Indonesia in the ‘REDD’:
Climate Change, Indigenous Peoples and Global Legal Pluralism

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INTRODUCTION

In the Copenhagen Accord, drafted in December 2009 at the United Nations Framework Convention on Climate Change Conference of the Parties No. 15, a scheme known as REDD (Reducing Emissions from Deforestation in Developing Countries) emerged as a critical component.\(^1\) Responsible for almost a third of global carbon emissions from deforestation and forest degradation, Indonesia is a prime candidate for implementation of the REDD scheme.

Indonesia, in May 2009, was the first country to enact national REDD regulations and; throughout 2008-2009, it has been targeted by the World Bank’s REDD scheme\(^2\), the UN REDD programme\(^3\), voluntary

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\(^1\) See paragraphs 6, 8 and 10, Draft Decision-/CP.15, Copenhagen Accord, (FCCC/CP/2009/L.7), 18 December 2009.

\(^2\) Known as the Forest Carbon Partnership Facility.

\(^3\) Known as the UN-REDD programme.
carbon credit investment\textsuperscript{4}, and several REDD programmes from other states.\textsuperscript{5} This global scheme has highlighted longstanding issues relating to Indigenous peoples’ customary rights to forests the world over. This article examines some of the ways various actors, from global institutions to local actors, are dealing (or not, as the case may be) with this issue. It particularly contributes to the nascent literature on global legal pluralism and grassroots perspectives on law and globalisation, by examining the contemporary struggle of Indigenous peoples in Indonesia for recognition of their customary forest rights within the emerging legal frameworks for REDD.

The first section briefly examines how the theory of legal pluralism has developed. It will also analyse some of the recent contributions by fore-most scholars such as Tamanaha,\textsuperscript{6} Merry,\textsuperscript{7} Berman\textsuperscript{8} and Santos.\textsuperscript{9} It

\textsuperscript{4} For example, the $US9 million carbon credit deal made between investment bank Merrill Lynch and the Province of Aceh in June 2008.

\textsuperscript{5} For example, Australia has secured numerous bilateral agreements with Indonesia in relation to REDD. The principal of these is the Indonesia-Australia Forest carbon Partnership, signed on 13 June 2008. This includes a $40 million support package on forests and climate change. Specifically, Australia has targeted Kalimantan for the first, large scale REDD demonstration activity of its kind in Indonesia under The Kalimantan Forests and Climate Partnership. These projects are orientated towards carbon trading. ‘REDD Concerns Deepen’, Down to Earth Newsletter No. 82, (September 2009) available at http://dte.gn.apc.org/82acl.htm.

\textsuperscript{6} Brian Z. Tamanaha is Chief Judge Benjamin N. Cardozo Professor of Law at St John’s University, New York. For his most recent relevant work see Brian Z. Tamanaha, \textit{Understanding Legal Pluralism: Past to Present, Local to Global}, Legal Studies Research Paper Series (2008) and Brian Z. Tamanaha, \textit{Law} (St John’s University, School of Law 2008).

\textsuperscript{7} Sally Engle Merry is Professor of Law and Society, and Anthropology, Director of Law and Society Centre, NYU, New York. For her most recent work, see Sally Engle Merry, \textit{International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism}, in \textit{Law and Society Reconsidered} (Austin Sarat ed. 2008).

\textsuperscript{8} Paul Schiff Berman is a prominent international lawyer and Dean of Sandra O-day Law School, Arizona. For his most recent work, see Paul Schiff Berman, \textit{Global Legal Pluralism}, 80 S. CAL. L. REV. 1155 (2007).

\textsuperscript{9} Boaventura de Sousa Santos is an eminent legal philosopher and Professor of Law, Director Centre for Social Studies, University of Coimbra, Portugal. For his most recent work, see \textit{Boaventura de Sousa Santos, The Heterogeneous State and Legal Pluralism in Mozambique}, 40 LAW & SOC’Y REV. 39 (2006) and Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, \textit{Law, Politics and the Subaltern in Counter-Hegemonic Globalization}, in \textit{Law and Globalization From Below: Towards a Cosmopolitan Legality} (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005). More recent work by respected legal pluralist scholars working in post colonial countries such as Indonesia and India respectively, includes Franz von Benda-Beckmann & Keebet von Benda-Beckmann, \textit{Transnationalisation of Law, Globalisation and Legal Pluralism: A Legal Anthropological Perspective}, in \textit{Globalisation and Resistance, Law Reform in Asia Since the Crisis} (Christoph Antons & Wolkmar Gessner eds., 2007), Franz von Benda-Beckmann & Keebet von Benda-Beckmann,
focuses especially on theoretical developments in the emerging field of
global legal pluralism and law and globalisation scholarship, providing
the theoretical basis for examination of the case study in the second
section.

Section two focuses on an area to which only scant scholarly
attention has been paid. It explores the incipient literature on law and
‘globalisation from below’; in particular, Santos’ recent work on subaltern
cosmopolitan legality, to examine the potential and limits of strategic
exploitation of global legal pluralism by local actors. To this end, it
examines the contemporary case study of Indonesia’s Indigenous peoples’
counter hegemonic struggle for recognition of their customary forest rights
within the emerging national and global REDD legal framework. This
“most intellectually challenging and politically compelling aspect of
globalisation” and nascent field of scholarship is interesting and
important for social movements around the world.

I. SECTION ONE: LEGAL PLURALISM THEORY

A number of grand statements on the significance of the theory of
legal pluralism, labeling it “the key concept in a postmodern view of

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10 Merry, in her recent contribution to global legal pluralism scholarship noted
the lack of sociolegal scholarship in the field of international law and globalisation.
Merry, International Law and Sociolegal Scholarship: Toward a Spatial Global Legal
Pluralism, in LAW AND SOCIETY RECONSIDERED (Austin Sarat ed. 2008). Mark Goodale
also recently noted the “poverty of theory through which transnational processes have
been conceptualised, explained and located in time and space.” Mark Goodale, Locating
Rights, Envisioning Law Between the Global and the Local, in THE PRACTICE OF HUMAN
RIGHTS, TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 4, (Mark Goodale &
Sally Engle Merry eds., 2007).

11 Santos notes that current studies on law and globalisation are “missing almost
entirely” a bottom-up perspective, and rather “draws on a rather conventional account of
globalisation and global legal transformations as top-down processes of diffusion of
economic and legal models from the global North to the global South. law and society
studies have largely failed to register the growing grassroots contestation of the spread of
neoliberal institutions and the formulation of alternative legal frameworks by
transnational advocacy networks and the populations most harmed by hegemonic
globalisation.” Santos & Rodriguez-Garavito, Law, Politics and the Subaltern in
Counter-Hegemonic Globalization, 2-3.

12 Id. at 2.
law”¹³ and “a central theme in the reconceptualisation of the law/society relation”¹⁴, have been made over the last thirty years. Law professor Brian Z. Tamanaha’s assertion that “[l]egal pluralism is everywhere” in a recent article suggests the concept has mileage yet.¹⁵ Of particular value and interest in today’s globalised society is the emerging theory and literature on global legal pluralism, or law and globalisation.

These theoretical developments provide analytical tools for examining power relationships between local, state and global legal systems, and also, for exploring the potential and limits for resistance and strategic use of global legal pluralism by local, non-state actors. This theory on global legal pluralism will provide the basis for analysis of the case studies in chapters two and three, which examine aspects of the struggle of Indigenous peoples in Indonesia and competing claims to forest resources. The focus of the case studies is on the national and global legal frameworks in relations to Indonesia’s forest landscape. In particular, it considers emerging legal frameworks surrounding REDD schemes (Reducing Emissions from Deforestation and forest Degradation in developing countries). REDD is being developed as part of the global architecture for mitigating anthropogenic impacts from climate change; however, it has much broader implications which are closely tied to the power relations between international, national and sub-national actors. This makes it a cogent example for a case study on global legal pluralism. The legal pluralism theory, on which this case study will be based, is presented next.

A. Development of the concept of legal pluralism

There have been three generally acknowledged phases in legal pluralism scholarship to date. The following section will outline these phases. It will particularly focus on the phase that is most recent and most pertinent to my case study, scilicet, law and globalisation.

