peoples. This provides original and thorough research grounded in detailed discussion of historical events.

Dominic O'Sullivan, *Indigeneity: A Politics of Potential Australia, Fiji and New Zealand* (Policy Press, 2017)

The concept of 'indigeneity' as a political theory and process, and as a rejection of liberal democratic theories, is used to analyze the situation of indigenous people in Australia, Fiji and New Zealand.

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INDIGENOUS RIGHTS BEFORE THE UNDRIP

While the interest in researching indigenous rights may have spiked following the approval of the UNDRIP, there was a great deal of interest in it during the two decades of instrument drafting. What position indigenous rights should occupy within international law, and what principles, norms and doctrines justified this was the subject of much work which remains highly relevant in the post-UNDRIP era. As what eventually became the UNDRIP was being debated, drafted and re-drafted, the commentary about the place that indigenous rights should have, as well as the shape that should take was growing apace. Traditional notions of human rights as individual rights were challenged. Pentassuglia 2003 discusses the way in which indigenous peoples were trying to establish the right to legal personality in the international system, and also establish themselves as legally distinct from minority groups. Barsh's 1994 article might well be regarded as a classic for anyone who is researching indigenous rights. Barsh discusses the indigenous aim of achieving international legal personality, which would make them active participants rather than passive recipients in the international legal system. Williams 1990 continues this discussion, with a thorough examination of the power of indigenous advocacy to bring about changes in the international system. Coulter 2006 examines the ways in which international doctrines and principles can be useful in the promotion of indigenous issues in the American domestic state system. This highlights the importance and potential for international law to affect state decisions, and thus, the significance of achieving an international recognition of indigenous rights. Kingsbury 2001 provides a more theoretical exposition on how indigenous rights could be catalogued within international law. This is usefully read with Anaya 2005, to understand the theoretical underpinnings that could be and were given to indigenous rights at the international level. Anaya 2006 discusses the ways in which indigenous activism has been instrumental in shaping contemporary international law doctrines. Issues about deciding who is recognized in international law as being "indigenous" are covered by Corntassel 2003. Who would be able to lay claim to the emerging body of indigenous rights was an area of much argument in the development of the UNDRIP. Despite the UNDRIP being regarded as a significant positive development in indigenous rights, Corntassel 2007 effectively points out the negative implications of becoming involved in the international system.

Gaetano Pentassuglia 'Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law' (2003) 14(2) *European Journal of International Law* 390

A useful juxtaposition of minority and indigenous rights in international law.

Russell Lawrence Barsh, 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?' (1994) 7 *Harvard Human Rights Journal* 33

Although the recognition of indigenous rights through the UNDRIP is now a fait accompli, in fact the efforts to draft and seek approval of the instrument took place over twenty-two long years. This article traces important developments in indigenous rights during the period in which the UNDRIP was being discussed and drafted.

Robert A Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World'(1990) *Duke Law Journal* 660

This article discusses the changes that indigenous advocacy at the international level for a recognition of indigenous rights has had on tradition rights-based discourse and on the way in which law itself is understood and analyzed. It makes a case for the use of critical race approaches.

Robert T Coulter, 'Using International Human Rights Mechanisms to Promote and Protect Rights of Indian Nations and Tribes in the United States: An Overview' (2006) 31 *American Indian Law Review* 573

A discussion of the relevance of international law doctrines in domestic arguments regarding tribal issues in the United States.

Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law (2001) 34 *New York University Journal of International Law and Policy* 189

This provides an examination of five different platforms for indigenous rights and the implications of the usage of each one.

S James Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist trend'(2005) 16 *Colorado Journal of Environmental Law and Policy* 237

Another article that has been written by the current UN Special Rapporteur on the Rights of Indigenous Peoples that considers the various doctrinal approaches that have been used to debate and litigate indigenous claims about land and water resources.

S. James Anaya, 'Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law' (2006) 22 *Washington University Journal on Law and Policy* 107

A discussion of how international law has been shaped by the emergence of indigenous rights and claims for justice by indigenous peoples

Jeff Cornassel, 'Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9(1) *Nationalism and Ethnic Politics* 75

Deciding by what criteria someone is determined to be indigenous in both international and state law has been very contentious (See further articles on this in the section regarding American jurisprudence, in particular the discussion on the 'existing Indian family doctrine'). Jeff Cornassel provides an insightful and important discussion by reviewing the debates on definitional criteria for being indigenous and making the case for why it is important for the right of indigenous self-identification to be recognised.

Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Decade (1995-2004) (2007) 29 Human Rights Quarterly 137

This ranks as one of the most important pieces of research on international indigenous rights and the politics which surround rights development within the United Nations and international law. Corntassel effectively argues how involvement in international arenas may dilute and weaken efforts towards development and advocating for indigenous rights.

AFTER THE UNITED NATIONS DECLARATION ON INDIGENOUS RIGHTS

There has been an explosion of research in the wake of the approval of the UNDRIP. Many articles provide an examination of the impact of the UNDRIP on indigenous rights. Articles are published across a variety of journals. There is a great deal of debate about the exact nature of indigenous rights. The debates include questions on whether the UNDRIP created new rights that are specific for indigenous peoples or simply re-packaged already existing human rights in context for indigenous peoples. How well indigenous rights fit into traditional notions of human rights, whether new normative meanings have been created within the UNDRIP, and what meaning should be given to indigenous land rights. The approval of the UNDRIP has also sparked new debate on the role of soft law within the international legal system. Siegfried Wiessner is a prolific and insightful author, who has written extensively on indigenous rights and now focuses on the meaning of indigenous sovereignty in the wake of the UNDRIP (see Wiessner 2008 and Wiessner 2011). Sovereignty is a concept that is at the heart of a state-centric international system—and which is challenged by normative meanings that are given to indigenous sovereignty. New normative constructions for indigenous sovereignty might mean a reconstruction of sovereignty itself, and may bring changes, subtle or otherwise, to the very foundations of the international system. Xanthaki 2009 focuses on developments in indigenous rights and the likely course that indigenous rights are likely to take after the UNDRIP. One of the most notable achievements of the UNDRIP is that it has given indigenous peoples a voice and legal personality in the international legal system. The contributions that indigenous individuals and groups made to the drafting and eventual approval of the UNDRIP, along with the growth of an indigenous advocacy movement is detailed by Organick 2009. This highlights one of the very important features of the UNDRIP and the movement behind it—the growth of indigenous participation in the international community. **au: Please also discuss Singel 2008.** Singel 2008 provides a discussion on the evolution of indigenous rights within international law, culminating in the approval of the 2007 UNDRIP. Corrodi (*et al*, eds) 2018 provide a fresh discussion on the changing nature of indigenous rights in the face of challenges of making rights on paper rights in reality. Pinero Graham 2018

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continues the analysis of provision of indigenous rights, by focusing on the difficulty of making international indigenous rights a reality in Peru.

