

Protecting Indigenous Rights in the Indonesia–Papua New Guinea Border Area

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Abstract

The determination of customary land rights for indigenous communities in border areas grows increasingly complex when assessing individual claims within the framework of collective rights. This study aims to formulate a legal protection model for the customary land rights of indigenous communities along the Indonesia-Papua New Guinea border. To formulate this model, the research will comparatively analyze the conceptual frameworks governing customary rights across three existing border areas, namely in Jayapura Regency, Boven Digoel Regency, and Merauke Regency. The research method used is normative empirical, with data collection techniques through observation, documentation, and interviews. The data analysis technique used in this legal research is qualitative-descriptive data analysis. Critical Review of previous studies reveals a significant research gap regarding the protections for customary law communities, especially customary land rights in the Papua border area. This study identifies the absence of a comprehensive scholarly examination regarding the protection and control of customary land rights in the border area between Indonesia and Papua New Guinea, especially in Merauke Regency, Boven Digoel Regency, and Jayapura Regency.

Keywords: *Protection Model; Customary Rights; Customary Law Communities; Border Areas; Indonesia and Papua New Guinea.*

1. INTRODUCTION

The Constitutional Court affirms that recognition of customary law communities through regional regulations remains constitutionally relevant and as long as there is no Customary Community Law.¹ Customary law communities have their own culture, traditions, and customs. Historically, the disregard for these cultural systems has frequently generated social conflict worldwide. In Indonesia, while the 1945 Constitution of the Republic of Indonesia acknowledges the rights of customary law communities, the absence of specific national regulation leaves protections inadequately enforced.²

Indonesia's border areas basically show two major phenomena. First, these border areas continue to demonstrate severely constrained socio-economic conditions, cultural development, and security provisions within Indonesia's territories. Second, the management of the borders between Indonesia and

1 Muhammad Arman, "Legislasi Daerah Masyarakat Adat Pasca Putusan MK.35/PUU-X/2012" (AMAN, 2016).

2 Konvensi ILO No. 169 tahun 1989 mengenai Masyarakat Hukum adat: sebuah panduan (Jakarta: Kantor Perburuhan Internasional, 2003).

neighboring countries requires more intensive coordination and regulation due to ongoing issues and disputes concerning territorial demarcation³. The state should protect and prosper its people. However, many communities in the border areas continue to experience inadequate living conditions and limited prosperity. Moreover, the government has been criticized for failing to provide sufficient attention to the development efforts, as well as for neglecting the rights, dignity, and protection of indigenous peoples in Papua's border areas.⁴

A key legal issue in the border areas is the use of straight-line (astronomical) boundary divisions⁵, which often disregard socio-cultural realities. This approach has led to the forced division of indigenous communities, artificially separating kinship groups and disrupting traditional ways of life across state-imposed borders. The current international border was established through colonial-era agreements, such as the 1895 Convention between Great Britain and the Netherlands defining boundaries in New Guinea. These demarcations were imposed without considering the existence of indigenous peoples who had inhabited these territories for generations, resulting in the artificial division of ancestral lands and communities. The border agreement process failed to account for indigenous territorial systems and customary boundaries that had long governed the local communities. This oversight has resulted in persistent land conflicts between the two communities in two countries across the border. Such recurring conflicts not only threaten local stability but also risk escalating into interstate tension due to the transnational nature of these contested territories.⁶ These issues required proactive mitigation to prevent further escalation.. This study attempts to provide policy-relevant insights for the Government, with the expectation of obtaining substantive feedback and responses from respondents and key informants in the field. A comprehensive examination of recurring customary land rights conflicts is essential. Field-derived data should inform rapid resolution strategies for these persistent territorial disputes.⁷

According to preliminary data research from customary law communities in the areas of conflict, especially in Skouw, Yetetkun, and Sota, conflicts often occur in the land border areas of Papua, primarily stemming from inter-clan boundary conflicts. A key contributing factor is the disappearance of traditional natural boundaries, including rocks, wood, rivers, and mountain features, which previously served as recognized territorial markers. As these physical boundaries have eroded or become unrecognizable, competing claims have emerged between clans over ancestral lands.⁸ Another significant factor is the lack of formal documentation mapping customary land rights boundaries, which has created legal uncertainty regarding indigenous Papuan landownership. This administrative gap has led to violent confrontations as communities attempt to enforce

3 Usman Pakasi, "Identifikasi Potensi Sumber Konflik Daerah Perbatasan Republik Indonesia – Papua New Guinea (Ri – Png) (Study Kasus Di Wilayah Perbatasan Skow- Wutung Distrik Muara Tami Kota Jayapura Provinsi Papua)," n.d.

4 Julianto Jover Jotam Kalalo, "Protection of Indigenous Legal Community Rights in the Border Area of the South Papua," *IAEME Publication* 9, no. 12 (n.d.): 212–19.

5 "Kenapa Perbatasan RI-Papua Nugini Tidak Lurus?," *CNN Indonesia*, n.d., <https://www.cnnindonesia.com/internasional/20240827101550-106-1137902/kenapa-perbatasan-ri-papua-nugini-tidak-lurus>.

6 Melyana Ratana Pugu and Yanyan Mochamad Yani, "Perbatasan Papua-Papua Nugini: Dengan Atau Tanpa Pandemi Covid-19," no. 1 (2020).

7 Djoko Sulistyono, "Penyelesaian Konflik Tanah Hak Ulayat Dari Kelompok Masyarakat Di Kawasan Perbatasan Antar Negara Nusa Tenggara Timur," *GRIN: Gerbang Riset Inovasi* 1, no. 1 (August 4, 2022): 11–18, <https://doi.org/10.55932/grin.v1i1.9>.

