

Protecting Indigenous Collective Land Property in Indonesia under International Human Rights Norms

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Abstract

This essay examines the applicability of international human rights instruments as the legal basis to protect indigenous rights to land, territories, and natural resources to non-ratification countries of the Convention on indigenous peoples' rights, especially to the Indonesian context. In the last few decades, the United Nations has developed and recognized the rights of indigenous peoples, including rights to their ancestral lands, territories, and resources. These rights have been stipulated in several instruments, such as the ILO Conventions No.169 and UNDRIP. Nevertheless, most Asian and African countries have not ratified the Treaty, including Indonesia. Consequently, the rights failed to be adopted into national policies, which the ratification is a precondition before came into force through the national regulations. Indonesia also doubted the exclusive rights of land, territories, and resources traditionally owned by indigenous peoples. Legally, lands, territories, and resources are controlled by the States, as mentioned in Article 33 of the 1945 Constitutional law. Economically, Indonesia relies on land, territories, and natural resources to boost its national revenues. To achieve this aim, the expropriation of indigenous land and territories often occurs through land concession policy for private or state-owned companies. As a result, land tenure and social conflict were common phenomena from the New Order Regime until the current day. This conflict spreads across the country from the west part (Sumatra) to the east of Indonesia (Papua). Therefore, author argues that applying general international human rights instruments will be an alternative approach in protecting the fundamental rights related to their traditional land rights in the Indonesian context.

Keywords: *Indigenous, Human Rights Law, Land, Property, and Indonesia.*

I. INTRODUCTION

The development of international norms to protect indigenous rights had been initiated by Deskaheh, the chief of Indian indigenous, who sought sovereignty for Canadian native

to the League of Nations in the 1920s.¹ This notion was followed by the adoption of ILO Convention No.107 in 1957 on Indigenous and Tribal Population.² In 1982, the United Nations (U.N.) published research on the “The Problem of Discrimination against Indigenous Populations.”³ This study became an academic reference for the U.N. to establish the Working Group on Indigenous Populations (WGIP). The WGIP is an official organ of the U.N. under Sub-Commission on the Prevention of Discrimination and Protection of Minorities, with a unique mandate to produce a draft declaration to promote indigenous rights.⁴ The U.N. General Assembly finally adopted the Draft of Universal Declaration on Rights of Indigenous Peoples (UNDRIP) in 2007 after the majority voted in favour of the Declaration.⁵ Meanwhile, the ILO revised Convention No. 107 to Convention No.169 on Indigenous and Tribal Peoples in 1989, focusing more on protecting the divergent cultural identities of indigenous from the dominant populations.⁶

However, the most contentious issue is related to the collective rights to land property. Most countries opposed adopting the Convention and argued the Declaration is a non-legally binding instrument, which is not effectively applied to the national policies. Indonesia itself neither ratifies the ILO convention on indigenous and tribal peoples⁷ nor adopts the UNDRIP. Consequently, indigenous peoples in Indonesia cannot avail of the ILO Conventions to advocate their interest, particularly to address indigenous peoples’ rights to lands, territories, and natural resources. Meanwhile, the peoples have experienced losing their traditional lands from the Dutch colonial era until modern Indonesia. The adoption of the agrarian legal system that derived from the *Dutch Agrarisch wet* had caused the expropriation of indigenous collective lands for decades. Several national laws, such as agrarian law, forest law, foreign investment law, and omnibus law, have provided a legal justification for the State to expropriate non-

1 Donald B Smith, “Deskahel | The Canadian Encyclopedia”, (2006), online: <<https://www.thecanadianencyclopedia.ca/en/article/levi-general>>.

2 UN ILO, “Convention C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)”, (2017).

3 Martinez Cobo, “Martínez Cobo Study United Nations For Indigenous Peoples | United Nations For Indigenous Peoples”, (2014), online: <<https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/>>.

4 Martin N Nakata, *Indigenous Peoples, Racism and the United Nations* (Australia: Common Ground, 2001) at 15 Google-Books-ID: DOxoctug6ecC.

5 UN DESA, “United Nations Declaration on the Rights of Indigenous Peoples”, (2007), online: <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

6 International Labour Organisation, *Understanding the Indigenous and Tribal People Convention, 1989 (No. 169): handbook for ILO Tripartite constituents*. (Geneva: International Labour Office, 2013) at 169.

7 See TOM ETTY, “Indigenous land rights and the ILO”, (30 September 2007), online: *Inside Indonesia* <<https://www.insideindonesia.org/indigenous-land-rights-and-the-ilo>>.

registration indigenous collective land rights under the ‘doctrine’ national economic development.

Meanwhile, the U.N. Commission on Human Rights has simultaneously insisted on the importance of protecting indigenous peoples’ rights, and this protection becomes a *sui generis*⁸ under international human rights law. Nevertheless, the implementation of this norm requires the interplay between international and national institutions.⁹ This connection becomes the key and visible in applying international norms, both ‘hard law’ and ‘soft law,’ to all countries – including Indonesia. The interconnection of all parties due to international human rights laws is complex and varied.¹⁰ It is an inter-cultural perspective on protecting fundamental rights, particularly related to traditional land property rights.

This article analyses the applicability of general international human rights norms as an alternative approach to protect indigenous land property rights in Indonesia. Following the introduction, Part II describes the experience of indigenous peoples in Papua and other parts of Indonesia being expropriated of their traditional land by the State and foreign investors. Part III analysis the applicability of the implementation of a general international human rights instrument to protect indigenous collective land rights property in Indonesia. This article concludes that applying general international human rights norms can protect indigenous land rights, as land is a core aspect for indigenous survival.

II. THE DISPOSSESSION OF INDIGENOUS LAND PROPERTY UNDER THE NATIONAL DEVELOPMENT INTEREST

The 1945 Indonesian Constitution, on the one hand, has recognized indigenous peoples and their traditional rights, including rights to customary land.¹¹ On the other hand, the

8 *Sui generis* is a term from Latin word, literally means “of its own kind or unique. It also means an acceptable or because of its familiarity. In the context of indigenous rights, *Sui generis* can be interpreted that indigenous rights as a unique rights that has been acknowledged under international law regimes. See: Bryan A Garner, *A Dictionary of Modern Legal Usage* (England: Oxford University Press, 2001) at 851 Google-Books-ID: 35dZpfMmxqsC. See also John Borrows & Leonard I Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (1997) Canada Accepted: 2016-02-16T19:51:55Z.