Siegfried Wiessner 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples' (2008) 41 *Vanderbilt Journal of Transnational Law* 1141

The approval of the UN Declaration on the Rights of Indigenous Peoples called for a re-examination of indigenous rights in international law. The issue of indigenous sovereignty has long been debated within international law circles. This article considers the changes that have occurred in the normative meanings assigned to indigenous sovereignty, and examines what UNDRIP principle of self-determination now means to understandings of indigenous sovereignty.

Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) *European Journal of International Law* 121

Cultural rights are an important facet of the international body of indigenous rights in the UN Declaration on the Rights of Indigenous Peoples. This article places the UNDRIP, including its content on cultural rights, in a modern historical context as well as identifying the challenges for ongoing protections of indigenous rights, and the necessity of linking the right to culture with other rights such as self-determination.

Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27

This article discusses the significant developments in indigenous rights, which is a rapidly changing and evolving area of international law. The author includes information on the UNDRIP as well as other developments.

Wenona Singel. "New Directions for International Law and Indigenous Peoples' (2008) 45 *Idaho Law Review* 509

A detailed discussion and analysis of the development of indigenous rights in international law.

Aliza Organick, 'Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes' (2009) 16 *University of California Davis Journal of International Law & Policy* 171

This article discusses the involvement of indigenous peoples in the development of the UNDRIP, and the impact which it will likely have on the indigenous peoples in the United States.

Critical Indigenous Rights Studies, (Corrodi, et al, eds) (Routledge 2018).

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This edited collection makes a significant contribution to a contemporary understanding of indigenous rights through the application of a variety of interdisciplinary perspectives in the newly emerging field of critical indigenous rights studies.

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Samantha Pineiro Graham, 'The Continuing Struggle: Exploring the Extent of Indigenous Rights in the Modern Age' (2018) 4 Journal of Global Justice and Public Policy 1.

With a focus on indigenous rights in Peru, this article examines challenges in provision of indigenous rights at the domestic level, even while recognizing the gains that have been made over time in international law.

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Human Rights

How well indigenous rights fit within contemporary understandings of international human rights is the subject of ongoing discussion. These articles compare and contrast canons of indigenous rights and international human rights. The approval of UNDRIP has also created vigorous debate about the nature of human rights. Indigenous rights are comprised of both individual and group/collective rights, in contrast to the traditional understanding of human rights as the rights of the individual. This is brought about much debate as to whether indigenous rights are really human rights, and if human rights are restricted to individual rights. Anaya 2009 argues that there are no new rights in the UNDRIP, but rather simply already existing international human rights. Wiessner 2010 and Engle 2011 make valuable contributions to the analysis of the nature of indigenous rights in light of the usual construction of international human rights.

S James Anaya, 'Why there should not have to be a declaration on the rights of indigenous peoples' (2009) 58 *International Human Rights and Indigenous Peoples* 63

A very useful discussion by the current UN Special Rapporteur on the Rights on Indigenous Peoples on the content of the UNDRIP. The UNDRIP is often regarded as a human rights instrument, a position that is critically and thoroughly evaluated in this article. It discusses the UNDRIP as an instrument that has a remedial nature, and argues that the rights it contains are already existing human rights with a universal application.

Siegfried Wiessner, 'Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime' (2010) 15 *UCLA Journal of International and Foreign Affairs* 239

A discussion on the role of law in society and the implications for indigenous rights within a larger human rights legal regime.

Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) *European Journal of International Law* 141

This article discusses indigenous rights and human rights—and how well indigenous rights, which include collective rights can be incorporated within an international human rights corpus which gives heavy emphasis to individual rather than collective rights.

Self-determination

The issue of indigenous self-determination has been a very contentious one. The UNDRIP recognises "internal" self-determination for indigenous peoples. These articles examine normative meanings of self-determination, and state resistance to the recognition of indigenous groups as "peoples" within international law—where that recognition as "peoples" gives access to self-determination. One of the fundamental questions about indigenous rights has been about the normative meaning to give to 'self-determination.' The UNDRIP recognizes indigenous groups as "peoples" who then have some claim to "self-determination" under international law. Exactly what "self-determination" in this contest means has been the subject of fierce debate, both before and after the approval of the UNDRIP. The UNDRIP has attempted to settle the question by stating it gives no right for indigenous groups to separate from the state. Coulter's 2010 article gives important insight to not only the nature of the debates but the continuing controversy over the inclusion of the right to self-determination in the UNDRIP. Sargent and Melling 2012 consider why states continue to be so resistant to the notion of indigenous self-determination, arguing that state fears of indigenous secession would not be supported by modern interpretations of international law. Corntassel's 2008 and Corntassel's 2012 articles point to another area of dynamic growth within indigenous rights—that of a rejection of the utility of international law in realizing indigenous rights. Corntassel calls for an indigenous meaning to be given to the norm of self-determination, which he calls "sustainable self-determination." His articles provide insight into the vigorous continuation of indigenous rights being sought on indigenous terms.

Robert T. Coulter, 'The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples' (2010) 15 *UCLA Journal of International and Foreign Affairs* 1

The UNDRIP recognises an indigenous right to self-determination—an aspect of the instrument that was highly contested. The exact normative meaning and application of indigenous self-determination remains an area of controversy following the UNDRIP. The article's author was involved in the drafting of the UNDRIP and offers keen insight into the background and current debates on the meaning and significance of indigenous self-determination.

Sarah Sargent and Graham Melling, 'Indigenous Self Determination: The Root of State Resistance' (2012) 24 *Denning Law Journal* 117

States have long been resistant to the granting of self-determination to indigenous peoples. This article explores the root of that state resistance, exposing state fears of secession as groundless within modern international law.

Jeff Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 *Alternatives* 105

Self-determination has been a hotly contested and contentious principle when applied in the context of indigenous rights. Corntassel argues for the need for a new definition of "self-determination"—one which is not reliant upon international law but rather one that is reflective of indigenous values and norms.

Jeff Corntassel, *Cultural Restoration in International Law: Pathways to Indigenous Self-Determination* (2012) 1(1) *Canadian Journal of Human Rights* 94

This article considers the possibilities for land and water remediation—both forming an important base for indigenous culture—through UNDRIP provisions. The author argues that a rights-based strategy has significant limitations and that the pursuit of an indigenous sustainable self-determination strategy that is independent of international law is the most useful way forward for indigenous peoples.

Soft Law

The role of soft law within the international system has been highlighted since the approval of the UNDRIP, which is a soft law instrument. Barelli's 2009 article provides an important analysis of the current role of soft law in the international legal system—and those implications for UNDRIP, as well as implications that UNDRIP has for understandings of soft law.

Mauro Barelli, 'The Role of Soft law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957

UNDRIP is a soft law instrument—as it is a declaration. The 2007 approval of the UNDRIP also have a new high profile to the role of soft law in the international legal system—which is analysed in detail in this article.

