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# POLICIES OF INEQUITY — A WORLD APART: A COMPARISON OF THE POLICIES TOWARD INDIGENOUS PEOPLES OF A POST-COLONIAL DEVELOPING NATION TO THOSE OF A POST-INDUSTRIAL DEVELOPED NATION

Caitlain Devereaux Lewis\*

## I. Introduction

*A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands . . . , until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.*<sup>1</sup>

Federal Indian law is rooted in a history of conquest and colonization. Indeed, theories of conquest<sup>2</sup> and discovery<sup>3</sup> rights are the foundation of

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1. *Cherokee Nation v. Georgia*, 30 U.S. (1 Pet.) 1, 15 (1831).

2. *See, e.g., Williams v. Lee*, 358 U.S. 217, 218 (1959) (“Through conquest and treaties [the Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.”); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (“After conquest [the tribes] were permitted to occupy portions of territory over which they had previously exercised ‘sovereignty’ . . . . This is not a property right but amounts to a right of occupancy . . . . This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.”).

3. *See, e.g., Worcester v. Georgia*, 31 U.S. (1 Pet.) 515, 543–44 (1832) (“To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, ‘that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.’” (quoting *Johnson v. M’Intosh*, 21 U.S. (1 Wheat.) 543, 573 (1823))); *Worcester*, 31 U.S. (1 Pet.) at 543–44 (“This principle, acknowledged by all Europeans . . . gave to the nation making the discovery, as its inevitable consequence, the

many of the early Federal Indian law decisions that still serve as precedent for cases decided today.<sup>4</sup> This body of law evolved out of what is known as the “classic phase”<sup>5</sup> of colonization when “colonial contact metamorphosed over time into the successful full-scale implantation of Western society on extra-European soil.”<sup>6</sup> Many comparative studies of the legal regimes governing indigenous peoples that evolved out of this classic phase of colonization have been conducted, especially those comparing the policies of common law countries such as Australia, Canada, and the United States.<sup>7</sup> Yet, the classic phase is not the only model of colonization. Indeed, “[s]tate conquest and incorporation have happened in diverse places to millions of indigenous people over the past few centuries. The process has many histories. But as different as these histories are, they seem to share certain features.”<sup>8</sup> For example, “[i]t [is] evident in looking beyond the reservation system in the United States that . . . power relationships are not unique to Native American communities. Similar patterns shape the experience of other indigenous peoples in different state systems.”<sup>9</sup>

An interesting comparison can be made between the governing systems affecting Native Americans and those of post-colonial, developing nations.

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sole right of acquiring the soil and of making settlements on it.”); *Johnson*, 21 U.S. (1 Wheat.) at 584 (“Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”).

4. See, e.g., *Cnty. of Oneida v. Oneida Indian Nation (Oneida II)*, 470 U.S. 226, 234 (1985) (“The ‘doctrine of discovery’ provided . . . that discovering nations held fee title to these lands, subject to the Indians’ right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign.” (citing *Oneida Indian Nation v. Cnty. of Oneida (Oneida I)*, 414 U.S. 661, 667 (1974))).

5. MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION* 14 (2000) (“The classic phase of this at first European enterprise . . . may be said to run from Columbus’ arrival in the New World in 1492 to the General Assembly *Declaration on the Granting of Independence to Colonial Countries and Peoples* in 1960. Victims in the classic phase included peoples who had already constituted themselves into centralized nations at the time of contact with the West as well as others who, while organized on a subsistence basis, occupied territories that were accessible to Western intruders.”).

6. *Id.*

7. See, e.g., RICHARD J. PERRY, *FROM TIME IMMEMORIAL: INDIGENOUS PEOPLES AND STATE SYSTEMS* xiii (1996) (listing examples of such comparative studies and stating that “[a] number of studies already have drawn some limited comparisons, especially between Canada or the United States and Australia”).

8. *Id.* at xi.

9. *Id.* at xiii.

Such developing nations are governed by the predominant indigenous groups that inherited power from former colonizing powers, usually European, when they relinquished control over their colonies. While these governments are composed of the predominant indigenous groups, there is often a subset of disfavored or minority indigenous people who are then governed by the indigenous peoples favored by the colonizing power. Thus, a comparison between the policies of post-industrial, developed nations toward their indigenous peoples, such as those embodied in Federal Indian law, and the policies of post-colonial, developing nations, serves as an interesting study in power relationships, ethnic tension, and legal justifications. Surprisingly,

[m]any so-called Third World states, which themselves had experienced colonization, seem to repeat the action of earlier European states in their own policies toward indigenous peoples . . . . “Territorial consolidation, national integration, the imperatives of population growth, and economic development are phrases used by Third World states to cover up the killing of indigenous nations and peoples.”<sup>10</sup>

This article examines the policies of one post-colonial, developing nation, the Republic of Indonesia, toward its minority indigenous populations. As in Federal Indian law, which “is a subject that cannot be understood if the historical dimension of existing law is ignored,”<sup>11</sup> these policies are best understood within their historical context. To this end, this article is arranged chronologically and begins by briefly outlining contact with the indigenous peoples of West Papua during the colonial era. It will then provide an examination of the Indonesian government’s policies toward West Papua during the infancy of the Republic: the “Irian Jaya” era. Finally, this article will examine the most recent policies of the twenty-first century that evolved in reaction to separatist sentiment. In the process, the article will draw comparisons to the policies of Federal Indian law in order

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10. *Id.* at 203 (quoting Bernard Nietschmann, *Third World Colonial Expansion: Indonesia, Disguised Invasion of Indigenous Nations*, in *TRIBAL PEOPLES AND DEVELOPMENT ISSUES: A GLOBAL OVERVIEW* 191, 192 (John H. Bodley ed., 1988)).

11. Nathan R. Margold, *Introduction*, in Felix COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* xxvii (Univ. of N.M. photo. reprint 1971) (1942); *see also* *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511–12 (1986) (Blackmon, J., dissenting) (“Even more than other domains of law, ‘the intricacies and peculiarities of Indian law demand[d] an appreciation of history.’” (quoting Felix Frankfurter, *Foreword, A Jurisprudential Symposium in Memory of Felix S. Cohen*, 9 *RUTGERS L. REV.* 355, 356 (1954))).

to make observations about how the policies of post-colonial, developing nations toward their indigenous peoples correspond to and differ from those of post-industrial developed nations, such as the United States.

*A. The Republic of Indonesia and the Island of Papua: An Overview of the Population and Geography*

With a population of over two hundred million, Indonesia is the world's fourth most populous nation.<sup>12</sup> Composed of over 17,000 islands, it is also the world's largest archipelago,<sup>13</sup> and "[s]pread out over these many islands are literally hundreds of spoken dialects and cultural sub-groups."<sup>14</sup> Of the islands, West Papua, Kalimantan, and Sumatra are the largest, and are among the five largest islands in the world.<sup>15</sup> West Papua is the western half of the island of New Guinea. The island of New Guinea is "the most culturally diverse place on earth. This one island harbors nearly a thousand distinct languages and cultures — one-fifth of the world's total."<sup>16</sup> While West Papua is part of Indonesia, the eastern part of the island was formerly held by Australia and is now the independent nation of Papua New Guinea.<sup>17</sup>

West Papua<sup>18</sup> was previously known as Netherlands New Guinea (up until 1962), West Irian (from 1962 to 1973), and Irian Jaya (from 1973 to 2001), but was renamed West Papua in 2001.<sup>19</sup> West Papua is considered a province of Indonesia and is "roughly the size of France, has a population under two million in a country of over two hundred million, and its capital, Jayapura, is some 3500 kilometers (2100 miles) from the Indonesian capital [of] Jakarta."<sup>20</sup> It is also "the most resource-rich region of the Indonesian archipelago, yet most of its native population lives in abject poverty."<sup>21</sup>

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12. INDONESIA: COUNTRY BRIEFING BOOK: REPUBLIC OF INDONESIA 2 (Sawyer Miller Consulting 1997) [hereinafter INDONESIA: COUNTRY BRIEFING BOOK].

13. *Id.*

14. ADAM SCHWARZ, A NATION IN WAITING: INDONESIA IN THE 1990s, at 6 (1994).

15. *Id.*

16. ART DAVIDSON, ENDANGERED PEOPLES 172 (1993).

17. DATUS C. SMITH, JR., THE LAND AND PEOPLE OF INDONESIA 8 (rev. ed. 1983).

18. This article will refer to the Indonesian part of the island of New Guinea as "West Papua" and its peoples as "West Papuans," unless use of one of the former names within its historical context is appropriate. "Papua New Guinea" will refer to the independent nation on the eastern part of the island.

19. Diana Glazebrook, "If I Stay Here There Is Nothing yet If I Return I Do Not Know Whether I Will Be Safe": West Papuan Refugee Responses to Papua New Guinea Asylum Policy 1998–2003, 17 J. REFUGEE STUD. 205, 206 (2004).

20. Amber Dufseth, Comment, *Indonesia's 1999 Political Laws: The Right of Association in Aceh and Papua*, 11 PAC. RIM L. & POL'Y J. 613, 624 (2002) (quoting HUMAN

### B. Tribes of Papua

West Papua is home to approximately 312 tribes, some of which have yet to be contacted.<sup>22</sup> Among the better known of these tribes are the Amungme, Asmat, Dani, and Moi.<sup>23</sup> Interestingly, the Dani were not “discovered” by westerners until 1938.<sup>24</sup> The indigenous population of West Papua is comprised of approximately one million people, and consists of “hundreds of distinct societies and languages.”<sup>25</sup> Most of these people live “in villages and hamlets linked by ties of trade, ceremonial exchange, marriage, and intermittent small-scale conflicts.”<sup>26</sup> The “central mountainous region of Papua is home to the highland peoples, who practice pig husbandry and sweet potato cultivation,” and the “lowland peoples live in swampy and malarial coastal regions, and live by hunting the abundant game, and gathering.”<sup>27</sup> While some of the hundreds of Papuan tribal languages are related to one another, others are entirely unique.<sup>28</sup> The indigenous Papuan groups are all “ethnically distinct from the Indonesians who control their country,”<sup>29</sup> and they have “no history of any large-scale overall political organization that united more than a few groups.”<sup>30</sup>

### C. History of the Area

Like those of Federal Indian law, the policies of Indonesia toward its indigenous peoples can only be understood with “an appreciation of history,”<sup>31</sup> therefore a brief historical overview is necessary.

The Dutch arrived in the Indonesian islands early in the seventeenth century and by 1602 had established the Dutch East India Company.<sup>32</sup>

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RIGHTS WATCH, HUMAN RIGHTS AND PRO-INDEPENDENCE ACTIONS IN PAPUA, 1999–2000, at 2 (2000)).

21. Correspondent’s Diary, *Cursed by Plenty: Paying a Covert Visit to Papua’s Fighters in the Forest*, ECONOMIST (July 8, 2010), <http://www.economist.com/node/16524650>.

22. *Papuan Tribes*, SURVIVAL INT’L, <http://www.survivalinternational.org/tribes/Papuan> (last visited Feb. 15, 2013).

23. See DAVIDSON, *supra* note 16, at 171–78.

24. See Correspondent’s Diary, *supra* note 21.

25. PERRY, *supra* note 7, at 205.

26. *Id.*

27. *Papuan Tribes*, *supra* note 22.

28. *Id.*

29. *Id.*

30. PERRY, *supra* note 7, at 205.

31. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986) (Blackmun, J., dissenting).

Contact with the island of New Guinea, however, was minimal. Indeed, it was not until 1848 that “the powers of Holland and Britain artificially divided the island at the 141st meridian.”<sup>33</sup> This dividing line between the sovereign nation of Papua New Guinea and the Indonesian province of West Papua remains today.