Although related ideas on the sociology of law had been explored in the early twentieth century,¹⁶ the concept of legal pluralism had its

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¹⁵ Tamanaha, *Understanding Legal Pluralism*, 1. In fact, Tamanaha related this statement not only to the existence of multiple legal orders in every social arena, but also to the existence of the notion of legal pluralism itself in multiple academic and professional arenas. Tamanaha, *Understanding Legal Pluralism*, 1-2. Tamanaha acknowledged it as a ‘major topic’ in fields including legal anthropology, legal sociology, comparative law, international law and socio-legal studies. See also, Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate about Legal Pluralism*, 1998 J. LEGAL PLURALISM & UNOFFICIAL L. 21(1998).

¹⁶ The most renown of these are EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Arno Press. 1975), BRONISLAW MALINOWSKI, CRIME AND
renaissance in the late 1960s, originally from those pursuing the law and society research agenda.\textsuperscript{17} This phase, known as ‘law and colonisation,’ examined the classical interplay between customary and state law, and expanded to include religious law and courts.\textsuperscript{18} While in the first phase, legal systems were generally seen as parallel and autonomous, ‘new’ legal pluralism\textsuperscript{19} in the 1980s emphasised the dialectic, mutually constitutive relationship between state law and other normative orders.\textsuperscript{20} In this phase, the attention shifted to noncolonised, industrial countries of Europe and the United States, thus attracting the label ‘legal pluralism at home’\textsuperscript{21}. While the dominance of state law was unquestionable in these countries, scholarship focused on “the extent to which other forms of regulations outside law constitute law.”\textsuperscript{22}

The most recent focus of legal pluralism scholarship is linked with the current era of globalisation\textsuperscript{23} and is known as either ‘law and globalisation’ or ‘global legal pluralism’. One of the earliest writers linking legal pluralism with globalisation was Gunther Teubner.\textsuperscript{24} Teubner took Ehrlich’s scholarship, based on empirical study of an area in the Austrian Empire called Bukowina, and expanded this to a transnational field referring to ‘Global Bukowina’ and juxtaposing Ehrlich’s notions of

\begin{thebibliography}{99}
\bibitem{Hooker} A seminal piece of this period was Hooker’s comprehensive review of colonial and post-colonial law in Asia, Africa and the Middle East. M. B. HOOKER, \textit{LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS} (Clarendon Press. 1975).
\bibitem{Merry} Merry refers to the first phase as ‘classic’ legal pluralism, which was replaced by ‘new’ legal pluralism in the 1980s. Merry, \textit{Legal Pluralism}, 880.
\bibitem{Ehrlich} Id.
\bibitem{Berman} Id. at 874.
\bibitem{Groundwork} Id. Groundwork in this area had already been laid by the person commonly considered the father of sociology of law, Eugene Ehrlich. In the early twentieth century Ehrlich examined the disjuncture between state posited law and the law lived by the people, which he termed ‘living law’. He insisted that the “center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time.” EHRlich, 390.
\bibitem{Globalisation} It is acknowledged that the idea of an ‘era of globalisation’ is itself contested. I agree with Berman’s view that whether, as an empirical matter, the world is more or less globalised than at other times, is less important than the fact that many people-government actors, multilaterals, corporations, general citizens- using the term think and act like it is a real phenomena. Berman, 1169, n. 50.
\end{thebibliography}
state’s law, lawyer’s law and living law. Teubner’s assertion that a theory of legal pluralism is required to effectively examine transnationalisation of law, as compared to a political theory or an institution theory, flows from his main thesis that global law is created by the social peripheries rather than from the political centers of nation-states and international institutions.

Francis Sydner and Oren Perez were among the first to introduce the term ‘global legal pluralism’ to conceptualise the transnational instances of legal pluralism. But the most sophisticated writing thus far is that of law professor Paul Schiff Berman. According to Berman, “[s]cholars seeking to understand the multifaceted role of law in an era of globalisation must take seriously the insights of legal pluralism.” He notes that legal pluralism shifts the focus of attention from official government rules or sovereign actions to the fact that often transnational or sub-national norms may be more powerful. Berman advocates the use of a legal pluralism framework when working in an international law context for a number of reasons. It allows for discussion and study of the interaction between the multiplicity of communities found in the international system, as well as, the mutually constitutive nature of state law and other normative orders. He also advocates a broader conception of law that allows acknowledgement of non-governmental norms because, in doing so, the “real force these norms have and the ways in which they interpenetrate official legal doctrine” is less likely to be missed.

B. ‘Non-state law’: The other hemisphere of the legal world

Legal pluralism and the existence of non-state law is not a new phenomenon in legal history. While the notion itself has been developed

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25 Id. at 6-7.
26 Id. at 7.
29 Berman, Global Legal Pluralism, 1169.
30 Berman, From International Law to Law and Globalisation, 539.
31 Berman, Global Legal Pluralism, 1176-1177.
32 Berman, From International Law to Law and Globalisation, 556.
33 Merry, Toward a Spatial Global Legal Pluralism. 2. Tamanaha also recently stated that legal pluralism in a common historical condition. “The long dominant view that law is a unified and uniform system administered by the state has erased our
in more recent times, a close look at many different historical contexts reminds us that legal pluralism and, indeed, global legal pluralism has existed over a variety of temporal and spatial moments.\footnote{For example, if one takes the combined Roman Empire and Medieval periods, then it is evident that the coexistence of legal norms was the normal state of affairs for around two thousand years of European history. See A. ULLMAN, THE MEDIEVAL IDEA OF LAW (Barnes and Noble. 1969), NORBERT ROULAND & PHILIPPE PLANEL, LEGAL ANTHROPOLOGY (The Athlone Press. 1994).} This was especially so before the state building period in Europe, from the 13th century, in which “consolidation of law in the hands of the state was an essential aspect.”\footnote{Tamanaha, Understanding Legal Pluralism, 8.} By the 17th and 18th centuries, in Western civilization, public and private realms were more sharply distinguished and law became linked exclusively with the state.\footnote{For the history of the relation between state and law, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITCS IN THE PARADIGMATIC TRANSITION 21-84 (Routledge. 1995).}

Challenging this contingent political situation, many legal pluralists reject, as Griffiths puts it, “the ideology of legal centralism.”\footnote{John Griffiths, What is Legal Pluralism?, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 3 (1986).} In such a conception, “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.”\footnote{Id. at 3-4.} Griffiths asserts that strict adherence to this ideology has long been a major obstacle to the development of a descriptive theory of law and to accurate observation of legal reality.\footnote{Id. at 3-4.}

Indeed, legal pluralism scholarship “has focused on the rejection of the state legal order as the lynch-pin of legal normativity.”\footnote{McDonald & Kleinhans, 30. This is not to say that legal pluralism necessarily denies the importance, or even the dominance of state law. While this may have been part of the political motivation behind some legal pluralist’s work, as an analytical concept, this need not be inherently so. Franz von Benda-Beckmann, Who’s Afraid of Legal Pluralism?, 47 J.Legal Pluralism 37 (2002). For more, see chapter three.}

Teubner was one of the first to make this assertion in the context of globalisation, contending that role of the law-making is no longer the monopoly of the state.\footnote{Teubner, 3-4.} Building on the work of Teubner, Berman notes that the two guiding principles of traditional international law study: 1) law was found only from acts official state-sanctioned entities, and 2) it...
was an “exclusive function of state sovereignty,” have now been eroded.  
Along with the rise of individuals as stakeholders in human rights law, this is due to the increasing recognition of the host of ways non-state actors limit state sovereignty. Recent scholarly interest in international norm development considers overlapping jurisdictions by nation-state, but also, “norms articulated by international bodies, nongovernmental organisations (NGOs), multinational corporations and industry groups, Indigenous communities, transnational terrorists, networks of activists, and so on.”

Randeria recognised the “vital contributions” made by transnationally connected civil society actors to international legal formation due to their ability to bridge the activist-professional, state-community and local-global, divides. Esteemed law professor Boaventura de Sousa is of the view that subaltern actors, often working in transnational networks, alliances, and social movements, “are a critical part of processes whereby global legal rules are defined.” Indeed, he asserts that civil society actors have “contested the traditional status of the state as the sole actor in processes of construction and enforcement of international human rights regimes.”

According to Berman:

Rather than focusing solely on the nation state, therefore, the study of law and globalisation helps us to recognise that, in a world of permeable borders, multiple affiliations, and overlapping interest, law is diffused in myriad ways, and the construction of legal communities is always contested, uncertain and open to debate.

