

CASE STUDY

**“THE CONTROVERSY  
SURROUNDING THE STATE’S USUFRUCT RIGHTS  
OVER INDIGENOUS OWNED LAND-BASED RESOURCES  
AND IT’S ENVIRONMENT IMPLICATIONS  
IN PAPUA NEW GUINEA”**



Photo credit: Roger Williams Zoo, Rhode Island

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### DISCLAIMER

The views expressed in this case study document are not the views of any supporting organizations and affiliations but that of the Author.

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<sup>1</sup> The Author worked for the Papua New Guinea National Forest Service, WWF Papua New Guinea Country Programme and is currently the country liaison for Bishop Museum of Hawaii.

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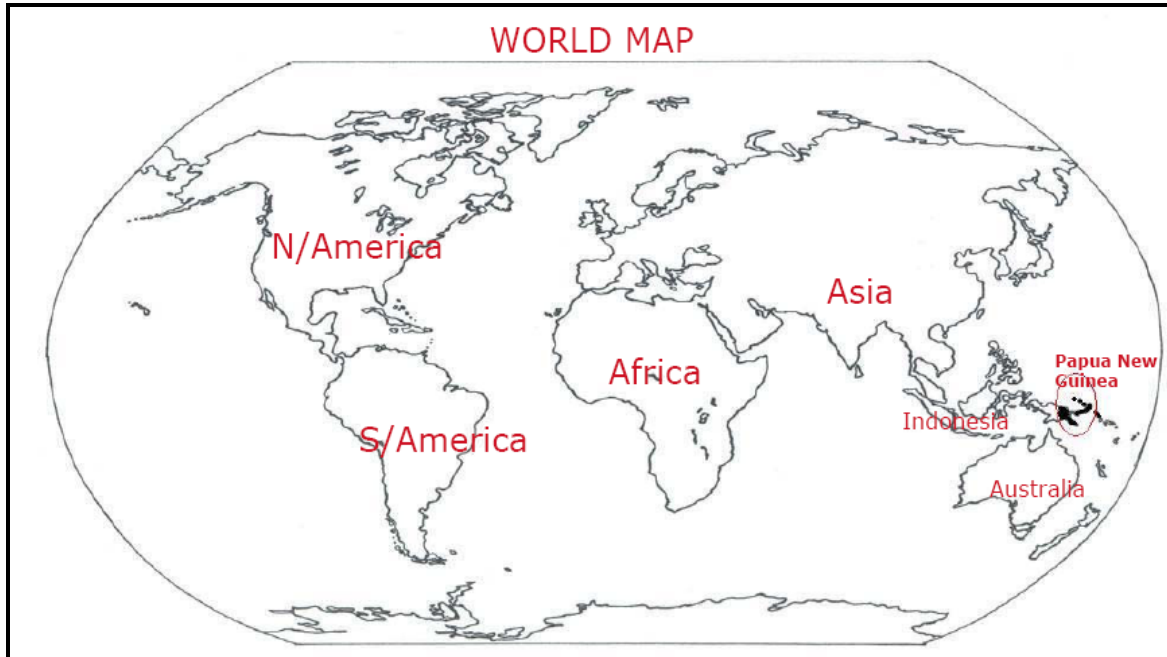
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## **ABSTRACT**

The fundamental mistake by successive Governments of Papua New Guinea is failing to honor its ethnic tribal governing structures. The unique and simplest cultural and political institution existed for about 300 years, but oppressed by colonization and at independence in 1975. Though, subjected to, under the Land Group Incorporation Act of 1974, herald the colonial legacy of the 'village council system', as an 'impregnable curse' to continue oppressing the cultural institution (or chiefly system). The untapped 300 year old cultural governing institution is like being 'trapped inside a bottled jar tightened with a lid' for nearly a century. As a consequence, the colonial 'relic' has plagued the island nation of Papua New Guinea with land disputes and conflicts one after the other over pertinent ownership issues and management of land based resources. The political process of electing village councilors for over 90 years has greatly divided family units and ruined clanships and is the root cause of socio-political instability in many rural communities in Papua New Guinea. This behavioral pattern in general poses risky environmental management. It may take a political-will to remove this curse.

LOCATION:

Fig. 1



## 1.0 OVERVIEW

### 1.1 Aim

The overall ambit of the case study is to ascertain why it is controversial that the State's usufruct<sup>2</sup> rights over indigenous owned land based resources have been so prevalent in PNG since independence, while taking into account the overall policy context as to which of the existing policy and legislative framework has made it conducive for the escalating land disputes and conflicts in relation to resource exploitation. The other aspect is seeing whether the State actually understands the ILO Convention 169<sup>3</sup> in particular section (b) wherein it refers to 'retaining part or all of its cultural and political institutions'. Such is the magnitude and scope of the instability furthermore compromises the environment and ecosystems at large. Upon these findings, an important set of recommendation is suggested for relevant government agencies to act accordingly and where possible make necessary amendments to the appropriate legislation.

### 1.2 Background

Through time immemorial, tribal communal societies in Papua New Guinea strived by a simple, but well defined and visible traditional governing "common property management structure". Till 1905, when the British Commonwealth handed its reign over the territories of Papua and New Guinea to Australia, the intellectual communal common property rights system was brushed aside by the colonial administration. Though, the system existed by the very nature of the different ethnic land groupings and affiliations, it was not visibly recognized. Instead, due to lack of knowledge of the culture, Australian colonial administration then introduced the 'village council system' to manage the affairs of its administration at the village level. The role of the council was more like an informer and assigned a village council book to keep record of disputes, demography and head tax records. The council book was inspected during every patrol officer visit.

In doing so, the colonial administration subsequently displaced the communal governing system into conflict with the colonial imposed governing system. Under this system, the local natives were forced to switch allegiance to the councilor who is the colonial representative in-charge of the village. Consequently, the colonial administration without a

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<sup>2</sup> The right to use and enjoy the profits and advantages of something belonging to another, as long as, the property is not damaged or altered in any way. *American Heritage Dictionary*.

<sup>3</sup> The International Labor Organization Convention 169 refers to the Definition of Indigenous and Tribal peoples.

"1. the conventions applies to:

- (a) tribal peoples in independent countries whose social, cultural, and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) people in independent countries who are regarded as indigenous on account of their descent from populations which inhabit the country, or a geographical region to which the country belongs, at the time of conquest or colonization or establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply". (Article 1.)

slightest hint of knowing that the imposed system created a lasting conflict as most communities then tended to rely on the council and not their respective traditional governing system. The system also brought about lasting impression of the cargo-cult<sup>4</sup> movement, when the people saw general cargo ships coming ashore they relied on the colonial government to bring more “goods & services”. Hence, the cargo-cult mentality was imposed on them. Many of the people were afraid and have only just come into contact with the white men some for the first time. The colonial administrators brought with them guns, axes and knives etc. Some coastal societies especially in the Gulf province even believed they were ancestral spirits belonging to their dead ancestors being re-incarnated and returned to them as white men. It reminded the bygone era of the ‘Vailala Madness’ a cargo-cult movement amplified in the colonial past.

