

Reparations for Indigenous Peoples

International and Comparative Perspectives

Edited by
FEDERICO LENZERINI

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Reparations for *Masyarakat Adat* in Indonesia: A Sombre Tale

*Adérito de Jesus Soares**

1. Introduction

Notwithstanding the divergence of concepts regarding *masyarakat adat*¹ in Indonesia, it must be acknowledged that they have been on a very long journey in the struggle for their rights. This struggle can be divided into two components: the internal struggle for self-identification,² and concomitantly the struggle against external forces, including state and multinational corporations, which have violated the rights of *masyarakat adat*.

Masyarakat adat in Indonesia have suffered a range of misfortunes since the former president, Soeharto, came to power in 1965. This was partly because Soeharto opened Indonesia up to foreign investors and allowed them to exploit the immense natural resources of the country, without providing any legal protection or guarantees for the *masyarakat adat* in Indonesia.

The main objective of this chapter is to map out the various endeavours of NGOs and *masyarakat adat* in Indonesia in the struggle for their rights. In order to meet this principal aim, the chapter is divided into several parts. Following the introduction, it briefly addresses the discourse on indigenous peoples in Indonesia and also their struggle towards being recognized as indigenous within Indonesia. This is followed by an examination of several cases of human rights violations facing indigenous peoples and the efforts of indigenous peoples to achieve justice through legal avenues. It then presents an analysis on reparations for *masyarakat adat* through existing mechanisms.

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¹ This term means 'indigenous peoples' in Indonesian.

² This is in relation to the definition of indigenous peoples in Indonesia, which will be discussed in detail later in this chapter.

2. A Brief Trajectory of *Masyarakat Adat*

In this section we will look briefly at the debates over the concept of indigenous peoples in Indonesia.

Different interpretations of indigenous peoples exist among intellectuals and human rights advocates, let alone among indigenous peoples themselves. However, one has to acknowledge that the concept of indigenous people in Indonesia is much more lucid now than ever before. This is partly because Indonesian NGOs activists, who have been advocating for the rights of the indigenous people in collaboration with representatives from various indigenous peoples from different parts of the country, tried their best to work out a common, widely acceptable concept of indigenous peoples in Indonesia, although indigenous peoples themselves vary enormously from one place to another in the archipelago of Indonesia.

The concept of indigenous peoples acquired different meanings according to the different interpretations by different agencies. In the past, the Government of Indonesia had been very reluctant even to use the term *masyarakat adat*. The common term used by the Government was *suku terasing* (literally, 'isolated people'), a term which is very much opposed by *masyarakat adat* and the NGO community, as will be explained later in more detail.

The term 'indigenous peoples', as adopted by the ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries, has been literally translated as *masyarakat adat*. The term *masyarakat adat* sprang from a national dialogue organized by human rights activists, greatly concerned about indigenous issues in Indonesia. As noted by Zacaria, in a meeting in Tana Toraja, South Sulawesi Province in Indonesia in May 1993, the organizers of the meeting had the theme of 'the Development of *masyarakat adat* law in the Management of Natural Resources Within Forestry Area', as a means of being able to discuss the issue of *masyarakat adat* during the Soeharto regime. The meeting was organized by a several NGOs and a few indigenous peoples groups.³ Although there were then various terms used to describe indigenous peoples in Indonesia, the term *masyarakat adat* was agreed upon by the NGOs activists and representatives of indigenous peoples who attended the conference. *Masyarakat adat* in

³ These NGOs included The Indonesian Legal Aid Foundation (from Medan, Surabaya, Jakarta and West Papua), KSPPM North Sumatra, the Indonesian Environment Forum (WALHI), LATIN (Bogor), Manikaya Kauci (Bali), Lembaga Bela Puti Jari (East Kalimantan), WALDA (Tana Toraja, South Sulawesi), Yayasan Tanah Merdeka (Sulawesi Tenggara Provinsi), Lembaga Bela Banua Talino (West Kalimantan), LBBP (East Kalimantan), Rusmram Foundation (Biak, West Papua Province), Lorenz Foundation (West Papua Province), Catholic Diocese of West Papua and Social Famaur Lestari Foundation (West Papua). Representative of indigenous peoples came from Sugapa people in North Sumatra, the Sumber Klampok from Bali, Nenggala from Tana Toraja, South Sulawesi, Kasimbar from Central Sulawesi and Bentian from East Kalimantan. See R Yando Zakaria, *Merebut Negara* (Yogyakarta, Laper and Karsa, 2004), p 45.