Land rights

Many of the UNDRIP provisions deal with indigenous land rights, and the resolution of land claims. Land rights continue to be one of the most critical areas of litigation that involve indigenous rights. The Inter-American Human Rights system has indicated it views indigenous land rights as customary international law. This in itself is an important development for the way in which regional and international systems, as well as states, will respond to future indigenous land claims and claims over natural resources on indigenous lands. Pentassuglia's 2011 article explains the ways in which two

regional legal systems have analyzed indigenous claims to land, and compares this to the way in which land rights are provided for in the UNDRIP. The Inter-American Human Rights system is a complex set of treaties, bodies and differing jurisdictional authority. It has also issued a number of very important decisions on indigenous land and natural resource rights. The Introduction by Helton 2010 provides a helpful overview of the Report issued by the Inter-American Human Rights Commission on the normative meanings and jurisprudential it has developed and continues to develop (see Inter-American Commission on Human Rights 2010). Although written in 2001, the Anaya and Williams 2001 article gives a detailed and clear explanation of the Inter-American human rights system, its connection to the international system, and the growing body of cases on indigenous land rights. The Anaya and Grossman 2002 article discusses the landmark *Awas Tingni* decision from the Inter-American Human Rights system, explaining its significance in the unfolding jurisprudence of the Inter-American system. Finally, Contreras-Garduno and Rombouts 2011 provides a discussion of recent developments in the Inter-American system. The articles in this section would be appropriate for post-graduates and more experienced scholars who are interested in the rapidly evolving principles and position on indigenous land rights in both the Inter-American and international systems.

Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22(1) *European Journal of International Law* 165

This article considers land rights provisions in the UNDRIP and compares it to regional approaches taken in the Inter-American and African systems.

Taiawagi Helton, 'Introduction to IACHR Report on Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (2010) 35(2) *American Indian Law Review* 257

An overview of the Report issues by the Inter-American Commission on Human Rights and their current interpretations of human rights norms.

Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (2010) 35(2) *American Indian Law Review* 263

A very important if lengthy document that sets out in detail the jurisprudence of the Inter-American human rights system on indigenous land and natural resources. The Inter-American system has been instrumental in establishing precedent in favor of indigenous rights. The report also explains the Commission's position that indigenous land rights are now a matter of international customary law.

S James Anaya and Robert A Williams, Jr 'The Protection of Indigenous Peoples' Rights over Land and Natural Resources Under the Inter-American Human Rights System' (2001) 14 Harvard Human Rights Journal 33

This is a still timely and contemporary discussion of the growing jurisprudence of the Inter-American Human rights system on claims of indigenous land rights.

S James Anaya and Claudia Grossman, 'The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19 Arizona Journal of International and Comparative Law 1

A helpful discussion on the landmark decision from the Inter-American Court of Human Rights that established precedent on claims on indigenous collective rights in land disputes.

Diana Contreras-Garduno and Sebastiaan Rombouts, 'Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights' (2011) 27(72) Utrecht Journal of International and European Law 4.

This article provides a useful summary of the approaches taken in international law on indigenous land claims and discusses recent decisions by the Inter-American Court of Human Rights.

State Resistance

Despite the approval of the UNDRIP and subsequent endorsement by the four "no states", the full implementation of the UNDRIP provisions is hindered by continuing state resistance to some of rights. These articles examine the basis for state resistance to some, but not all, indigenous rights and examine the reasons for differing state responses to international indigenous rights. These articles can usefully be read alongside those under the headings for the United States, Canada, Australia and New Zealand, as well as under the heading of Self-Determination. Lightfoot's trio of articles (Lightfoot 2012, Lightfoot 2008, and Lightfoot 2010) is most usefully read together. They build an argument about the ways in which states have responded to the contents of the UNDRIP, being willing to give more weight and effect to some rights than others. Lightfoot 2012 focuses on the rights that states in the Anglosphere (the four states to oppose the approval of the UNDRIP—Australia, Canada, New Zealand and the United States) are willing to accept. Lightfoot also analyzes the rights provisions of the UNDRIP that these states continue to resist. This same theme of states being willing to recognize some but not all of the rights within the UNDRIP are examined in Lightfoot 2008 and with a comparative analysis of Australia and New Zealand in Lightfoot 2010.

Sheryl Lightfoot, 'Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere' (2012) 16(1) *International Journal of Human Rights* 100

This article examines the before-and-after positions of the four "no states" of Australia, Canada, New Zealand and the United States on the UNDRIP, and considers how and why

these states are willing to accept some of UNDRIP provisions and remain in steadfast opposition to others.

Sheryl Lightfoot, 'Indigenous Rights in International Politics: The Case of "Over Compliant Liberal States"' (2008) 33(1) *Alternatives* 83

In this article, Lightfoot examines what it means for a state to be "over-compliant" on some indigenous rights while failing to give recognition or effectiveness to other rights, and what prompts states to address indigenous rights in this bifurcated manner.

Sheryl Lightfoot, 'Emerging International Indigenous Rights Norms and 'over-compliance' in New Zealand and Canada' (2010) 62(1) *Political Science* 84

This article compares and contrasts the ways in which New Zealand and Canada have addressed indigenous rights, continuing with the "over-compliance" analysis developed in Lightfoot 2008.

INDIGENOUS RIGHTS BEFORE THE UNDRIP [au: Should this section appear *before* the section 'after the United Nations Declaration on Indigenous Rights'?

While the interest in researching indigenous rights may have spiked following the approval of the UNDRIP, there was a great deal of interest in it during the two decades of instrument drafting. What position indigenous rights should occupy within international law, and what principles, norms and doctrines justified this was the subject of much work which remains highly relevant in the post-UNDRIP era. As what eventually became the UNDRIP was being debated, drafted and re-drafted, the commentary about the place that indigenous rights should have, as well as the shape that should take was growing apace. Traditional notions of human rights as individual rights were challenged. Pentassuglia 2003 discusses the way in which indigenous peoples were trying to establish the right to legal personality in the international system, and also establish themselves as legally distinct from minority groups. Barsh's 1994 article might well be regarded as a classic for anyone who is researching indigenous rights. Barsh discusses the indigenous aim of achieving international legal personality, which would make them active participants rather than passive recipients in the international legal system. Williams 1990 continues this discussion, with a thorough examination of the power of indigenous advocacy to bring about changes in the international system. Coulter 2006 examines the ways in which international doctrines and principles can be useful in the promotion of indigenous issues in the American domestic state system. This highlights the importance and potential for international law to affect state decisions, and thus, the significance of achieving an international recognition of indigenous rights. Kingsbury 2001 provides a more theoretical exposition on how indigenous rights could be catalogued within international law. This is usefully read with Anaya 2005, to understand the theoretical underpinnings that could be and were given to indigenous rights at the international level. Anaya 2006 discusses the ways in which indigenous activism has been instrumental in shaping contemporary international law doctrines. Issues about deciding who is recognized in international law as being "indigenous" are covered by Corntassel 2003. Who would be

able to lay claim to the emerging body of indigenous rights was an area of much argument in the development of the UNDRIP. Despite the UNDRIP being regarded as a significant positive development in indigenous rights, Cornstassel 2007 effectively points out the negative implications of becoming involved in the international system.