Berman also notes that the legal pluralism framework allows for disparities in power and other differences between normative orders. In this way, the concept of legal pluralism does not deny the significance of state law, or lack thereof, but provides an analytical tool to be able to

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42 Berman, From International Law to Law and Globalization, 487.
43 Berman, Global Legal Pluralism, 1175. Santos also recognises that increased transnational interconnectedness “has given rise to a ‘transnational civil society’, whose privileged actors are NGOs”. BOAVANTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBLIZATION, AND EMANCIPATION 185 (Butterworths 2d ed. 2002). Michaels similarly acknowledges that in a globalised world supranational organisation, non-state organisation and powerful private players might be lawmakers. Ralf Michaels, The Re-State-ment of Non-state Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism, 51 WAYNE L. REV 1209, 1211 (2005).
46 Id. at 20.
47 Berman, From International Law to Law and Globalization, 556.
48 Berman, Global Legal Pluralism, 1178.
examine how far state law penetrates and to examine spaces of resistance, adaptation, contestation, and appropriation.\textsuperscript{49} According to Santos, the centrality of the nation-state to law in the last few centuries has only been possible because the other ‘time-spaces of law’, the local and the global, “were formally declared non-existent by the hegemonic liberal political theory.”\textsuperscript{50} Part of Santos’s project is to show that the legal landscape in contemporary societies is far more complex and rich than has been assumed by liberal political theory, and to show that these landscapes contain “a constellation of different legalities (and illegalities) operating in local, national, and global time-spaces.”\textsuperscript{51}

In the context of globalisation, a few scholars are beginning to examine the relationships between transnational law, state law, and various ‘local’ or regional legal systems. One of the forms of globalisation and law linking these three arenas identified by Santos is ‘localised globalism’, which “entails the specific impact of transnational practices and imperatives on local conditions that are thereby altered and restructured in order to respond to transnational imperatives.”\textsuperscript{52} This focuses on ‘top down’ processes that have hereto dominated scholarly attention. Chapter two examines some of the top down transnational legal processes relating to the forests of Indonesia, not only in the current era of globalisation, but also, in the colonial and postcolonial periods.

However, a handful of studies are starting to emerge with a focus on ‘bottom up’ law. Santos, noting the “overwhelmingly” focus in existing literature on top-down globalising processes by the most visible, hegemonic actors, offers the concept of counter-hegemonic subaltern cosmopolitan legality, whose purpose is “to expose the potential and the limitations of law-centered strategies for the advancement of counter-hegemonic political struggles in the context of globalisation.”\textsuperscript{53} This subaltern cosmopolitanism consists of various organisations of

\textsuperscript{49} Merry also recognises the framework legal pluralism provides for examining the relationship between dominant and subordinate groups or classes in situations of legal pluralism. She states that it offers ways to consider the possibility of domination through law, as well as limits and resistance to this domination. Sally Engle Merry, \textit{Anthropology, Law and Transnational Processes}, 21 \textit{ANNU. REV. ANTHROPOL.} 357, 372 (1992).

\textsuperscript{50} SANTOS, \textsc{TOWARD A NEW LEGAL COMMON SENSE} 85.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.} at 179. Similarly, ‘glocalisation’ is a term coined by Randeria Shalini to describe the increasing interaction between local peoples and transnational legal fora. Shanil Randeria, \textit{Glocalization of Law: Environmental Justice, World Bank, NGOs and the Cunning State of India}, 51 \textit{CURRENT SOCIOLOGY} 305 (2003). Santos also notes that it is especially upon the ‘peripheral countries’ that localised globalism is imposed. SANTOS, \textsc{TOWARD A NEW LEGAL COMMON SENSE} 179.

subordinate nation-state, regions, groups, or communities, who organise globally in defence of common interests, “and use to their benefit the capacities for transnational interaction created by the world system.” Having evolved from a growing awareness of the new opportunities provided by globalisation for transnational creativity and solidarity:  

the perspective of subaltern cosmopolitan studies of globalisation aims to empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter.

Disclaiming subaltern cosmopolitan legality as a theory or set of fixed substantive claims, Santos maintains that its main contribution is its unique ‘bottom-up’ perspective. It aims to amplify the voices of those who have suffered from neoliberal globalisation, such as Indigenous peoples, and to privilege these excluded groups “as actors and beneficiaries of new forms of global politics and legality.” This is in contrast with the top-down approach, which misses:

the myriad local, non-English-speaking actors- from grassroots organisations to community leaders, who, albeit oftentimes working in alliance with transnational NGOs and progressive elites, mobilise popular resistance to neoliberal legality while remaining as local as ever.

Subaltern cosmopolitanism encourages examination of the ways in which small isolated and excluded local communities increasingly speak in the global area, and as noted by Merry, “what they speak is law; a law which is a multi-layered amalgam of UN resolutions, national law, and local categories and customs.” This is evidence of the increased opportunities offered to local actors to use to their benefit capacities for

54 SANTOS, TOWARD A NEW LEGAL COMMON SENSE 180.
56 Id. at 13.
57 Id. at 4. Note here that, as described in chapter two with forest legalities in Indonesia, the struggle of Indigenous peoples against hegemonic forces and against exclusion has not just been recent occurrence, but one that has been ongoing since colonisation.
58 Id. at 9.
59 SANTOS, TOWARD A NEW LEGAL COMMON SENSE 473.
transnational interaction.\textsuperscript{61} While there is a body of research on how legal systems and actors interact within a state system,\textsuperscript{62} increased transnational dimensions of legal pluralism offer new opportunities along similar principles. In a situation of legal pluralism within a state, actors have opportunities to be strategic in their maneuvering of the systems, often playing the competing systems against one another.\textsuperscript{63} They may use the state legal system when it suits them, but not at all times.\textsuperscript{64} Rather, they are frequently ‘Janus-faced’, choosing the legal system that suits their particular objective, a phenomenon that has been called ‘forum shopping’.\textsuperscript{65} In an increasingly interconnected world, transnationalised law and an expanding international legal system increases the repertoire of

\textsuperscript{61} Santos, Toward a New Legal Common Sense 473.


\textsuperscript{63} Tamanaha, Understanding Legal Pluralism, 60.

\textsuperscript{64} Benda-Beckman, 27.

\textsuperscript{65} This concept originated in private international law but was first used in the legal pluralism literature by Keebet von Benda-Beckman in Benda-Beckmann, Forum Shopping and Shopping Forums: Dispute Processing in a Mingangkabau Village in West Sumatra.
legal systems available, providing new legal resources and sources of legitimacy for local peoples. As noted by Merry, “[I]ocal actors face a richer and more diverse legal terrain than they did, a terrain which provides new possibilities for using the law as a form of resistance. And local actors are using it extensively.”

According to Santos, this legal plurality “plays a central role in cosmopolitan legality.” One of the main tasks involved in a subaltern cosmopolitan legality is inquiring into ways it operates across a variety of legal and political systems how actors strategically use state, non-state and supra-state legal orders thus taking up “the opportunities offered by an increasingly plural legal landscape.” It is also “inherent” to the perspective because cosmopolitan legality is anti-monopolistic in that it recognises rival legal claims.

Transnational legal processes and ideologies of commercialism and conservationism have impacted on the rights of Indigenous peoples in Indonesia to forest resources in a hegemonic fashion for centuries. However, it is only recently, in an era of globalisation, that increasingly transnationally connected local actors have had opportunities to exploit the resources offered by international legal fora. While it is beyond the scope of this article to examine all the ways Indigenous peoples in Indonesia have done this with regard to forest resources, an analysis of two instances in the context of REDD is stated in section three. Section two maps the emerging legal and policy framework for the REDD scheme, especially in relation to Indonesia, providing the context for the case studies in the third section.

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67 SANTOS, TOWARD A NEW LEGAL COMMON SENSE 468.


69 SANTOS, TOWARD A NEW LEGAL COMMON SENSE 473.

70 For a brief example of two other recent occasions, in June 2009 Indonesian NGO Sawitwatch and AMAN wrote a letter to the Indonesian Minister of Forestry regarding REDD-related policy and legal proposals, drawing on a number of national and international legal and policy sources and appealing for increased recognition of the rights of Indigenous peoples in Indonesia. They also made a similar submission to the World Bank which was (and still is, as of October 2009) considering admitting the Indonesian State to their lucrative REDD scheme, known as the Forest Carbon Partnership Facility. See Sawitwatch and AMAN, Letter to Minister of Forestry RE: Indonesian Draft Readiness Plan, 16 October 2008, May 15 2009, available at http://www.redd-monitor.org/2009/06/02/indonesian-ngos-call-for-transparency-consultation-and-rights-in-redd-plans/. This illustrates the fact that local actors often use norms and institutions at various levels and of different sources of legitimacy simultaneously.
II. SECTION TWO: REDD AND INDONESIA

A. UNFCCC and the Kyoto Protocol

Under the United Nations Framework Convention on Climate Change (UNFCCC)\(^71\) the first protocol to be negotiated relating to climate change was the Kyoto Protocol in 1997. This came into force in 2005 and set binding targets for reduced green house gas (GHG) emissions. Deforestation was controversially not included in the market-based mechanisms for reducing emissions; however, increased recognition of the impact of deforestation in recent years has led to the proposal that a post-Kyoto (2013) agreement should include mechanisms for Reducing Emissions by preventing Deforestation and forest Degradation (REDD). This will primarily be aimed at developing countries, providing them financial benefits for conserving their forests and decreasing their emissions.

