



“A sweetness like unto death”



Voices of the indigenous Malind of Merauke, Papua

2013



Forest
Peoples
Programme

PUSAKA



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Cover photo: Interviews with Malind women and children in Zanegi village, Anim Ha district, Merauke province

Inside cover photo: Malind children, Baad village, Anim Ha district, Merauke province

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Contents

Acronyms	4
Executive summary	6
Introduction	
Context	7
Rationale	11
Methods	12
Schedule	12
Papua: relations with the State	14
Area in question	16
Peoples in the area	19
Company profile	25
Community perspectives on the consultation process	
BAAD	28
WAYAU	31
KOA	36
ZANEGI	38
Legal framework of land rights and acquisition in Papua	44
Company perspective on consent-seeking process	49
Conclusions	51
Recommendations	
Government	52
Company	53
Non-Governmental organisations	54
References	55
Appendix I: Chronology of events	64
Appendix II: Extracts of selected laws and regulations	65
Endnotes	72

Textboxes

Free, Prior and Informed Consent	10
Origin myth of the Malind people	22
Indonesia's sugar high (and low)	27
The voices of Malind women	35
'We are a dying village'	42



'If we start selling the land, we might as well not have children or grand-children anymore, as they will have nowhere to live' – quote from community member

Acronyms

AMAN	Aliansi Masyarakat Adat Nusantara/Indigenous Peoples' Alliance of Indonesia
AMDAL	Analisis Mengenai Dampak Lingkungan/Environmental Impact Analysis
BAL	Basic Agrarian Law
BPN	Badan Pertanahan Nasional/National Land Bureau
BPKM	Badan Koordinasi Penanaman Modal/Investment Coordination Board
CIFOR	The Center for International Forestry Research
CSR	Corporate Social Responsibility
DOM	Daerah Operasi Militer/Military Operation Zone
ESIA	Environmental and Social Impact Assessment
FPIC	Free, Prior and Informed Consent
FPP	Forest Peoples Programme
GFSI	Global Food Security Index
GPFG	Norwegian Government Pension Fund Global
HCV	High Conservation Value
HGU	Hak Guna Usaha/Business Use Right
IFC CAO	International Finance Corporation Compliance/Advisor Ombudsman
ILO	International Labour Organisation
IUP	Izin Usaha Perkebunan/Plantation Business Permit
KKPA	Koperasi Kredit Primer Anggota/Primary Co-operative Credit for Members
Komnas HAM	Komisi Nasional Hak Azasi Manusia/Indonesian National Human Rights Commission
MP3EI	Masterplan Perluasan Pembangunan Ekonomi Indonesia/Masterplan for Acceleration and Expansion of Indonesia's Economic Development
MPR	Majelis Permusyawaratan Rakyat/People's Consultative Assembly
OPM	Organisasi Papua Merdeka/Papuan Independence Movement
PIR-Trans	Perkebunan Inti Rakyat Transmigrasi/Transmigration Nucleus Estate Scheme
PMPN	Program Nasional Pemberdayaan Masyarakat/National Programme for Community Empowerment
PSAL	Papua Special Autonomy Law/Otsus
PT ACP	PT Agriprima Cipta Persada
PT ARN	PT Anugrah Rejeki Nusantara
PT BIA	PT Bio Inti Agroindo
PT SIS	PT Selaras Inti Semesta
PT TSE	PT Tunas Sawa Erma
RSPO	Roundtable on Sustainable Palm Oil
SKP KAME	Sekretariat Keadilan dan Perdamaian Keuskupan Merauke/Secretariat for Justice and Peace of the Archdiocese of Merauke
SOP	Standard Operational Procedure
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNTEA	United Nations Temporary Executive Authority
UPR	Universal Periodic Review
UUPA	Undang Undang Pokok Agraria/Basic Agrarian Law
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security



Children of Zanegi

Executive summary

Since its inception in 2010, the government-endorsed 2 million ha Merauke Integrated Food and Energy Estate (MIFEE) project in Papua has been the cause of widespread outcry by a wide range of civil society actors who have documented the negative impacts of the project on the rights of the indigenous peoples of Papua. Despite three submissions made by civil society organisations to the United Nations Committee on the Elimination of All Forms of Racial Discrimination (UNCERD) in 2011 - 2013, and strong recommendations for a change of approach from the Committee itself, no action has been taken by the Indonesian government to provide better recognition and protection of the Papuan peoples' rights, nor remedy where these have been violated.

This report examines in detail the activities of one company, Wilmar-owned PT Anugrah Rejeki Nusantara (PT ARN) in Merauke district, with a particular focus on the processes of consultation underway between the company, the local government and the indigenous Malind communities of four villages whose lands are targeted for conversion to a projected 40,000 ha sugarcane plantation. The findings reveal that where local communities are giving their consent to the conversion of their customary lands, this is largely based on insufficient and one-sided information, non-guaranteed promises of economic and social welfare aid, unilaterally imposed terms of compensation, vague or non-existent contracts, and with little freedom of choice and expression. Purposeful manipulation and fragmentation of the Malind's customary community collective decision-making processes and representative institutions is leading to rampant elite co-optation, social fragmentation and intra/inter-community dissent. National and local regulations are either not being implemented, or interpreted to suit the interests of the companies and government, or inherently in contradiction with international human rights standards, and are in urgent need of reform. Particular concerns are raised over the threatened food security of the Malind peoples in the light of the conversion of vast areas of their customary lands to mono-crop plantations, as well as the consequences of this rapid and imposed transformation on their livelihoods, culture, identities and very survival as a people.

It is imperative that the government of Indonesia immediately suspend any part of that project that may threaten the cultural survival of the affected peoples and provide immediate support to indigenous communities – designed with their participation and consent – that have been deprived of their means of subsistence. National and local regulations need to be revised and harmonised in line with existing human rights instruments, including with regards to the right to FPIC. Regulations also need to be developed to allow for better implementation of the Papuan Special Autonomy Law (PSAL). PT ARN, and other companies operating in Papua, must provide comprehensive and impartial information to communities sufficiently in advance of any project going ahead, under conditions where communities are free to express themselves, and consult with them in ways that respect communities' right to *withhold* their consent. Sufficient time needs to be given to communities to reach decisions through their own customary decision-making structures and representatives. Promises of benefit-sharing and development must be negotiated thoroughly with the community and their implementation independently monitored and verified. Meanwhile, civil society organisations must continue providing legal and human rights training to communities, support lesson-sharing between communities and help raise the voices of affected indigenous Malind people at the national and international levels to support rights-based development based on self-determination and respect for the right to Free, Prior and Informed Consent.

Ever since their inception, monocrop plantations have been associated with land concentration, exploitation of labour, slavery-like practices and the ruination of indigenous peoples.

Colchester M, S Chao & N Jiwan 2013 *Conflict or consent? Oil palm expansion and community rights*. Paper presented at the Annual World Bank Conference on Land and Poverty, World Bank, Washington, D.C. 8th – 11th April 2013.

Introduction

Context

PT Anugrah Rejeki Nusantara (hereforth referred to as PT ARN) is one of over 80 documented companies operating, or seeking to operate, in Papua as part of the government-initiated 2 million hectare Merauke Integrated Food and Energy Estate (MIFEE) project, launched in 2010 by the government of Indonesia in response to the food crisis of 2008 ('feed Indonesia, then feed the world'). MIFEE is part of the central government's Masterplan for the Acceleration and Expansion of Indonesia's Economic Development (MP3EI) for 2011 to 2025. The project is valued at approximately \$5 billion and ostensibly aims to rapidly increase agricultural output, putting Indonesia on track toward self-sufficiency in basic foodstuffs.¹

Since its inception five years ago, the MIFEE project has been the cause of widespread outcry by civil society actors, including NGOs, IPOs and academics, as well as regional and international human rights institutions, who have documented and criticised the top-down project for its potential negative impacts on the rights of the indigenous peoples of Papua. These include reports of violations of communities' rights to customary lands and livelihoods, and of their right to Free, Prior and Informed Consent, as well as reports of a lack of credible benefit-sharing mechanisms for these communities being anticipated by the project operators. Particular concerns have been raised on the threat to the food security of these largely forest-dependent peoples posed by the conversion of vast areas of their customary lands to industrial mono-crop plantations by both domestic and foreign investors.²

Statements from government bodies have done little to alleviate concerns over the threats to the protection and promotion of the rights of Papua's indigenous peoples. For instance, the Unit for the Acceleration of Development in Papua and West Papua (UP4B), tasked, according to its Chairman Bambang Darmono, with building the basis for sustainable development, in line with the aspirations of local communities leading towards social integration,³ declared publicly in 2011 that 'we do not need the people of Papua, we need the land of Papua' ('*kami tidak butuh orang Papua, tetapi kami butuh tanah Papua*').⁴ In 2011, at a workshop organised in Jayapura by The Center for International Forestry Research (CIFOR) on Forestry and Plantations Sector Investments in Papua in the context of the Implementation of Low Carbon Development, the Head of the Forestry Agency of Merauke stated publicly that 'regardless of what the communities and the NGOs have to say about MIFEE, MIFEE will go ahead anyways'.⁵

The MIFEE project has been brought to the attention of the United Nations by Forest Peoples Programme and twelve other signatories through a Request for Consideration of the Situation

of Indigenous Peoples in Merauke on 21st July 2011 under the United Nations Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures.⁶ UNCERD issued a formal communication to the Permanent Mission of Indonesia on 2nd September 2011,⁷ but Indonesia failed to respond to the communication, prompting the signatories to send a Request for Further Consideration under UNCERD's Urgent Action and Early Warning Procedures on 6th February 2012.⁸ At the time of writing (over two years since the original submission was made), no response had been received from the Indonesian government to the recommendations made by the CERD Committee. A third submission to UNCERD was made shortly following the fieldtrip of which this is the report, based on the findings therein and further visits made to other oil palm and timber concessions in Merauke district,⁹ following which further recommendations were made to the government of Indonesia by the CERD Committee.¹⁰ The United Nations Special Rapporteur on the Rights of Indigenous Peoples has also been called upon to urgently bring up the human rights violations associated with the MIFEE project to the government of Indonesia, most recently at the Asia Regional Consultation with the Special Rapporteur in Kuala Lumpur in March 2013.¹¹

The company investigated in this report, PT ARN, is a 95%-owned subsidiary of Wilmar, a Singapore-based multinational company and one of the largest agribusiness corporations in Asia, with a sectoral focus on palm oil production and processing. In 2010, Wilmar announced that it was extending its operations to the sugarcane sector and acquired PT ARN in May 2011.¹² Of the 40,000 ha targeted by the company in Merauke district, an estimated 25,000 ha will be available for actual production of sugarcane destined for domestic consumption.¹³ The lands targeted are the customary lands of four indigenous Malind communities – Baad, Koa, Wayau and Zanegi.

On 2nd November 2012, concerns were raised by the communities of Baad and Koa villages over the potential impacts on their livelihoods and access to land of this projected development on their customary lands.¹⁴ On 11th February 2013, it was made public that PT ARN was carrying out consultations ('*sosialisasi*') with the affected communities towards their Environmental and Social Impact Assessment (AMDAL), and that participatory mapping of customary lands had been carried out by the company.¹⁵ The purpose of this investigation was therefore to meet with the affected communities and assess, from their perspective, the process of consultations undertaken by PT ARN and the degree to which these communities' right to give or withhold their Free, Prior and Informed Consent is being respected.

In addition to being a member of the Roundtable on Sustainable Palm Oil (RSPO) since 2005 and of the United Nations Global Compact since 2008,¹⁶ Wilmar has also made a number of commitments to sustainability,¹⁷ community development¹⁸ and core values including 'integrity' and all-round 'excellence',¹⁹ as well as human rights.²⁰ As a receiver of loans from the lending branch of the World Bank, the International Finance Corporation (IFC), Wilmar is required to abide by the IFC Performance Standards, notably Performance Standard 7 on Indigenous Peoples, which underscores the need for Borrowers and Bank staff to identify indigenous peoples, consult with them, ensure that they participate in, and benefit from Bank-funded operations in a culturally appropriate way.²¹ However, Wilmar has yet to offer to join a certification standard (e.g. BonSucro) for its sugarcane operations.

Despite these commitments and obligations, the precedents set by Wilmar both in Indonesia²² and in Africa²³ have led to several complaints from civil society organisations in support of

indigenous peoples and local communities negatively affected by the company's operations. Complaints have highlighted Wilmar's failure on several occasions to adhere to the law, its takeover of communities' lands without their consent, the clearance of forests without prior environmental impact assessments and illegal burning.²⁴ There are numerous ongoing land disputes between Wilmar subsidiaries and local communities, as well as conflicts over the way the company's subsidiaries treats smallholders.²⁵

Complaints have been made through the RSPO's Complaints Panel, but also through the International Finance Corporation's Compliance/Advisor Ombudsman (IFC CAO), as Wilmar receives substantial support from the World Bank's private sector arm. In July 2007, Forest Peoples Programme with 18 other NGOs including local groups in Indonesia filed a complaint with the International Finance Corporation's (IFC) Compliance Advisory Ombudsman (CAO) about the IFC's funding of the palm oil producing and trading company, Wilmar.²⁶ The complaint raised concerns about the impacts of Wilmar's operations on local communities and company violations of Indonesian laws and environmental policies.

A second complaint was submitted to the IFC CAO in December 2008, when it was discovered that the IFC had approved a Wilmar-owned palm oil processing company despite the fact that the IFC was, at the time, subject to an audit by the CAO for a previous project to support the same company. Following the release of a highly critical audit by the IFC's independent 'complaints advisory ombudsman' which confirmed the findings of the NGO consortium, the President of the World Bank, Robert Zoellick, agreed to suspend World Bank funding of the oil palm sector pending the development of a revised strategy for dealing with the troubled sector.

A third complaint was submitted to the IFC CAO in November 2011 with regards to Wilmar's operations following an independent investigation by Forest Peoples Programme, Sawit Watch and HuMa in the Wilmar subsidiary plantation PT Asiatic Persada, Jambi, Sumatra.²⁷ The field assessment identified serious human rights abuses against the indigenous Batin Sembilan peoples living within the concession, including the systematic eviction of some 83 families from their homes and the destruction of their dwellings. At the time of writing, a further complaint had been made to Wilmar as the Group has now sold off this concession to non-IFC funded and non-RSPO companies without any prior consultation with the affected communities, despite the fact that IFC CAO mediation was still ongoing at the time of the sale agreement.²⁸

Wilmar's environmental track record led the Norwegian Government Pension Fund Global (GPF) to sell its stakes in the company (and 22 others) in 2012, based on the findings of its annual report that revealed how the activities of Wilmar were incompatible with the Fund's policy related to climate change and tropical deforestation.²⁹ In both 2011 and 2012, Wilmar was named the 'worst company in the world' in terms of environmental performance by Newsweek.³⁰

Doubts as to Wilmar's commitment to transparency and multi-stakeholder engagement were also sparked prior to the investigation documented in this report, as field operating staff responded to the enquiry from civil society organisations to meet with the single word reply 'spam' and then later accused them of illegally obtaining the company's contact details. A complaint was filed with Wilmar and signed by over 30 signatory civil society organisations at the international, national and local levels. As a result, a meeting was granted with PT ARN staff in Jakarta but it was not possible to meet with field office staff.³¹

Free, Prior and Informed Consent

Free, Prior and Informed Consent has emerged as a principle of international law that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and other properties. FPIC is a collective right of indigenous peoples to make decisions through their own freely chosen representatives and customary or other institutions and to give or withhold their consent prior to the approval by government, industry or other outside party of any project that may affect the lands, territories and resources that they customarily own, occupy or otherwise use. Respect for the right to FPIC is an obligation (or legal duty) of governments that have committed themselves as members of intergovernmental bodies through their ratification or endorsement of one or more of the following instruments (and see Appendix II):

- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*
- *International Covenant on Civil and Political Rights (ICCPR)*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*
- *International Labour Organisation Indigenous and Tribal Populations Convention No. 107 (ILO Convention: C107)*
- *International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention: C169)* and
- the Conference of Parties' decisions relating to the implementation of the *Convention on Biological Diversity (CBD)*.

The United Nations Declaration on the Rights of Indigenous Peoples (2007) most clearly articulates the right of indigenous peoples to FPIC and related rights to be represented through their own institutions; to exercise customary law; to the ownership of the lands, territories and natural resources that they traditionally own or otherwise occupy or use; to self-identification; and, more fundamentally, to self-determination. All laws listed above have been interpreted as supporting the right to FPIC and to self-determination of all peoples in international jurisprudence and the statements of United Nations bodies and Rapporteurs, including the United Nations Special Rapporteur on the Rights of Indigenous Peoples and the United Nations Special Rapporteur on the Right to Food.