9 Barelli, ‘The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime’, 32 *the Johns Hopkins University Press* (2010).

10 Aaron Xavier Fellmeth, *Paradigms of International human rights law* (New York, NY: Oxford University Press, 2016) at 1.

11 “The State recognises and respects units of regional authorities that are special and distinct, which shall be regulated by law. [2] The State recognises and respects traditional communities along with their traditional customary rights as long as remain in existence and are in accordance with the societal development and the principle of the Unitary State of the Republic of Indonesia and shall be regulated by law.” See Article 18B R. Indonesia, Indonesian Constitutional Law, 1945.

government claimed that the State has a right to control, use, and manage all lands within Indonesian sovereign territories. This claim is referred to Article 33 Para (3) of the Constitution and several sectorial regulations, which stated that: “The land, the waters, and natural resources within shall be controlled by the State and exploited to the greatest benefit of the peoples.”¹² This constitutional norm has two meanings: First, the State has the right to control its territory, including lands, waters, minerals, and other natural resources. Second, the right to control, use, and manage the territory and all resources must seek prosperity for all peoples. In practice, various derivative State laws and regulations merely justify control over lands and resources and ignore the Constitution's second objective, which aims to provide all peoples' welfare. The ignorant to achieve the second aim of the norm is represented in the commercialization of state-owned lands by granting concession rights for foreign investors. This policy had severely impacted the indigenous collective land property of Indonesia.¹³

The expropriation of indigenous land rights had predominantly occurred during the Suharto and continuously happened under the current regime. One year after Suharto took power, the regime passed several laws that severely impacted the indigenous lands, such as Law No.11 of 1967 concerning Mining and Law No. 5 of 1967 concerning Forestry. The government argued that these laws aimed to provide a legal justification for national economic development by exploring the natural resources within the Indonesian territories. This notion stated in the mining law's preamble that “to mobilize all funds and forces to process and develop the entire economic potential of mining into real economic potency, and to speed up the realization of the national economic development leading to a just and prosperous Indonesia society...” In reality, the law merely aimed to endorse foreign funds and expertise to enrich foreign countries' shareholders and line the regime pockets, family, and entourage.¹⁴ This liberalization of lands and natural resource policy was influenced by the IMF, World Bank, and other international financial institutions' intervention to deliberate liberalism to Indonesia post the communist block collapsed.¹⁵

Looking at the case of Freeport-McMoran, a US-based company signed a contract with the Suharto administration for exploiting gold, silver, copper, and other minerals in

12 *Ibid.* See Article 33 Para 3.

13 See M Y Aiyub Kadir & Alexander Murray, “Resource Nationalism in the Law and Policies of Indonesia: A Contest of State, Foreign Investors, and Indigenous Peoples” (2019) 9:2 Asian Journal of International Law 298–333.

14 Marr, 'Forests and Mining Legislation in Indonesia', in T. Lindsey (ed.), *Indonesia, Law and Society* (2008), at 249.

15 See Arnold C Brackman, *The Communist Collapse in Indonesia* (USA: Norton, 1969) Google-Books-ID: GNLNAAAAMAAJ; Anwar Nasution, *Financial Institutions and Policies in Indonesia* (Singapore: Institute of Southeast Asian Studies, 1983) Google-Books-ID: GpYggnTFBJYC.

West Papua in 1967.¹⁶ The government had provided the company about 10,000 hectares of land and extended it to 2.6 million hectares in 1995.¹⁷ This huge allocation of land concession had made this company become the largest gold mining on Earth. In contrast, the indigenous peoples, Amungme and Komoro tribes who lived in the territory had been displaced from their ancestral lands without compensation, free, prior, and informed consent (FPIC) as obligated under the ILO Convention and UNDRIP.¹⁸

The State's ignorance to consult and provide compensation for the indigenous due to the government argued that the State has the right legally to control, use and manage the lands. Meanwhile, for the Amungme and Komoro peoples, the lands had been traditionally occupied or used since their ancestral. The people are also believed that the traditional lands that the company had expropriated were not only entitled as communal property, but it reflects their “ancestral grandmother,” called “Tu Ni Me Ni.” This expression, as quoted by BRAITHWAITE et al. from MacLeod that:

“...to be their ancestral grandmother, Tu Ni Me Ni...Freeport has decapitated Tu Ni Me Ni's head, is digging out her 'stomach' and dumping her intestines in the rivers, a process that pollutes her life-giving milk. To the Amungme, Freeport's mining activities are killing their mother on which they depend for sustenance - literally and spiritually.”¹⁹

Unfortunately, this cultural and spiritual aspect relates to the traditional lands of indigenous, as legally protected under the international law and Article 18B of the Constitution, had rarely been taken into the government's concern. Unlike, the government merely focuses on the development project by exploiting all-natural resources.

Following the years, many other foreign and national companies have been exploiting the natural resources across the country. Free-Port McMoran is a portrait among other extractive industries that predicted more than 6000 legally, and 8,663 illegal mining projects operate within the Indonesian territory.²⁰ The government has also boosted national development by utilizing forest resources for timber industries and palm oil plantations. In the 1990s, the central government provided permits for 657 logging industries to manage and utilize the forest resources (timber), which took around 69 million hectares across the country.²¹ Several transnational companies were involved

16 See Anugrah Dea, “Freeport di Papua ialah Warisan Daripada Soeharto”, (2017), online: *tirto.id* <<https://tirto.id/freeport-di-papua-ialah-warisan-daripada-soeharto-cjrC>>.

17 See Denise Leith, *The Politics of Power: Freeport in Suharto's Indonesia* (Hawaii: University of Hawaii Press, 2003) Google-Books-ID: CpT_HleBbEMC.