Gaetano Pentassuglia 'Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law' (2003) 14(2) *European Journal of International Law* 390

——— A useful juxtaposition of minority and indigenous rights in international law.

Russell Lawrence Barsh, 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?' (1994) 7 *Harvard Human Rights Journal* 33

Although the recognition of indigenous rights through the UNDRIP is now a fait accompli, in fact the efforts to draft and seek approval of the instrument took place over twenty-two long years. This article traces important developments in indigenous rights during the period in which the UNDRIP was being discussed and drafted.

Robert A Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660

This article discusses the changes that indigenous advocacy at the international level for a recognition of indigenous rights has had on tradition rights-based discourse and on the way in which law itself is understood and analyzed. It makes a case for the use of critical race approaches.

Robert T Coulter, 'Using International Human Rights Mechanisms to Promote and Protect Rights of Indian Nations and Tribes in the United States: An Overview' (2006) 31 *American Indian Law Review* 573

A discussion of the relevance of international law doctrines in domestic arguments regarding tribal issues in the United States.

Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law (2001) 34 *New York University Journal of International Law and Policy* 189

This provides an examination of five different platforms for indigenous rights and the implications of the usage of each one.

James Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist trend' (2005) 16 *Colorado Journal of Environmental Law and Policy* 237

Another article that has been written by the current UN Special Rapporteur on the Rights of Indigenous Peoples that considers the various doctrinal approaches that have been used to debate and litigate indigenous claims about land and water resources.

S. James Anaya, 'Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law' (2006) 22 *Washington University Journal on Law and Policy* 107

A discussion of how international law has been shaped by the emergence of indigenous rights and claims for justice by indigenous peoples

Jeff Cornassel, 'Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9(1) *Nationalism and Ethnic Politics* 75

Deciding by what criteria someone is determined to be indigenous in both international and state law has been very contentious (See further articles on this in the section regarding American jurisprudence, in particular the discussion on the 'existing Indian family doctrine'). Jeff Cornassel provides an insightful and important discussion by reviewing the debates on definitional criteria for being indigenous and making the case for why it is important for the right of indigenous self-identification to be recognised.

Jeff Cornassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation During the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137

This ranks as one of the most important pieces of research on international indigenous rights and the politics which surround rights development within the United Nations and international law. Cornassel effectively argues how involvement in international arenas may dilute and weaken efforts towards development and advocating for indigenous rights.

REGIONAL LEGAL SYSTEMS

[au: Please provide here a commentary paragraph that specifically and directly introduces/contextualizes each source cited in this section using the Author Year or **Title** format.]

Regional legal systems have a key role to play in the provision and interpretation of indigenous rights. In particular the Inter-American human rights system has been the site of significant litigation over indigenous rights. The operation of this regional system which covers North, Central and South American states is covered in the Inter-American Commission on Human Rights 2009 guide on indigenous rights over land and natural resources. Similarly Anaya and Williams Jr (2001) discuss the decisions landmark indigenous rights decisions from the Inter-American system. The interplay of regional systems with the international legal system after UNDRIP is explored by Barelli 2010. Pasqualucci 2009 focuses on the role of the Inter-American system in determining indigenous rights following the 2007 UNDRIP approval. The operation of the Inter-American advisory, in contrast to its binding, operation is provided by Pasqualucci 2002. Anaya and Grossman 2002 focus on a decision from the Inter-American system that establishes indigenous rights to their ancestral lands. Schaaf and

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Fishel 2002 detail the Inter-American Commission decision that granted indigenous peoples rights to their ancestral lands in the United States. Fishel 2007 follows up on a related claim that was the subject of a decision in favour of indigenous land rights against the United States by the Committee on the Elimination of All Racial Discrimination.

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Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System (produced by the Inter-American Commission on Human Rights-35) (2009) 35(2) *American Indian Law Review* 263

An absolute must-read regarding the workings of the Inter-American Human Rights system and decisions and positions it has taken on indigenous rights claims and disputes over land and natural resources.

S James Anaya and Robert A Williams Jr, The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System (2001) 14 *Harvard Human Rights Journal* 33

The Inter-American Human Rights system has provided ground-breaking decisions and positions on indigenous rights, including claims for land and for natural resources. This article discusses those decisions and their implications.

Mauro Barelli, 'The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime(2010) 32(4) *Human Rights Quarterly* 951

A post-UNDRIP analysis of the roles played by regional and global legal systems regarding indigenous rights.

Jo Pasqualucci, "International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 27(1) *Wisconsin International Law Journal* 51

A very helpful look at the continued role of the Inter-American Human Rights system in the wake of UNDRIP approval.

Jo Pasqualucci, "Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law" (2002) 38 *Stanford Journal of International Law* 241

This provides useful information on the advisory practices of the Inter-American Human Rights Court and implications for human rights in international law.

S James Anaya and Claudio Grossman, 'The Case of *Awas Tingni v Nicaragua*: A New Step In the International Law of Indigenous Peoples' (2002) 19 *Arizona Journal of International and Comparative Law* 1

Analysis of a ground-breaking case establishing indigenous rights to ancestral lands.

Deborah Schaaf and Julie Fishel, '*Mary and Carrie Dann v United States* at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment (2002) 16 *Tulane Environmental Law Journal* 175

Analysis of high profile case on indigenous rights to ancestral lands [in the United States](#) decided in the Inter-American human rights system.

Julie Ann Fishel, 'United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level' (2007) 31(2) *American Indian Law Review* 619

Analysis of the implications of the Mary and Carrie Dann claims of indigenous rights for ancestral lands raised at the United Nations following actions brought in the Inter-American human rights system.

INTERSECTIONS WITH OTHER LAWS

The intersection of indigenous rights with other rights and laws is an important aspect of indigenous scholarship. There may be a tendency to think of indigenous rights as a narrow niche within the law, when in actuality, indigenous rights themselves are inclusive of many kinds of rights, and transcend the usual label of human rights placed upon them. The articles here address the intersections of indigenous law with other legal regimes and issues and demonstrate the breadth of indigenous rights in legal research and practice. Indigenous rights are often thought of as a narrow and niche area of the law, but in fact, indigenous rights intersect with many other legal areas of law. Batt 2012 discusses the intersection of indigenous rights in DNA from ancient indigenous remains and the intellectual property legal framework. Vadi 2011 discusses the intersection of indigenous cultural rights with investment law, with a particular focus on how these have been handled in investment treaty arbitration. Vadi 2007 argues that intellectual property frameworks are not appropriate for the protection of indigenous traditional knowledge, and that alternative frameworks should be developed. [See also Corntassel 2008 and Corntassel 2012 on the need to develop alternative legal frameworks for the effective realization of indigenous rights](#)

[\[au: Which Corntassel articles? The ones in "Self-Determination", or the ones in "Indigenous Rights before the UNDRIP"?\]](#)

Fiona Batt 'Ancient Indigenous Deoxyribonucleic Acid (DNA) and Intellectual Property Rights' (2012) 16(1) *The International Journal of Human Rights* 152

This considers the use of intellectual property rights in debates over the proper consideration of DNA from ancient indigenous remains.