8 Yeremias Yekirim, interview with the sub-tribal chief on the border of Yetetkun Boven Digoel, April 14, 2024

territorial claims, with some conflicts escalating to the use of supernatural powers to kill each other.⁹

Indonesia and PNG have established both land and maritime borders, which originated from the colonial partition by the British and Dutch authorities under the 16 May 1895 Haque Convention, known as the Convention between Great Britain and the Netherlands defining boundaries in New Guinea. However, persistent cultural differences continue to generate tensions and misunderstandings in the border governance. Different conceptions of territoriality emerge from conflicting epistemologies where indigenous communities' rational understanding of land contrasts sharply with the state's relational-legal framework of territorial or citizenship. These fundamentally incompatible views create governance challenges exacerbated by enduring cross-border kinship networks and shared cultural identities. Such a condition transforms customary land claims into complex socio-legal dilemmas that resist a conventional conflict resolution approach.¹⁰

Papua New Guinea shares a direct territorial border with Indonesia. Preliminary research conducted among people living around border areas in Merauke reveals persistent socio-cultural connections between populations on both sides of the international boundary. These people maintain shared tribal affiliations and continue to recognize common customary rights systems that transcend modern political borders. The conflict that has been described above greatly complicates the determination of the extent of the customary territory of indigenous peoples from both sides who have competing claims over ancestral domains.¹¹ The situation is further complicated by ethnic and tribal affinities between border communities, who share common racial identity, tribal affiliations, and customary territories. These cross-border kinship ties, including intermarriages from both tribes in Papua and Papua New Guinea, generate complex legal and social challenges in territorial governance.¹²

According to one of the district heads in Sta Merauke, this conflict often occurs because of the joint ownership of customary rights of indigenous peoples in Indonesia and Papua New Guinea. A representative case occurs when land transactions in Merauke require participation from Papua New Guinean indigenous communities, as they maintain ancestral claims to territories across the border. This cross-border attachment necessitates their involvement in any land sale processes within Indonesian territory. When such agreements are not properly honored, they often cause conflicts over customary land rights.¹³ The unresolved status of indigenous territorial claims presents a critical governance challenge, particularly the regions that represent sensitive zones for maintaining Indonesia's national territorial integrity.

Based on the existing problem background, the problem formulation according to the author is: What is the model for protecting the customary rights of indigenous legal communities in the land border areas between Indonesia and Papua New Guinea?

This study employs a dual-method research framework to systematically address the research problem.¹⁴ The problem approach in this study was carried out using two approaches, namely the normative approach and the empirical approach. The normative

9 Norce Mahuze, interview with the Secretary of Kampung Sota, Mei 15, 2024

10 Agung Djojoseokarto, *Nilai-nilai dasar orang Papua dalam mengelola tata pemerintahan (governance): studi refleksi antropologis*, Cetakan pertama (Kebayoran Baru, Jakarta Selatan: Partnership for Governance Reform, 2012).

11 Rizal Yuliansya, interview with the Head of Sub, PLBN Sota, August 8, 2024

12 Julianto Jover Jotam Kalalo, Philipus Betaubun, and Chyntia Novita Kalalo, "Implementation of Marriage by Indigenous Law to Yei Tribe Communities," *International Journal Of Management* 10, no. 6 (November 30, 2019), <https://doi.org/10.34218/IJM.10.6.2019.005>.

13 Bilardo Sineri, interview with Sota District Head, August 8, 2024

14 Abdulkadir Muhammad, *Hukum Dan Penelitian Hukum* (Bandung: PT. Citra Aditya Bakti, 2004).

approach involves analysis of legal documents, scholarly literature, and applicable regulations relevant to the problem being discussed. Complementing this, the empirical approach examines the reality and practical implementation of these regulations through direct and indirect observations, especially regarding customary rights in border areas, with input from knowledgeable stakeholders.

Based on the above problems, the author sees that it is necessary to research the protection of customary rights of indigenous peoples in the border area between Indonesia and Papua New Guinea. Producing a protection model of customary rights, the research will employ a comparative analysis of the concept of control of customary rights systems through indigenous peoples across the three strategic border areas, called Jayapura Regency, Boven Digoel Regency, and Merauke Regency.

This study employs a qualitative research design focusing on three Papuan regencies bordering Papua New Guinea: Jayapura, Boven Digul Re, and Merauke.. The research population comprises the entire Customary Law Community residing in these border areas. Using purposive sampling, the study will engage with nine Customary Heads in 3 border areas (Jayapura Regency, Boven Digul Regency, and Merauke Regency) and 6 community members (two from each regency), for a total sample size of samples is 15 people. The data collection techniques will utilize triangulation through observation, documentation, and interviews. The data analysis will follow the qualitative descriptive methods, incorporating thematic data analysis with a descriptive analytical approach.

2. ANALYSIS AND DISCUSSION

Customary rights constitute a complex system of obligations and powers held by customary law communities.¹⁵ Customary rights are the rights of association held by certain customary law communities over a certain area that form their living environment, encompassing the rights to utilize land, forests, water resources, and subsurface assets in accordance with laws and regulations.¹⁶ Recognition of the existence of customary rights is legally justified, as both these rights and customary law communities have existed before the formation of the 1945 Constitution, which contains the concept of state control of rights. The basic Agrarian Law (UUPA No. 5/1960) does not explicitly define customary rights, except to state that what is meant by customary rights, except to reference them as *beschikkingsrecht* in customary law literature.¹⁷ Customary communities inherently possess both the natural environment and their natural wealth contained therein, as well as the freedom to manage and utilize natural resources wisely.¹⁸

Customary law communities possess ancestral lands encumbered with customary rights, comprising regulations governing the authority and responsibilities of these communities regarding territorial lands that sustain their livelihood across generations.

