

DRAFT

Palm oil and indigenous peoples in South East Asia



Land acquisition, human rights violations and indigenous peoples on the palm oil frontier

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Palm Oil and Indigenous Peoples of South East Asia: land acquisition, human rights violations and indigenous peoples on the palm oil frontier by Marcus Colchester, Director, Forest Peoples Programme: marcus@forestpeoples.org

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Cover photograph: Collecting oil palm fresh fruit bunches, Sanggau, West Kalimantan, Indonesia

Photographer: Marcus Colchester

Introduction

Crude palm oil (CPO) is a highly valued product that is traded on the international commodities and futures markets. Processed palm oil is used in a huge variety of products in cosmetics, foods, lubricants and also fuels,¹ and overall consumption more than doubled between 2000 and 2010 with the main new demand coming from Eastern Europe, India and China. In broad terms, the price of palm oil has increased steadily over the past 20 years, although heightened interest in biofuels led to a spike in its commodity price in early 2008 followed by a crash, after which the price returned to where it was before the boom and then continued its more gradual appreciation.²



Two countries in South East Asia, Malaysia and Indonesia, produce over 80% of the internationally traded CPO. While significant expansion is occurring in Thailand, Papua New Guinea, Costa Rica, Colombia, Ecuador, Cameroon and the Democratic Republic of Congo, the dominance of Indonesia and Malaysia is likely to endure for quite some time. In Peninsular Malaysia, the palm oil frontier has come near to the limits of land availability and most expansion within Malaysia is now in the two eastern States in Malaysian Borneo, Sabah and Sarawak. However, the most vigorous expansion is now taking place in Indonesia where, even by 2006, provincial land use plans had targetted up to 20 million hectares of lands for oil palm expansion.⁴

Within Indonesia, expansion is still intense on the island of Sumatra although new land is harder to find and the resource frontier has moved down from the mineral soils in the interior to the peat-swamps on the eastern seaboard. Investment is already

¹ Jason Clay, 2004, *World Agriculture and the Environment*, Island Press, Washington DC.

² <http://www.oilworld.biz/app.php?ista=9709639d5c2e60068c91742efa30ead0>

³ Source of table: *The Economist* 24 June 2010.

⁴ Marcus Colchester, Norman Jiwan, Andiko, Martua Sirait, Asep Yunan Firdaus, A. Surambo and Herbert Pane, 2006, *Promised Land: Palm Oil and Land Acquisition in Indonesia – Implications for Local Communities and Indigenous Peoples*. Forest Peoples Programme, Sawit Watch, HuMA and ICRAF, Bogor.

intense further east in Kalimantan, now increasing also in Sulawesi and becoming a major driver of deforestation in West Papua.

Currently there are an estimated 4 million hectares of land under oil palms in Malaysia and over 7.5 million hectares in Indonesia.⁵ Much of the investment for oil palm expansion has come from European Banks,⁶ but increasingly funds are being raised from Islamic banks in the Middle East, while investors from India and China are also showing a keen interest.⁷ It has been estimated that about two thirds of the companies opening lands to plant oil palm in Indonesia are majority-owned by Malaysian conglomerates.⁸

Current technologies and the characteristics of the oil palm itself impel a certain logic in production techniques. When planted as seedlings, palms start producing fruits after three years and reach full productivity after about seven years. They benefit from having a very controlled undercover and, if well tended, will continue in full production until they become too tall to be easily harvested after about 25 years. Maximum production from the least amount of land favours regularly spaced palms planted in monocultures. Because oil in the very heavy, mature, fresh-fruit bunches rapidly loses its quality, producers have to be able to get fruits to a mill, where the oil can be extracted and stabilised, within 48 hours, meaning that farmers need ready access to roads, which in their turn require maintenance.

The mill itself is a lumpy investment and, although mini mills are now being experimented with, the rule of thumb is that a mill requires between four and five thousand hectares of oil palm to maintain steady production. Of course, the crop can be dispersed over a large area and fresh fruit bunches trucked in over long distances but this increases both the costs of transport and roading and the risks that crops will spoil before they reach the mill. The economies of scale and the crop's characteristics thus favour the development of large palm oil schemes, either as company-owned

⁵ 'RI to expand oil palm estates amid environmental concerns' *Jakarta Post* 12 March 2009; 'Plantation Sector set for steady growth: Govt' *Jakarta Globe* 3 January 2010. In Indonesia, as at March 2009, an additional 1.8 m ha were already fully permitted for planting (HGU).

⁶ Greenpeace NL, 2000, *Funding Forest Destruction - The Involvement of Dutch Banks in the Financing of Oil Palm Plantations in Indonesia*, Research commissioned by Greenpeace Netherlands, (by Eric Wakker, Jan Willem van Gelder and Telapak Sawit Research Team), Greenpeace NL and AIDEnvironment, Amsterdam; Anne Casson, 2002, *The Political Economy of Indonesia's Oil Palm Subsector*. In: Carol J. Pierce and Ida Aju Padnja Resosudarmo (eds.) *Which Way Forward? People, Forests and Policy-Making in Indonesia*, Resources for the Future, CIFOR and Institute of South East Asian Studies, Washington DC: 221-245.; Jan Willem van Gelder, 2004, *Greasy Palms: European Buyers of Indonesian Palm Oil*, Friends of the Earth, London; Forest Peoples Programme with Profundo, 2008, *HSBC and the Palm Oil Sector in South East Asia: towards accountability*, Forest Peoples Programme, Moreton-in-Marsh; Jan Willem van Gelder, Hassel Kroes and Howard Law, 2009, *Wilmar International: a research paper prepared for the Palm Oil Monitoring Initiative (POMI)*, Profundo, Amsterdam.

⁷ 'Chinese Consortium Eyes Business in Indonesia's Palm Oil Sector', *Antara*, 25 April 2005; 'Chinese Investors eye RI palm oil sector', *Jakarta Post*, 9 June 2005; 'Kadin to Help Expand Oil Palm Plantations in Indonesia', *Antara*, 10 June 2005; 'Artha Graha, Sampoerna Cooperate with Chinese Investors in Agrobusiness', *Antara*, 18 July 2005; 'RI inks US\$7.5 bn in deals with China', *Jakarta Post*, 30 July 2005; 'China Bangun Kebun Sawit Senilai US\$8 miliar', *Bisnis Indonesia*, 9 August 2005; 'China Plans Oil Palm Plantations in Kalimantan', *Antara*, 9 August 2005; 'Ambalat is Ours', *Tempo*, 16-22 August 2005.

⁸ In West Kalimantan around 70% of oil palm companies are Malaysian majority owned and in Riau the figure is 60% (Norman Jiwan, SawitWatch pers. comm. 5th July 2010).

estates or as managed smallholder schemes, meaning that land needs to be acquired in large blocks and large areas converted to mono-cultures. It is this logic which largely explains the current pattern of oil palm cultivation in South East Asia.⁹

Land laws and indigenous peoples' rights

The global market for palm oil is thus driving a process of rapid land acquisition in the form of consolidated blocks of land, a demand which is testing the capacity of local land agencies, administrators and legislatures to the limits and beyond. Regulations and procedures, which evolved to deal with small-scale, often informal, domestic land markets, are proving unequal to the challenge posed by this global demand for huge areas of land. Obviously, this pressure to acquire land has implications for those who currently own the same areas, who are for the most part 'indigenous peoples'.¹⁰ When land transfers accelerate and the laws are ineffective at recognising and protecting their rights, then they lose out.