Despite the fact, that the customary governing system had unwritten laws people generally abided by the rules. Those members who were in defiance of such rules were sometimes placed under a curse or punishable by death through means of sorcery and witchcraft. The customary political structure is a de-facto governing body at the village level. Many villages in PNG today rarely see this socio-political structures exist in its entirety as these were overshadowed by western political influence and cultural syndrome. After almost seven decades of colonial rule, the administration through a recommendation emanated from the Commission of Inquiry into native land affairs in 1973 enacted the Incorporation of Land Groups Act, 1974. This legislation has been in place for over thirty years and though successive governments have come and gone, they failed to successfully implement this Act. However, come independence in 1975, the young Somare Government assumed power but hypocritically ‘inherited the village council system’ continuing the oppression of ‘customary common property rights governing system’ into disintegration. Hence, councilor’s role became more authoritative over an affirmative and effective-decision making customary governing system. Somare’s vision for PNG reaching statehood was to re-align a colonial imposed council system, but failed to recognize the ‘customary common property governing system’ by not fully implementing the ILG Act of 1974. To add international flavor, the UN resolution 61/265 of 13 September 2007 with regard to the declaration of Indigenous Rights has been very timely indeed however, whether this has echoed through out Papua New Guinea is yet to be heard.

### **1.3 Introduction:**

The global economic development demands for tropical hardwoods between 1979 and 2000 seized by the successive governments of Papua New Guinea, to revitalize the rural economy. Timber resources were acquired through timber rights purchases to forest management Areas under the new Forest Act, 1991. This transition applied enormous pressure on the natural resources and the rural populace in Papua New Guinea. The fact that forest resource is a land based resource makes the case study more worthwhile to address the conflicts and communal instability. The case study would concentrate in particular, the Vailala forest resources harvest resulting with the multiple conflicts raging between the landowners over monetary benefits and territorial disputes.

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<sup>4</sup> A movement of high expectation in receiving goods announced by certain individuals through false beliefs.

It is commonly suggested that over ninety percent of the land in PNG is under customary ownership. This arbitrary figure simply indicates that some legitimate figure is definitely required. We cannot forever hold onto this figure and the only way to derive that is by having all developed areas and government acquired areas mapped out. What remains is remains to be seen is the realistic estimate for which portion is customary owned inclusive of the FMA's and WMA etc;.

A trend that is becoming a major concern is the increase in innocent landowners being disgruntled victims not of their own doing, but that of weak natural resource acquisition and allocation processes. The State in its anxiety has got its land use policies muddled up. The distinction between "land rights" must not be confused with "land ownership rights" but are not the same and somehow used interchangeably. A land right is inclusive of both ownership rights and user rights. A user right does not grant, allow and access ownership rights. Customary notion is that land ownership is non-transferable right and cannot be held under any form of State control and must be clearly defined in resource development documentation such as a FMA. The overall forest sector planning processes and policy aspects are not working in cohesion and creates an impediment over the 'voluntary transfer of traditional land user-rights' held by the State. The incorporation of land groups in the FMA, for instance; Vailala Block (3) as a potential case study site aims to restore some credibility to the government and its line agencies such as the PNGFA, DEC<sup>5</sup> and DLPP<sup>6</sup>. The State agencies' aggressive campaign towards 'voluntarily' transfer of customary land user rights to the State only implies temporary control and not transfer of land ownership rights. A closer look at one WMA work has placed the significance of how legislations have been inconsistent when dealing with people's land resources. The ILG aspect is non-conforming in the WMA instance where is applicable to FMA. This study has taken the Kamiali WMA into account to make that contrast in terms of Land-use change in decision making while not recognizing the other. They study intends to reveal these gross errors by focusing on two very distinct areas, such as; a FMA land-use change area in the Gulf Province and a WMA area in the Morobe Province. Both are maritime provinces and geographically opposite each other separated by a mountain range.

## 2.0 LAND-USER RIGHTS ENTRUSTED TO STATE

There is no such thing as *land ownership rights* transfer to any other traditional society in Papua New Guinea. Land ownership rights are in fact an inheritance by birth. The acquisition of Timber Rights since 1979 was seen as the participatory approach to development with the people's consent. A FAO<sup>7</sup> sanctioned, PNG country report in 1997 acknowledged that prior to the 1991 National Forest Policy, the landowners rights were acquired through a TRP<sup>8</sup> option. Under this option, there must be consenting requirement of up to absolute majority of seventy-five percent of adult population within the concession area to legitimize the acquisition. However, the TRP acquisition process turned out not to serve the best interest of many landowners. The World Bank funded sweeping forestry legislative changes in the early 1990's accommodated the common interest of legitimate landowners and hence, the FMA was formulated and adopted as the suitable alternative for the TRP.

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<sup>5</sup> Department of Environment & Conservation

<sup>6</sup> Department of Lands & Physical Planning

<sup>7</sup> Food and Agriculture Organization

<sup>8</sup> Timber Rights Purchase



Soon after a World Bank induced 3 year moratorium on all new allocation of forest resources was lifted in 1995, it took an ambitious project in designing the FMA. Its first guinea pig testing was with the Turama FMA Blocks adjacent to Vailala FMA blocks and green light was turned on to give new resource areas and expired permits that FMA was the most suitable way forward. How was Turama ILG process more convincing to have other areas locked into FMA? Despite Turama being a model FMA has yet to solve its landowner problems. Hence, the Government's endorsement of the land-user rights transfer leaves no room for termination of the State's usufruct rights (e.g. for the purpose of this case study it's the Forest Management Agreement). This agreement binds various land groups within a forest concession canvassing their will to have their forest land developed for timber production. This only refers to customary land user rights but the issue of ownership rights is not clearly elaborated under the ILG/FMA processes.

The Government's adoption of the FMA was the ideal means to 'takeover' people's rights over their forest resources through the provisions stipulated under the Land Group Incorporation Act 1974. The vast majority of the Vailala people absolutely had no idea as to how they would exercise their land user rights. The State was merely empowered under the FMA to do what was for the best interest of people. However, the State after having being "voluntarily" granted such rights play a completely different role when it came to enforcement and monitoring. The people without being clearly informed of their legitimate rights simply follow what the government officers perceived to be a 'good idea' to allow their land and resources to be developed in exchange for services and income (in the form of stumpage royalties).

Moreover, in contrast to the WMA area upon request made by the people to the State, it is declared a State designated area for Wildlife Management. The process by which the State declaration is with full knowledge of the DEC but with very little guidelines as to whether it remains a State property upon gazettal is uncertain. If the State through DEC objects that it no-longer has any significant benefit as a State acquired property by virtue of the fact that it's a State control and managed area, may decide otherwise any economic preference without having to seek the people's input. The State's function and interest for its mandate to conserve its bio diversity is compromised with other areas overlapping into official government gazetted areas. Kamiali WMA is a granted State control WMA officially gazetted area. The land user rights were generally accepted in the form of simple documentation agreeing to seek Government approval for a WMA. So a situation now arises whereby a WMA is declared and gazetted but managed by an ad-hoc local committee not identified through an ILG process.