15 Stivani Marantika Poro, Ali Imron, and Wika Yudha Shanty, "Perlindungan Hukum Hak Tradisional Masyarakat Hukum Adat Terhadap Tindakan Individualisasi Tanah Ulayat Untuk Tujuan Komersial," *Bhirawa Law Journal* 2, no. 1 (May 31, 2021): 73–78, <https://doi.org/10.26905/blj.v2i1.5857>.

16 Yunimar, "Pensertipikatan Tanah Wakaf Yang Berasal Dari Tanah Ulayat Di Minangkabau Dalam Rangka Mewujudkan Kepastian Hukum," *Universitas Tamansiswa Padang* 5, no. 1 (April 20, 2017): 16–27.

17 Ni Ketut Sari Adnyani, "Perlindungan Hukum Kesatuan Masyarakat Hukum Adat Dalam Pengelolaan Pariwisata Berbasis Kearifan Lokal," *Media Komunikasi FPIPS* 20, no. 2 (August 18, 2021): 70, <https://doi.org/10.23887/mkfis.v20i2.33738>.

18 zidane Tumbel, "Perlindungan Hukum Terhadap Hak-Hak Budaya Masyarakat Adat Dalam Perspektif Hukum Hak Asasi Manusia," *Lex Et Societatis* 8, no. 1 (May 18, 2020), <https://doi.org/10.35796/les.v8i1.28466>.

In addition, these customary rights extend beyond cultivated areas to include customary forests, provided they support the subsistence needs of community members.¹⁹

The existence of customary land has been recognized by the Basic Agrarian Law, where Article 3 states that the exercise of customary rights and similar entitlements of customary law communities, insofar as they still exist in practice, must comply with national interest and state unity, and must not conflict with higher-level laws and regulations.²⁰ The determination of customary rights for indigenous communities is related to land administration services systems.²¹

Critical Review of previous studies and future research agenda Julianto Jover Jotam Kalalo²². Building on prior Critical research engages with two key works: (1) the dissertation research on the Legal Politics of Protection of Customary Rights of Indigenous Peoples in Border Areas²³, and (2) the seminal study examining tensions on the Dichotomy of National Legal Politics with Customary Law Politics in Border Areas.²⁴ Our intervention focuses specifically on customary law in border areas, with the subject of customary law for indigenous communities and their rights. Furthermore, the protection of customary law communities, especially customary rights in border areas. Preliminary analysis reveals a persistent regulatory gap: Indonesia currently lacks a definitive legal framework governing the administration of customary rights in its border regions with Papua New Guinea, especially in Merauke Regency, Boven Digoel Regency, and Jayapura Regency. In developing this concept, Julianto Jover Jotam Kalalo & Samingun^{25,26} have conducted further research related to the regulation of traditional border crossings of customary law communities in border areas which show that there are special rights of customary law communities to cross between countries because of the existence of joint customary rights ownership rights both in Indonesia and Papua New Guinea. In the development of further research, it is hoped that it can produce a concept for the protection of customary rights of customary law communities in land border areas.

2.1. Model of legal protection of customary rights of indigenous legal communities in the land border areas of Indonesia and Papua New Guinea

Customary Rights are a unique characteristic of an indigenous community; customary rights are referred to as *sui generis*.²⁷ Customary Rights occur when land rights are

19 Sukirno, *Politik Hukum Pengakuan Hak Ulayat* (Jakarta: Grup Prenadamedia, 2018).

20 Eviandi Ibrahim, "Peranan Penghulu Terhadap Hak Ulayat Di Minangkabau," *JCH (Jurnal Cendekia Hukum)* 6, no. 1 (September 30, 2020): 161, <https://doi.org/10.33760/jch.v6i1.296>.

21 Arif Rahmadi, "Urgensi Penetapan Hak Ulayat Masyarakat Hukum Adat Terkait Kebijakan Pelayanan Pertanahan Di Papua," *Tunas Agraria* 5, no. 1 (February 16, 2022): 17–32, <https://doi.org/10.31292/jta.v5i1.170>.

22 Julianto Jover Jotam Kalalo and Irwansyah Irwansyah, "Dikotomi Politik Hukum Nasional dengan Politik Hukum Adat di Daerah Perbatasan," *Amsir Law Journal* 1, no. 1 (October 15, 2019): 22–35, <https://doi.org/10.36746/alj.v1i1.19>.

23 Julianto Jover Jotam Kalalo, *Legal Politics for the Protection of Customary Rights of Customary Law Communities in Border Areas* (Makassar: Hasanuddin University, 2018).

24 Kalalo and Irwansyah, "Dikotomi Politik Hukum Nasional dengan Politik Hukum Adat di Daerah Perbatasan."

25 Samingun Samingun and Julianto Jover Jotam Kalalo, "Immigration Law Regulations Against Traditional Border Crossers in the Border Area of Merauke Regency," *Musamus Law Review* 3, no. 1 (October 20, 2020): 36–48, <https://doi.org/10.35724/mularev.v3i1.3514>.