Valentina Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42 *Columbia Human Rights Law Review* 3 (2011) 797

This provides a comprehensive and systematic overview and critical assessment of investment treaty arbitrations involving elements of indigenous cultural heritage. Increasingly indigenous issues feature in investment legal disputes.

Valentina Vadi, 'Intangible Heritage, Traditional Medicine and Knowledge Governance' (2007) 2 *Journal of Intellectual Property Law and Practice* 10 (2007) 682

This article argues that intellectual property rights are inadequate to protect indigenous traditional knowledge and proposes an alternative solution in the form of creating a traditional knowledge database.

INDIGENOUS CHILDREN

The rights of indigenous children have been a matter of particular attention, given past state practices of forced removal of children in an effort to assimilate indigenous groups. While forcible removal is now prohibited by the UNDRIP, concerns remain about the treatment of indigenous children, and on-going generational effects of forced removal. [Sargent 2010 reviews the situation of children being sent from Guatemala in intercountry adoption, in light of resistance by Guatemala to fully recognizing indigenous self-determination. Libesman 2007 questions whether international law is able to adequately address and safeguard the rights of indigenous children. Tilbury 2008's empirical research considers the whether the way that child welfare decisions are made contribute to over-representation of indigenous children in the Australian care system. Cunneen and Libesman 2008 also consider the issue of indigenous children over-representation in Australia through empirical research on the intersections of the child welfare system with indigenous families and communities. Kline 1993 writes from a feminist perspective on the way that stereotypes on idealized motherhood have a deleterious effect on indigenous women and families. Kline 1992 identifies how the best interests of the child principle can result in discrimination against indigenous children. Blackstock 2011 provides a critical discussion of the human rights abuse claims examined by the Canadian Human Rights Commission. Hand 2006 contrasts and compares indigenous worldviews with non-indigenous child welfare concepts.](#)

[au: Please specifically and directly introduce/contextualize each source cited in this section using the Author Year format.]

Sarah Sargent, 'Indigenous Children's Rights—International Law, Self-determination and Intercountry Adoption in Guatemala' (2010) 10(1) *Contemporary Issues in International Law* 1

This article looks at intercountry adoption of children from Guatemala in light of barriers presented by state resistance to a full implementation of indigenous self-determination.

Terri Libesman, 'Can International Law Imagine the World of Indigenous Children?' (2007) 15 *International Journal of Children's Rights* 283

This article examines the issue of whether international law is able to respond effectively to the particular needs and challenges of indigenous children.

Clare Tilbury, 'The over-representation of Indigenous Children in the Australian Child Welfare System' (2008) 18(1) *International Journal of Social Welfare* 57

This article examines the over-representation of indigenous children in the child welfare system of Australia through empirical data. It considers the effect of how decisions are made at certain points in the child welfare system and how this contribute to the over-representation.

Chris Cunneen and Terry Libesman, 'Removed and Discarded: The Contemporary Legacy of the Stolen Generations' (2002) 7 *Australian Indigenous Law Reporter* 1

Empirical research into the over-representation of indigenous children in New South Wales that looks at child welfare system interactions with indigenous families and groups.

Marlee Kline, 'Complicating the Ideology of Motherhood: Child Welfare law and First Nation Women' (1993) 18 *Queens Law Journal* 306

From the standpoint of legal feminist theory, this article examines how ~~idealised~~idealized notions of motherhood impact upon indigenous families and women.

Marlee Kline, 'Child Welfare Law," best interests of the child" Ideology, and First Nations.' (1992) 30 *Osgoode Hall Law Journal* 375

This article argues the necessity of self-government of indigenous peoples in Canada to be able to effectively provide for the welfare of indigenous children. It reveals the shortcomings and discrimination that result from non-indigenous legal constructs including the best interests of the child principle.

Cindy Blackstock, 'The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada Wins, Equality and Justice Lose' (2011) 33(1) *Children and Youth Services Review* 187

An examination of the inquiry by the Canadian Human Rights Commission of governmental treatment of indigenous children on Canadian First Nation reserves and claims of human rights abuses.

Carol Hand, 'An Ojibwe Perspective on the Welfare of Children: Lessons of the Past and Visions for the Future' (2006) 28(1) Children and Youth Services Review 20.

This provides an insightful discussion on Ojibwe (an American based tribe) cosmology in relation to modern child welfare issues. The inclusion of indigenous perspectives which are compared and contrasted with non-indigenous child welfare principles makes this a very valuable piece of research on indigenous child welfare issues.

UNITED STATES

There is much in the American jurisprudence on indigenous peoples which is unique. This is due to the recognition that the United States federal government gives to some indigenous tribes. Tribes given federal recognition are also seen to have at least a limited sovereignty on tribal lands for certain legal matters. There are many articles which deal with the development of legal doctrines on tribal sovereignty, and explain and analyse the federal legal doctrines that deal with tribal jurisdiction. New Holy's 1998 article provides insight on the importance that land plays in indigenous identity, and how land is regarded as sacred. The complex history of contested land claims in the United States is also covered in a discussion of the on-going dispute over the Black Hills. This article provides a helpful overview of the complicated issues that arise within the United States on indigenous rights.

Alexandra New Holy, 'The Heart of Everything that Is: Paha Sapa, Treaties and Lakota Identity' (1998) 23 Oklahoma City University Law Review 317

This provides excellent coverage of on-going disputes over Lakota peoples' claims over the Black Hills, or Paha Sapa, land, ceded to them in treaties with the United States. It provides an indigenous perspective—on how the land is seen as sacred and how it forms an integral part of the Lakota culture and heritage.

Tribal sovereignty

Whether tribes are sovereign, the origin of any sovereignty, and the limits upon it, are issues which are at the root of much academic research and commentary on indigenous rights within the United States. That the United States recognizes a limited sovereignty of some indigenous tribes is the subject of Kowalski's 2009 article. That the existence of this sovereignty is often overlooked or forgotten is the focal point of her article. Understanding how Indian tribe sovereignty works in conjunction with state and federal jurisdictions is the subject of the Francis et al. 2010 article. The state of Kansas is used to explain the complexities of Indian tribe sovereignty on criminal matters. This provides a broader discussion on indigenous sovereignty alongside state and federal jurisdictions in the United States. Paschal 1991 discusses the process of tribal recognition by the

American federal government. It is this recognition that provides tribes with some limited sovereignty under federal law. Metteer 2003 links issues of tribal sovereignty and determination of membership within a tribe. Finally, Organick 2009 argues for the importance of including tribal law as part of legal education, complementing the arguments raised by Kowalski that indigenous sovereignty and tribal law, while vital components of the American legal system, are virtually ignored by large parts of the academic and legal community.

Tonya Kowalski, 'The Forgotten Sovereigns' (2009) *36 Florida State University Law Review* 765

This article discusses the frequently over-looked sovereignty of tribal nations within the United States.

