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## **Climate change and indigenous peoples: the search for legal remedies**

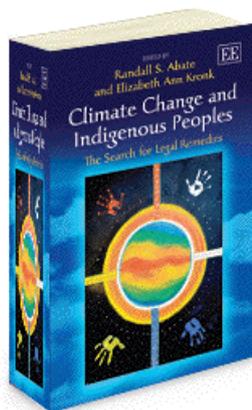
**Editors: Randall S. Abate and Elizabeth Ann Kronk**

**Edward Elgar Publishing Limited (2013)**

**ISBN 978 1 78100 179 0**

**Book review by Sally Ramage, editor, *The Criminal Lawyer***

This new book published by Edward Elgar Publishing Limited is 'right on the button' and the subject matter was in dire need of being brought up-to-date, notwithstanding the swathe of ill-informed dramatised newspaper and other publications on the subject of climate change.



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For when it comes to climate change issues, the whole planet, rich and poor countries, are all affected and effective, the principal factor being economics.



The developing countries, most affected by climate pollution effects, and trying to drag their economies into the running, are in the same boat as the rich countries, whose sophisticated farming processes and urban areas have havoc wreaked on them, which no amount of financial reparation and speedy resettlement could assuage the fear and stress they suffer at the hands of the elements.



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However, let us take a look at the possible legal remedies as discussed by the distinguished legal scholars who kindly contributed to this comprehensive book, divided into two parts- *Part One* containing 6 chapters dealing with context and principles, and *Part Two*, in 18 chapters, which discusses the global perspective, divided into chapters on South America; United States of America; Arctic; Pacific Islands; Asia; Australia and New Zealand; and Africa.

The contributors to *Part One* are:-

Randall S. Abate  
Elizabeth Ann Kronk  
Deepa Badrinarayana  
Lillian Aponte Miranda  
Eugenia Charles-Newton  
Elizabeth Ann Kronk  
Rebecca Tsosie, and  
Maxine Burkett.

The contributors to *Part Two* are:-

Leonardo A Crippa  
Andrew Long  
Philomena Kebec  
Sarah Krakoff  
Jon Daniel Lavalley  
Judith V Royster  
Sophie Theriault  
Peter Van Tuyn  
Irina L Stoyanova  
Hari M Osofsky  
Erika J Techera  
Victoria Sutton  
Clement Yow Mulalap  
Keely Boom  
Wenxuan Yu  
Jingjing Liu  
Po Dong  
Megan Davis

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Naomi Johnstone  
Patricia Kameri-Mbote, and  
Elvin Nyukuri.

### **Indigenous peoples**

As reflected in the title, this book on climate change concentrates on its effect on the world's indigenous peoples and hence their communities. The causes of climate change on these vulnerable peoples are outside of their control, occurring as they do as a result of developed countries afar and such indigenous peoples are located in vulnerable locations throughout the world (Parker *et al*, 2006). Indigenous peoples suffer changes to their biodiversity, causing them to no longer rely on their customary foodstuff such as decreased fish population due to, for example, bleaching of the coral reefs. When the mitigation of climate change began and forest conservation initiatives were put in place by the world's governments, it displaces many indigenous peoples and restricted their long established and rights to their use of land and to natural resources, forcing them to leave their homes, thereby displacing them.

### **UN Declaration on the Rights of Indigenous Peoples (2007)**

Indeed, the 2007 United Nations Declaration on the Rights of Indigenous Peoples, Articles 1-34, state:

#### **'Article 1**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>4</sup> and international human rights law.

#### **Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

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**Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

**Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

**Article 6**

Every indigenous individual has the right to a nationality.

**Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

**Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;  
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;  
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;  
(d) Any form of forced assimilation or integration;  
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

**Article 9**

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Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

**Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

**Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

**Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

**Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political,

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legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

**Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

**Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

**Article 16**

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

**Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral

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or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

**Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

**Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

**Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

**Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

**Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

**Article 23**

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Indigenous peoples have the right to determine and develop priorities particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

**Article 24**

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realisation of this right.

**Article 25**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

**Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

**Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

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**Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

**Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

**Article 30**

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

**Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop

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their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

**Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

**Article 33**

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

**Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

**Article 35**

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.'

Even before the 2007 Declaration above, there was much legislation to protect the world against adverse climate change. However, indigenous peoples need special treatment as they are on the frontline of climate change—they are the first to feel its effects, with subsistence economies and cultures that are the most vulnerable to climate catastrophes. The United States passed the law of Tribal Water Rights in 1952, codified and thus restrictive as to measure of quantification, as discussed in chapter 11. And even before

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this, there had been important litigation (see *United States v Pelican*<sup>1</sup> and *Oklahoma Tax Commission v Sac & Fox Nation*<sup>2</sup>. Federal reserved rights continued to be an issue, as in *United States v District Court*<sup>3</sup>; *Colorado River Conservation District v United States*<sup>4</sup>; *Colville Confederated Tribes v Walton*<sup>5</sup>; and *United States v Adair*<sup>6</sup>, for example.

In Australia, more recent litigation concerned the indigenous peoples in Australia. There is a noted lack of litigation concerning indigenous people from less developed areas of the world with less sophisticated legal systems.