International human rights regimes have made major advances in recent years to clarify what are the rights of indigenous peoples in international law. The current consensus about indigenous peoples' rights, which evolved through standard-setting work at the International Labour Organisation and then the United Nations Human Rights Commission and its various sub-commissions, has also been reflected in the jurisprudence of bodies set up to review the implementation of the various human rights treaties which many States party have ratified. The resulting norms have been consolidated in the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by vote at the General Assembly in 2007. Among the key rights relevant to this article are the rights of indigenous peoples to the lands, territories and natural resources that they have traditionally owned, occupied or otherwise used and the right to give or withhold their free, prior and informed consent expressed through their own representative institutions to measures which may affect their rights.

International law is very clear on the matter of lands. Indigenous peoples' rights in land derive from custom and not from any act of the State which they may in any case predate. These rights endure unless the State explicitly extinguishes these rights through due legal process and provides appropriate compensation to the rights holders.¹¹ There has been very uneven progress worldwide in adjusting national legal regimes to comply with these exigencies of international law, even though most countries are obliged to make such reforms to fulfil their obligations in terms of the

⁹ In Africa the pattern has long been quite different with oil palm being cultivated as one crop among many in farms of mixed economies. Oil may be extracted from the fruit directly in cooking or by being pounded with a pestle and mortar.

¹⁰ This article uses the term indigenous peoples in the broad sense that it is used in international law to include peoples locally referred to as 'aboriginal', 'native', and 'tribal'. In Malaysia, the term includes the Orang Asli, Kadazan-Dusun and Dayak peoples and also rural Malay peoples still transferring and inheriting lands through the application of customary law. In Indonesia the term includes both the narrower category of government recognised '*komunitas terpencil*' (isolated communities) and the wider self-identified '*masyarakat adat*' (peoples governed by custom), as well as other groups that still transfer and inherit lands through the application of customary law.

¹¹ For a recent summary see: Joji Cariño and Marcus Colchester, 2010, From Dams to Development Justice: Progress with 'Free, Prior and Informed Consent' since the World Commission on Dams, *Water Alternatives* 3(2): 423-437.

international human rights treaties that they have ratified. The main palm oil-producing States, Indonesia and Malaysia, are notable in this regard.

One of the legacies of the British colonial system is that it bequeathed Malaysia a functioning legal apparatus of law, judiciary and legislature – as well as a relatively well-organised enforcement system – which was taken over without any major changes at independence. The Constitution of the Malaysian Federation does recognise custom and also provides some protection for the rural Malays who make up the majority of the population. The oil palm frontier in Malaysia has thus expanded according to a government-directed plan of encouraging both the private sector to invest in large mills and estates while also allocating lands to peasant farmers so they become smallholders. This was done by providing long term licences for large estates on State land and at the same time setting up large schemes managed by para-statal agencies on which smallholders could settle and raise themselves out of poverty.¹²

In the Peninsula, there are some 140,000 ‘aboriginal people’ (*orang asli*) of whom about 84% live in or near forests.¹³ Although these *orang asli* historically, and still today, have livelihoods based on extensive use of forests for cultivation, hunting, fishing and gathering, their customary rights in land are not recognised by the Government and only 19,000 ha. of State lands have been set aside as federally administered ‘Reserves’ for their occupation and use.¹⁴ Reserves encompass only 15% of the settled village areas occupied by *orang asli*, leaving the remainder with even less land security and none with secure rights to their wider territories. During the 1950s and 1960s, many of the widely dispersed *orang asli* communities were forcibly relocated into larger, supervised settlements as part of a counter-insurgency programme and this has continued as part of a national policy of integration. Much of the *orang asli*’s customary lands that have been taken over by palm oil estates were taken over during the colonial era.¹⁵

Malaysia has a plural legal regime, meaning that it accepts the simultaneous operation of distinct bodies of law, and, as noted, custom is upheld under the Federal Constitution. In the Bornean States of Malaysia, Sabah and Sarawak, where the ‘native peoples’, as they are known, are in the majority or at least among the most numerous groups, the colonial and independent Government have made stronger legal provisions for the continuation of their customs to ensure their governability.¹⁶ Native authorities and courts are thus officially recognised in Sabah and Sarawak and continue to administer community affairs and deliver local justice,¹⁷ meaning that

¹² Sonia Vermeulen and Nathalie Goad, 2006, *Towards better practice in smallholder palm oil production*, IIED, London.

¹³ Colin Nicholas, Tjah Yok Chopil and Tiah Sabak, 2003, *Orang Asli Women and the Forest*, Centre for Orang Asli Concerns, Subang Jaya.

¹⁴ Colin Nicholas, 2000, *The Orang Asli and the Contest for Resources*, IWGIA and Centre for Orang Asli Concerns, Copenhagen and Subang Jaya.

¹⁵ Marcus Colchester, 2004, Indigenous Peoples and Communal Tenures in Asia. *Land Reform Bulletin* 2004(1):29-43.

¹⁶ A. F. Porter, 1968, *Land Administration in Sarawak*, Government Printing Office, Kuching; Marcus Colchester, 1989, *Pirates, Squatters and Poachers: the Political Ecology of Dispossession of the Native Peoples of Sarawak*, Survival International and INSAN, Kuala Lumpur; Amity A. Doolittle, 2005, *Property and Politics in Sabah, Malaysia: native struggles over land rights*, University of Washington Press, Seattle

¹⁷ Peter R. Phelan, 2003, *The Traditional Legal System of Sabah*, Pusat Kajian Borneo, Kota Kinabalu.

custom is a living and active source of rights in Sabah and Sarawak, both in law and in practice.

In Sarawak, where there are currently some 800,000 indigenous people from 28 ethnic groups, land issues have been a cause of international controversy since the 1980s.¹⁸ However the roots of this problem lie in the legal framework itself. Since the colonial period and progressively thereafter, through a series of laws and regulations, the Government of Sarawak has sought to limit the exercise of 'Native Customary Rights', freezing their extension without permit and interpreting them as weakly secure use rights on State lands. Moreover, although the Government admits that some 1.5 to 2.8 million hectares of land are subject to 'Native Customary Rights', it has not revealed where it thinks such lands are, meaning that most communities are unsure whether or what part of their lands are recognised under the Government's limited interpretation of their rights.¹⁹ The lack of fit between customary systems of land ownership and inheritance and the legal system as interpreted by the Government underlies the disputes between the indigenous peoples and Government-permitted developers.

In Sabah, there are some 1,350,000 indigenous people drawn from 39 indigenous groups, referred to collectively as *Dusun* and *Kadazan* or as *Kadazan-Dusun*. Collective rights to land are relatively weak in Sabah. The legislation creates 'Native Reserves' on State lands and recognises Native Customary Rights (NCR), interpreted as rights of usufruct, which are however extinguished in areas declared to be forests, areas of State projects and protected areas. Few NCR areas are demarcated. The majority of indigenous communities lack any legalised rights and are merely tolerated as tenants-at-will on State lands. Although the Land Ordinance is meant to give priority to those claiming customary rights on 'unalienated country land' and recognises customary lands after more than 3 years of occupation, in practice, lands are often allocated to other claimants without natives having a chance to object.

In Sabah, official procedures require customary rights holders with unregistered lands to make their claims known within a specified time when others make claims to State lands but notices of such claims are rarely distributed to local villages.²⁰ To gain some protection, households or individuals have to go through an arduous procedure to request native titles, which are non-transferable although lands can be sub-leased to non-natives. In settlement areas, customary owners must register their claims and be issued native titles to avoid expropriation. When lands are gazetted as forests, natives must declare their interests to preserve their usufructuary rights, which they often fail to do as they are not aware of the procedures or consequences.²¹

In a series of cases in the higher courts in Sarawak and Peninsula Malaysia, where indigenous plaintiffs have asserted their rights in land and sued companies and the

¹⁸ Evelyn Hong, 1987, *Natives of Sarawak*. Institut Masyarakat, Penang; *Pirates* op cit.