The State upon declaration and gazettal of WMA then shuns the responsibility in not meeting any form of assistance to affect its control. It basically leaves the WMA to fend for itself while maintaining control that the WMA is recognized State control land. The State usurps authority over the land without any input from the landowners to even decide a mining exploration lease over the WMA as and when it pleases. A classic example is the Crater Mountain WMA. In 2004, the State issued certain portions of the Crater Mountain WMA under a Gold Mining<sup>9</sup> prospecting license. The State's usurpation of indigenous user

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<sup>9</sup> [www.minesandcommunities.org/article.php?a=748](http://www.minesandcommunities.org/article.php?a=748) - 7k

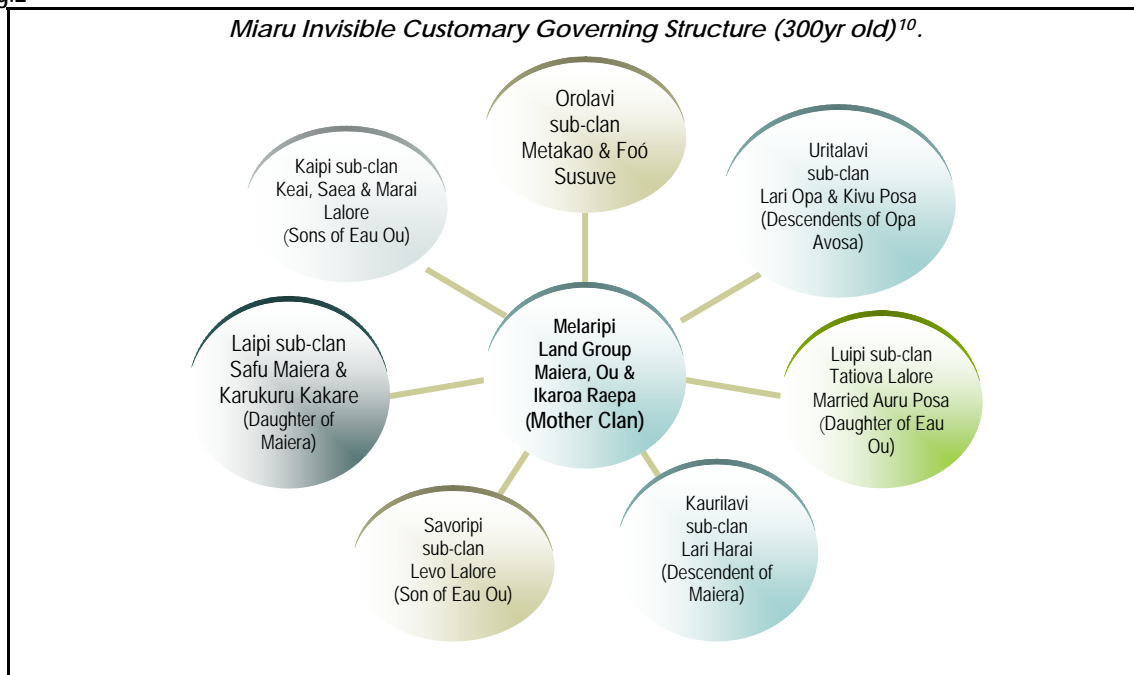
rights is more like expropriating their ownership rights even if incorporated under ILG. There has to be conditions attached to these rights. There are many other areas sensitive towards biodiversity, but is simply ignored due to economic reasons.

### 3.0 LAND TENURE SYSTEM

#### 3.1 Melanesian Governing Structure

The typical example of an ‘invisible’ Vailala and Kamiali hierarchical governing structure is very similar as the one depicted below from Miaru village, Gulf Province. It’s an intellectual property governing system that needs to be protected. Though it has disintegrated and considered “endangered” and on the verge of extinction. Miaru’s common governing structure includes one major clan with seven subsidiary clans. The structure portrays more or less represents a “council of elders” who oversees and applies the traditional rules. So obviously, by understanding such a structure you can then accurately figure out how the land is divided amongst clanships and have discrete control over these lands. However, it’s sad to mention that the oral communications between these generations of these subsidiary clans were fast disappearing as the ‘council of elders’ took to their graves. This resulted with mass fragmentation of customary governing system leading to ineffective decision –making processes thus increasing lasting conflicts. Papua New Guinea village council elections have caused so much instability and rarely communities benefit from the role of the Councilors.

Fig.2



The communal governing structures which were active pre –independence are no longer visible today because of the colonial imposed system and post-independence negligence.

<sup>10</sup> Source: The Birthright of Ori Mai of Biaru Ancestral and Land Inheritance Study. Avosa 2007 (revised version)

They are dormant but the pillars of surviving structures are those of the Mekeo<sup>11</sup> and the Kiriwina<sup>12</sup> societies, which means that they need to be revived. Therefore recognizing 'chiefdoms' is important in a typical village setting in New Guinea (J.Diamond, 2005). However, during the hi-speed ILG awareness campaign it was not seriously considered but as a thing of the past. The Government's failure to recognize the fact that every village, hamlet or enclave in Papua New Guinea have one form of customary governing structure which every decision-making with regard to land and resources. The positive essence of implementing ILG is merely to resurrect the 'dead socio-political structures' that once governed the traditional land rights 'buried' during the colonial reign. By promoting and having the customary governing structure fully functional, empowers the people to enjoy the benefits in this modern society by having decisions made through this system. Transparency is obsolete during the resource development phase especially when it comes down to decision-making processes.

The ILG constitution for the Vailala Block 3 and its adjacent blocks was not propagated fully to the people. The ninety six incorporated land groups each signed up under FMA bearing a standard constitution for their legitimate recognition as land groups upon gazettal. The ILG constitution are best considered redundant "paper constitutions" and having no teeth. The ILG constitution has never been tested and tried in a court of law. Ironically, the ILG constitution is practically to defend the indigenous rights and the customary governing body and land groups, but its constitution defends nobody. In view of the high illiteracy level within the Vailala constituents, the State agencies did not foresee up scaling of literacy programs as a priority. The downside of the ILG awareness programs was the gross manipulation of people's land user rights, thus undermining their social justice and overlooking their customary governing structure.

The biggest challenge is how to make this invisible customary governing structure visible and workable. It requires a new indigenous land use policy direction. Though a number of umbrella organizations have been established but have been highly politicized. These organized associations have undermined the very existence of a legitimate and genuine governing structure with unwritten clear objectives and goals. For instance, the Miaru customary governing structure exists today but is practically 'invisible'. It will work if all clans and sub-clans are recognized through the ILG processes by forming a council of elders to be the decision-making body at the village level. Similar sentiments can be expressed for the Vailala and Kamiali customary governing structures which are also invisible today. These structures are put to test every once in while when it comes to land ownership matters.