18 See BRAITHWAITE et al., 'Papua', in *Anomie and Violence* (2010) 49, at 71.

19 *Ibid.*

20 Robinson, 'Mining, Land and Community Rights in Indonesia', in J. F. McCarthy (ed.), *Land and Development in Indonesia* (2017), at 145.

21 See Herman Hidayat, *Politik lingkungan: pengelolaan hutan masa Orde Baru dan reformasi* (Jakarta: Yayasan Obor Indonesia, 2008) Google-Books-ID: QfPI2Fbn7QwC.

in these industries, including the USA-based companies (Weyerhaeuser and Goerge Pacific) and Japanese companies, such as Mitsubishi, Sumitomo, Shin Asahigawa & Ataka, etc.²²

After the Indonesian political reform in 1997- 1998, the land crisis used in Indonesia, including deforestation, land grabbing, and land concession, has continuously emerged. Forest Watch Indonesia (FWI) reported that from 2013 to 2018, deforestation had reached around 1,47 million hectares per annum. The forestlands concession becomes the largest, which stands around 71.2 million ha or equivalent to 37 percent of all Indonesian lands.²³ The Agrarian Reform Consortium (*Konsorsium Pembaharuan Agraria*, KPA) noted that during 2019, there were 279 cases of land conflict that cover more than 734,000 hectares and affected more than 109,000 households.²⁴

The indigenous activists, human rights organizations, and legal scholars had proposed the government reform the agrarian law and other laws related to indigenous rights protection.²⁵ In response to this aspiration, President Joko Widodo (Jokowi) has politically promised to undertake land reform as a central pillar of the national development program during his reign [2014-2019]. This commitment was followed up by providing a national strategy for implementing agrarian reform, establishing social equality in national development, reducing disparity, and eradicating poverty.²⁶ In addition, the government also committed to allocating nine million hectares of land to poor or landless peoples across the countries managed collectively at the village level.

However, this program has not directly solved the agrarian conflict, especially the conflict between corporations and indigenous peoples' claim to their communal lands allocated by the government under the concession permit. The Jokowi administration's political project focuses on delivering land certificates [title] to private or individual land ownership instead of communal lands recognition.²⁷ Hence, the political project of land reform remains uncertain for indigenous peoples in reclaiming their collective rights to lands, particularly when it confronts national economic development and investment

22 *Ibid.*

23 See *Angka Deforestasi Sebagai "Alarm" Memburuknya Hutan Indonesia*, by Forest Watch Indonesia (Jakarta, 2019).

24 *Empat Tahun Implementasi Reformasi Agraria*, by KPA (Jakarta: KPA, 2019).

25 Neilson, 'Agrarian Transformations and Land Reform in Indonesia', in J. F. McCarthy, K. M. Robinson and ISEAS-Yusof Ishak Institute (eds.), *Land & Development in Indonesia: Searching for the People's Sovereignty* (2016), at 245.

26 There are six priorities in the agrarian reform programs that had been politically promised, including (1) strengthening of a legal framework and solving of land dispute, (2) organising land ownership management, (3) providing legal certainty on land rights, (4) supporting local community development, (5) allocating forest resource for the peoples, (6) establishing of agrarian reform institution. See Kantor Staf Presiden, *Strategi Nasional Pelaksanaan Reforma Agraria 2016-2019* (Kantor Staf Presiden, 2016).

27 Bintoro Agung, "Aktivis Kritik Bagi-bagi Sertifikat Tanah ala Jokowi", (9 May 2018), online: <<https://www.cnnindonesia.com/nasional/20180905173701-20-327938/aktivis-kritik-bagi-bagi-sertifikat-tanah-ala-jokowi>>.

interests. By leaving the recognition on communal lands, the conflict between indigenous groups and private corporates remains continues., Martinez Cobo, the U.N. Special Rapporteur for indigenous peoples, pointed out that:

“The fundamental root source of conflict between indigenous peoples, on the one hand, and states and non-indigenous entities and individuals, on the others, is their differing views as to which actor possesses valid title to the land and resources, located in territories traditionally occupied by indigenous groups.”²⁸

In 2016, the Indonesian Human Rights Commission published an investigation regarding human right violation related to social and economic rights. From the 40 selected cases, the Commission reported that the number of land disputes continued to grow, from 1,123 complaints in 2013 rose to 2,483 complaints in 2014, which affected indigenous peoples' individual and collective rights.²⁹ The cases also contain an internal conflict among the society that companies and government agencies fostered to take advantage of community divisions.³⁰ Further, the Commission recommended to the government to take immediate action in order to prevent further conflict. Unfortunately, there was no action had been taken to implement the recommendation.

In sum, the State's policy to provide large-scale lands for State-owned and private companies to boost national economic development has adversely affected tribal or indigenous peoples. This development approach through providing a massive land concession had caused indigenous' land property disrupted and discriminated against either by the State organ or by the private corporates. In many cases, they were displaced from their homeland and violated by the security enforces that often cause human rights violations.

III. THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN PROTECTING INDIGENOUS LAND PROPERTY RIGHTS

The issue of indigenous land property under international is considerably debatable, particularly between states and indigenous groups. The following analyses explore how international human rights norms provide indigenous peoples in Indonesia the right to a collective land property using three doctrines: self-determination rights, cultural rights, and property rights.

28 *Study of the Problem of Discrimination Against Indigenous Populations, Chapter XVII on Land*, by Jose R Martinez Cobo, E/CN.4/Sub.2/1983/21/Add.4 (1983).

29 *National Inquiry on the Right of Indigenous Peoples on Their Territories in the Forest Zones: Summary of finding and recommendation for improvement of the Law and Policy concerning respect, protection, compliance and remedy relating to the human rights of indigenous peoples over their territories within the forest zones*, by KOMNAS HAM (Jakarta: The National Human Rights Commission, 2015).

30 *Ibid.*

1. Right to Land and Self-Determination Doctrine

Overall, the right to self-determination under international law provides the right for all peoples to freely determine their political status, economic, social, and cultural development. Article 1 of the 1966 Covenant on Human Rights states: “All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.”³¹ This principle is also stipulated in Art.3 of the UNDRIP: “Indigenous peoples have the right to self-determination. By virtue of that rights, they freely determine their political status and freely pursue their economic, social, and cultural development.” The question, how does this doctrine applicable and compatible to indigenous society in the modern Indonesian context?