¹⁹ Marcus Colchester, Wee Aik Pang, Wong Meng Chuo and Thomas Jalong, 2007, *Land is Life: Land Rights and Palm Oil Development in Sarawak*, Forest Peoples Programme and SawitWatch, Bogor.

²⁰ Lim Heng Seng, 2000, The land rights of the Orang Asli. In: Consumer Association of Penang (ed.) *Land Issues on Malaysia*, CAP, Penang: 170-195; Lim Teck Ghee and A.G. Gomes, 1990, *Tribal Peoples and Development in Southeast Asia*. University of Malaya, Selangor.

²¹ Marcus Colchester and Chip Fay, 2007, *Land, Forest and People: Facing the Challenges in SE Asia*, Forest Peoples Programme, RECOFTC and ICRAF, Bangkok.

Government for failing to respect their rights, judges have upheld native peoples' land claims as consistent with the Malaysian Constitution and common law principles. These judgments refute the Government's restrictive interpretation of 'Native Customary Rights' and the rights of *orang asli*. Consistent with international human rights law, the courts have accepted that indigenous peoples have rights in their lands on the basis of their customs and not as a result of grants by the State.²² The problem is that despite these judgments the Government has not moved to amend the laws in favour of indigenous peoples. In fact, to the contrary, the Land Code in Sarawak has been amended several times in an effort to frustrate indigenous peoples' land claims.²³

In Indonesia the term 'indigenous peoples' is commonly used to refer to those peoples who self-identify as '*masyarakat adat*' and is applied more generally to all those whose rights in land are defined by custom rather than by positive law. Rough estimates suggest that between 60 and 110 million rural Indonesians fall into the category. World Bank studies show that less than 40% of all land holdings in Indonesia are formally titled with the rest being held under informal or customary tenures. Since independence, the Indonesian State has progressively dismantled customary institutions and pursued policies designed to integrate 'isolated and alien peoples' or 'isolated communities' into the national mainstream through resettlement, re-education and through the banning of traditional religions. Although the worst excesses of these policies have been attenuated since 1998, underlying laws and policies continue to severely limit indigenous peoples' rights and customs.

Although customary rights are meant to be protected by the Constitution of the Republic of Indonesia, they are severely limited under the Forestry Law and Basic Agrarian Law. The Agrarian Law treats customary rights (*hak ulayat*) as weak usufructuary rights on State lands which must give way to development projects. A 1999 Ordinance which permits the titling of *hak ulayat* has never been followed up with implementing regulations. Likewise the Forestry Law prioritises the allocation of exploitation rights to concessionaires for logging and plantation schemes and defines 'customary forests' (*hutan adat*) as areas of State forest (*kawasan hutan Negara*), which in turn are defined as 'forests with no rights attached'.²⁴ Again there are no clear regulations for the recognition of *hutan adat*, while other tenures offered to communities are short term leaseholds which are difficult to secure and maintain. In reality only token areas have so far been allocated to local communities. Less than 0.2% of the 70% of the national territory classified as 'forest' has been allocated to communities under the various tenures available in law.²⁵

²² A recent case which summarises the history of such judgments is *Agli Anak Bungkong vs. Ladang Sawit Bintulu Sdn Bhd.*, which was decided in favour of the Dayak plaintiffs on 21st January 2010; see also 'Malaysia Indigenous Tribe wins land rights case' Associated Press, 26 May 2010.

²³ IDEAL, 1999, *Tanah Penghidup Kitai – Our Land is our Livelihood*, Ideal, Sibul; Attorney General, 2007, *Native Customary Laws and Native Rights over Land in Sarawak*, Prepared by the State Attorney-General's Chambers, Sarawak for Human Rights Commission in 2004. Updated on 15th January, 2007. Available at: <http://www.rengah.c2o.org/assets/pdf/de0157a.pdf>; *Land is Life* op. cit.

²⁴ Marcus Colchester, Martua Sirait and Boedhi Wijardjo, 2003, *The Application of FSC Principles 2 & 3 in Indonesia: Obstacles and Possibilities*. WALHI and AMAN, Jakarta.

²⁵ World Agroforestry Centre, 2005, *Facilitating Agroforestry Development through Land and Tree Tenure Reforms in Indonesia*, ICRAF South East Asia Working Paper No. 2005/2, World Agroforestry Centre, Bogor.

In 2000, the Assembly of People's Representatives (MPR), the senior chamber in the Republic's tripartite legislature, passed a Legislative Act, which requires an overhaul of the laws relating to lands and natural resources including the need to recognise the customary rights of indigenous peoples. However, ten years later, despite this instruction, such legislation has still not been developed by the Government or the legislature. Instead, in response to indigenous demands, various senior Government representatives, including the current President and the new Minister for the Environment, have just made promises to recognise indigenous peoples' rights in land,²⁶ but these promises have yet to be honoured. The old laws thus remain unamended and pose formidable obstacles to indigenous peoples in the face of imposed palm oil schemes and other top-down developments.

Land acquisition

Since independence in 1963, successive governments in Sarawak have supported plantation schemes designed to promote 'development' and the more productive use of land. The first pilot scheme with oil palm was implemented in 1966 and the land development policies then went through various phases in the ensuing decades. The process began with State-owned enterprises on what were considered to be vacant State lands, which ignored customary rights altogether. Since this gave rise to conflicts, the Government switched its approach and initiated State-led ventures on native customary lands which were recognised as such. The aim was to 'consolidate' 'idle' customary lands and turn them to productive use with the indigenous peoples trained to operate as oil palm smallholders on the schemes. Serious management problems meant these schemes were barely profitable. In the third phase, the Government sought to promote private sector ventures on lands unencumbered by the State of prior rights but again land conflicts brought this initiative to an end. The latest approach seeks to promote joint ventures between the private sector, native peoples and the Government, in which the Government holds native lands in fiduciary trust for development by private companies.²⁷

Under the so-called *Konsep Baru*, the 'New Concept', native land owners with State recognised NCRs are expected to surrender their lands to the State for 60 years to be developed as joint ventures with private companies, in which the State acts as Trustee on behalf of the customary owners. The result is that the companies buy a 60% share in a joint venture, communities are allocated a 30% share in recognition of their contribution of lands, while the State acquires the remaining 10%. However, rather than allow the community shareholders any say in the affairs of the joint venture, instead they are treated as wards of the State. The explanation, according to the Ministry for Land Development which is tasked with implementing the *Konsep Baru*, is that this arrangement is favoured because it 'will give absolute right to the implementing company to manage the plantation WITHOUT interference from the NCR landowners over a period of 60 years'.²⁸ During those 60 years, the landowners' interest in the plantation is represented entirely by the State agency that acts as Trustee for the native people. There is a serious lack of clarity about exactly how

²⁶ For example: 'Govt likely to accept tribal communal rights' *Jakarta Post*, 4th December 2009.

²⁷ For details see *Land is Life* op cit.

²⁸ Ministry of Land Development, nd, pdf on website titled 'Issues and Responses' page 1, emphasis in original.

native landowners get benefits during these schemes and how they can reclaim their lands on the expiry of the lease.²⁹

In Indonesia, mechanisms for making effective the right to free, prior and informed consent are also absent. Not only are the rights of indigenous peoples not recognised (see above) but their customary institutions lack legal personality. State-recognised village-level institutions commonly operate in ways that favour State control and are hindered from independently representing the interests of communities.³⁰ Also, the constitution gives the State a controlling power over natural resources to allocate them for the benefit of the people. As repeated World Bank and other studies have confirmed, this authority is exercised (or abused) so as to give the State almost unfettered power to ignore or extinguish community and indigenous peoples' rights in land. It is frequently asserted that any project in the Government's Five Year plans, or on lands allocated to such use through spatial planning or even that has acquired a business land use permit (HGU) is by definition State endorsed and thus in the national interest, meaning that local owners and rights holders must give way in the face of such development plans.