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turn, according to Zakaria, replaced the humiliating terms such as *suku terasing* (isolated people), *masyarakat rentan* (vulnerable people), or worst still *masyarakat terbelakang/primitif*⁴ (backward/primitive people). At that meeting in 1993, they defined *masyarakat adat* as 'communities which have ancestral lands in certain geographic locations and their own value systems, ideologies, economy, politics, cultures, and societies in their respective homelands' (DTE-SI:4).⁵ As noted by Moniaga, 'the term was also seen as the most socially and politically acceptable in the context of 1993 under the authoritarian and oppressive rule of the Soeharto regime.'⁶ But even after the fall of Soeharto, one might wonder if anything substantial really changed regarding the concept of *masyarakat adat*.

The conference also agreed to establish an advocacy network in order to carry out advocacy for the rights of the indigenous people in Indonesia. As a result, a network called Jaringan Pembela Hak-Hak Masyarakat Adat (JAPHAMA, or the Network for Defence of the Indigenous Peoples' Rights) was formed. Following this, another meeting held in Bali in December 1993 aimed to further focus the ideas which emanated from the previous meeting.⁷ This was later followed by a momentous first congress of *masyarakat adat* held in the Indonesian capital of Jakarta in 1999, where an important organization called Aliansi Masyarakat Adat Nusantara (AMAN or Alliance of the Indigenous Peoples of the Archipelago)⁸ was formed. Since then, the issue of *masyarakat adat* has been publicly aired via various campaigns and through the work of various advocacy groups in Indonesia.

In terms of its legal acknowledgment, the moniker *masyarakat adat* has been through different stages. Although its precise legal status was not clear, as noted by Simarmata, the existence of *masyarakat adat* was acknowledged in the 1945 Constitution of the Republic of Indonesia. This was later followed by the Agrarian Law of 1960/5 and other decree laws such as law No 5/1967 on Forestry

⁴ Author's addition to Zakaria's terms. Zakaria, *ibid*.

⁵ For the Indonesian definition version see Zakaria, *ibid*, p 45. For the English version see Down To Earth (DTE-SI:4) as cited in Tania Murray Li, *Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone*, *Modern Asian Studies* 35,3 (Cambridge, Cambridge University Press, 2001), p 647. Although the definition of *masyarakat adat* was contested by some observers, Murray Li acknowledged this as a milestone achievement for NGOs and indigenous groups who were advocating the recognition for *masyarakat adat* in Indonesia. Murray Li, *ibid*. The question of conceptualizing indigenous peoples in Asia, including Indonesia, has also been raised by other writers such as Benedict Kingsbury in 'Indigenous peoples in International Law: A Constructivist to the Asian Controversy', 92 *American Journal of International Law* (1998) 414. See also A Gray, 'The Indigenous Movement in Asia' in RH Barnes *et al* (eds), *Indigenous Peoples of Asia* (Michigan, Association for Asian Studies, 1995), p 35.

⁶ See Sandra Moniaga, *Emerging Indigenous Peoples Movement in Indonesia*, <http://www.hurights.or.jp/asia-pacific/no_36/02.htm> (visited April 2007).

⁷ According to Zakaria, the number of participants for this meeting was purposely limited, with the aim of deepening ideas from the previous meeting held in Tana Toraja, South Sulawesi province. Zakaria, n 2 above, p 46.