Many scholars believe that the application of this doctrine has been largely unsuccessful for indigenous groups. The failure is primarily caused by the resistance for the host-states to implement this doctrine to maintain their State’s sovereignty. For instance, the Indonesian government has insisted that securing the sovereignty and territory is essential, and any measurement will be taken to block the effort to separate from the unitary State of Indonesia, including through the self-determination act. Hence, the government was misunderstood for the meaning of self-determination. They presume that the self-determination right is solely meant to secede an independent statehood. This misconception is often influenced by reference to the decolonization project, which focuses on transforming colonial territories into new States under the normative aegis of self-determination.³² The right to self-determination can also be meant by applying autonomy or self-governance principle. This term is popularly called “internal self-determination.” This type of self-determination insists on the peoples' rights to express their political, economic, social, and other fundamental rights without threatening States’ territorial integrity.³³

The resistance of the Indonesian government to implement the (external) self-determination doctrine was caused by the emergence of the freedom movement in some regions. The case of East Timor resulted in a political trauma for the State that lost its territory after the government acknowledged implementing the right to self-determination.³⁴ In August 1998, Timorese conducted a referendum, and 78.5%

31 *International Covenant on Civil and Political Rights*, 1966.

32 S James Anaya, *Indigenous peoples in international law* (Oxford University Press, USA, 2004) at 103.

33 Jérémie Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors. Second Revised Edition* (The Hague: BRILL, 2016) at 205 Google-Books-ID: aGxyDAAAQBAJ.

34 Historically, East Timor was colonised by Portuguese, instead of the Dutch - like other regions of Indonesia. The independent movement by indigenous Timorese had begun prior the land was annexed by Indonesian military force in 1975. However, the occupation of the territory

favouring independence, opposing the alternative offer of being an autonomous province within Indonesia.³⁵ This option was strongly related to Art.1 of the Human Rights Covenants application for Timorese natives who sought sovereignty under the international instruments.

The demand for implementing (external) self-determination also occurred in Aceh province, an area rich in natural resources. The Acehnese declared their independence in 1976, five years after the Mobil Company found gas in the region.³⁶ This movement was led to a bloody civilian war with Indonesia for 30 years, and an estimated more than 20,000 people have been killed.³⁷ Following Timorese's announcement for independence in 1998, the Acehnese civilian activists sought international support for implementing self-determination or the referendum in Aceh as a democratic way to solve the sub-national conflict of Aceh peacefully. In November 1999, the referendum march drew about two million native Acehnese in the provincial capital to ask for self-determination as recognized by international law with two options, autonomy or independence.³⁸

In response to this aspiration and avoiding the same case as the East-Timor, president Megawati signed a martial law to the province to secure the State's integrity by carrying out the vast military operation. In May 2003, The HRW reported that thousands of civilians were killed, extrajudicial execution, forced disappearances, arbitrary arrests and detentions, and severe limits on freedom of movement.³⁹ The Indonesian security forces - military and police - routinely resorted to violence against civilians, primarily young Acehnese, suspected as GAM sympathizers.⁴⁰

from Portuguese to the Indonesia was not recognised by the UN. The UNGA's Special Committee of Twenty-Four (Decolonisation Committee) declined the invitation of the Indonesian government to attend the meeting of the assembly and to visit East Timor. The UN Security Council also had adopted Resolution 384 (1975) and 389 (1976), calling on Indonesia to withdraw all its force from the territory, and on all states to respect the territory integrity of East Timor and the people's right to self-determination. See: Ian Martin, *Self-determination in East Timor: The United Nations, the Ballot, and International Intervention* (USA: Lynne Rienner Publishers, 2001) at 17-18 Google-Books-ID: ZjC1cGfvARQC.

35 See Jamsheed Marker, *East Timor: A Memoir of the Negotiations for Independence* (North Carolina and London: McFarland, 2010) Google-Books-ID: 4tWSU_F9WW8C.

36 M Isa Sulaiman, *Aceh merdeka: ideologi, kepemimpinan, dan gerakan* (Banda Aceh: Pustaka Al-Kautsar, 2000) Google-Books-ID: xwFxAAAAMAAJ.

37 See Bertrand, *Nationalism and Ethnic Conflict in Indonesia* (2004).

38 Elizabeth F Drexler, *Aceh, Indonesia: Securing the Insecure State* (USA: University of Pennsylvania Press, 2009) at 170 Google-Books-ID: 2nUJFtoHq7YC.

39 I. Human Right Watch, *Aceh Under Martial Law: Inside the Secret War*, Vol.15, No.10 (2003); K. E. Schulze, *The Free Aceh Movement (GAM): Anatomy of a Separatist Organization* (2004).

40 *The Context of the Current Violations: The Long War in Aceh*, by Human Rights Watch (Jakarta: Human Right Watch, 2004).

The conflict ended after the tsunami hit the region in 2004, and both signed a peace agreement in 2005. This peace process was facilitated by the Crisis Management Initiative (CMI), a Finland-based International NGO and supported by the European Union. This agreement resulted in acknowledging the Aceh autonomous region under the Indonesian State.⁴¹ Following this peace agreement, the government enacted a new law No.11 of 2006 on Governance of Aceh that legally recognized the region to manage all aspects of their life, including land resources management. Article 1, paragraph 2, has acknowledged that:

“Aceh is a provincial territory constituting legal community unit having a specific characteristic and provided with special authorities for self-governing and administering in the governmental affairs and for the interest of the local community in accordance with the statutory regulations in the system and principle of the Unitary State of the Republic of Indonesia based on the 1945 Constitution of the Republic of Indonesia, led by a Governor.”⁴²

Similarly, the Indonesian government had also provided a special autonomy for Papuan under Law No.21 of 2001 to regulate and manage their local governance and resources according to their own initiatives. Although there is still a Papuan liberation movement, the central government wants to ensure that the region rich in natural resources will not separate from the Indonesian territory. Thus, the Indonesian government's political approach by agreeing to provides a special autonomy status for the region manifests the international self-determination application, as stated in Article 4 of UNDRIP that:

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their international and local affairs, as well as ways and means for financing their autonomous functions.”⁴³

This provision insists on an alternative ‘meaning’ of self-determination under the UNDRIP instrument. This right aims to express indigenous political, economic, social, and cultural values that shall first and foremost be exercised through autonomy and self-

41 See Edward Aspinall, *The Helsinki Agreement: A More Promising Basis for Peace in Aceh?* (USA: East-West Center Washington, 2005); Dr Farid W Husain KBD Sp B, *TO SEE THE UNSEEN - Scenes behind the Aceh Peace Treaty* (Jakarta: PT. Rayana Komunikasindo, 2007); Damien Kingsbury, *Peace in Aceh: A Personal Account of the Helsinki Peace Process* (USA: Equinox Publishing, 2006); Damien Kingsbury, “The Aceh Peace Process” in Arndt Graf, Susanne Schroter & Edwin Wieringa, eds, *Aceh: History, Politics and Culture* (Singapore: Institute of Southeast Asian Studies, 2010).

42 *Undang-Undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh*, 11/2006 (2006). See Article 1

43 DESA, *supra* note 5. See Art.4

governing arrangements with indigenous people's own political institutions as principal actors.⁴⁴ Anaya argued that:

“Accept a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. In that context, the exercise of the right involves negotiation between states and the various indigenous peoples within those states to determine the political status of the indigenous peoples involved, and the means of pursuing their economic, social and cultural development. ...”⁴⁵

The doctrine of ‘internal self-determination’ focuses on maintaining the States’ integrity is adopted under human rights principles, such as non-discrimination, cultural integrity, land and resources, and social-economic development.⁴⁶ The discrimination against the indigenous population is one of the U.N. priorities over the last few decades, as stated in Art.1 Para 2 of CERD, that:

“...that in many regions of the world indigenous peoples have been, and still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and state enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.”⁴⁷

Furthermore, this statement shows that indigenous peoples were expelled from their lands, territories, and resources. The international law regime has emphasized the importance of land and resources to the survival of indigenous cultures and, by implication, indigenous rights to self-determination.⁴⁸ This claim is commonly mentioned by international human rights covenants, which affirms: “In no case may a people be deprived of its own means of subsistence.”⁴⁹ In addition, Article 26 of UNDRIP proclaimed that “Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁵⁰

44 Jessie Hohmann et al, eds, “Part I the UNDRIP’s Relationship to Existing International Law, relationship to Human Rights, and Related International Instruments” in *The UN Declaration on the Rights of Indigenous Peoples: a commentary* Oxford commentaries on international law, first edition ed (Oxford, United Kingdom: Oxford University Press, 2018).

45 Anaya, *supra* note 32, at 111.

46 *Ibid* at 129.

47 CERD, *General Recommendation XXIII: Indigenous Peoples*, U.N. Doc.CERD/C/51/misc 13/Rev 4 (1997), para 3.

48 Anaya, *supra* note 32, at 141.

49 Covenant on Civil and Political Rights, *supra* note 161, Art. 1(2); International Covenant on Economic, Social and Cultural Rights, Dec.16, 1996, G.A. Res.2200 (XXI), art.1 (2), 993 U.N.T.S. 3 (entered into force Jan.3. 1976).

50 *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2007). See Art. 26

The case of indigenous peoples in Aceh and Papuan represents the conflict related to lands and natural resources in contemporary Indonesia that involved the State, companies, and indigenous groups. The interconnection between political-economic interests and indigenous land occurred when indigenous lands, territories, and resources were controlled by ‘alien powers’ after obtaining the Indonesian State permit. This case led to armed revolt and separatist movements post-Indonesian independence, such as West Papua and Aceh.⁵¹

Nevertheless, granting special autonomy status for native regions also does not assure that the rights to lands, territories, and resources claimed by indigenous groups are guaranteed. The autonomous laws did not provide indigenous groups special rights to hold their ancestral lands but rather recognize local governments' special rights to carry out a self-government system (decentralization). In many cases, local governments become the new oligarchic powers that permit private companies to exploit natural resources, mainly located in indigenous or tribal inhabitants, such as forest-fringed village areas or other locations rich in natural resources. As a result, indigenous peoples continue to have experienced discrimination, and their local elites continuously expropriate their traditional land property by providing land concession rights to corporates.

Finally, the self-determination doctrine as stipulated in the international human rights conventions has been ‘adopted’ into several laws in Indonesia, especially in terms of the ‘internal self-determination’ approach. The Constitution has mentioned that Indonesia's unitary State is a final form, and there is no opportunity to propose the right of choice. Additionally, the Constitution has recognized the indigenous nations’ specificity or the difference in cultural identities across the Indonesian archipelago. Therefore, applying the self-determination principle meant each region of Indonesia, whose living across the archipelago, has the right to implement self-governance or autonomy status under the national interests and integrity.

2. Right to Land as Cultural Identities

Nowadays, several international and regional instruments have recognized indigenous people's right to culture, both the general human rights instruments and specific instruments on indigenous peoples. Several instruments, such as the UNESCO, ICCPR, and ICESCR conventions, are among the prevailing international norms that have discussed the protection of indigenous cultural rights. Meanwhile, the American Convention on Human Rights (ACHR) is the most comprehensive human rights instrument at the regional level in protecting indigenous peoples' cultural rights related to the indigenous collective land rights. The ACHR becomes the prototype for other

⁵¹ See P. Bang, *Papua Blood: An Account of West Papua* (2018); A. Missbach, *Separatist Conflict in Indonesia: The Long-Distance Politics of the Acehnese Diaspora* (2017); B. Vaughn, *Indonesia: Domestic Politics, Strategic Dynamics, and American Interests* (2010).

regions, such as the African countries, where the African human rights system has been following the Inter-American system, mainly in regulating indigenous peoples' rights.