### **3.2 Land Rights**

Due to the fact that over 90% of the land is traditionally owned by indigenous land groups, the onus is on the Government to acquire resources through land custodianship. Many researchers and land management experts have considered Papua New Guinea as both patrilineal and matrilineal society as ownership is divided between either; a female and male. Though, male domination is very much spread across the entire country. Below is an

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<sup>11</sup> An ethnic group in the Central Province

<sup>12</sup> An ethnic group from the Trobriand Islands in the Milne Bay Province

abstract of one of the best description of land tenure system in PNG by a colonial patrol officer in 1970<sup>13</sup>.

I quote: "Land ownership appears generally to be in the hands of the extended family groups, rather than the sub-clans. Originally, all land was regarded as being owned and controlled by the headman of each sub-clan, however with population explosion, we now find that the Patriarch of each extended, and in an increasing number of cases, immediate family group, has complete, full and proprietary ownership including the rights to sell or transfer the land in question, over a large area of land, usually in two or more sections. Whilst the Patriarch remains healthy, and in full control of his faculties, he will retain control over that entire sub clan land inherited from his father, although the various adult family members have subsidiary rights enabling them to cultivate the said land". Before passing away, the Patriarch will endeavor to ensure that his land is divided up amongst his children and even the members of his extended family group, whilst ensuring that his eldest son receives the lions share, as he will then become the next leader of the group and must inherit an area of land large enough for him to, in turn, divide amongst his own children and the members of the group of which he will inherit leadership. One could term the land inheritance system an example of the patrilineal succession, although women folk do often inherit parcels of land from their father and upon their marriage to a man of a different sub-clan, the children issuing from the said marriage will inherit full ownership rights over land inherited from both their father and their mother. There is a great deal of overlapping of land rights in this type of system which can only be described as chaotic as it works in a satisfactory manner only because of the large numbers of permanent absentees from the home area". The amount of land which each successive patriarch of either his immediate or extended family group, controls and is able to divide up at the end of his years as leader, grows progressively smaller, whilst the overlapping situation and the pattern of individual ownership of small areas grows more confusing with rapid increase in the population. It is common practice for a land owner to grant gardening rights to a friend, who may be a man from a different sub-clan on temporary basis. Occasionally, the rights are granted for life, however, the children of the grantee would normally inherit the same rights their father enjoyed; the said rights having ceased upon the death of their father". Naturally, it is expected that in the event of the above-said Patriarch becoming invalid or not retaining his faculties, the eldest son would succeed the father before the latter's death. The sub-clan head man will exert their influence in the event of the question of whether or not to transfer land to the administration and normally the actual controllers of the land in question would heed the advice of the elders of the sub-clan. The normal practice however, is for the headman to stay aloof from negotiations and to leave the decision entirely to those men of the sub clan who have full rights over the land in question. The headmen control their own particular area of what was originally sub-clan land and would only negotiate with the administration on the question of the sale of land when part of their own inherited land was involved" Unquote.

#### **4.0 LAND GROUP INCORPORATION**

The PNGFA used the ILG process to identify 'authentic' customary land owners to the customary land upon which the timber resource is found.(Kalinoe,2003). The main thrust of the ILG Act, 1974 was to restore the credibility of 'council of elders' under the Melanesian governing system. It's a perfect and existing decision-making model, which has been passed down from generation to generation was oppressed by the colonial imposed village council system. This is a requirement under the FMA for detailed maps demarcating land boundaries in order to clearly ascertain the timber resource within the area. However, it proposes a de

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<sup>13</sup> Source: National Achieves of PNG- KN Grigg, an Australian Assistant District Commissioner who patrolled the Kerema District. Area adjacent to Ihu District, Gulf province which Vailala FMAs are located.

facto mechanism to demarcate boundaries of customary land which effectively gives rise to ownership claims. Largely, part of the ongoing conflict is due to the role of the village council not being clearly defined in relation to the customary governing system. Councilors also had ‘conflict of interest’ when dealing with resource development.

More over, when major resource projects are negotiated the government struggles with the ILG Act of 1974 with roles of the council system (now LLGC). Since the inception of the FMA concept under the *Forestry Act 1991*, a total of 32 FMAs have been concluded with a total of 1870 ILGs incorporated for that purpose.

The table below showing the number of FMAs and ILGs by province is represented:

**Table 1.**

PROVINCE	FMA	ILGS
Central	3	68
<b>Gulf</b>	<b>7</b>	<b>643</b>
Western	3	242
Northern (Oro)	1	74
Milne Bay	1	66
Morobe	2	95
Madang	1	131
East Sepik	1	130
West Sepik	5	244
West New Britain	7	202
East New Britain	1	24

Source: Melanesian Law Journal

The FMA/ILG process was deemed the ideal logic for proper transparency in the resource sector in terms of determining bona-fide and genuine landowners. However, the due-diligence process was less applicable and more effort was towards transferring of rights to State and little did the staff of the NFS <sup>14</sup> realize that they were about to ‘close the books’ on the Vailala people with regard to their land rights. Forest industrial development has been further hampered by the judiciary at the village, district and provincial land courts as a result of improper facilitation of the ILG processes.

All forest concession areas acquired under FMA where in fact acquired in a hasty manner under a consolidating agreement binding customary land user rights under the Incorporated Land Groups Act of 1974. This process allowed for the ‘voluntary transfer’ of their customary land user rights to the State. Though, the ILG a fundamental four step process is an excellent way for the Government to recognize genuine landowners and their legitimacy to exist as a land group. The four basic steps are as follows:

- a) *Register land groups*
- b) *Document genealogy*
- c) *Establish constitution*
- d) *Appoint dispute settlement committee*

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<sup>14</sup> National Forest Service

However, the prerequisite of identifying the legitimate land ownership is through (1) anthropological research of historical and genealogical aspects and (2) the demarcation of customary land boundaries. These two issues are pertinent to making ILG are very worthwhile exercise. The gross abuse of government policies has resulted with customary landowners disputing themselves while loggers continue to log and export timber through means of court injunctions and stay orders not to interfere with their logging activity. The Governments ad-hoc approaches to secure resources for the industry have created a vile situation for the innocent landowners.