REDD was formally recognised as a strong contender for inclusion in a post-Kyoto agreement at the UNFCCC 13\(^{th}\) Conference of the Parties (COP-13) in December 2007 in Bali.\(^72\) COP-13 made a specific decision on REDD, which invited states to support ongoing efforts to reduce emission from deforestation on a voluntary basis.\(^73\) In the Copenhagen Accord, drafted in December 2009 at the United Nations Framework Convention on Climate Change Conference of the Parties No. 15, three of the twelve paragraphs included REDD measures.\(^74\) Prior to this, voluntary projects had already commenced, often with international private investment actors in conjunction with NGOs.\(^75\)

Indonesia, responsible for almost a third of global carbon emission from deforestation and forest degradation,\(^76\) is a prime candidate for REDD schemes; and in May 2009, Indonesia was the first country in the

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\(^71\) The UNFCCC has been ratified by 192 countries and entered into force in 1994.


\(^73\) Decision 2/CP.13. “Reducing emission from deforestation in developing countries: approaches to stimulate actions in report of the Conference of the Parties on its Thirteenth Session.” This decision also encouraged parties to explore a range of actions, and undertake demonstration activities to address the drivers of deforestation in order to reduce emissions.

\(^74\) See paragraphs 6, 8 and 10, Draft Decision-/CP.15, Copenhagen Accord, (FCCC/CP/2009/L.7), 18 December 2009.

\(^75\) According to the World Bank, in March 2009, there were 20 voluntary REDD projects underway in Indonesia. Reuters.com29/3/09.

\(^76\) The World Bank, “Indonesian and Climate change: Current Status and Policies” (The World Bank, 2007) at 1.
world to enact national REDD regulations.\textsuperscript{77} Article 1 of this Regulation parrots previous forestry legislation, recognising Indigenous forest only as state forest in an area of customary law, and claims it is not burdened by proprietary rights. However, a new forest category of ‘village forest’ is added.\textsuperscript{78} This is still defined as a state forest, but one that is “managed by the village and used for welfare of the villager and not yet burdened by permits/rights.”\textsuperscript{79} National entity implementers of REDD programs include customary forest managers and village forest managers,\textsuperscript{80} which at first glance, seems to provide for local adat (Indonesian customary law) forest dwelling or dependent communities to benefit from Indonesia’s REDD involvement. However, Article 8 provides that a manager must have a copy of a Ministerial Decree to say that he is the manager of customary or village forest, (which practically, administratively and financially will almost never happen) and along with other requirements to submit an application to the Minister of Forestry, who assigns the REDD Commission to conduct an assessment.\textsuperscript{81} In a move that ignores decentralisation reforms and retains centralized, authoritarian Ministry of Forestry control, the Minister may approve or reject the application, but there is no mention of the criteria he may or should take into consideration in making this decision.\textsuperscript{82}

Nowhere in the Regulation is there any mention of obligations to local communities, forest-dependent peoples, tenure security or Indigenous rights, or benefits that will flow to these communities who have often been maintaining the forest and the now valuable carbon stored within for centuries. According to a group of local and international NGOs, and Indonesian Indigenous peoples:

In effect, Indonesia’s REDD Regulation and Law on Forestry allows the state to create a massive system of publicly- and privately-held forestry concessions and ‘carbon sinks’ in the forests traditionally owned by Indigenous peoples without any regard for their rights or


\textsuperscript{78} REDD Regulation, Article 1, paragraphs 4 and 5.

\textsuperscript{79} REDD Regulation, Article 1, paragraph 6.

\textsuperscript{80} REDD Regulation, Article 4, paragraph 2.

\textsuperscript{81} REDD Regulation, Article 12, paragraphs 1 and 2.

\textsuperscript{82} REDD Regulation, Article 12, paragraph 4.
existence.\textsuperscript{83}

In the author’s opinion, this is disappointing, especially given Indonesia’s support of the United Nations Declaration on the Rights of Indigenous Peoples (‘UNDRIP’) adopted by the General Assembly in 2007.\textsuperscript{84} Article 26 is the most relevant in this context. It provides that Indigenous peoples have the “right to the lands, territories which they have traditionally owned, occupied or otherwise used or acquired.”\textsuperscript{85} It also provides that “States shall give legal recognition and protection to these lands, territories and resources” in a way that respects tradition and land tenure systems of the indigenous people concerned.\textsuperscript{86} Article 29, also worth noting, provides that “Indigenous peoples have the rights to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.” The UN-REDD Joint Programme in which Indonesia is participating, has incorporated the UNDRIP into its operational policy instruments.\textsuperscript{87} However, the lucrative World Bank REDD scheme to which Indonesia has recently applied, known as the Forest Carbon Partnership Facility, has not recognised or incorporated the UNDRIP.

In response to the emerging REDD scheme, Indigenous peoples round the world, particularly in Indonesia, have made strategic and innovative use of global legal pluralism to help secure their rights.

\textsuperscript{83}Request for Further Consideration of the Situation of Indigenous Peoples in the Republic of Indonesia under the Early Warning and Urgent Action Procedures. Seventy-fifth Sess. (2009). They conclude that “implementation of the Law on Forestry, the REDD regulation and REDD activities is likely to cause significant and irreparable harm to Indigenous peoples whose traditional lands in Indonesia include a large percentage of the remaining forest areas.”

\textsuperscript{84}United Nations Declaration on the Rights of Indigenous People 2007 A/61/L.67. While it is not strictly binding in international law, the Declaration “represents the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions”. United Nations Permanent Forum for Indigenous Issues, Frequently Asked Questions, Declarations on the Rights of Indigenous Peoples, 2 (2007).

\textsuperscript{85}UNDRIP, Article 26, paragraph 1.

\textsuperscript{86}UNDRIP, Article 26, paragraph 1.

III. SECTION THREE: INDIGENOUS RESISTANCE TO REDD

In this section, the potential and limits of leveraging international systems to secure rights in counter hegemonic globalisation are explored. To this end, a contemporary case study is offered of the struggle of Indonesia’s Indigenous peoples to secure customary forest rights in the context of REDD-related law and policy creation at regional, national and international levels.\(^{88}\) The two year,\(^ {89}\) ongoing campaign by Indonesia’s Indigenous peoples to influence REDD law and policy creation at the UNFCCC, the UNREDD programme, the World Bank and the Indonesian government has been waged in collaboration with national and international environmentalist NGOs, international forest peoples’ right groups and the wider transnational Indigenous movement. It illustrates the potential and limitations of attempts to leverage international bodies such as the United Nations Committee for Convention for the Elimination of Racial Discrimination (‘the Committee’) in support of Indigenous rights, as well as innovative conceptions of law drawn from plural sources, as demonstrated in the Sinar Resmi Declaration. This case study will be particularly useful for understanding the relationships between local, national, transnational, and global institutions in counter hegemonic globalisation for several reasons.

The first reason relates to the transnational composition of the actors involved, including the Indonesian state, various elements of the international legal system and a variety of non-state actors. The resistance has consisted of not only Indigenous peoples from all over the Indonesian archipelago, represented by the national alliance Aliansi Masyarakat Adat Nusantara/Indigenous Peoples’ Alliance of the Archipelago (‘AMAN’), but also numerous other local community groups, provincial organisations, Jakarta-based policy and advocacy NGOs, national human rights organisations,\(^ {90}\) as well as international environmental alliances, Western

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\(^{88}\) To the author’s knowledge, this case study has not been examined by any scholar to date. In fact, Indigenous peoples’ struggle in relations to REDD in any country has not been examined.

