 [1]

 [2]

The sky is our roof,
the earth is our floor,
this is our *adat* in the forest
Hatop, belangit
lantoi, begebun
Iyoi, kami adat Rimba
(*Orang Rimba* proverb)[3]

[1] A child who is a member of *Orang Rimba* peoples plays slingshot at *Bukit Tigapuluh* National Park. Their live is always on threat because of the illegal logging and concessions destroying their forest. Picture taken from http://forclime-photocontest.com/gallery/forests-and-people/suku-anak-dalam

[2] *Orang Rimba* children play in the river inside their forest. Picture by A, Madestra Dell, taken from http://www.jakartaphotoclub.com/forum/topic-5487.php?no_page=3

Recognition of Indigenous Peoples in Indonesia:
An International Human Rights Law Approach

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Table of Contents

Introduction

During the colonization period, the Dutch colonial government segregated the population in Indonesia into three categories: Europeans, Orientals, and Indonesian Natives. These categories were used to determine which legal system applied to each category.

Using a similar approach, the Indonesian Government claimed that the terminology of indigenous peoples cannot be applied in Indonesia because almost all Indonesian are natives Indonesian. This claim is reflected inthe Indonesian delegation's statement in the adoption of United Nations Declaration on Rights of Indigenous peoples (UNDRIP) on 13 September 2007.

In the 61st General Assembly Plenary, Indonesia voted "yes" for the adoption of the UNDRIP. However, the delegation's statement explained the future implementation of UNDRIP within Indonesian jurisdiction: that it cannot be implemented in Indonesia. Since most Indonesian are natives, there are no indigenous peoples in Indonesia and thus UNDRIP provisions are not applicable:

> *"(Indonesia) noted that several aspects of the Declaration remained unresolved, in particular what constituted indigenous peoples. The absence of that definition prevented a clear understanding of the peoples to whom the Declaration applied. In that context, the Declaration used the definition contained in the International Labour Organization Convention, according to which indigenous peoples were distinct from tribal people. Given the fact that Indonesia's entire population at the time of colonization remained unchanged, the rights in the Declaration accorded exclusively to indigenous peoples and did not apply in the context of Indonesia"*

The indigenous peoples in Indonesia take on a different position with the government's point of view. In March 1999, indigenous peoples throughout Indonesia were holding a National Congress in Jakarta. The Congress resulted in the establishment of the Aliansi Masyarakat Adat Nusantara (AMAN) or Indigenous peoples' Alliance of the Archipelago.

Realizing that if they were to come up with a definition of indigenous peoples it would deny them of the self-identification principle, AMAN then defined the elements and common features to describe indigenous peoples. Within their criteria, there are 50-70 million people that can be classified as indigenous. And there are 1163 indigenous communities that have become its members by the year 2007.

Despite of the statement explicitly not recognizing the existence of indigenous peoples in Indonesia, the Indonesian laws and practices are showing a different position. Recognition towards indigenous peoples and their rights can be found in, inter alia, the Indonesian Constitution (and its Second Amendment); Basic Agrarian Law; Forestry Law; etc.

However, according to various documentations, conflicts are still occurring between the indigenous peoples and the government of Indonesia, mostly in terms of land and the utilization of natural resources. Various documentations have shown this. During 2007, 514 indigenous communities were in conflict with palm oil plantations in 14 Provinces in Indonesia, according to Sawit Watch. Back in 2004, after the introduction to the Plantation Law, 143 conflicts were recorded. And in 2006, more than 500 active cases over land were appropriated for plantations.

In August 2010, a judicial review was proposed towards the Plantation Law. Two of the four applicants were members of indigenous peoples namely: *Jelai Kendawangan* and *Silat Hulu* peoples that live in Ketapang, West Kalimantan. The Constitutional Court has issued a decision on this matter on June 2011, and in deciding the decision, the judges had taken into considerations the indigenous peoples' collective land right.

Another incident occurred in 2009 that affected the lives of *Suku Anak Dalam* people, or more popularly called the *Orang Rimba* or Forest People in Pemayung Village, Jambi, West Sumatera. They were expelled from their forest because the government has given concession to the Sinar Mas Group, a conglomerate for the palm oil business in Indonesia. Until now, the government is silent about all the violence that took place towards the indigenous peoples and the company is now hiring security officers to make sure that the indigenous peoples will not show up in the forest.

The occurrence of conflicts between the indigenous peoples shows the lack of laws relating to the recognition of indigenous peoples and their rights in Indonesia. Thus, it is important to compare Indonesian recognition towards the indigenous peoples and their rights with the international frameworks related to this matter.

From all the elaboration of the issues, I have come up with the central research question: "What is the current status of recognition of indigenous peoples in Indonesia and how does this relate to the international framework of indigenous peoples' recognition under *inter alia* UNDRIP and ILO 169?"

In answering the research question I will divide the discussion into three chapters. In chapter one, I will discuss the recognition of indigenous peoples and their rights in Indonesian laws. There has been a lot of research regarding this issue, but I will focus mostly on the laws that relate to the indigenous peoples' existence and their rights on the utilization of natural resources.

The second chapter will discuss the consequences of Indonesian recognition of indigenous peoples and their rights on the utilization of natural resources. This chapter will elaborate the struggle of AMAN and bring up some case studies.

The third chapter will put the Indonesian recognition of indigenous peoples in the light of the international frameworks, particularly the ILO Convention No. 169 and UNDRIP. Afterwards, the conclusion will follow.

Chapter I

Recognition of Indigenous Peoples in Indonesia

The point of view of Indonesia's delegation in the adoption of UNDRIP in 2006 was actually a continuation of the same stance made by the Permanent Mission of Indonesia for the UN in 1993.[4] At that time the delegation stated the absence of their participation in the UN Year of indigenous peoples. The Government of Indonesia on both occasions claimed that indigenous issues are not applicable to Indonesia.

This point of view was actually rooted from the colonization era. Therefore the first chapter of this thesis will start with the colonization laws. The discussion will then continue to the evolution of Indonesian laws concerning the recognition of indigenous peoples from the early independence era up till the recent state of affairs.

I. Colonization Era: Recognition of Indigenous Peoples

During the colonization period, the Dutch government applied its laws to Indonesia, which at that time was named: the Dutch East Indies. But the Dutch realized that the native Indonesian people had their own laws, so it divided the communities living in Indonesia into two categories. With the *Reglement op het beleid for Regeering van Ned. Indies (RR)* the government stipulated the European peoples (including the Japanese since they were one of the colonizing peoples) to be bound by the European laws, while the native Indonesian or indigenous peoples (including those groups similar to them such as the *Timur Asing* or Orientals consisting of the Arabic, Indian and Chinese) were to be bound by their respective "hukum adat" (customary laws). Native Indonesian people were first legally recognized by the Dutch with the term "bumi-putera", which literally means son of the earth. [5]

Following the RR, the colonial government then revised the earlier categorization with article 131 and 163 of the *Indische Staats Regeling (IS)*. The IS made the categorization into: the

[4] Persoon, Gerard. Isolated Groups of Indigenous Peoples: Indonesia and the International Discourse. In: *Bijdragen tot de Taal-, Land- en Volkenkunde*, Globalization, Localization and Indonesia 154, No. 2. Leiden. 1998. Downloaded from http://www.kitlv-journals.nl. Page 281.

[5] Moniaga, Sandra. From Bumiputera to Masyarakat Adat: A Long and Confusing Journey. A Paper Presented at the Workshop on Adat Revivalism in Indonesia's Democratic Transition, Batam Island, 26-27 March 2004. Downloaded from http://www.perhimpunan-karsa.org. Page 3-4.

Europeans, the Orientals and the *inlander* or "bumi-putera" (The native Indonesians).[6] For the *inlander*, they were bound by their own customary law instead of the European Laws.[7]

However, the IS stated that the application of their customary law could only be applied on one condition: as long as the law in question is not in contrast with the "civilized" principles of justice, which could only be found in the European laws. The colonial government was implementing a conditional recognition.[8] An example of such would be the implementation of customary law in the land ownership: the colonial government assumed to possess all the land in Indonesia except land owned by the native Indonesian's, which could be proved conversely by showing a certificate of ownership. This was of course difficult for the indigenous peoples since their laws were not familiar with written certificate; their ancestors passed the land to them, which was usually done by an oral tradition or informal/unwritten evidence.[9]

The colonial government also recognized the *adat* court which was given authority to try both civil and criminal matters subject to customary laws. However, this court was considered as a subsidiary of the *Landraad* (colonial district court). Before a case concerning native Indonesian's was brought to the *Landraad*, the parties must first bring the case to the a*dat* court. The colonial government once again displayed conditional recognition by regulating that any settlement by the judge in the a*dat* court must not violate the general principle of civilized law, which referred to the European laws.[10]

Another aspect of the native Indonesian's that was recognized by the Dutch colonial government was the *adat* legal communities. The categorization of "bumi-putera" was not a synonym with the *adat* legal communities as the a*dat* legal communities were part of the "bumi-putera". The recognition was implicitly made by the administering of *inlandsche gemeente*, which means that the colonial government recognized the *adat* legal communities in each region

[6] Moniaga, Sandra. Ibid.
[7] The colonial government was not only recognizing the customary laws of *inlander*, it also recognized customary laws that bound and applied to the Orientals.
[8] Simarmata, Rikardo (1). *Pengakuam Hukum terhadap Masyarakat Adat di Indonesia*/Law Recognition of Indigenous Peoples in Indonesia. Published by Regional Initiative on Indigenous Peoples' Rights and Development (RIPP). Bangkok, Thailand. 2006. Page 309-310
[9] The written evidence of land ownership was introduced by the *domain verklaring* policy. Toha, Kurnia. The Struggle Over Land Rights: A Study of Indigenous Property Rights in Indonesia. Dissertation, University of Washington, USA. 2007. Page 11-12
[10] Simarmata, Rikardo (1). Ibid. Page 33-34.

of Indonesia (which primarily consisted of villages) as their subordinate to administer the population.[11]

These *adat* legal communities were taking the form of autonomous villages and their existences were recognized by the Dutch on the basis of treaties. These treaties entitled them to maintain their systems of customary government and rights. Pursuant to Article 71(2) of the *Regeringsreglement* of 1854 the autonomous communities elected their own heads and held the authority to govern their own local affairs, albeit under the obligation to comply with the regulations of the colonial government.[12]

The recognition of *adat* communities also brought recognition towards the indigenous rights over their land because the colonial government also recognized the entities' right to avail to their (agrarian) lands (*hak ulayat)*. Right to avail *(hak ulayat)* is the English translation of the Dutch term *beschikkingsrecht*. With the right to avail, the Dutch government recognized the application of customary law over the lands owned by *hak ulayat.* However, the Dutch colonial government could ask for the *adat* land when it considered necessary. When the colonial government wanted to do this, they had to get permission from the customary government of *adat* communities, and they were bound to pay compensation for this usage. The usage was temporary and within a certain period of time: which was until the objective of the usage was fulfilled.

The brief summary written above has brought about different interpretations between the after-independence-Indonesian-government and the indigenous peoples group, with regards to the proponents in Indonesia. For the government of Indonesia, the term "bumi-putera" was referred to most people after the independence of the Indonesian population. The basis of the argument was because after the independence, the construction of the population didn't change as the native Indonesian's existed in the land of Indonesia and the colonials left. Thus, indigenous peoples can be associated with all native Indonesians.

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[11] Simarmata, Rikardo (1). Ibid. Page 36-37.

[12] By the end of Dutch rule, in 1941, 52-53% of the population of the outer islands (*buitengewesten*) lived in the *zelfbesturende landschappen* under indirect colonial rule. Bedner, Adriaan and Stijn van Huis. The return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation. *Bijdragen tot de Taal-, Land- en Volkenkunde (BKI) 164-2/3 (2008):165-193*. Downloaded from https://openaccess.leidenuniv.nl/bitstream/handle/1887/18073/Bedner%20A.W.%20and%20S.C.%20van%20Huis,%20The%20return%20of%20the%20native%20in%20indonesian%20law.pdf?sequence=2. Footnote 15.

In the indigenous peoples group's point of view, the Dutch colonial government made different recognitions between the native Indonesians and the indigenous peoples communities. The term "bumi-putera" indeed referred to the native Indonesians, but in addition to that, the Dutch government has made treaties with the *adat/*customary communities group during the colonial era. They associated these communities/entities as indigenous peoples in the after independence-of the Indonesian population. Their argument was based on the fact that the Dutch colonials were the ones that made recognition towards the existence of indigenous peoples in Indonesia, and that they requested for the after independence-of the Indonesian government to continue to do so.

II. Independence: Indonesian Constitution 1945

The Indonesian Constitution was issued after the independence of Indonesia in 1945. The founder of Indonesia realized that the nation was established by a very pluralistic society which was based on *adat* laws, which had been in existence long before the modern Indonesian State was founded.[13] Elucidation of article 18 recognized that:

> "there are approximately 250 self-governing regions (*zelfbesturende landschappen*) and village communities (*volksgemeeschappen*), such as the "desa" (village) in Java and Bali, the "nagari" in Minangkabau, the "dusun" and "marga" in Palembang and other social-administrative units. These regional units have their own indigenous social systems and thus may be considered as special regions.[14]

This was actually a continuation of the recognition made by the Dutch colonial government towards the *adat* law communities. The implementation of their *adat* rights were said to have been considered in all legislations that applied to them.[15] The scope of their autonomy was only limited by the provision of point (I) the Elucidation of Article 18 which stated that they were not allowed to have the character of a state within the state of Indonesia.

For the indigenous peoples group and their proponents in Indonesia, this was a significant recognition for their existence in Indonesia. Rikardo Simarmata in his article regarded this

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[13] Simarmata, Rikardo (1). Ibid. Page

[14] Elucidation of Article 18 point (II), Indonesian Constitution 1945. Unofficial translation from the Department of Information Republic of Indonesia, 1989. Downloaded from www.usig.org/countryinfo/laws/Indonesia/ConstitutionIndonesia.doc

[15] Bedner, Adriaan and Stijn van Huis. Ibid. https://openaccess.leidenuniv.nl/bitstream/handle/1887/18073/Bedner%20A.W.%20and%20S.C.%20van%20Huis,%20The%20return%20of%20the%20native%20in%20indonesian%20law.pdf?sequence=2. Page 7.

recognition as a "brilliant breakthrough".[16] He also went further to explain that the recognition made by the Constitution was differed from the conditional recognition made by the Dutch colonial government. Instead of a conditional approach, the Constitution used a declarative approach. This is an important landmark because it had laid a constitutional foundation for the recognition of the existence of indigenous peoples and their rights in Indonesia. [17]

However, during the implementation of the Constitution, the Indonesian Government didn't share the same opinion with the indigenous peoples group as shown by the Indonesian delegations in the international affairs, and also by the subsequent laws issued after the Constitution in 1945. The government has shown an inconsistent attitude towards the recognition of indigenous peoples in Indonesia. Sandra Moniaga even interpreted the lack of political will of the State to resolve ambiguities as a way to not recognize indigenous peoples and their rights in Indonesia.[18] This issue will be elaborated further in the next section and it will focus on the laws that relate to indigenous peoples and their rights toward lands and natural resources.

III. Basic Agrarian Law No. 5/1960 (BAL) and State Minister for Agrarian Affairs Regulation No. 5/1999

The Indonesian government issued the BAL 15 years after the establishment of the Constitution, which regulates lands in Indonesia and also provides the position of indigenous people's rights towards the national agrarian law. In its preamble, the BAL stated that its provisions are based upon *adat* law.[19] Paragraph III verse (1) of the General Elucidation of the BAL elaborates the reasoning: the Indonesian agrarian law before the BAL was dualistic as it distinguished between land rights based on *adat* law and western law. The aim of BAL was to gain unified land law, and because most Indonesian people adhered to *adat* law, it was considered as the original law of Indonesian people thus the BAL will also be based on it.[20] In

[16] Simarmata, Rikardo (2). *Menyongsong Berakhirnya Abad Masyarakat Adat: Resistensi Pengakuan Bersyarat*/Welcoming the Ending of the Indigenous Peoples' Century: Conditional Recognition Resistance. 2003. Donwloaded from http://dte.gn.apc.org/AMAN/publikasi/Artikel%20Politik%20Simarmata.htm.
[17] Simarmata, Rikardo (1). Ibid. Page 299.
[18] Moniaga, Sandra. Ibid. Page 6.
[19] Letter (a) Opining Section of the Preamble of Basic Agrarian Law, English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs of Democratic Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc
[20] *As has been explained above, our current agrarian law is dualistic in nature as it distinguishes between land rights based on adat law and those based on western law. Such a distinction rests on the provisions of Book II of the Indonesian Civil Code. UUPA (Basic Agrarian Law) seeks to do away with such a distinction and, wittingly, to create legal unity in line with the wish of the people, who live as one nation, and with economic interests. Inevitably,*

addition to that, article 5 of the BAL also stipulates that: "the agrarian law is applicable to the earth, water, and airspace is *adat* law […]", and article 3 of the BAL recognizes the existence of *adat* communal land rights (or *hak ulayat* over the land) and other similar rights of *adat* law communities.