In addition to the above, the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, negotiated and endorsed by the 194 member governments of the Committee on World Food Security, set out detailed provisions for the good governance of lands, fisheries and forests, which include: securing communities' rights in land, including respecting informal tenures and the customary rights of indigenous peoples; improved government capacity to administer lands transparently and without corruption; providing secure rights to women and other marginal groups; ensuring that all land transfers are effected in consultative ways, including respect for indigenous peoples' right to free, prior and informed consent; providing access to justice; ensuring dispute resolution, including through the use of customary approaches and; including options for the restitution of lands.

Free: implies no coercion, intimidation or manipulation

Prior: implies consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect of time requirements of indigenous consultation/consensus processes

Informed: implies that information is provided that covers (at least) the following aspects:

- The nature, size, pace, duration, reversibility and scope of any proposed project
- The reason(s) or purpose of the project
- The location of areas that will be affected
- A preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits
- Personnel likely to be involved in the implementation of the project
- Procedures that the project may entail

Consent: consultation and participation are key elements of a consent process. Consultation must be undertaken in good faith. The parties must establish a dialogue allowing them to identify appropriate and workable solutions in an atmosphere of mutual respect, and full and equitable participation, with ample time to reach decisions. This process may include the option of withholding consent. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives and customary or other institutions. The participation of women, youth and children are preferable where appropriate.

Source: UNPFII 2005 *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*. Document E/C.19/2005/3, submitted to the Fourth Session of the UN Permanent Forum on Indigenous Issues, 16th – 17th May.

Rationale

The purpose of this report is to assess, based on detailed field information, the extent to which Wilmar's sugarcane operation PT ARN is implementing consultations with local communities in ways that recognise and respect the right of these communities to give or to withhold their Free, Prior and Informed Consent. Particular attention is given to the impacts of private sector investments on customary lands on the food access and security of local communities, as well as impacts on their culture and *adat* traditions. Irregularities in the company's consultation processes are documented in order to support redress to relevant parties.

This report will be used to push for reforms in the way PT ARN adheres to the principle of Free, Prior and Informed Consent and respects customary rights to land, and to demand changes on the ground where requested by impacted communities. A substantial part of the fieldwork involved information-sharing and training of local communities on human and land rights under international and national law, with the objective of strengthening their capacity to demand respect for their rights from companies and the government. Further training was provided on community organisation, representation, decision-making processes and preparations to enter negotiations with the two aforementioned parties. Both of these capacity-building activities were followed by workshops and further consultations. The findings of this investigation were also used as part of a renewed submission to the United Nations Committee on the Elimination of All Forms of Racial Discrimination in August 2013.³²

Methods

The team operated independently of Wilmar and used an informal interview-based approach to build up an understanding of the situation and determine the sequence of events. Wherever possible, efforts were made to corroborate allegations or claims through at least three sources. Where this was not possible, the text in the report seeks to make clear that the information being recorded is the view or assertion of only one or two parties.

Verification was also made by looking at all available documents, maps, photos and videos. Recordings were made of all meetings. A photographic record was also made. The team stayed in the various villages and interviewed a wide range of people involved including various community leaders (*ketua adat*, *kepala kampung*, *ketua marga*), affected villagers, women and children, the elderly and youth.³³ Anonymity of interviewed individuals is maintained throughout this report for reasons of security.

On-site fieldwork has been complemented by analysis of primary and secondary sources, such as NGO publications, social and environmental impact assessments, Standard Operational Procedures, contracts, maps, land tenure studies, press coverage and company annual reports. This report was shared with the company for comments prior to publication. Anonymity of interviewed persons is respected throughout the report is for reasons of security.

Schedule

The 11-day field investigation on which this report is based took place in three villages within the planned PT ARN concession (Baad, Wayau and Zanegi) and with members of a fourth affected community, Koa, which the team were unable to reach due to flooding.³⁴ Meetings with the company staff of the PT ARN Jakarta office, government bodies and partner NGO SKP took place in Jakarta and Merauke.

Date	Location	Activity	Key issues addressed
06.05.13	Jakarta	Meeting with PT ARN (9.30 – 11.00)	Wilmar's sugarcane investments, consultation process in PT ARN, sugarcane market trends, community needs
15.05.13	Jakarta - Merauke	Flight to Merauke	
16.05.13	Merauke	Meeting with Investment Coordination Board (BPKM) (13.30 – 15.00)	Latest data on current investments, status and types of operations and stages of permit issuance in Merauke Background information on PT ARN
	Merauke	Meeting with SKP (19.30 – 23.00)	Briefing, overview of recent developments in affected communities, exploring ideas for community capacity-

			building
17.05.13	Merauke	Meeting with Archbishop of Merauke (8.00 – 9.30)	Lack of educational facilities in Merauke, ideas for community capacity-building through education
	Merauke	Forestry Agency (15.30 – 18.30)	Customary land rights in Papua, permit allocation process, mapping and consultation procedures, perceptions on MIFEE
	Merauke	Meeting with SKP (20.00 – 21.30)	Technical planning for fieldtrip
18.05.13	Merauke – Nohdeg	Travel to Baad	Overnight in Nohdeg
19.05.13		Travel to Baad	
		Community interviews	Malind culture, history and land tenure
20.05.13	Baad	Community interviews	Malind tenure, consultation process of PT ARN, MIFEE project
21.05.13	Baad - Wayau	Interview with community women	Women's rights to land and in decision-making, gender-based division of labour, strategies for women's empowerment through education
		Travel to Wayau	
22.05.13	Wayau	Interviews with community members	Consultation process with PT ARN, compensation arrangements, recommendations to PT ARN, information-sharing on FPIC and international human rights law, overview of experiences of FPP & Pusaka in Wilmar-focused advocacy in palm oil sector
		Interviews with community women and children	Malind culture (marriage, birth, coming of age, death), women's rights under <i>adat</i> , land tenure, health and education, food access and quality, hopes and aspirations for future generations
23.05.13	Wayau - Zanegi	Interviews with Koa community members	Consultation process with PT ARN, compensation arrangements, information-sharing on FPIC and international human rights law
		Travel to Zanegi	
24.05.13	Zanegi	Interviews with community	Health and education, access

	women and children		to food, changes in livelihoods since MEDCO operationalisation
	Discussion with MEDCO CSR staff		MEDCO CSR policy and commitments, conservation policy, strategic plan 2013++
	Interview with head of village		Update on MEDCO situation, consultation process with PT ARN, land release terms of agreement with local community
25.05.13	Zanegi - Merauke	Return to Merauke	
		De-briefing with SKP	Findings of investigation, next steps
19.08.13	Jakarta	Meeting with PT ARN	Cross-checking field findings, recommendations

Papua: relations with the State

The politics and history of West Papua since its incorporation in the Indonesian State have been characterised by military repression, marginalisation of the indigenous Papuans in policy and decision-making, co-optation of indigenous elites, and widespread and State-endorsed exploitation of Papua's rich natural resources. Governance and rule over the region remains highly centralised, despite laws developed in recognition of, and to seek redress, for the acknowledged violations of the rights of the Papuan people to land, natural resources and basic freedoms.³⁵

Although formerly not part of Indonesia, occupation of then-called West New Guinea was central to President Sukarno's struggle for independence from Dutch colonisation, as the Dutch sought to hold onto West Papua after relinquishing their colonies in the rest of what is now Indonesia.³⁶ After several failed negotiation attempts between the Netherlands and Indonesia, a treaty was signed in 1962, the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian) (or the New York Agreement), between the Netherlands, Indonesia and the United Nations on the administration of West New Guinea, which required authority over the region to be transferred to a United Nations Temporary Executive Authority (UNTEA) on 1st October 1962, and which stipulated a referendum within six years to allow Papuans to decide whether they wished to be included as part of Indonesia or become an independent State. The controversial referendum, called the 'Act of Free Choice' took place in 1969, in which the military handpicked and coerced through threats and intimidation some 1,026 Papuans into voting in favour of incorporation. To this day, the 'Act of No Choice' as it is locally referred to, is rejected by the vast majority of Papuans, who continue to demand a vote of real self-determination.³⁷

Military oppression, socio-economic and political exclusion, and physical and psychological intimidation of the Papuan peoples fuelled fear and distrust in the central government, particularly during the thirty years of Suharto's regime, during a decade of which Papua was

declared a Military Operation Zone (*Daerah Operasi Militer/DOM*) and separatist movements violently clamped down. To this day, occasional raids by armed separatist forces (*Organisasi Papua Merdeka/OPM*) are frequently used to legitimise continued occupation and the criminalisation of any discussion about independence.³⁸ Papua was also subject to the State-organised transmigration programme that sought to relocate millions of landless farmers from the densely populated Java to the ‘idle lands’ of the ‘outer islands’.³⁹ This scheme is widely seen by Papuans as a strategy of domination, assimilation and cultural dilution encouraged by the Indonesian State, and a source of deep resentment and sporadic conflict with transmigrant groups.

A decentralisation policy for the region was enacted in 1999 and Special Autonomy Status given to Papua in 2001⁴⁰ under the Papua Special Autonomy Law (PSAL or *Otsus*), which was adopted as an alternative to demands for independence made by the representatives of the Papuan indigenous peoples to the President of Indonesia in February 1999.⁴¹ This law was intended to correct serious inequality and human rights violations as well as to refocus the self-determination aspirations expressed by the majority of indigenous Papuans. The PSAL includes an explicit acknowledgement that

the administration and development of the Papua Province has not complied with the sense of justice, has not yet achieved prosperity for all people, has not yet fully supported law enforcement, and has not yet respected the human rights of people in Papua Province, in particular among the Papuan indigenous communities; and (2) that the management and use of the natural wealth of Papuan land has not yet been optimally utilised to enhance the living standard of the indigenous Papuan peoples, creating a wide socio-economic gap between Papua Province and other regions, and violating the basic rights of indigenous Papuans.⁴²

Following decentralisation, a larger share of taxes from West Papua were returned by the national government, with transfers rising from under 5.000 billion Rupiah (500 Million USD) in 2001 to over 20.000 billion in 2008.⁴³ However, ten years down the track, these extra billions have not reached most of the Papuan inhabitants. Instead, the political elite use the funds for its own (private) version of development whilst basing their power on compliance with Jakarta, the military and votes from the increasing number of Javanese migrants. The MIFEE project is, in the words of Ginting and Pye, ‘set firmly within this framework of military-business-politicians networks and of political intimidation and oppression.’⁴⁴

Furthermore, despite the adoption of the PSAL in 2001, which is intended to decentralise decision making over prescribed issues to the provincial level, the law remains largely unimplemented due the absence of the required subsidiary legislation. In any case, decision making over issues pertaining to the exploitation of natural resources – the subject of this request - remains largely vested in the central government in Jakarta and is controlled by national laws that have been considered by bodies including the CERD Committee as prejudicial to indigenous peoples’ rights.⁴⁵

The Indonesian State is now in the process of amending the PSAL because, according to the Office of the President, ‘the people have held the view that special autonomy has failed....’⁴⁶ However, while discussions about the amendments are taking place between the State and regional government bodies in Papua, there has been no attempt to-date to consult with indigenous Papuans in accordance with international standards about these amendments. This is especially troubling given that it is widely acknowledged that the PSAL has failed largely

due to, as stated by the Indonesian Institute of Sciences, a ‘lack of ownership’ over that law by all parties.⁴⁷

Lack of implementation of the Autonomy Law is especially apparent in relation to securing the territorial rights of indigenous Papuans. Implementing regulations and agency capacity to recognise or create cadastres of customary lands are still lacking. Therefore, despite the legal recognition of vague customary rights, in practice, as in the rest of Indonesia, the State generally treats traditionally owned indigenous lands in Papua as State lands unencumbered with rights.⁴⁸ In addition, the majority of the MIFEE area is classed as ‘forest’ and falls under the jurisdiction of the Ministry of Forests, which interprets the 1999 Forestry Law as further limiting indigenous peoples’ customary rights. However, a landmark decision by the Constitutional Court in May 2013 may open the way for a major reallocation of forests back to the indigenous peoples of Indonesia who have long occupied them and looked after them, including the Malind of Merauke.⁴⁹ In what may well prove to be a historic judgment for Indonesia's indigenous peoples, the Constitutional Court in Jakarta ruled that the customary forests of indigenous peoples should not be classed as falling in ‘State Forest Areas’, paving the way for a wider recognition of indigenous peoples’ rights across the archipelago.⁵⁰

Area in question

The concession of PT ARN is located in Merauke Regency, the largest of the 29 Regencies in Papua Province, and located in the south of Papua province. Merauke is composed of 11 sub-districts (Merauke, Semangga, Tanah Miring, Jagebob, Sota, Elikobel, Ulilin, Kurik, Okaba, Muting and Kimaam) and shares borders with the Regencies of Boven Digoel and Mappi to the north, Papua New Guinea to the east, and the Arafura Sea to the south and west.

Papua is the largest province in Indonesia, but also the least densely populated: based on projections for 2008, the total population of Papua was of 2,469,785 with an average growth of 4.18% per year, equivalent to 6 inhabitants per km².⁵¹ The Merauke Regency covers a total area of 45,071 km² (11% of Papua province) and is inhabited by an estimated 233,000 individuals⁵², less than half of whom are indigenous Papuans as a result of government-sponsored immigration schemes from other parts of the Indonesian archipelago. Just over 30% of the population of Merauke (71,838) live in the capital city of Merauke to the southeast of the Regency.

Merauke Regency is an ecologically rich region, encompassing varied ecosystems with high biodiversity, ranging from mangrove forests, marshes, swamps and wetlands to savannah and dense forests. The interior of the Regency is abundant in natural resources, including oil, gold, gas, timber and arable land. The northern inland is characterised by high plains and hilly landscapes (slope gradient 8 – 12%), while the south is largely low marshes and swamps (slope gradient 0 – 3%), which cover over 1,425,000 ha. Over 95% of the territory was classified as forest in 2010, of which 75.16% had intact forest cover. Much of the Merauke Regency is composed of peatland. Several rivers run through the Regency, the largest being River/Kali Bian, Digul, Maro, Yuliana, Lorents and Kumbe. The Wasur National Park, covering a total area of 413,810 ha, is located in the Regencies of Sota, Naukenjerai and Merauke, and is known for its wide variety of endemic and migrant protected bird species (at least 421).

The southern coast of Papua Regency is constituted of timber sediment, classified alluvium sediment, quartz sand and pumice. Soil types found across the area include grey

hydromorphic, alluvial and organosol soil.⁵³ The climate of Merauke is wet and tropical, with an average air humidity of 78-81%. Climate differs between the hilly north and the marshy south, but generally features five to six months of monsoon followed by a slightly longer dry season. In the northern plains, the change in season is marked by monsoon winds from the sea to the west, signalling the wet season, and monsoon winds from the east and southeast, making the beginning of the dry season. Climate characteristics allow for two harvests a year in most areas of Merauke. Travel by road is practically impossible in many parts of the Regency during the wettest part of the rainy season, when onsets of malaria are common. The dry season, on the other hand, annually gives rise to clean water shortages and irrigation complications for farmers.⁵⁴



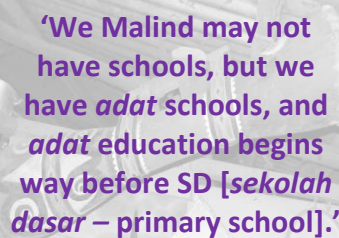
The communities of Koa, Baad and Wayao rely on the Kali Kumbe river, which runs southwards through the three villages, for transport as well as fishing

Peoples in the area

The indigenous peoples of Papua are Melanesian and distinct from the rest of the inhabitants of the Indonesian archipelago. They are organised along distinct tribal lines and speak some 253 different languages. Indigenous Papuans are approximately 60% of the population of Papua, with the other 40% of the population made up of migrants and transmigrants from other parts of Indonesia.

The population of Merauke is composed in large majority of the indigenous Malind Anim⁵⁵ ('Anim' meaning people), or Marind-anim as frequently referred to in earlier ethnographies, and a large number of incoming migrants, including from Java and Makassar, as part of the government-sponsored transmigration scheme. The Malind Anim of Merauke are related to other peoples speaking related Malind⁵⁶ languages, including the Mandobo and Muyu peoples in the north and the Mappi and Asmat in the northwest. Some of the Malind Anim in Merauke retain links with related Malind communities in today's Papua New Guinea, as the customary territories of the various groups and clans (*marga*) extend across this relatively new frontier. The land of the Malind Anim is referred to as Anim-ha and they trace their genesis back to present-day Kondo (see box on The Myth of Origin of the Malind people). The Malind Anim consist of 7 clans (*marga*) and sub-tribes of each *marga*, all represented by a *marga* head. Village heads (*kepala kampung*) are an import of Indonesian rule, and heads of *marga* continue to retain greater legitimacy, authority and power than village heads.

Livelihoods and culture



'We Malind may not have schools, but we have *adat* schools, and *adat* education begins way before SD [sekolah dasar – primary school].'

