**Submission of Franciscans International**

**EMRIP Study on Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.**

The submission[[1]](#footnote-2) focuses on the situation of indigenous peoples in West Papua, Indonesia.

**The status of indigenous peoples in Indonesia**

1. The Indonesian Constitution recognizes the rights of Indigenous Law Communities (*Masyarakat Hukum Adat*) in Article 18b-2. However, while supporting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Government of Indonesia (GoI) does not recognise the applicability of the concept of indigenous peoples. For the GoI, Indonesia is a multicultural and multi-ethic nation with unchanged demographic composition at the time before and after independence.[[2]](#footnote-3) This constitutes as a reason of the non-applicability of the notion of indigenous peoples according to UNDRIP in the context of Indonesia. The GoI has rejected calls for the recognition of the specific needs of groups that identify themselves as indigenous, which creates legal uncertainty, and results in a lack of access to justice for indigenous peoples.
2. The GoI and the House of Representatives have yet to formulate the Indigenous Community Law as mandated in the Constitution. The Draft Law on the Recognition and Protection of the Rights of Indigenous Peoples, which would streamline processes for legal recognition of indigenous peoples’ rights, has been languishing in the Parliament for over a decade despite repeated supporting statements made by some members of the Parliament.[[3]](#footnote-4)
3. Law No. 5/1960 on Basic Agrarian Regulation,[[4]](#footnote-5) Law No. 39/1999 on Human Rights and the Decree of MPR No X / 2001 on Agrarian Reform implicitly recognise some rights of *Masyarakat Hukum Adat -*. Law No. 27/2007 on Coastal and Small Islands Management[[5]](#footnote-6) and Law No. 32/2009 on Environment Protection and Management [[6]](#footnote-7) use the term *Masyarakat Adat*. The Indonesian Constitutional Court confirmed the constitutional rights of indigenous peoples over their lands and territories in May 2013, including their collective rights over traditional forests. This decision has been considered as a landmark decision on the recognition of the rights of indigenous people to their customary forest.[[7]](#footnote-8)