When we see those provisions, there seems to be a positive recognition towards the *adat* law, *adat* law communities and also the *adat* communal land rights.

However, when the articles are read in more depth, it can be seen that the article actually creates a contrast recognition with the Indonesian Constitution of 1945. Let's begin with the rest of the provision in article 5 of the BAL: […]*provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislation* […]. The rest of article 3 moreover gives the same nuance towards the implementation of *adat* communal rights: […]*as long as such communities in reality still exist-- must be such that it is consistent with the national interest and the State's interest and shall not contradict the laws and regulations of higher levels*.

Adat laws are recognized **as long as** they are not contrary to:

- the national interest and the interest of the State
- the Indonesian socialism[21]
- the provisions stipulated in this Act
- other legislation

Adat communal land rights and other similar rights of *adat* law communities are recognized **only if** they fulfill these conditions:

- such communities in reality still exist

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the new agrarian law should be consistent with the legal awareness of the common people. Since most Indonesian people adhere to adat (customary) law, the new agrarian law will also be based on the provisions of adat law, which is the indigenous law, with the latter being improved and adjusted to the interests of the people of a modern State which connects with the international community as well as to Indonesian socialism. As may have been understood, adat law --in its growth-- could not have been spared from the influences of the capitalistic politics of the colonizer and from those of the feudalistic swapraja (self-governing) communities. Paragraph III verse (1) of the General Elucidation of BAL, English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc.

[21] Indonesian socialism is mentioned three times in the BAL, without a definition being given. Article 14 indicates that one of its key features is state planning related to the use of land, water, sky and natural resources, to promote societal development (*pembangunan*). Bedner, Adriaan and Stijn van Huis. Ibid. Footnote 24.

- the implementation of such rights are consistent with the national interest and the State's interest; and
- they are not in contradiction with the laws and regulations of the higher levels

The BAL is going backward to the conditional recognition implemented by the Dutch colonial government. And this type of recognition has been followed rigidly by the laws issued after the BAL. [22] According to the research done by the National Law Commission, the law makers believed that the *adat* laws and its communities will disappear in the future, they consider the *adat* laws as something backward, therefore they came to the notion that it need to be modernized.[23] This concept is reflected in the spirit of BAL which put the national and state interests over the *adat* communities' rights.

The proponents of indigenous peoples have raised questions concerning the inconsistencies between the recognition made by the BAL and the contents of the law itself. The BAL stated that it is based on *adat* law; in truth the tenure systems contained in the law were altered from the tenure system recognized by *adat* law. For example, the BAL recognizes various types of rights over the ownership of land except communal rights over the ancestral land. Furthermore, BAL only allows certain persons and legal bodies to have rights over the land and does not recognize the *adat* community institution as a legal entity that are entitled to posses any tenure systems acknowledged by BAL. [24]

State Minister for Agrarian Affairs Regulation No. 5/1999

The implementation of the regulation of article 3 BAL came 29 years after the BAL was enacted: which was done by the State Minister for Agrarian Affairs Regulation No. 5/1999 on the Guidance for Problem Solving over the Customary Land Rights of Customary Communities.[25] In its consideration, the Regulation mentioned that there were many conflicts that took place between the *adat* communities with the government concerning their right to

[22] Simarmata, Rikardo (2). Ibid.
[23] Komisi Hukum Nasional/National Law Commission is established by a Presidential Decree Letter No. 18 Year 2000. This Commission has duty to give legal consideration for the Government of Indonesia.
[24] Moniaga, Sandra. Ibid.
[25] Literal translation: "Peraturan Menteri Agraria No. 5/1999 tentang Pedoman Penyelesaian Masalah Hak Ulayat Masyarakat Hukum Adat"

avail towards their lands. Thus, one of the objectives of this Regulation was to give guidance in settling this kind of conflict over land.[26]

Article 1 paragraph 1 defines the *adat* communities' land rights (*hak ulayat)*:

> *Ulayat* rights and those resembling them of *adat* law communities […] concern the authority (*kewenangan*) that according to *adat* law a certain *adat* law community enjoy over a certain territory which forms the living environment for its members to make use of its natural resources, including land, within that territory, to survive and make a living, which arises from the physical and spiritual bond, inherited from generation to generation and uninterrupted, between the *adat* law community and the said area.[27]

Article 2 (1) is an important recognition because it recognizes the existence of *ulayat* lands in reality. However, following that in verse (2), it stipulates conditions under which an *ulayat* land could be recognized. The conditions are: 1. if there is an *adat* law community, they must be bound by and practice their own law in their daily life; 2. if there is *an ulayat land,* the community must live and use it to fulfill their daily needs; 3. if there is a*dat* law in their own governance system, it must be practiced by the community.

The Regulation indicates that *ulayat* rights can still be recognized, although again, this is limited by some condition. The main problem with this Regulation is that it excludes the land which is already possessed by the third party with a formal title (article 3 of the Regulation). The indigenous peoples are not satisfied with this provision because more often than not, conflicts emerge from a third party claim over indigenous peoples' land under the formal title provided by the BAL, which are considered by the indigenous peoples as a unilateral action.[28]

Although it follows the BAL in the implementation of the conditional recognition, there is still little information about how it operates in reality. However it should be pointed out that the Regulation can be considered as the first serious sign of the Indonesian government's willingness to recognize *adat* law communities and their rights.[29] This last statement has to be seen in the context of the recognition on indigenous peoples' rights after the issuance of Forestry

[26] Letter (a) until (e) the Consideration of the Peraturan Menteri Agraria No. 5/1999 tentang Pedoman Penyelesaian Masalah Hak Ulayat Masyarakat Hukum Adat/State Minister for Agrarian Affairs Regulation No. 5/1999 on the Guidance for Problem Solving over the Customary Land Rights of Customary Communities. Downloaded from http://hukum.unsrat.ac.id/tanah/menagraria_5_1999.pdf

[27] Unofficial translation by: Bedner, Adriaan and Stijn van Huis. Ibid. Page 22.

[28] Arizona, Yance. Satu Dekade Legislasi Masyarakat Adat: Trend Legislasi Nasional tentang Keberadaan dan Hak-hak Masyarakat Adat. Working Papaer Estima No. 07/2010.

[29] Bedner, Adriaan and Stijn van Huis. Ibid. Page

and Mining Law in 1967 and the replacement of Forestry Law in 1999. Both will be elaborated in the next section.

IV. Basic Forestry Law No. 5/1967 (BFL), the Mining Law No. 11/1967, and the BFL 1999

The next landmark for the recognition of indigenous peoples and their rights took place when the government issued regulations concerning particular sectors, such as forestry and mining. Seven years after the issuance of the BAL, the government of Indonesia showed its inconsistent attitude towards indigenous peoples by issuing two regulations: the BFL and the Mining Law in 1967.

Mining Law No. 11/1967

From the indigenous peoples' perspective, the provisions of this law were very repressive. It blatantly obliged all rights-holders to allow mining activities in their land (article 25) and there was no single reference to specific rights of a*dat* communities whatsoever. The only limitation was elaborated in article 16, which prohibited mining in locations such as: cemeteries, holy places; public works (for instance public roads, railroads); means of distribution of utilities (water, electricity, gas); places where other mining companies are active; buildings, houses or factories with their adjoining lands, except with the permission of the owner.[30]

Basic Forestry Law No. 5/1967 (BFL)

Article 5 (1) of the said Law grants the State, the right to control all forests in Indonesia including all natural resources found within the forests. The second paragraph of the same article authorizes the State to designate land as forest area. In addition to that, the Department of Forestry issued the subsequent Ministerial Decree on *Tata Guna Hutan Kesepakatan* – Forest Land Use Consensus (TGHK) for each province in Indonesia. As a result, 143 million hectares of land are being classified as state forest which is 70% of the total land area of Indonesia.[31]

The Government assumed that the forests were uninhabited or in other words it used the concept of empty forest. In reality most indigenous peoples or *masyarakat adat* in Indonesia are living in the forests, which cover 61% of the land in Indonesia. Conflicts that emerge between

[30] Bedner, Adriaan and Stijn van Huis. Ibid. Page 18.
[31] Moniaga, Sandra. Ibid. Page 7.

the indigenous peoples and the government take place primarily inside or around the forests territory.[32]

As a consequence, there were expulsions of indigenous peoples from their forest, like the Moronene peoples from Rawa Opa National Park, South Sulawesi. Another example would be the Katu and Lindu peoples who were being expelled from their forest which was transformed to be Lore Lindu National Park in Central Sulawesi.[33] The Mentawai peoples who lived in National Park Mentawai, Mentawai Island as well as the Rimba peoples who lived in National Park Tiga Puluh which are located in Jambi and Riau, West Sumatera, were also forcibly removed from their forest.[34]

Article 17 of the BFL recognizes the existence of *ulayat* rights in forest areas, but in a restricted way because the implementation of the rights of *adat* law communities may not disturb the goals stipulated in this law. Furthermore, the Elucidation of article 17 assumed that the implementation of the rights of indigenous peoples could cause a disturbance towards the development of the nation[35]:

> It cannot be justified if the *ulayat* rights of a local *adat* law community are used to obstruct the implementation of general state plans, for example by refusing large-scale forest clearance for large projects, or in the interests of transmigration, and so on.

In addition to that, the Elucidation of article 2 of the law considered that the rights of *adat* communities will disappear sooner or later:

> In the areas where *ulayat* rights in reality have ceased to exist (or never have existed) these *ulayat* rights will not be revived in the future. In their evolution *ulayat* rights have the tendency to weaken under the influences of multiple factors.

The implementation of this Law has prompted rejection and created conflicts between the indigenous peoples and the government.

The government was replacing the problematic BFL 1967 with Law No. 41/1999, using the same title. BFL 1999 was the first law on natural resources enacted after the fall of tyrant Soeharto in 1998. The people hoped that this statute would bring a new legislative approach to

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[32] Arizona, Yance. Ibid.
[33] Wiratraman, R Herlambang Perdana. The Human Rights Situation concerning Indigenous Peoples and Ethnic Minorities in Indonesia. February 2007. Page 20. The paper was obtained from personal communication with Rikardo Simarmata.
[34] Simarmata, Rikardo (2). Ibid.
[35] Bedner, Adriaan and Stijn van Huis. Ibid. Page 18. English translation of the elucidation of article 2 is an unofficial translation found in this article.

the recognition of indigenous peoples and their rights. But, in many aspects the BFL 1999 continues the approach of the BFL 1967.

Basic Forestry Law No. 41/1999 (BFL 1999)

In line with BFL 1967, Article 4 (1) and (2) of the BFL 1999 grants the State the right to control forest and natural resources found in it, thus giving them the authority to designate land as forest area. What makes it slightly different with the BFL 1967, is that paragraph (3) of this article recognizes the rights of *adat* law communities. However, the rest of this paragraph gives a condition on which rights could be recognized: as long as the *adat* law community is still in existence and recognized by the government, and that the implementation of those rights would not be in conflict with national interest.

Furthermore, article 5 granted the authority to the State to designate status of a forest as *adat* forest. But, again this can only be done with conditions: as long as the *adat* law community is still in existence in reality and recognized by the government. This is in line with the concept that all forests are under the State's control (not under State's ownership). In other words, the State doesn't recognized indigenous peoples' rights towards their forests in line with their original rights from their ancestors.

As a consequence of this concept, it is in the hands of the State to lay down the authority to grant the rights to use the forest for the indigenous peoples. These rights are elaborated in article 67 (1) of the BFL 1999[36]:

a. collect forest products for daily needs of concerned communities;
b. undertake forest management in accordance with prevailing customary laws which do not contradict the laws; and
c. be empowered for improving their welfare.

However, the article gives restriction of which a*dat* law communities are possibly granted these rights to use the forest: as long as it exist and is recognised. Furthermore, paragraph 2 of the article obliged that recognition must only be done by the inauguration of the a*dat* law communities by the Local Regulation.

[36] Article 67 (1) of the BFL 1999, English translation provided by the Indonesia Investment Coordinating Board. Downloaded from http://www.bkpm.go.id/file_uploaded/Law_4199.htm

In addition to the condition mentioned in paragraph (1) of the article, the elucidation of article 67 paragraph 1 gives more detail conditions to be fulfilled by an *adat* law community in order to gain recognition[37]:

- the community is still a legal community (*rechtsgemeenschap*);
- the existence of *adat* institutions;
- the existence of a clearly defined *adat* law territory;
- the existence of *adat* law institutions that are still respected
- the community is still dependent upon collecting forest products

Furthermore, the elucidation of paragraph (2) of article 67 determines that the process of recognition must be conducted through research. This not only sets a conditional recognition, but also requires a layered process for a*dat* law communities in order to be recognized.[38] There is another requirement sought by this Law in comparison with the BAL: it requires the existence of *adat* law institutions. This adds to the lists that need to be fulfilled by the indigenous peoples in order to gain recognition.

The single positive point that can be found is that BFL 1999 seems to assume that new recognition of *adat* communities is still possible. However, that is the only point where it constitutes a break with the past.[39]

V. Second Amendment of the Indonesian Constitution Year 2000

There are two significant articles from the Second Amendment of the Indonesian Constitution that relates to the recognition of indigenous peoples and their rights. These articles are: article 18 B (2) and 28 I (3).

Article 18 B paragraph (2) of the Second Amendment of the Indonesian Constitution

> The state recognizes and respects individual [*kesatuan-kesatuan*] *adat* law communities [*masyarakat hukum adat*] and their traditional rights, in as far as they are still alive and in line with the evolution of society [*perkembangan masyarakat*] and the principle of the Unitary State of Indonesia, as regulated by Act of Parliament.[40]

The article contains recognition from the State towards the *adat* law communities, as well as their traditional rights. Taking a different approach with the original Constitution, the Second

[37] Unofficial English translation provided by Bedner, Adriaan and Stijn van Huis. Ibid. Page 20
[38] Simarmata, Rikardo (2). Ibid.
[39] Bedner, Adriaan and Stijn van Huis. Ibid. Page 20
[40] Article 18 B paragraph (2), unofficial English translation by

Amendment followed conditional recognition that was being developed by the subsequent laws issued after the original Constitution. This article creates necessities that the *adat* law communities must prove in order to be recognized. They have to prove that they are still in existence and that the implementation of their rights must not be in conflict with the development of the society and the Unitary State of Indonesia. In addition to that, the article requires that the recognition should be regulated by the law, which means that this article doesn't have a lot of meaning in the operative level, because in order to be operative it has to depend heavily on the subsequent laws.

This second amendment has revived the conditional recognition towards indigenous peoples and their rights into the Constitution. Rikardo Simarmata put it as a "constitutionalization" of conditional recognition concerning indigenous peoples and their rights in Indonesia. What he means by that is that this amendment has laid the constitutional basis for conditional recognition for indigenous peoples. This is because before the amendment, the conditional recognition never had a constitutional basis.[41] This is definitely a major backward struggle for the indigenous peoples' movement in Indonesia.

The Second Amendment also removed the Elucidation section of the original Constitution. Again, this is clearly a setback to indigenous peoples in Indonesia, because the former Elucidation of Article 18 had been a solid support for many indigenous communities' claims, as it established a link with the colonial legal system of autonomy for special territories and 'autonomous villages' (see section II). Clearly, instead of reinforcing the indigenous peoples' recognition and rights, the Second Amendment has curtailed them. [42]

Article 28 I (3) the Second Amendment of the Indonesian Constitution

> The cultural identity and the rights of traditional communities [*masyarakat tradisional*] are protected in accordance with altered times and culture [*perkembangan zaman dan peradaban*].[43]

In this article, the government created another terminology. Instead of using *adat* law community (*masyarakat hukum adat*) or a*dat* community (*masyarakat adat*), it used the term *masyarakat tradisional*, which literally translates to: traditional communities. It would seem that its main aim was to avoid the nuance of autonomy, which is used by both of the earlier terms.[44]

[41] Simarmata, Rikardo (1). Ibid. Page 302
[42] Bedner, Adriaan and Stijn van Huis. Ibid. Page 7-8.
[43] Unofficial English translation found in Bedner, Adriaan and Stijn van Huis. Ibid. Page 6.
[44] Bedner, Adriaan and Stijn van Huis. Ibid. Page 6.