Foreign activity on the island climaxed during the Second World War. Indeed, in 1944 General Douglas MacArthur made his headquarters in West Papua and “[f]rom a mountaintop near what was then the Dutch colonial town of Hollandia he planned America’s recapture of the Philippines from Japanese occupation.”<sup>34</sup> While Indonesia remained under Dutch rule at the onset of World War II, Japan occupied the country from 1942 to 1945.<sup>35</sup> When the Japanese withdrew at the end of the war, Indonesia, under the guidance of President Sukarno,<sup>36</sup> the first president of Indonesia, declared its independence in order to prevent Holland from reentering.

The 1949 transfer of sovereignty formalized Indonesia’s independence, but “left the determination of the fate of West Papua to later negotiations.”<sup>37</sup> In the interim, Holland continued to hold the area, “but Indonesia pressed its claim in the United Nations . . . and elsewhere”<sup>38</sup> and the Dutch administration in West Papua endeavored “to create conditions for the self-determination of a population.”<sup>39</sup> To this end,

[u]nder Dutch tutelage the West Papuan New Guinea Council (partly elected parliament) was installed in 1961 by almost universal suffrage. Political parties and trade unions were formed, public service positions were increasingly filled by

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32. M.C. RICKLEFS, A HISTORY OF MODERN INDONESIA SINCE C.1300, at 27 (2d ed. 1993). In the Dutch language, the Dutch East India Company is known as *Vereenigde Oost-Indische Compagnie* or VOC, which translates to the “United East India Company.” *Id.* at xviii.

33. DENISE LEITH, THE POLITICS OF POWER: FREEPORT IN SUHARTO’S INDONESIA 10 (2003).

34. Correspondent’s Diary, *supra* note 21.

35. SUDARGO GAUTAMA & ROBERT N. HORNICK, AN INTRODUCTION TO INDONESIAN LAW: UNITY IN DIVERSITY 181 (rev. ed. 1974).

36. There are two conventions for spelling Indonesian names, the Dutch and the English. Using the Dutch spelling, Sukarno is spelled “Soekarno,” while Suharto is spelled “Soeharto.” For purposes of this article, the English spellings of Indonesian names (i.e., Jakarta, Sukarno, and Suharto) will be used, except in quoted material.

37. LÂM, *supra* note 5, at 119.

38. SMITH, *supra* note 17, at 8.

39. LÂM, *supra* note 5, at 119 (citing A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 7 (1973)).

Papuans, and a plan was launched to place West New Guinea under United Nations control pending independence. Finally, a Papuan crest, national anthem, and flag (the Morning Star) were introduced and the western half officially renamed West Papua.<sup>40</sup>

In some ways, this period is reminiscent of a brief period in Federal Indian law, the Indian New Deal era from the late 1920s to the 1940s, when tribes were provided with tools to become self-sufficient, both economically and culturally.<sup>41</sup> Like the brief Indian New Deal period, the West Papuan experience with independence was fleeting.

West Papua enjoyed independence during a ten-month period from 1961 to 1962,<sup>42</sup> but President Sukarno “responded by declaring a campaign of total mobilization to wrest Netherland’s New Guinea from the Dutch.”<sup>43</sup> Indonesia viewed “the continuing Dutch presence as the prolongation of colonialism” and “nothing other than a desperate Dutch ploy to leave in place a regime favorable to the Netherlands and hostile to Djakarta.”<sup>44</sup> Coincidentally, it was Indonesia’s second president, Suharto, who was charged with planning and carrying out Sukarno’s military campaign,<sup>45</sup> however, the “forces available to [Suharto] were appallingly ill prepared, his initial losses were high, and he was saved from having to launch the invasion Sukarno wanted by the intervention of the United States.”<sup>46</sup>

The impasse between Indonesia and the Netherlands ended in 1962 when the Netherlands entered into the “New York Agreement” which was mediated by the United States.<sup>47</sup> Under this Agreement, the “Dutch would leave West Papua and transfer sovereignty to the United Nations Temporary Executive Authority . . . for a period of [six] years.”<sup>48</sup> Under

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40. LEITH, *supra* note 33, at 11.

41. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 1339 (Nell Jessup Newton et al. eds., Lexis Nexis 2005) [hereinafter COHEN].

42. Correspondent’s Diary, *supra* note 21.

43. Glazebrook, *supra* note 19, at 206.

44. LÂM, *supra* note 5, at 119.

45. See JOHN BRESNAN, *MANAGING INDONESIA: THE MODERN POLITICAL ECONOMY* 47 (1993).

46. *Id.*

47. LÂM, *supra* note 5, at 120.

48. 145 CONG. REC. H9197 (daily ed. Sept. 30, 1999) (statement of Del. Eni Faleomavaega) [hereinafter Statement of Del. Faleomavaega]; see also Ikrar Nusa Bhakti, *New Era for Free Papua Movement*, JAKARTA POST, Aug. 3, 1998, at 4 (“After five months of talks . . . Indonesian and Dutch negotiators signed ‘the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)’ at the UN headquarters in New York on Aug. 15, 1962. Under the New York



the supervision of the United Nations, Indonesia agreed to then “allow [West Papua’s] inhabitants to engage in an act of self-determination regarding its political status by no later than 1969.”<sup>49</sup> This plebiscite later became known as the “Act of Free Choice.”<sup>50</sup> Interestingly, although “their fate was to be decided at the United Nations, the West Papuans were never heard from by that body. The discussions of West Papua’s self-determination engaged states only, including highly interested ones, but not the people centrally affected.”<sup>51</sup>

The “Act of Free Choice” was to “be held in 1968 to determine whether the inhabitants desired to be a part of Indonesia.”<sup>52</sup> However, “Indonesia orchestrated an election that many regarded as a brutal military operation. In what came to be known as an ‘act of no-choice,’ . . . 1025 elders under heavy military surveillance were selected to vote on behalf of 809,327 West Papuans on the territory’s political status.”<sup>53</sup> The United Nations (“UN”) “simply noted that irregularities had occurred and went on to validate Indonesia’s extension of sovereignty over West Papua.”<sup>54</sup> The UN sent Ambassador Ortiz-Sanz to observe the plebiscite<sup>55</sup> to ensure it was conducted in accordance with international practices.<sup>56</sup> Ambassador Ortiz-Sanz issued the following statement:

I regret to have to express my reservation regarding the implementation of article XXII of the Agreement relating to the rights, including the rights of free speech, freedom of movement and of assembly of the inhabitants of the area. In spite of my constant efforts, this important provision was not fully

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agreement, the Netherlands transferred the administration of the territory to a United Nations Temporary Executive Authority (UNTEA) on Oct. 1, 1962, and then after May 1, 1963, the UNTEA and Indonesia jointly administered the territory. A transitional period followed in the history of Irian Jaya until 1969, when the Act of Free Choice was held.”).

49. LÂM, *supra* note 5, at 120.

50. *See generally* JOHN SALTFRD, *THE UNITED NATIONS AND THE INDONESIAN TAKEOVER OF WEST PAPUA, 1962–1969: THE ANATOMY OF BETRAYAL* (2006).

51. LÂM, *supra* note 5, at 119–20.

52. Dufseth, *supra* note 20, at 624.

53. Statement of Del. Faleomavaega, *supra* note 48.

54. LÂM, *supra* note 5, at 120 (citing ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* 84–86 (1995)).

55. Statement of Del. Faleomavaega, *supra* note 48.

56. LÂM, *supra* note 5, at 120 (citing CASSESE, *supra* note 54, at 84).

implemented and the Indonesian administration exercised at all times a tight political control over the population.<sup>57</sup>

The United States also expressed concern about the process.<sup>58</sup> Soon after the “closely orchestrated vote, the Free Papua Movement (*Organisasi Papua Merdeka* or ‘OPM’) formed with a core of 200 fighters and began a low-intensity insurgency.”<sup>59</sup> In response to the OPM’s activities, in 1969 Indonesia declared Papua an “Operational Military Zone.” For this reason, “the OPM has ‘never coalesced into the united or organized form its name implies.’”<sup>60</sup>

After Indonesia took control of West Papua,

the next six years of military rule systematically dismantled the symbols of West Papuan sovereignty: the West Papuan police were confined to barracks; all political groups were disbanded; the use of national symbols, including the words “Papuan” and “Melanesian,” were outlawed; public gatherings of any kind became illegal; freedom of movement and speech were denied, and the Papuan education system was destroyed.<sup>61</sup>

While Sukarno’s leadership initiated a “struggle to establish an ideological basis for the Indonesian state, and the military’s evolving role within the leadership of that state,”<sup>62</sup> Suharto perfected this struggle by the time West Papua became part of Indonesia. As the first Indonesian president to control West Papua, coupled with his thirty-two year tenure, Suharto had the greatest impact upon the policies of Indonesia toward West

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57. Statement of Del. Faleomavaega, *supra* note 48.

58. Correspondent’s Diary, *supra* note 21 (“Official documents released by America’s National Security Archive in Washington, DC, reveal what the Americans were thinking at the time. They knew perfectly well that there was no element of free choice in the Act of Free Choice. In July 1969 the American embassy in Jakarta sent a confidential cable to Washington saying that the Act of Free Choice was unfolding ‘like a Greek tragedy, the conclusion preordained.’ Jakarta could and would not permit any resolution other than the inclusion of Papua into Indonesia, the memo stated. America’s ambassador offered an estimate: as many as 85–90% of all Papuans favoured independence. But, this being the height of the Vietnam war, the Americans saw Indonesia as an indispensable ally in the region.”).

59. Dufseth, *supra* note 20, at 624 (citing HUMAN RIGHTS WATCH, *supra* note 20, at 6).

60. *Id.*

61. LEITH, *supra* note 33, at 12.

62. SCHWARZ, *supra* note 14, at 6.

Papua.<sup>63</sup> For this reason, a discussion of Suharto's policies will constitute the bulk of this article. After three decades under Suharto's military control, however, West Papua then experienced a number of short-term presidents who brought in a new era of reform.<sup>64</sup>

*II. Policies During the Colonial Era:  
"Netherlands New Guinea" (1895–1962)*

Just as the colonial period in the United States served as the basis of Federal Indian law, so too did the Dutch colonial period in Indonesia set the stage for the development of Indonesia's policies toward the indigenous peoples of West Papua. This is especially true in legal policies governing ethnic divisions, natural resources management, economic development, and transmigration policies.

*A. Ethnic Division*

In terms of ethnic divisions, "[f]rom the earliest days of Dutch colonization, inhabitants of the Indonesian archipelago have been divided for legal purposes into various 'population groups' . . . based primarily on racial origin."<sup>65</sup> These divisions determined the

kinds of contracts one might enter into and in what form, whether one could own land and where, from whom one could inherit wealth and in what ways. . . . This was so because distinct rules of contract law, of property law, of inheritance law existed for each group.<sup>66</sup>

Therefore, each population group "had what amounted to its own legal system — separate regulations administered by separate government officials and enforced in separate course of law."<sup>67</sup>

Dutch colonial masters may have had a number of different motives for dividing the population of the Indonesian islands along ethnic lines. "Whatever the original motives, the division of colonial society into population groups has survived the transfer of sovereignty, and citizens of

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63. LAWYERS COMM. FOR HUMAN RIGHTS & INST. FOR POLICY RESEARCH & ADVOCACY, IN THE NAME OF DEVELOPMENT: HUMAN RIGHTS AND THE WORLD BANK IN INDONESIA 35 (1995) [hereinafter LAWYERS COMM.].