26 Julianto Jover Jotam Kalalo and Samingun Samingun, "Implementation of Immigration Control Against Traditional Border Crossers in The Border Area of The Republic of Indonesia And Papua New Guinea in Merauke," *Jurnal IUS Kajian Hukum Dan Keadilan* 9, no. 3 (December 21, 2021), <https://doi.org/10.29303/ius.v9i3.916>.

27 Muhamad Agil Aufa Afinnas, "Perbandingan Hukum Penetapan Eksistensi Hak Ulayat Dengan Penetapan Native Title di Australia," *DIVERSI: Jurnal Hukum* 8, no. 1 (June 3, 2022): 139, <https://doi.org/10.32503/diversi.v8i1.2316>.

owned by an indigenous community group and its use is regulated by the Group Leader; these joint rights are referred to as customary rights.²⁸

Land holds profound importance for human existence, serving both vital functions during life, which sustain all human activities, and sacred purposes after death as ancestral resting places.²⁹ For indigenous communities, this connection carries particular cultural and historical weight. As custodians of territories settled since time immemorial, customary law communities maintain an uninterrupted, ancestral bond with their lands that persists through generations.

Customary law communities, commonly referred to as traditional communities, represent social groups governed by established regulatory systems and enduring customary norms that shape social life within indigenous communities. As explained above, these communities maintain a profound symbiotic relationship with their ancestral lands, characterized by a defined governance structure between the land and its ruler. In their daily lives, community members conduct their activities based on traditional rules and adaptive customs with normative systems that vary according to each community's unique cultural heritage and traditions. The Indonesian state has authority over land which is called the right to control and maintain as clearly explained in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which has been amended (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia) which states that: *"the earth, water, and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people"*.³⁰

Legal protection serves as a fundamental safeguard for human rights (HAM) against violations by third parties, ensuring all members of society may fully exercise their legally guaranteed entitlements. Law can be used to realize protection that is not only adaptive and flexible, but also predictive and anticipatory. Crucially, law systems are designed to empower vulnerable groups who lack social, economic, or political strength, thereby facilitating the realization of substantive justice.³¹ In accordance with the description above, it can be stated that the function of law is to protect the people from potentially harmful actions that can harm their lives from other people, society, and the authorities. In addition, it also functions to provide justice and facilitate the realization of collective welfare for all people.

According to Satjipto Raharjo, legal protection is to protect human rights (HAM) that are harmed by other people, and that protection is given to the community, ensuring all the rights granted by law. Law can be used to realize protection that is not only adaptive and flexible, but also predictive and anticipatory. Raharjo emphasizes the Law's redistributive function in empowering socially, economically, and politically marginalized groups to achieve substantive social justice.³² In accordance with the description above, it can be stated that the function of law is to protect the people from danger and actions that can

28 I Made Suwitra, "Eksistensi Tanah Adat Dan Masalahnya Terhadap Penguatan Desa Adat Di Bali," *WI-CAKSANA: Jurnal Lingkungan dan Pembangunan* 4, no. 1 (June 3, 2020): 31–44, <https://doi.org/10.22225/wicaksana.4.1.1816.31-44>.

29 Novyta Uktolseja and Pieter Radjawane, "Tinjauan Juridis Perkembangan Tanah-Tanah Adat (Dahulu, Kini dan Akan Datang)," *SASI* 25, no. 1 (August 24, 2019): 13, <https://doi.org/10.47268/sasi.v25i1.146>.

30 Fengky Kotalewala, Adonia Ivone Laturette, and Novyta Uktolseja, "Penyelesaian Sengketa dalam Pengadaan Tanah Bagi Pembangunan Jalan untuk Kepentingan Umum," *SASI* 26, no. 3 (September 21, 2020): 415, <https://doi.org/10.47268/sasi.v26i3.397>.

31 Satjipto Raharjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2000).

32 Satjipto Raharjo

harm their lives from other people, society, and the authorities. Apart from that, it also functions to provide justice and be a means to realize prosperity for all people.³³

Indonesia's pre-amendment constitution did not expressly employ the formal terminology of customary law. However, careful examination reveals that its provisions embodied fundamental principles and values aligned with customary legal traditions.³⁴ Consistent with international law, States are required to recognize and carry out their duties and obligations to enforce the FPIC requirements that apply to Indigenous Peoples and recognize the right of forest-dependent communities to participate effectively in the governance of their countries, at a minimum.³⁵

The application of *the Living Law* concept in Indonesian jurisprudence has been predominantly interpreted through the framework of Customary Law by several leading scholars. First, there are Franz and Keebet, who found that the concept of *The Living Law* is not as conceptualized by Ehrlich, but rather a concept used and labeled by Cornelis van Vollenhoven as "*levend recht*" in 1907. Second, the authors find similarities in the concept of *the Living Law*, especially in the understanding of positive law and living law. Additionally, there are similarities in the legal conditions under study, where the law is considered to be truly relevant to people. This type of law is not merely the subject of social and legal studies, but also an instrumental mechanism for achieving collective interests.. This aligns with *Levende Recht*'s conception of *levend recht* as autonomous customary law – a self-validating normative system that derives authority from traditional practice rather than state recognition or coercive enforcement.³⁶

When examining constitutional provisions on national law alongside international legal obligations, states face a dual imperative to formally recognize both domestic customary rights and those spanning international borders. This has happened because international law requires the state to recognize the existence of customary rights in general and the existence of customary rights that pass between two countries. That is why the state should be obliged to pay attention to the border areas that provide a new legal concept. The law in the border area runs and lives according to the concept of Ehrlich and van Vollenhoven, where in the border area the customary law communities of the two countries live and are subject to the customary laws that exist in that place.