However, although different terminology was used, the indigenous peoples associated this article as recognition of their existence and rights, despite the fact that it uses a conditional recognition approach.

This article recognizes the rights and cultural identity of indigenous peoples and protects them as long as they are in line with "civilization" and modern society. These two parts of the sentence actually contrast each other, because the requirements made by this article enable the protection provided to become meaningless.

Moreover it is unclear what rights this provision refers to and whether a community must lose their rights if it is not found to be "traditional".

VI. Decree No. IX/MPR-RI/2001 on Agrarian and Natural Resource Management Reform

Majelis Permusyawaratan Rakyat (MPR) or the Indonesia's People's Consultative Assembly is one of the high State institutions in Indonesia. It is a bicameral institution, consisting of the members of House of Representatives and members of regional representatives (similar to senator function in the USA). In 2001, the *MPR* acknowledged and admitted that land conflicts between the government and indigenous peoples have been occurring in an agitating level, and something should be done. The *MPR* elaborated its concerns in more detail in the consideration section of the Decree No. IX/MPR-RI/2001 on Agrarian and Natural Resource Management Reform[45]:

- ongoing agrarian/natural resource management conflicts cause environmental quality degradation, imbalance in agrarian structure and various conflicts;
- the existing laws and regulations concerning agrarian/natural resource management are overlapping and contradictory
- Just, sustainable and environmentally friendly management of agrarian/natural resources have to be developed in a coordinative, integrated way, which accommodates the people's dynamics, aspirations and participation, as well as resolving outstanding conflicts

This Decree also ordered a review and renewal of existing legislations concerning land and natural resources (article 6). Furthermore, Article 4 elaborates aspects that should be

[45] Unofficial English translation found in Moniaga, Sandra. Ibid. Page 1-2.

considered by the legislation and executive bodies in making legislation concerning land and natural resources. One of these aspects is to respect the a*dat* law communities:

> The renewal of agrarian affairs (*pembaruan agraria*) and natural resource management should be performed according to the following principles: [..] j. recognize, honour, and protect the rights of *adat* law communities and the people's cultural diversity (*keragaman budaya bangsa*) to agrarian resources/natural resources.[46]

The *MPR* has recognized the existence of indigenous peoples and their rights; however the status of this Decree is disputed, because after the amendment of the Indonesian Constitution the *MPR* doesn't have a right to enact decrees which are binding upon other state organs, with the exception of constitutional amendments (Article 3, Constitution). Moreover, Article 7 of Law No. 10/2004 on Lawmaking Procedure no longer includes *MPR* decrees in its hierarchy. Nonetheless, according to the MPR itself, this decree remains valid until the legislation it calls for has been enacted (Article 4(11) of MPR Decree no. I/2003).[47]

In its official report of the *MPR* to the Annual Meeting of *MPR* in 2002 and 2003, there has not been any systematic action in place to implement this Decree. Neither the Executive nor the Legislative reported any systematic efforts to implement the Decree.[48]

VII. Recent Laws on Natural Resources

In this section, I will discuss about three recent Laws on natural resources that relates to indigenous peoples. Two of the Laws, in overall, have laid conditional recognition towards indigenous peoples and their rights. But the other Law, and the recent one, uses a different approach towards the recognition of indigenous peoples and their rights.

Law No. 7 Year 2004 on Water Resources

Article 6 (3) contains the recognition for indigenous peoples and their rights:

> The control of water resources by the central and local government must be implemented with due respect for the *ulayat* rights of the local *adat* law communities and similar rights as long as this does not conflict with the national interest or the law. These *ulayat* rights to water resources will be recognized as long as they are real and are registered in regional legislation (perda).[49]

[46] Unofficial English translation found in Bedner, Adriaan and Stijn van Huis. Ibid. Page 23.
[47] Bedner, Adriaan and Stijn van Huis. Ibid. Footnote number 33.
[48] Moniaga, Sandra. Ibid. Page 2.
[49] Unofficial English translation found in Bedner, Adriaan and Stijn van Huis. Ibid. Page 24.

The conditional recognition is given towards the *adat* law communities as well as their rights (*hak ulayat)*. The national interest and state's law are superseding the implementation of a*dat* law communities' rights and the existences of their rights need to be proved by showing that the community is recognized by the regional legislation.

Law No. 18 Year 2004

This Law obliged plantation entrepreneur candidates to have discussions with the *adat* law community who possesses indigenous rights towards the land in question (article 9 paragraph (2)). However, the a*dat* law communities in this article need to be recognized first by the law, and the conditions to be recognized are elaborated in the elucidation of this article. The conditions are exactly the same with the elucidation of article 67 (1) the BFL 1999.

Law No. 27/2007 on Coastal Areas and Small Islands

This Law differs with the Laws concerning indigenous peoples; this Law uses the term: *masyarakat adat* (adat community) to refer to indigenous peoples. This term is the most accepted by the indigenous peoples in Indonesia and their proponents. The elimination of the word law (compare with: a*dat* law communities) would mean that indigenous peoples have more aspects rather than just the law, such as their tradition, belief and culture.

This Law recognizes the existence of indigenous peoples and their rights without any condition. It defines *adat* communities as 'a coastal community which is living hereditary in a certain geographical location, due to an ancestral bond. It also has strong ties with coastal and small islands and their resources, and it owns certain values which determine its own economical, political, social and legal institutions' (article 1 paragraph 33, which is influenced by the definition used by the Aliansi Masyarakat Adat Nusantara (AMAN)/Alliance of the Indigenous Peoples of the Archipelago).

However, many NGOs and civil society movements have protested against this law because this is a form of privatization of the coastal and small islands. Due to this law, the indigenous peoples have to "compete" with the private or government owned enterprises to use the coast and its natural resources.

VIII. Conclusion

This chapter shows how the Indonesian government recognizes indigenous peoples and their rights by using a chronological framework. This gives a picture of the dynamics of the

recognition made by the Indonesian government. Eventually, the existing laws have shown a conditional recognition towards indigenous peoples and their rights. From the laws elaborated above, we can draw a conclusion that an indigenous peoples' community can be recognized only if it can fulfill these conditions: 1.) in reality it still exist; 2.) the implementation of their right does not conflict with national interest; 3.) the implementation of their right does not contrast with higher regulation or law; 4.) and, the recognition must be made through regional law. Not only do these laws use conditional recognition but it also introduces a layered recognition. Besides fulfilling a; social condition (must exist in reality); political condition (cannot be in conflict with national interest); and/or juridical condition (cannot be in contrast with higher law), it must also fulfill procedural condition (must be inaugurated by regional law).

Furthermore, the government has shown an inconsistent attitude towards indigenous peoples which can be seen by how Indonesia's representatives in international relations are denying the existence of indigenous peoples, arguing that almost all Indonesians are indigenous. This attitude is contrary with the Constitution (and its amendment) and the existing Laws where the government recognizes the existence of indigenous peoples, even though it uses different terminologies.

For indigenous peoples, how the government uses different terminologies does not bother them, to them the government has recognized their existence, although most of the existing laws are using conditional recognition towards them.

These different interpretations between the government and the indigenous peoples have caused conflicts between the government and indigenous peoples, particularly in the context of the rights towards lands and the utilization of natural resources. As we can see from the existing law, indigenous peoples' rights with regards to the natural resources are relatively very weak.

Chapter II

Expulsion, Conflicts and Indigenous Peoples' Movement in Indonesia

As elaborated in the earlier chapter, the Indonesian Government has created conditional recognition towards the existence of the indigenous peoples and their rights. This chapter will discuss in depth regarding the consequences of this recognition towards the status of indigenous land and forest, and how they lead to expulsions as well as conflicts between the indigenous peoples and the government. This chapter will also discuss how indigenous peoples have organized themselves to make a significant movement with the AMAN organization. Thereafter a request before the Committee on the Elimination of Racial Discrimination concerning the situation of indigenous peoples in Kalimantan will be discussed.

I. Indigenous Peoples' Rights over Land

The recognition for indigenous peoples' land rights can be found in the BAL. The BAL has shown a conditional recognition towards the *ulayat* land. The explanation of this issue has been elaborated in section III of the first chapter of this thesis. However, this section will elaborate deeper on what does that kind of recognition mean for indigenous peoples.

The Government's Powerful Authority

Article 3 of the BAL provides that[50]:

> In view of the provisions contained in Articles 1 and 2, the implementation of the *ulayat* rights and other similar rights of *adat*-law communities --as long as such communities in reality still exist-- must be such that it is consistent with the national interest and the State's interest and shall not contradict the laws and regulations of higher levels.

Ulayat right is often referred to as the *adat* rights of indigenous peoples to manage the land according to their own rules and arrangement. Early Dutch scholars described *ulayat* right as the "right of disposal" and "sovereignty" over the land.[51]

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[50] English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs of Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc

[51] There is a debate about whether *ulayat* right is a right on land or a mere right to manage the land. The focus on the nature of *ulayat* right as a relationship with the land rather than an enforceable land right inhibits efforts to secure the rights of indigenous people in Indonesia. This semantic debate distracts attention from the central issues which are the security of the rights of the indigenous communities to their land, the right to make decisions about its use by members and nonmembers, compensation when *ulayat* right is extinguished according to acquisition laws or intruded upon through the past and future grants of mining, forestry, plantation concessions or other uses in the public interest, and its surrender to outsiders. None of these issues is dealt with in the existing regulation. Wright, Warren L et.al. Final Report on the Review of the Basic Agrarian Law of 1960. December 1999. Page 93-94.

In general, indigenous communities in Indonesia believe that human beings are part of nature and have the responsibility to keep the harmony between the two. In doing so, the communities established collective rights over particular territories or objects (such as the sea, the fish inside the sea, the forest, the trees and woods inside the forests, etc). To maintain the management of natural resources as a collective right, most indigenous communities had to develop a knowledge system, customary law and indigenous institutions to enable the communities to makes decisions and comes up with solutions over the issues regarding the utilisation of natural resources.[52]

While article 5 of the BAL reads as[53]:

> The agrarian law applicable to the earth, water, and airspace is *adat* provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislation, all with due regard to elements which are based on religious law.

Both of these articles show the conditional recognition given by the BAL towards the existence of the indigenous peoples, their *adat* law and their rights. Section II paragraph (3) of the general elucidation gives example of what does this conditional recognition means. The recognition given towards the *ulayat* right means: "[…] in principle, *hak ulayat* will be taken into consideration as long as the said right in reality still exists in the law community in question. For example, in the granting of a land right (e.g. *hak guna-usaha* or a right to cultivate), the relevant law community will first be heard and given some "*recognitie*" (recognition) to which they are entitled in their capacity as holder of the *hak ulayat* in question."[54]

However, the explanation continues: "[…] it would not be justifiable for the relevant law community to block the granting of the *hak guna-usaha* in question on the pretext of their *hak ulayat* in the case where the granting of the *hak guna-usaha* is indeed required in support of broader interests. Similarly, it would not be justifiable for a law community, on the pretext of their *hak ulayat* to, --for example-- reject a plan on clearing forests in a big way and on an on-

[52] Country Report: Indonesia. Asia Workshop for Promotion of the UN Declaration on the Rights of Indigenous Peoples, June 7 – 12, 2008, Baguio City, Philippines. Page 4.
[53] English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs of Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc
[54] English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs of Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc

going basis which is required to support the implementation of large-scale projects on the production of food and the relocation of people."[55]

In conclusion: "The interests of a law community should be **subordinated** to the broader interests of the nation and of the State […]".[56] (Emphasize added)

From these explanations we can see clearly that according to this Law, the interest of indigenous peoples must be submitted under the interest of the State. This stance could be made by the founders of the BAL because they envisioned that *adat* law will gradually adapt to national law or be absorbed and replaced by national law or it could be because they also considered that *ulayat* rights are incompatible with economic development.[57]

With this kind of provisions, the BAL substantially limits the ability of indigenous peoples to exercise their rights over land as well as natural resources.

Furthermore, the State justifies itself as the single source of legitimacy for determining whether indigenous peoples still exist or not and to take over lands from indigenous peoples by extinguishing their *ulayat* rights.[58]

The biggest issue regarding this kind of justification – especially Indonesia is still facing corruption issue – is that none of the concepts listed in article 3 and 5: national interest and Indonesian socialism; are defined in the BAL or anywhere else. From the past experiences, this authority has been misused in its implementation and leaves the indigenous people in suffering and marginalized.

On 3 May 2005, the President signed the Presidential Regulation No. 36 of 2005 on Land Procurement for the Development of Public Purposes which stipulates that public interest means the interests of the majority of the people. There are various objects of State or public interest, including: public roads, toll roads, railways (over land, above the land, or underground); water supplies, drainage and sanitation; reservoirs, dams, dykes, irrigation, and irrigation buildings; public hospitals and people's health centers; seaports, airports, railway stations and terminals;

[55] English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs of Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc
[56] English Translation by the Directorate General of Agrarian Affairs of the Department of Home Affairs of Republic of Indonesia. 1976. Downloaded from www.eastimorlawjournal.org/legalresearch/uupa_english.doc
[57] USAID. USAID Country Profile. Property Rights and Resource Governance: Indonesia. Page 5-6
[58] Colchester, Marcus. Et.al. Palm Oil and Land Acquisition in Indonesia: Implications for Local Communities and Indigenous Peoples. Published by Forest Peoples Programme, Perkumpulan Sawit Watch, HuMA and the World Agroforestry Centre. 2006. Page 49-50

houses of worship; education facilities or schools; markets; public funeral facilities; public safety facilities; telecommunications; sports facilities; radio and television stations, broadcasting equipment and supporting facilities; government offices, regional government offices, foreign representatives offices, United Nations buildings, and those of international institutions under the United Nations; facilities for the Indonesian Armed Forces and the National Police of the Republic of Indonesia based on their main tasks and functions; prisons; low price settlements; garbage disposal points; nature reserves and cultural reserves; parks; social institutions; and facilities for the generation, transmission, and distribution of electricity.[59]

From here, we can see how public interest is widely interpreted in Indonesian law. Where a public interest can be demonstrated, there will be severe limitations in place on community rights of land ownership. Thus, ownership may be revoked and the community has no right to stop land acquisition by the government.[60]

This kind of recognition weakens the indigenous peoples' position, particularly when they seek to defend their *ulayat* lands against government or company's expropriation.

State's Right to Control over Land

During the colonial era, *Agrarische Wet* or land law of 1870 established land titling and registration in Indonesia. Using this law, Dutch colonials were legitimizing effective expropriation of indigenous lands because all land that could not be proved to belong to a particular person were returned to the colonial government and was made available to rent. The only means to prove ownership was to present western-style title documents, thus all *adat* land was effectively "up for grabs".[61]

The BAL actually resembles the *Agrarische Wet* by emphasizing registration of land title. Contrary to that, an *ulayat right over land* has always been based upon local knowledge of ownership and the use of rights, without a need for paper title. This is why the rights of indigenous peoples over land continue to draw away in the face of BAL.[62]

[59] Colchester, Marcus. Et.al. Ibid. Page 55-56
[60] Colchester, Marcus. Et.al. Ibid. Page 56.
[61] Szczepanski, Kallie. Land Policy and *Adat* Law in Indonesia's Forests. Pacific Rim Law & Policy Journal Association. January 2002. Page 5.
[62] Szczepanski, Kallie. Ibid. Page 10.

Furthermore, article 2 of the BAL[63], which is consistent with article 33 (3) of Indonesian Constitution, provides that all land in Indonesia are under the control of the State. The concept of control by State is different with the ownership concept. Paragraph 2 of article 2 stipulates authorities of the State contained in the "State's right to control":

a. to regulate and administer the allocation, use, supply, and maintenance of the earth, water, and airspace;
b. to determine and regulate legal relationships between people and the earth, water, and airspace;
c. to determine and regulate legal relationships among people as well as legal acts concerning the earth, water, and airspace

This article gives full authority for State to issue or revoke land titles given to any eligible legal subject. As a consequence, *ulayat* land is not recognized by law unless the State has awarded the *adat* community a legal recognition towards the *ulayat* land.[64]

As elaborated above, it is commonly noted that *adat* communities do not have any proof of formal registration since these *ulayat* rights existed long before BAL came into effect. Therefore, these lands are not treated under a certain land right, they are treated as "State Land".