64. See *infra* Part V.

65. GAUTAMA & HORNICK, *supra* note 35, at 1.

66. *Id.*

67. *Id.*

independent Indonesia, especially in matters of civil and commercial law, are often subject to separate regulations depending on which population group they belong to.”<sup>68</sup> This is particularly true for the people of West Papua, who were subjected to aggressive assimilationist policies under Suharto.<sup>69</sup>

### *B. Exploitation of Natural Resources*

The Dutch colonial period also emphasized the exploitation of natural resources. In fact, the Dutch arrived in the Indonesian islands early in the seventeenth century in search of riches, and by 1602 had established the Dutch East India Company.<sup>70</sup> Thus, the colonization of Indonesia began as a commercial endeavor to exploit the spice wealth of the Indonesian islands, and only later did it become a nationalized colony.<sup>71</sup> Indeed, “[n]ot until the 1930s did the Europeans venture into [Papua’s] mountainous interior. They went looking for gold, and unexpectedly discovered a lost world — millions of tribal people living a Stone Age life in the twentieth century.”<sup>72</sup>

As is the case with many indigenous peoples around the world, the Papuans are cursed with an abundance of natural resources, as they inhabit “the most resource-rich region of the Indonesian archipelago.”<sup>73</sup> Predictably, exploitation of these natural resources in the name of economic development greatly influenced the policies implemented under President Suharto.<sup>74</sup> This is quite similar to the plight of many Native American tribes; indeed,

[s]ome [thirty] tribes in the United States . . . own roughly one-third of the surface-accessible coal west of the Mississippi as well as 15% of all coal reserves, 40% of all uranium ore, and 4% of all oil found in the country. Not that these figures translate into wealth for the concerned tribes.<sup>75</sup>

While exploitation of natural resources was part and parcel of the European colonial enterprise, surprisingly “it is not clear that the leaders of

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68. *Id.*

69. *See infra* Part IV.B.

70. RICKLEFS, *supra* note 32, at 27.

71. *Id.* at 26.

72. DAVIDSON, *supra* note 16, at 172.

73. Correspondent’s Diary, *supra* note 21.

74. *See infra* Part IV.E.

75. LÂM, *supra* note 5, at 19 (citing JULIAN BURGER, THE GAIA ATLAS OF FIRST PEOPLES 45 (1990)).

the independence movements in [Asia and Africa] saw anything fundamentally wrong with the export-oriented economies that they inherited from the West.”<sup>76</sup> Alarming, “the social dislocation, environmental degradation, cultural alienation, wealth differentiation, and militarization that ‘going global’ produced in the Third World after independence surpass in scale anything seen in colonial times.”<sup>77</sup>

This new model, called “neo-colonialism,” is characterized by “externally controlled but internally mediated colonialism,” and has proven “particularly threatening to indigenous and tribal peoples.”<sup>78</sup> This results from the dependency on a large supply of natural resources for intense economic development, which has been the focus of many post-colonial, developing countries. Inevitably, “[a]s raw materials for the industrial economy ran out in accessible places, they had to be sought out in formerly inaccessible ones, where the world’s remaining unassimilated peoples live.”<sup>79</sup>

### C. Transmigration

Transmigration is another major Dutch colonial policy that influenced Indonesian policies toward West Papua, and was a core part of Suharto’s social and developmental policies.<sup>80</sup> Transmigration in many ways mirrors the policies of the United States during the Removal Era,<sup>81</sup> from the 1820s to the 1840s. “Transmigration was first introduced by the Dutch in 1905 when they moved impoverished Javanese peasants to the less-populated areas to supposedly allow them to start a new life. In reality they represented a supply of cheap labor to foreign-owned plantations.”<sup>82</sup> Suharto’s transmigration policies extended the Dutch policies into the post-colonial era, with transmigrants providing a supply of cheap labor to support foreign investment in the nascent country.<sup>83</sup>

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76. *Id.* at 16.

77. *Id.* at 17 (citing BURGER, *supra* note 75, at 35).

78. *Id.* at 18.

79. *Id.*

80. *See infra* Part IV.F.

81. The Removal Era began with the passage of the Indian Removal Act in 1830, under which the federal government would provide lands west of the Mississippi in exchange for the eastern lands of Native American tribes under purportedly voluntary conditions, although great pressure was put on the tribes to enter into such removal treaties. Indian Removal Act, ch. 148, § 2, 4 Stat. 411, 412 (1830).

82. LEITH, *supra* note 33, at 204.

83. *See infra* Part IV.F.

*III. Policies During the Infancy of the Indonesian Republic Under President Sukarno: “West Irian” (1962–1967)*

Generally speaking, “Indonesian law is a remarkably complex mixture of Dutch legislation, uniquely indigenous institutions and Islamic commandments.”<sup>84</sup> In some ways, Federal Indian law parallels Indonesian law with its various sources, such as the common law inherited from the Anglo tradition, federal statutory law, and tribal law and constitutions.

While “Indonesia is the site of long-standing, diverse efforts to shape lives in an Islamic way,” an important and unique aspect of Indonesian law is the “local complexes of norms and traditions called *adat*, some 300-plus of them according to conventional calculations.”<sup>85</sup> While the impact of *adat* is well documented, it is important to note that only certain aspects of *adat*, that of the predominant ethnic groups such as the Javanese, figure into Indonesian law in any major way.<sup>86</sup> Throughout its legal history,

Indonesians have been trying to work out ways to reconcile th[e] normative florescence [of *adat*], and to do so within resolutely centralizing forms of state rule, under the Dutch, under the democracy, real and then “guided,” of the first president, Sukarno, . . . and now, under what looks increasingly like “unguided chaos” under a succession of short-term presidents.<sup>87</sup>

Given this diversity of legal influences, coupled with “literally hundreds of spoken dialects and cultural sub-groups,”<sup>88</sup> it is “[l]ittle wonder, then, that maintaining national unity has been the one constant preoccupation of all of Indonesia’s leaders.”<sup>89</sup> As will be demonstrated, the overemphasis on centralization, assimilation, and integration of the Indonesian Republic has had devastating effects on minority indigenous groups such as the West Papuans.

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84. GAUTAMA & HORNICK, *supra* note 35, at v.

85. JOHN R. BOWEN, *ISLAM, LAW, AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING* 3–4 (2003).

86. *See generally id.* at 13–14.

87. *Id.* at 4.

88. SCHWARZ, *supra* note 14, at 6.

89. *Id.*

*A. Adoption of the Constitution and Establishment of Early Laws*

The Indonesian Constitution was initially adopted in 1945 and was “drafted hastily to declare independence, in the wake of the retreating Japanese occupation forces and in anticipation of the returning Dutch.”<sup>90</sup> While the Constitution has been amended a number of times, this founding document “embodied the concept of a single nation and gave little recognition to ethnic diversity. This Constitution was inspired by organicist theories that espoused strongly centralized, integrative mechanisms tying together state and society.”<sup>91</sup> It left little room for regional variation, and therefore precluded any notion of sovereignty, in great contrast to the important role sovereignty has played in Federal Indian law.

The 1945 Constitution also established the structure of the government. There are six principal bodies of the Indonesian Republic: the People’s Consultative Assembly, the House of People’s Representatives, the Presidency, the Supreme Court, the Supreme Advisory Council, and the State Audit Board.<sup>92</sup> The Constitution did not delineate with precision the roles of these six governing bodies, but it became clear under President Sukarno that the main governing authority was the Presidency, with the other bodies taking a submissive role. Indeed, the 1945 Constitution “allowed the regime to consolidate the power of the president and the armed forces.”<sup>93</sup> Additionally, with “a few notable exceptions, . . . the Constitution rejected individual protections as well as checks on the executive. It created the basis for a strong presidency and conceived the institutional framework of the state as an organic whole with strong powers to control all sectors of society.”<sup>94</sup>

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90. Jacques Bertrand, *Indonesia’s Quasi-Federalist Approach: Accommodation Amid Strong Integrationist Tendencies*, 5 INT’L J. CONST. L. 576, 577 (2007).

91. *Id.*

92. INDONESIA: COUNTRY BRIEFING BOOK, *supra* note 12, at 18–19.

93. Bertrand, *supra* note 90, at 587 (citing ROBERT EDWARD ELSON, SUHARTO: A POLITICAL BIOGRAPHY 86–90, 159–65 (2001); DAVID JENKINS, SUHARTO AND HIS GENERALS: INDONESIA MILITARY POLITICS, 1975–1983, at 37–48 (1984)).

94. *Id.* at 584 (citing David Bouchier, *Totalitarianism and the “National Personality”*: Recent Controversy About the Philosophical Basis of the Indonesian State, in IMAGINING INDONESIA: CULTURAL POLITICS AND POLITICAL CULTURE 157, 161–62 (Barbara Martin-Schiller & James William Schiller, eds. 1997)).

*B. Republican Integrationism*

While West Papua officially became part of Indonesia after President Sukarno yielded power to President Suharto, Sukarno's presidency built the foundation for the policies Suharto imposed upon West Papua. Upon independence on August 17, 1945, "Indonesia inherited jurisdiction over many indigenous peoples" from the Dutch,<sup>95</sup> and President Sukarno immediately "sought control of the far-flung reaches of the former Dutch East Indies."<sup>96</sup> The difficulties posed by the ethnic, cultural, and religious diversity of the enormous archipelago were immediately recognized. "A top aide warned [Sukarno] that trying to control such culturally diverse peoples 'is not going to work. They are totally different people, totally different cultures. We should have nothing to do with them.' But Sukarno was determined to forge these hundreds of distinct cultures into a nation."<sup>97</sup> Therefore, from the early days of Sukarno's presidency, he "emphasized the building of a strong nation."<sup>98</sup> To this end, while Sukarno "ensconced his government in [J]akarta on the island of Java, [he] ruled with an iron hand and an eye to expansion. One of his first targets was New Guinea."<sup>99</sup>

Republican integrationism also influenced Sukarno's economic policies. "All revenues, except for minor taxes, were collected by the central government before budget allocations were redistributed to provinces and regencies."<sup>100</sup> In practice, this meant that all revenues derived from the outlying islands were collected in the capital, Jakarta, but very little were redistributed to the source islands.<sup>101</sup> In sharp contrast to Suharto's economic policies,<sup>102</sup> under "President Sukarno, Indonesia traded with Western industrialized countries but sought military and economic support from the Communist bloc. The Sukarno period was marked by rhetoric against the West and its aid."<sup>103</sup> Therefore, Western investment and economic development in the islands, including Papua, was not a major factor under President Sukarno, although it would later become the centerpiece of Suharto's rule.<sup>104</sup>

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95. PERRY, *supra* note 7, at 203.

96. DAVIDSON, *supra* note 16, at 171.

97. *Id.* at 171–72.

98. Bertrand, *supra* note 90, at 576.

99. DAVIDSON, *supra* note 16, at 172.

100. Bertrand, *supra* note 90, at 588.

101. *See id.*

102. *See infra* Part IV.C.

103. LAWYERS COMM., *supra* note 63, at 52.

104. *See infra* Part IV.C.