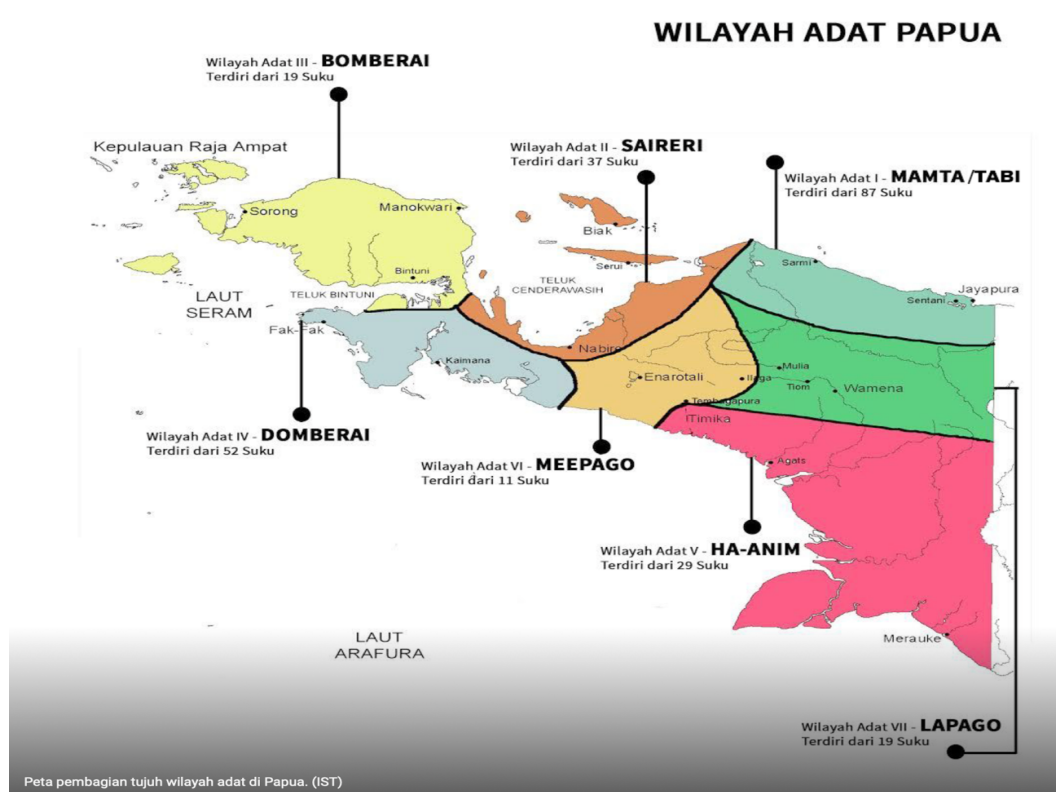
If we pay further attention to the Papua region, which shares a direct border with the neighboring country of Papua New Guinea, it becomes evident that there are overlapping customary territories along the national administrative boundary. This is illustrated in the map of Papua's customary territories, where the three Papuan indigenous territories are directly adjacent to the state of Papua New Guinea.

33 Yules Moses Urasana, Adonia Ivonne Laturette, and Pieter Radjawane, "Perlindungan Hukum Terhadap Hak Masyarakat Hukum Adat Setelah Berakhirnya Hak Guna Usaha," *BAMETI Customary Law Review* 1, no. 1 (July 23, 2023): 26–40, <https://doi.org/10.47268/bameti.v1i1.9904>.

34 M Saleh, "Eksistensi Hukum Adat Dalam Polemik Hukum Positif Suatu Kajian Dalam Perspektif Tatanegara," *Jurnal IUS Kajian Hukum Dan Keadilan* 1, no. 3 (2013).

35 Retno Kusniati, "Free, Prior, and Informed Consent Principles as Indigenous Peoples' Right: Soft Law or Hard Law?," *Jambe Law Journal* 7, no. 1 (August 3, 2024): 169–93, <https://doi.org/10.22437/home.v7i1.350>.

36 Ratih Lestarini, "The Sociological Perspective on The Study of The Living Law: Is It a Part of Legal Discipline or Social Discipline?," *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 3 (December 25, 2023): 448–64, <https://doi.org/10.29303/ius.v11i3.1270>.



Picture Papua Customary Region

Based on the image above, it is necessary to consider efforts to protect the customary rights of the indigenous community within the Papuan customary territories that border both Indonesia and Papua New Guinea. An analysis of the customary territorial divisions in Papua reveals that 3 (three) customary territories directly intersect with the Indonesia-Papua New Guinea land border. They are called the Ha-Anim Customary Territory, the Lapago Customary Territory, and the Mamta/Tabi Customary Territory. The research team has conducted studies in 2 existing customary territories, namely Ha-Anim (Yetetkun and Sota), and Mamta/Tabi (Skouw). However, fieldwork in the Lapago territory has not been feasible for the research team due to its extreme geographical conditions and the absence of an Integrated Cross-Border Post (PLBN) in the Lapago area.

Based on the research findings, none of the three study areas has established legal recognition for indigenous communities in the border areas. To date, no regional regulations have been enacted to formally acknowledge the recognition of these customary law communities or their traditional territories, whether through local ordinances or other regulations.

2.1.1. Legal protection of customary rights of indigenous legal communities through the determination of indigenous community territories.