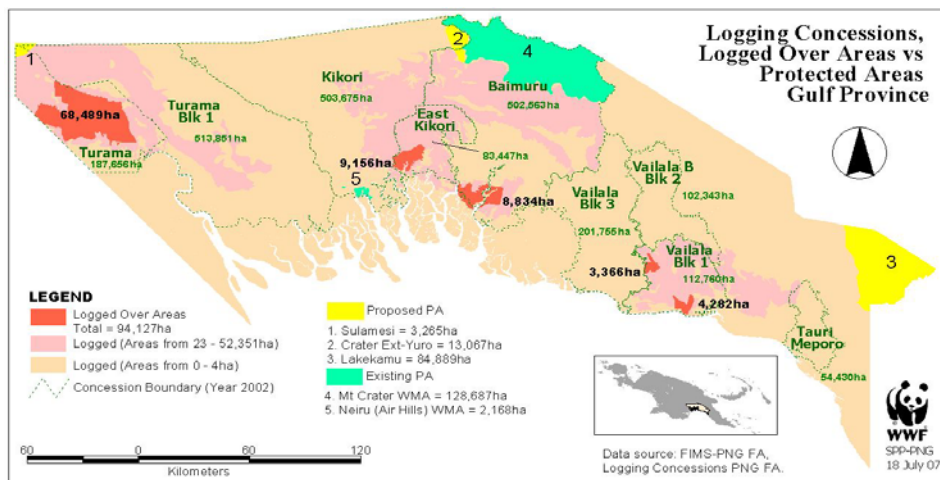
## 5.0 STATUS OF CASE STUDY AREAS

Given that the 1991 Forest Policy was major thrust geared towards downstream timber processing and it also called for greater participation by the resource owners. A new industrial pre-registration scheme was established to register all forest industry participants including resource owners. The NFP was launched by the Ministry of Forest and approved by Parliament in July 1996, which canvassed the entire country's forest resource areas as merchantable logging areas. An allowance of Ten Percent of the total FMA area was set-aside as conservation areas.

### 5.1 Vailala Forest Management Area

The Vailala Block (3) having approximately 200,000 hectares out of which 20,000 ha would be a conservation area in reference to the ten percent set-aside blanket rule. On the other hand, the registered ninety-six Incorporated Land Groups within the Vailala Block (3) are unaware that Vailala Block (3) was mapped out and in the pipeline to be considered a FMA through overall consent. Regardless of its socio-political implication, the forest concession area was mapped by the State. The mapping exercise committed PNGFA to seek consensus in the form of ILG registration binding Vailala forest concession area. Examining this process closely, the prior informed consent of the landowners was secondary, as the primary issue at hand was the demarcation and mapping by the State which is an infringement of the land owning rights. Furthermore, this access to gain approval by the Vailala constituents casts serious doubts on the National Forest Plan. Furthermore, the State's high speed forest land-use planning process was indeed a 'top down' approach and therefore, relentlessly sort to seek overall consensus through the ILG process disguising as a 'bottom up' approach.

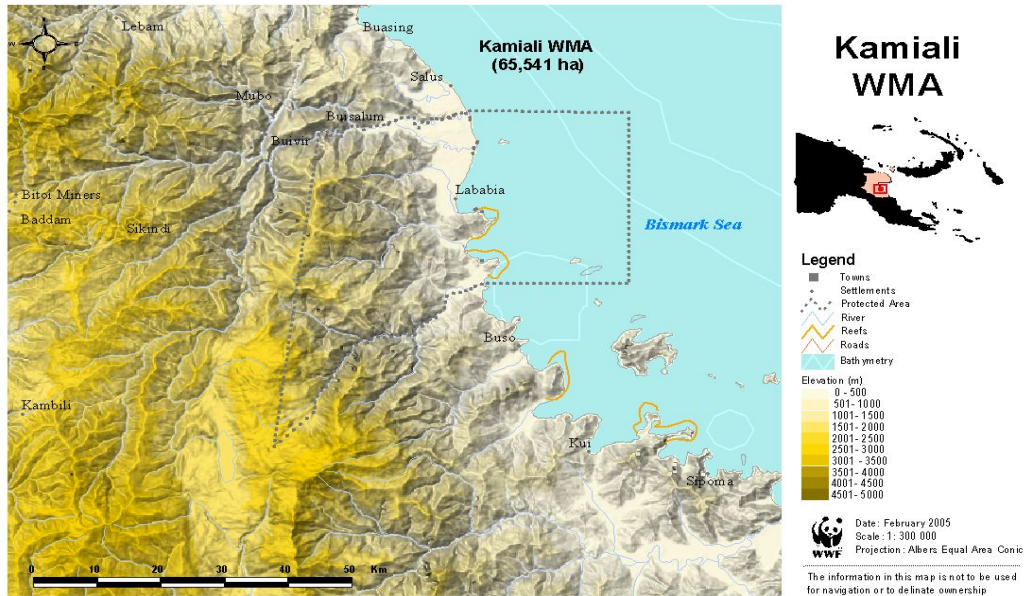
Fig 4



The genuine transparent ‘bottom up’ planning would have seen a much different forest concession mapping. According to the national Forest Service, the Vailala Block (3) has not been logged. The recent Provincial Plans review failed to re-examine the ILG processes as this would have been largely part and partial of the PFP review. The Gulf PFP review amongst others cannot ignore the ILG processes. It must be reviewed in light of the overall review.

## 5.2 Kamiali Wildlife Management Area

Fig.5



This site was initially an Intergrated Conservation and Development project site (J.Wagner, 2001). The Kamiali WMA on the other hand experienced a near ‘bottom up’ approach to land–use planning. Though, the geographical features of the map do contradict a full consensus of the legitimate boundaries. The State likewise took for granted the actual boundaries not to question its legitimacy over it being aligned to the geographical features. In so doing, gazetted the boundary as such.

The gazettal of a wildlife management area is legislated through the Fauna Protection and Control Act. It is estimated that the total terrestrial area as gazetted in 1996 was 47,000 ha (minus the Marine portion). However, in contrast for a WMA the process for State approval is much less cumbersome. The people normally would apply to the MEC<sup>15</sup> to declare the area as a WMA. This is only feasible following a general consensus by the village community to establish a WMA committee, who then manages the WMA through set of agreed principles. Moreover, these rules must be gazetted as well so that it can be enforced. Without proper guidance in relation to land rights awareness led to the demise of the previous

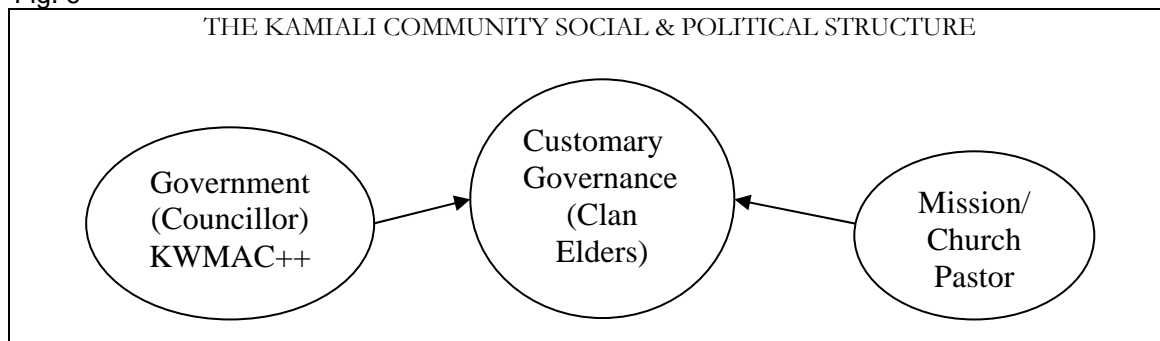
<sup>15</sup> Ministry of Environment & Conservation

committee following its gazettal. Another WMA committee is under proposition and a meeting to be convened is awaiting a DEC response.