**Indigenous peoples in West Papua, Indonesia**

1. Indonesia’s Papua region is known internationally as West Papua[[8]](#footnote-9) and refers to the western half of the island of New Guinea. Under the New York agreement, Indonesia was mandated by the United Nations (UN) to administer a referendum in West Papua in 1969 to decide whether the region would join Indonesia or decide to be independent. The referendum was supposed to be based on the principle of one man one vote. However, there were only 1.026 Papuan tribal leaders participating, out of an estimated population of 800.000. The result was overwhelmingly the integration of West Papua to Indonesia. Since then, West Papua has been internationally recognised as part of Indonesia, even though some groups in West Papua challenged the conduct of the referendum process.
2. Currently in Indonesia, it is only in the West Papua region that the country faces both peaceful and armed independence movements. Those who oppose the integration of West Papua formed pro-independent armed groups, who are under the coordination of *the Tentara Pembebasan National Papua Barat* (*TPNPB* – the armed wing of the Papua Freedom Organisation or West Papua National Liberation Army). There has been an on-going armed conflict between TPNPB and the Indonesian Security Forces.
3. Since the inclusion of West Papua in Indonesia, there have been concerns about human rights violations in the region, in particular affecting the indigenous Papuan population. The violations include not only cases of arbitrary detentions, torture, extrajudicial killings, but also undue restrictions on freedom of expression and peaceful assembly. In addition, development projects of the Indonesian government in West Papua are considered by many indigenous Papuans to bring benefits only to the non-Papuans who now constitute the majority of the population in West Papua, creating a deeper gap and tensions between the indigenous Papuans and non-Papuans.
4. According to the Indonesian State Institute of Sciences (*LIPI – Lembaga Ilmu Pengetahuan Indonesia*), the main sources of the conflict in West Papua are different interpretations of the West Papuan political status in terms of integration into Indonesia, ongoing human rights violations with impunity, the failure of development policies in the region – which have been considered as bringing the unequal benefits of development efforts among the population in the region , leading to the marginalization and discrimination of indigenous Papuans.[[9]](#footnote-10) The GoI grants very limited access to West Papua to international human rights observers and has shown little tolerance for freedom of expression.
5. In 2001, the GoI adopted Law of the Republic of Indonesia No. 21 Year 2001 on Special Autonomy for the Papua Province (*OTSUS Law for Papua*),[[10]](#footnote-11) which is applicable to Papua and Papua Barat Provinces.[[11]](#footnote-12) In its considerations, *OTSUS Law for Papua* stipulates that “that the administration and development of the Papua Province has not complied with the feeling of justification, has not yet achieved prosperity for the whole people, has not yet fully supported legal enforcement and has not yet shown respect to the Human Rights in the Papua Province, in particular the Papua community”.[[12]](#footnote-13) The *OTSUS Law for Papua* recognizes the existence and rights of native Papuans (*OAP* -*Orang Asli Papua*).[[13]](#footnote-14) This shows that the Law was adopted to respond to the on-going concerns of injustice felt by the indigenous Papuans.
6. The *OTSUS Law for Papua* has a specific provision on the establishment of a Papua People’s Assembly (*MRP* - *Majelis Rakyat Papua*) as the cultural representative of the native Papuans which has a certain authority in protecting the rights of the Papua natives, based on respect of the customs and culture (among others).[[14]](#footnote-15) It has several mandates including to give approval of the candidacy of the position of Governor and Vice Governor in Papua; to provide view and opinions on the adoption of provincial legislations; to provide considerations on matters related the protection of the rights of the indigenous Papuans.[[15]](#footnote-16)
7. With regards to addressing human rights violations, the article 45 of *OTSUS Law for Papua* contains three key provisions. The first is the appointment of a representative of the National Commission for Human Rights in Papua. This provision has been implemented by the establishment of the representative of the National Commission for Human Rights (KOMNAS HAM) in Jayapura, Papua Province. The second provision is the establishment of the Human Rights Court. The GoI has yet to establish the Court. The third is the establishment of the Truth and Reconciliation Commission (*Komisi Kebenaran dan Rekonsiliasi – KKR*) which is supposed to be established by a Presidential Decree. Further, Article 46 of the Law explains that the task of the Commission is to have historical clarification on Papua, and to take steps toward reconciliation. The Commission has no mandate to carry out judicial investigation. So far, no such decree on the establishment of the Commission has been issued.
8. The *OTSUS Law for Papua* might not be seen as a consensual agreement between the indigenous Papuans with the central government. Rather, it serves a tangible legal product of the central government to reduce and resolve the conflict in Papua.[[16]](#footnote-17) Some Papuans would consider this law as the tool of the central government to stop their resistance. Since its adoption, several civil society organisations, student movements and other elements of society, in West Papua and outside West Papua have expressed their concerns about the effective implementation of *OTSUS Law for Papua*. The Special Autonomy Law has been criticized not only for failing to bring prosperity to indigenous Papuans, but also for failing to improve the human rights situation in West Papua.[[17]](#footnote-18)
9. The *OTSUS Law for Papua* was amended for the first time in 2008 on the occasion of the establishment of Papua Barat Province, in addition to the existing Papua Province. In 2020, through Presidential Letter No. R-47/ Pres/12/2020, President Joko Widodo submitted to the House of Representative a second amendment of the Law. [[18]](#footnote-19) The government proposed amendments of three articles, namely Article 1 on definitions of terms used in this Law; Article 34 concerning the Special Autonomy Fund, and Article 76 concerning proliferation of province and regency level administration. The Indonesian House of Representative, however, proposed amendments to 19 articles.[[19]](#footnote-20)
10. The proposal of the second amendment was responded by strong reactions in West Papua, including by the Papuan People’s Representative Council (DPRP), MRP, as well as civil society organisations, arguing that any amendment should consult the Papuan people first which is represented by DPRP and MRP,[[20]](#footnote-21) as mandated by the several provision in the *OTSUS Law for Papua* itself. In addition, there was a strong concern on the ongoing human rights violation in Papua and Papua Barat provinces that have not been addressed by the central government. The Papuan also expressed their concern that the development approach by the central government benefited only for a few in West Papua, and the indigenous people remain at the disadvantage position. The central government was also considered to block the enactment of several by-laws which were considered as contradicting to the national interests, such as the establishment of local political parties in West Papua.[[21]](#footnote-22)
11. In November 2020, the MRP as a statutory body of the *OTSUS Law for Papua* launched an initiative to organise series of consultation and hearings in Papua and Papua Barat Provinces, to collect views and inputs from the Papuans, in accordance with Article 77 of the Law. The consultations which were expected to take place between 17 and 18 November 2020 in five customary areas of West Papua were finally cancelled due to the intimidation and obstructions from some pro-government groups. On 17 November 2020 in Merauke, Papua Province, the police arrested 55 persons who were in the town to participate in the MRP consultation and hearing. Among them were MRP members, resource persons and civil society representatives.[[22]](#footnote-23) They were released on the next day. However, they were summoned for further interrogation on 19 November 2020 by the Police.
12. Despite the protest and widespread rejection, on 19 July 2021, the President of Indonesia adopted a decision on the amendments of the Special Autonomy Law for Papua Province.[[23]](#footnote-24) Some of the key issues in the amendments include the decision to create new provinces, in addition to the existing Papua and Papua Barat Provinces and the increase of the Special Autonomy Law from 2% of the national budget in the period of 2001 to 2021 to 2.25% of the national budge.[[24]](#footnote-25) While the increase seems encouraging, there was no comprehensive monitoring and evaluation on how the budget was implemented, whether the indigenous Papuans have benefited from the Special Autonomy Law Fund. The deepening gap on the living condition between the indigenous Papuans and non-Papuan provides the thinking that the Fund had not been used effectively in improving the living condition of the indigenous Papuans. Despite the concerns of the on-going human rights situation in West Papua, the amendments did not specifically address these concerns. In reaction to the decision on the amendments, KOMNAS HAM expressed its concern regarding the State obligation under the *OTSUS Law for Papua* to protect, respect and fulfil the human rights in Papua, in particular for the indigenous Papuans.[[25]](#footnote-26)