Customary law, which was initially a living law and able to provide solutions to various problems in the social life of the Indonesian people, is increasingly fading in its existence. Customary law is a social product resulting from joint work (agreement)

and collective work (social property) of a customary law community. The application of customary law in Indonesia is very diverse; each region has different customary laws.³⁷

Legally speaking, the application of *ulayat* right shall limit the implementation of state right to control in the territory of indigenous people. If the indigenous community practices their *ulayat* right in their territory, the state shall restrict itself to controlling it. The application of the *ulayat* right according to the Basic Agrarian Law is limited. *Ulayat* right shall be applied only if it is in accordance with national and state interest; national unity; Indonesian socialism; law and regulation, including religious law. The practice of *ulayat* right is restricted by law and regulation issued by the state. Later, indigenous people find that it is troublesome to exercise their *ulayat* right because they are not recognized as legal subjects.³⁸

Aside from the required consent, leveraging or delivery is not a distinct act or type of legal activity.³⁹ The recognition of customary territories is grounded in agrarian law, specifically the Basic Agrarian Law (UUPA), with further elaboration provided in Permenag 5/1999 concerning Guidelines for the Settlement of Customary Rights Issues for Indigenous communities. This legal framework operates through the form of Regency/City Regulations in determining the object of rights (land and natural resources contained in it) or also known as “customary land”, and various customary rights attached to it.

Based on several searches of existing documents, we found that no regency/city regulation in the Papua region currently provides a detailed explanation of the mapping of customary territories in accordance with what is mandated by law.

According to Mr. Rizal Yuliansyah⁴⁰, the Merauke region, especially in the Sota border area directly adjacent to Papua New Guinea, currently lacks formal written regulations delineating indigenous territorial boundaries. This regulatory gap specifically concerns the official mapping of customary territories for border communities and the formal recognition process for these territories. Mrs. Norce Mahuze⁴¹ also confirmed the same thing, that in this border area, there has been no determination of customary territory. According to Mrs. Norce, the customary territory in Sota has been mutually agreed upon between indigenous peoples in Indonesia and also in Papua New Guinea in the control of their customary rights. This observation is corroborated by Mr. Bilardo Sineri⁴², who emphasized that these cross-border agreements have been mutually agreed upon and have simultaneously operated effectively without producing conflicts among customary law communities.

A field research in the Jayapura area reveals distinct patterns of customary land governance. According to Mrs. Brendina Mathilda Pusung⁴³, the customary area in Jayapura derives its legitimacy primarily through the tribal leadership structures. The demarcation process follows the traditional boundaries as established and maintained by the tribal chief, reflecting an authority-based system of territorial governance. Likewise,

37 Dian Ekawaty Ismail, Avelia Rahmah Y Mantali, and Mohamad Rivaldi Moha, “The Concept of Revitalizing Traditional Institutions in the Criminal Law System to Realize Restorative Justice,” *Jambura Law Review* 5, no. 2 (June 3, 2023): 220–34, <https://doi.org/10.33756/jlr.v5i2.11682>.

38 Sartika Intaning Pradhani, “Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation,” *Jambe Law Journal* 1, no. 2 (July 12, 2019): 177–205, <https://doi.org/10.22437/jlj.1.2.177-205>.

39 M. Yazid Fathoni, Adi Sulistiyono, and Legu Karjoko, “Reformulation of Sale And Purchase Agreement Regulations in Creating Legal Certainty and Justice in The Transfer of Land Rights in Indonesia,” *Jurnal IUS Kajian Hukum Dan Keadilan* 12, no. 1 (April 26, 2024): 55–67, <https://doi.org/10.29303/ius.v12i1.1351>.

40 Rizal Yuliansya, interview with the Head of Sub, PLBN Sota, August 8, 2024

41 Norce Mahuze, interview with the Secretary of Kampung Sota, August 8, 2024

42 Bilardo Sineri, interview with Sota District Head, August 8, 2024

43 Brendina Mathilda Pusung, interview with the Head of PLBN Skouw, August 14, 2024

a resource person from Papua New Guinea (while engaged in cross-border commerce in Indonesia) confirms that they were submissive and followed the division of customary territories from an indigenous leader. Customary territories have been determined to be an obligation for the people to know and obey.

In the Boven Digoel area, according to Mr. Yeremias Yekirem⁴⁴, as the head of the sub-tribe in the Yetetkun border area, the customary territory of the customary law community has been mapped based on the narration of the ancestors and passed down from generation to generation by their parents, so that their customary territory is clear. The customary territories that they know through hereditary narration turn out to pass through the boundaries of the country's territory. In general, there are customary rights across the state.

According to Mr. Isak Mewed⁴⁵ and Mrs. Yohana Kuan, they⁴⁶ also stated almost the same thing as Mr. Jeremiah, that the existence of customary territories according to customary law of indigenous peoples in the border area of the country in Yetetkun has also been agreed and believed to be the boundaries among the customary law communities. Second, customary law communities that are different countries respect each other and also understand the position of their respective customary rights, even though each community has customary rights both in Indonesia and in Papua New Guinea.

The current Regulatory framework in Papua lacks formal provisions for the official demarcation of customary territories. Notably absent are legally binding instruments that would establish: (1) precise boundaries of indigenous lands, and (2) authoritative cartographic representations of these territories through regulatory annexes. The absence of legally binding documentation leaves customary land rights ownership unclear, with competing groups asserting claims over the same territories. Without standardized procedures for boundary determination, these conflicts remain unresolved, especially in sensitive border regions.

One form of legal protection of the rights of indigenous peoples in border areas should be the determination of customary rights areas of customary law communities in certain areas, for example, in Merauke Regency, Boven Digoel Regency, and Jayapura Regency. Mapping of customary territories enables the creation of derivative territorial delineations for cross-border indigenous communities, using district-level customary maps as the authoritative reference.