\(^{89}\) REDD has been an issue for indigenous people in Indonesia and around the world for about 2 years, however, the campaign for forest rights against TNCs involved in palm oil plantations and other deforestation activities, the Indonesian government, and before that, the colonial government has been ongoing for over a century.

\(^{90}\) For example, the following are the eight Indonesian NGOs/Indigenous groups (of community, district, provincial and national levels), one Indonesian chapter of a international network and one international NGO who made the submissions to the CERD Committee: 1) Aliansi Masyarakat Adat Nusantara/AMAN (Indigenous People Alliance of the Archipelago): An alliance representing Indigenous Peoples from the whole of Indonesia. 2) Provincial alliances who make up AMAN are very active, eg. Aliansi Masyarakat Adat Kalimantan Barat (Indigenous Peoples’ Alliance of West Kalimantan) was also a signatory to the CERD submissions. 3) Perkumpulan Sawit Watch: An Indonesian Network concerned with the adverse impacts of oil plant plantation development in Indonesia. It is active in 17 provinces. 4) Lembaga Studi da
NGOs, various transnational Indigenous alliances\textsuperscript{91} and the United Nations Permanent Forum for Indigenous Issues (‘PFII’). Other actors involved with REDD in Indonesia, but generally not so concerned about the role of Indigenous peoples, include transnational corporations and provincial governments,\textsuperscript{92} the national Indonesian government, the World Bank, several Western governments\textsuperscript{93} and a number of United Nations agencies.\textsuperscript{94}

Advokasi Masyarakat/ELSAM (The Institute for Policy Research and Advocacy): works to promote accountability for gross human rights violations in Indonesia. 4) Wahana Lingkungan Hidup Indonesia/WALHI (Friends of the Earth Indonesia): works to defend Indonesia’s natural resources and associated local communities from unjust economic development. It is represented in 25 provinces and has over 438 member organisations (as of June 2004) and is a member of the International Friends of the Earth network. 5) Perkumpulan Untuk Pembaharuan Hukum Berbasis Masyarakat da Ekologis/HuMA (Association for Community and Ecologically-based Legal Reform) 6) Yayasan Padi Indonesia: concerned with sustainable development. 7) Lembaga Bela Banua Talino (Institute for Community Legal Resources Empowerment): established to advocate for reformed regulations and policies regarding the rights of local communities and Indigenous Peoples. 8) Lembaga Gemawan (The Institution of Swandiri Society Empowerment): designed to empower local communities. 9) Institut Dayakologi (Institute for the studies of Dayak): a community-based organisation aiming to revitalize and restore the cultural identity of the Kayak communities in Kalimantan. 10) Forest Peoples Programme/FPP: An international NGO that supports the rights of forest peoples.


\textsuperscript{91} For example the Anchorhage Declaration (2009) and the Accra Statement (2008).

\textsuperscript{92} For example, in Aceh in June 2008 investment bank Merrill Lynch made a voluntary deal with the provincial government of Aceh worth, at this stage, $9 million for carbon credits in the Ulu Masen Rainforest. Also in Aceh, Sustainable Forestry SEAsia Inc. is looking make a similar deal in relation to the Leuser national park. See Seeing ‘REDD’? Forests, climate change mitigation and the rights of indigenous peoples and local communities (2009). As of March 2009, there were an estimated 20 voluntary carbon credit programmes on their way in Indonesia

\textsuperscript{93} Australia has secured numerous bilateral agreements with Indonesia in relation to REDD. The principal of these is the Indonesia-Australia Forest carbon Partnership, signed on 13 June 2008. This includes a $40 million support package on forests and climate change. Specifically, Australia has targeted Kalimantan for the first, large scale REDD demonstration activity of its kind in Indonesia under The Kalimantan Forests and Climate Partnership. These projects are orientated towards carbon trading. \textquote{REDD Concerns Deepen}', Down to Earth Newsletter No. 82, (September 2009) available at http://dte.gn.apc.org/82acl.htm.

\textsuperscript{94} For example, the international legal framework for REDD is been worked out through the United Nations Convention Framework for Climate Change (‘UNFCCC’). The UNREDD Programme is a collaborative programme that is made up of United Nations Environment Programme (‘UNEP’), the United Nations Development Programme (‘UNDP’) and the Food and Agricultural Organisation of the United Nations (‘FAO’). United Nations bodies more sympathetic to the cause of Indigenous peoples in this case study include The United Nations Committee for Convention for the Elimination of Racial Discrimination (‘the Committee’), the United Nations Permanent
Second, the resistance brings to light the potential of strategic utilisation of situations of global legal pluralism by grassroots actors. The resistance in these case studies has been framed not only in terms of evolving local customary principles and law, national laws, the Indonesian constitution, but also in term of international law and global public policy, indicating the various sources of legal pluralism involved. Analysis of this case study shows the potential this situation of legal pluralism has to seek new (or neotraditional) legal understandings, and alternatives to the hegemonic status quo. This case study also highlights the limitations of appealing to international bodies and appropriating national law in the context of power differentials between the different legal systems.

A. The CERD Committee: Strategic use of global legal pluralism

This example outlines the attempted leveraging by local actors, in collaboration with international environmental networks and a Western NGO, against the government of Indonesia through the urgent action and early warning procedures of the Convention for the Elimination of Racial Discrimination (‘CERD’) committee. These procedures are directed at preventing existing structural problems from escalating into conflicts and criteria for early warning procedures include: a lack of adequate legislative basis for prohibiting all forms of racial discrimination, and encroachment on the lands on minority communities. Merry’s ethnographic analysis of a similar convention, the United Nations Convention of the Elimination of All Forms of Discrimination against Women (‘CEDAW’), suggests that despite the lack of enforceability of this convention to compel states to comply with the obligations they assumed by ratifying the treaty, it is similar to state law in that it does important cultural and legitimacy work.

For more information, please refer to the following:

95 These were developed in 1993 to enable measures to prevent and respond more effectively to violations of the Convention. It was adopted from the working paper A/48/18, Annex III, available at http://www2.ohchr.org/English/bodies/cerd/early-warning.htm. The Committee is charged with monitoring compliance of the States (including Indonesia) that have ratified CERD.

96 A/48/18, Annex III, paragraph 8(a).

97 A/48/18, Annex III, paragraph 9(b)(i) and (v). These procedures have been utilised by Indigenous Peoples before, namely in New Zealand in relation to the Foreshore and Seabed Act 2004. In this case, rather than writing a letter, CERD sent special rapporteur and made a decision on the issue. For the decision, see Office of the High Commissioner for Human Rights, Decision1(66): New Zealand 27/04/2005, CERD/C/DEC/NZL/1, available at http://www2.ohchr.org/English/bodies/cerd/early-warning.htm.

98 SALLY ENGLE MERRY, Constructing a Global Law: Violence against Women
Under the procedures, the previously mentioned groups\(^9\) first made a ‘Request for Consideration of the Situation of Indigenous Peoples in Kalimantan, Indonesia’ on 6 July 2007.\(^10\) This submission focuses mainly on the palm oil plantations that the government has approved all over Indonesia, but especially in Kalimantan, on territories traditionally owned by Indigenous peoples in the area.\(^11\) However, the issues this raises are longstanding and also relevant to REDD. The letter outlines the ways Indonesian law discriminates against Indigenous peoples and their claims to forests, focusing on the Constitution, BAL, the 1999 Forestry Act and the 2004 Plantation Act. Playing off one part of the UN legal system (CERD) against another legal system (Indonesian state) in support of yet another legal system (customary/adat) it requests the Committee to recommend, inter alia, that Indonesia adopt legislative, administrative and other measures to give full effect to the rights of Indigenous peoples.\(^12\) Demonstrating an awareness of the relative power and different roles of the heterogeneous UN system, it also requests that the Committee draw the attention of the UN Secretary General, the HRC, the UNPFII and the

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\(^9\) See footnote 233 for the list of submitting parties.


\(^12\) Request for Consideration.

*and the Human Rights System*, 28 Law & Social Inquiry 941, 942-943 (2003). Merry states that while it “is law without sanctions” per say, nonetheless, through the process of national and international NGOs as well as other international actors endeavouring to shame noncompliant governments, a cultural system is developed “whose coin is admission into the international community of human-rights-compliant states”. Similarly, only a small percentage of conflicts in state law come before the court and “compliance depends largely on individual consciousness of law . . . .” Despite its lack of sanctions, CEDAW can be considered part of an emerging global system of law. As global law has expanded, it has acquired greater influence over national and local systems of law.” MERRY, *Constructing a Global Law- Violence against Women and the Human Rights System*, 943.
OHCHR to the situation of Indigenous peoples in Indonesia. Further exploiting the array of transnational legal resources, the submission also refers to the Inter-American Commission on Human Rights’ interpretation of public interest and Indigenous peoples’ rights to land and resources.