Moreover, the ILO Convention and UNDRIP become the specific international instruments and the most comprehensive international standards in protecting indigenous peoples' rights, including in the context of cultural rights. In its Preamble, ILO169 recognizes: “The aspiration of these peoples to exercise control over their own institutions, ways of life... to maintain and develop their identities, languages, and religions, within the framework of the States in which they live.” Meanwhile, UNDRIP specifically addresses cultural rights, as it stipulates in part III of the Declaration entitled cultural rights of indigenous peoples. For indigenous peoples, rights to traditional lands represent both intangible and tangible, and these aspects are the core of their cultural identities.

Furthermore, ICESCR is also an essential international instrument in protecting cultural rights for all peoples. Although the Covenant does not discuss the relationship between cultural rights and indigenous land rights,⁵² the Treaty has encouraged all Parties to promote and take the maximum measurement to ensure all peoples have the right to express their culture freely without any discrimination.⁵³ The principle of non-discrimination has been mentioned in the Covenant's Preamble that: “...recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world...” For indigenous, securing land rights meant surviving their tradition. The relationship between cultural rights and traditional lands or territories is based on the principle that land is of central significance to a culture's sustenance, and to enjoy this right – it needs the protection of the land from any expropriation efforts.⁵⁴

In the Sixty-sixth session, the Committee on Economic, Social and Cultural Rights published an ‘Issued Paper on “State Obligation under the International Covenant on Economic, Social and Cultural Rights and governance of land tenure,” by referring to Resolution 73/165 of 17 December 2018, recommends that:

“States shall take appropriate measures to provide legal recognition for land tenure rights, including customary land tenure rights not currently protected by law, recognizing the existence of different models and systems. States shall protect legitimate tenure and ensure that peasants and other people working in rural areas are not arbitrarily or

⁵² ICESCR recognises several aspects of these rights, including (a) the rights to take part in cultural life, (b) the rights to enjoy the benefits of scientific progress and its application; (c) rights to benefit from one’s own scientific work and creative activity; (d) the rights to freedom of scientific work and creative activity. See *International Covenant on Economic, Social and Cultural Rights*, *supra* note 49. See Article 15

⁵³ See *Ibid.* See Article 3

⁵⁴ Jérémie Gilbert, *Indigenous peoples’ land rights under international law: from victims to actors*, 2nd ed (Ardsey, NY: Transnational Publishers, 2006) at 115.

unlawfully evicted and that their rights are not otherwise extinguished or infringed. States shall recognize and protect the natural commons and their related systems of collective use and management.”⁵⁵

This recommendation shows that the CESCR has moved forwards to focus on land rights, which are essential for indigenous people to survive. Without access to land, indigenous find themselves in a deteriorate situation economically, socially, and culturally. Indigenous or other isolated tribe people rely upon their traditional lands and resources based on the fact that land is the intangible and tangible asset that constitutes the basis for access to food, livelihood, housing, and necessary for the realization of their cultural life, such as practicing their language and religion.⁵⁶ Thus, displacing indigenous from their lands, such as the Amungme and Komoro people in Papua, and other indigenous in the Indonesia archipelago will severely impact their access to traditional livelihoods, such as hunting and fishing. Further, it also impacts the realization of the right to their cultural life.

The 1945 Indonesian Constitution has also acknowledged that indigenous peoples' or traditional society's cultures and rights should be protected. Article 28I Para.3 asserted that “The cultural identities and rights of traditional communities shall be respected in accordance with progressing times and civilization.”⁵⁷ The meaning of cultural identities and rights could be understood as intangible and tangible assets, such as ethnic languages, customs, traditional medicines, historic sites, traditional lands, and others. The recognition of communal land rights as a part of cultural rights has also been mentioned in several national laws. For instance, Article 6 of Law No.39 of 1999 on Human Rights states, “the cultural identity of indigenous peoples, including indigenous land rights, must be upheld, in accordance with the development of the times.” This law emphasizes that securing cultural identities, including traditional land, is a fundamental human right for indigenous peoples.

Several local governments had also issued district regulations to protect their territory's tangible cultural assets following the national law. For example, in West Kutai District, the government has issued regulation No.6 of 2014 concerning “The protection of traditional forests, historical sites, flora and fauna, and environmental preservation.” Article 1 Para 14 of the regulation states:

55 Committee on Economic, Social and Cultural Rights, “General discussion on land and the International Covenant on Economic, Social and Cultural Rights”, (2019), online: <<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/GeneralDiscussionLand.aspx>>. See Para. 7 (3)

56 Lucy Claridge et al, *Moving towards a right to land: the Committee on economic, social and cultural rights' treatment of land rights as human rights* (London: Centre on Human Rights in Conflict, University of East London, 2015) at 4.

57 This norm contains a contradiction. On the one hand, the State recognises indigenous cultural identities and their traditional rights, including the right to lands, territories, and resources. On the other hand, this recognition must be placed within the modern Indonesian state's civilisation framework. See Article 28I Indonesia, *supra* note 11.

“Indigenous rights consist of communal or individual rights inherent in indigenous groups, which derive from their social and cultural systems, particularly rights to lands, territories, and resources.”⁵⁸

Similarly, the local government of Sorong, West Papua, enacted a district regulation No.10 of 2007 concerning *Pengakuan dan Perlindungan Masyarakat Hukum Adat MOI di Kabupaten Sorong* (Recognition and Protection of Indigenous Peoples in Sorong District). Article 1 Para 20 insisted that indigenous peoples' lands or territories in the Sorong district consist of geographic landscape, social, and culture with specific demarcation border where they had owned, inhabited, managed, and utilized by the people on their customary law.⁵⁹ The relationship between cultural rights and traditional land is further stipulated in Article 11 para 3: “The communal land rights is the cultural property from indigenous peoples of Moi.”⁶⁰ This cultural property includes communal lands, forests, and coastal, including islands traditionally occupied or utilized by the indigenous Moi clan.