⁸ AMAN has been playing an important role in the advocacy for *masyarakat adat* rights in Indonesia. Moniaga, n 6 above.

and Law No 11/1966 on Mining⁹ which all also acknowledged the existence of indigenous peoples. After the fall of Soeharto in 1998, *masyarakat adat* was also recognized in new laws. These include Law No 41/1999 on Forestry and the Decision of Parliament (Tap MPR/1998) regarding Law No 39/1999 on Human Rights.¹⁰ However, in spite of the acknowledgment of *masyarakat adat* in some laws, its legal position is not really strong. As noted by Simarmata, 'the legal recognition of the *masyarakat adat* prevails [in the government's view] as long as: 1) in reality, [*masyarakat adat*] still exist; 2) [their existence] is not in conflict with globalization; 3) it conforms with the national interest; and 4) is legalized through the local government laws'.¹¹

Regardless of the varied interpretations of *masyarakat adat*, the acceptance of the term itself by NGOs and *masyarakat adat* themselves was a paramount step, in the context of resisting the oppression and injustice facing *masyarakat adat* in Indonesia. It was a concept that motivated various peoples' movements in Indonesia to fight together for injustice on land issues, forests and water.¹²

The pragmatic position held by some of the defenders of the term *masyarakat adat* was important because it advanced the advocacy for the existence of the *masyarakat adat* at a time when their position had previously been very weak. But today, more than ten years on, a deeper debate regarding the concept of *masyarakat adat* is imperative in order to define a more clear and solid strategy for the advocacy of the rights of *masyarakat adat* in Indonesia.

3. The Legal Battle for *Masyarakat Adat*

Since the era of the Soeharto dictatorship, *masyarakat adat* have been subjected to various human rights violations and environmental degradation of their lands. However, as noted before, the struggle for their rights only began in the late eighties. This was not exclusively faced by *masyarakat adat*—it was a common phenomenon under the Soeharto regime, where widespread human rights violations took place across the country. To make matters worse, there were no credible and proper mechanisms for fighting for these aggrieved rights.

In this section we will look at a few cases involving *masyarakat adat* to illustrate the difficulties of struggles for their dignity and their legal rights. Some of the cases are old, but some are quite recent, involving the ongoing efforts of NGOs and *masyarakat adat* in their legal battles against the state and multinational corporations.

⁹ See Ricardo Simarmata, *Menyongsong berakhirnya abad Masyarakat Adat: Resistensi pengakuan bersyarat*, at <<http://aman.or.id/ina/paper.php#ppr>> (visited in April 2007). See also, Zakaria, n 2 above, pp 51–60.

¹⁰ Simarmata, *ibid.*

¹¹ *Ibid.*

¹² Zakaria, n 2 above, pp 62 and 166.

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a) *Beanal v Freeport McMoran*

This was the first case ever brought by *masyarakat adat* to the international level. This case involved a group of *masyarakat adat* in Timika in the West Papua Province in the Eastern part of the Indonesia archipelago. In April 1996, Tom Beanal, an Amungme tribe leader in West Papua, lodged a class action against a US mining company, Freeport McMoran.

Before touching on the issue of the lawsuit, it is worth describing briefly the presence of Freeport McMoran in Indonesia. PT Freeport Indonesia is the subsidiary of the largest mining company in the world, Freeport McMoran Inc which is based in New Orleans, USA. Even before West Papua was taken over by the Indonesian regime, the then President Soeharto authorized Freeport McMoran to exploit gold and copper deposits in the Timika mountain in West Papua, which is sacred to the local people. Since then, the *masyarakat adat* in that area were, at best, simply marginalized and excluded from their lands. At worst, *masyarakat adat* suffered various kinds of human rights violations. They were killed, tortured and raped and these violations continued to take place after the fall of Soeharto.¹³

The Amungme people, with the support of NGOs both national and international as well as the support of the religious institutions in West Papua, undertook a series of initiatives. A string of talks between representatives of the Amungme people and Freeport was facilitated by the Indonesian National Commission of Human Rights (KOMNAS HAM) from 1996 to 1997. However, not much resulted from these talks. Instead, *masyarakat adat* of Amungme and other tribes in Timika proceeded by filing a lawsuit against Freeport McMoran Company and its subsidiary PT Freeport Indonesia in Timika, West Papua, in the US District Court for the Eastern District of Louisiana.¹⁴