The politics of getting people to come to terms with the real meaning of legitimate government approved committee had little effect. The ILG process was not considered under this proposition and though it is relevant to this cause. Customary governing structure was identifiable and as such should be considered for ILG process for WMA deliberation in general. A new biological research center has been proposed for the WMA area which will ensure the ILG process takes pre-eminence.

In Kamiali, it was identified that there are at the most three most influential players in the existing community social & political governance structure. Although, the government and Lutheran mission could also both be described as additional interventions thereby revealing the utmost significant player, the clan governance structure. This was proven to be very effective when executing the Memorandum of Understanding. These political institutions in Lababia village community effectively manage the socio-cultural aspects of their livelihood. The identification of the existing community governance structure is best summed up below as a community organization chart.

Fig. 6



Source: Kamiali Workshop Report (Avosa, 2007)

Hence, similar structures exist today in almost every society in Papua New Guinea, which influences the land-use change decision-making processes. Though, the central decision making rests within the domain of the clanships.

## 6.0 ENVIRONMENT IMPLICATIONS

The consequence of not having transparent customary governing systems has practically allowed the State to ineffectively monitor and evaluate environmental standards applicable to resource development projects. Under current practices, soon after a timber permit has been issued by State, the permit holder exercises its discretion to sub-contract the logging operations to either its subsidiary or another private entity who is not a party to the permit agreement. Hence, the contractor will do every thing within its power to deliver the production target. In so doing environmental standards become secondary issue. The question therefore is who then is responsible for any environmental damages. Surely the contractor will not be responsible because it's only a contractor and not a party to the permit agreement. The permit holder is responsible but it was not carrying out any harvesting



activity so who then is primarily responsible and if neither one is to bear the blame – and certainly if not the State, who then is responsible?

The aftermath of this permit issuance will bring about lasting environmental impact through natural forest destruction and loss of biodiversity. The State's track record in environmental management through the MEC has been quite absurd since independence. One of the key State's failures in upholding high environmental standards in the mining sector has been the "no control" of mine tailings dumped into freshwater river systems is a classic example. With this negative environmental background, the Vailala people's land user rights to have been entrusted to the State brings unfolding questions about the total safety and health of their eco-system, whereby sustenance of their rural livelihood is compromised. While landowners have been incorporated as land groups it does not necessarily empower them to monitor their own environment and hold the State accountable.

### **6.1 National Forest Plan**

The State's yard stick, NFP has expired and is subject to review. A number of provinces have undertaken provincial forest plans reviews. The ESP<sup>16</sup>, Central and Gulf have had provincial forest plans reviews. Obviously, it seems the provincial forest plans were not discussed with the representatives of the FMA. Though required by the Forestry Act the NFP was an ambitious plan. In its formative stage, the plan did not receive an overwhelming public scrutiny. It inevitably is one of the "high speed" land use planning tool by overlooking the inner parameters of customary land rights where concession areas were practically mapped out without the land owner prior informed consensus. Land owners were passive participants. They merely followed instructions and were told what to do. This is a critical factor where a democratic government ushers in plans without properly informing its constituents. It does not make sense to map the areas and go out tell the land owners and the public that this is the best plan we have in place. The 1996 NFP was adopted without the full consent of all landowners whose resources were already mapped out. The plan was framed like a 'cart placed before the horse'. The provincial governments were weak in getting the message to the people. They did not have the human resources to back up the landowners.

### **6.2 Conservation Set-Aside**

The State's performance in managing the resources under its custodianship has been total neglect let alone exposing the environmental implications as per land use change. The Governments counter argument with NGO's over not living up to its mandate for conservation has always been denied with the claim that it has accommodated the 10 % set-a-side for conservation in FMA. The ten percent set-a side has practically never been considered to be managed by the DEC or even the ILGs from Vailala. The management of such ten percentage conservation set-aside has been ignored by the Department of Environment & Conservation to this point. DEC had basically no significant set of criteria and to even map the area to satisfy its legitimate purpose with the ninety-six ILG members in view of their user rights. What were the conditions for setting aside these conservation areas? Such a portion of area must be fully explained to the people and if so were they in

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<sup>16</sup> East Sepik Province

total agreement? These questions lead to too many unanswered questions which may never be answered during the course of this case study. However, these are some of the very cloudy areas as a result of the economically induced “high speed” planning processes.

### **6.3 High Conservation Value Forest**

With all the forest being messed around, certain initiatives were underway to address the “authentic” forest management practices. One such preferred practice has been a part of a definition in the HCVF<sup>17</sup> tool kit as part of property list of the Incorporated land Groups. All previously documented ILGs do not regard this as property list and this was one way of addressing the pitfalls of the ILG processes. One of the initiatives was the promotion of FSC<sup>18</sup> Forest Certification which was very much addressed at the policy level. In addition to this, PNG launched the national High Conservation Value Forest tool kit first edition was published in 2005 and more recently launched in 2007. It is very much a practical guide to identify, manage and monitor HCVF. For the purposes of this study, the principle HCVF#5 relates to; quote “Forest areas fundamental to meeting basic needs of local communities (e.g. subsistence, health) and critical to local communities’ traditional cultural identity (areas of cultural, ecological, economic or religious significance in cooperation with such local communities” unquote. The study could not obtain EP<sup>19</sup> and EIA<sup>20</sup> for the respective project areas.

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<sup>17</sup> High Value Conservation Forest

<sup>18</sup> Forest Stewardship Council

<sup>19</sup> Environmental Plan

<sup>20</sup> Environment Impact Assessment

## 7.0 KEY FINDINGS

The study revealed the following weak linkages to effective decision-making processes. Certain legislative deficiencies have brought about negative impact upon the livelihoods of the people.

### 7.1 Definition of Land Rights

#### a) OLPLLG<sup>21</sup> vs. ILG Act 1974

There is clash between these ordinances for both ILG and OLPLLG through LLGC<sup>22</sup> wherein again the LLGC becomes more superior to the other.

- The State's usufruct rights is a gross mismanagement of the indigenous people's land based resources as no bond fee is negotiated by landowners as security for the land owners bestowing such temporal occupancy.
- The colonial adopted village council system continues to melt the inner fabrics holding clanships together and inevitably divide families and villagers during the councilor's electoral processes. It has worked against the customary governing system since colonial history.
- Oral history is not documented for both Vailala and Kamiali as part of the Governments role in ensuring legitimate ownership, which complicates the ownership issues.
- The role of the village councilor and the 'council of elders' overlap during project negotiations and during implementation. The councilor's subjection to government had compromised people's land rights.
- One off common packages did not reflect a "real property investment" for the landowners for the duration of the occupancy.
- Customary land-user rights have been confused by the State and its implementing agencies into believing that, with ILG blessing land ownership is automatically transferred.
- ILG constitutions are too vague that such bond fees were non applicable in this instance.
- The ILG application stipulated under ILG Act 1974 was not applicable in this instance which is absurd given that it is legislative requirement for landowners to be recognized.
- The councilor's role in the implementation of ILG Act 1974 is unclear and where does it fit into the ILG constitution.
- The ILG Act of 1974 is a success story for the colonial administration to improve the village council system.
- The definition of "land rights" as opposed to "land user rights" within the context of incorporation of land groups leaves a lot to be desired.