Taking advantage of these arbitrary and extensive powers of the Indonesian State, the Indonesian Government's policy for the allocation of land concessions ignores or overrides the rights and interests of other rights holders. In theory based on spatial plans (though in practice in more arbitrary ways), lands and forests are allocated to companies as preliminary concessions (*ijin lokasi*) without consultation with other land users.³¹ Concessionaires, sometimes along with teams from the land agency (*Badan Pertanahan Nasional*) and local government, are then expected to acquire lands from local communities (or may ignore local rights holders altogether). Once 51% of lands in the *ijin lokasi* have been acquired they may then convert their holding into a 35 year business use permit (*Hak Guna Usaha* – HGU). In these processes it is common for communities to lose control over huge areas of land in exchange for nugatory or no payments. Field studies of numerous concessions in four provinces show that communities are never informed that by relinquishing their lands to government-backed palm oil schemes they are permanently surrendering their lands, as under the Basic Agrarian Law at the expiry of the HGU the lands revert to the State and not to the original owners.³²

Historically, the establishment of plantations on Indonesia's 'Outer Islands' was carried out in parallel with the State programme to colonise these areas with landless settlers from Java, Madura and later Bali – the so-called Transmigration

²⁹ Ramy Bulan, 2006, *Native Customary Land: The Trust as a Device for Land Development in Sarawak*, in: Fadzilah Majid Cooke (ed.) *State, Communities and Forests in Contemporary Borneo*. Canberra, Australian National University epress:45-64 epress, available online at, <http://epress.anu.edu.au/titles>

³⁰ Martua Sirait, 2009, *Indigenous Peoples and Oil Palm Plantation Expansion in West Kalimantan, Indonesia*, Cordaid, The Hague.

³¹ For more detailed explanations of the permitting procedures see *Promised Land* op. cit. and Marcus Colchester, Patrick Anderson, Norman Jivan, Andiko and Su Mei Toh, 2009, *HCV and the RSPO: report of an independent investigation into the effectiveness of the application of High Conservation Value zoning in palm oil development in Indonesia*, Forest Peoples Programme, HuMA, SawitWatch and Wild Asia, Moreton-in-Marsh.

³² *Ibid.* and see *Promised Land* op. cit. and *Indigenous Peoples and Oil Palm Plantation* op.cit.

Programme.³³ ‘Nucleus estates’ were set up with smallholder schemes alongside and provided with both workers and smallholders from the migrants. Since this led to resentment from local people, who lost both lands and opportunities of employment to incomers, later versions of these schemes sought to benefit the local people by offering them the smallholdings. In either case the smallholders were then contractually tied to the nucleus estates and mills, which hold their land titles until they have paid off the debts, which are payable for the land improvements and plantings, that they incur as participant smallholders. Many smallholders complain of being trapped in a cycle of debt to the mills that they are obliged to service.³⁴

Since 2005, a new model of for dealing with local communities has been adopted in Indonesia which is quite similar to the *Konsep Baru* in Sarawak. Under this so-called partnership model (*kemitraan*) indigenous peoples surrender their lands to concessionaires in exchange for signing a promissory note which supposedly assures them a share of the profits from the venture and nominally assures them a smallholding which is however managed by a cooperative not by the smallholder himself. However, the signed agreements are not left with the landowners as the company needs these as collateral to raise loans. Then, with land and loans in hand, the companies can acquire business use permits from the local land office.

The *kemitraan* approach is quite new so its effectiveness and legal consequences have yet to be ascertained clearly but preliminary surveys from the field are already worrying.³⁵ The promissory notes seem often to be flawed, with information about the extent and boundaries of the surrendered land sometimes being left blank, as are the details about what benefits will actually flow to the landowners. Meanwhile the participant landowners have no clarity about what they have relinquished or what they are promised in return, as they get no contract. There are also unanswered questions about what would happen to the landowners’ share in the enterprise if the company was sold, transferred or had to close, an issue that is likely to be extremely problematic as there appear to be no clear records of who has given up what land. Surveys in Sanggau in West Kalimantan show that local people are divided and agitated about the newly introduced scheme.³⁶

Human Rights violations

Since 2004, international and local NGOs have produced a series of detailed reports based on field surveys and the direct testimony of affected people, which document the serious human rights abuses resulting from the imposition of oil palm plantations.

³³ Marcus Colchester, 1986a, Unity and Diversity: Indonesian policy towards tribal peoples. *The Ecologist* 16 (2/3):61-70; and 1986b The Struggle for Land: tribal peoples in the face of the Transmigration Programme. *The Ecologist* 16 (2/3):89-98.

³⁴ Marcus Colchester and Norman Jiwan, 2006, *Ghosts on our own land: oil palm smallholders in Indonesia and the Roundtable on Sustainable Palm Oil*. Forest Peoples Programme and SawitWatch, Bogor.

³⁵ Zahari Zen. John McCarthy and Piers Gillespie, 2008, *Linking pro-poor policy and oil palm cultivation*, Australia Indonesia Governance Research Partnership Policy Brief , Australian National University, Canberra; John McCarthy and Robert Cramb, 2009, Policy narratives, landholder engagement and oil palm expansion on the Malaysian and Indonesia frontiers, *The Geographical Journal* 175(2):112-123.

³⁶ Tania Li. pers. comm. to the author 26 June 2010.

The publications show that these abuses are widespread, are inherent in the way lands are acquired and estates are developed and continue up to the present day.³⁷

Among the most persistent problems are the following. Acquisition of lands for estates and smallholder schemes violates the rights of indigenous peoples to their property. Their lands are being taken off them without due payment and without remedy. In addition, their right to give or withhold their free, prior and informed consent for these proposed developments is being violated. In Indonesia, those that sign up to join imposed schemes are not informed that this reallocation of lands implies a permanent surrender of their rights in land. The dramatic changes in local landscapes and ecosystems - including the loss of agricultural and agroforestry lands, hunting grounds, game, fish, forests, as well as water for drinking, cooking and bathing - in turn have major consequences and deprive people of their customary livelihoods and means of subsistence.

The research also details the worsening situation of women, as their livelihoods, cultures and economic circumstances are transformed. The reports note that whereas under customary law lands may be held by women (as among the Minangkabau in West Sumatra) or equally by men and women (as among most Dayak peoples in Borneo), when they get formal titles as smallholders these are vested in male heads of households. The marginalization of women has been cited as a cause of the increased instances of prostitution in oil palm areas.³⁸ According to the Indonesian Ministry of Women's Empowerment, the impact of oil palm plantations on rural women can include: an increase in time and effort to carry out domestic chores through the loss of access to clean and adequate water and fuel wood and an increase in medical costs due to loss of access to medicinal plants obtained from gardens and forests; loss of food and income from home gardens and cropping areas; loss of indigenous knowledge and socio-cultural systems and; an increase in domestic violence against women and children due to increased social and economic stresses.³⁹

In Indonesia, in particular, smallholders also complain of serious problems in the way they participate in land holding schemes. According to several field surveys as well as the testimony of farmers at numerous meetings of the Roundtable on Sustainable Palm Oil, smallholders in Indonesia suffer from: monopsonistic relations with local mills; unfair allocation of smallholdings; untransparent processes of land titling; high and manipulated debts and; unfair pricing. Farmers speak emotively of being 'ghosts