### C. Assimilation

In his pursuit of “building a single nation from the diverse peoples of the former Dutch East Indies,” Sukarno’s republican integrationism “gave way, over time, to assimilationist tendencies.”<sup>105</sup> The policies of assimilation were particularly prevalent in social and cultural areas. For example, “[t]he educational system was standardized . . . and a top-down curriculum [was] adopted, thereby creating an exclusive narrative of the country’s history meant to inculcate a sense of [a] single Indonesian nation.”<sup>106</sup> This “narrative” did not include any reference to Papuan culture or knowledge.<sup>107</sup>

These early assimilationist efforts of the Indonesian educational system are quite comparable to those of the Indian boarding schools established during the Allotment and Assimilation Periods of Federal Indian law to “inculcate [Indian children] with American culture, language, and religion.”<sup>108</sup> In Indonesia, “[c]ultural differences were acknowledged only with respect to artifacts that could be displayed in museums, in colorful dress for weddings, or as a way to promote tourism; such differences were not permitted to seep into the realm of politics, government, and administration.”<sup>109</sup> More profoundly, “[l]ocal languages could be used only in the first few years of primary school in selected regions; Indonesian was the only language for all subsequent levels of education.”<sup>110</sup> As history unfolded, Papua was not identified as one of the “selected regions” where local languages were retained. West Papua, having experienced ten months of independence from the Dutch before being annexed by Indonesia,<sup>111</sup> became the forefront of resistance to assimilation. Eventually, the Indonesian government responded by

adopt[ing] assimilationist policies to strengthen integrationist institutions in Papua. More so than in other regions, it imposed stringent restrictions on cultural expression through the educational system or other public forums. Indonesian was decreed the sole language of education, and a national curriculum, with almost no local content, was imposed on

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105. Bertrand, *supra* note 90, at 577.

106. *Id.* at 588.

107. *See id.*

108. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW 126 (2nd ed. 2010).

109. Bertrand, *supra* note 90, at 588.

110. *Id.*

111. *See supra* Part I.C.

Papuans; even local songs were banned in some instances. Political expression, such as the raising of the Morning Star flag, was strongly repressed, as was the revival of calls for the integration of West Irian or for alternative political representation.<sup>112</sup>

*IV. Policies During the “New Order” Under President Suharto:  
“Irian Jaya” (1967–1998)*

*A. Development of the Constitution*

After President Suharto assumed power in 1967, two important changes were made to the Constitution, both of which intensified the harm against West Papuans that was initiated by Sukarno’s republican integrationism. The first of these major changes was the adoption of a national “ideology” called *Pancasila*, which is embodied in the amended Constitution.<sup>113</sup> Pancasila “is comprised of five fundamental principles: the belief in one supreme God, a just and civilized humanity, the unity of Indonesia, democracy through deliberation and consensus among representatives and justice for all.”<sup>114</sup> Adherence to these principles of monotheism, humanitarianism, national unity, representative democracy by consensus, and social justice profoundly affected the shape of legislation and other social policies toward West Papua under Suharto.<sup>115</sup> Suharto also adopted a “social policy” of multiculturalism, which is termed *Bhineka Tunggal Ika*, or “Unity in Diversity.”<sup>116</sup> While this policy sounds like an attempt to embrace the diversity of the archipelago, it was actually adopted to further promote and solidify the integrationist regime established by Sukarno.

*B. Further Centralization of Government and Political Integration*

Resistance to Suharto’s *Bhineka Tunggal Ika* policy was “repressed harshly.”<sup>117</sup> Furthermore, “the autocratic and integrationist spirit of the Constitution and its unitary principles [i.e., Pancasila] guided the regime’s responses to regional challenges. The Regional Law of 1974 established the framework for regional representation, clearly placing the provinces and regencies, or municipalities, under the authority of the central

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112. Bertrand, *supra* note 90, at 590.

113. INDONESIA: COUNTRY BRIEFING BOOK, *supra* note 12, at 18.

114. LAWYERS COMM., *supra* note 63, at 38.

115. *Id.*

116. INDONESIA: COUNTRY BRIEFING BOOK, *supra* note 12, at 2.

117. Bertrand, *supra* note 90, at 576.

government.”<sup>118</sup> Indeed, instead of empowering regional leaders with a voice in the central government, the Regional Law of 1974 simply sent agents from the central government to the remote reaches of West Papua to ensure adherence to the integrationist policies.<sup>119</sup> Like Sukarno, Suharto’s government followed “an aggressive policy of political integration and often . . . used force to compel acquiescence among its indigenous peoples.”<sup>120</sup>

The integrationist and assimilationist policies serve as a good comparison to the assimilationist tendencies underlying many periods of Federal Indian law, especially the Reservation, Allotment, and Assimilation eras. Indeed, part of North America’s “Indian problem” was the issue of “cultural transformation: how best to accomplish the cultural transformation of Indians into non-Indians.”<sup>121</sup>

During the Allotment and Assimilation eras, “Congress authorized forcible assimilation measures and [the] Supreme Court created the plenary power doctrine to sanction these measures.”<sup>122</sup> This was because “Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy of privately [] owned parcels of land.”<sup>123</sup> This shift focused on the “Indians’ assimilation into American society.”<sup>124</sup> As will be demonstrated, many of Suharto’s specific policies toward West Papua had a similar assimilationist goal.

### C. Economic Development

Upon assuming power, Suharto “viewed economic development and strong centraliz[ed] political control as flip sides of the same coin.”<sup>125</sup> Like many post-colonial, developing nations, particularly in Southeast Asia, Suharto’s government sought “much of its legitimacy through its success in economic development. As a result, any opposition to a government development project [was] seen as a direct threat to stability and development, and [was] met with harsh measures.”<sup>126</sup> However, Suharto’s

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118. *Id.* at 587.

119. *See id.* at 587–88.

120. PERRY, *supra* note 7, at 203.

121. STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 6–7 (1988).

122. ANDERSON ET AL., *supra* note 108, at 79.

123. *Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

124. *Id.*

125. SCHWARZ, *supra* note 14, at 64.

126. LAWYERS COMM., *supra* note 63, at 51.

emphasis on economic development was attractive to foreign investment. Indeed, Suharto's "[p]ro-business policies and . . . [twenty]-year legacy of political stability . . . created a favorable environment."<sup>127</sup> While Suharto's policies created "an environment for business investment that [was] unique among emerging market economies,"<sup>128</sup> it was at the expense of indigenous populations, many of which lived in areas rich with natural resources, ready for exploitation by foreign investors.<sup>129</sup>

In furtherance of his economic policies, Suharto "adopted as a slogan a 'trilogy of development' consisting of stability, growth and equality. The importance of the first element of that trilogy — stability — is apparent in the establishment of the 'security approach' to governance. . . ."<sup>130</sup> Under this "security approach," the Indonesian "military play[ed] a significant role in the supervision of political management of the country, including government operations and the execution of law."<sup>131</sup>

#### D. Suharto's "Security Approach"

Suharto's reliance on the security approach is closely tied to his military roots. "Soeharto came to power on the army's coattails and the repressive might of the army [was] . . . the single most important factor in undermining potential opponents throughout his tenure."<sup>132</sup> Suharto relied upon the military "to reinforce his power and maintain cohesion within the archipelago," and this "meant that the military was encouraged to strengthen its existing politico-military role."<sup>133</sup> As such, the security approach was the natural evolution and amplification of the integrationist approach initially established by Sukarno.

Economic activities took place "within [a] . . . model of development which emphasize[d] stability and a security approach to governance. The Indonesian military [was] accorded *dwi-fungsi*[,] or dual function, in which it [had] a social and political role in society as well as a military one . . ."<sup>134</sup> Under Suharto's economic development policies, the military was "directed to 'assist in the national development,' and those who

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127. INDONESIA: COUNTRY BRIEFING BOOK, *supra* note 12, at 4 ("For example: . . . American companies . . . invested more than \$12 billion in Indonesia's economy" by 1997).

128. *Id.* at 6.

129. *See infra* Part IV.E.

130. LAWYERS COMM., *supra* note 63, at 35.

131. *Id.* at 35–36.

132. SCHWARZ, *supra* note 14, at 39.

133. LEITH, *supra* note 33, at 7.

134. LAWYERS COMM., *supra* note 63, at 3.

oppose[d] national development [could] be found guilty of subversion.”<sup>135</sup> For indigenous populations, especially those living in regions with abundant natural resources, the military’s presence had devastating consequences. Indeed, “the Asian Legal Resource Centre noted that the most significant obstacle to the effective implementation of human rights in [Indonesia was] fear of the military.”<sup>136</sup>

#### *E. Natural Resources Management*

Economic development, fueled by Indonesia’s abundant natural resources, has produced the policies that have been most destructive to the indigenous peoples of West Papua. Indeed, as discussed below,<sup>137</sup> the majority of legal actions involving the grievances of indigenous peoples in Indonesia are against companies engaged in the extractive industries on indigenous lands.

In many ways, the policies of the Indonesian government under Suharto mirror another important aspect of North America’s “Indian problem”; namely, there was “an economic problem: how best to secure access to Indian resources.”<sup>138</sup> However, in this regard, Native Americans have fared better under Federal Indian law policies regarding natural resources than the West Papuans did under the policies of Suharto. As some scholars have noted, “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 [indigenous peoples],” they “have suffered a range of misfortunes since . . . [he] came to power.”<sup>139</sup>

Because Suharto’s economic policies were part of a greater centralized regime of integrationism, regional economic disparities resulted in wealth moving from the resource-rich indigenous provinces to the capital city.<sup>140</sup> Indeed, the “capital city has consistently been the only province without minerals that has been among the richest in the nation. The exploitation of mineral resources has made several provinces with relatively small

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135. DAVIDSON, *supra* note 16, at 173.

136. Phutoli Shikhu Chingmak, *International Law and Reparations for Indigenous Peoples in Asia*, in REPARATIONS FOR INDIGENOUS PEOPLES 409, 418 (Federico Lenzerini ed., 2008) (footnote omitted).

137. *See infra* Part IV.E.6.

138. CORNELL, *supra* note 121, at 6.

139. Adérito de Jesus Soares, *Reparations for Masyarakat Adat in Indonesia: A Somber Tale*, in REPARATIONS FOR INDIGENOUS PEOPLES, *supra* note 136, at 467, 467.

140. *See* BRESNAN, *supra* note 45, at 287.

populations on the geographic periphery [including West Papua] the nation's wealthiest provinces in nominal terms."<sup>141</sup> In both Aceh and West Papua, "the wealth produced per inhabitant (as measured by per capital gross domestic product) is among the highest in Indonesia. But in both provinces income and consumption per person — which more accurately reflect the quality of living — fall much lower in the national rankings."<sup>142</sup> Under this system, those profits derived from natural resources that did not accrue to the capital city went on to foreign companies, thereby resembling the former colonial model wherein the Dutch exploited Indonesia's resources for the benefit of the Netherlands<sup>143</sup> Therefore, "[f]rom the perspective of resources-rich provinces like . . . Irian Jaya . . . , the [Suharto] system seem[ed] like a replay of colonial times. Their natural resources, according to their leaders, [were] exploited primarily to improve living standards at the centre."<sup>144</sup>

When combined with Suharto's security approach, which guaranteed the safety of foreign investments with security furnished by the military, West Papua's natural resources were not only "exploited at great profit for the Indonesian government and foreign businesses, but at the expense of the Papuan peoples and their homelands. When international companies come to Papua, the Indonesian military accompanies them to 'protect' the 'vital projects.'"<sup>145</sup> As a result, the Papuans "are not only fighting the military within the country. [They] have come to realize that all the industrialized countries of the North are also hurting [them]."<sup>146</sup>

### *1. Timber Industry*

In terms of timber, indigenous people in West Papua, particularly the Moi Tribe, "have lost extensive lands to timber-cutting enterprises."<sup>147</sup> The Moi Tribe is "totally dependent on the forest. But with the government's sanction, [a] logging company is cutting eight hundred and thirty-seven thousand acres of trees in the heart of Moi ancestral lands."<sup>148</sup> As one Moi

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141. *Id.*

142. SCHWARZ, *supra* note 14, at 63.

143. *See supra* Part II.B.