The staple food of the Malind is sago, the starchy interior of a palm species which is abundant in the area and grown as sago forests. Sago is consumed both dry when grilled (*sago sep*) or wet as a gluey paste called *bopeda*. However, rice is increasingly consumed as well as imported commodities such as instant noodles, and many of the younger generations say they prefer rice to sago, while elders note that sago is more nutritious and tasty. This diet is supplemented by hunting wild animals in the forest (deer, kangaroo, turtles, crocodile, cassowary and boar) and fish from the river Kumbe. The Malind also collect fruit from trees in their gardens and in the forest, including mangoes, rambutan, papayas, bananas, coconuts and grapefruits. A wide range of medicinal plants found in the forest, including cures for malaria, dengue fever, dysentery and migraine (use of leaves, roots, bark and fruit as well as sap).

Men teach young boys to hunt while women teach daughters to cook and harvest sago. While hunting is practised by men alone, fishing is practised by both men and women, with the men throwing the nets and the women gathering the catch. Catch is customarily shared within the nuclear household, and any surplus given to extended kin. However, with land growing scarce due to company development projects, game is in short supply and the best cuts often sold to grocery stores, while the family itself consumes the remains. Most of the present-day villages were formed during the Dutch colonial period when Malind peoples were encouraged to sedentarise, but in many parts of the region, the Malind continue a highly mobile lifestyle to sustain their hunting needs, camping in bivouacs for several days on end and returning to the villages on Sundays for mass.



The sago is the traditional staple food of the Malind peoples, but is gradually being replaced by imported commodities such as rice and instant noodles, as land and forest needed to grow the crop are being converted to industrial plantations

Custom (*adat*) continues to play a central role in Malind social organisation, livelihoods, relations with the environment, relations with other clans and outsiders and beliefs. *Adat* practice is imparted to younger generations by the elders, and knowledge of *adat* is the prerogative of ‘experts’ within the community, who alone hold the right to impart this knowledge.

The Malind peoples to this day practice ritual fasting as part of rites of passage throughout life, including at the birth of the first child (similar to the practice of *couvade*), during illness of a family member, at the coming of age of children, and after a death. Meat is avoided by the fasting parents, wider family members and/or the individual undergoing the transition, as well as temporary exclusion from the community for a period of one month or more, during which they also do not wash. Ritual fasting is believed to prevent disease and is said to be ‘a medicine for all illnesses’. Inter-marriage with outsiders and the decline of the practice are commonly referred to as the cause of illness, misfortune and death.

Totems associated with the Malind marga (non-exhaustive list)

<i>Marga</i>	<i>Totem</i>
Gebze	coconut, <i>keluang</i> (type of bat)
Mahuze	dog, sago, <i>burung kuning</i> (yellow bird)
Likenze	<i>burung dik</i> (<i>dik</i> bird)
Kaize	cassowary
Belakaize	<i>kidup</i> (type of bird similar to falcon)
Samkakaize	kangaroo
Basikbasik	pig

Another widespread belief of the Malind and other Papuan indigenous peoples, is that of sorcery or witchcraft, commonly referred to as *suwanggi*, which is believed to be the cause of sudden deaths, of illnesses that cannot be cured easily or at all, and of the dead being reborn again. Sorcerers are believed to hold the skills to practice *suwanggi* through *adat* rituals, and such curses are testified to by the appearance or cries of specific animals. Sorcerers can be recognised from their fear of water, and must be carried across rivers and marshes.



Malind men hunt a wide variety of forest-dwelling animals, while both men and women fish from the nearby Kali Kum(be) river and marshes (left). Each spear is marked with designs specific to different clans (*marga*) and marks the ownership of the catch (right)

Land tenure

Land features prominently in the myth of origin of the Malind Anim (see box below) and is frequently referred to by the Malind as ‘sacred’ and as their ‘mother’ and ‘ancestor’, with people, animals and land seen as inextricably connected and indivisible. Each clan also has ownership over different, often vast, areas of land.⁵⁷ This geography is created by the memory of paths that ancestors have taken, or where they stopped to spend the night. Tales of the ancestors, the Dema, are passed from generation to generation, and their descendants believe that they have a duty to protect that land. If they fail to do so, bad luck will befall them.

‘Adat existed before the state and before religion. It gives safety and structure to our lives.’

Origin myth of the Malind people

'All the land of the Malind was divided among the seven *marga* at the genesis of our kind. So what land is there to give to investors? Our ancestors did not give us our land for us to sell it to companies. We know that our ancestors exist from the nature around us. To sell it is to kill ourselves. If we start selling the land, we might as well not have children or grand-children anymore, as they will have nowhere to live.'

Community member, Baad village

The genesis of the Malind peoples, transmitted orally by *adat* representatives through stories and songs, is traced back to the land of Kondo, a land which is said to have existed before mankind. Animals too are said to have existed before mankind. According to the myth, a supine female ancestor, whose name cannot be revealed, gave birth to seven humans, who were pulled out of her womb by a dog called Ovaye. A different version of the origin myth tells of a dog being instructed by a female ancestor to dig at the location of Kondo, from which humankind emerged. Yet another version tells of seven boats arriving in Kondo, each bringing the first of the seven *marga* of the Malind peoples.

At birth, the first ancestors of the Malind's limbs were connected, such as the fingers on their hands, the ears on their head, their arms and legs to their chest, as of a foetus in the womb. A mythical bird flying by knocked itself against the heads of these humans, leaving a crack that babes born to this day have on their skull at birth. God separated each of their organs with the use of a bamboo rod, allowing them to move and use their organs. Each of these humans was the original ancestor of each Malind tribe, or *marga*: Geb, Mahu, Belagai, Senkakai, Kai, Liken and Basikbasik. The Geb tribe were the first to emerge and retain highest authority among the *marga* to this day. Members of each tribe refer to themselves by these names followed by the suffix *-ze*, meaning 'grandson of'. At their birth, each tribe ancestor was given land in specific locations by God. Further sub-tribes for each *marga* then came into being, whose refer to themselves as 'sub-tribe of *marga*' in the form of '*marga* sub-tribe-*lik*', *lik* meaning 'of'. The ancestors of the Malind people are believed to reside in nature, and so the Malind, after a hunt, leave part of their catch in the forest for the ancestors to enjoy, and request the ancestors to protect them and bring them fatter, bigger catch the next day.

Each clan identifies with and is responsible for one element of the landscape. For instance, the Gebze clan takes the coconut as its totem and looks after the coconut trees, the Mahuze clan looks after sago, Basik-Basik the pigs, Samkakaize the kangaroos, Kaize the cassowary and Balagaize the falcon (see table above). If one of these should be lost from the landscape, the clan would lose its identity. Restrictions on and rituals associated with the killing and consumption of totemic animals and crops are practised.

Some areas, referred to as *sar*, are considered sacred or taboo and cannot be entered. These include locations where community members have died. Food offerings are made before such areas can be opened and accessed. Restrictions on access to such areas is also said to be a means of allowing nature to regenerate itself without human interference. Most sacred areas are restricted in access to the *marga* who own the land in question, and their location only known to the *marga*. These include ancestral sites and graveyards, as well as hunting grounds.

While land cannot be sold, it can be leased to other community members who face economic and subsistence hardships, in order to achieve egalitarianism throughout the village. The practice of adoption of children from cognates is also widespread where couples cannot have children, or have lost a child through miscarriage and illness. Such children formally enter the *marga* of the adopting family through an *adat* ritual, and hold rights of inheritance to land. All former ties and rights are abolished through the ritual, and mention of the connection to the former family is punishable by death.

‘Men are the inheritors of land. Women are like flowers, free to be picked. But women can also be gifted land by their father or husband.’

The Malind peoples practise patrilocal marriage, whereby the wife moves to the village of our husband. Women lose their rights in their native village upon marriage as well as their original *marga*, taking on that of their husband (see box on ‘The voices of Malind women’). They can use but not own land in their husband’s village. However, several women report that in practice, they can still access the land owned by their agnates (such as their brothers). Marriage within a *marga* is strictly forbidden.



Adat traditions are well maintained in Wayao village. This ritual offering of sago, banana, *wati*, cassava and coconut leaves and fruit is one of the elements of the Malind *adat* rite marking the end of mourning and fasting following the death of a community member



The elders among the Malind people are the holders of *adat* knowledge and beliefs, which are passed down to subsequent generations through oral teachings, rituals and daily practice, and can only be divulged to outsiders by specific members of the village with the authority to do so



The forest deer is hunted by Malind men with traditional bows and arrows. Night-hunting is now being practised as game is moving further away from the village due to company operations and forest clearing

Company profile

Wilmar began its expansion into the sugar business in 2010 through the acquisition of Australia-based Sucrogen Limited (now known as Wilmar Sugar), one of the world's largest sugar companies, and PT Jawamanis Rafinasi, a leading sugar refiner in Indonesia. In 2011, Wilmar also acquired PT Duta Sugar International in Indonesia and Proserpine Mill in Australia. In addition to producing sugar for consumption, Wilmar also produces ethanol and fertiliser using by-products from its milling operations.

PT ARN is a 95%-owned subsidiary of Wilmar, a Singapore-based multinational company and one of the largest agribusiness corporations in Asia, which acquired the company in May 2011.⁵⁸ PT ARN operates in Tambolaka, Sumba Barat Daya district, Nusa Tenggara Timur Province, and in Anim Ha district, Merauke Regency, Papua Province. The company also holds two subsidiaries in Mappi district, Merauke Regency: PT Surya Lestari Nusantara and PT Royal Agro Sejahtera. Plans to expand sugarcane plantations to Tabonji district, Merauke Regency, fell through in 2012 when the company's permit application was rejected, reportedly because the area in question was 'not approved for investment'.⁵⁹

Of the 41,000 ha targeted by the company in Merauke district, an estimated 25,000 ha are expected to be available for actual production of sugarcane destined for domestic consumption.⁶⁰ The remnant areas, the company reports, contain large rivers, sago forests, marshes, villages and rice paddies that will not be developed but rather enclaved as High Conservation Values.⁶¹ At the time of writing, PT ARN was in the process of completing its AMDAL (Environmental Impact Analysis). Consultations with local communities in Baad, Koa, Zanegi and Wayau are in their preliminary stages, as are mapping of village and customary territory boundaries with the participation of community members, in order to identify areas to be enclaved. The permit held by the company at the time of writing was the *izin lokasi*, or Location Permit, which is issued to a company to obtain land required for investment. Permits still being sought include the forest land release permit (*izin pelepasan kawasan hutan*) from the Ministry of Forestry and then the Business Operation Permit (*hak guna usaha/HGU*) from the National Land Bureau (*Badan Pertanahan Nasional/BPN*).

The company reported that it would not buy land but would make use of their Business Operating Permit (HGU) for a period of 25 years (and possibly renewed beyond this). A nucleus-plasma (*inti*) scheme is also projected, with 80% of land to be managed by the company and 20% by the communities. The company reported that they would cover all costs of clearing the land for the sugarcane plantation, but that compensation would only be paid for nucleus land.

PT ARN also reported that they would provide comprehensive support to the educational needs of the communities within the concession, which they see as a more sustainable and responsible way of helping communities 'move forward' (*maju*) than giving money. Support would cover students' costs of schooling, educational materials, food and so forth. A scholarship programme to send bright children to further their education at the Agricultural Institute in Yogyakarta, Kalimantan and Merauke would be accompanied by contracts to ensure that students returned to work in their own villages.

Indonesia's sugar high (and low)

The world's second largest sugar exporter in the 1930s, Indonesia is now the world's top raw sugar importer, with a projected domestic consumption of around 5.2 million tonnes in 2013 (2-3% more than in 2012), and an expected increase of 4% in 2013. 62 companies and processing facilities are located in Lampung, Java and Sulawesi, producing 2.5 – 2.7 million tonnes of sugar per year, at a yield of around 80 metric tonnes (or 1,000 kg) per hectare. To feed growing demand, the government issued raw sugar import permits (mainly from Thailand) for 240,000 tonnes in May 2013. The target of becoming self-sufficient in sugar production by 2014 was abandoned due to feasibility concerns in September 2012 (Pardomuan 2013). PT ARN staff report that an additional 30 million tonnes of domestically produced sugar would be required to cease dependence on imports, which in turn would require an expansion of around 375,000 ha of sugarcane plantations.



Map of PT ARN concession and villages of Baad, Wayau and Koa. The concession also overlaps with land owned by three *marga* of Zanegi (Sinnegi) village to the west

Community perspectives on the consultation process

BAAD

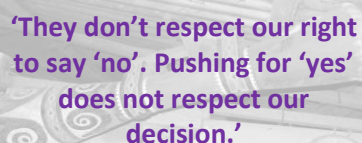
The village of Baad ('dead end' in the Malind language) is home to over 100 households and has existed in its present location since the Dutch period, when the communities in the area were encouraged by the authorities to adopt a more sedentarised lifestyle. The *adat* leader (*ketua adat*) of the indigenous Malind in the area reports that their nearby original village was called Osser. The boundaries of the customary lands of Baad are said to extend from the Kali Kum to Wapeko, Kaliki, Zanegi and Wayau, and beyond the Kali Maro river to Kanum and Salor.

Since the establishment of Baad, several families are reported to have moved out from the village to nearby settlements, including Sengamit, Senayu, Kalidowi and Sernayam. These four villages are considered as part of Baad due to sustained kinship links, inter-village migration and inter-marriage. The main tribes (*suku*) in the village are Badelik and Baad. In the past, all seven *marga* are reported to have been represented in the population of the village but this ended due to deaths from illness brought by Dutch and Javanese incomers. Interaction with outsiders is traced back to the era of British colonisation of Australia, through to the arrival of Dutch missionaries, missionaries sent by Portugal, the short-lived British presence, and finally the Indonesian government.

As part of a Papua-wide development scheme, Baad is supported by two State projects, Respek (since 2005) and National Programme for Community Empowerment (*Program Nasional Pemberdayaan Masyarakat/PMPN*) (since 2010), which provide clean water tanks, home infrastructure and limited electricity. A transmigration scheme was once projected in the area but never implemented.

(Male) community members interviewed in Baad reported having been approached on several occasions by PT ARN field operating staff, over the last 1 ½ - 2 years.⁶² Consultation meetings (*sosialisasi*)⁶³ have taken place, but many noted that not everyone in the community was invited to attend (usually only the village head and heads of *marga*). Other meetings were reportedly held in Merauke city, meaning only a limited number of community members were able to attend. It was noted by many that since the consultations revolved around the issue of the land, it made little sense to hold them anywhere else but on the land in question ('we need to talk about the land sitting on the land itself, not in the city'). Limited participation and information among residents of Baad was testified by the fact that many community members interviewed were not sure if PT ARN was planning to plant sugarcane or manioc, or a combination of both. Other accounts suggest that collective meetings were essentially tokenistic, the 'real decisions and negotiations' taking place in one-on-one meetings between the company and land-owners, rather than as a collective process involving all the clans and their members.

In some cases, clan heads are reported to have agreed to the company's terms for land surrender without consulting their wider constituency, causing significant tensions and resentments within the clans. Conflicting views were most notable between senior and junior clan members, but with no discernible trend – in some cases, the elders had agreed to surrender the land for monetary compensation, whilst younger members were opposed. In many cases, these



'They don't respect our right to say 'no'. Pushing for 'yes' does not respect our decision.'

young individuals had a relatively high level of education, working as teachers or nurses at local schools and clinics, and were very much aware that the terms of surrender offered by the company were at the distinct disadvantage of the community ('they don't see that they are being duped in bright daylight'). In other cases, elders interviewed lamented the willingness to surrender land of younger members and the lack of cultural integrity and concern for future generations of today's youth ('they don't understand our cultural values anymore').

Across both generational groups, however, concerns were expressed that the company might further extrapolate any consent given by individuals or clans to wider areas of land within the village territory than those owned by these individuals and clans. Many interviewed had already on several occasions informed the company that they did not want to surrender their land, but were confused as to why company staff continued to approach them to negotiate terms of surrender. They were certain that this would continue this year and beyond, and saw this as intrusive and contravening their right to withhold their consent ('they don't respect our right to say 'no'. Pushing for 'yes' does not respect our decision'). Some community members, on the other hand, noted that the company has stated in the past that it would not go ahead with its project if even a single *marga* did not consent.

'We don't trust companies. We expect to be cheated.'

While some community members reported being inclined to cede parts of their lands for sugarcane development, issues of compensation and terms of surrender remain unclear and unsatisfactory to them, and therefore no formal agreements had been made at the time of writing. Many stated that the company was seeking their consent to the surrender *before* being willing to engage in negotiations over compensation, both in form and amount. Offers of educational support were welcomed by the community, but the reluctance of the company to clarify compensation was resented, as they felt unable to make an informed and wide decision without this information, and would lose bargaining power once the land was ceded.