³⁷ Eric Wakker, 2004, *Greasy Palms: the social and ecological impacts of large-scale oil palm plantation development in Southeast Asia*, Friends of the Earth, London; WRM, 2004, *The Bitter Fruit of Oil Palm: Dispossession and Deforestation*. Montevideo; *Promised Land* (2006) op. cit.; *Ghosts on our own land* (2006) op. cit.; *Land is Life* (2007) op. cit.; Milieudedefensie, Lembaga Gemawan and KONTAK Rakyat Borneo, 2007, *Policy, Practice, Pride and Prejudice: Review of legal, environmental and social practices of oil palm plantation companies of the Wilmar Group in Sambas District, West Kalimantan (Indonesia)*, Milieudedefensie (Friends of the Earth Netherlands), Amsterdam; FoE, LifeMosaic and SawitWatch, 2008, *Losing Ground: the human rights impacts of oil palm expansion in Indonesia*, Friends of the Earth, Life Mosaic and SawitWatch, London; *Indigenous peoples and oil palm plantations* (2009) op. cit.; ELSAM, 2010, *Human Rights Violations in the Palm Oil Plantation PT PP Lonsum Tbk-North Sumatera*, Jakarta; see also CIFOR, 2009, *The impacts and opportunities of oil palm in Southeast Asia: What do we know and what do we need to know?*, CIFOR, Bogor.

³⁸ Ibid.

³⁹ Powerpoint presentation to a National Meeting on the Macro Effects of Biofuels by Dr. Ir. Hertomo Heroe of the Indonesian Ministry for Woman's Empowerment, 12 August 2009, Jakarta.

on our own land' because of the endless cycle of debt they are trapped in.⁴⁰ These problems are common, though not universal, and amount to the extraction of 'forced labour' – a 'contemporary form of slavery'.⁴¹ Recent studies by researchers from the Australian National University show growing disparities between rich and poor in smallholder areas especially in Sumatra.⁴²

Not surprisingly, the indigenous peoples suffering these abuses are neither passive nor silent in the face of the take over of their lands and other violations of their rights. The studies show that affected communities have been voicing their complaints and mounting protests through making representations to the companies directly, taking their concerns to the local authorities and to the land office, appealing to the legislature and voicing their indignation to the press. Others have sought remedy through the courts.⁴³

In Indonesia, however, the courts are notoriously corrupt and the land laws so weak that few communities feel confident of a fair hearing. Consequently, denied other remedies, many communities have been driven to protest the take over of their lands through direct actions such as demonstrations, occupations of company buildings, public protests outside government offices, petitions and blockades of company roads. Others have protested by stealing fruits from palms on company estates and selling them to third parties. There have also been incidents of attacks on company properties such as buildings and machinery. The Indonesian palm oil monitoring NGO, SawitWatch, through its own independent network of contacts, has identified 630 land disputes between palm oil companies and local communities in Indonesia as a whole.⁴⁴ However, the actual number of disputes may be much higher than this. According to the *Badan Pertanahan Nasional* (the National Land Bureau) there are currently some 3,500 land disputes related to palm oil in Indonesia.⁴⁵

These protests have brought repression from company security forces or State agencies brought in by the companies to defend their interests. Further human rights abuses have thus ensued and in some instances these clashes have turned ugly and numerous cases of shooting, leading to deaths and injuries, have been recorded.⁴⁶ A recent incident occurred when the Riau Mobile Police Brigade clashed with hundreds of palm oil plantation smallholders and members of a smallholder cooperative on 8th June 2010. The smallholders were protesting at the way, they claimed, PT Tri Bakti Sarimas (TBS), a palm oil plantation company and member of the Roundtable on Sustainable Palm Oil, had broken promises it had made to smallholders. The farmers demanded the return of their lands. In the incident a female smallholder was shot

⁴⁰ *Ghosts on our own land* op. cit. These issues have been repeatedly brought to light through the public meetings of the Task Force on Smallholders of the Roundtable on Sustainable Palm Oils and see www.rspo.org

⁴¹ ILO Conventions No. 29 on Forced Labour (1930) and No. 105 on Abolition of Forced Labour; <http://www.hri.ca/fortherecord2000/vol1/slavery.htm> accessed 27 March 2007; <http://www.ohchr.org/english/about/publications/docs/fs14.htm> accessed 27 March 2007.

⁴² <http://news.bbc.co.uk/2/hi/asia-pacific/8534031.stm>; John McCarthy, 2008, Processes of Inclusion and Adverse Incorporation: Oil Palm and Agrarian Change in Sumatra, Indonesia, *Journal of Peasant Studies* 36(3); and see also refs footnote 35.

⁴³ Op. cit. footnote 37.

⁴⁴ *Jakarta Post* 1st July 2010.

⁴⁵ Presentation made by BPN to the RSPO in Kuala Lumpur on 1st November 2009.

⁴⁶ Op. cit. footnote 37.

dead, several others injured and a number of people arrested. A coalition of NGOs grouped together as 'Solidarity for Riau Farmers' made further protests outside the National Police Headquarters in Jakarta on 10th June 2010, demanding the police be brought to justice over the killing and violence.⁴⁷

Procedures for redress

Indigenous peoples facing these infringements of their rights, which they perceive as an assault on their lands and livelihoods, are far from powerless, even though legal frameworks, national policies and State agencies may oppose them. A long term study of land conflicts between oil palm companies and five different self-governing Minangkabau communities (*nagari*) in West Sumatra shows in detail how national laws and policies favouring large-scale, highly capitalised development have marginalised Minang communities, disempowered their own decision-making structures and denied the validity of customary law.⁴⁸ Notwithstanding, the Minang communities have persisted in challenging the expropriation of their ancestral lands. However, although conflicts over land underlie these struggles, the communities have mainly been concerned to improve their livelihoods and regain control of their lives. The tactics they have used vary from passive resistance, active protest, mass mobilisation to media campaigns. The study found that, despite continuing repression by companies and security forces, communities have been partially successful in getting improved deals. In part this success can be attributed to the fact that, even though it was the State that provided the companies their permits and has tended to support the companies' interests, the communities have mainly directed their protests at the companies themselves. The companies have been forced to accommodate the communities' demands or face continuing disruption and losses.⁴⁹

In Sarawak, the tactics used by communities have been somewhat different. Although petitions, protests and media campaigns have also been used, the favoured mechanism of recourse adopted by farmers has been to take their concerns to the courts. This tactic has been made possible by the dedicated work of a number of public interest lawyers which has made this option affordable and by the fact that the judiciary in Malaysia has retained a greater degree of independence. A study of local experiences with palm oil development in Sarawak shows that about one third of the 150 land disputes that are currently in the courts in the State concern oil palm. Although many of these cases get backed up in the courts for as long as 15 to 20 years, once they have been brought to trial the judges have often found in favour of indigenous plaintiffs and have upheld their customary rights to their lands.⁵⁰

A recent case concerns the Kayan community of Long Teran Kanan, Tinjar, Miri Division which finally got the justice they deserve after fighting a legal battle at the High Court for more than 12 years to get recognition of their rights to their native customary land. The case was between the community, which fought a class action, and the Sarawak Government, the Land and Survey Department, the Land Custody

⁴⁷ 'NGOs demand justice in farmer shooting case' *Jakarta Post* 10th June 2010.

⁴⁸ Afrizal, 2005, *The Nagari Community, Business and the State: the origin and process of contemporary agrarian protests in West Sumatra, Indonesia*, Ph. D. thesis, Flinders University.

⁴⁹ *Ibid.*

⁵⁰ *Land is Life* op. cit.