The Committee, in response to the request and as part of its consideration of the report submitted by the Indonesian state, made concluding observations at its seventy-first session and requested the Indonesian state to provide information on how it followed up on the Committee’s recommendations within a year. More than a year and a half later, with still no response from the Indonesian government, in February 2009, the same NGOs made another ‘Request for Consideration of the Situation of Indigenous Peoples in Indonesia’. This submission references the concluding observations of the Committee’s seventy first session and claims that, not only has the state not written its report or put into practice the Committee’s recommendations, but it has been drafting new laws and regulations that perpetuate discrimination against Indigenous peoples. It uses as its main example the 2008 draft regulation on REDD. The submission notes that the regulation requires the state to be the “sole regulator of forest areas without recognising or protecting the rights and forest stewardship role of traditional and Indigenous peoples” which “[i]n both word and intent . . . serves to reiterate existing violations of Indigenous peoples’ rights found in other national laws.” The submission also notes the ways the REDD regulation perpetuates a number of the deficiencies noted by the Committee’s observations in 2007, such as the state determining whether Indigenous peoples exist, which ignores the principles of self identification. Cashing in on international legal developments since their last submission, this submission points out that the Committee’s observations are consistent with the UNDRIP, which was adopted with Indonesia’s support and, inter alia, requests the Committee to recommend the state amend the

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103 Id.

104 Id. citing Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname). (2006).

105 CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Indonesia, 15 August 2007. CERD/C/IDN/CO/3 (2007). The Committee noted its appreciation of the contribution of many Indonesian NGOs, which it felt “enhanced the quality of the dialogue with the State party.” CERD, 2.


107 Id. Italics are mine.

108 CERD, paragraph 15.

109 Request for Consideration
REDD regulation so that it is fully consistent with its obligations under CERD and the UNDRIP.\textsuperscript{110}

It is the author’s opinion that this is an innovative exploitation of the tension between draft state laws, the previous recommendations of the Committee, and customary legal concepts such as the role of Indigenous peoples as stewards of the forest - a concept which is not mentioned, let alone recognised by either international law or national law. The creative appropriation of Western law and hybrid incorporation of Indigenous norms represents a truly pluralistic form of resistance to hegemonic legal conceptions. It shows that from the perspective of local actors, rather than being conceived as universal and homogenous “rights are cultural resources deployed in specific cultural contexts by local agents operating within legally and culturally plural frameworks.”\textsuperscript{111} This also demonstrates a process referred to as ‘legal vernacularisation’ by Merry.\textsuperscript{112} That is, in the same way languages are vernacularised over time in a different culture and by association with other languages, so to, when the global human rights system and international law is mobilized by social movements and local actors it is reinterpreted and transformed in accordance with their own legal concepts.\textsuperscript{113} It demonstrates the space that is opened by transnational fora to “new discourses and subjectivities not recognised in national cultures or laws”.\textsuperscript{114} In this case, these include racial discrimination against Indigenous peoples, (CERD) the collective rights of Indigenous peoples (UNDRIP), self identification rights, new interpretations of ‘public interest’ (Inter-American Commission on Human Rights), alternative interpretations of ‘national interest’ (CERD) and Indigenous propriety rights to forest (CERD Committee). This rich new world of concepts, rules and resources provided by the global legal order opens up new space for the use of law as resistance, and is clearly being utilised by local actors.\textsuperscript{115}

Responding within a month, the Chairperson of CERD wrote Indonesia’s UN Ambassador a stern letter strongly condemning how “Indonesia continues to lack any effective legal means to recognise, secure and protect Indigenous peoples’ rights to their lands, territories and resources”, and noting how the draft REDD Regulation denies Indigenous

\begin{flushright}
\textsuperscript{110} Id.
\textsuperscript{111} MERRY, Global Human Rights and Local Social Movements in a Legally Plural World, 249.
\textsuperscript{112} MERRY, Legal Pluralism and Transnational Culture, 29.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} MERRY, Global Human Rights and Local Social Movements in a Legally Plural World, 250.
\end{flushright}
peoples proprietary rights in forests.\textsuperscript{116} The Committee requested comments with respect to Indonesia’s implementation of its recommendations by 31 July 2009. This is an example of Keck and Sikkink’s “boomerang effect”, where social movements make claims directly to international institutions, which then “bounce back” to pressure the state.\textsuperscript{117}

The Indonesian state did not comply, prompting a further request for consideration by the same NGOs in July 2009.\textsuperscript{118} This submission notes that the REDD regulation had entered into force on 1 May 2009, heedless of any recommendations by CERD, national and international NGOs and Indigenous groups. It also condemns current processes and substantive policy and legal proposals of the Indonesian state in its application to the World Bank’s FCPF. Not only does the letter request the Committee make various recommendations to the state regarding Indigenous rights and REDD\textsuperscript{119}, but it also asks that the Committee formally request the World Bank’s FCPF ensure that Indigenous peoples’ rights are secured within its mandate - referencing the FCPF’s own charter.\textsuperscript{120} In support of these requests, the submission refers to the numerous UN bodies who have recognised the potentially devastating effects of REDD for Indigenous peoples’ rights, including the PFII,\textsuperscript{121} the UN REDD Programme,\textsuperscript{122} the OHCHR\textsuperscript{123} and the UN Special Rapporteur on the right to food who highlighted the potential for large scale ‘land grabbing’ posed by REDD schemes.\textsuperscript{124} This section supports Tamanaha’s recent assertion that because official legal systems most often carry institutionalised support and symbolic authority, strategic actors will try to


\textsuperscript{117} MARGARET KECK & KATHRYN SIKKINK, Activists Beyond Borders: Advocacy Networks in International Politics (Cornell University Press. 1998).

\textsuperscript{118} Request for Further Consideration.

\textsuperscript{119} Id.

\textsuperscript{120} Id.


\textsuperscript{122} Request for Further Consideration citing UN REDD Programme/Tebtebba Foundation, Global Indigenous Peoples’ Consultation on Reducing Emissions from Deforestation and forest Degradation (REDD), Bagiuo City, Philippines, 12-14 November 2008.


\textsuperscript{124} Request for Further Consideration
enlist the support of an official legal system.\textsuperscript{125} In situations where there are plural official legal systems, actors will appeal to the one that best aligns with their cause.\textsuperscript{126} The submitting groups have strategically and selectively referenced a selection of United Nations norms and findings regarding REDD and exploited their dissonance with national REDD legislation, national Forestry laws, the state’s interpretation of the Constitution, and the state’s application to the FPCF, to encourage reform of national law, implementation of World Bank safeguards (which would in turn further influence state law reform), and advance claims based on collective customary rights of Indigenous peoples.

B. The Sinar Resmi Declaration: Toward a new legal common sense

Counter-hegemonic politics and subaltern cosmopolitan legality go beyond the solely deconstructive task first theorized by Gramsci,\textsuperscript{127} and “ultimately seek to offer new understandings and practices capable of replacing the dominant ones and thus of offering a new common sense.”\textsuperscript{128} One of the main goals of subaltern cosmopolitan legality is to analyse the plural forms of resistance and “embryonic legal alternatives” being developed around the world from the ‘bottom up’.\textsuperscript{129} The subject of this section, the Sinar Resmi Declaration on climate change and REDD\textsuperscript{130} (‘the Declaration’) produced by AMAN\textsuperscript{131} in August 2009, is an interesting example of such an ‘embryonic legal alternative’. It is the author’s opinion that the Declaration demonstrates a formulation ‘toward a new legal common sense’\textsuperscript{132} woven together from plural sources of legitimacy.

\textsuperscript{125} TAMANAH, Understanding Legal Pluralism, 53-54.

\textsuperscript{126} Id.

\textsuperscript{127} ANTONIO GRAMSCI, Selections from the Prison Notebooks (Lawrence and Wishart. 1971).

\textsuperscript{128} SANTOS & RODRIGUEZ-GARAVITO, Law, Politics and the Subaltern in Counter-Hegemonic Globalization, 18.

\textsuperscript{129} Id. at 12.

\textsuperscript{130} Sinar Resmi Declaration, 8\textsuperscript{th} August 2009, Aliansi Masyarakat Adat Nusantara, (AMAN), Kasepuhan Sinar Resmi, Sinar Resmi village, Sukabumi District, West Java, Indonesia.