Reasons given by those community members opposed to the project were numerous in addition to the compensation issue. The overwhelming view among this group was that the land is too valuable and integral to their livelihoods and culture to be sold or leased, and that they do not envisage radically transforming their lives for the sake of money ('If we talk about sugarcane or timber or palm oil, these can move around. But the land does not move. Where would we go without our land?'). Others noted that the duration of the agreements offered by PT ARN (30 years) was 'a long time', and they were uncertain if they could commit to surrendering their lands for this long ('it is our grandchildren tomorrow who will live our decision today. Can we really anticipate that far ahead?'). Many also do not believe that their lands will be returned to them upon the expiry of the lease, and a generalised mistrust of companies in general was evident ('We don't trust companies. We expect to be cheated').

'The company tells us it will help to build roads, schools, clinics. But we are confused: is this not the responsibility of our government towards its people, rather than the companies?'

Some community members interviewed reported having been shown a copy of the satellite map of the areas targeted by the company, but were not given a copy. They reported that mapping of the village land boundaries had been carried out, but that they themselves have not been involved. This map was also shown to the community but copies not shared. It was reported that there are notes of the consultations, as well as meeting agendas and participant lists, which are in the village office, but the authors were unable to access these materials.

The notes taken were said to be those of the village head, but that the company also took notes, which the community has not seen and does not hold. A land survey was said to have been carried out, but descriptions of the process in question seem to suggest that its purpose was to gather soil and water samples (probably to evaluate the potential of the terrain for sugarcane development) rather than to investigate local systems of land ownership and use. A very small number of individuals knew that PT ARN was conducting its AMDAL, but none of those interviewed had heard of the term HCVs.

'Our land cannot be sold because mankind, animals and nature are one and indissociable'

A widely expressed view from the community of Baad was that the information they were given by the company was limited and conditional on some sign of consent or acceptance to engage with the company. What little information was available was said to already be causing intra-community dissent, even though no actual agreements had been made with the company yet. Manipulation of local representative institutions, such as the head of *marga*, as well as certain cases of elite co-optation, were said to be 'breaking up (*merusak*) the Malind people'. Many community members were aware that this was also happening in other parts of Merauke when companies are seeking to operate, and a great concern (expressed by both the elderly and the young) was that if this trend continues, the Malind peoples would be destroyed (*orang Malind akan dihancur*), or, even worse, would 'end up eating each other' (*orang Malind makan orang Malind*). For many, giving away the land was spoken of literally as a matter of life and death:

Our land is ours by *adat*, and governed by *adat*. *Adat* gives our lives order. In the forest, I will never go hungry or thirsty. We would be killing ourselves by giving away our land. Already we are worried about our future because our rights are not protected. And anyway, who says the land is ours to give away? It belongs to our ancestors first, and they did not give us this land to give it to companies and investors.



Group discussion with women and children of Baad village

WAYAU

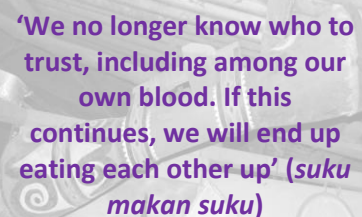
The village of Wayau (meaning ‘careful!’ in the Malind language) is home to around 98 households, of which the overwhelming majority are indigenous Malind and the remaining handful Javanese shopkeepers. Part of the lands of Wayau are located within the concession of PT Hardaya Sugar Papua, a 44,812 ha sugarcane plantation to the east of the village.

Like the community of Baad, Wayau has been approached on a number of occasions since 2011 by PT ARN staff in relation to their projected development. It was reported that in some cases, the company was accompanied by a local government representative, and in all cases, by a member of the military or police (*aparat*). Community members interviewed said the only document they were shown (not given) was a copy of the satellite map of PT ARN’s targeted area of land. The agenda, notes and participant lists of the meetings were said to be with the company.

At first, PT ARN informed the community that they only needed 80 ha of their land to establish a sugarcane seedling nursery. They offered 250,000 Rp (25 USD) to 500,000 Rp (50 USD) per ha of land, which they said they only needed for three years. Later on, the community was informed that the nursery would be of up to 200 ha, and last for five years. At the time of writing, the community had been told by the company that it was seeking to obtain a permit for a sugarcane plantation for 35 years. Several were unclear as to whether their land would return to them upon the expiry of the HGU.

Land measurements in the village of the land targeted by the company have already been carried out, but not all community members have agreed to cede their land and the boundaries between clan-owned territories have not been mapped yet. Some community members noted that they were not explained the point of the land measurement survey when it took place, and not all of them were involved (‘the company just came in, took some people from the village and went to do the survey’). Some community members recall mention of the plasma scheme offered by the company, but apart from the 20:80 arrangement, were unclear as to the details of the scheme. Some community members had been invited by PT ARN to a comparative field study (*studi banding*) in a plantation in West Sumatra in order to familiarise them with the operations and benefits drawn by smallholders there.

Those community members willing to engage with the company to negotiate compensation for land ceded reported that they were told by the company that compensation was ‘non-negotiable’ since the rate per hectare was fixed by the government at the national level at 200,000 Rp (20 USD) – 300,000 Rp (30 USD) per hectare for a period of 35 years (varying figures within this range were obtained in the interviews). The company also only offered compensation for land ceded, and not the crops planted by the community on that land. Sacred sites were also to be enclaved as protected areas with a buffer zone of 1 km.



‘We no longer know who to trust, including among our own blood. If this continues, we will end up eating each other up’ (*suku makan suku*)

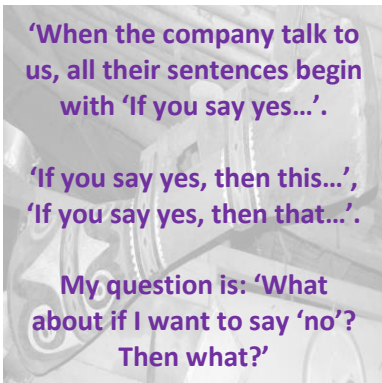
Suspicion and frustration were the main sentiments expressed by the majority of community members interviewed about the process and potential implications of the sugarcane project on their customary lands. They were also realistic in terms of their expectations of the company. In the words of one community member:

The company is not bad – they can help us. They can be good for our development, but at the same time, they can also harm us. And we also know that the company is here to do business and make money, not to do charity.

In terms of the consultation process, many noted that the presence of *aparatus* restricts their ability to express themselves freely, and the power imbalance between the communities and the company (and government) further exacerbated. The original openness to dialogue with the company was then undermined as the company’s version of how much land would be needed, and for how long, gradually changed. Many reported that they had only been informed of the possible benefits of the sugarcane plantation project for their livelihoods, but none of the potential negative impacts had been mentioned.

Furthermore, the community were upset to hear they had been misled regarding compensation – some of them had visited the local government office in Merauke, who told them that there was no law on compensation terms or amounts. This was further confirmed in the authors’ own meeting with the Investment Coordination Board. One community member noted that when he disagreed to the terms of compensation (for the fifth or sixth time), a government official accompanying the company representatives got frustrated and asked him: ‘What more do you want? What are you hiding from us in the forest? Why won’t you lease your land? What more do you want?’ It is worth noting here that the amount offered by the company (a maximum of 30 USD per ha for 35 years) is equivalent to a miserable 0.86 USD per ha per year per clan. Even that assumes that the land would return to the communities at the end of the term of the initial lease, although renewal of the lease is more likely.

Another concern expressed by the community was the lack of clarity over the terms used (sometimes interchangeably) by company representatives in consultations in relation to compensation. These terms include *tali asi* (similar to a voluntary payment given out of gratitude and good will), *ganti rugi* (similar to indemnification for damages), *kompensasi*, *uang ketuk pintu* (literally ‘money to knock on the door’), *pembayaran* (‘payment’), *sewa* (‘rent’), *penghargaan* (literally ‘valuation’ or ‘appreciation’), *kontrak* (‘contract’) and *uang muka* (akin to ‘deposit’ or ‘down payment’). However, it is unclear to them if these terms mean different things, and if they are being deceived into being paid only ‘money to open the door’, or actual full compensation for the duration and extent of the land they cede. As one community member put it:



‘When the company talk to us, all their sentences begin with ‘If you say yes...’.

‘If you say yes, then this...’,
‘If you say yes, then that...’.

My question is: ‘What about if I want to say ‘no’? Then what?’

When we visit friends and relatives, we bring gifts to show our appreciation for being welcome. We would expect the company to pay us money as a sign of good faith to begin consultations. We give our time and thought to them. That money I suppose would be *uang ketuk pintu*, money to begin negotiations with us. We have never heard of *tali asi* before, it is not a native term of ours, and when we ask what it means, we are told it is the same as *kompensasi*. But *kompensasi* for what? For giving our time and energy to meet and negotiate with the company? Or *kompensasi* for our land and crops? For us, *sewa* and *pembayaran* are also two very different things. One is to lease our land, the other is to sell it. And we will never agree to sell our land. But again the company tells us they mean the same thing. They speak a different language than us.

Many community members suspected this was a strategy of the company to avoid paying full compensation for land and crops ceded, or that payments made by the company would be interpreted as a sale of the land (which none were prepared to do), or that payments community understood as goodwill contributions to initiate and facilitate the negotiation process would then be interpreted by the company as payment for the land itself. Such concerns are not without good reason: these scenarios have all been documented in other concessions in Merauke, including oil palm plantation PT Tunas Sawa Erma (PT TSE) in Asikie and Getentiri, PT Agriprima Cipta Persada (PT ACP) in Muting, PT Bio Inti Agroindo (PT BIA) in Selil and PT Dongin Prabhawa. Some community members also noted that *tali asi* and *uang ketuk pintu* are not legal terms in Indonesia law, and therefore they would have no resource to legal remedy, should agreements signed using these terms be violated.

Some community members noted that their mistrust in the company was largely a result of the fact that none of the interactions to date had been documented and shared with them. For instance, the enclaving of sacred areas was assumed to be an empty promise, since it was an oral statement only, and precedents in neighbouring concessions suggested that ‘the forests and sacred sites will be destroyed anyway’. Many community members emphasised that the company could have got a lot more consent from them if they were more transparent in their dealings with them, and information-sharing was key in this. They noted that they wanted ‘everything to be written down, check and stored carefully’. If agreements for land lease were reached, these would need to be engraved into a village monument, so that all the agreements could be remember, publicly read, and last for many generations, so that ‘the agreements we make today are not forgotten by those who come tomorrow’. When asked why a monument was necessary, one community member exclaimed:

Houses can burn down, documents can be damaged by the rain and the rats.
Even computers can crash!

Another issue raised was the fact that no discussions with the company had taken place on what would happen should agreements be contravened, or should conflict take place between the community and the company. While some noted that ideally, *adat* conflict resolution methods should be employed in such cases, they were aware that such mechanisms could not realistically be used outside of their own community, particularly with a company. Many feared that money would be exploited as a means of conflict resolution by those advantaged in the clear power imbalance between communities and company:

We are in a money politic – anyone can be bought with money. Anyone with money is the boss. We can’t use *adat* to fight a company. In other villages, we have heard of companies actually exploiting *adat* to get what they want. We would rather not use *adat* than be tricked into things we do not want by companies who manipulate our own *adat*.

When asked about what they foresaw in the near future in relation to PT ARN, most community members responded that it was too early for them to agree or disagree to anything offered by the company. Time, information and reflection were seen as key to coming to any decision: ‘we need to think through our decision very carefully. We need more time to think. We are not ready to make any decisions based on the information we have now.’

Interestingly, one of the main reasons given by community members for their reluctance to commit to anything at the time was the stories and experiences they had heard of other

villages who had ceded their land to various companies under non-transparent conditions, and with little tangible benefits accrued. Most widely cited was the example of Zanegi village (see below) to the west of Wayau, where timber company Medco operates. Community members reported having seen or heard of the unprecedented poverty, diseases, malnourishment and landlessness of the Zanegi inhabitants after they ceded their land to the company, and had seen what the ‘wrong kind of decisions can lead to’. One community member stated:

We want to accept the company’s offer, but then we see the experience of other villages, such as Zanegi, who have given away their land to companies and have got even poorer than ever before. So we are careful now. Of course, we feel sorry for Zanegi, but in some ways, we are grateful for Zanegi because from their experience we have learned a lot.



Community meeting with women of Wayau

The voices of Malind women

The women of Wayao, Baad and Zanegi were interviewed in separate informal group discussions in order to obtain a better understanding of Malind culture, *adat* and contemporary changes from their perspective. Customary norms dictate that women do not participate actively in community meetings, meaning that the majority of the women interviewed had heard of PT ARN and past consultations, but had no say in the decision-making process over land leasing and associated terms and conditions: ‘we have no rights in that regard’ (*kami tidak punya hak di sini*) (interview in Wayao, 22nd May). The little information available to them was shared informally by their husbands or fathers in the household setting. Most women did differentiate investors and companies from itinerant traders, the latter of which they entertain trade relations with through the men.

Women interviewed confirmed that while they use the land on a daily basis (harvesting sago, growing a variety of vegetables and fruit – papaya, banana, cassava, coconut, betel nut, mango, guava, jackfruit, *kedondong*, grapefruit, rambutan, pineapple etc. – and fishing at the nearby river), they have no rights over the land per se, as men hold rights over land. Comparison was made by some with child-bearing in relation to land inheritance: ‘we give birth to children for the men’ (interview in Wayao, 22nd May). Several women noted the fundamental importance of land to the livelihoods and future of the Malind peoples, and its significance within *adat* principles: ‘if there is no longer any land, there will no longer be any *adat*.’ (interview in Baad, 19th May). Frequent comparison was made of the land with motherhood, as the provider of ‘milk and food for the Malind peoples’ and the ‘carer and provider of food’: ‘land is our mother because of what it generates and gives birth to’ (interviews in Wayao, Baad and Zanegi, 22nd – 24th May). Concerns were expressed over the loss of land and its implications for the survival future Malind generations: ‘fish, wild deer and kangaroo were plentiful in the past. If they disappear when the land disappears, where will we get the food to feed our children from? Where will we plant our crops? Hardship will follow’ (interview in Wayao, 22nd May). Some women noted that they felt their community was not ready for companies to begin operating, citing lack of education and awareness as obstacles: ‘we need information and education to make the right decisions’ (interview in Wayao, 22nd May).

Some also noted that water pollution was beginning to impact on the community, which they believed to result from the operations of upstream oil palm plantation companies: ‘we are not sure where the pollution comes from, but we think it is from oil palm, or so we have heard. What we do know is that it is making our children and our fish drunk (*mabuk*)’ (interview in Zanegi, 24th May). Other illnesses, such as diarrhoea, *muntaber* (diarrhoea and vomiting), malaria, dengue fever and skin rashes were reported as common among children, and infant mortality highest between the ages of 6 months to 2 years. Most women attributed these diseases to sorcery rather than malnutrition and/or water pollution.

When asked about their hopes for their children, the most common response was the need for better access to quality education as the key to social change and ‘keeping up with the times’ so as not to be ‘left behind’ (*ketinggalan*): ‘education is important because it makes us proper people’ (*sekolah penting karena anak harus jadi manusia*) (interview in Wayao, 22nd May). Some women noted that education about Malind culture and *adat* was of equal importance as formal education: ‘our children need to know their history and customs’ (interview in Zanegi, 24th May). Other hopes for coming generations included ‘a better life’, employment and the ‘ability to survive independently’ (interviews in Wayao, Baad and Zanegi, 22nd – 24th May).

Women noted that they were not authorised to discuss or share Malind myths with the research team, as the authority to do so lay with the men, but did note in relation to their myth of origin (see box above): ‘at the beginning of time, we were given the land by our ancestors and by God. We didn’t create the land, so how could we have the right to sell or lease it out?’ (interview in Wayao, 22nd May). In relation to possible conflict resulting from the selling or leasing of land to companies, some women noted that Malind women had customarily played an important role as ‘peace-keepers’ or ‘pacifiers’ in Malind culture, and that this might remain the case should conflict occur in the future: ‘women don’t have many rights, but one of our rights is to make peace between and within communities. In the past, when warfare was rife, our role was to mediate and bring peace, ending conflict by distributing betel nuts between the war-faring parties. Maybe we will continue to play this role when conflict comes to us again’ (interview in Wayao, 22nd May).

With regards to the rights of women in Malind society, views expressed by the women interviewed differed significantly, with age and education levels being key factors to their perspectives. While some noted that as times changed, so custom needed to adapt, and women needed to be given space to speak out and contribute to men’s decisions, others were uncomfortable with this idea, noting that interactions with companies and land-related issues were strictly the domain of men, and of little interest to them. Yet others admitted that they were unsure as to how such cultural change could come about, and if so, if it would happen in time to make a difference to the way the Malind faced new challenges and opportunities.