144. SCHWARZ, *supra* note 14, at 63.

145. *Papuan Tribes*, *supra* note 22.

146. DAVIDSON, *supra* note 16, at 175.

147. PERRY, *supra* note 7, at 204.

148. DAVIDSON, *supra* note 16, at 172.

tribesman stated, “[t]earing down our forest is like tearing out our hearts.”<sup>149</sup>

As compared to the policies of Federal Indian law, Native Americans have fared better in this area. For example, in a 1938 decision, *United States v. Shoshone Tribe of Indians*, the court held that the Shoshone’s possessory right to the land “included the timber and mineral resources within the reservation.”<sup>150</sup> The West Papuans, in contrast, have been unable to establish any right to the land, possessory or otherwise, let alone to its resources.

## 2. Extractive Industries

The most blatant abuses against the West Papuans, however, have resulted from the extractive industries in West Papua. Indeed, it is difficult to find any discussion of West Papua that does not reference the Freeport McMoRan mining company’s operations in West Papua, and its decades of confrontations with the indigenous people of West Papua.

The reign of Freeport in West Papua coincides with that of Suharto. “In 1967, a year after Suharto seized power in Jakarta, a new foreign-investment law was passed. The first company to take advantage of the new opportunities was Freeport” and it has maintained its facility ever since.<sup>151</sup> Freeport, headquartered in New Orleans, Louisiana, is the “largest mining company in the world.”<sup>152</sup> Over time, “[b]y maintaining a close relationship with the Suharto regime and its feared arm of repression, Freeport secured for itself a powerful political and economic insurance policy.”<sup>153</sup>

By the 1990s, “Freeport financed Suharto’s government, his closest associates, and even the president into the company on exceptionally favorable, if not questionable, terms.”<sup>154</sup> Freeport has also had a long-term relationship with the Indonesian military: “[a]round 3000 Indonesian soldiers and police are on guard to protect the mining facilities.”<sup>155</sup> The relationship between Suharto’s government and military and Freeport has

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149. *Id.*

150. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938).

151. Correspondent’s Diary, *supra* note 21; *see also* LEITH, *supra* note 33, at 3 (“In 1967 Freeport became the first foreign company to sign a contract with the new regime in Jakarta and became a significant economic and political actor within Indonesia.”).

152. Soares, *supra* note 139, at 471.

153. LEITH, *supra* note 33, at 3.

154. *Id.* at 4.

155. Correspondent’s Diary, *supra* note 21.

had a dramatic environmental impact on the lands of the indigenous people, has impaired land ownership rights, and has resulted in serious human rights violations.

### 3. Environmental Impact

Freeport mines “the world’s largest single reserve of both copper and gold in the Grasberg minerals district in Papua.”<sup>156</sup> In order to develop the mine site after securing rights under Suharto’s Foreign Investment Law, Freeport built a sixty-three mile road from the southern coast of West Papua to its first mine, moving twelve million tons of earth in the process.<sup>157</sup> Much of this development cut straight through the heart of indigenous lands.<sup>158</sup> In terms of the mining operation, the company mines approximately 250,000 metric tons of ore per day, producing an additional 150,000 metric tons of overburden per day as a byproduct.<sup>159</sup> In the process, Freeport “is essentially grinding [an] Indonesian mountain into dust, skimming off the precious metals, and dumping the remainder into the Ajkwa River. The pulverized rock (called ‘tailings’) has created a wasteland in the river valley below. [In 1996,] . . . the company [estimated that it would] dump more than 40 million tons of tailings into the river th[at] year alone.”<sup>160</sup>

Obviously, these activities have devastated indigenous lands. According to a 1996 Dames & Moore environmental audit, which was endorsed by Freeport, the “mine’s tailings have already ‘severely impacted’ more than [eleven] square miles of rainforest, . . . [and] over the life of the mine 3.2 billion tons of waste rock — a great part of which generates acid — will be dumped into the local river system.”<sup>161</sup> Interestingly, the Overseas Private Investment Corporation (“OPIC”), a United States federal agency, had

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156. FREEPORT-McMORAN COPPER & GOLD, CONNECTING THE FUTURE: 2011 ANNUAL REPORT 14 (2011), available at [http://www.fcx.com/ir/AR/2011/FCX\\_AR\\_2011.pdf](http://www.fcx.com/ir/AR/2011/FCX_AR_2011.pdf); see also LEITH, *supra* note 33, at xv (Freeport “operat[es] the largest gold mine on Earth . . . in the heart of West Papua.”); Robert Bryce, *Spinning Gold*, MOTHER JONES (Sept./Oct. 1996), <http://motherjones.com/politics/1996/09/spinning-gold?page=1> (“Since 1973, Freeport has operated the world’s largest gold mine, located in Irian Jaya, Indonesia.”).

157. Statement of Del. Faleomavaega, *supra* note 48.

158. See *infra* Part IV.E.4.

159. FREEPORT-McMORAN COPPER & GOLD, *supra* note 156, at 14; see also Bryce, *supra* note 156 (estimating that the company was mining approximately 190,000 tons of ore per day in 1996).

160. Bryce, *supra* note 156.

161. *Id.*



insured Freeport's mining operations in Indonesia.<sup>162</sup> In recognition of the vast environmental devastation resulting from Freeport's operations, however, in 1995 OPIC cancelled Freeport's "\$100 million political risk insurance policy. . . . Officially, OPIC's cancellation was for environmental reasons, [and] according to U.S. federal law, the agency must take human rights and environmental and health and safety issues into consideration when issuing insurance."<sup>163</sup> However, because Freeport has operated with the blessing of the Indonesian government, it has not suffered any other repercussions — although it has been the target of increasing legal actions initiated in United States courts.<sup>164</sup>

#### 4. Land Ownership Rights

In addition to wreaking havoc on the indigenous environment, Freeport's operations have fundamentally impaired indigenous land ownership rights. As for Native Americans, land plays a central role in West Papuan religion and culture.

Others may laugh at our customs and how we are so closely related to the land and all things that grow on the land. . . . But all the trees, animals, fish, insects, reptiles, and even mountains have special meaning for us. Long before whites came here, these things were very sacred, because they were part of our well-being.<sup>165</sup>

This sentiment is markedly similar to the Native American relationship to land. Land "is the source of spiritual origins and sustaining myth[,] which in turn provides a landscape of cultural and emotional meaning."<sup>166</sup>

Freeport's 1967 contract with the Indonesian government gave the company access to 10,000 hectares of indigenous Amungme tribal land in order to mine for copper.<sup>167</sup> Just as environmental damage and human rights violations have "continued to sour relations between the company and the indigenous peoples[,] so too has the sensitive issue of land rights recognition or *recognisi*, for arguably the greatest loss to these peoples has

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162. Bryce, *supra* note 156; see OPIC: OVERSEAS PRIVATE INVESTMENT CORPORATION, <http://www.opic.gov> (last visited Apr. 15, 2013).

163. LEITH, *supra* note 33, at 176.

164. See *infra* Part IV.E.6.

165. DAVIDSON, *supra* note 16, at 173.

166. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

167. Statement of Del. Faleomavaega, *supra* note 48, at H9198.

been spiritual.”<sup>168</sup> This is because, similar to Native Americans, the “land is their mother, it is where the souls of their ancestors live, it gives them life.”<sup>169</sup> In light of this, Freeport’s operations are particularly offensive:

In the process of taking twenty-five million tons of copper from West Papua, Freeport excavated an enormous open-pit mine on the traditional lands of the Amungme people. A mountain once held sacred has been leveled, the people have lost their livelihood, and effluents from the mine have polluted waters downstream.<sup>170</sup>

Furthermore, when Freeport commenced its operations in West Papua, the Amungme Tribe’s village “was moved to make way for the company town [and] the Amungme graveyard was moved to build the company’s helipad.”<sup>171</sup>

By 1996, Freeport exercised control over three times the amount of land it started with, “and the company ha[d] no policy of commitment or royalty distribution to the local community.”<sup>172</sup> In 1977, the Amungme Tribe had unsuccessfully attempted to gain compensation from the Indonesian government for the land they lost to the mining operation to no avail.<sup>173</sup> This was due to the Indonesian government’s view of indigenous land ownership rights: “the land belongs to [the Papuans] only until the government needs it. Then it belongs to the state. This means [the Papuans] have no rights whatsoever. If the government wants your land, you have to move. Just like that.”<sup>174</sup>

This serves as a contrast to the possessory rights of Native Americans under Federal Indian law. For example, in *County of Oneida v. Oneida Indian Nation*, the Oneidas were able to sue under federal common law to validate their possessory rights.<sup>175</sup> The Amungme Tribe has never had such standing.

Similarly, Indonesia has refused to recognize the rights of the Moi Tribe, whose land has been exploited extensively for timber. Like many Native

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168. LEITH, *supra* note 33, at 108.

169. *Id.*

170. DAVIDSON, *supra* note 16, at 176.

171. LEITH, *supra* note 33, at 209.

172. Statement of Del. Faleomavaega, *supra* note 48, at H9198.

173. *Id.*

174. DAVIDSON, *supra* note 16, at 175.

175. *Cnty. of Oneida v. Oneida Indian Nation (Oneida II)*, 470 U.S. 226, 236 (1985).

American tribes, “Moi lands are ‘owned’ by clans and communities, not by individuals, but Indonesia refuses to recognize their land rights.”<sup>176</sup> From the perspective of the Moi, they “‘are the people who [have] a right to this land, an absolute right.’”<sup>177</sup>

However, the policies of Suharto’s government explicitly precluded any West Papuan claim to their land. In some ways, the unilateral ability of Suharto’s government to assume ownership of West Papuan indigenous land parallels the origins of Federal Indian law. Under the Discovery Doctrine in Federal Indian law, “discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.”<sup>178</sup> Similarly, when foreign investors discovered an area ripe for economic development in Indonesia, the Indonesian government simply assumed ownership of the land.

##### 5. Human Rights Violations

Suharto’s aggressive pro-development policies, coupled with the unique power of the Indonesian military, combined to cause extensive human rights violations that have occurred in furtherance of economic development projects, such as Freeport’s mining operations. Indeed, the “military presence is almost always associated with human rights violations such as killings, arbitrary arrests, rape and torture. Those Papuans who protest against the Indonesian government, the military or ‘vital projects’ are even more likely to experience abuses of their human rights.”<sup>179</sup> These human rights violations have been extensively documented. In fact, in 1999, a congressional hearing was held where Representative Faleomavaega of American Samoa testified about the human rights abuses. He reported,

since the Indonesian government seized control of West Papua, the Papuans have suffered blatant human rights abuses, including extrajudicial executions, imprisonment, torture and, according to Afrim Djonbalic’s 1998 statement to the United Nations, “environmental degradation, natural resource exploitation, and commercial dominance of immigrant communities.” Sadly, . . . a U.S.-based company mining copper, gold, and silver in West

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176. DAVIDSON, *supra* note 16, at 173.

177. *Id.*

178. *Johnson v. M’Intosh*, 21 U.S. (1 Wheat.) 543, 587 (1823).