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<sup>21</sup> Organic Law on Provincial & Local Level Government

<sup>22</sup> Local Level Government Council

- The State tends to forget that the question of ownership still remains with the landowners and they have all power of ownership to request full explanations from the State as to what is happening to their land, environment and resources.

**b) ILG Act 1974 vs. Forestry Act 1991 (as amended)**

The Forestry Act appears more superior to the ILG Act, as the other is not fully implemented. ILG Act recognizes people to make bring forest development beneficial.

- The FMA is still a legal document In PNGFA’s own admittance of maladministration of the ILG can be summed up as failing to define what *land rights* are and *land user rights* supposed to mean.
- What transpired within the ILG/FMA process is the bestowing of customary “land-user rights” to the State by way of “usufruct rights” entered into agreement under FMA as pertained to the Forestry Act 199. At this stage, the State would claim ‘de-facto ownership’ to do what it wants with the resources under such privilege.
- The user rights condition had been framed to give the State temporal occupancy on customary land. Hence, this temporal occupancy requires some form of bond fee “property rental” as deposit to safe guard the interest of the land owners.
- Impossible to negotiate given the landowners position and meant a common package for all such as schools, health posts, roads and bridges.
- The FMA is an agreement and not a land ownership title.

**c) FMA vs. WMA**

Different land-use options mandated by two different Acts namely the FMA under Forestry Act and WMA under the Fauna and Flora Protection Act. One does apply ILG and the other ignores.

- The Vailala FMA incorporated 96 ILG members from 28 villagers with each respective constitution, including all assets minus definitive land boundaries were gazetted in the national gazette.
- The Vailala Block (3) FMA logging concession map is not gazetted formally, but its generic descriptions are presumptuously pertained to the ILG gazetted.
- The Kamiali WMA, on the other hand, had been gazetted with the full knowledge by the people that its user rights have been entrusted to State as a government sanctioned Wildlife Management Area.
- The Kamiali WMA mapping descriptions were gazetted upon declaration by the MEC<sup>23</sup> about the time Parliament approved the NFP in 1996.
- The MEC declared and gazetted a WMA map description without first having to satisfy genuine and legitimate land ownership through the ILG process. Such gross negligence by State not to fulfill its due diligence leads to more conflicts and disputes over land.

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<sup>23</sup> Ministry of Environment & Conservation

- The Kamiali people are still unaware of not being legitimately recognized under the Incorporation of Land Groups Incorporations Act, 1974 by the State even though their land has been declared a WMA.
- The Vailala people must also realize that the FMA process only took into possession their user rights and not their ownership rights.
- The State sees no conditions attached with the land user rights and by taking full advantage of the situation set its own terms and conditions instead with the investor.

## 7.2 Institutional Capacity

- The responsible NGO did not comply with the ILG process and this is an unlawful practice, as unlawful in the manner it was carried out, let alone the MEC's failure to point this out.
- Both the State and responsible NGO should be held responsible for the Kamiali people's legitimate right not to be recognized as genuine landowners through the ILG processes.
- PNGFA was hampered by its lack of land management skills while DLPP lacked manpower resources to even support in the overall administration and enforcement of the ILG processes.
- The land boundary issues are common and interrupts the successful implementation of the ILG.
- The four steps process of land group incorporation did not legitimately satisfy a proper and legitimate land user rights transfer to the State.
- The land owners unaware of proper documentation of oral history with regard to land user rights were not a mandatory issue when fulfilling the ILG statutory requirements.
- Since ILG data were collected this was not effectively coordinated into a database program for assisting ILG decision-making processes.
- All landowner conflicts reported to PNGFA have been referred back to the people to settle the matter through customary means.

## 7.3 The Dispute Settlement Authority

- Transparency and prior informed consent for land use changes is flawed in every aspect under the colonial imposed council system and currently under prevailing conditions.
- The DSA<sup>24</sup> only refers to domesticated land disputes but does not make any reference to holding the State accountable over environmental disputes.
- The DSA stipulated under the ILG constitution are virtually paper committees.
- The DSA set up does not involve the CoE<sup>25</sup>. The ILG constitution at present is at face value does not take on board the CoE which would otherwise over rule the DSA.

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<sup>24</sup> Dispute Settlement Authority

<sup>25</sup> Council of Elder

- The people without any greater understanding of the mechanics are expected that the DSA function even without advanced proper training and awareness of its significance.
- The ninety-six committees per se have not performed their roles as per constitution with regard to the continued land disputes.
- The decision-making lies with the customary governing system and its effectiveness thereby reducing and avoiding potential land conflicts. Therefore, in many instances the disputed parties are transferred to district level courts.
- The Vailala landowner disputes have been entertained by the Provincial and national Court hearings. The DSA members within the Vailala ILGs are ghost appointees. They just do not exist do not function at all.
- Do the appointees know that they are members of the DSA? Do they have any idea what their primary roles and objectives are? How can we make them work and by what means?

## 8.0 CONCLUSION

The non-recognition of the once mighty and visible customary governing system disintegrated power and authority leaving the people and its resources vulnerable for gross manipulation and exploitation through the State's usufruct right. The State's usufruct right is undeniably seen here as gross abuse of power and authority and the acquisition processes is interpreted as expropriating indigenous land and resources from its own people.

In essence, the ILG Act, 1974 is the only piece of legislation to address the customary 'common property governing system'. As part of colonial government's exit strategy, they at least left one of the best pieces of legislation ever enacted under the colonial government to safe guard and to promote the customary common property governing system it had overlooked.

The FMA in its current shape and form is draconian in nature and aroused a lot of expectation and suspicion surrounding its implementation. The harsh realities are that the people were led to believe that more monetary benefits were in store for them and missed the genuine equitable progress and development. While it is an essential agenda for the State to bring economic prosperity, in its haste only inflicted pain and misery to the Vailala people under the FMA. Since 1990, the development of these land based resources has seen an unprecedented increase in conflict with landowners over royalty payments and fundamentally on land boundary issues. The forestry sector has been one of the most controversial sector dealing with land ownership conflicts. The FMA concept 'steam rolled' impropriety, animosity, empathy, betrayal and hatred in the minds of people who were denied their constitutional right to legally document their oral ancestral history and genealogical aspects related to customary land boundary and demarcation. This blatant omission by the State enabled the foreign dominated logging industry to wash their hands clean by seeking refuge under the existing judiciary system.