**Right to self-determination of indigenous peoples in West Papua (Indonesia), and the right to 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**

1. In the current legal system in Indonesia, there is limited legal recognition of indigenous peoples’ ownership and control of their customary lands. There is no legal requirement to obtain the consent of the indigenous peoples prior to either the issuance of concessions or the commencement of commercial activities on the customary lands. The customary land holders have limited opportunities to participate in decision-making processes. They are presented with a fait accompli with respect to the establishment of a development project. Their right to use their lands is subordinated to the interests of the companies having the concessions for the development projects.
2. While there is a certain recognition on the rights of indigenous Papuan in the *OTSUS Law for Papua* and other laws, the current laws prescribe burdensome and costly processes for indigenous groups. For example, the process for customary forest recognition put the burden to prove to the indigenous groups. This process requires submission of the regulation formally recognising the customary group together with evidence of the group’s territory and forest, and proof of rights. A letter of consensus developed through consultation among key stakeholders and outlining the scope of authorities of the customary group is also required. Following satisfactory fulfilment of requirements and verification, a ministerial decree is issued.[[26]](#footnote-27) Even though legislation exists in some provincial and district-level jurisdictions to recognize the rights of indigenous peoples, only a few recognition processes have been effectively carried out in the twenty years since the enactment of the *OTSUS Law for Papua*.[[27]](#footnote-28)
3. In cases where legislations exist, authorities take years to process applications.[[28]](#footnote-29) In the meantime, the Government of Indonesia passed new laws that may severely undermine the rights of indigenous peoples. This is the case for instance of the Omnibus Law on Job Creation (Law No. 11/2020), that does not include the participation of indigenous representatives in the law-making processes.[[29]](#footnote-30) In November 2021, Indonesia’s Constitutional Court issued an order to the Government and Parliament to amend parts of the Omnibus Law on Job Creation. The Court also prohibited the passing of any further implementing regulations and policies associated with the law in a two-year grace period. If the necessary changes are not made within two years, the Court ordered that the Omnibus Law would become “permanently unconstitutional” and void.