John Francis *et al*, 'Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas' (2010) *59 University of Kansas Law Review* 949

The complexities of jurisdiction between the federal government, the state, and Indian tribes on criminal matters within the state of Kansas is evaluated. The article provides useful information in understanding issues of tribal sovereignty within the federal and state jurisdictions of the United States.

Rachael Paschal, 'The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process' (1991) *66 Washington Law Review* 209

An insightful discussion on the process by which Indian tribes in the United States seek federal recognition.

Christine Metteer, 'The Trust Doctrine, Sovereignty, and Membership: Determining Who is Indian' (2003) *5 Rutgers Race and Law Review* 53

Tribal sovereignty and indigenous self-determination are issues which underlie determination of who meets the "criteria" for being an "Indian" (as a defined legal term of art in American federal and state law). This article examines differing definitions for being an "Indian" and links between federal legal doctrine, federal recognition of Indian tribes and the legal doctrine of sovereignty. This can usefully be read alongside Metteer's 1997 article on the Indian Child Welfare Act.

Aliza Organick, 'Tribal Law and Best Practices in Legal Education: Creating a New Path for the Study of Tribal Law' (2009) *19 Kansas Journal of Law and Public Policy* 63

This article discusses the study of tribal law as part of American legal education.

Assimilation Jurisprudence

The United States has not pursued a consistent policy with regard to American Indians. While it is now generally seen to be operating policies consistent with self-determination, this has not always

been the case. One major policy effort was that of the assimilation of American Indians, with the goal of an eradication of tribal culture and heritage, such that the American Indian would cease to be distinctive from the white settler culture and would become part of it. Ragsdale's 1989 article is an important study of the assimilationist policies that were developed, which is helpfully read alongside that of Lacey 1986 which discusses both assimilationist policy and the United States' development of self-determination doctrines well before the advent of the UNDRIP and its content on indigenous self-determination. Trocino's 1995 article compares the assimilationist efforts in the United States and Australia and can also be usefully read alongside the publications under the Australia heading. Haag 2007 discusses one aspect of the assimilationist policy –the removal and education of Indian children in boarding schools. These schools had the aim of separating Indian children from their families and culture, and to ensure the assimilation of these children to white society. Haag 2007 is usefully read alongside the publications in the section *The Indian Child Welfare Act*.

John Ragsdale Junior, 'The Movement to Assimilate the American Indians: A Jurisprudential Study' (1989) 57 *UMKC Law Review* 399

This is a must-read article for anyone doing research on the United States policies and law to assimilate American Indians. It provides a rich historical analysis which gives an important context for how and why assimilation policies were developed and ultimately abandoned.

Linda J Lacey, 'The White Man's Law and the American Indian Family in the Assimilation Era' (1986) *Arkansas Law Review* 327

This article covers not only the effects of assimilation laws on American Indians but also focuses on the reasons that the assimilation policy was pursued. It focuses on the effects that assimilation and provides comprehensive coverage on the development of assimilation laws and policies and changes that occurred to create a new federal policy of indigenous self-determination (culminating in the Indian Reorganization Act of 1934).

Craig Joseph Trocino, 'Civilizing the Savages: A Comparison of Assimilation Laws and Policies in the United States and Australia' (1995) 14 *Glendale Law Review* 33

This comparative law piece looks at the assimilation laws and policies that were pursued by Australia and the United States regarding the indigenous peoples in each state.

Ann Murray Haag, 'The Indian Boarding School Era and Its Continuing Impact on Tribal Families and The Provision of Government Services' (2007) 43 *Tulsa Law Review* 149

The author provides a very helpful and detailed critique of the removal of Indian children to boarding schools and how this continues to have an impact in the present day. The detail of the historical analysis is impressive and well done. This article fills a key gap in research on the pre-Indian Child Welfare Act governmental policies and practices.

The Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) which is a major piece of American federal legislation on indigenous rights and self-determination has been the subject of legal debate and analysis. The Act is intended to prevent the unwarranted and forcible removal of indigenous children from their families and tribal groups. There has been a great deal of state resistance to the Act, including the development of judicial doctrines that enable the court to evade the application of the Act. The appropriateness of ICWA and its application remains a highly contested feature of indigenous child welfare legal practice and research in the United States. Tribal sovereignty is a key feature of many ICWA provisions and also a much debated and analyzed facet of the Act. In this way, ICWA highlights the unique grant of tribal sovereignty as well as its contested nature. Graham 2008 argues that the Indian Child Welfare Act has an important role to play as remediating the past wrongs of Indian child removal. Haag 2007 (cited under *Assimilation Jurisprudence*) can usefully be read along with the Graham 2008 article. Atwood 2008 argues that increased participation of children in Indian Child Welfare Act proceedings would increase the effectiveness and utility of the Act. Gallagher 1994 focuses on the ICWA provisions for adoption of Indian children, and provides a general discussion on the black letter requirements of the Act.

Lori Graham, 'Reparations, Self-Determination and the Seventh Generation' (2008) 21 *Harvard Human Rights Journal* 47

Although not immediately evident from the title, this article is in fact a discussion of indigenous rights. It discusses ICWA in the context of reparations for past wrongs. Reparations are a key part of the UNDRIP and of international indigenous rights. This provides helpful contextualisation of ICWA in the post-UNDRIP indigenous rights regime.

Barbara Atwood, 'The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation' (2008) 50 *Arizona Law Review* 127

This article argues the benefits of increasing the participation of Indian children in proceedings brought under the Indian Child Welfare Act.

Brian D Gallagher, 'Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process' (1994) 15 *Northern Illinois University Law Review* 81

This article examines the role given to Indian tribes by ICWA provisions when an "Indian child" is being adopted. Although a largely descriptive article, it gives a useful discussion on both the general provisions of ICWA and their application in the adoption of an "Indian child."

Individual v Collective/Group Rights Analysis of ICWA

ICWA provides for collective rights—that of tribal rights. This has been the source of much resistance by state to the full implementation of the Indian Child Welfare Act. This is addressed in Slaughter 2000, which identifies a clash between liberal state elevation of individual rights with the collective

rights contained in the Indian Child Welfare Act as fundamental to state resistance to the Act. Appell 2004 also discusses the rights based foundations of ICWA. Adams 1994 also discusses the implications of the collective rights contained in ICWA as a basis for state resistance. Goldsmith 1990 provides a valuable analysis of the perceived clash between individual and collective rights by a thorough examination of the 1989 United States Supreme Court decision on the Indian Child Welfare Act. Only one other case has been accepted for a hearing by the United States Supreme Court, this a case pending hearing in 2013 with no decision made at the time of writing. The 1989 United States Supreme Court dealt with the issue of exclusive tribal jurisdiction for the adoption of a child. Kunesh 2007 also examines the issue of tribal jurisdiction of children who are wards of the tribal court but do not live on the Indian reservation. The exercise of tribal court jurisdiction is one aspect of indigenous sovereignty, and consequently, is one of the contested and resisted aspects of ICWA. Publications under the Sovereignty subheading could usefully be read along with the publications under the Indian Child Welfare Act heading.