KOA

While the research team were unable to visit Koa village due to inclement road and weather conditions, they were approached by a group of Koa community members visiting Wayau at the time of the investigation wanting to discuss PT ARN’s consultation process. The village of Koa (meaning ‘mother’s womb’ in the Malind tongue) is inhabited by approximately 118 Malind households, as well as a small number of Bugis and Javanese shopkeepers. As with Wayau, part of Koa’s land is already within the concession of PT Hardaya Sugar Papua. The borders of the village are said to extent up to Yakebob village to the east, Kaptel to the west, Keisar to the north and Wayau to the south. In the past, the community migrated a number of times (former villages include Awewal Babor, Silgog, Nasol and Salol) and then grouped in the Koa of today during the Dutch period. Community members say all these villages were located in their customary territory, where they have lived since time immemorial. 51 *marga* are present in Koa: Gebze (sub-clans Walinaolik, Kuyamlik, Geblik, Ohamlik and Awabalik), Basikbasik, Kaize (sub-clans Saulamlik and Honilik), Mahuze (sub-clans Zohelik and Aluenlik) and Likenze (sub-clans Yaolimalik and Malinlik). Of these, the Zohelik, Aluenlik, Saulamlik, Honilik, Basikbasik and Walinaolik have ceded parts of their lands to PT Hardaya Sugar Papua. Consent given or not, almost all of these groups own land that PT ARN is now seeking to develop.

‘If we talk about sugarcane or timber or palm oil, these can move around. But the land does not move. Where would we go without our land?’

According to community members interviewed, PT ARN first approached them in the course of 2011 to engage in *sosialisasi*, with the participation of district government representatives and the presence of security personnel.⁶⁴ Participatory mapping of the village and *marga* land boundaries, which started in 2012, was underway by both PT Hardaya Sugar Papua and PT ARN to the north, east and south of the village, but not yet in the west. All *marga* were said to have participated in the mapping, which lasted over a week and involved over 60

**'When nature disappears,
the Malind will disappear'
(alam habis, Malind habis)**

individuals. Community members have not seen the map produced yet. They have been show the *izin lokasi* letter of the company and the GPS-coordinated map of the company's targeted land area, but not given copies.

The research team was told that a majority of community members had agreed to cede their lands to PT ARN (although no written contracts or agreements have been made yet), but were seeking the advice of the research team on a substantial number of issues that had not been fully or adequately addressed in their perspective. First, it was noted that they did not have contact details for the company (e.g. location of the main and field offices, contact numbers of company representatives) and were unsure whom to approach (and how) should the agreements reached require renegotiation. Secondly, it was reported that no agenda, participant list or notes of the meetings held had been provided by the company – the community has its own notes but has not seen the company's version. Some noted that precedents set by other companies led them to feel concerned about whether or not both versions matched. They also noted that consultation participant lists had in the past also been manipulated by companies as tantamount to consent to issues discussed in those meetings, and wanted clarification that this was not the case with PT ARN.

While a plasma scheme had been discussed in meetings, most community members reported that they did not know where the plasma land would be located, and even whether it was guaranteed that it would be within their own *marga*'s customary territory. Some worried that if not, this would cause inter-*marga* disagreement and possibly conflict. With regards to the HGU permit of the company, several community members wanted clarification that their land would return to them upon expiry of the permit, as they were unaware of the laws and regulations pertinent to this matter. As in the village of Wayau, several individuals were confused as to the difference between terms related to compensation.

Some community members noted that while the company had assured them that protected areas would not be cleared or planted, these had not been mapped to date, and therefore they were curious as to how they could be effectively preserved if not identified. It was also noted that PT ARN had committed to compensate community members for trees of over 40 cm, but no discussion had been held about compensation for planted vegetation below this height. The company was reported to have stated that it would not clear or plant within 500 m of large rivers, and 200 m of smaller rivers. The community had asked for a 1 km buffer zone from their village from the company, but the company agreed to 100 m.

**'The land is sacred and it is
because companies have
violated the sacral nature
of these areas that the
hardships faced by the
Malind peoples today have
come to be.'**

Community members report having been offered 350,000 Rp (35 USD) per ha for a period of 35 years as compensation for the land ceded. When asked if they thought this was a reasonable amount of money, they acquiesced. However, a later break-down of the figure equivalent to 10,000 Rp (1 USD) per year per ha per *marga* (then to be sub-divided to the sub-*marga*) led to great consternation among the community members. One noted:

When the company tells us how much compensation we will get for our land, they talk about the hundreds and thousands of hectares we are ceding, and therefore the amount of money we are offered looks huge, because we

have a huge amount of land. But 10,000 Rp per hectare? That isn't even enough to buy a packet of *kretek* cigarettes...



Community members of Koa village (photo taken in Wayao village)

ZANEGI

The village of Zanegi (or Sinnegi, meaning ‘coloured or coming onto colour’) is home to 108 households living in 59 houses, and a couple of non-Malind kiosk-holders. All Malind *marga* are represented by the village population. The customary territory of Zanegi is composed of two areas, Sakao and Mepel. The village is now in its fifth location, with former locations including Kiwal Awaswig, Yobal Barorep, Dalami and Sakao. The people of Zanegi spend a significant amount of time bivouacking in the forest or by the side of roads (including women and children) during hunting trips, and the village is sparsely populated during the week, with groups returning on the weekend to attend mass at the village church.

The village of Zanegi ceded a vast amount of land to timber company PT Selaras Inti Semesta, a subsidiary of the Medco Group in 2009.⁶⁵ The company’s concession extends for over 300,000 ha and to date thousands of hectares of forest have been felled and taken to PT PT Medco Papua Industri Lestari’s mill in Kampung Buepe, in neighbouring Kaptel District. Widespread discontent has been documented with the deals reached with PT SIS and the deplorable poverty of the village testifies to the absolute failure on the part of the company to implement promises made of social development and economic aid.⁶⁶ Very few community members are employed by the company, and are paid an average salary of 70,000 Rp (7 USD) a day. Disease and malnutrition are rampant, and infant mortality one of the highest in the region, as the community now has insufficient land to hunt, and the fish are dying from polluted waters.



Malnutrition, and infant diarrhoea and vomiting are shockingly widespread in Zanegi village, where land has been ceded to timber company Medco, and where game and fish are scarce. Skin irritations are widespread among children, allegedly due to water pollution from pesticides and other chemicals used in Medco's operations



Group discussion with the women and children of Zanegi village



Community members report that the doctor stationed at Zanegi village only visits once a month for one day and does not reside in situ. Infants taken to Merauke for medical help have been told they are not suffering from any illness but from malnutrition, but not provided with any, or sufficient, medicine or food supplements

At the time of writing, five infants had died of malnutrition-related diseases (including severe vomiting and diarrhoea – locally called *muntaber*) since January 2013. These tragedies, as well as generalised emaciation, water-related skin infections, infant and child lethargy and bloated stomachs provide clear evidence of the severe food insecurity faced by the community as a result of the loss of their customary lands and livelihoods (see section below ‘We are a dying village’).⁶⁷ All neighbouring villages visited saw this deplorable situation as a vivid and ominous omen of what may happen to them, should they agree to release their land to companies.

Yet despite the appalling conditions in the community, three *marga* and six sub-*marga* had agreed to release another 1,000 ha land to PT ARN (Siepeze and Naolik of Basikbasik, Maliulik and Wakabalik of Mahuze, and Manaozelik and Savalik of Balakaize) for a period of 30 years.

Those opposed to the project said these individuals were after ‘easy money’, or were succumbing to pressure from the company and the military, police and government representatives who are usually present at consultations. Few of the *marga* heads who had given consent to the land release were willing or present to be interviewed at the time of the investigation, but those who were, when asked why they had agreed to cede more land, said that they trusted PT ARN more because their representative was a priest (*pendeta*). Further

corroboration of information with other community members and audio-records of consultations provided by community members confirmed that indeed, the Public Relations Manager of PT ARN, Nanser Gultom, was passing himself off as a priest in meetings, encouraging the community to come to an agreement with the company on the basis of shared religion, values and ethics. For instance, the audio-documentation records Nanser Gultom encouraging the community to engage with the company because ‘we are all brothers of one religion...unlike the Muslims’. It is worth noting that Nanser Gultom is the same individual who rebuked the researchers’ request to meet with PT ARN by treating their query as ‘SPAM’ and then accusing them of illegally obtaining his contact details in violation of Indonesian law.⁶⁸



Child suffering from malnutrition, Zanegi

Those community members who ceded their land reported that PT ARN only required the land to establish a sugarcane nursery of 1,000 ha. Consultations had taken place on a number of occasions, the most recent on 26th February 2013 and then 10th May 2013. Community members had recently completed a 2 ½ day survey of village boundaries with the company (23rd – 25th May). It was reported that around 24 individuals were involved in two teams. A second survey was planned to take place in a few weeks’ time, this time of the boundaries of *marga* lands.

Written agreements have been signed between *marga* heads and the company for the release (*pembebasan*) of land but it is unclear if community members hold copies of these agreements. Furthermore, land surveying and participatory mapping were carried out *after* these agreements were signed, rather than before. There is also doubt as to whether the land will be used solely for the purposes of establishing a nursery, as community members report that their agreement is for a period of 30 years, and plasma has been offered to them. PT ARN also told the community that their land would be returned to them after 30 years.

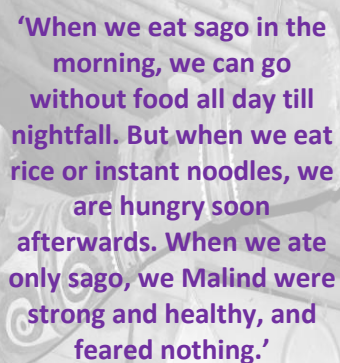
'We are a dying village'

The community of Zanegi has traditionally depended on hunting, fishing, sago-harvesting and forest-product gathering for its livelihood. Interviews with men and women revealed the extent to which these practices have been eroded as a result of the loss of access to land ceded to PT SIS, and raise serious concerns as to the potential consequences should further land and forest be relinquished to PT ARN or other investors. If alternative livelihoods and immediate health and nutritional support are not provided by these investors and the State, it is not an exaggeration to suggest, as many community members themselves reported, that the community of Zanegi may no longer exist in the near future, as illness, malnutrition and poverty takes a daily toll on their lives.

Whereas in the past, game was plentiful ('the deer would poke out and greet us in the morning in the village') and river catch abundant, today, the inhabitants of Zanegi eat meat once every two weeks or once a month. Groups are away from the village for much longer than in the past, and now hunting at night as well, as game is fleeing far from the noise and pollution caused by PT SIS' heavy machinery, road construction, vehicles and sawing. Energy expended on such long trips was reported to be a cause of increased illness ('before the company, there was little illness. Now we have to walk far to get our food, so we get sick more easily'), while the fact that children and women were being left alone in the village for longer periods of time was a cause of concern for some. What game is caught is frequently sold to traders and shopkeepers for cash to buy rice or instant noodles, as nearby sago forests have been cleared. Sometimes, even crops grown close to or in the village are lost to wild pigs and deer, also finding their food supplies depleted by deforestation. While some community members noted that rice and instant noodles are 'less hard work than sago' to cultivate and process, many women in the village noted that rice and instant noodles were far less nutritious than sago, and gave them less energy.

Water pollution caused by the clearing by PT SIS as well as the operations of upstream oil palm companies is also widely reported. Water is said to be 'yellow', 'oily' and 'foul-smelling'. Consequences of this include skin infections and rashes in children (see photo below), diarrhoea and vomiting. Sago is also said to be affected by the water pollution: 'sago used to be hard and firm so we could bake it, but now it is wet and fritters away because the water is dirty, and this causes diarrhoea.' Fish were described as having 'big heads and tiny bodies, and their skin is tough'. Frequent mention was made of fish being 'drunk on pollution', as evidenced by their spasmodic jerking and contorting. A large number of endemic fish species are said to have disappeared or decreased significantly in numbers. Malind terms for such species include *olip*, *kativ*, *haum*, *yover*, *abuaita*, *ininga*, *gedua*, *bida*, *tunga*, *busuai*, *otaka* and *nabimba*.

Many of the women interviewed noted that infants and young children were falling ill more easily than before companies began operating on their lands: 'in the past, children were always healthy. Now the children and grandchildren are always sick. Poor them...' While some identified a link between the lack of food (in particular proteins and carbohydrates) resulting from the loss of land and the condition of children in the village, more often than not disease and death were explained as a result of sorcery or witchcraft (*suwanggi*), reflecting Malind beliefs in witchcraft and curses. Some women noted that the community can obtain food from the company in the form of one box per person per day (for those who do not work for the company), but that this is not sufficient. Others noted that medical help is available at the company clinic but only for employees. Promises of extended medical support from PT SIS have not materialised to date. Children sent to Merauke for medical treatment have been told that they are 'not ill', just 'malnourished', and sent home without any food supplements or medication. Five infants had died of malnutrition-related illness in Zanegi at the time of writing.



'When we eat sago in the morning, we can go without food all day till nightfall. But when we eat rice or instant noodles, we are hungry soon afterwards. When we ate only sago, we Malind were strong and healthy, and feared nothing.'

Community members report that they have expressly asked PT ARN to provide them with economic and social development support to improve the conditions and livelihoods of the village, as part of the land ceding agreement. However, they report that the company said these matters would come to be discussed following the survey, and likewise for compensation. Agreements made to date make no mention of either of these issues – PT ARN informed the community members that a second agreement would be made 'later on' (*nanti*) on compensation, plasma and social aid.

The agreement for land release of 1,000 ha for 30 years was not given to the community members but rather read out to them once, in the presence of the village head, the *adat* leader, the three relevant *marga*, company representatives and the Anim Ha police. It was reported that several community members asked for three to four days to read the agreement and think through the terms of the contract, but were told by the company that the company 'had targets to meet' and needed to 'get the agreement signed as soon as possible and not waste time'. Some said that they did not think they had any more choice at this point, since the company arrived with a contract with the names of the *marga* pre-printed, and all they had to do was sign (meeting on 10th May 2013).

It is also worth noting that a single contract has been developed for the 1,000 ha as the contract preceded the land survey. As a result, many community members are under the impression that they will all receive the same amount of compensation, when in fact, this will depend on the outcomes of the land survey. Should areas (and therefore compensation) of land between the *marga* differ, it is very likely that this will cause inter-*marga* resentment.

Not mentioned in the agreement, according to what community members remember, is how sacred areas within the territory of Zanegi will be preserved and maintained. These include two sago forests (Bazan and Ewaifi), three graveyards (Sawayo, Saling and Sambil), one ancestral pathway (Walataisman) and two former villages (Senayugmit and Dumti). Some *marga* asked that a 1 km buffer zone be demarcated, which the company reduced to 500 m.

Community members interviewed who are opposed to PT ARN's project questioned the frequent practice on the part of companies of seeking local Malind middle-men (sometimes from the same village, sometimes from others) to convince communities to accept their propositions. They noted that communities are more likely to trust these individuals because they are also Malind, but that these individuals are also 'well paid to do their job'. Elite capture of *marga* heads, in particular, appeared to be the case in Zanegi, as it was reported that these individuals had given consent without broader consultation with the rest of the *marga*. One strategy adopted by those opposed to the development project in the village (and this was also reported in Wayau, Koa, Baad and neighbouring village Kaizer) was to boycott *sosialisasi* and any form of interaction with the company at all, because they were worried that any contact could and would be interpreted as consent. The downside of this strategy, although understandable, is that as a result of omissive representation, it is only the view of individuals in attendance that is taken into consideration by the company, and then extrapolated to the rest of the community and *marga* members. One community member noted:

We refuse to go to the *sosialisasi* because we don't even want to give the company one chance to trick us. But when we do that, then our silence is interpreted as a go-ahead, and worse, other members of our own *marga* and community take decisions on our behalf, and we suffer the consequences. So we don't know what we should do: participating is risky, not participating is even more risky.