 **Recommendations**:

* *The State should expedite the constitutional recognition of the indigenous peoples in accordance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*
* *The State should guarantee the respect of the principle of free, prior and informed consent of indigenous peoples on issues that affect them in accordance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*
* *The State should ensure the effective implementation of Special Autonomy Law for the indigenous people, such as the case in West Papua and the involvement of their representatives in the monitoring, evaluation, and eventual amendments of such Law.*

1. The information of this submission was taken from the two joint submissions of Franciscans International with other NGOs for the CEDAW Review of Indonesia in October 2021 available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fIDN%2f46761&Lang=en> and the List of Issues of the CESCR Indonesia in January 2022, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fICO%2fIDN%2f47590&Lang=en> [↑](#footnote-ref-2)
2. Statement of by the delegation of Indonesia in General Debate Item 5 during the 38th Session of the UN Human Rights Council, 16 September 2016. Available at <https://mission-indonesia.org/2016/09/21/statement-by-the-delegation-of-indonesia-general-debate-item-5/> [↑](#footnote-ref-3)
3. DPR RI, Legislator Dorong RUU MHA Mengakomodasi Kepentingan Masyarakat Adat, 2 September 2021, available at: [https://www.dpr.go.id/berita/detail/id/34421/t/Legislator+Dorong+RUU+MHA+Mengakomodasi+Kepentingan+Masyarakat+Adat](https://www.dpr.go.id/berita/detail/id/34421/t/Legislator%2BDorong%2BRUU%2BMHA%2BMengakomodasi%2BKepentingan%2BMasyarakat%2BAdat). [↑](#footnote-ref-4)
4. Article 2.4 the unofficial English translation of Law No.5/1960 on Basic Agrarian Regulation available at <https://zerosugar.files.wordpress.com/2014/08/law-no-5-of-1960-on-basic-agrarian-principles-etlj.pdf> [↑](#footnote-ref-5)
5. Article 1.33 of Law No 27/2007 on Coastal and Small Islands Management defines *Masyarakat Adat* as a group of communities living traditionally in a specific geographic area because of binding in origin of ancestor, strong relation with the environment as well as system of values determining economic, political, social and legal structures. The Indonesian version of the law is available at <https://peraturan.bpk.go.id/Home/Details/39911/uu-no-27-tahun-2007> [↑](#footnote-ref-6)
6. Article 1.31 of Law No 29/2009 on Environmental Protection and Management has the same definition of *Masyarakat Adat* as Article1.33 of Law No 27/2007 on Coastal and Small Islands Management. The English version of the Law No 29/2009 is available at <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC097643/#:~:text=Law%20No.,and%20control%20of%20the%20environment>. [↑](#footnote-ref-7)
7. The ruling of the Indonesian Constitutional Court was made in response to a petition filed by the National Indigenous Peoples' Organisation (AMAN- *Aliansi Masyarakat Adat Nusantara*) in 2009. The unofficial English translation of the ruling is available at <https://www.forestpeoples.org/sites/default/files/news/2013/05/Constitutional_Court_Ruling_Indonesia_16_May_2013_English.pdf>. The Bahasa Indonesia version of the ruling is available at <https://www.aman.or.id/wp-content/uploads/2018/05/putusan_sidang_35-PUU-2012-Kehutanan-telah-ucap-16-Mei-2013.pdf>. [↑](#footnote-ref-8)
8. In this submission, West Papua term is used to refer to the Provinces of Papua and Papua Barat. In 2003, the Government of Indonesia decided to split West Papua into those two provinces. [↑](#footnote-ref-9)
9. Indonesian State Institute of Science (LIPI), Updating Papua Road Map; Peace, Process, Youth Politics and Papuan Diaspora, 2017, available at:<http://www.politik.lipi.go.id/downloadpap/newsletter-preview/Exsum%20Updating%20Papua%20Road%20Map%20-%20LIPI%202017.pdf> [↑](#footnote-ref-10)
10. Special Autonomy Law for Papua No. 21/2001, the unofficial English translation by the United Nations Refugee Agency (UNRA) is available at: <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=84431>) [↑](#footnote-ref-11)