The plaintiff, Tom Beanal, a leader of Amungme Tribal Council of Lembaga Suku Amungme (LEMASA) alleged Freeport McMoran Inc (Freeport) committed environmental torts, human rights abuses and cultural genocide.¹⁵

After years of watching the degradation of the environment and the human rights violations committed because of the Freeport presence on his lands, Beanal, with the support of NGOs and a private attorney from New Orleans, decided to take legal action. This was the first legal action ever taken by any *masyarakat adat* group or individual in Indonesia.

¹³ For a complete account of PT Freeport Indonesia's track record in human rights please see D Leith, *The Politics of Power: Freeport in Soeharto's Indonesia* (University of Hawaii Press, 2003); and also see Ammirudin and Adérito Soares, *Perjuangan Amungme: Antara Freeport dan Militer (The Struggle of the Amungme: Between Freeport and the Military)*, (Jakarta, ELSAM, 2003).

¹⁴ For the Amungme struggle against Freeport and its impact on the local community, see Adérito de Jesus Soares, 'The Impact of Corporate Strategy and Community Dynamics: A Case Study of Freeport Mining Company in West Papua' in *International Journal on Minority and Group Rights*, (Martinus Nijhoff Publishers, 2004), pp 115–142.

¹⁵ *Beanal v Freeport-McMoran, Inc*, 969 F Supp 362, 365 (1997).

According to Beanal:

... [t]he law suit is seen as a window, for the outside world, to at least overlook the chain of human rights atrocities that have taken place in West Papua for centuries.¹⁶

Although the law suit was dismissed with prejudice by the US court,¹⁷ for the Amungme people it was a hugely important as a way of pressuring Freeport and the Government of Indonesia. It also gave *masyarakat adat* in Indonesia more confidence to fight for their rights. Subsequent to the law suit, both the Government and Freeport have paid greater attention to *masyarakat adat* in Timika, West Papua even though local people in this region still face a number of problems.¹⁸

b) Newmont case

PT Newmont Minahasa Raya (NMR) in Sulawesi province is a subsidiary of Newmont, a giant US mining company. PT NMR has been operating in Sulawesi for many years and has generated many problems for *masyarakat adat* in that area. In April 2005, a criminal case was lodged by the Indonesian Prosecutor's office against PT NMR and its President Director Richard B Ness for unlawful acts including pollution, which caused the indigenous people's environment and Buyat Bay to be degraded. The law suit claimed that PT Newmont did not have any permission to dump the tailings from its factory into Buyat Bay. It also stated that the tailings, comprised of mercury, arsenic, iron, were above accepted maximum levels set by the Indonesian government.

It was interesting that the case was first investigated by Indonesian Police from National Headquarters and later followed up by the Prosecutor's Office in Manado, South Sulawesi. This happened partly because of the pressure of *masyarakat adat* in that area and the strong support of various NGOs in Indonesia. So, the effort by Indonesian Police and the Prosecutor Office indicates very strong support from NGOs and *masyarakat adat* in that area.¹⁹ This case was particularly interesting, since most similar cases involved indigenous peoples and NGOs on the one side, against state and a multinational corporation on the other side.

However, fifteen months into the case, the District Court of Manado decided abruptly on 24 April 2007 to acquit PT NMR as well as its President Director,

¹⁶ See Ammiruddin and Adérito Soares, n 13 above, p 170.

¹⁷ For a historical perspective on the law suit, see Ethan Jessup, 'Beanal v Freeport-McMoran, Inc: Anatomy of an International Environmental Tort Case', *New England International and Comparative Law Annual*, in <<http://www.nesl.edu/intljournal/VOL5/jessup.htm>> (visited April 2007).

¹⁸ Soares, n 14 above.