Development Authority (LCDA) and IOI Pelita Plantation Sdn. Bhd., a subsidiary of the very large IOI plantations group. The case, which had been contested by the defendants since 1997, found in favour of the indigenous people upholding their rights in land and declaring the permits issued over their lands to be null and void.

In making this ruling the judge noted that the defendants had violated the indigenous peoples' rights to both life and property which are guaranteed under Articles 5 and 13 of the Federal Constitution. The judge also ruled that the companies had trespassed on the Kayan's land and so should pay damages as well as the costs of the action. The Government, as one of the defendants, has indicated it may appeal the decision, which led to indignation from the communities. 'The government should help and protect the rights and interest of the poor. They should not take away our lands then give it to the rich and powerful' said the Government-recognised headman Lah Anyie who led the action.⁵¹

Given the fact that the national judicial process is largely mistrusted in Indonesia but the country has ratified the key human rights instruments, indigenous peoples and civil society groups in Indonesia have made a long term effort to gain redress using the international human rights machinery. This has included raising their concerns with the UN Permanent Forum on Indigenous Issues,⁵² the UN Special Rapporteur on the Rights of Indigenous Peoples,⁵³ the UN Special Rapporteur on the Right to Food⁵⁴ and the UN Committee on the Elimination of Racial Discrimination.⁵⁵

In 2008, responding to civil society concerns about an Indonesian Government plan to create a 1.8 million hectare palm oil plantation along the Indonesian–Malaysian border, the UN Committee on the Elimination of Racial Discrimination (CERD) explicitly called on the Government of Indonesia to amend its laws to recognise indigenous peoples' rights. CERD, which oversees the application of the UN Convention on the Elimination of All Forms of Racial Discrimination to which the Republic of Indonesia is a signatory, explicitly recommended that:

⁵¹ 'Another victory for the natives of Sarawak', Press Release by Borneo Resources Institute of Malaysia, BRIMAS, 31st March 2010; see also Milieudéfense, 2010, *Too Green to be True: IOI Corporation in Ketapang District, West Kalimantan*, Milieudéfense and FoE-Europe, Amsterdam.

⁵² V. Tauli-Corpuz and P. Tamang, 2007, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods*, UN Permanent Forum on Indigenous Issues Working Paper, E/C.19/2007/CRP.6, para. 33 (hereinafter "UNPFII Working Paper"). Available at: http://www.un.org/esa/socdev/unpfii/en/session_sixth.html

⁵³ Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Oral Statement to the UN Permanent Forum on Indigenous Issues Sixth Session*, 21 May 2007. Available at: http://www.un.org/esa/socdev/unpfii/documents/6session_SR_statement_asia_en.doc

⁵⁴ AMAN, SawitWatch, HuMA and FPP, 2010, *Indonesia: palm oil development on indigenous peoples' lands* submission by Aliansi Masyarakat Adat Nusantara, SawitWatch, HuMA and Forest Peoples Programme to the UN Special Rapporteur on the Right to Food, January 2010.

⁵⁵ SawitWatch, AMAN, ELSAM, WALHI, HuMA, YPI, LBBT, Gemawan, ID and FPP, 2007, *Request for Consideration of the Situation of Indigenous Peoples in Kalimantan, Indonesia*, filed under the United Nations Committee on the Elimination of Racial Discrimination's Urgent Action and Early Warning Procedures to the Committee on the Elimination of Racial Discrimination at its Seventy-First Session 30 July – 18 August 2007.

The State party should review its laws, in particular Law No. 18 of 2004 on Plantations, as well as the way they are interpreted and implemented in practice, to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands. While noting that the Kalimantan Border Oil Palm Mega-project is being subjected to further studies, the Committee recommends that the State party secure the possession and ownership rights of local communities before proceeding further with this plan. The State party should also ensure that meaningful consultations are undertaken with the concerned communities, with a view to obtaining their consent and participation in it.⁵⁶

Likewise CERD specifically recommended that Indonesia:

should amend its domestic laws, regulations and practices to ensure that the concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory, and are not used as a justification to override the rights of indigenous peoples, in accordance with the Committee's general recommendation No. 23 (1997) on indigenous peoples... The Committee, while noting that land, water and natural resources shall be controlled by the State party and exploited for the greatest benefit of the people under Indonesian law, recalls that such a principle must be exercised consistently with the rights of indigenous peoples.⁵⁷

Whereas the Republic of Indonesia as a party to international human rights treaties and in conformity with its Constitutional obligations has an obligation to protect the rights of Indonesian citizens including indigenous peoples, it must also ensure that corporations comply with these social and environmental obligations. Steps in this direction are discernible in Chapter 5 of Indonesia's new Company Law, which obliges Natural Resources Companies to shoulder social and environmental responsibilities. Further, in line with the Indonesian Commercial Code, insofar as morality and lawfulness requires respect for human rights, corporations are more broadly liable to respect human rights. Article 7(2) of the Human Rights Law (39/1999) provides that international human rights instruments ratified by Indonesia form part of domestic law. Likewise under the Law concerning the Elimination of Racial and Ethnic Discrimination (40/2008), corporations are also subject to criminal and civil liability.⁵⁸ The problem is that the State's capacity to enforce such laws is very weak.

Indigenous peoples and civil society groups have thus sought to complement actions using international laws with efforts to hold companies to account through other means, including international media campaigns and consumer boycotts, which have often targeted specific companies and many of which have focused on environmental damage and threats to endangered species such as orang utans.⁵⁹ The industry response to this has been to set up the Roundtable on Sustainable Palm Oil a multi-stakeholder body initiated through a partnership between industry and the WWF,

⁵⁶ UN Doc. CERD/C/IDN/CO/3 15th August 2007.

⁵⁷ Ibid.

⁵⁸ Allens Arthur Robinson, 2009, *Corporate Law Tools Project: Report to the Special Representative of the Secretary General on the Issue of Human Right and Transnational Corporations and Other Business Enterprises*, United Nations, September 2009.

⁵⁹ See for example: Rainforest Action Network, 2010, *Cargill's Problems with Palm Oil: a burning threat to Borneo*, San Francisco.

which on the one hand seeks to improve company practices but on the other hand seeks to legitimise continued expansion.⁶⁰

Sustained inputs to the RSPO by social justice NGOs have ensured that the RSPO has adopted a very strong standard against which companies are meant to be independently audited by accredited certification bodies. The standard was developed with the aim of being consistent with international human rights norms. It thus affirms the rights of indigenous peoples to their customary lands, requires just land acquisition and the redress of conflicts, and insists that no lands can be taken from indigenous peoples and local communities without their free, prior and informed consent expressed through their own freely chosen representatives (FPIC). The standard also requires the fair treatment of smallholders and prohibits discriminatory practices against women.⁶¹

The RSPO has also provided training and published guidance for companies on how they should respect FPIC.⁶² RSPO has adopted a Certification Protocol which obliges companies with certified mills and estates to ensure that associated scheme smallholders are also certified within three years. The protocol likewise requires corporations to have credible plans to bring all subsidiaries into compliance with the standard within 5 years of any one subsidiary getting certified.⁶³ RSPO members are all required to endorse a Code of Conduct which requires them to uphold the RSPO standard.⁶⁴ A grievance mechanism exists which is meant to provide recourse for those who believe RSPO members are violating the Code.⁶⁵ RSPO is also in the process of setting up a dispute resolution facility which is aimed at addressing the legacy of land conflicts caused by unfair land allocations to companies without respect for indigenous peoples' and local communities' rights. NGOs are divided over the usefulness of the RSPO but many have made use of the redress mechanisms. Indeed so many complaints have been filed about faulty certificates and alleged violations of the Code of Conduct that the RSPO's sub-committees set up to deal with these submissions have been overwhelmed.