M M Slaughter, 'Contested Identities: The Adoption of American Indian Children and the Liberal State' (2000) 9(2) *Social and Legal Studies* 227

A discussion of liberal state values prioritising individual rights and clashes with the provisions of ICWA which provide tribes with a role in adoption actions of Indian children.

Annette Appell, 'Uneasy Tensions Between Children's Rights and Civil Rights' (2004) 5 *Nevada Law Journal* 141

While it is not apparent from the title of this article that it focuses on ICWA, it in fact provides a very useful rights-based analysis of ICWA provisions.

Jill Adams, 'The Indian Child Welfare Act of 1978: Protecting Tribal Interest in a Land of Individual Rights' (1994) 19 *American Indian Law Review* 301

The possibility of a clash between individual rights which predominate in American thought and the collective rights of tribes under the Indian Child Welfare Act are examined. Key decisions are analyzed in this rights-based analysis of ICWA.

Donna Goldsmith, 'Individual v Collective Rights' (1990) 13 *Harvard Women's Law Review* 1

Very much what it says on the tin—a straightforward analysis of ICWA through discussion of individual and collective rights. It provides a very useful analysis of only United States Supreme Court decision on ICWA, the 1989 *Mississippi Band of Choctaw Indians v Holyfield*.

Patrice Kunesh, 'Borders Beyond Borders—Protecting Essential Tribal Relations off Reservation Under the Indian Child Welfare Act' (2007) 42 *New England Law Review* 15

Exclusive tribal jurisdiction over children who are wards of tribal courts, but not physically located on the tribe is one key aspect of ICWA. The article traces how the extension of tribal

sovereignty to children physically not located on tribal lands yet a ward of the tribal court has been and remains a very contentious issue

The Existing Indian Family Exception

State resistance to the collective tribal rights contained in the Indian Child Welfare Act is expressed through the use of the Existing Indian Family Exception. This is a judicially created doctrine that allows courts to determine that a child's case will not be heard under the Indian Child Welfare Act, and is one of the issues raised in the case which is pending hearing at the United States Supreme Court in 2013, with no decision issued as of the time of writing. Painter-Thorne 2009 examines the existing Indian family doctrine as one means by which assimilationist aims are perpetuated thus putting Indian cultural heritage and autonomy at risk. Metteer 1997 also writes about the risks of the doctrine to Indian heritage and argues that the United States government has a responsibility to protect indigenous existence. Atwood 2002 provides a thoughtful and thorough analysis of the reasons why states continue to resist the Indian Child Welfare Act.

Suzianne Painter-Thorne, 'One Step Forward, Two Giant Steps Back: How The "Existing Indian Family" Exception (re) Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy' (2009) 33 *American Indian Law Review* 329

The judicially created doctrine of the "existing Indian family" which is used by courts to evade the application of ICWA is given an insightful and thorough coverage. This article argues that the exception intrudes upon the cultural autonomy of tribes. Cultural autonomy features as an important right in the United Nations Declaration on the Rights of Indigenous Peoples. This post-UNDRIP analysis of the existing Indian family doctrine fills an important gap in research.

Christine Metteer 'The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act' (1997) 30 *Loyola Los Angeles Law Review* 647

This is a richly detailed account of not only the existing Indian family doctrine, but a thorough analysis of whether ICWA's application is constitutional. It provides an examination and analysis of key ICWA decisions. It can usefully be read alongside Metteer's 2003 article.

Barbara Ann Atwood, 'Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance' (2002) 51 *Emory Law Journal* 587

Insightful examination of why state courts continue to resist the application of ICWA.

AUSTRALIA

Australia was one of the states that initially opposed the approval of the UNDRIP. Australia has had numerous issues raised regarding indigenous claims to land, and the effects of state policy and practice to assimilate indigenous groups. As in other states, the rights of indigenous peoples to

traditional and ancestral lands has been the focus of much debate and contention. Hill 1995 discusses the implications of the landmark *Mabo* decision which created limited land rights for Australian Aboriginal peoples. Howitt 2006 continues the analysis by providing an updated discussion on the post-*Mabo* state of indigenous land rights in Australia. Moreton-Robinson 2004 looks at further judicial developments and their implications by an examination of the *Yorta Yorta* decision, also a landmark case for establishing benchmarks in Aboriginal land rights. Short 2003 and Short 2012 consider the effects of reconciliation efforts in Australia, criticizing the efforts of falling far short of what is needed to address relationships and historical wrongs between Aboriginals and the state.

Ronald Paul Hill 'Blackfellas and Whitefellas: Aboriginal Land rights, the *Mabo* Decision, and the Meaning of Land' (1995) 17(2) *Human Rights Quarterly* 303

The case of *Mabo v Queensland* set new rules for resolving indigenous claims to land in Australia. This article considers the implications of the historic and precedent setting *Mabo* decision.

Richie Howitt, 'Scales of Coexistence: Tackling the Tension Between Legal and Cultural landscapes in post-*Mabo* Australia' (2006) 6 *Macquarie Law Journal* 49

Further analysis of the effects of the *Mabo* decision on indigenous land rights in Australia.

Aileen Moreton-Robinson . 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the *Yorta Yorta* Decision' (2004) 3(2) *Borderlands e-journal*

This article considers the effects of a post *Mabo* court decision and Australian legislation on indigenous land rights in Australia.

Damien Short, 'Reconciliation, Assimilation, and the Indigenous peoples of Australia' (2003) 24(4) *International Political Science Review* 491

This provides an evaluation of the Australian reconciliation process and its shortcomings, and argues for the need to create different strategies if the aims of the reconciliation process are to be met.

Damien Short, 'When Sorry is not Good Enough: Official Remembrance and Reconciliation in Australia' (2012) 3(5) *Memory Studies* 293

This article identifies limitations on the effectiveness of the state reconciliation process in Australia in the context in which the process was conducted.

NEW ZEALAND

New Zealand also initially opposed the approval of the UNDRIP but has subsequently indicated its endorsement. New Zealand is unique in its relation with indigenous peoples with the Treaty of Waitangi, a treaty between the indigenous peoples in New Zealand and the British Crown signed in

1840. Cox 2002 provides a useful discussion of the place that the Treaty has in New Zealand. Kingsbury 2002 also examines the appropriate legal basis for indigenous rights in New Zealand.

Noel Cox, 'The Treaty of Waitangi and the Relationship between Crown and Maori in New Zealand' (2002) 28 *Brooklyn Journal of International Law* 1

The Treaty of Waitangi, which was made between the indigenous peoples of New Zealand and the British Crown, is examined in a present-day context. Discussions of state-indigenous relationships in Canada and Australia are contrasted with that of New Zealand.

Benedict Kingsbury, 'Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law' (2002) 52(1) *The University of Toronto Law Journal* 101

This article examines five different legal platforms for the basis of indigenous rights in New Zealand.