\textsuperscript{131} Teubner stated over ten years ago that in global legal pluralism, the main source of non-state laws would be “discourses and communicative networks” (he contrasted these with ethnic communities in the first wave of legal pluralism, and minorities in the second wave). TEUBNER, 7. While discourses and communicative networks clearly do indeed play a critical role in non-state orders, the author disagrees with the contrast made by Teubner between these and ethnic communities and minorities. Instead it seems, especially in a subaltern cosmopolitan legality that it is precisely ethnic communities and minorities, albeit often in alliance with Northern NGOs, who are the subaltern actors appropriating, transforming and formulating international discourses and who are increasingly well connected to strategic communicative networks.

\textsuperscript{132} This phrase is drawn from the title of Santos' book SANTOS, TOWARD A NEW
and law including collective Indigenous rights, international legal standards and transnational discourses on environment, sustainability, climate change and human rights. It is also clearly a result of the specific legal history relating to forests and Indigenous peoples in Indonesia. It shows how Indigenous social movements can act strategically and proactively to challenge dominant legal thinking in national and international arenas (even while drawing on national and international law and sources of legitimacy) and initiate alternative law and policies.

The first innovative aspect regarding the creation process of this Declaration is that, noting the lack of consultation with Indigenous peoples by most national and international parties on REDD and climate change, AMAN held their own national consultations of Indigenous Indonesian communities and representatives in August 2009 to help formulate the Declaration.

The document is broadly separated into issues for the international and national legal arenas. First the international arena is addressed; beginning with a call for industrialised countries listed in Annex 1 of the Kyoto Protocol to reduce their emissions dramatically. The justification for this demand is alluded to in the introduction of the Declaration which recognises the threat that climate change presents to the customary domain.

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133 In fact, the rather recently accepted idea (at least, in the official international legal arena) of collective rights, is in itself an example of subaltern cosmopolitan legality. While subaltern cosmopolitan legality does not seek to abandon individual rights, it does aim to articulate rights “that go beyond the liberal ideal of individual autonomy, and incorporate solidaristic understandings of entitlements grounded on alternative forms of legal knowledge.” SANTOS & RODRIGUEZ-GARAVITO, Law, Politics and the Subaltern in Counter-Hegemonic Globalization, 16. Rodriguez-Garavito, in his study of the struggle of the Indigenous U’wa people of Columbia concluded that their focus on collective action and rights, “holds out the promise of a grassroots, multicultural redefinition of human rights.” CESAR A. RODRIGUEZ-GARAVITO & LUIS CARLOS ARENAS, Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U’wa People in Colombia, in Law and Globalization from Below: Towards a Cosmopolitan Legality 263-264, (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005).

134 Sinar Resmi Declaration, Introduction.

135 For ease, I have categorised the first half as 'Section A', and the second as 'Section B'.

136 Sinar Resmi Declaration, Section A, paragraph 1. They call on governments of industrialised nations to reduce emissions to 45% of 1990 levels by 2020, and to 95% by 2050. This is significantly more than is currently in the Kyoto Protocol (5.2% of 1990 emissions by 2012) and more than even the UNFCCC is hoping will be agreed upon for the post Kyoto Protocol (40% of 1990 emissions by 2020). Emelda Abano, "Gearing up for Copenhagen" 1 July 2009, available at http://www.businessmirror.com.ph/home/perspective/12544-gearing-up-for-copenhagen.html.
of Indonesia’s Indigenous peoples “whose homes are in the mountains and forests, including the coasts and small islands”.  

It states their belief that this threat has arisen as a “result of a development model which is contingent on using up natural resources with no consideration for sustainability”, while also recognising the role of “greed and control over resources” and the “pressure of industrialised nations”.  

By asserting that Indigenous peoples have so far been able to manage and protect their resources sustainably, the Declaration suggests that by further protecting customary Indigenous interests, sustainable use of resources will ensue.

The next section shows a creative deployment of the United Nations legal system as a potential check on one of the most important global bodies relating to REDD - the UNFCCC. Recognising that the Declaration of the Rights of Indigenous Peoples is in itself non-binding, they point out that the UNFCCC is subject to the decisions of the UN General Assembly, which having adopted the Declaration on the Rights of Indigenous Peoples, means that countries which have signed up the UNFCCC, “must therefore acknowledge and protect the Indigenous peoples’ rights contained in its policies.”

The Declaration then points out specific Indigenous peoples’ rights pertinent to REDD legal and policy instruments. It states that all REDD initiatives “must guarantee the acknowledgement and protection of Indigenous peoples’ rights, including protecting our rights to land, customary domains and ecosystems and providing maximum opportunities for indigenous communities.” It is not explicitly mentioned but the first three of these elements are protected in Articles 26 and 27 of the UNDRIP. The ‘maximum opportunities’ phrase is arguably an extension of elements of the Declaration regarding the right to determine and develop priorities and strategies for the development of their resources and land in Article 32 of the UNDRIP. Similarly, the demand contained in the

137 Sinar Resmi Declaration, Introduction.
138 Sinar Resmi Declaration, Introduction.
140 Sinar Resmi Declaration, Section A, paragraph 2.
141 Sinar Resmi Declaration, Section A, paragraph 4.
Sinar Resmi Declaration that all climate change mitigation initiatives be based on the principles of Free, Prior and Informed consent of Indigenous peoples, including consultations and guarantee of involvement in decisions making, builds on the mandate contained in Article 32, paragraph 2 that states consult and cooperated in good faith with Indigenous institutions “in order to obtain their free and informed consent prior to the approval of any project affecting their land or territories and other resources.”

It is the author’s opinion that these legal ‘extensions’ show that while Indigenous groups will draw on international law and documents such as the UNDRIP, they will not necessarily be confined by them, especially when they see their rights as existing beyond what is guaranteed within them. In a bold next move, the Declaration states that, in the absence of the above guarantees “Indigenous peoples will reject the implementation of all REDD plans and any other climate change mitigation initiatives.” In making demands that all REDD initiatives (national or global in origin) must guarantee these ‘rights’- which are beyond what is deemed ‘acceptable’ or inscribed in national or international law, and by rejecting initiatives that do not adhere to these standards, Indonesia’s Indigenous peoples are disputing the positivist conception that their rights emanate from official law (be it national or international). By eliminating the state or the international legal system as the external referent for rights in this section, it demonstrates an observation recently made by Speed in the case of the Zapatista Indigenous movement in Mexico, that “such conceptual reframings are challenging not only to the state itself, but liberal and neoliberal conceptualizations of rights and their relationship to the law.” At the same time, it seems that AMAN, with perhaps an awareness of the vulnerabilities and limitations of such an approach with the power disparities at play, covers all the bases by in the next section explicitly appealing to the state to be the provider and protector of Indigenous rights.

It is important to note that thus far, analysis has focused on non-state legal systems and how they might affect or relate to the state legal system. However, it is would be wise to keep in mind a recent warning from Tamanaha against thinking that non-state legal systems are parallel

142 Sinar Resmi Declaration, Section A, paragraph 5.
143 SHARON SPEED, Exercising rights and reconfiguring resistance in the Zapatista Juntas de Buen Gobierno, in The Practice of Human Rights: racking Law Between the Global and the Local 164, (Mark Goodale & Sally Engle Merry eds., 2007).
144 The author believes that this has been a worthy area to emphasise analysis. Merry, among others, has noted that the ways in which other normative orders shape state law are “particularly unstudied”. MERRY, Legal Pluralism, 884. It is also consistent with the aim of subaltern cosmopolitan legality.
Rather each situation of legal pluralism should be examined to analyse the relationship between the legal systems and their respective capacities to exert power. He makes the point that regardless of whether the state law is very powerful or weak, it remains a “unique symbolic and institutional position” because the state still holds a unique position in the contemporary political order. This is especially highlighted in the next section of the Declaration, which while it is still innovative, drawing from plural legal sources and formulating alternative laws and policies, as mentioned, it explicitly appeals to the state to put these laws into force within the official state legal system. This seems consistent with the analysis of Shanili, who, based on studies of legal interaction between NGOs, supra-state institutions and the Indian state concluded (in contrast with much of the existing globalisation literature) that “the state, its laws and policies continue to play a pivotal role in transposing and shaping neoliberal globalisation at the national and local level.” While she recognises the new constraints imposed by international and supra-state institutions on the freedom of the state to design and implement its own laws, she maintains that the state is not “being rolled back as law-making or rule-enforcing agency” but rather “it has merely lost its monopoly over the production, adjudication and implementation of law, if, given the plurality of postcolonial legal landscapes, it ever had such a monopoly.”