Last, as a pluralistic country, which consists of thousands of different ethnicities and cultural identities, Indonesia has constitutionally recognized indigenous peoples' cultural rights. This recognition has been mentioned in the Constitution, national and local regulations. However, in the Tangible Cultural Rights (TCR), such as historical sites, these objects become national property and controlled by the State's institution. Normatively, the State recognizes the TCR inherent with communal lands can be owned or controlled by indigenous with some conditions, including the land still existences, the existences stipulated by the State's law, and must not conflict with the State's interest. In this case, the State considers that culture associated with customary sites or customary lands are part of the State's property and must but determined based on legal provisions regarding property rights instead of cultural rights. Therefore, the State formed the indigenous collective rights land under the property rights, instead of cultural rights. For indigenous, the land is not just a physical place and property rights, but “their beliefs make remaining at that place a compelling dictate of faith.”⁶¹ A traditional land is also a place for a spiritual connection to the indigenous ancestral spirit, which is believed to remain within, and these become the reason the essential of land for indigenous survival.

58 *PERDA Kab. Kutai Barat No. 6 Tahun 2014 tentang Perlindungan terhadap Hutan Adat, Situs-Situs Bersejarah, Flora dan Fauna serta Pelestarian Lingkungan Hidup dalam Wilayah Kabupaten Kutai Barat*, 6 (2014).

59 B. Sorong, Peraturan Daerah Kabupaten Sorong No.10 Tahun 2007.

60 *Ibid.* See Article 11 Para 3

61 See Siegfried Wiessner, “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” (2011) 22:1 *The European Journal of International Law* 121-140.

3. Indigenous Land as Property Rights

Property rights under international law are a complex and controversial issue. Gilbert noted that the notion of property rights was linked to liberalism and colonialism perspectives.⁶² This right is mainly ruled under international private law and predominantly governed by domestic laws. The property rights are also regulated under international private law by insisting that the typical right is individually instead of collectively based.

However, the evolution of human rights had developed the scope of this right more extensively, by which was not merely the ‘privilege’ of the private law, but it has also become the scope of public law. Article 17 of UDHR stated that: “(1) Everyone has the right to own property alone as well as in association with others, and; (2) No one shall be arbitrarily deprived of his property.” The term “everyone” within this Declaration imposes on all individuals, including all members of indigenous groups. The provision also seemingly recognized the communal property rights, as it represents in the word “... to own property...in association with others.”⁶³

In this regard, indigenous peoples’ right to traditional lands and resources is based on communal properties or collective land rights.⁶⁴ This property belongs to the community where they use it to support their livelihood and preserve their traditional heritage.⁶⁵ Preserving their traditional heritage, such as their ancestral or traditional landscapes also categorized as protecting indigenous land property rights.⁶⁶ The case of *Mabo v Queensland (2)*, in which the High Court decided to favour Aboriginal and Torres Strait Islanders against Australia's government, shows indigenous collective land property rights have been recognized and protected under the principle of human rights.⁶⁷ This decision was taken after The Court annulled the principle of *terra nullius*, which assumed the concept is a “discriminatory fiction” and should not be regarded as a rule of international law.

In the Indonesian context, however, the State recognized the land rights as long as they have land titles or certificates of land ownership, either individually or collectively owned. Unfortunately, most indigenous groups cannot provide a legal certificate of their traditional land or forest property. It is caused by the different legal systems between the State law system and the indigenous legal system. The collective land property for

62 Gilbert, *supra* note 54, at 110.

63 General Assembly United Nations, “Universal Declaration of Human Rights | United Nations”, (1948), online: <<https://www.un.org/en/universal-declaration-human-rights/>>.

64 Gilbert, *supra* note 54, at 110.

65 Karolina Kuprecht, *Indigenous Peoples’ Cultural Property Claims Repatriation and Beyond* (Cham: Springer International Publishing, 2014) at 84.

66 Jérémie Gilbert, “Land Rights as Human Rights” (2017) 18 Sur - International Journal on Human Rights, online: <<https://sur.conectas.org/en/land-rights-human-rights/>>.

67 See Sven Lindqvist, *Terra nullius: a journey through no one’s land* (New York: New Press, 2007).

indigenous refers to the communal recognition, while the State is based on the file registration.

To overcome land ownership conflict over the collective right to land property, the Ministry of Agrarian Affairs and Spatial Planning issued regulation No. 5 of 1999 revised to the regulation No.18 of 2019 concerning “The Guidelines for Resolving Indigenous Peoples’ Collective Rights to Land.” Similarly, the Minister of Home Affairs enacted regulation No.54 of 2014 on “The Mechanism to Stipulate the Collective Rights to Indigenous People's Land. Overall, these regulations provide a legal standing in re-identifying the indigenous collective right to land and the process of legal recognition.

Nevertheless, the mechanism in determining indigenous peoples' collective rights to lands, territories, and resources through local regulations, or district head decrees, would face many obstacles. First, not all Head Districts have a political will to issue the legality document for the indigenous groups over their collective land property. Second, the provision of local government is inferior to the central government regulations [*lex superior derogat legi inferior*]. In the case of land concession permits issued by the central government, it was often annexed customary lands. For instance, the enactment of Law No.11 of 2020 concerning Job Creation or known as the Omnibus Law, shows the authoritarianism of the central government by removing the right of local government as the primary institution in issuing the recommendation for extractive industries in obtaining concession permit, in order to ease investment procedures.

This Omnibus Law has also created a more massive vulnerability to the land rights of indigenous peoples in Indonesia. First, the law does not specifically regulate the provisions of obligations for business license holders to settle land use with indigenous groups, especially on their land collective rights. Article 41 paragraph (18), related to amendments to Law No. 21 of 2014 concerning Geothermal (Oil and Gas) states that:

"In the case of using state land parcels, land rights, customary land, and or forest areas within the working area, the holder of Business Permit related to direct utilization or the holder of a Business Permit related to geothermal energy must first settle the land use with the land user on state land or holders of rights or business permits in the forestry sector in accordance with the provisions of laws and regulations."⁶⁸

This provision states that the settlement of the status of land rights must be settled by referring to and based on the regulation. Unfortunately, the provisions regarding indigenous land rights are only regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 18 of 2019 concerning Procedures for Administration of indigenous collective land rights (*hak ulayat*). The provisions of this regulation may exclude *ulayat* rights or does not recognise