Legal framework of land rights and acquisition in Papua

The international legal framework: Indonesia has ratified and endorsed a number of international norms and instruments which require recognition by and protection of indigenous peoples' rights from signatory States (see Appendix II on Extracts of Selected Laws and Regulations). All of these instruments either explicitly refer to the right of indigenous peoples to Free, Prior and Informed Consent, or have been so interpreted in the jurisprudence of the international and regional human rights treaty bodies. This right is most explicitly stated in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which stipulates that States must 'consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.'⁶⁹

The right to FPIC as an expression of the right to self-determination is also integrally linked to the *United Nations Covenant on Civil and Political Rights* (UNCCPR) which stipulates that all peoples have the right of self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.⁷⁰ The *United Nations Covenant on Economic, Social and Cultural Rights* (UNCESCR), requires that signatory States 'recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. [...].'⁷¹ Furthermore, the *United Nations Convention on the Elimination of All Forms of Racial Discrimination* (UNCERD) requires that signatory States '[...] take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'⁷²

Pertinent also is the *United Nations Convention on Biological Diversity* (UNCBD), which requires Contracting Parties to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.'⁷³ Finally, the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT), adopted by the World Committee on Food Security in May 2012, requires that 'States and other parties [should] hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and

informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States. [...].⁷⁴

The national and provincial legal framework: A number of laws at the national and provincial levels also provide the basis for recognition of indigenous peoples' (referred to as *masyarakat hukum adat*, or customary law communities) rights to land, livelihoods, culture and consultation. The *1945 Constitution of the Republic of Indonesia* notes that 'the State recognises and respects the unity of customary law communities as well as their traditional rights', so long as they are 'still active and in line with social development and the principles of the Unitary State of the Republic of Indonesia, as set out in the law.'⁷⁵ The *Basic Agrarian Law of 1960 (Undang Undang Pokok Agraria No. 5 tahun 1960)* stipulates that 'agrarian law pertinent to land, water and air space is customary law', also 'as far as it is not contrary to the national interest and the State [...]'.⁷⁶ The *People's Consultative Assembly Decree No. IX/MPR/2001 on Agrarian Renewal and Natural Resources (TAP MPR No. IX/MPR/2001)* also notes that agrarian reform and natural resource management should be implemented in accordance with the principles of 'recognition and respect for the rights of customary law communities and the nation's cultural diversity in relation to agrarian resources and natural resources.'⁷⁷ Indonesia's *Law No. 39 of 1999 on Human Rights (Undang Undang No. 39 tahun 1999 tentang Hak Azasi Manusia)* stipulates that 'in order to uphold human rights, differences and needs, indigenous peoples must be taken into consideration and protected by the law, the public, and the Government' and that 'The cultural identity of indigenous peoples, including indigenous land rights are protected, consistent with the times.'⁷⁸ *Law No. 41 of 1999 on Forestry (Undang Undang No. 41 tahun 1999 tentang Kehutanan)* notes that 'customary law communities, as long as they exist and are recognised to exist have the right to: a) collect forest products to fulfil the daily needs of the community b) engage in forest management activities based on customary law and not contrary to the law c) achieve empowerment in order to improve their well-being.'⁷⁹

A number of laws specific to Papua also provide the basis for the protection of indigenous peoples' rights to land and to consultation in land acquisition and other processes. Notably, the *Papua Special Autonomy Law/PSAL (Otsus)* stipulates that customary land rights (*hak ulayat*) is 'the right of association controlled by a certain *adat* community over a certain area, which is the living environment of its member, covering the right to utilise the land, forest and water and all their contents according to statutory regulations.'⁸⁰ The PSAL also requires that the government of Papua 'acknowledge, respect, protect, empower and develop the rights of the *adat* community' and that 'the *ulayat* land and the individual land of the members of the *adat* law community for any purpose whatsoever shall be provided through deliberation with the *adat* law community and the member concerned to obtain approval on the delivery of the land required as well as the compensation.'⁸¹

Furthermore, *Local Regulation of Papua Province No. 22 of 2008 on the Protection and Management of the Natural Resources of the Indigenous Peoples of Papua (Peraturan Daerah Khusus Provinsi Papua No. 22 tahun 2008 tentang Perlindungan dan Pengelolaan Sumber Daya Alam Masyarakat Hukum Adat Papua)* lists the rights of indigenous peoples, which include the right to benefit from the natural resources in their *adat* areas; to obtain information about the planned allocation and utilisation of natural resources and; to obtain compensation or damages for the use and transfer of property rights to others in accordance with written agreements contained in an authentic deed.⁸² *Local Regulation of Papua Province No. 23 of 2008 on the Collective Land Rights and the Individual Land Rights of Indigenous Peoples (Peraturan Daerah Khusus Provinsi Papua No. 23 tahun 2008 tentang*

Hak Ulayat Masyarakat Hukum Adat dan Hak Perorangan Warga Masyarakat Hukum Adat atas Tanah) stipulates that customary law communities and/or individuals have the authority to manage collective and/or lands under customary land rights in line with customary law that is actively used by the community in question and; conduct consultations with third parties outside of customary law communities who need the land for various purposes.⁸³

Defining ‘indigenous peoples’: The way ‘indigenous peoples’ are defined under Indonesian law contravenes their right to self-determination, a right of all peoples, under international law, which includes their right to self-identification: to decide for themselves who they are. By contrast, Indonesian laws cited above give the prerogative of deciding who are indigenous peoples to the local government. In the context of Papua, for instance, recognition of the existence of indigenous peoples is based on the Decisions of the Regent, mayor and/or Governor.⁸⁴ This not only places the burden of proof on indigenous peoples to satisfy the (often arbitrary) requests from the government for evidence of their institutions and customs, but also long delays their recognition and therefore the State's recognition and protection of their rights.

Customary land rights and permit allocation: Interviewed high-level representatives of the Investment Coordination Board (*Badan Koordinasi Penanaman Modal/BKPM*)⁸⁵ and the Forestry and Plantations Agency of Merauke (*Dinas Kehutanan dan Perkebunan*)⁸⁶ in Merauke noted the particularities of Papua in terms of land rights, given that customary land rights are recognised and protected under various regulations, and under the PSAL. The Forestry and Plantations Agency affirmed that ‘all land in Papua is under *hak ulayat*’, ‘all land in Papua is owned by Papuans’ and that ‘there is no State land in Papua’.

However, the law is far from explicit and highly subject to interpretation in this regard. For instance, in accordance with *Regulation No. 40 of 1996 on Business Use Permit, Building Use Permit and Right of Use over Land*, Business Use Permits (HGU) can only be given over State land,⁸⁷ which retains this status upon the expiry of the HGU.⁸⁸ The BAL clearly defines HGU as the ‘right to use land owned directly by the State [...]’.⁸⁹ This effectively means that former status as customary land must be lost first and converted to State land for a HGU to be issued. No community member interviewed was aware of this distinction, and government representatives interviewed did not elaborate on this point when raised by the research team.

Representatives interviewed were also adamant that customary land reverts to the original land owners upon expiry of the HGU. Yet the law nowhere states that customary land reverts to the original land owners upon expiry of the HGU, but rather that ensuing use is based on a new agreement from the indigenous peoples concerned as long as these customary law communities’ customary land rights still exist.⁹⁰ But given that recognition of customary law and rights is the prerogative of the government, that any land that becomes HGU must become State land before HGU issuance, and that HGU land retains this status upon HGU expiry, customary land rights could not possibly be recognised over these lands.

Furthermore, serious doubts are raised as to whether customary land rights would either continue to exist (let alone recognised as existing) after such protracted periods of time and areas of land as allowed for HGUs in Indonesia, and with the kind of radical land conversion and use that monocrop plantations entail. The *Regulation of the Ministry of Agriculture No. 357 of 2002 on Guidance on Plantation Business Permits (357/KPTS/HK.350/5/2002)*, which stipulated a maximum of 20,000 ha per HGU per company per province, was replaced in 2007 by *Regulation of the Ministry of Agriculture No. 26 on Guidance on Plantation*

Business Permits, which raises the maximum HGU holding per company per province to 100,000 ha. However, in Papua, a maximum of twice this area is allowed (Article 12(3)). In terms of HGU duration, *Regulation No. 40 of 1996 on Business Use Permit, Building Use Permit and Right of Use over Land* stipulates that the maximum duration of a HGU is 35 years, extendable for another 25 years. The HGU can then be renewed over the same land for another 35 years, also extendable for another 25 years (Article 8). The extension or renewal of a HGU need not wait the expiry of the original duration, but can be applied for and granted concurrently with the first HGU application. In other words, in Papua, a HGU can be granted over 200,000 ha per company for a total of 120 years. Once again, no community member interviewed had been informed of the legal possibility delineated above.

The research team was also told by both agencies interviewed that the conversion of lands to plantations does not entail a sale of the land by the communities, but rather a lease (*sewa* or *pinjam pakai*) to companies for use of the land for a set period of time, subject to extension.⁹¹ However, if the land transfer was indeed only a lease, then a HGU would not be required in the first place, and a Plantation Business Permit (*Izin Usaha Perkebunan/IUP*) would suffice.⁹² However, the fact that HGU are easier to extend and renew, given that the land is now considered as State land, motivates companies to seek HGU rather than IUP, and this sheds serious doubt as to whether land release by communities is legally speaking a lease or a surrender of lands in perpetuity for conversion to State land.

With regards to compensation, and in contradiction to statements from PT ARN staff to local communities with regards to compensation amounts, both agencies interviewed confirmed that there is no regulation or legal requirement with regards to the terms and costs of land leases, and that this is to be decided jointly by the company and the community. Neither agencies reportedly hold copies of these agreements.

Mapping of customary lands: Mapping of *hak ulayat* lands has not been comprehensively carried out by the government, reportedly due to lack of funds and resources to do this. There is also no legal requirement for companies to undertake such mapping, although it was reported by government representatives interviewed that mapping should figure as part of the AMDAL process, and that the government encourages companies to do mapping in a participatory manner, with the involvement of relevant government agencies at the village and district levels. Maps are also one of the elements based upon which the Ministry of Forestry gives or withholds forestland release permits, which companies require to operate. Participatory mapping by the government independent of companies is reported to be planned by the National Land Bureau of Papua for the whole of the province, but no timelines for this were shared by interviewed government representatives.

Some of those interviewed agreed that mapping of customary land boundaries was important, particularly where it could resolve and prevent overlapping land claims and compensation disputes, but at the same time, they stated that ‘we cannot wait until mapping is done to start operations in MIFEE’ and that ‘a moratorium on permit issuance and operations pending mapping is out of the question’. It is worth noting that participatory maps produced were requested for viewing by the research team at the Forestry and Plantations Agency of Merauke on several occasions, but not shared. This was also the case for other documents requested, including copies of agreements of land release between companies, the government and communities, and updated lists of permits beings sought and already acquired in the Regency.

Consultation process: No government representative interviewed had heard of the term Free, Prior and Informed Consent, or of the international human rights instruments pertinent to indigenous peoples' rights. BPKM representatives explained the process of consultation as 'informing the communities of the benefits of the project'. All referred to this process as *sosialisasi*, which incidentally is not a legal term, as opposed to *musyawarah* and *konsultasi*. Both agencies noted that *sosialisasi* is held in the villages, in the presence of various relevant government bodies, including the Ministry of Forestry, BPKM and BPN, and is a central part of the AMDAL process.

Government representatives noted that decisions on the part of the community with regards to the project were their own choice: 'if they don't want it, it doesn't matter.' Clarification on the latter statement could not be obtained i.e. whether it means the project will *not* go ahead, or whether it does not matter whether the communities want it or not – the project will still go ahead). Neither agency interviewed addressed the research team's question as to whether there had been any precedents of communities withholding their consent to land surrender and compensation, and that decision being respected by the company in question. One interviewee explained this as 'ignorance' and 'lack of education' on the part of local communities.

Plasma scheme: Interviewed community members and PT ARN informed the research team that a nucleus-plasma (*inti*) scheme was planned, with 80% of land to be managed by the company and 20% by the communities.⁹³ The exact phrasing in relation to this in the relevant law, however, reveals that 'at least 20%' of HGU land must be invested for the community's benefit in the form of plasma.⁹⁴ Community members who have accepted the 20% offer were not aware of this, and thus gave consent on the basis of partial information. Furthermore, the law itself is incomplete in that it does not state explicitly whether plasma land should be inside or outside the HGU. Precedents set by oil palm companies operating in other parts of Indonesia have shown that in some cases, companies have obtained community consent based on promises of plasma (without informing them of the location of the plasma), but have then been reluctant to set aside part of their acquired HGU land for plasma. These companies have then failed to realise their promises and argued that they are still in the process of acquiring land for plasma outside the allocated HGU. This can take significant amounts of time and cause huge frustration for local communities, and also be exploited by companies to justify the need for further expansion of their concessions.

Corporate social responsibility: Interviewed government representatives noted that companies operating in Papua and elsewhere in Indonesia are obliged to abide by the terms of Law No. 40 of 2007 on Limited Companies (*Undang-Undang No 40 tahun 2007 tentang Perseroan Terbatas*) and Regulation No. 47 of 2012 on Environmental and Social Responsibility of Limited Companies (*Peraturan No. 47 tahun 2012 tentang Tanggung Jawab Sosial dan Lingkungan Perseroan Terbatas*). However, neither of these laws makes mention of the need for consultation with local communities, requiring only 'fairness and appropriateness' in the CSR implementation.⁹⁵ On top of this, representatives from both agencies interviewed expressed serious doubts as to whether companies operating in Papua are actually implementing any of their planned CSR policies on the ground, citing a good number of examples where this is the case.

Overlapping jurisdictions: Another complicating factor in land titling and allocation processes is the overlap in authority of different government bodies in Indonesia. A notable example is that of the Ministry of Forestry and the National Land Bureau (BPN). While BPN

has jurisdiction over both State and non-State land, it does not have jurisdiction over forest areas (*kawasan hutan*). On the other hand, the jurisdiction of the Ministry of Forestry extends only over forest land. However, gazettelement to determine the boundaries of State and non-State land is still ongoing and thus there remains overlap and lack of clarity over the authority of both agencies, exacerbated by the fact that all forest is considered State land.

Overview: In sum, the rights of indigenous peoples in Indonesia such as the Malind of Merauke are enshrined in international human rights instruments to which Indonesia is party, and national and provincial regulations do to some extent provide recognition and protection of these rights. However, in practice, national law invariably takes precedence over international standards, given that these are not automatically domesticated into national legal frameworks, and it was evident from interviews with high-level government representatives in Merauke that the understanding of international human rights laws and rights enshrined therein is generally minimal. The all-pervading discourse of national interest, particularly in the context of the MIFEE project and its stated objectives, prevails over respect for Papuan peoples' collective and individual rights, in contravention of the *Vienna Declaration and Programme of Action* of 1993, which declares that 'while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.'⁹⁶ And even where national and provincial laws recognise customary rights, they are not being implemented on the ground, nor have mechanisms been established to monitor and verify implementation.

Furthermore, there are significant contradictions and inconsistencies both within and between national and provincial laws which undermine the extent to which indigenous peoples' rights are recognised and respected in practice. In addition, the PSAL is not sufficiently supported by local-level legislation or mechanisms to ensure its effective implementation. At an institutional level, different governmental bodies have overlapping jurisdictions over land related matters, leading to lack of clarity as to the extent of their respective authority over land status determination and titling. The *Draft Law on the Recognition and Protection of the Rights of Indigenous Peoples*, adopted by the Indonesian National Parliament on 16th December 2011, and which would provide the basis for better recognition and protection of indigenous peoples' rights in Indonesia, has yet to be enacted or implemented. The recent landmark Constitutional Court decision No. 35 of May 2013 which ruled that the customary forests of indigenous peoples should not be classed as falling in 'State Forest Areas', is a glimmer of hope for the Malind and other indigenous peoples of the Indonesian archipelago, but it remains to be seen how quickly and effectively follow-up legislation will be set up so that the decision can be implemented, and it remains unclear what will happen to indigenous communities' forests in the meantime. In particular, concerns have been raised as to whether companies may in fact accelerate exploitation in customary forests before legislation is developed to implement the Decision, and whether their existing leases will still be deemed valid despite the change in legal status of the forests they operate in.⁹⁷

Company perspective on consent-seeking process

The responsibility of corporations to respect human rights wherever they operate has been affirmed in the *United Nations Guiding Principles on Business and Human Rights*, which states that this responsibility exists 'independently of States' willingness and/or abilities to fulfill their own obligations... and exists over and above national laws and regulations protecting human rights'.⁹⁸ At the regional level, and following up on these principles, the

National Human Rights Institutions of Southeast Asia have promulgated the *Bali Declaration on Human Rights and Agribusiness*,⁹⁹ which clarifies how rights must be upheld by both the private sector and governments in Southeast Asia¹⁰⁰ and they have called on the ASEAN Inter-Governmental Commission on Human Rights to enforce these norms regionally.¹⁰¹

As a signatory since 2008 to the United Nations Global Compact, which encourages companies to publicly commit to uphold core human rights principles and to report annually on their progress in implementation, Wilmar has committed to

making the Global Compact and its principles part of the strategy, culture and day-to-day operations of our company.¹⁰²

Furthermore, Wilmar's sustainability policy with regards to community development includes a commitment to

ensure we bring meaningful and lasting benefits to the communities in areas where we operate, while we maintain the continual viability of our business. We reckon one of the best means to achieving this is **to build open, honest and mutually beneficial relationships that promote harmony with them.**¹⁰³ (emphasis added)

The company declined our request for the interviews to be recorded.