179. Papuan Tribes, *supra* note 22.

Papua New Guinea allegedly shares in the exploitation and abuse of Papuan lands and its people.<sup>180</sup>

Representative Faleomavaega also detailed Freeport's relationship with the Indonesian military, which has been responsible for many of the human rights violations. He stated,

[s]pecific allegations have been made to Freeport's direct association with human rights abuses undertaken by the Indonesian government on Freeport land. Freeport facilities are policed both by Freeport security and the Indonesian military; Freeport feeds, houses, and provides transportation for the Indonesian military; and after any incidence of indigenous resistance against Freeport, the military responds while Freeport looks on.<sup>181</sup>

Two episodes brought Freeport's activities to the attention of some international organizations, including Amnesty International. In 1977, Amungme villagers ejected two Indonesian policemen from their village, and "the Indonesian military retaliated by strafing the area on the 22nd of July, 1977, from two Bronko OV-IOs until they ran out of ammunition."<sup>182</sup> The local people then retaliated "by blowing up a copper slurry pipe," and the military "responded with *Operasi Tumpas* ('Operation Annihilation')." "The Indonesian military destroyed Amungme gardens, burned down houses and churches, and tortured and killed men, women, and children. The OPM believes thousands of Me, Dani, and Amungme were killed in 1977, although Indonesia claims it was far less, only about 900."<sup>183</sup>

Later that year, "when West Papuans attacked Freeport facilities, the Indonesian military bombed the natives using U.S.-made Broncos."<sup>184</sup> After this episode, "Amnesty International reported that the military used steel containers from Freeport to incarcerate indigenous people."<sup>185</sup> In sum, Suharto's security approach, coupled with his aggressive economic policies,

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180. Statement of Del. Faleomavaega, *supra* note 48.

181. *Id.* at H9198.

182. PERRY, *supra* note 7, at 206 (quoting David Hyndman, *Melanesian Resistance to Ecocide and Ethnocide: Transnational Mining Projects and the Fourth World on the Island of New Guinea*, in *TRIBAL PEOPLES AND DEVELOPMENT ISSUES: A GLOBAL OVERVIEW*, *supra* note 10, at 281, 286).

183. *Id.*

184. Statement of Del. Faleomavaega, *supra* note 48.

185. *Id.*

have resulted in tremendous human rights violations in West Papua, violations that occurred with the complicity of Freeport.

### 6. Legal Response

Remarkably, most of the judicial activity associated with the grievances of indigenous peoples in Indonesia has occurred in United States courts. This is due to the “inability of international environmental regulation to protect developing countries from the activities of [transnational corporations],” which “has led victims of environmental damage to seek redress in U.S. courts under the Alien Tort Claims Act (‘ATCA’).”<sup>186</sup> Some of Freeport’s activities have also raised questions about possible violations of the U.S. Foreign Corrupt Practices Act.<sup>187</sup> To date, however, Freeport has evaded any such liability, even though its dealings with the Suharto administration have been called “questionable.”<sup>188</sup>

In West Papua, “[a]fter 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.”<sup>189</sup> *Beanal v. Freeport-McMoRan, Inc.*<sup>190</sup> was “the first legal action ever taken by any [indigenous] group or individual in Indonesia.”<sup>191</sup>

In 1997, Beanal filed a complaint against Freeport in federal district court in the Eastern District of Louisiana, invoking jurisdiction based upon diversity of citizenship,<sup>192</sup> the ATCA,<sup>193</sup> and the Torture Victim Protection

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186. Jean Wu, Note, *Pursuing International Environmental Tort Claims Under the ATCA*: *Beanal v. Freeport-McMoRan*, 28 *ECOLOGY L.Q.* 487, 489 (2001).

187. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2006).

188. See LEITH, *supra* note 33, at 4 (discussing the use of “carried interest” as a device for Freeport’s evasion of the Foreign Corrupt Practices Act).

189. Soares, *supra* note 139, at 471.

190. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

191. Soares, *supra* note 139, at 471.

192. 28 U.S.C. § 1332(a)(2) (2006).

193. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006). As this article went to press, the United States Supreme Court issued a major decision involving claims made under the ATCA. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2013 WL 1628935 (U.S. Apr. 17, 2013). The issue in *Kiobel* was whether an ATCA claim could extend to conduct that occurred in the territory of a foreign sovereign. *Id.* at \*4. The Court held that the presumption against extraterritoriality applies to claims under the ATCA, but stated that “[o]n these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” *Id.* at \*13, 10.

Act of 1991.<sup>194</sup> Beanal was the leader of the Amungme Tribal Council.<sup>195</sup> He alleged that

Freeport engaged in environmental abuses, human rights violations, and cultural genocide. Specifically, he alleged that Freeport mining operations had caused harm and injury to the Amungme's environment and habitat. He further alleged that Freeport engaged in cultural genocide by destroying the Amungme's habitat and religious symbols, thus forcing the Amungme to relocate. Finally, he asserted that Freeport's private security force acted in concert with the Republic to violate international human rights.<sup>196</sup>

In addition to being the first lawsuit brought on behalf of indigenous people in Indonesia, at the time it was also “the only environmental tort case brought under the ATCA.”<sup>197</sup>

Enacted in 1789, the ATCA provides that federal “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>198</sup> Since plaintiffs have used the ATCA “successfully in international human rights cases, . . . victims of international environmental

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It is important to note that *Kiobel* involved Nigerian nationals suing Dutch, British, and Nigerian corporations, and there was consequently little nexus with the United States. As the three concurrences point out, it is unclear whether the outcome would have been different on another set of facts. *See, e.g., id.* at \*11 (Kennedy, J., concurring) (“The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the [ATCA]. In my view that is a proper disposition.”); *id.* at \*12 (Breyer, J., concurring) (The majority opinion “makes clear that a statutory claim might sometimes ‘touch and concern the territory of the United States . . . with sufficient force to displace the presumption.’ It leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’” (citations omitted)). Indeed, in his concurrence, joined by three other justices, Justice Breyer states, “I would find jurisdiction under this statute where . . . the defendant is an American national, or . . . the defendant’s conduct substantially and adversely affects an important American national interest, [including] a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind.” *Id.* Hence, had the defendant-corporation been an American corporation responsible for tortious conduct in a foreign territory, the result may well have been different.

194. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006).

195. *Beanal*, 197 F.3d at 163.

196. *Id.*

197. Wu, *supra* note 186, at 490.

198. 28 U.S.C. § 1350.

abuse have attempted to use the ATCA to bring international environmental rights cases.”<sup>199</sup>

Unfortunately, the district court ultimately dismissed Beanal’s case for failure to state a claim upon which relief could be granted, which was affirmed by the Fifth Circuit Court of Appeals.<sup>200</sup> The dismissal was premised on both courts finding that “the allegations of human rights violations lacked specificity. More importantly, the courts found that the allegations of international environmental law violations were not cognizable torts under the ATCA.”<sup>201</sup>

Despite the unfavorable outcome of *Beanal*, several other indigenous groups in Indonesia have followed his lead and sought relief from American corporations in United States courts. For example, in *Doe v. Exxon Mobil Corp.*, Indonesian villagers in Aceh, Indonesia sued Exxon, alleging “that Exxon’s security forces committed murder, torture, sexual assault, battery, false imprisonment, and other torts,” and sought relief under the ATCA and the Torture Victim Protection Act.<sup>202</sup> Similarly, in Papua New Guinea, villagers brought an action against the Rio Tinto mining group under the ATCA, claiming “that various war crimes, crimes against humanity, racial discrimination, and environmental torts arose out of Rio Tinto’s mining operations.”<sup>203</sup>

Indigenous Indonesian litigants have also pursued other strategies. Yosefa Alomang, a West Papuan, brought a lawsuit against Freeport alleging that “Freeport has engaged in human rights violations, cultural genocide, and environmental violations through its corporate policies and conduct at the Grasberg Mine, located in Irian Jaya, Indonesia.”<sup>204</sup> Alomang’s claim for relief was based upon Louisiana state tort law.<sup>205</sup> While unsuccessful, the increasing number of cases claiming relief under United States law is an interesting correlation to the experience of Native Americans, with both groups resorting to the same courtrooms for relief.

Litigation activity has also picked up on the domestic front in Indonesia, with indigenous groups resorting to local courts. Predictably, these cases also target foreign corporations. For example, in April 2005, a “criminal

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199. Wu, *supra* note 186, at 489.

200. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

201. Wu, *supra* note 186, at 490–91.

202. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 346 (D.C. Cir. 2007).

203. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008).

204. *Alomang v. Freeport-McMoran, Inc.*, No. 96-2139, 1996 WL 601431, at \*1 (E.D. La. Oct. 17, 1996), *aff’d*, 811 So. 2d 98 (La. App. 4th Cir. 2002).

205. *Id.*

case was lodged by the Indonesian Prosecutor's office" against PT Newmont, an American mining company. This "law suit claimed that PT Newmont did not have any permission to dump the tailings from its factory into Buyat Bay."<sup>206</sup> In addition, Aurora Gold, an Australian mining company, was sued in an Indonesian court.<sup>207</sup>

#### F. Transmigration

As discussed above, one of the Dutch colonial policies that left a lasting legacy on the governance of Indonesia was transmigration.<sup>208</sup> Indonesia began its transmigration program under Suharto in 1969.<sup>209</sup> The transmigration program was a "massive resettlement effort designed to move families from densely-populated Java and Bali to less crowded outer islands of the Indonesian archipelago where they are . . . provided with houses, land and other assistance to develop viable agricultural communities."<sup>210</sup> The international community supported Suharto's transmigration project via the World Bank, which provided funding for "seven projects totaling US \$560 million approved between 1976 and 1985."<sup>211</sup>

Like the removal policies of Federal Indian law, Suharto's transmigration program was voluntary, at least in nominal terms. However, "[m]igrants are drawn to Papua because of money. Papua's low population, the richness of its natural resources and mild competition are among the pull factors of migration to the region."<sup>212</sup> For this reason, "[w]ith more than 130 transmigration settlements in West Papua, it . . . became the largest recipient of migrants so that the province, which is one of the most sparsely populated in the archipelago, has the distinction of having one of the highest population growth rates."<sup>213</sup> The success of Suharto's transmigration program corresponds to a number of ill effects in West Papua.

It has been widely acknowledged that "transmigration is a political rather than an economic tool which seeks the integration and pacification of

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206. Soares, *supra* note 139, at 472.

207. *Id.* at 473.

208. *See supra* Part II.C.

209. Glazebrook, *supra* note 19, at 208.

210. LAWYERS COMM., *supra* note 63, at 58.

211. *Id.*

212. *Population Growth 'Good for Papua,'* JAKARTA POST (Aug. 23, 2010), <http://www.thejakartapost.com/news/2010/08/23/population-growth-%E2%80%98good-papua%E2%80%99.html>.

213. LEITH, *supra* note 33, at 206.



outlying regions.”<sup>214</sup> Indeed, the transmigration program was part of the broader integrationist policies of both Sukarno and Suharto. The transmigration program under Suharto was an “integral part of the central government’s policy of ‘Indonesianization’ or the creation of one kind of Indonesian and focused on incorporating areas resistant to Jakarta’s rule, such as East Timor, Aceh, and West Papua.”<sup>215</sup> Assimilation as an official component of the transmigration program is evident from a 1993 statement of Indonesia’s former Minister of Transmigration: “different ethnic groups . . . will in the long run disappear because of integration, and there will be one kind of man.”<sup>216</sup>

Transmigration also included a range of related “[c]oercive programs to assimilate islanders and induce conformity with the predominant Javanese population, [including the] suppression of local religious practices, forced relocation to centralized villages, and such apparently trivial issues as compulsory haircuts.”<sup>217</sup> For these reasons, Indonesia’s transmigration program relates to some of the foundational ideas of Federal Indian law. President Jefferson once wrote, “our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi.”<sup>218</sup> This policy statement is synonymous with the policy underlying Indonesia’s transmigration program.

As the “largest recipient of migrants,”<sup>219</sup> the assimilative policies of Suharto’s transmigration program have had devastating effects on West Papuan culture.<sup>220</sup> The Papuans “have been made a minority in their own land.”<sup>221</sup> From the West Papuan perspective, “transmigration settlements are an integral component of Jakarta’s integration policy designed to destroy the Melanesian culture.”<sup>222</sup>

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214. LAWYERS COMM., *supra* note 63, at 58.