11. In February 2003, the GOI decided to divide West Papua into Papua Province and Papua Barat Province. [↑](#footnote-ref-12)
12. Special Autonomy Law for Papua No. 21/2001, Preambular Paragraph f. [↑](#footnote-ref-13)
13. Article 1.t of the Special Autonomy Law for Papua defines Papua native as a person originating from the Melanesian race group, comprising native ethnic groups in Papua Province and/or a person accepted and acknowledged as a Papua native by the Papua Adat community. [↑](#footnote-ref-14)
14. Idem, Article 1.g [↑](#footnote-ref-15)
15. Idem, Article 19 to 24 on the Papua People’s Assembly. [↑](#footnote-ref-16)
16. Pelupessy, Eddy. *The Land Rights of Indigenous Peoples: Revaluation of Papua Special Autonomy.* Harlev, Volume 3 Issue 1, April 2017, pp 077-090. Faculty of Law, Hasanuddin University, Makassar, South Sulawesi, Indonesia. ISSN: 2442-9880. [↑](#footnote-ref-17)
17. Human Rights in West Papua, the Seventh report of the International Coalition for Papua (ICP) provides an analysis of violations from January 2019 until 2020. September 2021. pp 112-113. Accessible in <https://humanrightspapua.org/hrreport/2021/> [↑](#footnote-ref-18)
18. Katharina, Riris and Amrynudin, Anin Dhita Kiky. *Revision of Papua Special Autonomy Law In Public Policy Perspective.* Info Singkat, A Brief Study of Actual and Strategic Issues, Vol.XIII, No.14/II/Puslit/July/2021, pp 25-31. Research Center Expertise Agency of the House of Representative of Indonesia. Available at <https://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-XIII-14-II-P3DI-Juli-2021-176-EN.pdf> [↑](#footnote-ref-19)
19. Surpiatna, Made. *The second Amendment to Papua’s Special Autonomy Law and Recentralization of Power to Jakarta.* Perspective, ISEAS Yusof Ishak Institute, Issue: 2021, No 23. 21 September 2021. Available at <https://www.iseas.edu.sg/wp-content/uploads/2021/09/ISEAS_Perspective_2021_123.pdf> [↑](#footnote-ref-20)
20. Idem. [↑](#footnote-ref-21)
21. Article 8.1 of Law No 2/2001 on the Special Autonomy Law for Papua Province stipulates that “The population of the Papua Province shall be entitled to form Political Parties.” [↑](#footnote-ref-22)
22. Human Rights in West Papua, *idem. Pp 114-115.*  [↑](#footnote-ref-23)
23. See the full version in Bahasa Indonesia of the decision including the amended articles is available at <https://peraturan.bpk.go.id/Home/Details/172403/uu-no-2-tahun-2021> [↑](#footnote-ref-24)
24. See the Article 34 of Law No 2/2001 on the Special Autonomy Law for Papua Province 2001 as amended on 19 July 2021. [↑](#footnote-ref-25)
25. The statement of the Vice Chair of KOMNAS HAM, Mr. Amiruddin Al Rahab, available at <https://www.komnasham.go.id/index.php/news/2021/7/21/1851/perubahan-uu-otsus-papua-disahkan-komnas-ham-ingatkan-komitmen-pemerintah.html> [↑](#footnote-ref-26)
26. Broadhead, Jeremy; Steni, Bernadinus; and Hinrichs, Alexander. *Implementing SVLK in customary forests*. *Working Paper. November 2018.* EU FLED REDD Facilities. Available at [https://www.euredd.efi.int/documents/10180/463214/Working+paper+-+Implementing+SVLK+in+customary+forests.pdf](https://www.euredd.efi.int/documents/10180/463214/Working%2Bpaper%2B-%2BImplementing%2BSVLK%2Bin%2Bcustomary%2Bforests.pdf) [↑](#footnote-ref-27)
27. So far, there are only 3 Recognition Decrees on indigenous peoples’ rights have been enacted. These initiatives have not come from the Government of Indonesia, but the communities themselves with the support of Non-Governmental Organisations. [↑](#footnote-ref-28)
28. According to a leading local nongovernmental initiative (Badan Registrasi Wilayah Adat), as of December 2018, of 1,100 Indigenous territories spread over more than 14 million hectares, only 35, 094 hectares has been legally titled across Indonesia. [↑](#footnote-ref-29)
29. IWGIA (the International Work Group for Indigenous Affairs), the Indigenous World 2021 35th Edition, April 2021, p. 223, available at <https://www.iwgia.org/en/resources/indigenous-world.html>. [↑](#footnote-ref-30)