In order to be awarded a land title by the government, an *adat* community needs to register their *ulayat* land. With regards to registration, article 16 of the BAL enlists land rights that can be registered. [65] *Ulayat* right is not included in the article. Furthermore, Government

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[63] On the basis of the provisions contained in Article 33 paragraph 3 of the Constitution and of the matters referred to in Article 1 of this Act, the earth, water, and airspace, including the natural resources contained therein, are at the highest hierarchical level controlled by the State in its capacity as the whole people's organization of powers (article 2 BAL).
The land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people (article 33 (3) Indonesian Constitution).

[64] Colchester, Marcus. Et.al. Page 168

[65] (1) The rights on land as meant in paragraph (1) of Article 4 are as follows:
a. *hak milik* (right of ownership),
b. *hak guna-usaha* (right of cultivation),
c. *hak guna-bangunan* (right of use of structures),
d. *hak pakai* (right of use),
e. *hak sewa* (right of lease),
f. *hak membuka tanah* (right to clear land),
g. *hak memungut-hasil-hutan* (right to collect forest produce), and
h. rights other than those mentioned above which shall be stipulated by way of an act and rights of provisional nature which are mentioned in Article 53.

(2) The rights to water and airspace as meant in paragraph (3) of Article 4 are as follows:
a. *hak guna-air* (right of use of water);

Regulation No. 24 Year 1997 on Land Registration does not include *ulayat* right as a right which is capable of registration.[66] In order to be recognized, the *ulayat* right should be registered under *hak milik* or right of ownership. This is because the BAL emphasizes on the individuality of land rights, which means that land titles are given only to individuals (or a corporate body), while most *ulayat* rights are communal property and under communal ownership.

Nevertheless, it is possible for a member of the *adat* community to acquire right of ownership. Many *adat* laws recognize property rights given to individuals. According to the *adat* law, individual rights over land are given according to what extent the individual make use of land. If he has a strong and close 'relationship' with the land, the *adat* community will allow him to have 'higher' rights over it, such as the right to inherit the land by their children. On the contrary, if individuals do not have this kind of 'relationship, then the community has the right to take over the land and give it to other members of the community who are in need.[67]

However, in recent times, these kinds of parcels of land have already been individualized and possessed by individual members of the community. This is mainly happened because their predecessors have had a strong relationship with the land, therefore the community has granted him and his family higher rights over the land which they possess. Nonetheless, the community still has the authority to maintain the land under the community's possession. This means that transferring the land to non-member is strictly forbidden.[68] For example, '*druwe'* in Balinese means a full personal and individual right to property over a communal land. [69] Once the owner

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b. *hak pemeliharaan dan penangkapan ikan* (right to cultivate and catch fish); and
c. *hak guna-ruang-angkasa* (right of use of airspace).

[66] Article 9 of this Regulation lists the objects of land registration as land parcels having the status of *hak milik* (right of ownership); *hak guna usaha* (right to exploit), a kind of agricultural commercial lease; *hak guna bangunan* (right to build), which applies to rights to construct and use buildings; *hak pakai* (use right), which applies to possessory rights, such as usufruct, that do not have a permanent quality; *hak pengelolaan* (right of management), *wakaf* (*Wakaf* is the asset which shall be put aside by a Moslem or an organization owned by a Moslem according to the provision of the religion and shall be given to the people entitled for these assets), *hak milik atas satuan rumah susun* (rights over an apartment unit)*, hak tanggungan* (mortgage), and **state land** (*tanah negara*). English explanations of these rights are from USAID. Ibid. Page 7-8.

[67] Mulyani, Lilis. Beyond a Formal Legal Property System: Property Rights on Land, Land Apartheid and Development in Indonesia. Page 13

[68] Mulyani, Lilis. Ibid.

[69] Soesangobeng, Herman. Page 10-11

leaves the community or abandons the land, the community regains its strongest and fullest power and authority to control the land.[70]

Difficulty arises when the individual ownership within the realm of *ulayat* rights need to be registered. Once this right in question is registered under the BAL, it cannot return to the jurisdiction of its original *adat* community. As a consequence of article 27 letter a paragraph (3) of the BAL, upon extinction of the right through abandonment, the land will revert to the control of the State and does not return to the *adat* community.

Thus, the concept of State's right to control has caused the loss of *adat* communities' ancestral lands and the extinction of their way of life. Many conflicts arise between the *adat* communities and the governments due to the loss of their lands. As a response to this, the State Minister for Agrarian Affairs Regulation No. 5/1999 was established. As elaborated in the first chapter, although the Regulation recognizes *ulayat* rights towards land as communal ownership, it also preserves the conditional recognition like the BAL. The biggest problem that arises from this law is the provision that excludes the land which is already possessed by the third party with a formal title. Most conflicts between the indigenous peoples and the government occurred because the State considers *adat* land as State land and then gives concession towards the land to third parties.

For example, in August 2003 three of the *Ama Toa* (*Kajang*) people were shot dead by the local police, and more than fifty people were injured because they were trying to reclaim their ancestral land under the control of a plantation company. The members were forced to hide for months in their sacred forest without any medical supplies while the police searched for leaders, who they threatened to shoot on sight. The same can be seen in the District of Manggarai, Flores, Nusa Tenggara Timur Province. Here conflicts arise between indigenous peoples and the local government. The source of the conflict is land, which is a*dat* land, which is claimed by the Local Government as a Protected Area.[71]

The efforts made by the Indonesian government towards the situation of the indigenous peoples through new laws and regulations are only symbolic features, while within the same regulation, the government shows an inconsistencies attitude. The statement "controlled by the

[70] Soesangobeng, Herman.The Possibility and Mode of Registering Adat Title on Land. Page 9.
[71] Moniaga, Sandra. Ibid.

State" has been characterized with the negation of the communal traditional land rights in many parts of Indonesia.[72]

II. Indigenous Peoples' Right over Forest

Since the Ministry of Forestry claims that all forest in Indonesia belong to the State, many indigenous peoples living in the forest are being expulsed. This situation leads to conflicts between indigenous peoples and the government. Adding to that, the BFL 1999 till now has not made any further specific regulation regarding *adat* forest. The question of 'how does the State's claim over forest affect the indigenous peoples' rights?' arises. The next section will discuss further about it.

Through a Ministerial Decree on *Tata Guna Hutan Kesepakatan* – Forest Land Use Consensus (TGHK), Indonesian government declared 70% of the total land area in Indonesia as forest. Article 4 paragraph (1) of the BFL 1999 stipulates that: "All forests within the territory of the Republic of Indonesia, including the natural wealth contained therein, are controlled by the State for the maximum prosperity of the people." The BFL 1999 effectively treats forests as if they were empty, even though they have been occupied for thousands of years by certain indigenous peoples.[73] Furthermore the second paragraph of this article explains the authority contained within the State's right to control over forest: "Forest control by the State as mentioned in paragraph (1) authorizes the government to:

a. regulate and take care of everything connected with forests, forest areas and forest products;
b. stipulate the status of a particular area as a forest area as a non-forest area; and
c. regulate and stipulate legal relations between people and forests as well as legal acts regarding forestry.

Paragraph 3 of this article stipulates that in utilizing this authority, the State must take into account the rights of *adat* communities, however the same paragraph gives conditions that must be fulfilled by the communities in order to be recognized by the State:

[72] Mulyani, Lilis. Ibid. Page 17
[73] Colchester, Marcus. Et.al. Page 51

> "Forest control by the State continues to take into account the rights of the communities upholding customary acts as long as they actually still exist and their existence is recognized, and does not contradict with national interests."[74]

The BFL 1999 only recognizes 2 forest's statuses: State's forests and titled forests (article 5 paragraph (1)). As the holder of the right to control, the State is authorized to give title to private entities towards a certain area of forest, including the *adat* community. Again, paragraph (3) of the same article gives conditions that have to be fulfilled by the communities in order to be recognized by the State. When a title over forest is given to a certain *adat* community, it is called *hutan adat* (*adat* forest). Paragraph (4) continues by stipulating that when the community in question no longer exists, the title will be given back to the State[75]:

> (1) On the basis of their status, forests comprise:
> a. state's forests; and
> b. titled forests.
> (2) State's forests as meant in paragraph (1) letter a may be the form of customs related forests.
> (3) The government will stipulate the status of forests as meant in paragraphs (l) and (2), and customs-related forests will be stipulated as long as in accordance with the reality the communities upholding the customary acts concerned are still in existence and their existence is recognized.
> (4) If in their development, the communities upholding customary acts concerned no longer exist, the right to manage customs-related forests will return to the government.

There are at least two implications for indigenous peoples in Indonesia as the consequence of this kind of regulation. Firstly, because of the conditional recognition established by this regulation, the State alone has the power to grant or withhold recognition of indigenous peoples.[76] This denies indigenous peoples of their self-identification.

Secondly, the State denies the original rights of indigenous people which give them hereditary rights over their ancestral forests. The State does not consider the ancestral ties between the indigenous peoples and their ancestors as a basis of indigenous peoples' right over their forest. The government considers the *adat* forest as part of the State's forest area, thus the

[74] English translation by FAO, downloaded from: http://faolex.fao.org/docs/pdf/ins36649.pdf. In this version, *adat* in Indonesian language is translated as **CUSTOMARY**
[75] English translation by FAO, downloaded from: http://faolex.fao.org/docs/pdf/ins36649.pdf. In this version, *adat* in Indonesian language is translated as **CUSTOMARY**
[76] Szczepanski, Kallie. Land Policy and *Adat* Law in Indonesia's Forests. Pacific Rim Law & Policy Journal Association. January 2002. Page 13

basis that the State use is its own authority.[77] *Adat* communities can only obtain rights to use and manage *adat* forest if the State acknowledges their existence. They are not able to own the forest.[78]

With the denial of indigenous peoples' original rights over forest and a large authority it possesses, the State has given an enormous conversion of land uses within the forest. Between 2004 and 2009, the Ministry of Forestry has allocated 1.2 million hectares of forests for mining activities and plans to allocate a further 2.2 million hectares of forests between 2010 and 2020. Palm oil production is also a main factor in changes in forest land uses. In 2009 the country's crude palm oil (CPO) production exceeded 20 million tons, and Indonesia now controls 14.3% of the world's vegetable oil market. While 9.7 million hectares of land are licensed for oil palm estates, 7.9 million hectares have already been planted. It is estimated that the establishment of 66% of all currently productive oil- palm plantations involve forest conversion. [79]

When the State decides to give a concession to a certain private entity over a certain area of forest, most of the time, as a consequence, the indigenous peoples will be removed from their traditional living territory. Forest dwellers have lived in their traditional forest in heredity since imminent time; they don't know how to survive without their forest. Thus, when the government removes them from their forest, it obstructs their way of living and drags them to poverty.

For example, this is what happened to the live of *Suku Anak Dalam* or *Orang Rimba* which literally means people of the forest. *Orang* Rimba is a forest-dwelling tribe and have limited their contact with people outside their tribe. There are no precise demographic figures on them, because for a long time the Indonesian census did not recognize ethnic distinctions and state could not accurately calculate the numbers of mobile forest peoples. The *Bukit Duabelas* region is one of the few spots where 2,000 to 3,000 *Orang Rimba* maintain their self-governed way of life.[80] They have never had a permanent home, whenever they felt there was bad luck or when a death occurred, they would move through the forest usually in groups of around 30 people. Their houses often came in the shape of "rumbia" – a kind of coconut tree, whose leaves

[77] Firdaus, Asep Yunan. Hutan Adat: Waspada sebelum berharap ada Peluang! http://www.wg-tenure.org/file/Warta_Tenure/Edisi_05/Warta_Tenure_05f.pdf
[78] Muliastra, Yohanes I Ketut Deddy. Community Mapping, Tenurial Rights and Conflict Resolution in Kalimantan, Indonesia. Page 3.
[79] USAID. Ibid. Page 5.
[80] Wawrinec, Christian. Tribality and Indigeneity in Malaysia and Indonesia. University of Vienna, Austria. 2010. Page 3.

they used as their roof. Since the *Orang Rimba* believe they are part of nature, part of the forest, they sometimes go so far as to sleep under the stars, unprotected.[81] However, even though a territory approximately 650 km^2 – roughly the size of the Special Capital Territory of Jakarta – was declared a national park in 2001, the loss of forest continues, as the conservation area is encroached upon by oil palm and pulpwood plantations.[82] As a result, they have had to moved deeper into the forest to avoid the conflict that began in 2009 between villagers who want to keep the forest and a company who wants to clear the forest to create a plantation.[83] The *Orang Rimba* in *Bukit Duabelas* are still struggling to save their forest and their lives. Their forest are all they have and taking the forest away from them is the same as taking their live away, like a statement given by one of the *Orang Rimba:* "If our forests are cut down, they destroy the world. If the government settles us in the village they kill our *adat* (customs, religion, and way of life). In the same way, they kill us (*Kalu balok rimba kami, maju kiamat Kalu pemer'intah tetap kami de dusun bunuh adat nenek puyong kami, bunuh hidup kami Samo lah, bunuh hidup kami*).[84]

III. Indigenous Peoples' Movement: AMAN

Although there are no exact figures, the National Commission on Human Rights has noted that more than 2000 land and other natural resource cases are reported to the Commission in the year 2000. This made cases concerning land issues as the highest number of human rights violations compared to other sector such as labor disputes and torture. Some of the reported cases even included the killings of indigenous peoples' members (by state apparatus) such as in Bulukumba (South Sulawesi) and Manggarai (Flores Timur, NTT).[85] This figure gives an illustration that the indigenous peoples are showing dissatisfaction and are trying to fight back over their land and forest.

Before 1993, many indigenous peoples have been struggling to save their lands, forests and lives in a more sporadic struggle, whether in individual struggle or a collective members' struggle. For example, in Kalimantan the *Dayak Bentian*, who are known for their knowledge

[81] Mega, Veby. Isolated by Forest Conflict, the *Orang Rimba* People of Jambi. 7 October 2011. http://www.greenpeace.org/international/en/news/Blogs/makingwaves
[82] Wawrinec, Christian. Ibid.
[83] Mega, Veby. Ibid.
[84] Sager, Steven. The Sky is Our Roof, the Earth Our Floor: *Orang Rimba* Customs and Religion in the *Bukit Duabelas* region of Jambi, Sumatera. A thesis submitted for the degree of Doctor of Philosophy of The Australian National University. May 2008. https://digitalcollections.anu.edu.au/bitstream/1885/49351/2/02whole.pdf
[85] Moniaga, Sandra. Ibid. Page 1.

and skill in rattan cultivation, have struggled against logging companies cutting down their forests and ruining their rattan gardens. [86] Another example which occurred in 1988 and continues until today, involved hundreds of *Batak Toba* in North Sumatera that have been struggling against a concession given to a company which granted permits to clear the forest and develop timber plantation for its pulp and paper mill. The struggle was pioneered with ten women who defended their ancestral lands.[87]

First Landmark of Indigenous Peoples' Movement

With the support from NGOs, the indigenous peoples then organized themselves to establish a more united and strategic indigenous peoples' movement. In 1993, the landmark of indigenous peoples' movement was the establishment of JAPHAMA (JAPHAMA stands for *Jaringan Pembelaan Hak-hak Masyarakat Adat* or the Indigenous Peoples Rights Advocacy Network). At the time of the establishment, the indigenous peoples' network agreed to use the term *"masyarakat adat"* as a phrase to refer to indigenous peoples in Indonesian language, which means: peoples who have ancestral origins of a particular geographical territory and have a system of values, ideology, economy, politics, culture, society and land management. Since 1993, more indigenous people's organizations and indigenous advocacy NGOs were established all over Indonesia in addition to those that have already existed.[88]

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[86] For more on the struggle of the indigenous peoples see Abdias Yas*, Menapaki Jejak Pejuan Hak Adat. Seri Kumpulan Kasus No. 01,* (Pontianak, Lembaga Bela Banua Talino, 2003); Theo P.A. van den Broek ofm, et al, *Memoria Passionis di Papua. Kondisi Sosial Politik dan Hak Asasi Manusia Gambaran 2000* (Sekretariat Keadilan dan Perdamaian, Keuskupan Jayapura and Lembaga Studi Pers dan Pembangunan, Jakarta 2001); Janis Alcorn, "An Introduction to the Linkages between Ecological Resilience and Governance" in Janis B. Alcorn and Antoinette G. Royo, eds. *Indigenous Social Movements and Ecological Resilience: Lessons from the Dayak of Indonesia* (Biodiversity Support Program, Washington, D.C., 2000); *The Indigenous World 1997-1998* (IWGIA, Copenhagen, 1998) pp. 216-220; and websites or Down to Earth (www.dte.org). Moniaga, Sandra. Ibid. Page 9 and footnote 34.