Two prominent members of the RSPO are the world's largest palm oil trading company, Wilmar Group, and the World Bank's private sector arm, the International Finance Corporation (IFC). Since 2001, NGOs in Indonesia supported by international NGOs have been writing letters to the IFC contesting its support for the Wilmar Group. Detailed reports based on field investigations showed very irregular processes of land acquisition by Wilmar subsidiaries as well as serious environmental malpractice including clearing and burning forests.⁶⁶ These complaints were ignored

⁶⁰ Marcus Colchester and Rudy Lumuru, 2005, *The Roundtable on Sustainable Palm Oil: Analysis, Prospects and Progress*. Briefing Paper following Second Meeting of RSPO. Available at:

http://www.forestpeoples.org/documents/prv_sector/oil_palm/rspo_feb05_briefing_eng.shtml

⁶¹ http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf

⁶² FPP, 2008, *Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: a guide for companies*. Forest Peoples Programme, Moreton-in-Marsh.

http://www.rspo.org/files/resource_centre/FPIC%20and%20the%20RSPO%20a%20guide%20for%20companies%20Oct%2008%20%282%29.pdf

⁶³ http://www.rspo.org/files/resource_centre/RSPO%20certification%20systems_1.pdf

⁶⁴ http://www.rspo.org/files/resource_centre/CoC.pdf

⁶⁵ http://www.rspo.org/files/resource_centre/RSPO%20Grievance%20Procedure.pdf

⁶⁶ *Greasy Palms* op. cit.; *Promised Land* op. cit.; *The Nagari Community* op. cit.; *Policy, Practice, Pride and Prejudice* op. cit.

and in 2006 the IFC provided a further credit guarantee to the Wilmar group. NGOs thus responded by filing a detailed complaint to the IFC's Compliance Advisory Ombudsman (CAO).

Backed by a detailed dossier of field-based information the complainants noted that abuses by Wilmar Group subsidiaries included: illegal use of fire to clear lands; clearance of primary forests and areas of high conservation value; the take over of indigenous peoples' customary lands without due process or their free, prior and informed consent; failure to negotiate with communities or abide by negotiated agreements; failure to establish agreed areas of smallholdings; social conflicts triggering repressive actions by companies and security forces; failure to carry out or wait for approval of legally required environmental impact assessments; clearance of peatlands and forests without legally required permits. The complaint also documented in detail how the IFC staff had failed to comply with their institution's own Performance Standards and had consciously sought to downplay the social and environmental implications of providing financial support for the company.⁶⁷

The CAO responded in two ways. After accepting that the complaint was a substantive one and carrying out a field assessment to ascertain the views of the communities, it initiated a long process of conflict mediation between the Wilmar Group and the affected communities it had visited. Over a period of two years, this mediation led the Wilmar group to adopt new operational procedures to ensure compliance with the RSPO's standards. With respect to the two communities that were the focus of the mediation, the Wilmar subsidiaries agreed to; compensate the communities for losses and damages; increase the proportion of lands to be allocated as smallholdings and; to return those lands which the communities insisted not be cleared. It also agreed that the lands that would be used for oil palm by the company would be considered leased community lands and not State lands, so they would revert to the community not to the State on the expiry of the lease.⁶⁸

While this complaint was still being resolved by the CAO, the IFC went ahead and made a further loan to the Wilmar Group despite strong protests from the complainants to the IFC Board well in advance of this decision. This triggered a second complaint in which the NGOs detailed 17 other cases of land conflict between the communities and Wilmar Group subsidiaries. The CAO agreed to also look into this complaint.⁶⁹

The second action, which the CAO took, was to address the alleged compliance failures by IFC staff. After an unsuccessful attempt to convene a dialogue between the complainants and the IFC to explore how to improve compliance, at which IFC staff refused to admit anything needed improving, the CAO decided the complaint should also trigger a full audit which would examine whether IFC staff had indeed complied with IFC standards and procedures or not.

⁶⁷ Complaint submission:

http://www.forestpeoples.org/documents/ifi_igo/ifc_wilmar_fpp_let_jul07_eng.pdf

⁶⁸ It remains unclear how this will be accomplished in law and discussions about the matter continue.

⁶⁹ The full series of letters and documents generated by this complaints process can be viewed at http://www.forestpeoples.org/documents/ifi_igo/bases/ifc.shtml

The CAO's audit was long in coming but when it was finally released, in 2009, it provided a damning indictment of the IFC.⁷⁰ Vindicating NGO concerns, the audit found that indeed, in providing financial assistance to the world's largest palm oil trading company, IFC staff had violated IFC due diligence procedures and Performance Standards (PS) and had allowed financial considerations to override social and environmental concerns.

When the audit report was published, it was accompanied by a bland Management Response which suggested that IFC staff still did not take the complaint or the CAO's findings seriously. This triggered a further NGO appeal to the World Bank President calling on him to suspend IFC funding for the oil palm sector until such a time as the IFC had developed a plausible strategy to ensure its funding complied with the Performance Standards. The issue gained wide press coverage and, in August 2009, the World Bank President suspended IFC financing for the palm oil sector world wide.⁷¹ Moreover, after further correspondence with NGOs, the President extended the suspension to include the whole World Bank Group.⁷²

In responding to the NGOs, the World Bank Group committed itself to a wide-ranging review of the sector in order to develop a revised strategy for investment and a 'common approach' to the palm oil sector for the whole World Bank Group. Meanwhile the Bank said that it would not approve any new investments in palm oil development until this strategy is in place.⁷³ The global review, which is now underway, will also look into other agribusiness commodities such as cocoa and soya.

Public consultations for the review process were opened by the IFC in March 2010 and have included public meetings with NGOs and other concerned parties to get their views.⁷⁴ Initial submissions from NGOs focused on the problems highlighted in this article, namely that the social and environmental harms caused by oil palm expansion result, in large part, from the inadequate legal and policy frameworks in Indonesia and Malaysia. Echoing the views of UN human rights bodies, NGOs called on the IFC to ensure that the emerging strategy be extended to include the whole World Bank Group, address the specific problems in the two main producer countries and ensure further consultations about the draft strategy itself. At the time of writing, the IFC seems to have acceded to some of these requests, agreeing that the Strategy will extend to the full World Bank Group, extending the period for the development of the strategy by a further three months, promising further consultations and agreeing to include NGOs in its External Advisory Group.⁷⁵ Just how the World Bank Group proposes to re-engage in this problematic sector remains to be seen.

⁷⁰ Audit report:

http://www.forestpeoples.org/documents/ifi_igo/ifc_wilmar_cao_audit_report_jun09_eng.pdf

⁷¹ Letter from Robert Zoellick to Marcus Colchester, 28 August 2009:

http://www.forestpeoples.org/documents/ifi_igo/ifc_wb_letter_pressrelease_sep09.pdf

⁷² Letter from Robert Zoellick to Jennifer Kalafut, 25 November 2009:

http://www.forestpeoples.org/documents/ifi_igo/ifc_wb_palm_oil_let_nov09_eng.pdf

⁷³ Letter from Robert Zoellick 28 August 2009 (op. cit. note 70) and Cheng Hai Teoh, 2010, *Key Sustainability Issues in the Palm Oil Sector: a discussion paper for multi-stakeholder consultations*, World Bank and IFC, Washington DC.