The Vailala people are innocent victims of a draconian law not of their own doing but are caught in the middle of a rapid forest resource development phase. The Kamiali people on the other hand did not have to go through the ILG process which again shows the State's lack of consistency in its environmental protection laws. Despite the fact that *Fauna Protection and Control Act* establishes the Wild management areas it therefore, must show cause to the government that they are dealing with a very legitimate ethnic group and verified through the ILG process. The Landowners with their sponsoring local Non Government Organization, failed to facilitate the ILG process and by-passed this Act and let alone due diligence by DEC, the Kamiali WMA was declared and gazetted as a WMA.

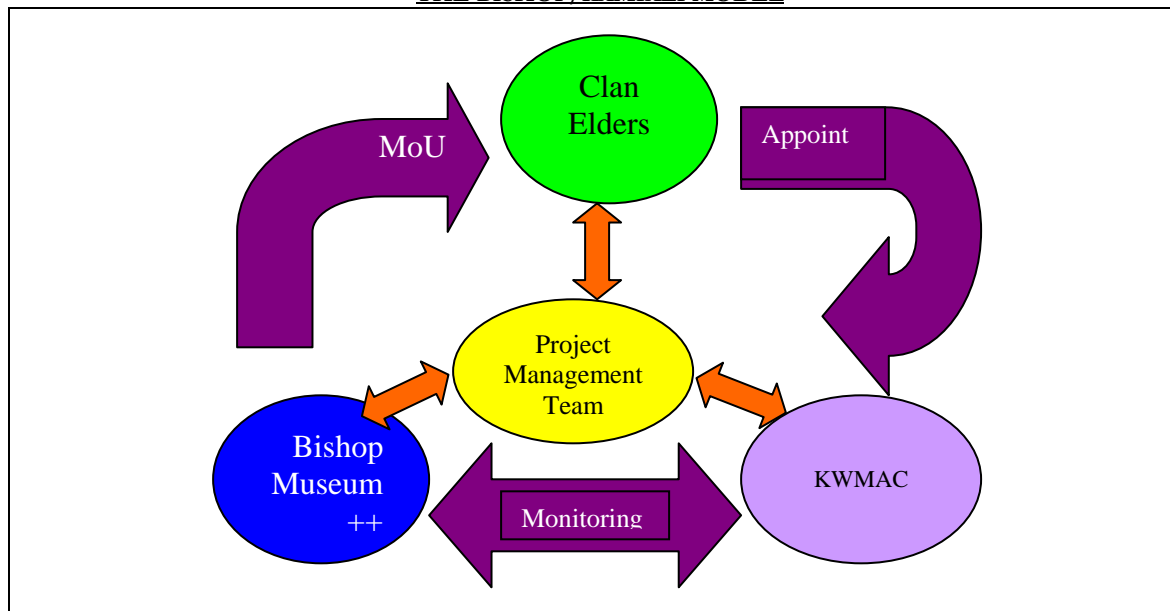
There are also many WMAs gazetted without proper ILG processes. ILG legitimizes the property user rights in the most appropriate and consensual way for empowering the Government to effectively control and manage the resources knowing fully who really owns the area. Hence, the NGO's mainly local NGO have been critical about land registration because they too have patronized a lot these of WMA and conservation areas gazetted with out first applying and effectively implementing the ILG processes.

Community Based organizations have also been incorporated as a network for local NGO's to camouflage and add more conflict towards the already existing customary common property governing systems thereby patronizing the people's land and resources.

Nevertheless, the question of 'customary land user rights' has been suppressed and undermined by the State through its weak land user right policies and legislative framework governing natural resource management. Obviously, similar issues are common to many communities around the world.

A closer look at the Kamiali Model for a Community project in the absence of ILG entails a much different approach. Bishop Museum of Hawaii entered into a memorandum of understanding with the Kamiali community signed by the clan elders to reflect the level of transparency involved.

**THE BISHOP/KAMIALI MODEL**



KWMAC= Kamiali Wildlife Management Area Committee

A tabular comparing the two distinct FMA and WMA processes.

**Table. 2**

Land-use Type	ILG Process	Area Maps	Government Approval Processes	Planning Process
FMA Vailala (Blk 3)	96 Land Groups Incorporated	1. Descriptions as per ILG 2. NFP	1. NFB Approval 2. Parliamentary Approval	Top Down
WMA Kamiali	None	Ministry of Environment & Conservation Declaration	1. Department of Environment & Conservation 2. National Gazette	(near) Bottom Up



## 9.0 RECOMMENDATION

The case study arrived at the following recommendation as constructive measures to address the ineffective decision-making processes towards land based resource-use- planning processes that currently plague the indigenous people and their land rights.

- I. that State fully comply to the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples as per Resolution 61/295 dated 13 September 2007.
- II. that the State make appropriate legislative amendments to the OLPLLG<sup>26</sup> pertaining to five-year election of ward member (Village Councilor) abolish the position and replaced with the “chairman of the council of elders” representing clans and sub-diary clans subjected to ILG Act of 1974. The chairman of the “council of elders” is rotated annually for the sake of transparency;
- III. that the State in consequent to the OLPLLG amendment above, review and amend provisions of the ILG Act, 1974 to strengthen the customary governing system for effective decision-making processes in communities particularly dealing with land based resources and other land use changes;
- IV. that the State establish also in view of the amendments to ILG Act of 1974 allow provisions for the establishment of an office of the Customary Lands Titles Commission to effectively implement the Incorporation of Land Groups Act, 1974 (and as amendment);
- V. that the state in view of the amendments to ILG Act 1974 allow provisions under the ILG constitution to hold DEC accountable for non- compliance of environmental monitoring;
- VI. that the State through DLPP with its line agencies (such as PNGFA, etc; to effectively conduct a major review of all incorporated land-groups gazetted to date and involved with land based resources. (forestry, mining & agriculture) and seek redress of its effectiveness and why some have been incorporated and not others;
- VII. that the PNGFA Acquisitions branch be strengthened through increased funding and manpower to undertake much needed review of the ILG exercises it once carried out and abandoned due to limited funding or alternatively outsourced to other local NGO's and education institutions.
- VIII. that the current and future land use changes and planning processes with regard to land based resources be consistent with the ILG consensus and decision-making processes;
- IX. that the DEC take immediate steps to make legislative changes to the Fauna Protection and Control Act allowing a provision for the application of ILGs to be part and partial of its vetting processing in gazetting Wildlife Management Areas and Conservation Areas in general and;
- X. that the respective University Councils review curriculum for the Land Management Course at the PNGUT<sup>27</sup> and Anthropological course at the UPNG<sup>28</sup> and insert defined ILG Modules for such courses. (A perfect material to start with is the Land Group Incorporation manuals by A. Power)<sup>29</sup>.

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<sup>26</sup> Organic Law on Provincial & Local Level Government

<sup>27</sup> Papua New Guinea University of Technology

<sup>28</sup> University of Papua New Guinea

<sup>29</sup> Place a compulsory practical field work for students to work with an existing ILGs in understanding its effectiveness. This can be tailored to form part of a community service program for the Universities and perhaps other Institutions.

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