[87] See WALHI. *Perjalanan Secarik Kertas*. (Jakarta. 1992); and Indira J. Simbolon, *Peasant Women and Access to Land: Customary Law, State Law and Gender-based Ideology, The Case of the Toba-Batak North Sumatera* (unpublished PhD thesis at Wageningen Agriculture University, Wageningen, 1998), pp.234-253. Moniaga, Sandra. Ibid. Page 9 and footnote 33.

[88] In West Sumatra young *Mentawaians* founded Yayasan Citra Mandiri, in West Kalimantan some young *Dayak* founded Lembaga Bela Banua Talino, while in East Kalimantan Lembaga Bina Benua Puti Jaji was founded. A similar process was established in Maluku with Baileo Maluku which later become a network of indigenous peoples organizations and indigenous NGOs in Central and South-east Maluku. At the same time, some of the Jakarta-based human rights and environmental NGOs took up the indigenous peoples issue as their priority work, including groups such as ELSAM, WALHI, INFID, KPA and YLBHI. During 1996-1997 the first two regional indigenous peoples organization were established, namely Aliansi Masyarakat Adat Kalimantan Barat and JAGAT in East Nusa Tenggara. In the same period a number of NGO networks were growing and taking up indigenous peoples' issues as one of their priority concerns, such as JKPP, KPSHK, JATAM and Jaring Pela. Moniaga, Sandra. Ibid. Page 10.

The Establishment of AMAN

As a follow up from JAPHAMA, the 1st Congress of Indigenous Peoples of the Archipelago was held in March 1999, attended by more than 200 representatives of indigenous peoples from all over Indonesia. This congress resulted in the establishment of Aliansi Masyarakat Adat Nusantara (the Alliance of the Indigenous Peoples of the Archipelago) or AMAN.[89] On this occasion, AMAN was formally adapting the definition of *masyarakat adat*.[90]

In this congress, AMAN also declared a very controversial statement: "if the Indonesian state does not recognize us, then we will not recognize the Indonesian state". Although this statement seems to challenge the unity and sovereignty of the Republic of Indonesia, it was not their actual aim. They actually seek to establish special indigenous rights to land and natural resources, as well as self-government by their own *adat* institutions. In most cases the rights towards land and natural resources are more important than the self-government, but in some cases they go together. [91]

AMAN has a permanent secretariat, a website, and its own newsletter, and has managed to attract a lot of media attention.[92] Its vision is: "The realization of an indigenous life which is politically sovereign, just, prosperous, valuable and democratic".[93] AMAN's members consist of indigenous communities in addition to indigenous organizations at local and regional levels (referred to district or customary bounded territory and provincial space). Now AMAN has 927 registered communities, and 777 out of them are verified members.[94]

Role and Strategic Position of AMAN

Although it was AMAN itself which proclaim that the organization is the national representative of *adat* movements in Indonesia, it has managed to lift the local struggles to a national level. In the national level, AMAN has proved to have been admitted by the government as an important source for indigenous peoples' issues. For example, AMAN was involved in the process of the discussion of the draft of the government regulation as a subordinate regulation from the BFL 1999 about *Adat* Forest, which has not been issued yet until now.[95] The definition

[89] Moniaga, Sandra. Ibid. Page 9.
[90] Wiratraman, R Herlambang Perdana. Ibid. Page 11.
[91] Bedneer, Adriaan and Stijn van Huis. Ibid. Page 3
[92] Bedneer, Adriaan and Stijn van Huis. Ibid.
[93] http://aman.or.id/in/mengenal-aman.html
[94] Moniaga, Sandra. Ibid. Page 11.
[95] Arizona, Yance. Ibid. Page 30.

of indigenous peoples in the Law No. 27/2007 on Coastal Areas and Small Islands was the first to use the term "*masyarakat adat"* which was influenced by the definition used by AMAN.

Recently, the government has also taken into consideration AMAN's position and so far two ministries have signed a memorandum of understanding (MOU) with AMAN. On 27 January 2010 the Ministry of Environment together with AMAN signed an MOU in order to detail the strategic cooperation between the two: (1) identifying the existence and rights of indigenous peoples in environmental protection and management; (2) managing indigenous knowledge for environmental sustainability; (3) strengthening the capacity of leaders in environmental protection; and (4) empowering indigenous peoples and exchanging information on indigenous peoples. While from 2-4 September 2010, AMAN and the Ministry of Maritime Affairs and Fisheries held a public consultation to prepare a Draft Regulation regarding procedures for granting, registering and revoking coastal tenure. [96]

Taking a more strategic role, AMAN has successfully lobbied for the inclusion of a Draft Law on the Recognition and Protection of Indigenous Peoples in the National Legislation Program (PROLEGNAS) for the year 2010-2014. AMAN still continues to guard the process with the aim of passing this law within the period of time.[97]

AMAN has also obtained legitimacy for its efforts from the international discourse of indigenous peoples, most notably the rights and claims laid down in ILO 169, and participates in the UN International Workgroup on Indigenous Affairs.[98] It also develops linkages with various international indigenous peoples' organizations. In Asia, AMAN became the member of Asia Indigenous Peoples Pact (AIPP) and during the World Summit on Sustainable Development they join the Indigenous Peoples Caucus which was one of the most organized and effective civil society's major group. AMAN has been working closely with International Working Group on Indigenous Affairs (IWGIA) both for supporting their work and joint international advocacy. Besides joining the international networks as a group, AMAN also assists its members to participate in various international forums and networks.[99]

[96] The Indigenous World 2011. The International Work Group for Indigenous Affairs (IWGIA), 2011
[97] http://www.aman.or.id/en/indigenous-peoples-archipelago/problems-faced-by-indigenous-peoples.html
[98] Bedneer, Adriaan and Stijn van Huis. Ibid.
[99] Moniaga, Sandra. Ibid. Page 11.

AMAN has brought the struggle of indigenous peoples, not only to national level but also international level. A more united strength can increase the bargaining position of indigenous peoples in Indonesia before the eye of the government.

However, the elaboration of the development of AMAN does not mean that their problems are resolved. The process has been recognized as developing the tools for empowering themselves to struggle collectively. Nevertheless, the efforts are not immune from critics both internal and external.[100]

IV. Request before the Committee on the Elimination of Racial Discrimination

The conversion of forests to palm oil plantations has escalated in numbers since the early 1990's. In Central Kalimantan alone the rate of conversion of forests to oil palm plantations has grow by 400% with almost 3 million hectares of peat lands converted. [101] This has resulted in the relocation of indigenous peoples into the mountains of Borneo. Consequently, land disputes among tribal peoples, the state and private loggers have become frequent and intense.[102]

In its General Recommendation No. 23, the Committee on the Elimination of Racial Discrimination (the Committee) considered that in the practice of the Committee, in particular in the examination of reports of States Parties under article 9 of the Convention on the Elimination of All Forms of Racial Discrimination (the Convention), the situation of indigenous peoples has always been a matter of close attention and concern. The Committee stated that in that respect it has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination. Thus, the State Parties with indigenous peoples in their territories are obliged to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention. [103] Indonesia has been a party of the Convention since 25 June 1999.

In 2007, AMAN together with national and international NGOs submitted a request under the Committee's urgent action and early warning procedures regarding a situation concerning indigenous peoples in Kalimantan.

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[100] Moniaga, Sandra. Ibid. Page 12.
[101] USAID. Ibid. Page 13.
[102] Xanthaki, Alexandra. Page 18-19
[103] General Recommendation No. 23 Committee on the Elimination of Racial Discrimination. http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c

Committee's Urgent Action and Early Warning Procedures

The Committee was founded in 1970 with the function to monitor State Parties' implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention).[104] Then, at its 43rd Session of the Committee which was held on the 31st of January 1992, it adopted a paper on preventive action, which included early warning and urgent procedures.[105]

The early warning measure has a function to address existing structural problems from escalation to conflicts. These could also include confidence-building measures to identify and support structures to strengthen racial tolerance and solidify peace in order to prevent a relapse into conflict in situations where it has occurred. While the function of the urgent procedure is to respond to problems requiring immediate attention in order to prevent or limit the scale or number of serious violations of the Convention.[106]

In order to use this procedure, some criteria must be fulfilled:

a. The possible criteria for initiating an urgent procedure could include the presence of a serious, massive or persistent pattern of racial discrimination; or that the situation is serious and there is a risk of further racial discrimination.

b. Early warning concerns could include some of the following criteria:

   (i) The lack of an adequate legislative basis for defining and criminalizing all forms of racial discrimination, as provided for in the Convention;

   (ii) Inadequate implementation or enforcement mechanisms, including the lack of recourse procedures;

   (iii) The presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations, notably by elected or other officials;

[104] The Convention sets up four functions of the Committee: to examine State Parties' reports (article 9); to consider inter-state communications (articles 11-13); to consider individual communications (article 14); and to assist other UN bodies in their review of petitions from inhabitants of Trust and Non-Self Governing Territories and of reports of those territories (article 15). Wolfrum, Rudiger. The Committee on the Elimination of Racial Discrimination. Max Planck UNYB 3. 1999. Page 1.

[105] Wolfrum, Rudiger. Ibid. Page 25.

[106] Prevention of racial discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination. Document number A_48_18_Annex_III_English. Paragraph 8

(iv) A significant pattern of racial discrimination evidenced in social and economic indicators;

(v) Significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities

Background of the Request

This request is submitted in relation to Indonesia's advanced plans to establish oil palm plantations over some 850 kilometers along the Indonesia-Malaysia border in Kalimantan as part of the Kalimantan Border Oil Palm Mega-Project. This area covers the ancestral territory of 1-1.4 million *Dayak* (indigenous peoples in Kalimantan) either fully or partially. The Dayak have not been involved in any decision-making and their consent has neither been sought nor obtained concerning these plantations.[107] This area is part of the traditionally owned territories of the indigenous peoples of this region. The project will cause irreparable harm to indigenous peoples' territories, their traditional means of subsistence, and their cultural, territorial and physical integrity. Indeed, it is no exaggeration to say that an intrusion of this magnitude threatens indigenous peoples' very survival.

The applicants supported their argument by presenting a working paper written by two Special Rapporteurs whom are appointed by the United Nations Permanent Forum on Indigenous Issues (UNPFII). In 2006, the UNFPII has acknowledged the severity of the situation created by oil palm plantations in Indonesia thus it took the unusual step of appointing two of its members to be Special Rapporteurs charged with writing a working paper on the impact of plantations on indigenous peoples.

The working paper noted that the Indonesian government announced new plans, "under the Kalimantan Border Oil Palm Mega-Project (April 2006), to convert an additional 3 million hectares in Borneo, of which 2 million will be located in the border of Kalimantan and Malaysia. […]. [T]he area is deemed suitable for oil palm which includes forests used by thousands of people who depend on them for their livelihoods." It concluded that oil palm plantations come with serious social and environmental costs which adversely impact indigenous peoples, forest-

[107] The Kalimantan Border Oil Palm Mega-Project was announced in the context of a series of two visits to China by the President of the Republic of Indonesia. Although official contracts have yet to be announced, newspaper articles reveal that Chinese, Singaporean, Malaysian, as well as Indonesian para-statal and private companies have all been encouraged to invest in the scheme. To further promote the project the Government held meetings with interested investors, as well as with concerned parliamentarians and research organizations, throughout 2005 and 2006.

dwellers and the tropical rainforests. Furthermore, the report concluded that it is estimated that 40 million indigenous peoples in Indonesia depend mainly on forests; however large areas of forest lands traditionally used by them have already been expropriated.

After elaborating the threat face by Dayak people in Kalimantan, the applicants elaborate the existing Indonesian' laws concerning indigenous peoples and their rights. In conclusion, they have declared that Indonesia's laws and practice are inconsistent with its obligations pursuant to the Convention. Adding to that, indigenous peoples' rights in Indonesia are neither adequately guaranteed by law nor are they adequately protected in practice.

In their conclusion, the applicants also stated that massive expansion of oil palm plantations. They stated that the ongoing and continuous effects of existing plantations, together with the presence of racially discriminatory laws and the absence of effective means of recourse at the domestic level, creates a situation "requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention", thus, fulfilling the requirement of the urgent procedure.

Committee's Recommendation

In its concluding observation, the Committee also took into consideration the request made by the applicants. The Committee gave remarks related to the indigenous peoples in Indonesia and based on them, gave recommendations for the Indonesian government.

The Committee noted that the State party recognizes the existence of indigenous peoples on its territory, while using several terms to designate them. Sharing its concern towards the conditional recognition given by Indonesian law, the Committee recommended Indonesia to take into consideration the definitions of indigenous and tribal peoples as set out in the ILO Convention No. 169 of 1989 on Indigenous and Tribal Peoples, and to envisage ratifying that instrument.

The Committee also highlighted that in practice, the interpretations adopted by the Indonesian government of national interest, modernization and economic and social development have compromised the rights of indigenous peoples. Thus, it recommended Indonesia to amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way to encompass world views and interests of all groups living in its territory, which are not used as a

justification to override the rights of indigenous peoples, in accordance with the Committee's General Recommendation No. 23 on indigenous peoples.

Concerning the palm oil plantation plan by the Indonesian Government in Kalimantan, the Committee noted with concern the threat this plan constitutes to the rights of indigenous peoples with regards to owning their lands and enjoying their culture. Furthermore, the Committee concerned stated that references to the rights and interests of traditional communities contained in domestic laws and regulations are not sufficient enough to effectively guarantee their rights.

Therefore, the Committee, while noting that land, water and natural resources shall be controlled by Indonesia and exploited for the greatest benefit of the people under Indonesian law, stated that Indonesia should review its laws, as well as the way they are interpreted and implemented in practice, to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands.

While noting that the Kalimantan Border Oil Palm Mega-project is being subjected to further studies, the Committee recommends that Indonesia secures the possession and ownership rights of local communities before proceeding further with this plan. Indonesia should also ensure that meaningful consultations are undertaken with the concerned communities, with a view of obtaining their consent and participation in it.

In the follow up meetings between the applicants and the government that was held in 2008, the Government's representatives repeated its stance that the term "indigenous peoples" used by the international framework cannot apply to the Indonesian context, because the indigenous peoples' definition is different with the term *masyarakat adat* used by the applicants.[108] From my personal communication, according to one of the applicants, there is no further follow up made by the government to implement the Committee's Recommendation.[109]

V. Conclusion

As a statement before the UNPFII on 2007, the Special Rapporteur of indigenous peoples' situation concluded that as a result of the State's claim of ownership over forest lands, the indigenous peoples whose cultures and subsistence are inevitably linked to forests and are

[108] Minutes from the meeting between the applicants and government representatives as a follow up of the Committee's Recommendation, 3 June 2008. The document obtained from personal communication with one of the applicant.
[109] Personal communication by email dated 27 of May 2011.

vulnerable as they lack any legal venue to defend their rights.[110] Indigenous peoples who are forest-dwellers face the loss of their traditional habitats with practically no compensation or economic alternative, and they face an uncertain future of poverty, loss of identity and social conflict.[111]

These are the situations that are faced by the indigenous peoples in Indonesia. Conditional recognition towards the existence of indigenous peoples and their rights in Indonesia has lead to the limitation of rights for indigenous peoples over their land and forest. The Indonesian government has also claimed control before land and forest, thus it does not acknowledge indigenous peoples' original rights over their land and forest. Indigenous peoples depend on the government to grant them the title over land and forest. The government also holds an absolute say toward the recognition of an *adat* community. This has caused conflicts, marginalization and poverty for the indigenous peoples in Indonesia.

As a result of this continuous repression by the State, the indigenous peoples try to fight for a better recognition and acknowledgment for their rights over land and forests. From 1993 onwards, they have tried to unify the scattered and localized struggles by establishing AMAN in 1999. Although AMAN has brought significant progress towards the recognition over indigenous peoples' existence and movement in Indonesia, both on a national and international level, they must keep struggling to fight the symbolic recognition made by the government.