⁷⁴ <http://www.ifc.org/palmoilstrategy>

⁷⁵ FPP and SawitWatch, 2010, Joint Statement Forest Peoples Programme and SawitWatch, Moreton-in-Marsh and Bogor, www.forestpeoples.org/

Conclusions: prospects of framework reform

While oil palm is a lucrative and productive crop and was originally grown as part of mixed farming economies in West Africa, currently it is being expanded as an industrial-scale monocrop in such a way as to impose serious long term social and environmental costs on those who can least afford them while bringing the most gains and benefits to those who already enjoy relative wealth. A major overhaul of the sector is needed if this pattern of land and wealth concentration is not to be intensified.

Unfair processes of land use allocation and land acquisition and the lack of respect for local communities and indigenous peoples' rights not only result in marginalization and impoverishment but also give rise to long term disputes over land, which all too often escalate into conflicts with concomitant human rights abuses due to repressive actions by company or State security forces.

The conclusion that flows from the above is that the legal frameworks in the world's two foremost palm oil producing countries are inappropriate to protect indigenous peoples' rights and ensure an equitable development process. Heightened global demand for edible oils and biofuels and international investment is driving these countries to expand oil palm estates and intensify palm oil production. However, the weak legal frameworks (and lax enforcement) are compatible neither with international human rights law, nor with indigenous peoples' customary law. In Malaysia, the courts have consistently upheld customary rights in terms of common law contrary to Government pleadings. In Indonesia, the international human rights treaty bodies have likewise recommended reforms in national law to protect the rights of indigenous peoples.⁷⁶ Similar deficiencies in the current legal framework in Indonesia have been found with regard to the need to protect high conservation values,⁷⁷ and likewise to effect adequate controls of agro-industrial pollution.⁷⁸

International organisations have begun to pin their hopes of reform on the creation of a global market in carbon to curb deforestation,⁷⁹ although whether this will help or harm indigenous peoples is a matter of debate.⁸⁰ Indeed, initial calculations based on current prices in the voluntary carbon trading market, suggest that market-based payments for Reducing in Emissions from Deforestation and Forest Degradation (REDD) will not be enough by themselves to make economies based on maintaining natural forests competitive with oil palm.⁸¹

⁷⁶ So far the Indonesian Government has been incapable of responding to these recommendations.

⁷⁷ *HCV and RSPO* op. cit.

⁷⁸ John McCarthy and Zahari Zen, 2010, Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro-industrial Pollution in Indonesia, *Law and Policy* 32(1):153-179.

⁷⁹ Dan Zarin, 2008, *Reducing Emissions from Deforestation and Forest Degradation: an options assessment report*, Government of Norway and Meridien Institute, Washington DC.

⁸⁰ Tom Griffiths with Francesco Martone, 2009, *Seeing REDD? Forests, climate change mitigation and the rights of indigenous peoples and local communities*, revised and updated edition, Forest Peoples Programme, Moreton-in-Marsh (May 2009).

⁸¹ Lian Pin Koh and Rhett A. Butler, 2010, Can REDD make natural forests competitive with palm oil, *ITTO Tropical Forest Update* 19/1:9-10.

Indonesia has been a target for international concern about climate change as, by some accounts, the country's massive Green House Gas (GHG) emissions, 80% of which result from its clearance of peatlands and forests – notably for oil palm, make Indonesia the world's third highest emitter of GHGs after the USA and China.⁸² The figures imply that per capita emissions of Indonesians equal those of the average European. These concerns coupled with the expectation that reductions of these figures can earn Indonesia substantial sums of money have led the Government of Indonesia to promise up to 41% cuts in projected national greenhouse gas emissions by 2020.⁸³

In late May 2010, the Governments of Indonesia and Norway signed a joint Letter of Intent in which, in exchange for Indonesian efforts to reduce its emissions for deforestation and forest degradation, Norway would pay Indonesia US\$1 billion over 5 years. At the same time the Indonesian Government announced with much fanfare that there would be a two year moratorium on expansion into forests and peatlands.⁸⁴

Just what this really means remains to be seen. Some government functionaries have been cited as claiming that the moratorium is only on the hand out of permits not of land clearance itself. Moreover, the Director General of Forest Production at the Ministry of Forestry has told reporters that 'the moratorium on new permits will take place next year so any business players that have secured permits before the moratorium can still run their business'.⁸⁵ At the time of writing (July 2010) this matter is now under discussion within the President's office. However, if it is true that existing permits will be honoured then, at least as far as the palm oil frontier is concerned, the moratorium may actually have little effect on curbing land grabbing and slowing deforestation.

According to the Indonesian palm oil monitoring NGO, SawitWatch, the Government has already issued 26.7 million hectares of land as *ijin lokasi* for palm oil development nationally, over one third of which are said to be on peat and providing scope for a further tripling of the total area currently under the crop in the country.⁸⁶ The Indonesian Palm Oil Producers Association, which represents the interests of the majority of palm oil producers in Indonesia, admits that it plans to double palm oil production by 2020. It claims that, if the moratorium is implemented, 'Indonesia will experience a breakdown in palm oil production within ten years'. The Indonesian Palm Oil Commission (IPOC), the government-run body which promotes the sector, notes that about half of the areas allocated in initial permits are found not to be suitable for planting and so it has also objected strongly to the proposed moratorium.

⁸² Marcel Silvius, Alex Kaat, Helen van de Bund and Aljosja Hooijer, 2006, *Peatland Degradation Fuels Climate Change*, Wetlands International and Delft Hydraulics, ms.

⁸³ *Jakarta Globe* 3 January 2010. The President has promised 26% cuts anyway and 41% if international finance is forthcoming.

⁸⁴ <http://www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-the-Environment/Ryddemappe/2008/why-a-climate-and-forest-initiative.html?id=526489>

⁸⁵ '1 percent of peatlands for carbon deal' *Jakarta Post* 26 June 2010. NGOs in Riau also report an acceleration of forest clearance by companies rushing to open up land before the moratorium comes into effect.

⁸⁶ Norman Jiwan, 'Deforestation moratorium is not panacea', *Jakarta Post*, 1st July 2010. Reliable figure on areas permitted and planted are hard to secure. Current areas under oil palm in Indonesia exceed 7.5 m ha. with an additional 1.8 m ha. in HGU still to be planted. The compilation by SawitWatch indicates that a further 15.4 m ha. are already leased as *ijin lokasi*.

Rosediana Suharto, spokesperson for IPOC, argues that developing countries such as Indonesia must prioritise economic development over the environment.⁸⁷

If, however, there is to be a real moratorium on land clearance then this may provide an important opportunity for the Government to effect reforms in the forestry and plantations sectors, take firm steps to amend the laws so they recognise indigenous peoples' rights and adopt a more measured approach to rural development that gives priority to local communities' initiatives and not the interests of foreign backed companies. The national indigenous peoples' organisation, *Aliansi Masyarakat Adat Nusantara*, has been strongly insisting that REDD must recognise indigenous peoples' rights if it is to be accepted by the communities.⁸⁸ Likewise, in response to concerns from NGOs and indigenous peoples, the UN CERD has noted in a letter to the Indonesian Government that, in current Ministry of Forestry regulations for issuing permits for REDD schemes, 'the property rights of indigenous peoples over traditional lands were not appropriately taken into account'.⁸⁹ If REDD is neither going to respect indigenous peoples' rights nor curb palm oil expansion, it would seem to be a hollow promise.

⁸⁷ 'CPO Producers oppose moratorium' *Jakarta Post* 2nd July 2010).

⁸⁸ 'No rights, no REDD: communities', *Jakarta Post*, 1st July 2010.

⁸⁹ Letter from the Chairperson of the UN Committee on the Elimination of Discrimination to the Indonesian Ambassador to the UN, 29th September 2009. Available at: http://www.forestpeoples.org/documents/asia_pacific/indonesia_cerd_response_urgent_action_sept09_eng.pdf