Santos’ analysis in relation to the position of the state is also valuable. He claims that any analytical challenge of state centrism does not benefit from a romantic anti-state position. He states that:

The nation-state and the interstate system are the central political forms of the capitalist world systems, and they will probably remains of the foreseeable future. What has happened, however, is that they have become an inherently contested terrain, and this is the central new fact on which the analysis must focus: the state and the interstate system as complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and even volatile combinations.

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145 TAMANAH, Understanding Legal Pluralism, 62. The other error Tamanaha warns against is to think that state law matters above all else.

146 Id.

147 Id.

148 RANDERIA, Glocalization of Law, 323.

149 Id.

150 SANTOS, TOWARD A NEW LEGAL COMMON SENSE 94.

151 Id.
Accordingly, the second half of the Declaration addresses a number of Indigenous legal concerns at the national arena relating to REDD. However it also goes beyond REDD policies to address deep and long-standing legal issues, which developed from the colonial era as outlined in chapter two. The only paragraph explicitly mentioning REDD urges the government to promote public awareness and consultation on climate change and REDD with Indigenous communities.\textsuperscript{152} Other paragraphs deal with longstanding issues of colonial provenance. For example, the Declaration calls for the government to cease issuing individual land ownership certificates on Indigenous customary lands\textsuperscript{153}, to cease granting permits for the exploitation of forests or other natural resources in customary domains without the consent of the Indigenous community concerned\textsuperscript{154}, the replacement of the 1999 Forestry Act and Article 33, paragraph 3 of the Constitution.\textsuperscript{155} The Declaration also contributes new initiatives and laws which would help address some of the worn colonial legal legacies, including calls for the establishment of a Ministry of Indigenous Peoples Affairs\textsuperscript{156}, for a law on the Recognition and Protection of Indigenous Peoples’ Rights\textsuperscript{157} and to resolve conflict over land and natural resources in customary domains by using a human rights approach\textsuperscript{158} and that the Free, Prior and Informed consent principles by used in decision-making in all state governance levels.\textsuperscript{159}

The Declaration cleverly ends, in a perfect example of the state and non-state options open to Indigenous groups such as AMAN, and of the power differentials between, by stating that they are “prepared to work with the government and all other relevant parties to realise the fulfillment” of their rights in Indonesia.\textsuperscript{160}

While the potential for contestation of dominant neoliberal legalities through creative deployment of plural legal sources has been demonstrated, Rajagopal’s observation is also pertinent: that, despite the

\textsuperscript{152} Sinar Resmi Declaration, Section B, paragraph 5.
\textsuperscript{153} Id. at paragraph 10.
\textsuperscript{154} Id. at paragraph 4.
\textsuperscript{155} Id. at paragraph 2.
\textsuperscript{156} Id. at paragraph 7.
\textsuperscript{157} Id. at penultimate paragraph.
\textsuperscript{158} Id. at paragraph 8.
\textsuperscript{159} Id. at paragraph 6. There are also calls for the government to implement laws or Declarations it has already agreed to, such as the UNDRIP, clauses 18b and 28i of the Constitution, (Sinar Resmi Declaration, Section B, paragraphs 9 and 3) and Resolution No9/200 of the People’s Consultative Assembly on Agrarian Reform and Natural Resources Management (Sinar Resmi Declaration, Section B, paragraph 3).
\textsuperscript{160} Sinar Resmi Declaration, Section B, concluding paragraph. Italics mine.
increased pluralisation of legal opportunities for contestation by local actors, the outcome of such engagements with the law “are highly uncertain in terms of their impact either on law or on the movements themselves.” That is, pluralisation and the opportunity to contest via legal strategies does not necessarily offer a guarantee of success nor even ‘propel’ law in a direction that would better support the objectives of local actors. He concludes that outcomes “seem to depend on particular local and national contexts.” This is found to be true in these cases. The obvious fact that ought to be pointed here is that, to date at least, neither the Indonesian government nor any relevant international body, has done or said nothing in response to the CERD report and reprimand, or the Sinar Resmi Declaration. Even Santos has acknowledged that “for all their accomplishments”, the experiences of subaltern cosmopolitan actors “are admittedly fragile” and that “experiments in counter-hegemonic uses of law are in constant danger of cooptation and obliteration.” Thus while these multiple orders can be strategically employed, providing resources, added legitimacy and power to local Indigenous people and their fight for support, the fact remains that, at least for the moment, the Indonesian state legal system, together with the international institutions dealing with REDD (such as UNFCCC) are powerful enough to not have to take into consideration Indigenous customary rights, or the various international bodies that support these in relation to REDD (such as CERD, HRC and PFII). On the other hand, it must be noted that this

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161 BALAKRISHNAN RAJAGOPAL, Limits of Law in Counter-Hegemonic Globalisation: The Indian supreme Court and the Narmada valley Struggle, in Law and Globalization from Below 183, (Boaventura de Sousa Santos & Rodriegruez Garavito eds., 2005).

162 Id. at 184.

163 Id. His italics.

164 Unfortunately it was beyond the scope of this essay to examine AMAN’s demands to the World Bank, which, coupled with international pressure from human rights groups, other nations and the PFII, the author believes may make a different to the World Bank’s pending decision at to whether to accept Indonesia as one the countries to its lucrative REDD finance scheme. If it does not, but rather, in response to international and AMAN’s demands, requires the Indonesian state to amend their REDD law and policy, it is possible that they will- largely because of the many hundreds of millions of dollars at stake.

165 SANTOS & RODRIGUEZ-GARAVITO, Law, Politics and the Subaltern in Counter-Hegemonic Globalization, 17. However, this seems to be part and parcel of cosmopolitan legality, according to Santos: “The question of power is the central one for cosmopolitan struggles as the subaltern groups fight for equality and recognition against the dominant groups. Cosmopolitan legality is thus the legal component of struggles that refuse to accept the power status quo and the systematic harm it produces and fight them in the name of alternatives cultural and normative legitimacies.” SANTOS, TOWARD A NEW LEGAL COMMON SENSE 473.
chapter documents merely a moment in time and future research on this ongoing struggle will be valuable and perhaps more encouraging.

IV. CONCLUSION

Global legal pluralism is a perspective that allows examination of an increasingly pluralised, globalised world, in which many different actors, state and non-state, are involved in the production, shaping and interpretation of law. Santos’ counter hegemonic subaltern cosmopolitan legality invites examination of the most vulnerable groups in this system and how they use to their benefit the capacities for transnational interaction in today’s globalised world. The unique ‘bottom up’ perspective offered by Santos aims to amplify the voice and struggle of local excluded actors. In taking this approach to examine two instances in the struggle of Indigenous peoples in Indonesia for inclusion in relation to their traditional forest domain, (in this instance, to proposed REDD schemes) some of the potential and limits of strategically using a situation of global legal pluralism are revealed.

It is clear that, just as in situations of intra state legal pluralism, local actors in a global legally plural world make strategic use and choices of legal fora, playing off legal systems against one another to further their objectives. Exploration of their actions has found that potential lies in the leveraging of power of international institutions, such as the CERD Committee, who in turn place pressure on the Indonesian government and other relevant institutions such as the World Bank’s and the UN’s REDD schemes. In the second case study, the ways in which local movements choose and creatively mix from a number of different legal and policy sources and legitimacies producing, at times, innovative and alternative legalities have been demonstrated. The source of potential in such innovative strategies lies in the re-framing of conventional conceptions of rights, and the formulation of alternative, contestatory legalities drawn from plural legal sources.

However, the limitations of these strategies have been particularly revealed when three things are considered. First, while the important role of the non-state actor has been highlighted - be it NGOs, but more particularly well connected networks and alliances - in bottom up law production, it is also clear that the state retains a central place in this complex constellation of power and contestation. Second, this power differential between systems, and the immense global pressure on states and international institutions to deliver effective and timely climate change mitigations measures means that the rights of Indigenous peoples are among the first to fall off the agenda. However, the efforts of the local Indonesian Indigenous actors, NGOs and their transnational alliances have succeeded in bringing the issue of their rights to, at least, the peripheral attention of national and global law and policy makers. It remains to be
seen however, what, if any, result this will have for the grassroots reality of Indigenous groups in Indonesia.