[110] Oral statement by Mr. Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. 6th session of UN Permanent Forum on Indigenous Issues. New York, 21 May 2007.
[111] Oral statement by Mr. Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. New York, 18 May 2007

Chapter III

Indonesian Recognition on Indigenous Peoples: in the Light of the UNDRIP and ILO Convention No. 169

There are already provisions for indigenous peoples mentioned in some international frameworks, such as the Convention on Biodiversity[112], and the Committee on the Elimination of Racial Discrimination (CERD)[113] which has even included indigenous peoples in its competency. Yet, the ILO Convention No. 169 (Convention 169) and UNDRIP (the Declaration) are the main international human rights instruments in force today that specifically concern the issues of indigenous peoples. Thus, this thesis will use these two main resources to analyze the Indonesian laws on the recognition of indigenous peoples.

There are some important key provisions that worth discussing about which concern Convention 169 and the Declaration, but this section will only discuss issues related to the recognition made by the Indonesian government, which includes the definition of indigenous peoples and indigenous lands recognition.

I. Recognition of Indigenous Peoples in the ILO and UNDRIP

ILO Convention No. 107 (Convention 107) was the first international convention that specifically focused on the rights of indigenous peoples. Although it was replaced by Convention 169, it has a fundamental importance to briefly discuss Convention 107 to see the evolution of approaches used to address indigenous peoples' issue. Moreover, some States with large amount of indigenous communities are still bound to the provisions in Convention 107 and which is the only binding instrument that sets out specific obligations with respect to their indigenous communities. [114]

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[112] Article 8(j) of the Convention on Biological Diversity affirmed indigenous peoples' rights to their traditional knowledge and has led to continued protective efforts in this forum. Wiessner, Siegfried. United Nations Declaration on the Rights of Indigenous Peoples. United Nations Audiovisual Library of International Law. 2009. Page 2

[113] Communications and complaints about violations of the human rights of indigenous people are plentiful and presented to diverse international bodies, such as the CERD, the Human Rights Committee and CEDAW, as well as regional bodies such as the Inter-American Commission on Human Rights. Stavenhagen, Rodolfo. Ibid. Paragraph 110.

[114] They are: Bangladesh, Cuba, El Salvador, Ghana, India, Mexico, Paraguay and Tunisia. Xanthaki, Alexandra. Indigenous Rights and United Nations Standards: Self-determination, Culture and Land. Cambridge University Press. 2008. Page 7.

ILO Convention No. 107

Only shortly after its establishment in 1919, the ILO showed its interest in the situation of indigenous workers and in 1921, it conducted studies on the issue. There was an immense tendency that indigenous peoples at that time were especially exposed to severe forms of labour exploitation. The ILO played close attention particularly to the situation that occurred upon the so-called "native workers" in the overseas colonies of the European States. Apparently there was an increasing need for special protection concerning these persons in cases where they were expelled from their ancestral lands and had become seasonal, migrant, bonded or home-based labourers.[115] Eventually, in 1957 the International Labour Conference adopted Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

The Convention not only covers matters concerning employment and occupation towards indigenous populations, but also a wider range of issues, such as the right to life, right to land, social security, health, participation and also the right to education in indigenous languages. Thus, the text was quite radical for its time because it expanded the scope of previous ILO initiatives – which was restricted to the labor issues.[116]

Another main positive aspect of this Convention is its binding nature. For the first time in international law, the Convention established specific state obligations towards indigenous populations.[117]

However, the assimilation approach used by this Convention has been the main object of rejection from the indigenous rights advocates over the years.[118] The purpose of Convention 107 was to achieve a progressive integration of persons from indigenous populations into the national

[115] This concern led, among other things, to the adoption of the ILO Convention No. 29 on Forced Labour in 1930. International Labour Organization. Indigenous and Tribal Peoples' Rights in Practice: a Guide to ILO Convention No. 169. 2009. Page 174

[116] Xanthaki, Alexandra. Ibid. page 51

[117] Eide, Asbjorn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009. Page 36

[118] Engle, Karen. On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights. The European Journal of International Law Vol. 22 no. 1. 2011. Downloaded from ejil.oxfordjournals.org. Page 16.

society as a whole. While, in contrast, indigenous leaders demanded authority for their people to administer themselves collectively.[119]

This approach was used genuinely as an effort to redress the seclusion of indigenous peoples and to make sure that they enjoy the benefits from the development plans. But, the Convention underpinned its concept of development in a very state-oriented way, which means it omitted opinions of the peoples affected by the development itself. It also didn't acknowledge that the interests of indigenous peoples were different from the state in which they were living. Therefore in many instances, indigenous peoples' customs and systems were viewed as an obstacle to economic and social progress. These ideas have influenced the Convention and hampered the protection of the indigenous peoples.[120]

The process of composing Convention 107 was the colonization in most parts of the world by European powers, thus it affected how Convention 107 separated indigenous and tribal populations.[121] At that time, the initial concern was only indigenous victims of settlement by European States, thus colonization was an essential element. Convention 107 didn't realize that the 'tribal" persons of Africa and Asia were included in "indigenous population" as they were not the descendants of the pre-European inhabitants prior to colonization. [122] According to Convention 107, all "indigenous" persons are "tribal", but not all "tribal" persons are "indigenous". Article 1 of the Convention defines the term "tribal" as persons whose "social and economic conditions are at a less advanced stage" in comparison with their neighbors, and they live under separate laws, either of their own choosing or imposed by the State. Some "tribal" persons, moreover, "are regarded as **indigenous** on account of their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonization" and remain socially, economically and culturally distinct.[123] Thus, colonization was an essential element to differentiate both terms.

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[119] Eide, Asbjorn. Ibid. Page 36.
[120] Xanthaki, Alexandra. Ibid. page 52
[121] Stavenhagen, Rodolfo and Claire Charters. The UN Declaration on the Rights of Indigenous Peoples: How it Came to be and What it Heralds. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009. Page 9.
[122] Wiessner, Siegfried et.al. Report of the Hague Conference of International Law Association: Rights of Indigenous Peoples. 2010. Page 7-8.
[123] Daes, Erica-Irene A. Working Paper by the Chairperson-Rapporteur on the Concept of "Indigenous People". E/CN.4/Sub.2/AC.4/1996/2. 10 June 1996. Paragraph 22

However, this division is of no practical consequence, since the Convention guarantees both categories of population exactly by the same rights. Hence, the source of rights is not a population's history of being colonized but its history of **being distinct** as a society or nation. [124]

Due to the integration approach it used, the indigenous rights activists have demanded the Convention to be revised. Apart from the rejection it received, Convention 107 has contributed to raise international awareness and cooperation on the issue of indigenous peoples. In 1989, it has being replaced by Convention 169. Convention 107 is now closed for ratification but it remains binding on 18 countries that have ratified and have not denounced it or ratified Convention 169.[125] In these countries, the Convention is still use as an instrument to guarantee indigenous and tribal populations' rights. However, the ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) and the ILO Governing Body has invited the States mentioned to consider ratifying Convention 169.[126] It is noteworthy that CEARC has been interpreting the Convention by greatly minimizing the restrictive aspects within the spirit of current developments and in accordance with Convention 169.[127]

ILO Convention No. 169

The period from 1988 to 1993 in which ILO decided to revise Convention 107 was approximately the same period where the text of the draft of UNDRIP was beginning to take form. [128] The revision was based on the new perspective of a greater autonomy for indigenous peoples, revising the integration approach used by Convention 107. The revision was a response to the aspiration of indigenous leaders that have been demanded a shift in focus towards self-determination and control over their own natural resources. Thus, Convention 169 stipulates, among others, recognition of indigenous peoples' collective control over land and natural resources and educational rights based on their own cultural orientation and needs.[129]

This new perspective is reflected on the preamble of Convention 169, which recognizes the indigenous peoples' aspiration "to exercise control over their institutions, ways of life and economic development and to maintain and develop their identities, languages and religions,

[124] Daes, Erica-Irene A. Ibid. Paragraph 21-23
[125] The States are Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syria and Tunisia.
[126] International Labour Organization. Ibid. Page 174
[127] Xanthaki, Alexandra. Ibid. page 66
[128] Wiessner, Siegfried et.al. Ibid. Page 4.
[129] Eide, Asbjorn. Ibid. Page 36.

within the framework of the States which they live.[130] Instead of integrating the peoples to the society, the Convention gives autonomy for the communities to maintain and develop their way of lives.

The new perspective has also influenced the use of the term "peoples" by Convention 169 instead of "populations" that have been used by Convention 107. The decision of using this term was taken in the 75th Session of The International Labour Conference with an argument that "there appears to be a general agreement that the term "peoples" better reflects the distinctive identity that a revised Convention should aim to recognize for these population groups". [131] However, it was highly challenged at the negotiations because of the implication it has with self-determination in the international law, which is recognized as a right of "all peoples" as provided for in common article 1 of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICECSR). Considering that the ILO's mandate being economic and social rights, it was outside its competence to interpret the political concept of self-determination, thus a disclaimer was included in Article 1(3) with regard to the understanding of the term "peoples" [132]:

> "The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

In practical significance, this provision assures that although the Convention uses the term "peoples" it does not provide a basis for a right of external self-determination in the form of secession. This decision has left the indigenous peoples' representatives devastated because of all the peoples of the world, they alone should be exempted from enjoying the same rights as other "peoples" defined under international law. But Engle noted that this devastation has faded over time which was shown by many indigenous rights activists, at least in states that have ratified the Convention, as they have embraced Convention 169 as a legally binding international framework that focuses on indigenous peoples' right. [133]

Although it excludes the right to external self-determination, the Convention ensures extensive rights of participation in decision-making, which is an important part of internal self-

[130] Paragraph 4 of the Preamble. Xanthaki, Alexandra. Ibid. page 69
[131] International Labour Organization. Ibid. Page 26
[132] International Labour Organization. Ibid. Page 26
[133] Engle, Karen. On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights. The European Journal of International Law Vol. 22 no. 1. 2011. Downloaded from ejil.oxfordjournals.org. Page 16-17.

determination.[134] Furthermore, it provides indigenous people with control over their status, lands, internal structures, and it guarantees indigenous peoples' rights to ownership and possession of the environment that they occupy or use.[135]

Another improvement achieved by Convention 169 is that the Convention provides self-identification for indigenous peoples. Article 1 paragraph (2) of the Convention stipulates self-identification as indigenous or tribal as a fundamental criterion for determining the groups that are to be identified as indigenous peoples.

Convention 169 has retained the distinction made by Convention 107 between "indigenous" and "tribal" but how these two terms are distinguished by both Convention are differed. Convention 107 identifies indigenous peoples as a sub-category of "tribal"; while the two groups are separate in Convention 169.

Both "indigenous" and "tribal" are now essentially defined by the extent to which the group in question constitutes a distinct society. Furthermore, the difference lies in the principle of self-identification. A people may be "tribal", either by its own choice (that is, by maintaining its own laws and customs), or without its consent (as a result of special legal status imposed by the State). A group of people may be classified as "indigenous" only if it so chooses by preserving its own distinctive institutions and identity.[136]

However, just like Convention 107, Convention 169 conform the same rights to "indigenous" and "tribal" peoples, further deteriorating the usefulness of distinguishing between these categories of peoples.[137]

This Convention is now the most comprehensive legally binding international law for the protection of indigenous peoples to preserve their own laws and customs within the majority of societies in which they lived. Convention 169 concerns, among others, with the indigenous right to land and territories, the recognition of their cultural, social and religious values, customs law, the right to health services, and the right to benefit from equal conditions of employment.[138]

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[134] Ulfstein, Geir. Ibid. Page 11-12.
[135] Wiessner, Siegfried. United Nations Declaration on the Rights of Indigenous Peoples. United Nations Audiovisual Library of International Law. 2009. Page 2.
[136] Daes, Erica-Irene A. Paragraph 28-34
[137] Daes, Erica-Irene A. Paragraph 28-34
[138] Stavenhagen, Rodolfo. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. UN Doc. E/CN.4/2002/97. 4 February 2002. Paragraph 11-12

As of 16 July 2009, it has been ratified by only 20 countries, which must be admitted that the numbers are very limited. However, it is promptly becoming a powerful instrument for use by both States and indigenous organizations.[139] For example, indigenous peoples have been using this Convention for their complaints which filed in the Inter-American Court of Human Rights, Human Rights Committee and the Committee on the Elimination of Discrimination.[140]

Adding to that, it is only natural to say that this Convention has inspired greatly the provisions in the UNDRIP because its provisions deal with all the areas cover by Convention 169. While influenced by discussions within the UN concerning the initiative to develop an indigenous rights declaration, the development of Convention No. 169 in 1989 contributed in turn to the process that finally led to the adoption of the Declaration on 13 September 2007.[141] Thus, Convention No. 169 and the UN Declaration are compatible and mutually reinforcing, although these instruments were negotiated by different bodies.[142]

United Nations Declaration on the Rights of Indigenous Peoples

In 1985, the UN Working Group on Indigenous Populations (UNWGIP)[143] decided to work on a Draft of Declaration on Indigenous Rights, and it continues to be negotiated within the UN mechanisms. Finally, after approximately 20 years, the UN General Assembly (UNGA) adopted the Draft as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The process of the establishment of the Declaration has composed of a very unique history in international law making within the UN system because no other UN human rights

[139] Stavenhagen, Rodolfo. Ibid. Paragraph 16
[140] Tauli-Corpuz, Victoria. How the UN Declaration on the Rights of Indigenous Got Adopted. Page 1.
[141] Anaya, S James. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya. A/HRC/9/9. 11 August 2008. paragraph 34.
[142] International Labour Organization. Ibid. Page 6
[143] The UN Working Group on Indigenous Populations (UNWGIP) was established in 1982 and held its yearly session until 2006. This is an expert body which consists of five independent experts, none of which are indigenous. Year by year the number of indigenous representatives participating in this body increased and at its peak, the number reached 600. This body was mandated to review developments concerning indigenous peoples and to work towards the development of international standards on indigenous peoples' rights. Since then, indigenous representatives occupied this space and actively participated in drafting the UN Declaration on the Rights of Indigenous Peoples. The WGIP provided the opportunity for indigenous peoples to come together not just to make statements at the Working Group but to consolidate their own movement at the global level. Tauli-Corpuz, Victoria Ibid. Page 2.

instrument has ever been elaborated with so much direct involvement of its beneficiaries.[144] The indigenous peoples' representatives have been involved actively and have become an important resource in the Declaration formulation by "occupying" the UNWGIP.[145]

Since it was accepted that indigenous and tribal peoples share very similar characteristics in their needs for protection and the types of difficulties they face, there was no need to use different term to address them. Thus, during the drafting of the Declaration in the UNWGIP it became agreed to refer to all such peoples as "indigenous" for the purposes the Declaration.[146]

The fundamental issue which became very arguable in the Convention 169 regarding the scope of self-determination for indigenous peoples was settled in the Declaration. Article 3 of the Declaration expressly recognizes indigenous peoples as full subjects of the right to self-determination, as established in the ICESCR and the ICCPR. Now, there is a formal acknowledgment for indigenous peoples to enjoy their right as "peoples" in the international law on the issue of both external and internal self-determination. This is of course an important progress when comparing the disclaimer made by Convention 169. [147]

However, the addition of Article 46(1) makes it clear that the Declaration does not support external forms of self-determination. It states that the Declaration should not be 'construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States'. Many indigenous peoples' activists defended this middle way clause by pointing to the argument that indigenous peoples do not want statehood because for many indigenous peoples 'cultural' – rather than 'political' – self-determination is the priority. Engle commented on this in a quite harsh way, by saying that this "betrays much of the history of indigenous movements". According to her, although many indigenous groups might not have called for their own states,

[144] Daes, Erica-Irene A. The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UNDRIP. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.
[145] For a detail discussion on the process and negotiation of the UNDRIP, see Tauli-Corpuz, Victoria. Ibid.
[146] Wiessner, Siegfried et.al. Ibid. Page 6.
[147] Montes, Regino Adelfo and Gustavo Torres Cisneros. The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.

the movement was relatively united for many years on the need to include the right to do so in the Declaration.[148]

Another important element of the Declaration is the affirmation of a number of collective human rights – which can be said as the derivative rights of the right to self-determination – extending from the right to land, territories and resources, right not to be subjected to forced assimilation, genocide or any other violence; to the rights affirming indigenous spirituality, culture, education and social welfare. [149] This marks a way towards a universal acceptance of the collective dimension of human rights, in contrast to individual rights which has been prioritized in the human rights realm prior to the Declaration. [150]

Something else worth discussing is the argument from some States in the drafting stages, which was of the opinion that a new international instrument makes the indigenous peoples become a "citizen plus" who enjoy special rights which are not enjoyed by other members of their populations. Responding to this kind of view, S James Anaya has the best explanation on the legal standing of the Declaration[151]:

> "[…] the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments."