### **Guyana in South America has allowed logging by Chinese company**

More recently, it has been alleged that Guyana in South America had allowed a certain Chinese company to cut a large amount of logs, exceeding the amount agreed. During 2012, a roundwood equivalent volume of approximately 120,000 cubic metres of timber was exported from Guyana. China and India each account for about one quarter of the total, almost entirely as logs. A further 3% was destined for the EU, predominantly as 'undressed' sawn wood having an export value of little more than US\$ two million. This accounts for a large majority of the roundwood equivalent volume which is exported from Guyana. China imports most of the coal which the United States exports. United States' export of coal is mainly to China. China's annual coal consumption is almost a total of half of this planet's coal consumption today.

Allegedly, a Chinese enterprise has negotiated rights to log 300,000 cubic metres - twice as much as this - in order to supply a proposed saw mill. This allegation has created doubt about sincerity of Guyana's Low Carbon Development Strategy. Under the United States Lacey Act and also the EC Regulation 995/2010 (which prohibit the placement, on the USA or EU market respectively of non-negligible amounts of wood-based products, supplied directly or indirectly. One would query whether a sum of \$2 million dollars of logs can compare to the billions of dollars of coal sent by the U.S. to China.

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<sup>1</sup> 232 U.S. 442, 449 (1914).

<sup>2</sup> 508 U.S. 114, 125 (1993).

<sup>3</sup> 401 U.S.520 (1971).

<sup>4</sup> 424 U.S. 800 (1976).

<sup>5</sup> 647 F.2d 42, 48 (9<sup>th</sup> Cir. 1981).

<sup>6</sup> 723 F.2d 1410 (9<sup>th</sup> Circuit 1983).

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### **Global warming**

Let us take a moment to examine global warming as it is at present. The fact is that global warming has been increasing more slowly than in previous decades.<sup>7</sup>

Such excitable news released to the public through local newspapers has apparently caused other countries to stop the carbon credit rebate due to Guyana. One cannot help wonder whether some of these machinations are not contrived to keep this poor country down since Guyana is one of the richest countries in the whole world as regards cleaning up carbon- it has a wealth of forestry, yet this country is very poor, still reeling from the massive loans it took from the United States decades ago in order to build roads – roads which crumbled nearly as soon as they were laid, partly causing Guyana to become a bankrupt country, from which bankruptcy it has now emerged. There is a difference between 'heat' and 'temperature'. For example a spark contains a small amount of intense heat but a heated swimming pool or an ocean contains more heat energy than a spark and comparisons should be with like volumes to make any sense.

### **Oscillation in the rate of global warming**

Thus a small oscillation in the rate of global warming. A study, based on sediment in a Siberian lake reveals or concludes that 3 million years ago, carbon dioxide levels were as high as in present years, ie. The average temperatures in Siberia 3 million years ago were 8 degrees centigrade higher than the temperatures today. The difference between then and now is the rate of speed at which the planet is heating up today is faster than then. In the medium term, climate is affected by atmospheric carbon dioxide levels.

### **El Nino Southern Oscillation**

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<sup>7</sup> See the United Kingdom's BBC television programme on the Global Warming debate on 17 May 2013.

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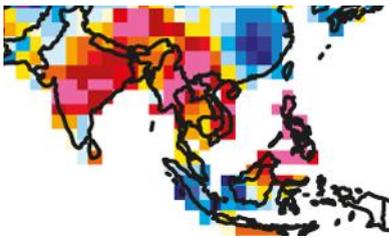
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The El Niño/Southern Oscillation exhibits natural variability on interdecadal to centennial timescales that obscures the effects of climate change.<sup>8</sup> A reconstruction shows anomalously high activity in the late twentieth century, relative to the past seven centuries. This suggests a response to global warming, and could be used to improve climate *models* and projections. If carbon emission on this planet were cut by 80% by the year 2050<sup>9</sup>, in 37 years' time, this would limit the average world atmospheric temperature rise to 2% by the year 2110 (in 97 years' time). The *rate of rise* of emission currently is 2.6% a year. If emissions were cut by 80% in 37 years time, it would stem the flow of heat waves, floods, crop failures, etc by 20-65%.

### **The developed countries continue to increase carbon emission**

Evidence of this abounds. In the Athabasca tar sands, oil production is planned to triple by the year 2020. The United States plans a Keystone XL pipeline from the the Athabasca tar sands to oil refineries in the state of Texas and such pipelines are already in place refineries in the states of Illinois and Oklahoma.

### **The planet's oceans**

Today's speed of the heating of the planet Earth would have been even higher were it not for the seas today. It is clear that in the medium term, climate is affected by the Pacific Decadal Oscillation and the Atlantic Multidecadal Oscillation, which oscillations affect the amount of heat absorbed by the planet and also affects the amount of heat

<sup>8</sup> *Nature Climate Change*, ISSN 1758-678X.

<sup>9</sup> See European Commission's 'road map'.

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radiated out into space. This factor is affected by atmospheric carbon dioxide levels. People fail to realize that there are major environmental issues faced on earth: the rate of increase of carbon dioxide in the atmosphere; the rise of sea levels as the oceans heat up; and extreme weather conditions – based on long-term Atmospheric warming trends. Some experts believe that when these oscillations in the rate of global warming enter another phase, warming could accelerate even further when oceans release to the atmosphere the heat accumulated in the current phase.

### **Nature Climate Change**

This book on climate change is very necessary reading for lawyers keen to grasp this important area of law. It was written by scholars at the coalface, so to speak. These writing assist the reader to realize the many factors, legal, political and social, which impact on climate change.

### **References**

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