2.1.2. Legal protection of customary rights of indigenous peoples through the determination of their customary communities.

Sustainable development is a critical concern in preserving local traditions. The state strikes a balance between maintaining these traditions and protecting the environment through various regulations.⁴⁷

Cultural heritage includes both tangible (material) and intangible (immaterial) artifacts, practices, and knowledge inherited from past generations.. Tangible cultural heritage can encompass physical objects such as temples, kris daggers, batik textiles, wayang puppets, angklung instruments, gamelan orchestras, paintings, drawings, prints,

⁴⁴ Yeremias Yekirim, interview with the sub-tribal chief on the border of Yetetkun Boven Digoel, September 15, 2024

⁴⁵ Isak Mewed, interview with the Head of PLBN Tetetkun September 15, 2024

⁴⁶ Yohana Kuan, interview with Ninati District Head, September 15, 2024

⁴⁷ Reza Amarta Sahajuddin et al., "The State's Responsibility in Preserving Local Culture: A Constitutional Law Perspective on the Practice of Akapulumba Jarangk," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 13, no. 4 (July 31, 2016), <https://doi.org/10.17304/ijil.vol13.4.666>.

mosaics, books, historical sites, and sculptures. In contrast, intangible cultural heritage includes elements like songs, traditional music, languages, traditional dances, customary ceremonies, customary celebrations, rituals, festivals, weaving traditions, traditional games, skills, expertise, and crafts.⁴⁸ Both forms require conservation to maintain their cultural significance and ensure intergenerational continuity.

Legal protection of customary rights of indigenous peoples through the determination of their customary communities is the determination of an indigenous community as a legal subject. This recognition route uses references to the Forestry Law (UUK), which was later strengthened by the Constitutional Court Decision No. 35/2012 concerning Customary Forests, which requires the determination of indigenous peoples through Regional Regulations to obtain indigenous peoples' rights to forests.

Interview findings reveal that formal recognition of customary law communities in Papua, particularly along the Indonesia-PNG border, remains noncompliant with legal requirements. Despite central government mandates delegating this authority to local administrations, no regional recognition frameworks. This regulatory gap. This regulatory gap complicates border communities' ability to secure legal status, hindering their capacity to assert customary rights through people's collective action.

2.1.3. Legal protection of customary rights of customary law communities as a government unit (Customary Village).

Local wisdom operates independently from external power structures, with legal norms and institutions deeply embedded in community consciousness. The customary governance system demonstrates notable resistance to the external interventions that have been imposed by the community. Unlike formal systems, these unwritten traditions derive their authority from collective ownership and voluntary adherence rather than coercion. Their psychological internalization creates organic compliance, making communities resistant to external interventions while maintaining self-sustaining governance.⁴⁹

The democratic principles are often reflected in the lives of village communities throughout the archipelago, marked by three key elements: first, the enduring traditions of gatherings that have been ingrained in the hearts of the Indonesian people from ancient times to the present; These traditions remain unbroken. Second, there exists a tradition of protest, which empowers the people to publicly challenge any state regulations they consider unjust. Third, there is a strong tradition of mutual assistance among community members.⁵⁰

The successful integration of local wisdom into community initiatives requires a fundamental restructuring of institutional power relations and the recognition of diverse knowledge systems.⁵¹ Current legal frameworks attempt to protect customary rights through administrative assimilation, integrating traditional communities into formal village governance structures.

48 Kartono Kartono et al., "Cultural Heritage Protection and Revitalization of Its Local Wisdom: A Case Study," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, September 29, 2024, 245–61, <https://doi.org/10.24090/volksgeist.v7i2.11281>.

49 Helmi Helmi et al., "Local Wisdom in Indonesia: Assessing Its Legal Status and Role in Forest Protection," *Jambe Law Journal* 6, no. 2 (November 30, 2023): 125–41, <https://doi.org/10.22437/jlj.6.2.125-141>.

50 Meri Yarni et al., "Democratic Values in Nagari: An Analysis on Electoral System Shifts in One Province of Indonesia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, December 15, 2024, 379–92, <https://doi.org/10.24090/volksgeist.v7i2.12106>.

51 Malahayati Rahman et al., "Bridging Global Protocols and Local Wisdom: Innovating Refugee Assistance Through a Harmonized Protection Model," *Jambe Law Journal* 7, no. 1 (August 3, 2024): 195–232, <https://doi.org/10.22437/home.v7i1.181>.

In this context, the customary villages such as nagari, huta, marga, and others operate under two parallel authorities: traditional customary power and formal village administration. Their traditional authority derives from ancestral rights over land and self-governance, while their administrative authority aligns with state-recognized village structures. This dual function integrates indigenous communities into the government system but also risks diminishing their autonomy, as customary norms must coexist with bureaucratic frameworks.

For now, in the border areas like Merauke, Jayapura, and Boven Digoel, settlements are administratively designated as 'Kampung' rather than recognized as customary village (*desa adat*). This reflects a bureaucratic interpretation of village governance that overlooks indigenous structures. The current *kampung* framework contradicts the Village Law's provisions for customary villages (*desa adat*), which are meant to integrate traditional authority into the administrative systems. This discrepancy hinders formal recognition of indigenous land rights and self-governance in border areas. Transitioning from *kampung* to *desa adat* would strengthen legal protection for customary territories, formalize indigenous governance systems, and align borderland administration with national laws on customary rights.