Rather than establishing any new rights in international law, the Declaration is a complement to the existing human rights standards such as the Universal Declaration of Human Rights, the ICCPR and the ICESCR but with a special circumstances that was owned by the

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[148] Engle, Karen. Ibid.
[149] Dorough, Dalee Sambo. The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.
[150] Montes, Regino Adelfo and Gustavo Torres Cisneros. Ibid.
[151] Kakunglu, Ronald. The United Nations Declaration on the Rights of Indigenous Peoples: a New Dawn for Indigenous Peoples Rights? Student Conference Paper of Cornell Law School Inter-University Graduate. 4 March 2009. Page 7-8

indigenous peoples.[152] Nevertheless, albeit the Declaration does not create any new rights in international law, it is the most thorough of the instruments concerning indigenous peoples.[153] And although the Declaration does not reflect all the indigenous demands that have been made over the course of many long years, it is one step further, which is needed to result in new norms within the spheres of respective countries and realities.[154]

Can the Declaration be credited as Customary International Law?

Commonly, the legal status of a declaration of the UNGA is a "soft" law or non-binding international law. It is not enumerated as one of the sources of international law in article 38 of the ICJ Statute. However, in the earlier times, there have been attempts to accredit a higher degree of authority to UNGA's resolutions designated as "declarations". An example of this attempt was the Universal Declaration of Human Rights (UDHR) in 1948. In 1962, the Commission on Human Rights requested the Office of Legal Affairs of the United Nations to clarify the legal status of "declarations". The Office clarified that "in United Nations practice, a "declaration" is a solemn instrument resorted in very rare cases relating to matters of major and lasting importance where maximum compliance is expected".[155]

In the adoption of the UNDRIP, some states have been quick to minimize its importance by pointing to the Declaration's non-legally binding character, particularly as it does not include enforcement mechanisms.[156] This may be the reason why it has 143 supports out of 158 States in the UNGA meeting, the State saw it as a light obligation because of the status of the Declaration. In other words, they may consider that supporting the Declaration is a gesture of goodwill but it will not carry any real obligations for them, and even less for those States that give abstentions or that voted against.[157] In the opinion of Stavenhagen, the worst thing that could happen to the

[152] Montes, Regino Adelfo and Gustavo Torres Cisneros. Ibid.
[153] Dorough, Dalee Sambo. Ibid.
[154] Montes, Regino Adelfo and Gustavo Torres Cisneros. Ibid.
[155] Wiessner, Siegfried et.al. Ibid. Page 5.
[156] Ahren, Mattias. The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.
[157] The UN Declaration was adopted with 144 States voting in favour, 4 voting against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

Declaration now is that it may be ignored even by the governments that affixed their signature to it.[158]

Scholars have given their arguments to support the Declaration. Some think that seeing the UNDRIP as mere non-binding international law instrument oversimplifies things. There are some reasoning's to support their arguments.

First of all, the reason that the Declaration was drafted by the right-holders themselves, which is the indigenous peoples, makes the Declaration carry moral force. Although it is not legally binding, it is morally binding.[159] Second, Wiessner argues that the Declaration deserves utmost respect like the UDHR because in the first paragraph of the preamble it stated that:

> "the General Assembly was guided by the purposes and principles of the Charter of United Nations and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter"

He argues that this statement implies that if a State is going to live up to the UN Charter, it must at the same time respect the UNDRIP. Wiessner gives another reason to support his argument, that although the UNDRIP cannot be counted with ease among the traditional "sources" of international law enlisted in Article 38(1) of the ICJ Statute, the United Nations Special Rapporteur on the rights of indigenous peoples has announced in August 2008 that he will measure state conduct *vis-à-vis* indigenous peoples, by the yardstick of UNDRIP in the process of "universal periodic review" instituted by the Human Rights Council. The same treatment has also been received by the UDHR that is also not enlisted in Article 38(1) of the ICJ Statute but will be used in reviewing states conducts in the review. [160]

Meanwhile, there are two important requirements for a norm to be credited as customary international law: states practices and *opinio juris* or opinion of law. An optimistic track has been taken by Anaya who declared that some of the articles in the Declaration have already constituted emerging customary international law of indigenous peoples' rights, although it cannot be said for the entire text. Many indigenous and non-indigenous commentators support this position by referring to the fact that even when it was still in the form of a draft, the Declaration was used extensively by indigenous advocates and by international bodies and

[158] Stavenhagen, Rodolfo. Making the Declaration Work. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.
[159] Perera, Jayantha. International Law and Indigenous Peoples' Rights
[160] Wiessner, Siegfried et.al. Ibid. Page 5-6

organizations as well as by governments in municipal contexts. The Declaration enhance indigenous peoples' place within the international human rights framework and international law.[161]

Wiessner, taking the same position as Anaya, has provided more empiric evidences which he documented briefly in his article. He elaborated global comparative research on state practice and *opinio juris* over a period of five years in the late 1990s. As far as the state practice was concerned, he took note on the recognition of indigenous peoples' rights to maintain their distinct identity and to govern their own affairs in the United States; the Sami in Lappland; the *resguardos* in Colombia; or Canada's Nunavut which were accompanied by an affirmation of native communities' title to the territories they traditionally used or occupied. Other state practices presented in his article are the demarcation and registration of indigenous title to the lands of their ancestors in the domestic laws of States such as Guatemala, Brazil and Australia.[162]

He added the facts that even in its draft form; the Declaration has composed the basis for legislation in some countries, such as the Indigenous People's Rights Act in the Philippines. It also has influenced constitutional and statutory reforms in various states of Latin America.[163]

In the issue of *opinio juris*, Wiessner gives an example of a judgment made by the Inter-American Court of Human Rights on 31 August 2001 which ruled over *Awas Tingni* peoples, an indigenous group who live in the rainforest of Nicaragua. The judgment pronounced the existence of an indigenous people's collective right to its land. He presented that other decisions

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[161] In May 2008, In May 2008, the Committee on the Elimination of All Forms of Racial Discrimination referred to the Declaration in its comments on US obligations under the *CERD*. In this case the Committee had received complaints about nuclear testing and dangerous waste storage on Native American lands. The Committee stated that: "While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples." This is an important comment from the Committee because the US was an objector to the Declaration, yet the Committee still regarded it as relevant to the implementation of the CERD.
The Supreme Court of Belize also applied the principles of the Declaration as a framework for determining land rights. One month after the adoption of the Declaration by the General Assembly, the Supreme Court of Belize handed down a decision relating to Mayan rights to lands and resources, applying the Declaration.
Davis, Megan. Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples. Melbourne Journal of International Law Vol. 9. 2008. Downloaded from http://heinonline.org. Page 28-29

[162] Wiessner, Siegfried. Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples. Vanderbilt Journal of Transnational Law. Vol 41: 1141. 2008

[163] Wiessner, Siegfried. Ibid

in the same vein has followed, including a recent decision involving Suriname by the Inter-American Court of Human Rights and the Belize Supreme Court which recognized the customary international legal character of an indigenous people's right to its land.[164]

In the international law association conference on the rights of indigenous peoples in The Hague on 2010, there were among others, who emphasize that the rights accommodated by the Declaration were recognized in various systems of domestic law and in diverse areas of international law, through treaties and other instruments, and they have been compiled in the Declaration.[165]

For certain rights enlisted in the Declaration, there have even have been unquestionably binding obligations, for example rights regarding their traditional lands which are being a derivate from the ILO Convention 107 and 169. Adding to that, in relation with cultural rights, article 27 of the ICCPR, are albeit indirectly enforced through individual rights of the members of the group but often informed by the provision in Article 1 on the collective rights of all peoples to self-determination. Another example given is Article 21 of the *American Convention on Human Rights* (ACHR) on the right to property, which is the basis for a broad-based reinterpretation of this entitlement as a group, or communal, right adjusted toward safeguarding of indigenous cultures for whom the use of their traditional lands is essential. [166] To a significant extent, it can be said that the Declaration clarifies and confirms rights that are already formally legally binding and applicable to indigenous peoples.[167]

Another noteworthy provision is the right to restitution in article 28 of the Declaration which is already enshrined in several international legal sources, such as in the African Charter of Human and Peoples' Rights, and the ICCPR, as interpreted by the UN Human Rights Committee in the context of indigenous peoples.[168]

There is another example to support the argument that the Declaration is underlining existing international law in the matter of restitution. In one of its recommendations, the CERD

[164] Wiessner, Siegfried. Ibid.
[165] Wiessner, Siegfried et.al. Ibid. Page 2
[166] Davis, Megan. The United nations Declaration on the Rights of Indigenous Peoples. Indigenous Law Centre. 2007. Downloaded from http://ssrn.com/abstract=1392569.
[167] Ahren, Mattias. The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.
[168] Ahren, Mattias. Ibid.

has elaborated upon indigenous peoples' rights to land, territories and resources as part of the right to non-discrimination under the UN International Convention on the Elimination of All Forms of Racial Discrimination. By doing this, the CERD has called on states "where [indigenous peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, **to take steps to return those lands and territories**". Further, when restitution is not feasible, compensation should be awarded, if at all possible in the form of lands and territories.[169]

Adding to that, the international practices have shown the authoritative characteristic of the Declaration. It can be seen in the matter of policy direction, since the Declaration's standards have also been urged to be "mainstreamed" into the UN's, the ILO's, and UNESCO's policies and programs. [170]

To conclude, even though there is no agreement yet on whether the Declaration has formed a customary international law, I am of the opinion that it is increasingly utilized and practiced widely, thus the Declaration definitely contributes to a growing body of customary international laws on the recognition of indigenous peoples and their rights.[171]

Surpassing the Debate: Focus on Rights

While the debate on whether the Declaration carries a customary international law, Royo is trying to leap beyond this *legal* debate because he argues that the distinction between hard law and soft law in the area of human rights is not necessarily relevant in practice. He continues his argument by saying that empirical research has shown that the legal status of specific human rights norms is far from a determinative factor in promoting compliance with these norms, and in several instances formally non-binding norms have played an even more effective role in promoting respect for human rights.[172] He emphasizes further by stating that one must see the legal character of the substantive standards included in the text. When the focus of the debate shifted to this matter instead of the legal status of the Declaration, one can see that most of the substantive rights affirmed in the Declaration relate to already existing obligations under treaty

[169] Ahren, Mattias. Ibid
[170] Wiessner, Siegfried et.al. Ibid. Page 5-6
[171] Davis, Megan. The United nations Declaration on the Rights of Indigenous Peoples. Indigenous Law Centre. 2007. Downloaded from http://ssrn.com/abstract=1392569.
[172] Royo, Luis Rodriguez-Pinero. "Where Appropriate": Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.

law, as interpreted by the relevant monitoring bodies.[173] Thus, it is already an obligation for State to fulfill its responsibilities towards indigenous peoples, whatever it position was in the UNGA adoption of the Declaration.

However, he is cautious about the important aspect of determining the legal status of the Declaration as an instrument which is particularly relevant with regard to the issue of monitoring. The Declaration lacks of specific monitoring, but if the focus is placed on the rights, he continues, the provisions included in the Declaration are subject to supervision by existing international monitoring bodies and mechanisms as they relate to the general rights affirmed in the treaties that they are respectively responsible for supervising.[174]

II. Defining Indigenous Peoples

One of the issues discussed in the first chapter of this thesis is the recognition of indigenous peoples in Indonesia in terms of who can be included as indigenous peoples. This section will analyze the recognition made by the Indonesian government in the light of the UNDRIP and the ILO Convention 169.

To Define or not to Define

One of the main struggles in the realm of the indigenous peoples issue is whether a definition of indigenous peoples is needed. In the 20 years of the negotiation of the UNDRIP, this issue too was very contentious. As mentioned before, the drafting of Convention 169 and the Declaration started at approximately the same time, and the discussions about defining indigenous peoples were shared in the same vein in both the different forums. Thus, the "self-identification" concept in Convention 169 was considered as a fundamental criterion for determining the groups that are to be identified as indigenous peoples while the Declaration was adopted without giving the definition towards indigenous peoples. Furthermore Article 33 echoes that it is the right of indigenous peoples to decide their own identities.[175]

The debate on defining or not defining indigenous peoples was particularly challenging in the negotiation periods of the Declaration. The African and Asian governments were generally of the opinion that a definition must be settled in order to identify the beneficiaries of the rights; however it was quite apparent that some of these states were more interested in getting a

[173] Royo, Luis Rodriguez-Pinero. Ibid.
[174] Royo, Luis Rodriguez-Pinero. Ibid.
[175] Roy, Chandra K. Indigenous Peoples in Asia: Rights and Development Challenges. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen.

definition which would exclude existing indigenous peoples in their own country. States from these regions were frequently declared that they did not have any indigenous peoples in their countries and that everyone there was indigenous.[176] Indonesia was one of these States.

While in the indigenous peoples' part, they insisted strongly against the composition of a definition. They supported their argument by presenting reports given by the Chairperson-Rapporteur of the WGIP, Ms. Erica-Irene Daes[177] which enunciated that "historically, indigenous peoples have suffered from definitions imposed by others". Thus, they did not want to limit the application of the Declaration too narrowly, and for strategical reasoning, they were alert in attaining the agreement among the wide variety of States and the indigenous peoples who could further prolong the process of the UNDRIP adoption.[178]

I will briefly elaborate the report given by Ms. Daes on the evolution of indigenous peoples' definition which was imposed to them. This elaboration is presented to obtain an illustration of the elements used by these definitions.

Elements of the Concept of Indigenous from the International Practices[179]

In her report for the WGIP on 10 June 1996, Erica-Irene A. Daes, the Chairperson-Rapporteur emphasized that it is not possible to have a definition on indigenous peoples which include the situations in all parts of the world and which can be applied to all. However it is possible to identify principal factors to distinguish indigenous peoples from other groups in the practice of the UN system. Furthermore in her report, she used the historical approach in international practice in an effort to identify the principal factors of the concept of indigenous.

The concept evolved from the late 19th century until the establishment of the WGIP in 1982. The indigenous term has its root from the Latin word "indigenae", which was used between persons who were born in a particular place and those who arrived from elsewhere (advenae). A starting point worth to note for the consideration of international practice was the Berlin-Africa Conference of 1884-1885 with the aim of agreeing on principles for the recognition of the Great Powers' territorial claim in Africa. The term "indigenous populations"

[176] Henriksen, John B. The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process. In Making the Declaration Work. Edited by Claire Charters and Rodolfo Stavenhagen. 2009.
[177] UN Doc. E/CN.4/Sub.2/AC.4/1995/3, page 4
[178] Wiessner, Siegfried et.al. Ibid. page 6-7
[179] Working Paper by Erica-Irene A. Daes on the concept of indigenous people. 10 June 1996 WGIP 14th session 29 july – 2 august 1996.

was used in article 6 of the Final Act of the Conference to state the commitment of the Great Powers to the “protection of indigenous populations” of Africa. In the legal realm of the Act, the word indigenous was meant to distinguish between citizens of the Great Powers and persons in Africa who were under the colonization of them. When the British Empire subjected the Dutch settlers in South Africa to British rule as a consequence of the Boer War, the British never conceived that article 6 applied to them. Thus, we can see the different approach used here, in the Latin rooted word, there is an emphasis on the element of: the priority on time, while in the later development of the term, the Great Powers used the element of race, when they used the term indigenous.

The approach used by article 6 of the Final Act of the Conference was again used by article 22 of the Covenant of the League of Nations. However, the Covenant added a second level of qualification which characterized “indigenous populations” as "peoples not yet able to stand by themselves under the strenuous conditions of the modern world", as contrasted to more "advanced" societies. The characterization was used in determining the degree of supervision that was appropriate to particular territories and peoples. It will be clearer to understand about this when we see the example in South Africa. South Africa was a part of the British Empire in 1919, although it has the authority to be self-governed for its internal affairs, it subordinated itself to the British Parliament in London. Under article 22, the League entrusted South Africa with a mandate over the territory of Namibia. Thus, within the conceptual framework of article 22, Namibia was “indigenous” in contrast with the “advanced” character of South Africa, while the African population of South Africa itself was not categorized as “indigenous” in relation to the then Dutch and British settlers. From this case there is another important element than can be identified. The term indigenous in article 22 was characterized by borders rather than the distinction of sociological, historical, or political factors of a population. Namibia was a territory which was geographically demarcated by the Great Powers, thus it was deemed to be indigenous, while the African population was not.