From the perspective of the company, the projected sugarcane plantation is a way out of poverty for the Malind people:

The Malind cannot keep surviving on hunting forever. We cannot allow them to keep living in the forest struggling to survive, we need to help them.¹⁰⁴

With regards to whether any land tenure or social surveys had been carried out, the company noted that they had made several preliminary observations with regards to the location and existence of communities in the targeted area, but that this was not available as a written report. No mechanism or Standard Operational Procedure (SOP) has been developed with regards to community participation in consultations, nor has any conflict resolution procedure been anticipated or designed. In relation to evidence that certain PT ARN field staff are presenting themselves as priests to communities in consultations, company staff interviewed stated that they have no specific standard for how interactions between the company and communities should proceed, and that they hope that such interaction is carried out in a professional manner.¹⁰⁵

The company stated that consultations were always held collectively and not as one-on-one negotiations, and that participants in the consultations included tribe, *marga* and sub-*marga* elders, village government representatives, district government representatives, sub-district government representatives, security personnel and company staff. Company staff claimed that information shared during such consultations concern the projected development, the economic benefits to be derived by community, how the land will be used, areas to be enclaved, the management of the sugarcane plantation, forms of community involvement, the planned education programme at Instiper, the possible environmental risks caused by the development and how these risks would be managed, and the AMDAL process. The

company affirmed that the military and police were present at consultations for security reasons only, and not to put pressure on the communities.¹⁰⁶

When asked why communities were not given copies of the agenda, meeting notes or participant list during consultations, PT ARN staff noted that as no agreements had been signed yet, there was no need to share such documents. However, agreements have been reached over land release in Zanegi, but the Jakarta office informed the research team that it does not hold copies of these agreements. The research team was also unable to see copies of the agenda, meeting notes or participant lists as copies were also said not to be kept at the Jakarta office. Other documents requested, such as the AMDAL and copies of participatory maps produced with the communities, were also not available at the Jakarta office. With regards to HCVs to be enclaved, the company noted that the location of these areas would not be included in agreements with community members but would be included in the company's master plan and endorsed by the local government.¹⁰⁷

The company noted that they would not force communities into consenting to their project, as giving or withholding consent was their right. This however contradicts the findings from the field, which show that even where consent has been withheld, the company has continued to approach the community and seek to negotiate an agreement with them. With regards to the terms used for compensation and the difference between *sewa*, *kontrak*, *ganti rugi* and so forth, PT ARN staff affirmed that they only use the term *ganti rugi tanam tumbuh*, and that this included compensation for both the land and the crops planted on that land. With regards to the amount of money being offered to communities per hectare of land surrendered, PT ARN staff stated that compensation amounts were determined by local government regulations in agreement with the land owners.¹⁰⁸

Conclusions

The findings of this investigation reveal that where local communities are giving their consent to the conversion of their customary lands, this is largely based on insufficient and one-sided information, non-guaranteed promises of economic and social welfare aid, unilaterally imposed terms of compensation, vague or non-existent contracts, and with little freedom of choice and expression. PT ARN is failing to provide comprehensive and impartial information to communities, under conditions where communities are free to express themselves, and failing to consult with them in ways that respect communities' right to *withhold* their consent. Purposeful manipulation and fragmentation of the Malind's customary community collective decision-making processes and representative institutions is leading to rampant elite co-optation, social fragmentation and intra/inter-community dissent. National and local regulations are either not being implemented, or interpreted to suit the interests of the companies and government, or inherently in contradiction with international human rights standards and in urgent need of reform. In any case, local communities lack awareness and understanding of their rights under national and international laws, meaning they are unable to defend these rights and demand redress where they are being, or are at risk of being, violated. Particular concerns are raised over the threatened food security of the Malind peoples in the light of the conversion of vast areas of their customary lands to mono-crop plantations, as well as the consequences of this rapid and imposed transformation on their livelihoods, culture, identities and survival as a people.

The findings also put in question the Government of Indonesia's whole approach to food security. The current policy emphasises the promotion of large-scale agricultural enterprises at the expense of local communities and their self-sufficiency. Yet recent, independent research suggests this policy is failing. Data from the Global Food Security Index (GFSI) of 2012 scores Indonesia well below neighbouring countries like Malaysia, Thailand, Vietnam and the Philippines, which give relatively more emphasis to supporting local farmers and secure tenure. The GFSI data focus on three symptoms of this failed policy: malnutrition, low children's weight and high mortalities. Indonesia's Centre of Information and Development studies points out that Indonesia has entered a 'red zone', 'because the government was too busy thinking about how to meet food demand and is overlooking the importance of becoming self-sufficient...self-sufficiency can be achieved by issuing policies prioritizing small farmers'.¹⁰⁹ As this study shows, MIFEE, is not just failing to promote local farmers, it is actually undermining local self-sufficiency and local food security, generating poverty for local people and denying their rights to their lands, livelihoods and to a future built on the own cultures and institutions. The recommendations which follow seek to address the immediate problems of the Malind peoples, but this study also shows the need for a much more fundamental rethink of Government food policy.

Recommendations

In the light of the findings in this report, a number of non-exhaustive recommendations to the government, PT ARN, NGOs and the affected indigenous Malind communities are delineated below.

Government

- 1) Immediately suspend any part of that project that may threaten the cultural survival of the affected peoples and to provide immediate support to indigenous communities – designed with their participation and consent – that have been deprived of their means of subsistence
- 2) Ensure that labour conditions in the MIFEE project and elsewhere in its forestry sector are consistent with international labour standards and in no way employ forced labour or discriminatory forms of employment, and adopt a policy that uphold the right of workers to freely choose their employment, as this right is fundamentally related to recognition of and respect for indigenous peoples' territorial rights
- 3) Engage in formal dialogue with the freely chosen representatives of Papuan indigenous peoples about how best to address this situation, and prioritise constructive dialogue and non-violent approaches to address conflict in Papua
- 4) Establish a Human Rights Court and a Truth and Reconciliation Commission for Papua, as provided for in the PSAL, and ensures that indigenous peoples are able to fully and effectively participate through their own freely chosen representatives in any processes established to amend the PSAL, as required by Article 5(c) of the ICERD and codified in Article 19 of the 2007 UN Declaration on the Rights of Indigenous Peoples

- 5) Enact and implement with the full and effective participation of indigenous peoples, the *Draft Law on the Recognition and Protection of the Rights of Indigenous Peoples* as it was adopted by the Indonesian National Parliament on 16th December 2011
- 6) Implement the decision of the Constitutional Court of 16th May 2013 with indigenous peoples' effective participation as well as ensure that there are national legal standards in place to direct the adoption of laws by regional governments in relation to the implementation of that judgment
- 7) Actively support and implement the *Bali Declaration on Human Rights and Agribusiness* in conjunction with Komnas HAM, indigenous peoples' organisations and NGOs
- 8) Request or accept requests for on-site visits from the UN Special Rapporteurs on the Rights of Indigenous Peoples, the Right to Food, and Contemporary Forms of Slavery so as to assist Indonesia with compliance with its international obligations, including in relation to the rights of indigenous peoples in Papua¹¹⁰

PT ARN

- 1) Share copies of all agreements reached with communities regarding location and buffer zone perimeter of sacred and protected areas (e.g. river banks, sago forests, villages, graveyards)
- 2) Inform communities of the projected HCV Assessment and classification scheme, and agree with the communities as to how HCVs 5 & 6 will be preserved, enhanced and managed
- 3) Ensure that consultations are collective and involve a wide range of community members from all local *marga* and sub-*marga*, not only the head of these clans and sub-clans, or one-on-one negotiations
- 4) Ensure all meetings are held in the villages in question rather than in Merauke city. If meetings must take place elsewhere than the village, provide support to the communities to attend (e.g. transport and facilitation costs)
- 5) Where communities have withheld their consent to the planned development, recognise that this is their right and respect it by ceasing further attempts of consultation
- 6) Agree on terms and amounts of compensation with communities *prior* to signing land release contracts with them
- 7) Carry out land tenure surveys and participatory mapping *prior* to signing land release contracts with local communities
- 8) Clarify to communities the legal status of the land upon the expiry of the HGU
- 9) Provide communities with copies of all relevant documents (e.g. maps, land surveys, agreements, contracts, meeting agendas, meeting participant list, meeting notes, photographs taken during consultations and field visits). This means providing copies to a wide range of individuals and not only the village head or other community representative.

- 10) Agree on authoritative version of consultation notes with the community, to avoid duplication and possible discrepancies in notes content
- 11) Hold consultations with communities without the presence of the army or the police in order for communities to feel they have the freedom to express themselves without pressure
- 12) Negotiate with communities compensation for land ceded *and* for crops planted on the lands to be acquired
- 13) Define clearly and comprehensively to communities the terms being used in relation to compensation, citing legal references where relevant
- 14) Negotiate with communities as to the model of grievance or conflict resolution mechanism to be developed jointly with them, should problems arise or contracts be violated
- 15) Give adequate time for communities to digest, discuss and reflect on the information shared during consultations before seeking their consent. 'Adequate' time is the amount of time that communities themselves feel necessary to make an informed decision.
- 16) Provide communities with contact details for the company (e.g. location of the main and field offices, contact numbers of company representatives) and who they can approach (and how) should the agreements reached require renegotiation

Non-governmental organisations

- 1) Provide legal and human rights training to communities in order to build their awareness of and capacity to defend their rights under national and international law
- 2) Mobilise youth and women in communities as agents of change through trainings and other capacity-building activities
- 3) Support lesson-sharing between communities in order for them to inform their decisions based on the positive and negative experiences of other communities
- 4) Develop simple guidance for communities on consultation and what this process should imply, as a practical toolkit that communities can use to ensure that they give or withhold their consent on the basis of sufficient information on their rights and on the obligations of companies and the State
- 5) Continue raising the voices of affected indigenous Malind people at the national and international levels to support rights-based development based on self-determination and respect for the right to Free, Prior and Informed Consent

It is not that we reject development. Rather, we do not want to be observers to our own development. In some ways, the companies can help us. In practice, however, they trample on our basic rights.

Community member, Wayau village



Young girls in Baad

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United Nations Convention on Biological Diversity

United Nations Convention on the Elimination of all Forms of Racial Discrimination

United Nations Covenant on Civil and Political Rights

United Nations Covenant on Economic, Social and Cultural Rights

United Nations Declaration on the Rights of Indigenous Peoples

Vienna Declaration and Programme of Action

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

Appendix I: Chronology of events

Date	Event
2010	Wilmar announces extension of its operations to the sugarcane sector ¹¹¹
May 2011	Wilmar acquires PT ARN ¹¹²
2 nd November 2012	Concerns voiced by communities from Baad and Koa villages (Anim Ha sub-district, Merauke) over impact of PT ARN's operations ¹¹³
11 th February 2013	Announcement by PT ARN of 'sosialisasi' and participatory mapping processes towards AMDAL ¹¹⁴
2 nd April 2013	First email sent by PUSAKA, FPP and Sawit Watch to PT ARN requesting meeting ¹¹⁵
2 nd April 2013	Email 1 from PT ARN
5 th April 2013	Second email sent by PUSAKA, FPP and Sawit Watch to PT ARN
5 th April 2013	Email 2 from PT ARN
8 th April 2013	Third email sent by PUSAKA, FPP and Sawit Watch to PT ARN
19 th April 2013	Complaint sent to Wilmar Group ¹¹⁶
23 rd April 2013	Complaint receipt acknowledged by Wilmar Group
26 th April 2013	Email 3 from PT ARN
1 st May 2013	Email 4 from PT ARN (Jakarta office) accepting request for meeting
2 nd May 2013	Formal response to complaint received from Wilmar Group
6 th May 2013	Meeting with PT ARN (Jakarta office)
14 th May 2013	Response to Wilmar's response sent by PUSAKA, FPP and Sawit Watch
15 th – 31 st May 2013	Field investigation
25 th July 2013	NGO submission of Request for further consideration of the situation of the indigenous peoples of Merauke, Papua province, Indonesia, under the Committee on the Elimination of Racial Discrimination's urgent action and early warning procedure ¹¹⁷
19 th August 2013	Meeting with PT ARN (Jakarta office)
30 th August 2013	CERD Committee communication to government of Indonesia ¹¹⁸

Appendix II: Extracts of selected laws and regulations

INTERNATIONAL INSTRUMENTS

United Nations Declaration on the Rights of Indigenous Peoples

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

United Nations Covenant on Civil and Political Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

United Nations Covenant on Economic, Social and Cultural Rights

Article 11

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

United Nations Convention on the Elimination of All Forms of Racial Discrimination

Article 2

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

International Labour Organisation Convention No. 107 concerning Indigenous and Tribal Populations

Article 11

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

United Nations Convention on Biological Diversity

Article 8. In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

Article 10. Sustainable Use of Components of Biological Diversity

Each Contracting Party shall, as far as possible and as appropriate:

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

3B Principles of implementation

These principles of implementation are essential to contribute to responsible governance of tenure of land, fisheries and forests.

[...]

6. Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

9. Indigenous peoples and other communities with customary tenure systems

9.9 States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States. Consultation and decision-making processes should be organised without intimidation and be conducted in a climate of trust. The principles of consultation and

participation, as set out in paragraph 3B.6, should be applied in the case of other communities described in this section.

NATIONAL REGULATIONS¹¹⁹

1945 Constitution of the Republic of Indonesia

Article 18B clause (2)

The State recognises and respects the unity of customary law communities [indigenous peoples] as well as their traditional rights as long as these are still active and in line with social development and the principles of the Unitary State of the Republic of Indonesia, as set out in the law.

Basic Agrarian Law of 1960 (*Undang Undang Pokok Agraria No. 5 tahun 1960*)

Article 5

Agrarian law pertinent to land, water and air space is customary law, as far as it is not contrary to the national interest and the State, and is based on the unity of races, Indonesian socialism and the regulations specified in this law, as well as other regulations, all taking into consideration the elements based on religious law.

People's Consultative Assembly Decree No. IX/MPR/2001 on Agrarian Renewal and Natural Resources (*TAP MPR No. IX/MPR/2001*)

Article 5

Agrarian reform and natural resource management should be implemented in accordance with the principles of:

j. recognition and respect for the rights of customary law communities [indigenous peoples] and the nation's cultural diversity in relation to agrarian resources and natural resources

Law No. 39 of 1999 on Human Rights (*Undang Undang No. 39 tahun 1999 tentang Hak Azasi Manusia*)

Article 6

(1) In order to uphold human rights, differences and needs, indigenous peoples must be taken into consideration and protected by the law, the public, and the Government.

(2) The cultural identity of indigenous peoples, including indigenous land rights are protected, consistent with the times.

Law No. 41 of 1999 on Forestry (*Undang Undang No. 41 tahun 1999 tentang Kehutanan*)

Article 67 verse (1)

Customary law communities, as long as they exist and are recognised to exist have the right to:

- a) collect forest products to fulfil the daily needs of the community;
- b) engage in forest management activities based on customary law and not contrary to the law;
- c) achieve empowerment in order to improve their well-being.

Papua Special Autonomy Law (*Otsus*)

Article 1

In this law the meaning of:

[...]

- o. *Adat* is the hereditary customs acknowledged, adhered to, institutionalised and maintained by the local *adat* community.
- p. *Adat* community is the members of the Papua natives living in and bound to a certain area and *adat* with high solidarity among its members.
- q. *Adat* Law is the verbal regulations or norms prevailing within the *adat* law community, regulating, binding and maintained and bear sanctions.
- r. *Adat* Law community is the members of the Papua natives which since their birth live within certain areas and are bound and governed by certain *adat* laws with a high feeling of solidarity among its members.
- s. *Hak Ulayat* is the right of association controlled by a certain *adat* community over a certain area, which is the living environment of its member, covering the right to utilise the land, forest and water and all their contents according to statutory regulations.

Article 43

- (1) The Government of the Papua Province shall acknowledge, respect, protect, empower and develop the rights of the *adat* community based on the provisions of prevailing statutory regulations.
- (2) The *adat* rights referred to in paragraph (1) shall cover the *ulayat* right of the *adat* law community and the individual right of the members of the *adat* law community concerned.
- [...]
- (4) The *ulayat* land and the individual land of the members of the *adat* law community for any purpose whatsoever shall be provided through deliberation with the *adat* law community and the member concerned to obtain approval on the delivery of the land required as well as the compensation.

Law No. 27 of 1999 on Environmental Impact Analysis (*Peraturan Pemerintah No. 27 tahun 1999 tentang Analisis Mengenai Dampak Lingkungan Hidup*)

Article 33

- (1) Every business and/or activity referred to in Article 3 paragraph (2) shall be publicised in advance to the public before the proponent prepares the Environmental Impact Assessment.

Article 34

- (1) Concerned community members must be involved in the preparation of the terms of reference, the evaluation of the terms of reference, the Environmental Impact Assessment, the environmental management plan and the environmental monitoring plan.