68 See Article 41 para 18 of Omnibus Law

legally if it deemed to be contrary to national interests,⁶⁹ and or the rights have been granted or owned by third parties, either by individuals or by legal entities.⁷⁰

Second, the takeover of local governments' rights in terms of granting permits for land use permission to the central government. The centralization of these permits will make indigenous peoples difficult to advocate of their land rights that have been usurped by the state's investment policy. For instance, the Amendments of Article 15 of the Forestry Law as regulated in Article 38 of the Omnibus Law, in which it stated that the central government prioritises the gazettment of forest areas in strategic areas, which will be further regulated by government regulations. Instead, there is no explanation regarding "strategic areas", which can impact indigenous lands or territories.⁷¹

Third, in the context of environmental impact protection, the Omnibus Law has also removed the right to object to the results of the environmental impact analysis (AMDAL). The amendment of Article 26 paragraph (4) of Law No. 32 of 2009 concerning Environmental Protection and Management (UU PPLH), which regulates that people can file objections to the AMDAL document.

Finally, the provisions of Article 39 paragraph (3) of the Omnibus Law, in conjunction with Article 162 of Law No. 3 of 2020 concerning Mineral and Coal concerning Criminal Offenses against people who interfere with mining business activities can be punished with imprisonment for a maximum of 1 year or a fine of a maximum of 100 million rupiah. This provision can lead to "criminalization" of indigenous peoples who protest their collective land rights by corporations that have obtained permits from the state.

Furthermore, the concept of recognizing land property rights in the Indonesian agrarian law system based on the principle of individual rights. This legal approach has caused collective rights, especially to customary lands, easily ignorant by the state institution. Whereas in the context of international law, customary land for indigenous people is not only entitled as a property right, but also as a cultural right or cultural identity of the groups. These cultural rights have been recognized and protected by various international conventions, such as the Universal Declaration of Human Rights, ICCPR, ICESCR, ILO169, and UNDRIP.

Interestingly, the government has also issued Presidential Decree No.56/2017 concerning the mitigation of land procurement social impact. This decree aims to protect the rights of people, including indigenous people's rights regarding their well-being and human rights.⁷² However, this Decree is related to land acquisition for infrastructure

69 See Article 3 of Agrarian Law No.5 of 1960

70 See Article 4 of Agrarian Minister's regulation No.18 of 2019.

71 See Article 37 of Indonesian Omnibus Law revised to Article 15 of Forestry Law No.41 of 1999.

72 Sekar Banjaran Aji & Achmad Firas Khudi, "Indonesia's National Strategic Project, Displacement, and the New Poverty" (2021) 5:2 JSEAHR 136, online: <<https://jurnal.unej.ac.id/index.php/JSEAHR/article/view/23399>>.

development, such as roads, railways, airports, ports, housing, dams, and others that are part of the national strategic project.

In the context of a human rights perspective, this development policy must be correlated with the protection of human rights, particularly related to social and economic rights. In practice, this Decree just focuses on providing a compensation towards those who effected on their land property, instead of securing their land for sustaining their livelihood. At this point, the Decree merely legalized the effort of the state to develop of national infrastructure projects by ignoring the social and economic aspects of the people. The case of indigenous in Kulon Progo district of Yogyakarta who displaced from their land due to the construction of New Yogyakarta International Airport. The airport construction displaced about 2,800 households from their ancestral land, and it was led to a massif unemployment and caused a new poverty in the region.⁷³ The case of expulsion of indigenous peoples in Kulon Progo is one recent example, where similar cases also occurred in various other places in Indonesia. The approach of the developmentalist group which is supported by legal justification on land procurements often ignores the most basic rights of indigenous peoples that should be protected by the state.

To sum up, indigenous communal property land rights have experienced uncertainty and insecurity. The recognition of the rights under Article 18B of the 1945 Constitution does not guarantee that Indonesian indigenous people's rights to their ancestral lands, territories, and resources can be easily reclaimed. The implementation of nationalization law over the Dutch colonial properties had affected indigenous peoples' communal land rights. The land that was once expropriated by the colonial regime has now been continuously claimed to belong to Indonesia's modern State. The adoption of Law No.5 of 1960, Law No.5 of 1967, and other sectoral laws had made indigenous groups further impossible to reclaim their communal land properties. The land law doctrine - all unregistered land is considered the State land domain until proven otherwise - has created indigenous peoples' traditional lands vulnerable and insecure. For the states, the recognition of land property is based on individual rights. This recognition is based on the private legal system and land law, which both legal systems were derived from the Dutch colonial law regime. Meanwhile, for indigenous peoples, lands or territories are owned collectively instead of individually. Ultimately, this approach also maintained a dichotomy between the State's territorial sovereignty and the indigenous land property rights.

73 *Ibid.*

IV. CONCLUSION

Although the Indonesian government neither ratifies the ILO 169 nor adopts UNDRIP, the general international human rights instruments have constructed several norms in protecting the land property rights of indigenous peoples. Firstly, indigenous land rights are protected under the principle of internal self-determination. This right provides legal rights for all peoples to determine their internal affairs regarding politics, social-cultural, and economics. The concept of autonomy reflects the application of internal self-determination, in which indigenous people have the right to govern their internal affairs in all sectors autonomously. Secondly, there are no obstacles or discrimination experienced by indigenous peoples to gain State recognition and respect for the intangible culture. The State even claims that cultural diversity is a hallmark of Indonesia and becomes a national property. However, it becomes a problem when the tangible asset is related to indigenous peoples' traditional lands. The recognition must be followed by several layered conditions, both procedurally and substantially, which shall be proven legally under the national agrarian legal system. Finally, Indigenous land rights as communal property have been mentioned in several international instruments, ILO 169 and UNDRIP. However, since Indonesia is a non-ratification State of ILO 169, adopting a general human rights instrument will provide an alternative approach in protecting the collective right to indigenous peoples' land in Indonesia. Article 17 of the Declaration stated that every person has property rights individually or in association with others, and no one can deprive their rights. Although this provision is not specifically intended to protect indigenous rights to the land property, it also does not prevent indigenous from using this norm as the legal basis for protecting their property lands.

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