A rather different approach was used by the Pan-American Union, the predecessor of today’s Organization of American States by its Resolution XI of 21 December 1938. The Resolution pointed the indigenous populations as descendants of the first inhabitants of the lands which today form America. It admitted the situation of deficiency in their physical and

intellectual development as important characterization of indigenous populations, and because of their weak position, the Resolution provides preferential treatment with the objective of a complete integration into the national life of existing States. In this document and its subsequent, the terms indigenous and Indian were used interchangeably. From this definition, it can be seen that in the Americas, the term indigenous was employed to identify marginalized or vulnerable ethnic, cultural, linguistic and racial groups within State borders, rather than the inhabitants of colonial territories that were distinct geographically from the administration of power.

Jose Martinez Cobo's Study

The concept of self-identification has being increasingly accepted in the international legal practices in the beginning of 1977, when the second general assembly of the World Council of Indigenous Peoples (WCIP) handed a resolution stating that "only indigenous peoples could define indigenous peoples." Afterwards, the UNWGIP and the ILO have advocated an unlimited right to "self-identification" for indigenous peoples within global forums. [180]

This acceptance of the self-identification concept was also parallel with the appointment of Martinez Cobo as a Special Rapporteur to conduct a comprehensive study of discrimination against indigenous peoples. It was the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) which appointed Cobo in 1971. In his final report to the Sub-Commission which finished in 1983, he emphasize that indigenous peoples should be given the sovereign right and power to decide who belongs to them, without external interference.[181]

Although he included self-identification as indigenous as a fundamental criterion, Cobo constructed a working definition of indigenous peoples, which reads as follows:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral

[180] Corntassel, Jeff J. Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity. 2003.

[181] Study of the Problem of Discrimination against Indigenous Populations by Jose R Martinez Cobo, Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities. E/CN.4/SUB.2/1986/7/ADD.4. Paragraph 382

territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural, social institutions and legal systems."

The definition is highlighted on the elements of:

- distinctiveness as a community/peoples/nation which includes the distinction on the cultural, social institutions, and legal system
- historical continuity of their existence on their ancestral territories from pre-colonial times
- non-dominant in today society which they live in

In international law, there is no universally accepted legal definition of indigenous peoples, but this working definition constructed by Cobo is usually accepted as authoritative. [182] For some states, the Cobo definition is totally unacceptable, particularly in the Asian and African Member States, which have argued that no indigenous peoples exist in their regions.[183] This tension contributed to the controversy regarding the draft text of the *Declaration*. [184] The perception of African and Asian Member States were largely based on the concept of "saltwater colonialism", which in this context means that only those groups which have been faced with the overseas colonization or occupation, such as in the Americas, Australia and New Zealand, are to be regarded as indigenous peoples. [185]

Another critical analysis come from Corntassel, which in his article he pointed out that the definition proposed by Cobo is fraught with difficulties, as research shows that indigenous peoples are not always in a "non-dominant" condition numerically or politically within their host state(s). An example of this would be the situation in Bolivia. The Quecha and other indigenous groups constitute 51-71 per cent of the overall populations of Bolivia.[186]

ILO Convention No. 169

Convention 169 uses two terminologies which fall into its coverage. Article 1 paragraph (1) of the Convention provides:

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[182] Perera, Jayantha. International Law and Indigenous Peoples' Rights.
[183] Davis, Megan. Indigenous Struggles in Standard-setting: the United Nations Declaration on the Rights of Indigenous Peoples. Melbourne Journal of International Law. Vol 9. 2008. http://heinonline.org.Page
[184] Davis, Megan. The United nations Declaration on the Rights of Indigenous Peoples. Indigenous Law Centre. 2007. http://ssrn.com/abstract=1392569.
[185] Henriksen, John B. Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7. 2008. Page 8-9
[186] Corntassel, Jeff J. Ibid. Page 15

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabit the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

While the second paragraph of the same article provides that self-identification as indigenous or tribal shall be granted to the peoples in question. In other words, a "peoples" may be "tribal" or "indigenous" only if it so chooses by perpetuating its own distinctive institutions and identity. However, Convention 169 does not differentiate treatments it gives to each category; it entitles the same rights to "indigenous" and "tribal" peoples.[187]

Both definitions basically reflect the element of **distinctiveness**, just like Cobo's working definition, but by adding the term tribal peoples, the Convention 169 actually expands its coverage to a "peoples" which are distinct but it doesn't fulfill the requirement of "historical continuity with ore-invasion and pre-colonial societies that developed on their territories." According to Kingsbury, these differences on definition suggest that "indigenous peoples" does not have a single fixed meaning. Numerous variations in relevant categories and rules of participation are evolving to meet different functional requirements, political conditions and regional mores. Nevertheless, he warned that in the absence of any unifying global concept, this functional divergence may come at the price of unsustainable fragmentation and inconsistency.[188]

The elements contained in the definition of indigenous peoples which are not found in its description of "tribal peoples" can be elaborated as follows[189]:

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[187] Working Paper by Erica-Irene A. Daes on the concept of indigenous people. 10 June 1996 WGIP 14th session 29 july – 2 august 1996. Paragraph 30-31.

[188] Kingsbury, Benedict. "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy. The American Journal of International Law, Vol. 92, No. 3 (Jul., 1998). www.jstor.org.

[189] Henriksen, John B. Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7. 2008. Page 7-8

- Historical continuity (pre-conquest/colonization societies);
- Territorial connection (their ancestors inhabited the country or region at the time of conquest/colonization/creation of the state); and
- Distinct social, economic, cultural and political institutions (they retain some or all of their own institutions).

The definition of indigenous peoples used by the Convention has been widely used, for example in the application the UNDRIP, the working definition used by the World Bank and also the United Nations Development Programme (UNDP).[190]

Highlight on the Indonesian Recognition towards Indigenous Peoples

When one compares the recognition given by the Indonesian Government with the international frameworks that was elaborated in this section, one can see that the conditional recognition made by the Indonesian government clearly does not give any room for self-identification for indigenous peoples in Indonesia. The government imposes its full authority to define whether a "peoples" could acquire its status as indigenous peoples or not. A "peoples" could be recognized as indigenous peoples **only if** it can fulfill requirements asked by the government, which in general can be read as follow: 1.) in reality it still exist; 2.) the implementation of their right does not conflict with national interest; 3.) the implementation of their right does not contrast with higher regulation or law; 4.) and, the recognition must be made through regional law. And almost all the evidences must be provided in written forms, which is almost impossible to fulfill by the indigenous peoples since most of their traditions are done in a verbal way.

Furthermore, both the working definition made by Cobo's study or the definition in Convention 169 emphasizes the character of "distinctiveness" as a fundamental element in categorizing a "peoples" as indigenous peoples. This factor occurs as one of the requirements made by the government which in particular is stipulated in the BAL: "the existence of *adat* law institutions that are still respected". However, as mentioned before the government shows inconsistencies in recognizing indigenous peoples, it must be understood that in the mind of the founders of the BAL, they did consider indigenous peoples as "distinct" but in a backward way,

[190] Henriksen, John B. Ibid. Page 14.

which means that they believe that the indigenous peoples' law and institutions will fade sooner or later, along with the modernization of their customs and traditions.

The next element from Cobo's study is "non-dominant in today society which they live in". This is not included in the recognition made by Indonesia. Following that is the element of "territorial connection (their ancestors inhabited the country or region at the time of conquest/colonization/creation of the state)". In the definition given by the BFL 1999, this element has been included: "the existence of a clearly defined *adat* law territory". Again, it is worth noting that the indigenous peoples need to provide written evidence to proof this, which means that the definition limits the recognition of the indigenous peoples, as they are without any written evidence. This is because indigenous peoples' lives in their ancestral land occurred before the modern Indonesian State was established.

The most contentious for Asian states – including Indonesia – is the element of: "historical continuity with pre-invasion and pre-colonial societies that developed in their territories." From the earlier chapter, it is clear that Indonesia has often declared that the term indigenous peoples cannot be applied in Indonesian context, since almost all of Indonesian population is indigenous due to almost all the population in Indonesia has experienced "historical continuity with pre-invasion and pre-colonial societies that developed on their territories."

Adding to that, since the issue of indigenous peoples' definition is always challenging there is no universally accepted definition until now. Academics and indigenous rights' activists and practitioner have never come to terms on this issue. However, it is important for Indonesia to use a more pragmatic approach in defining the indigenous peoples. Since there is urgency to address this issue as soon as possible because indigenous peoples are very often found among the poorest strata in society. The World Bank report in the 1990s stated that "the living conditions of the indigenous people were abysmal, and that their poverty was persistent and severe, especially when compared to those of the non-indigenous population". [191] Apart from the fact that Asian States' colonization processes were different from those of the Americas, Australia and New Zealand, it is important to note that indigenous peoples in every part of the world are facing the same problems, namely marginalization and poverty. Thus, although there is still tension in the academic realm on the definition of indigenous peoples, it is important for Indonesian

[191] Stavenhagen, Rodolfo. Indigenous Peoples: Land, Territory, Autonomy, and Self-determination.

government to leap and go beyond the debate of definition and focus on improving the condition of indigenous peoples which are marginalized and entangled by poverty. The Indonesian government needs to use a pragmatic approach in recognizing indigenous peoples, which means that it should consider the element of marginalization and vulnerability in defining indigenous peoples.

III. Comparison between Indigenous Land Rights in Indonesia with ILO Convention No. 169 and the UNDRIP

This section will compare the conditional recognition made by the Indonesian government on indigenous peoples' land rights to the related provisions included in both the international frameworks. The issue of indigenous land rights is a very complicated issue and thus this section will not give a thorough elaboration.

As elaborated in the second chapter, the Indonesian government claimed control before all the lands and forests in Indonesia. There are at least three consequences of this claim. First, the Indonesian government holds the full authority to define a "peoples" as indigenous and only if the "peoples" in question are acknowledged by the government, it can propose its rights over land. Secondly, by applying this conditional recognition, it means that Indonesian government considers the origin of indigenous peoples' rights over lands or forest being not from their original rights which were inherited by their ancestor, but from the authority of the state as the controller of all the lands and forests.

This point of view evidently is not the Indonesian government's alone; many states are sharing the same fear that a full recognition of indigenous territorial rights might jeopardize the unity and integrity of the State which indigenous peoples live in.[192]

The concept of lands in Convention 169 must be understood as embracing the whole territory they use, including forests, rivers, mountains and coastal sea, the surface as well as the sub-surface (article 13 paragraph (2) of the Convention).

Article 26 paragraph (1) of the Declaration shares the same spirit by stating that: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." This covers rights to the total environment of such lands, therefore comprising air, waters, coastal seas, sea-ice, flora and fauna

[192] Stavenhagen, Rodolfo. Indigenous Peoples: Land, Territory, Autonomy, and Self-determination

and other resources. [193] This is different within the scope of definition of lands in the Indonesian laws, which has different regulations for lands and forests, or coastal resources.

Overall, articles 24-30 of the Declaration deal with indigenous peoples' rights to lands, territories and resources in a much clearer language than Convention 169. Article 26 paragraph (2) takes a very wide approach by putting together notions of ownership, possession, and use. The article states:

> "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."
>
> Furthermore, paragraph (3) of the same article reads as follows:
>
> "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."

Thus, the government must grant indigenous peoples full recognition of their traditions, law, and customs, land tenure systems and institutions which they use for the development and management of resources. Indonesian law rooted indigenous land right from its full authority instead of the original rights that ownership by the indigenous peoples which originated from their ancestral heritage is stipulated by article 26 of the Declaration. Article 26 also gives full recognition towards indigenous peoples' law and customs and their institutions in developing the resources, while law in Indonesia only recognizes indigenous peoples' customs with conditional requirement.

Full recognition made by the Declaration towards indigenous land rights has come from the acknowledgment of the spiritual relationship that indigenous peoples have with their lands, territories and natural resources. The relationship between indigenous peoples and their land is also recognized by article 13 paragraph (1) of the Convention 169 which read as follows:

> "In applying the provisions of the Convention, governments shall respect importance of the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

[193] Perera, Jayantha. International Law and Indigenous Peoples' Rights

While in Indonesian laws, all the lands are controlled by the State, thus denying any indigenous peoples' spiritual relationship with their ancestral lands or forests.

Article 26 states that the State has the obligation to make any effective measures to prevent any interference with, alienation of or encroachment upon these rights. Meanwhile in the Convention, the protection of indigenous peoples' right to ownership and possession of their lands can be found in a series of provisions in articles 14, 17-19. Indonesian law does not provide any provision which guarantees prevention of any encroachment upon indigenous peoples' rights.

IV. Conclusion

Although there is still no consensus of whether the UNDRIP has constituted a customary international law, many scholars have however written that the Declaration in actual fact does not constitute new international human rights obligations, but only gives a special context of indigenous peoples' situation. Thus, although it status is Declaration, it cannot be seen as "merely" a Declaration because of the substantives of the Declaration which has an authoritative character.

This authoritative character is also shared by Convention 169, because although it has only received a small amount of ratification until now, many scholars have elaborated how UN bodies, judicial systems and states' policies have taken the Convention into consideration. As mentioned above, Convention 169 heavily inspires the Declaration. Thus, both of the instruments have to be implemented to complement each other and in mutual ways.

After comparing Indonesian recognition towards indigenous peoples in Indonesia, it is clear that it denies self-identification and the conditional recognition made by the government is only a symbolic recognition and thus instead of protecting indigenous rights, it limits them. The same case happened with the recognition towards indigenous lands. The government of Indonesia does not recognize indigenous land rights to have originated from indigenous peoples' ancestral heritage. It bases the recognition of indigenous rights towards land entirely on the claim of State's control over lands and forests.

Conclusion

My thesis aims to uncover the status of the recognition of indigenous peoples in Indonesia and then compare it with the two main international frameworks, the Convention 169 and the UNDRIP.

The Indonesian government has shown inconsistencies towards the recognition of indigenous peoples. An example would be the contradiction within the recognition made by the BAL and the contents of the law itself. The BAL stated that it is based on *adat* law; in truth the tenure systems contained in the law were altered from the tenure system recognized by *adat* law. Despite the inconsistencies it can be concluded that Indonesian laws use conditional recognition towards indigenous peoples. This is also applied to the recognition towards indigenous land rights. It is can also be concluded that this recognition is only a symbolic recognition.

In the international forum, the Indonesian delegation has been consistent in its actions by stating that the term "indigenous peoples" does not apply to Indonesian context. But in actual fact this statement is misleading because in reality, the national laws and regulations, although only in a symbolic way, have acknowledged the existence of indigenous peoples.

These inconsistencies have caused a lot of conflicts between the indigenous peoples and the government, of which mostly cases are related to indigenous ownership of lands. Due to this situation, the indigenous peoples in Indonesia have organized themselves and erected an indigenous organization which is named AMAN. Up till now, AMAN has achieved some important achievements but they are still struggling to change the symbolic recognition made by the government, into a realization.

Indonesia has adopted the UNDRIP in 2007, however, it once more denies the existence of indigenous peoples in Indonesia. As a consequence, there is an effect of this adoption for indigenous peoples in Indonesia, which is again only a symbolic gesture from the Indonesian government.

From chapter III, I have concluded that the UNDRIP and ILO Convention 169 owns an authoritative nature in the realm of indigenous peoples, thus although the Indonesian government has not ratified the Convention 169 yet, it has a moral obligation to respect the provisions of the

Convention. And, in regard of the Declaration, it cannot be seen as "merely" a non-binding instrument, but as adoptee of the Declaration, the Indonesian government has a moral force to comply with the good will of the Declaration.

This means that the Indonesian government needs to change its position towards the denial of the existence of the indigenous peoples in Indonesia. The spirit of Convention 169 and the UNDRIP (although it does not define indigenous peoples) is to protect the indigenous peoples who in reality have been marginalized by states' policies and categorized as the poorest people in any societies. The underlying approach of both of these instruments is to focus on fulfilling indigenous peoples rights to get a better life. Thus, instead of maintaining its traditional approach that almost the entire population in Indonesia is indigenous; the Indonesian government must use the pragmatic approach and focus on the rights of indigenous peoples as marginalized and a vulnerable group in the society.

The recognition on indigenous land rights in Indonesia also relies heavily on the recognition of a "peoples" as indigenous peoples. Furthermore the basis to recognize indigenous land rights is not consistent with their original right which is inherited through ancestry but the authority of the State which holds control over all lands and forests in Indonesia. This is contrary to the Convention 169 and the UNDRIP which fully recognizes indigenous land rights as indigenous peoples' original rights from their attachment to lands even before the modern state they lived in was established.

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