2.1.4. Legal protection of customary rights for customary law communities through customary agreements.

Local wisdom represents the nation's cultural identity and character. It enables societies to adapt and integrate external cultural influences while maintaining their distinct values. This wisdom reflects the community worldwide, ensuring cultural continuity without value distortion. Additionally, local wisdom serves two key functions called preserving and developing native culture, protecting communities from foreign cultural elements that conflict with local values and principles.⁵²

The legal protection of customary rights for indigenous communities operates through mutual customary agreements between the indigenous communities. These customary pacts establish binding relationships between different customary law associations. In border regions, these indigenous governance systems remain actively preserved. These jointly established provisions serve as the valid legal framework for source ownership and territorial management among neighboring indigenous associations.

Agreements in customary law are not primarily concerned with individual needs, but rather emphasize communal values such as psychological bonds, kinship ties, social harmony, and mutual assistance. Therefore, written documentation is often unnecessary in customary agreements, as they are fundamentally supported by a strong basis of trust among community members. Although it is not required in written form, agreements in customary law must be formally made in the presence of traditional leaders. These leaders serve as official representatives of the community, with the authority to witness and validate the agreements made between parties within their society.⁵³

Customary law communities demonstrate strong compliance with traditional agreements, adhering strictly to avoid violating established terms. As attested by local

⁵² Mutia Cherawaty Thalib, "Implications of Mixed Marriage in the Perspective of Gorontalo Customary Law and Its Reality Based on International Private Law Principles," *Jambura Law Review* 5, no. 1 (January 30, 2023): 179-98, <https://doi.org/10.33756/jlr.v5i1.16798>.

⁵³ M. Yazid Fathoni, "The Legal Position of the Transfer of Customary Land Rights in the Perspective of Indonesian Positive Law," *IUS Journal of Law and Justice Studies* 8, no. 1 (July 19, 2022), <https://doi.org/10.29303/ius.v8i1.882>.

leaders including Mrs. Norce Mahuze⁵⁴, Yeremias Yekirem⁵⁵, Isak Mewed⁵⁶, Mrs. Yohana Kuan⁵⁷, and Mr. Bilardo Sineri⁵⁸, these customary agreements hold sacred status among indigenous people in Papua, especially those in border areas. The sanctity of these agreements stems from accompanying traditional rituals that reinforce their binding nature. Community members firmly believe violations would bring adverse consequences for both current generations and their descendants in daily life. This deep-rooted conviction ensures continued respect for customary agreements without requiring formal legal enforcement mechanisms.

2.1.5. Legal protection of customary rights for indigenous peoples through agreements between countries

The principle of Free, Prior, and Informed Consent (FPIC) has become an established yet debated norm in international law, recognizing indigenous peoples' right to approve or reject resource development on their traditional lands.⁵⁹ This legal protection of indigenous customary rights is further reinforced through bilateral agreements between countries that share mutual interests in maintaining and preserving the existence of indigenous peoples and their customary rights between the two countries.

The existence of customary rights that are separated between two administrative areas of two different countries has legal consequences for the implementation of the rights of indigenous peoples in the border areas of the two countries. The division of traditional territories by national borders does not diminish the continuity of indigenous customary rights within these areas. When a single customary territory is bisected by an administrative boundary between the two countries, the rights of the affected indigenous community remain intact across both jurisdictions. This reality necessitates bilateral agreements between neighboring countries to formally recognize and protect the undivided nature of indigenous customary rights and their collective identity.

According to Mr. Rizal Yuliansyah⁶⁰, Mr. Isak Mewed⁶¹, and Mrs. Brendina Mathilda Pusung⁶², the Indonesian state has established bilateral agreements with the State of Papua New Guinea. This bilateral agreement regulates territorial boundaries that follow the New York Agreement and also several other specific arrangements. The International Agreement between the two countries also regulates traditional border crossers where customary law communities in each country are given special access to be able to cross between countries to see and cultivate in their customary lands rights, trading, and other things. However, more specific arrangements for customary territories have not been outlined in the bilateral agreement. This is because the current implementations prioritize established administrative boundaries over indigenous territorial demarcations, leaving the status of customary lands unresolved.

54 Norce Mahuze, interview with the Secretary of Kampung Sota, August 8, 2024

55 Yeremias Yekirim, interview with the sub-tribal chief on the border of Yetetkun Boven Digoel, September 15, 2024

56 Isak Mewed, interview with the Head of PLBN Tetetkun September 15, 2024

57 Yohana Kuan, interview with Ninati District Head September 15, 2024

58 Bilardo Sineri, interview with Sota District Head, August 8, 2024

59 Ros Vickers, "The Regulation of Natural Resources Law in Australia for Indigenous People," *Jambe Law Journal* 2, no. 2 (January 28, 2020): 99–117, <https://doi.org/10.22437/jlj.2.2.99-117>.

60 Rizal Yuliansya, interview with the Head of Sub, PLBN Sota, August 8, 2024

61 Isak Mewed, interview with the Head of PLBN Tetetkun September 15, 2024

62 Brendina Mathila Pusung, interview with the Head of PLBN Skouw, August 14, 2024

3. CONCLUSION

Legal protection of customary rights of indigenous peoples in the border areas between Indonesia and Papua New Guinea needs special attention because it is a customary area between the same tribes that is limited by different state administrative lines. Several models of legal protection that can be carried out in determining the customary rights of indigenous peoples are through the determination of their customary areas, determination of recognition of indigenous peoples, recognition of the customary government system in the form of customary villages or determination of customary government, implementation of bilateral agreements between two countries to recognize one customary area located in two countries.

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