¹⁹ In a joint statement the NGOs said, 'We are supporting the decision of the Indonesian Police to follow up with an investigation into alleged pollution of the local environment by PT. NMR.' See Segera Tetapkan PT NMR Tersangka Pencemaran di Teluk Buyat, Joint statement by WALHI, JATAM, ICCEL, ELSAM, KONTRAS and TAPAL, 20 August 2004, at <<http://www.walhi>> (visited April 2007).

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Richard B Ness from all allegations filed by the Prosecutor's Office in Manado. Four days before the court decision, several NGOs issued a press release²⁰ stating that Newmont's tailing waste was already higher than maximum levels set by the Indonesian government.²¹ The NGOs referred to Newmont's Environmental Monitoring Plan and Environmental Management Plan which indicated that the pollution was in fact created by Newmont. According to the NGOs, the report also stated that from 2001 to 2004 Newmont did not have permission from the Environmental Minister to dump tailings, containing arsenic, mercury, silver, zinc and manganese into the sea or Buyat Bay.

When faced with the decision of the court, the Mining Advocacy Network (JATAM), who was very supportive of the law suit, expressed its disappointment. 'The decision from the court seems odd, since the court has been presented very strong evidence regarding the unlawful actions of PT NMR', it said. JATAM and other organizations urged the Prosecutor's office to appeal the decisions. Meanwhile, Friends of the Earth International, an international grass roots environmental organization, said that 'the judgment delivered in Manado [court] shamefully ignored compelling evidence presented by the government-convened Joint Investigative Team which condemned the company's operations in 2004, finding that mine waste had caused extensive environmental damage'.²²

At the time of writing, not much progress has been made regarding the *Newmont* case, despite the appeal lodged by prosecutor to the High Court in Manado, North Sulawesi.²³

This case shows that *masyarakat adat's* interests, to some extent, were represented by the Prosecutor. However, they now have to wait until their case is reviewed by the Appeal Court in Manado.

c) *Masyarakat Adat v PT. Indo Muro Kencana*

PT. Indo Muro Kencana (PT.IMK) was a subsidiary of Aurora Gold, a multinational corporation from Australia. In 1985, during the Soeharto regime, PT.IMK was granted a contract of work (CoW) by the Indonesian Government, which allowed PT.IMK to operate in the mining area of Permata Intan, Murung and Tanah Siang, Barito District in Central Kalimantan province for 30 years.

²⁰ See 'Buyat Bay Case: Court has to decide in favour of people's justice', Joint Press Release, 20 April 2007, Mining Advocacy Network (JATAM), WALHI/Friends of the Earth Indonesia, Indonesian Centre for Environmental Law (ICEL) at <<http://www.minesandcommunities.org/Action/press1469.htm>> (visited April 2007).

²¹ Based on Environmental Ministry Decision (Kepmen LH) No 51/MENLH/10/1995 Annex C and tailing standards based on Environmental Ministry Decision Letter/Head of Environmental Impact Assessment Agency (BAPEDAL) No B-1456/Bapedal/07/2000. Ibid.

²² At <<http://www.foei.org/en/media/archive/2007/0424/?searchterm=newmont%20case>> (visited April 2007).

²³ See Kejaksaan Banding Putusan NMR, at <<http://hukumonline.com/detail.asp?id=16667&ccl=Aktual>> (visited 8 May 2007).

Since its operation in that area, there have been a series of conflicts with *masyarakat adat* as *masyarakat adat*, who had been living in that area and had been traditional miners, were slowly evicted from their ancestral lands. As reported by various local and national NGOs, local people were dragged from their beds and forced by the Indonesian military's Mobile Brigade (Brimob) to leave the mining area. Some of them were arrested and in 2001, two members of *masyarakat adat* were shot dead by the military in their home area.²⁴

Faced with these atrocities committed by the company with the support of the state's military apparatus, 29 representatives of *masyarakat adat* from Siang, Murung and Bakumpai from Central Kalimantan province filed a law suit at the South Jakarta State Court on 30 July 2002, against PT.IMK. They were supported by NGOs such as WALHI and JATAM, ELSAM and others.²⁵ Prior to the law suit, *masyarakat adat* had tried different initiatives such as writing protest letters to different state institutions, lobbying, and even holding public demonstrations. However, the outcome of all these efforts was disappointing.