CANADA

Canada also initially opposed the approval of the UNDRIP but now has indicated its endorsement. Land rights have, as elsewhere, been an area of contention. McNeil 2000 discusses the Canadian provisions for indigenous land rights. Huseman and Short 2012 focuses on the effects that tar sands oil extraction has on the health and well being of indigenous peoples in Canada, highlighting important issues on natural resource extraction and ownership as part of disputes over rights to land.

Kent McNeil, 'Aboriginal Title and Section 88 of the Indian Act' (2000) 34 *University of British Columbia Law Review* 159

Indigenous land rights in Canada in the wake of litigation and legislation are evaluated.

Jennifer Huseman and Damien Short, "A Slow Industrial Genocide": Tar Sands and the Indigenous Peoples of Northern Alberta' (2012) 16(1) *The International Journal of Human Rights* 216

This provides an important analysis of the impact of tar sands oil extraction on indigenous peoples.

AFRICA

Africa is another large region where there are vast and varied groups of indigenous peoples. Hays and Biesele 2011 looks at the way in which indigenous rights are affected by both local actions and international instruments, highlighting that although there is an international instrument on indigenous rights, local conditions still have a great impact on whether international rights are realized. Saugestad 2011 also examines the local implications of efforts to realize international indigenous rights.

Jennifer Hays and Megan Biesele, 'Indigenous Rights in Southern Africa: International Mechanisms and Local Contexts' (2011) 15(1) *The International Journal of Human Rights* 1

Discussion of indigenous rights in Southern Africa through a consideration of the impact of the UNDRIP, the appropriateness of a rights-based approach and the role of anthropologists.

Sidsel Saugestad, 'Impact of International Mechanisms on Indigenous Rights in Botswana' (2011) 15(1) *The International Journal of Human Rights* 37

A case study of the San indigenous people in Botswana provides insight into the effects of international law on the lives of indigenous peoples. It reveals that after-effects of a court case and the influence of international law have had detrimental effects.

ASIA

The identification of indigenous groups within Asia has been an area of a great deal of dispute. Kingsbury 1998 analyzes this controversy and provides alternative constructions for the identification of Asian indigenous peoples.

Benedict Kingsbury, "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy' (1998) *American Journal of International Law* 414

A very useful analysis of the consequences and implications of different meanings and ways of defining 'indigenous peoples' in an international law setting, with a focus on identification of indigenous groups in Asia.

EUROPE

Europe is perhaps a region of the world that does not come to mind when thinking about indigenous rights, but these articles highlight the issues of the indigenous peoples within Europe. Xanthaki 2004 provides a discussion of indigenous rights of groups in Russia, providing an analysis of indigenous rights before the approval of the UNDRIP. This article can usefully be read with those under the heading of the United Nations Declaration on the Rights of Indigenous Peoples and Indigenous Rights before the UNDRIP. Minde 2001 focuses on the Sami people of Norway, giving particular focus to the state response to indigenous land claims, while Snyder 2011 looks at the land rights of indigenous groups in the Arctic area in the context of the international law of the sea and of particular treaties. These articles combine to provide a comprehensive and broad analysis of the issues faced by the indigenous peoples within Europe and how they are affected by state practice and international instruments.

Alexandra Xanthaki, 'Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples in the Russian North, Siberia and the Far East' (2004) 26 *Human Rights Quarterly* 74

This article provides analysis of the indigenous peoples located within the Russian Federation. Relatively little scholarship and research has been devoted to indigenous peoples

in Europe and the Russian Federation. Written before the approval of the UNDRIP, the article discusses the location of indigenous rights in other international law instruments.

Henry Minde, 'Sami Land rights in Norway: A Test Case for Indigenous Peoples' (2001) 8 *International Journal on Minority and Group Rights* 107

An analysis of the land rights of the indigenous Sami peoples, through provision of both historic context and of the implications of Norwegian state practices for indigenous peoples worldwide.

Robert Snyder, 'International Legal Regimes to Manage Indigenous Rights and Arctic Disputes from Climate Change' (2011) 22 *Colorado Journal of Environmental Law and Policy* 1.

This article looks at the tensions arising from pressures to develop Arctic lands and the impacts to indigenous peoples in those areas, and the relevance of international law of the sea treaties and conventions.

LATIN AMERICA

The Latin American region has a great diversity of indigenous peoples and has been the site of a great deal of litigation in the Inter-American Human Rights system. In addition to the articles that are listed here, it would be useful for researchers to also see articles listed under Land Rights. Aponte Miranda 2008 provides a concise explanation of the claims of indigenous peoples in the Latin American region and how these have been received by the international system. The book Brysk 2000 is a thorough exposition of the growth of indigenous issues from the local level to the international level. The Latin American region has been influential on the development of not only regional but international normative standards on indigenous rights, including land rights, and has also been significant in the growth of international indigenous advocacy.

Lillian Aponte Miranda, 'Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America' (2008) 10 *Oregon Review of International Law* 419

A very detailed analysis of assertion of land rights by indigenous peoples in Latin America, and the implications of the use of international litigation for recognition of rights. The article includes a very useful discussion on legal pluralism.

Alison Brysk, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America* (Stanford University Press, 2000)

This book provides an insightful discussion on the development of indigenous rights in Latin America through the use of multiple case studies. It considers the implications of the growth of indigenous rights in the international arena. An international relations theoretical approach

is used. This is a helpful adjunct to legal understandings of indigenous rights in general, as well as in the Latin American setting and international law setting.

Cultural Heritage

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Indigenous cultural heritage is the subject of academic research and museum displays. It is both a representation of the past and a vibrant part of the present. Lonetree and Cobb, eds 2008 detail the influence of the indigenous managed National Museum of the American Indian in portrayals of past and present indigenous culture. Mitchell 2015 provides an in-depth exposition of the impact that the introduction of the horse as a result of European contact has had on indigenous societies around the world. Horse Capture and Her Many Horses, eds 2006 discuss the role of the horse in past and present day American Indian cultures through a series of reflective essays and photographs.

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The National Museum of the American Indian: Critical Conversations (Lonetree and Cobb, eds) (University of Nebraska Press, 2008)

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This book provides a comprehensive critical evaluation of the National Museum of the American Indian, a Smithsonian Institution in Washington DC that has a wholly indigenous perspective in its displays. The often-fraught relationship of museums and indigenous peoples is explored in the consideration the work of the National Museum of the American Indian.

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Peter Mitchell, *Horse Nations: The Worldwide Impact of the Horse on Indigenous Societies Post-1492* (Oxford University Press, 2015)

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Mitchell's work is an inter-disciplinary exposition of the effect that horses have had on indigenous societies after European contact. Indigenous societies in North and South America, Africa, and Australasia are examined to reveal the far-reaching changes influenced by the horse.

A Song for the Horse Nation: Horses in Native American Cultures (Horse Capture and Her Many Horses, eds) (National Museum of the American Indian, Smithsonian Institution 2006)

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This collection of essays reflects on the role of the horse in past and contemporary indigenous societies in the present-day United States, demonstrating the central role the horse has played and continues to occupy in across indigenous culture.

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