215. LEITH, *supra* note 33, at 205.

216. DAVIDSON, *supra* note 16, at 175.

217. PERRY, *supra* note 7, at 204.

218. Letter from Thomas Jefferson, President of the United States, to William Henry Harrison, Governor of Indiana Territory (Feb. 27, 1803), *available at* [http://www.let.rug.nl/usa/presidents/thomas\\_jefferson/letters-of-thomas-jefferson/jef151/php](http://www.let.rug.nl/usa/presidents/thomas_jefferson/letters-of-thomas-jefferson/jef151/php).

219. LEITH, *supra* note 33, at 206.

220. *See* DAVIDSON, *supra* note 16, at 175 (“In West Papua, transmigration supplies cheap immigrant labor for the logging operators, but its hidden agenda is to extend government control over indigenous peoples.”).

221. Correspondent’s Diary, *supra* note 21.

222. LEITH, *supra* note 33, at 218.

In addition to its integrationist goals, the transmigration program has also “focused on ensuring a supply of cheap and readily accessible labor to foreign enterprises operating in the most remote regions of the archipelago,”<sup>223</sup> including the extractive industries operating in West Papua.<sup>224</sup> In exchange for migrating, transmigrants are guaranteed employment in their new home. This has created an enormous economic disparity in West Papua.

[P]oorly paid jobs . . . are filled by native Papuans while skilled labour and commerce seem to belong exclusively to migrants from elsewhere in Indonesia. . . . The sense of division is such that nearly all the locals use the term ‘Indonesians’ to mean migrants from elsewhere, as if they did not share a single republic.<sup>225</sup>

This ethnic divisiveness harkens back to the divisions made along ethnic lines by the Dutch, as discussed above.<sup>226</sup>

A final aspect of the transmigration program is that of relocating indigenous people to make room for the transmigrants, called *relokasi*. West Papuan “traditional landowners claim that from the very beginning, because of [Freeport’s] presence on their land, their rights have been violated through *relokasi*.”<sup>227</sup> This is because Freeport employs many of the transmigrants, but not the native population, and has therefore relocated the Amungme Tribe to make room for its operations.<sup>228</sup>

The transmigration programs under Dutch colonial rule and under Suharto are quite comparable to the policies of the Removal Era in the United States. In 1830, Congress passed the Indian Removal Act whereby the federal government would provide lands west of the Mississippi in exchange for tribes’ eastern lands, a purportedly voluntary exchange.<sup>229</sup> Similarly, Indonesia’s transmigration policy is voluntary for the transmigrants; however, the indigenous people are forcibly removed from their lands to make way for the transmigrant settlements.<sup>230</sup>

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223. *Id.* at 205.

224. *See supra* Part IV.E.2.

225. Correspondent’s Diary, *supra* note 21.

226. *See supra* Part II.A.

227. LEITH, *supra* note 33, at 217.

228. Correspondent’s Diary, *supra* note 21; LEITH, *supra* note 33, at 209–12.

229. Indian Removal Act, ch. 148, § 2, 4 Stat. 411, 412 (1830).

230. Leith, *supra* note 33, at 4, 8–9.

Because of the integrationist policies underlying Indonesia's transmigration program, there is also a correlation to the policies during the Reservation Era in Federal Indian law, when the United States "aggressively pursued assimilation and conversion to farming by Indian people."<sup>231</sup> Finally, transmigration seems to closely parallel the policies underlying the Allotment and Assimilation eras of Federal Indian law, when "Congress authorized forcible assimilation measures and [the] Supreme Court created the plenary power doctrine to sanction these measures."<sup>232</sup>

### G. Civil Rights

Although the "right of political association was first established by Indonesia's 1945 Constitution, Article 28, which guarantees that "[f]reedom of association and assembly, of verbal and written expression and the like, shall be prescribed by law,"<sup>233</sup> Suharto's policies severely limited civil rights. This has had enormous consequences in West Papua where separatist sentiment has been present for decades. For example, freedom of association was severely curtailed under Suharto because the "process of granting permits for meetings allow[ed] the government to determine who can or cannot speak at forums or seminars. Under Article 510 of the Criminal Code, police are authorized to disband any discussion or forum that does not have a permit."<sup>234</sup> Additionally, as part of its integrationist policies,

[t]he Suharto government did not like to make any distinction between the ethnic groups that made up the state of Indonesia; therefore it did not acknowledge any group as West Papuan, Papuan, or Melanesian, but rather as Irianese . . . . The terms "West Papuan," "Papuan," and "Melanesian" were illegal under Suharto, with their use being associated with the separatist movement . . . .<sup>235</sup>

Amazingly, as part of these broader policies that infringed upon civil rights, the hoisting of a West Papuan flag was "a matter of national interest," and a "law making any kind of protest punishable as an act of subversion" resulted in one Papuan being sentenced to twenty years in

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231. ANDERSON ET AL., *supra* note 108, at 105.

232. *Id.* at 79; *see also supra* Part IV.B.

233. Dufseth, *supra* note 20, at 615 (quoting INDON. CONST. art. 28 (1945)).

234. LAWYERS COMM., *supra* note 63, at 45.

235. LEITH, *supra* note 33, at xxv.

prison for doing so.<sup>236</sup> Finally, during President's Suharto regime, "political leaders disappeared or were imprisoned, tortured, or executed; peaceful political dissent was violently crushed; and the rule of law remained subordinate to an all-powerful executive branch."<sup>237</sup>

#### *H. Papuan Religion and Culture*

In 1993 it was written, "[i]f Indonesian policies are not changed, virtually all of West Papua's tribal people will be culturally extinct within fifty years."<sup>238</sup> This is attributable to the combination of environmental devastation, aggressive transmigration policies, military-imposed abuse and control, and three decades of uncompromising integrationist policies developed by Sukarno and later perfected by Suharto. This projection, however, did not take into account the eventual fall of Suharto's three-decade rule in 1998. Since then, drastic changes have occurred, which will hopefully ameliorate the endangerment of West Papuan tribes.<sup>239</sup>

As an example of the degree of interference with West Papuan culture in the name of assimilation, "[b]eginning in 1971, the Indonesian government implemented a 'humanitarian' project called Operation *Koteka* in the interior regions of Irian Jaya."<sup>240</sup> This movement aimed "to end the wearing of the *koteka* penis sheath."<sup>241</sup> The *koteka* is worn by the males of many West Papuan tribes as a central part of their tribal identity, and is also used in ceremonies. In response to Operation *Koteka*, "[f]oreign critics perceived the programme to be one of political and cultural indoctrination."<sup>242</sup>

In addition to implementing official state policies aimed at assimilating the tribes of West Papua, such as Operation *Koteka*, many critics have described Indonesia's policies as genocidal. At the 1999 congressional hearing, Representative Faleomavaega reported that

the native Papuan people have suffered under one of the most repressive and unjust systems of colonial occupation in the 20th century. . . . [T]he Indonesian military has been brutal in West Papua New Guinea. Reports estimate that between 100,000 to 200,000 West Papuans have died or simply vanished at the hands

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236. DAVIDSON, *supra* note 16, at 175.

237. Dufseth, *supra* note 20, at 613–14.

238. DAVIDSON, *supra* note 16, at 172.

239. *See infra* Part V.A.

240. Glazebrook, *supra* note 19, at 208.

241. *Id.*

242. *Id.*

of the Indonesian military. While we search for justice and peace in East Timor, . . . we should not forget the violent tragedy that continues to play out today in West Papua New Guinea.<sup>243</sup>

Because of the deaths, cultural assimilation, and dilution of tribal populations associated with transmigration, many West Papuans have resorted to flight. As of 2005, there were “approximately 2460 West Papuan refugees living at East Awin” in the nation of Papua New Guinea.<sup>244</sup> The refugee situation caused by West Papuans crossing the border from West Papua, Indonesia, to Papua New Guinea has prompted a response by the UN High Commissioner for Refugees.<sup>245</sup>

*V. Policies During the Post-Revolution, “Special Autonomy” Era:  
“West Papua” (1998–Present)*

*A. Reform Era and Constitutional Developments*

After several weeks of social unrest, on May 21, 1998, President Suharto resigned and his Vice-President, B.J. Habibie, became his successor in accordance with the Indonesian Constitution. Even as an interim president, President Habibie immediately “opened the door to political reform . . . , eased constraints on the press and released political prisoners.”<sup>246</sup> At the time he took office, there were so many economic, political, and social problems in Indonesia that by 2002, one observer noted, “Indonesia is entering the fifth year of its post-Suharto ‘Reform Era,’ but the nation-state seems to be pulling itself apart at the seams.”<sup>247</sup>

The “Reform Era” has been characterized by a tension between two polarized predispositions, described by one scholar as “a double movement of reference.”<sup>248</sup> Under this view,

[o]ne direction is inward, towards indigeneness, authenticity, and Indonesian values, in an effort to find local points of support in the face of global moral corruption. The other direction is outward, towards universality, modernity, and transcultural

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243. Statement of Del. Faleomavaega, *supra* note 48.

244. Glazebrook, *supra* note 19, at 205–06 (detailing the plight of West Papuan refugees in Papua New Guinea).

245. *Id.*

246. Cindy Shiner, *Indonesia Police Fire on Separatists*, WASH. POST, July 7, 1998, at A08.

247. BOWEN, *supra* note 85, at 4.

248. *Id.*

values of social equality, in the hopes that these values may help overcome local injustices.<sup>249</sup>

This tension is also reflected in the struggle for indigenous rights in West Papua, which “can be divided into two components: the internal struggle for self-identification, and concomitantly the struggle against external forces, including state and multinational corporations, which have violated the rights of [indigenous peoples].”<sup>250</sup>

Despite the uncertainty of the post-Suharto economic and political environment, “the institutional changes after 1998 have been near-revolutionary.”<sup>251</sup> Most importantly, the 1945 Constitution was amended “and new laws were passed to democratize Indonesia’s political system.”<sup>252</sup> More specifically, the “Constitution of 1945 was preserved but amended to include several provisions that allow for regional differences and autonomy. Regional units . . . are now accorded wide-ranging autonomy in all spheres except those that, by law, were specified as within the jurisdiction of the central government.”<sup>253</sup> For West Papua, these changes have beckoned a new era of reform and self-realization.

### *B. Separatism*

As discussed, separatism emerged in West Papua during the final days of colonial control “when the Dutch stepped up economic and political development to thwart Indonesia’s attempt to gain outside support for their cause by increasing the perception of West Irian as a viable independent state.”<sup>254</sup> Over the next thirty years, the OPM “carried out sporadic actions both in Irian Jaya and abroad, to express their resistance to the Indonesian rule.”<sup>255</sup>

After he came to power, “Irianese leaders living in Jakarta called on President B.J. Habibie to grant immediate autonomy to their home province and accused the central government of failing to bring prosperity to their territory.”<sup>256</sup> They also “demanded a change in the name of their province to West Papua.”<sup>257</sup> Given these pressing issues, the new administration

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249. *Id.*

250. Soares, *supra* note 139, at 467.

251. Bertrand, *supra* note 90, at 592.

252. *Id.* at 576–77.

253. *Id.* at 592.

254. Bhakti, *supra* note 48, at 2.

255. *Id.* at 1.

256. *Id.*

257. *Id.*

focused on efforts “to quell [the separatist] movements by granting limited regional autonomy.”<sup>258</sup> These efforts have met with mixed success.