The plaintiffs argued that PT.IMK has taken over the traditional mining pits own by *masyarakat adat*. It also said that *masyarakat adat* of Dayak Siang, Murung and Bekumpi experienced the pollution of their land—including rivers and the destruction of their forests—as a result of PT.IMK's exploration.

In spite of the effort made of NGOs and *masyarakat adat*, the law suit was dismissed by the South Jakarta Court on a procedural matter alone.

4. Conclusion: Reparations in Limbo

The horrific experiences faced by *masyarakat adat* are enormous. They have been forced to move by the government from their ancestral lands without any proper compensation. The transmigration programme during Soeharto's regime is one blatant example of this. Torture, murder and other atrocities have been widely documented by various national and international organizations. Some of these atrocities committed against *masyarakat adat* fall under the rubric of international crimes, such as crimes against humanity. These violations have been committed either directly by the state and/or by non-state actors such as multinational corporations as shown in the above cases. In this context, the state as the duty bearer has the obligation to respect, protect and fulfil the rights of its

²⁴ See *Down to Earth* No 47, November 2000 at <<http://dte.gn.apc.org/47ind.htm>> (visited May 2007).

²⁵ This was a major law suit where several significant NGOs in Jakarta represented *masyarakat adat* in filing the law suit against a multinational corporation. They grouped themselves in TATR-Community Mining Advocacy Team (Tim Advokasi Tambang Rakyat).

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²⁶ For a discussion of International Human

²⁷ See for instance, *Victims of Gross Viola Humanitarian Law*, 1

²⁸ See *Mabo v Qu* granted the land title Australia.

²⁹ For an overview of Governance Assessme

citizens. *Masyarakat adat* also have the right to reparations²⁶ as granted in various international human rights instruments.²⁷

However, the various cases described above reveal how far *masyarakat adat* in Indonesia are from achieving justice for rights which have been violated by the state apparatus and multinational corporations, which have acquired vast economic interests on *masyarakat adat*'s land.

Unlike in other parts of the world where indigenous peoples movements are quite strong, resulting in various legal precedents for indigenous peoples, for *masyarakat adat* in Indonesia the legal system has not proven a promising avenue. Various landmark cases pertaining, for example, to land title for Aboriginal people in Australia,²⁸ are debated within small intellectual circles in Indonesia, but this has not reached the ears, let alone the hearts of Indonesian courts who decide on cases related to *masyarakat adat* rights.

This of course, is not a phenomenon uniquely faced by *masyarakat adat*. The haze surrounding Indonesia's justice system because of corruption, interventions by other state apparatus and lack of professionalism are daunting.²⁹ It will take almost a total reform of the Indonesian judiciary system, before *masyarakat adat* and other seekers of justice can enjoy their rights.

Indeed, in this context, various efforts undertaken by NGOs and *masyarakat adat* nationally and internationally (eg *Benal's* case) are vital. Each of these cases can be considered small steps for *masyarakat adat* to achieve the justice that has been denied to them for decades. Hopefully, this will in turn empower the state as the duty bearer to perform its duties of respecting, protecting and fulfilling the human rights of citizen including *masyarakat adat*. They are also one way of pressuring the state to perform its duties for its citizens.

Although these cases have not achieved much for indigenous people, in terms of tangible outcomes, they are still significant, because of their symbolic value and because they represent the very first steps of *masyarakat adat* in Indonesia, to vindicate their rights within the Indonesian system/context.

²⁶ For a discussion on the concept of reparation in international law, see D Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 2005), 2nd edn.

²⁷ See for instance, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN GA Res 60/147 of 16 December 2005, para 2.

²⁸ See *Mabo v Queensland* 107 ALR 1 (1992). For the first time ever the Aboriginal people were granted the land title rights through a landmark decision of Judge J Brennan of the High Court of Australia.

²⁹ For an overview on the judiciary system in Indonesia, see Asian Development Bank, *Country Governance Assessment Report, Republic of Indonesia*, Manila, 2004.