Law No. 32 of 2009 on Environmental Protection and Management (*Undang Undang No. 32 tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup*)

Article 26

- (1) The AMDAL document as referred to in Article 22 is compiled by the proponent with the participation of communities.
- (2) The participation of communities must be based on the principle of transparent and comprehensive information-sharing as well as notification prior to the undertaking of the activity.
- (3) Communities as referred to in paragraph (1) include:
 - a. Those that are affected;
 - b. Observers of the environment; and/or
 - c. Those affected in one form or another by the AMDAL process and related decisions.
- (4) Communities as referred to in paragraph (1) may appeal against the AMDAL document.

Regulation of the National Land Bureau No. 5 of 1999 on Guidance on the Issue of Customary Law Communities' Customary Lands (*Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional No. 5 tahun 1999 tentang Pedoman Penyelesaian Masalah Hak Ulayat Masyarakat Hukum Adat*)

Article 4

2. The release of customary land as referred to in verse 1(b) for agricultural and other purposes requiring a Business Use Permit (*hak guna usaha*) or Right of Use (*hak pakai*), can be done by customary law communities through the surrender of land use for a specific period of time, such that once this time has passed, or once the aforementioned land is no longer needed, or is abandoned such that the Business Use Permit or Right of Use expire, then ensuing use should be made based on a new agreement from the indigenous peoples concerned as long as these customary law communities' customary land rights still exist, in accordance with the requirements of Article 2.

Article 9

1) The Central Government or Local Government, in the use and transfer of ownership rights of customary law communities for the purposes of development, must obtain the written consent of customary law communities accompanied by the payment of compensation or damages.

(2) The other party, in the use and transfer of ownership rights of customary law communities, must obtain the written agreement of the customary law community members, accompanied by the payment of compensation or damages.

Article 14

(3) Other parties, in the use of natural resources as referred to in verse (1) must collaborate with enterprises owned by customary law communities.

Article 15

(2) The profits obtain from collaboration with enterprises owned by customary law communities must be allocated for the needs of customary law communities.

(3) The receipt of profit for the needs of customary law communities as referred to in verse (2) must be at least 30% of yearly profits.

(3) Acceptance advantage to the needs of indigenous communities as referred to in paragraph (2) at least 30% (thirty percent) of the profits obtained every year.

PROVINCIAL REGULATIONS

Local Regulation of Papua Province No. 22 of 2008 on the Protection and Management of the Natural Resources of the Indigenous Peoples of Papua (*Peraturan Daerah Khusus Provinsi Papua No. 22 tahun 2008 tentang Perlindungan dan Pengelolaan Sumber Daya Alam Masyarakat Hukum Adat Papua*)

Article 7

Customary law societies have the right to:

- a. Benefit from the natural resources in their *adat* areas;
- b. Obtain information about the planned allocation and utilisation of natural resources;
- c. Provide advice and opinions on the utilisation of natural resources;
- d. Obtain assistance from the Government, Provincial Government and City/Regency Government in conducting productive economic activities based on local knowledge;
- e. obtain assistance Government, Provincial Government and the
- f. Regency / City in conducting productive economic activities based on local knowledge;
- g. Supervise the activities of other stakeholders in the exploitation of natural resources;

- h. Obtain compensation or damages for the use and transfer of property rights to others in accordance with written agreements contained in an authentic deed;
- i. Obtain compensation in line with written agreements contained in an authentic deed for reduction or loss of customary law community access due to the zoning of customary lands as conservation areas; and
- j. Obtain legal recognition for the existence of customary law communities.

Local Regulation of Papua Province No. 23 of 2008 on the Collective Land Rights and the Individual Land Rights of Indigenous Peoples (*Peraturan Daerah Khusus Provinsi Papua No. 23 tahun 2008 tentang Hak Ulayat Masyarakat Hukum Adat dan Hak Perorangan Warga Masyarakat Hukum Adat atas Tanah*)

Article 8

(1) Based on the Decree of the Regent/Mayor or Governor that establishes that the collective and individual customary land rights of customary law communities and individuals still exist, customary law communities and/or individuals have the authority to:

- a. manage collective and/or lands under customary land rights in line with customary law that is actively used by the community in question;
- b. conduct consultations with third parties outside of customary law communities who need the land for various purposes.

Endnotes

¹ The Jakarta Globe 2013.

² See *inter alia* Down to Earth 2011a, b; Mote & Miller 2011; Moran 2012; Manufandu 2012; articles on the AWAS! MIFEE website; the 2011 documentary *Mama Malind su hilang*; West Papua Media Alerts 2011a, 2011b; Pusaka & Forest Peoples Programme 2011; Pusaka 2013a; Papua Forest Eye 2010; Sawit Watch & Forest Peoples Programme 2013; Ginting & Pye 2011; Forest Peoples Programme 2011, 2012a.

³ Somba 2012.

⁴ Majalah 2012.

⁵ Carlo Nainggolan (Sawit Watch) pers. comm. And see Sawit Watch 2011.

⁶ Forest Peoples Programme 2011.

⁷ CERD 2011.

⁸ Forest Peoples Programme 2012a.

⁹ Forest Peoples Programme 2013a, Forest Peoples Programme, Pusaka, Sawit Watch & Down to Earth 2013.

¹⁰ CERD 2013.

¹¹ Sawit Watch & Forest Peoples Programme 2013.

¹² Wilmar 2011a.

¹³ Interview with PT ARN, Jakarta office, 6th May 2013.

¹⁴ Pusaka 2012.

¹⁵ Bintang Papua 2013.

¹⁶ Wilmar 2008.

¹⁷ Wilmar (nd)a *Sustainability*.

¹⁸ Wilmar (nd)b *Community development*.

¹⁹ Wilmar (nd)c *Who we are*.

²⁰ Wilmar 2011b.

²¹ IFC Performance Standard 7 on Indigenous Peoples, available at

http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES

²² See *inter alia* Colchester et alii 2011; Chao et alii 2012; Forest Peoples Programme 2012b, 2013b; Colchester & Chao 2013 (eds); Forest Peoples Programme & Sawit Watch 2012; NRK 2012; Forest Peoples Programme, HuMa & Sawit Watch 2011.

²³ See for example Forest Peoples Programme 2012b.

²⁴ See Friends of the Earth International 2013.

²⁵ See Forest Peoples Programme (nd)a.

²⁶ For the full documentation of complaints on procedural irregularities and standards violations by Wilmar and the IFC through the Compliance/Advisor Ombudsman, see Forest Peoples Programme (nd)b.

²⁷ Colchester et alii 2011; Forest Peoples Programme, HuMa & Sawit Watch 2011.

²⁸ See Forest Peoples Programme 2013b.

²⁹ See Rainforest Foundation Norway 2012; Rainforest Foundation Norway & Friends of the Earth Norway 2012.

³⁰ Newsweek 2012.

³¹ See Forest Peoples Programme, Pusaka & Sawit Watch 2013.

³² See *Request for further consideration of the situation of the indigenous peoples of Merauke, Papua province, Indonesia, under the Committee on the Elimination of Racial Discrimination's urgent action and early warning procedure*. 25th July 2013. Available at <http://www.forestpeoples.org/topics/un-human-rights-system/publication/2013/request-further-consideration-situation-indigenous-pe>, and Pusaka 2013b.

³³ Separate interviews were held with women and children to ensure they felt more comfortable to express their views and opinions without the presence of male community members, who, in accordance with cultural norms, hold greater decision-making and information-sharing authority.

³⁴ Heavy rains and flooded roads were a notable hurdle in accessing the villages for the team travelling by motorbike. Transport by road to Koa was not possible as a result and no boats were available to travel by river. Interviews with Koa community members were however held in Wayau, which a number of representatives of the village were visiting at the time of the investigation. It is also worth noting that while the research team sought to interview as many community members as possible, hunting, sago-gathering and forest-camping patterns meant substantial number of these individuals were frequently away from the village.

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- ³⁵ For more on the history of Papua in the context of modern Indonesia, see Vickers 2005.
- ³⁶ Heidebüchel 2007.
- ³⁷ Drooglever 2010.
- ³⁸ Minority Rights Group 1983.
- ³⁹ Adhiati & Bobsien 2001.
- ⁴⁰ King 2004.
- ⁴¹ Sullivan 2003.
- ⁴² *Papua Special Autonomy Law 2001*, Considerations, Articles (f) and (g).
- ⁴³ World Bank 2009.
- ⁴⁴ Ginting & Pye 2011.
- ⁴⁵ See CERD 2007 at para. 15-7. The national laws in questions are discussed in detail in *Request for consideration of the situation of indigenous peoples in Kalimantan, Indonesia, under the United Nations Committee on the Elimination of Racial Discrimination's urgent action and early warning procedures*, 6th July 2007, at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/urgent_action.pdf; and *Request for consideration of the situation of indigenous peoples in the Republic of Indonesia under the follow up and early warning and urgent action procedures*, February 2009, at http://www.forestpeoples.org/documents/asia_pacific/indonesia_cerd_follow_up_feb09_eng.pdf
- ⁴⁶ Jakarta Post 2013.
- ⁴⁷ Jakarta Post 2011.
- ⁴⁸ Under the Basic Agrarian Law some form of customary rights to lands are recognised. However, these rights will be superseded by any grant of real title or other form of registered property right and the State has wide discretion to determine whether customary rights continue to exist.
- ⁴⁹ See Constitutional Court ruling and AMAN's press release at Forest Peoples Programme 2013c, and Down to Earth 2013.
- ⁵⁰ The judgment was made in response to a petition filed with the court by the national indigenous peoples' organisation AMAN (*Aliansi Masyarakat Adat Nusantara*) some 14 months before. AMAN had objected to the way the 1999 Forestry Act treats indigenous peoples' 'customary forests' as providing only weak use-rights within State Forest Areas.
- ⁵¹ BKPM 2009.
- ⁵² Lang 2012.
- ⁵³ Merauke Regency 2006.
- ⁵⁴ For more on the ecology of Papua, see Marshall & Beehler 2007 Parts 1 & 2.
- ⁵⁵ For more on the Malind people, see Van Baal's authoritative, although somewhat outdated ethnography of 1966. See also Boelaars 1986, Overweel (nd), Corbey 2010 and the articles in the now discontinued *Jurnal Antropologi Papua* Vol. 2, No. 4 (August 2003); Vol. 1, No. 2 (December 2002); Vol. 1, No. 3 (April 2003).
- ⁵⁶ The etymological origins of the term 'Malind' are unclear. Geurtjens's dictionary of the Malind language (Geurtjens 1933) suggests the word is composed of *maro*, a common river name used to denote the Merauke river, and *ind* (plural of *end*), meaning 'deriving from' (see Van Baal 1966).
- ⁵⁷ For more on the customary land tenure of the Malind people, see Galis 1970 and Verschuere 1970.
- ⁵⁸ Wilmar (nd) *Sugar*.
- ⁵⁹ Interview with PT ARN, Jakarta office, 6th May 2013.
- ⁶⁰ *Ibid.*
- ⁶¹ At the time of writing, no HCV Assessment had yet been conducted.
- ⁶² It was difficult to establish a clear chronology or dates of events and consultations from community members interviewed. Most use Christian festivals as an approximate reference point for events (e.g. before Christmas of 2012, after Easter 2011).
- ⁶³ Frequently used by companies operating in Indonesia and Indonesian government bodies, the term *sosialisasi*, which has the normal meaning of 'being friendly', is used as a technical term to mean 'awareness raising' or 'public dissemination of information'. In practice, it implies a one way transfer of information from the developer to those to be developed, informing communities and other stakeholders of the projected development (see Indonesia studies in Colchester & Chao (eds) 2013 (forthcoming)).
- ⁶⁴ The term *aparap keamanan* could imply military and/or police representatives as well as company-hired guards.
- ⁶⁵ It was reported by the village head that all but the Mahuze Wakabalik sub-*marga* had released land to PT SIS.

⁶⁶ The 2012 documentary *Mama Malind su hilang* documents the process of land acquisition by PT SIS and the numerous violations of the rights of the indigenous people of Zanegi village. The documentary is available at <https://www.youtube.com/watch?v=RqYoRh1aApp>. See also Awas MIFEE! 2013.

⁶⁷ Most community members in Zanegi (especially mothers) were reluctant to answer questions about why their children were sick and simply said they did not know. It is possible that this was out of a sense of 'shame' (*malu*) as mothers unable to provide for their children's wellbeing. In addition, the prevalent belief in witchcraft and sorcery led many community members to suggest this was the reason for widespread and sudden illness and deaths in the village, and it was often difficult as a result of this cultural belief to get community members to consider that the reasons could lie instead (or in addition) in the operations of PT SIS and the loss of their customary land.

⁶⁸ Forest Peoples Programme, Pusaka & Sawit Watch 2013.

⁶⁹ Article 32(2).

⁷⁰ Article 1(1).

⁷¹ *Ibid.* Article 11(1).

⁷² Article 2(2).

⁷³ Article 10(c).

⁷⁴ Article 3B(6).

⁷⁵ Article 18B(2).

⁷⁶ Article 5.

⁷⁷ Article 5J.

⁷⁸ Article 6.

⁷⁹ Article 67(1).

⁸⁰ Article 1S.

⁸¹ Articles 43(1) and 43(4).

⁸² Article 7A, 7B and 7H.

⁸³ Article 8(1).

⁸⁴ *Local Regulation of Papua Province No. 23 of 2008 on the Collective Land Rights and the Individual Land Rights of Indigenous Peoples*, Article 8(1).

⁸⁵ Interview with Investment Coordination Board, Merauke, 16th May 2013.

⁸⁶ Interview with Forestry and Plantations Agency, Merauke, 17th May 2013.

⁸⁷ Article 4(1).

⁸⁸ Article 17(2).

⁸⁹ Article 28(1).

⁹⁰ *Regulation of the National Land Bureau No. 5 of 1999 on Guidance on the Issue of Customary Law Communities' Customary Lands*, Articles 2 and 4(2).

⁹¹ *Local Regulation of Papua Province No. 23 of 2008 on the Collective Land Rights and the Individual Land Rights of Indigenous Peoples*, Article 8(3b).

⁹² *Regulation of the Ministry of Agriculture No. 26 of 2007 on Guidance for Plantation Business Permit*, Article 1(10).

⁹³ The plasma scheme was first conceived as part of the Indonesian government's transmigration programme in the 1980s and designed to assist smallholders to become independent plantation growers. In theory, in the early years of plantation development before plantations reach maturity, the livelihood of smallholders are supported through employment by the company and at the same time learning how to cultivate the plantation crop.

⁹⁴ *Regulation of the Ministry of Agriculture No. 26 of 2007 on Guidance for Plantation Business Permit*, Article 11.

⁹⁵ *Law No. 40 of 2007 on Limited Companies*, Article 74(2); *Regulation No. 47 of 2012 on Environmental and Social Responsibility of Limited Companies*, Article 5(1).

⁹⁶ Article 10.

⁹⁷ Down to Earth 2013.

⁹⁸ United Nations 2011.

⁹⁹ *Bali Declaration on Human Rights and Agribusiness in Southeast Asia*. Available at

<http://www.forestpeoples.org/sites/fpp/files/publication/2011/12/final-bali-declaration-adopted-1-dec-2011.pdf>

¹⁰⁰ Chao & Colchester (eds) 2012.

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- ¹⁰¹ See Forest Peoples Programme 2012c.
- ¹⁰² Wilmar 2008.
- ¹⁰³ Wilmar (nd)b *Community development*.
- ¹⁰⁴ Interview with PT ARN, Jakarta, 19th August 2013.
- ¹⁰⁵ Ibid.
- ¹⁰⁶ Ibid.
- ¹⁰⁷ Ibid.
- ¹⁰⁸ Ibid.
- ¹⁰⁹ Sihite 2013:6.
- ¹¹⁰ These recommendations are drawn from the *Request for further consideration of the situation of the indigenous peoples of Merauke, Papua Province, Indonesia, under the Committee on the Elimination of Racial Discrimination's urgent action and early warning procedures*, submitted by 26 Indonesian organisations and Forest Peoples Programme in 2013.
- ¹¹¹ Wilmar 2011a *Acquisitions and disposals*.
- ¹¹² Ibid.
- ¹¹³ Pusaka 2012.
- ¹¹⁴ Bintang Papua 2013.
- ¹¹⁵ For series of email communications from 2nd to 19th April 2013 between Pusaka, Forest Peoples Programme, Sawit Watch and PT ARN/Wilmar, see <http://www.forestpeoples.org/topics/palm-oil-rspo/publication/2013/international-and-indonesian-civil-society-organisations-compl>
- ¹¹⁶ Ibid.
- ¹¹⁷ See <http://www.forestpeoples.org/topics/un-human-rights-system/publication/2013/request-further-consideration-situation-indigenous-pe>
- ¹¹⁸ See <http://www.forestpeoples.org/sites/fpp/files/publication/2013/09/cerdindonesiamifeeaugust2013.pdf>
- ¹¹⁹ Authors' own translations except for PSAL excerpts, available at <http://www.papuaweb.org/goi/otsus/files/otsus-en.html>