Although it has only been fifteen years since the fall of Suharto, the “post-Suharto government has been unable to reconcile the Papuans’ desire for independence with its vision of a unified Indonesia.”<sup>259</sup> For example, when President Habibie “met with a delegation of 100 provincial representatives . . . in February 1999 to launch a ‘National Dialogue’ regarding Papuan autonomy, the delegation declared its desire for independence.”<sup>260</sup> The response to this “clear call for independence” was “to ban all discussion or dissemination of information on independence or autonomy,”<sup>261</sup> harkening back to Suharto’s strict limitations on freedom of speech and assembly. The activist group Human Rights Watch “decried the Order as calling for ‘systemic violations of free expression, assembly, and association rights.’”<sup>262</sup>

By the year 2000, there were at least six instances where “police broke up peaceful demonstrations in which Papuans raised the Papuan independence flag and, after demonstrators resisted, killed, and injured many demonstrators.”<sup>263</sup> By this time, President Wahid, the first elected president after Suharto, was in power. As a token gesture, “Wahid suggested that Irian Jaya should be renamed Papua in deference to local sentiment.”<sup>264</sup> The Indonesian Parliament ratified Wahid’s suggestion through the Special Autonomy Bill for Papua, discussed below, which became effective in 2001.<sup>265</sup> Despite this improvement, Wahid later declared, “because the Morning Star flag was a separatist symbol, Papuans would need to find ‘another cultural symbol.’ After Wahid’s announcement, the military engaged in ‘periodic and often violent raids . . . on gatherings where independence symbols [were] on display.’”<sup>266</sup>

In the early 2000s, “intra-state separatist and ethnic . . . conflicts [had] given rise to grave and pressing human rights and humanitarian

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258. Li-ann Thio, *Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe*, 43 HARV. INT’L L.J. 409, 418 (2002).

259. Dufseth, *supra* note 20, at 624.

260. *Id.* at 624–25.

261. *Id.* at 625.

262. *Id.* (citing HUMAN RIGHTS WATCH, *supra* note 20, at 16–17).

263. *Id.* at 626.

264. *Id.*

265. Glazebrook, *supra* note 19, at 206.

266. Dufseth, *supra* note 20, at 626 (quoting HUMAN RIGHTS WATCH, VIOLENCE AND POLITICAL IMPASSE IN PAPUA 10–11, 22 (2001)).

problems.”<sup>267</sup> In 2003, the “Indonesian government renewed its warning to Papuan separatists that harsher measures by security forces would ensue should they continue their secessionist movement.”<sup>268</sup> Despite this violence, the new administrations have attempted to subdue separatist activity through the enactment of new laws granting more autonomy to West Papua.

### C. “Special Autonomy” Status

In addition to the constitutional amendment “to recognize regional differences and enshrine principles of autonomy,” new laws were enacted that “created autonomous regions”; in particular, “[s]pecial autonomy laws were passed to accommodate the demands of Aceh and Papua.”<sup>269</sup> When the “Special Autonomy” Law was initially passed in 1999 under President Habibie, its effect remained unclear.<sup>270</sup> Indeed, “the widespread powers [the laws] purport to leave to the Central Government and the broad wording used to describe these powers could effectively reduce significantly the powers left to the regions.”<sup>271</sup> It was also “entirely uncertain . . . how the Central Government intend[ed] to transfer to the regions the funds, the personnel, the equipment, and the infrastructures that the regions [would] need to exercise their newly transferred powers.”<sup>272</sup>

While these new laws “represent a significant departure from the authoritarian policies of the New Order,”<sup>273</sup> some critics also feel that they “fail to accommodate the political aspirations of parties advocating for independence, even when they do so peacefully.”<sup>274</sup> The shortcomings in the new legislation are also “compounded by the executive’s ready resort to military force to suppress both peaceful and armed pro-independence activists. The bloodshed in Aceh and Papua has gathered international attention and disdain.”<sup>275</sup> This overreliance on the military is a lasting vestige of Suharto’s administration.

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267. Davinia Filza Binte Abdul Aziz et al., Note, *South East Asia and International Law: July–December 2001*, 5 SING. J. INT’L & COMP. L. 814, 822 (2001).

268. Kenneth Lim Tao Chung et al., Note, *South East Asia and International Law: July–December 2003*, 7 SING. J. INT’L & COMP. L. 603, 615 (2003).

269. Bertrand, *supra* note 90, at 592.

270. Gary F. Bell, *The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws*, ASIAN-PAC. L. & POL’Y J., Winter 2001, at 1, 3 (vol. 2, issue 1).

271. *Id.*

272. *Id.*

273. Dufseth, *supra* note 20, at 613.

274. *Id.* at 614–15.

275. *Id.* at 641.



By 2001, however, a more specific Special Autonomy Law was enacted that addressed the West Papuan concern over natural resources. Under the new law, “Papua will receive up to 80% of the revenue from natural resources[,] forestry and fishery[,] and 70% from oil, gas and mining.”<sup>276</sup> This addresses a major concern for the West Papuans, but success in its implementation has yet to be realized.

This same law, moreover, “also allows the province to use its own flag, anthem and change its name from Irian Jaya to Papua, which are important symbols of a people’s identity.”<sup>277</sup> Therefore, despite its shortcomings, the new Special Autonomy Law grants some power to the West Papuans. It has “granted autonomy at the provincial level, whereby the Papuan government obtained jurisdiction over all matters except foreign policy, defense, monetary and fiscal policy, religion, and justice.”<sup>278</sup> While the full effect of these laws has yet to come to fruition, the West Papuans have minimally gained a voice in their governance and their voice has been heard. “[T]he 2001 Special Autonomy Law for Papua appears to be a genuine effort to accommodate Papuan demands.”<sup>279</sup>

While it is too soon to fully evaluate West Papua’s Special Autonomy status, parallels can be drawn to the Indian New Deal era in Federal Indian law when, “[f]or the first time, assimilation was not the goal of Federal Indian services. Rather, tribal culture and organization were to be preserved while providing Indians with the tools to achieve economically and culturally.”<sup>280</sup> One of the tools provided to West Papua in furtherance of autonomy is a variety of new political institutions for self-governance.

#### *D. Political Institutions*

In addition to providing “many new areas of local authority, substantial fiscal resources, [and] much greater control over the region’s natural resources,”<sup>281</sup> the 2001 Special Autonomy Law also created new political institutions in Papua.<sup>282</sup> This included the creation of the Papuan People’s Representative Assembly, a legislative body representing all of the people of West Papua.<sup>283</sup> A second institution, the Papuan People’s Assembly,

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276. Aziz et al., *supra* note 267, at 826.

277. *Id.*

278. Bertrand, *supra* note 90, at 595.

279. *Id.* at 594–95.

280. COHEN, *supra* note 41, at 1339.

281. Bertrand, *supra* note 90, at 594–95.

282. *Id.*

283. *Id.* at 595.

was formed “to represent indigenous Papuan groups” and “included local customary groups, as well as religious and women’s groups.”<sup>284</sup> The new Assembly “was given the mandate of promoting and protecting the rights and customs of Papuan people and [was] endowed with the powers of consultation and assent regarding both candidates for the position of governor and decisions and regulations relating to the basic rights of Papuans.”<sup>285</sup>

While these institutions are still in their infancy, they represent an important change in the policies of Indonesia toward the indigenous people of West Papua. These changes also represent a shift from Indonesia’s former “strong unitarist approach” to “a quasi-federal form, while resisting any tendency toward a pluralist federation.”<sup>286</sup> Because this shift is still evolving, it remains to be seen just how much West Papua will gain through this transition.

#### *E. Land Ownership and Natural Resources Management*

While the full extent of reform in Indonesia is still unclear, the Special Autonomy Law for West Papua has addressed the natural resources issues discussed above.<sup>287</sup> However, because “Papua is so heavily endowed with mineral wealth, . . . Indonesia seems unlikely ever to loosen its grip,”<sup>288</sup> despite the language and purpose of the new laws. Additionally, in response to worldwide condemnation of its questionable environmental and social policies, Freeport has undertaken a variety of “community development” initiatives and in some ways has remained a constant during the tumultuous period after the fall of Suharto, with its rapid succession of new presidents.<sup>289</sup> Indeed, “in the continuing absence of a responsible government, the company will reluctantly continue in the role of de facto administrator and developer around its concession area.”<sup>290</sup>

Through its “community development program,” Freeport “provides much needed public health and medical programs for the area.”<sup>291</sup> Additionally, Freeport runs an education program “which involves building schools, dormitories, and vocational training centers; teaching literacy;

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284. *Id.*

285. *Id.*

286. *Id.* at 576.

287. *See supra* Part IV.E.

288. Correspondent’s Diary, *supra* note 21.

289. *See* LEITH, *supra* note 33, at 139.

290. *Id.*

291. *Id.* at 124.

supplying uniforms; supporting teachers in local villages and offering scholarships.”<sup>292</sup> Strangely, the fact that Freeport is now serving as a quasi-government in the area strengthens the analogy to the origins of the Dutch nationalized colony, which began as the commercial enterprise of the Dutch East India Company.<sup>293</sup>

On the other hand, Freeport no longer has a steadfast ally after the fall of Suharto. “For more than thirty years Freeport was feted by the Suharto regime and was politically significant in Indonesia. Today Suharto’s successors vilify the company for political expediency. While Freeport knew how to protect itself under Suharto, it is struggling in this new political climate.”<sup>294</sup> The resulting combination of the new Indonesian government’s mistrust of Freeport and Freeport’s new role as a quasi-governmental body in West Papua remains unclear.

Although it is too soon to judge, perhaps West Papua’s new Special Autonomy status will come to mimic the current era in Federal Indian law, the Self-Determination Era, where “[n]ative nations are pursuing economic development in order to have the freedom to control their own political, cultural and social destinies and to have the ability to sustain communities where their citizens can and want to live.”<sup>295</sup> Like this era in Federal Indian law, it will be decades before we can evaluate whether West Papua’s new status will be an effective means to meet these goals.

### VI. Conclusion

In the almost five decades it has controlled the province, the Republic of Indonesia has undergone a series of rapid changes in its policies toward the indigenous people of West Papua. The majority of this period fell under Suharto’s rule, and many of Suharto’s policies mirrored those of Federal Indian law. Most profoundly, the strong integrationist policy instigated by Sukarno, and furthered by Suharto, is congruent to the assimilationist tendencies during the Reservation, Allotment, and Assimilation eras of Federal Indian law. Similarly, the Removal era of Federal Indian law shares core underlying policies with the transmigration program under Suharto. Additionally, most of the case law involving indigenous people in Indonesia involves issues surrounding the exploitation of natural resources

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292. *Id.* at 126.

293. *See supra* Part II.B.

294. LEITH, *supra* note 33, at 260.

295. HARVARD PROJECT ON AM. INDIAN ECON. DEV., *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* 112 (2008).

and land ownership rights, which is also a strong current in Federal Indian law. Ironically, many of the more abusive policies leading to these cases involve American corporations, which have been complicit in the oppression of West Papuans.

While the picture was grim under Sukarno and Suharto, recent developments in the fifteen years since Suharto's fall from power have rapidly changed the policies of Indonesia toward the West Papuans. These new policies, which grant West Papuans increased autonomy and finally recognize the value of their culture, after decades of forced assimilation, are still too new to evaluate. It is possible, however, that the West Papuans may gain independence due to the momentum of a sixty-year separatist movement, the concerns of which are finally being heard as evidenced through the enactment of the Special Autonomy Laws. If West Papua is able to move toward independence and harness its enormous natural resources wealth, it may eventually stand in a better position than many of the tribes in North America, which are facing diminishing tribal sovereignty and increasing state encroachment.