

**Report of the National Inquiry
into the
Land Rights of Indigenous Peoples**

**NATIONAL HUMAN RIGHTS COMMISSION OF
MALAYSIA**

SUHAKAM

APRIL, 2013

As reconstituted from:

<http://sarawakreport.org/suhakam/suhakam-chapter1.html>

CHAPTER 1

BACKGROUND TO THE NATIONAL INQUIRY

A national inquiry is a mechanism that can be used to achieve the Commission's mandate to look into systemic human rights issues with a view to solving them through systematic means. By adopting a broad-based human rights approach, it can examine a large situation as opposed to an individual complaint, and has a dual focus, fulfilling both fact finding and educational roles. An effective national inquiry is one that is supported by the exercise of powers to subpoena witnesses and documents to its hearings, and produce a public report that contains recommendations to all relevant parties.

A national inquiry has also the benefit of being educational in nature, capable of educating the general public and all parties concerned and regarded to be better at investigating systemic causes of human rights violations. Using methodologies that involve broad participation in an issue, all perspectives can be heard resulting in more comprehensive recommendations, with general and specific applications to effectively tackle the issue.

A national inquiry examines human rights violations of a specific nature but with a wide and serious basis. The violation should also consist of an historic and systemic pattern and requires prospective action by many parties, not only the government. A national inquiry would also be suitable in situations where there is a low level of public and political recognition.

1.1 Since its establishment, the Human Rights Commission of Malaysia (SUHAKAM) has received various complaints and memorandums from indigenous communities alleging various forms of human rights violations. In response to these, SUHAKAM conducted investigations into specific cases, carried out field studies, held dialogues with the relevant communities, roundtable discussions with the State Government and other relevant agencies as well as private enterprises indicated in these complaints. Based on the activities, special Reports were published and submitted to the relevant parties.

1.2 SUHAKAM has also received numerous complaints between 2002 and 2010 related to customary rights to land, many of which have not been resolved. These complaints from indigenous peoples relate to allegations of encroachment and/or dispossession of land; land included into forest or park reserves; overlapping claims and slow processing of requests for the issuing of native titles or community reserves. Literature reviews about such issues also found that allegations of violation on indigenous customary land affect mainly the indigenous peoples in Malaysia.

1.3 SUHAKAM is of the view that a problem of this magnitude could not be overcome by using piecemeal approaches or addressed on a case by case basis. Instead, there is the need to tackle the root causes of issues comprehensively by taking cognizance of the experiences of indigenous peoples all over

Malaysia and examined from human rights lens. SUHAKAM thus decided to conduct a National Inquiry into the Land Rights of indigenous peoples in Malaysia.

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Legislative basis for the National Inquiry

1.4 SUHAKAM's authority to conduct a National Inquiry lies in section 12(1) of the SUHAKAM Act ("Act").

Section 12(1) states:

The Commission may, on its own motion or on a complaint made by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons.

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1.5 It is clear, from section 12(1), that if SUHAKAM has information suggesting that an infringement of human rights has occurred in Malaysia, it may inquire on its own motion into the incident. SUHAKAM's powers relating to the conduct of inquiries are prescribed in sections 12, 14, and 15 of the Act, read with section 18 of the Act and section 40 of the Interpretation Acts 1948 and 1967 (Act 388).

Terms of Reference

1.6 The Terms of Reference for the National Inquiry are as follows:

- i. To determine the constitutional, legal, administrative and political recognition of the indigenous peoples' right to land and their effectiveness in protecting and promoting the Indigenous peoples' right to land.
- ii. To inquire into the land rights situation of the Indigenous peoples and the impact of the recognition or non-recognition of the Indigenous peoples' right to land on their social, economic, cultural and political rights, taking into consideration relevant international and domestic laws.
- iii. To identify the constraints which impede the full enjoyment of the indigenous peoples' rights to land in accordance with their needs and requirements.
- iv. To create and promote more awareness, knowledge and understanding of the indigenous peoples' right to land and their way of life.
- v. On the basis of the facts and determinations arising from the National Inquiry, to develop recommendations to the Federal and State Government relating but not limited to the following:
 - a) the review of domestic land laws and other related laws and policies, with a view to incorporating a human rights focus therein, addressing, in particular, the problems faced by Indigenous peoples in their land claims; and

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b)the formulation of strategies and a plan of action with the aim of protecting and promoting the indigenous peoples' right to land as an indivisible and integral part of the protection and promotion of their other human rights.

Panel of Inquiry

1.7 The Commission's Chairman, Tan Sri Hasmy Agam, chaired the National Inquiry Panel in which other

Commissioners sat as members.

SABAH	SARAWAK	PENINSULAR MALAYSIA
1.Tan Sri Hasmy Agam	1.Tan Sri Hasmy Agam	1.Tan Sri Hasmy Agam
2.Ms Jannie Lasimbang	2.Mr Detta Samen	2.Datuk Dr Khaw Lake Tee
3.Mr Muhammad Sha'ani Abdullah	3.Mr James Nayagam	3.Ms Jannie Lasimbang

1.8 The Panel was assisted by a line of independent consultants who were selected by the Commission based on their wide knowledge, experience and expertise in the field of indigenous rights. The independent consultants were:

- Tan Sri Datuk Seri Panglima Simon Sipaun (for Sabah)
- Dato' Ranita Mohd Hussein (for Sarawak)
- Mr Andrew Khoo (for Sarawak)
- Dato' Dr Denison Jayasooria (for Peninsular Malaysia)
- Dr Colin Nicholas (for Peninsular Malaysia)

Procedure of the National Inquiry

1.9The National Inquiry (hereafter called the Inquiry) is committed to a cooperative and responsive approach to developing solutions to land problems of indigenous peoples. It involved a range of stakeholders, including government agencies, non-governmental organisations (NGOs), indigenous communities,

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private companies, and other interested groups and individuals, to identify and develop practical solutions that will yield improvements to the status of land ownership of the Indigenous peoples of Malaysia.

1.10The Inquiry started with introductory sessions followed by public consultations with stakeholders. Throughout the same period, the Inquiry also called for written public submissions. Subsequently public hearings were conducted to hear selected cases from the consultations and submissions. The Inquiry also commissioned studies into the land rights of the indigenous peoples to be conducted in Peninsular Malaysia, Sabah and Sarawak. This

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Report records the issues derived from the NI process and contains the NI findings, conclusions and recommendations taking into account complaints and responses to those complaints, and studies and submissions from independent sources.

Introductory Sessions

1.11 To ensure that all stakeholders understand the true intention of the Commission, appreciate the Terms of Reference, and participate actively in the process of the Inquiry, the Commission held a series of introductory sessions in the Peninsula, Sabah and Sarawak.

1.12 At those sessions, the participants were informed of the objectives of the Inquiry and what was to be expected of it. Invitations for stakeholders' continuous participations in the other Inquiry process were also made.

Research

1.13 To support the process of the Inquiry, the Commission appointed researchers to undertake in-depth study into the land rights of the indigenous peoples. Researchers, based in the University of Malaya,

University Malaysia Sabah and University Malaysia Sarawak, were appointed to conduct field studies and GIS mapping into indigenous land conflicts in selected cases in Peninsular Malaysia, Sabah and Sarawak respectively. Alongside these studies, a research into the conceptual and legal framework of indigenous peoples' land ownership in Malaysia was also carried out. This research reviewed applicable laws and procedures involving indigenous peoples' land based on international standards and principles. The research reports are available in the Annex.

Public Submissions

1.14 To ensure that all stakeholders were given equal opportunity to participate in the Inquiry, the

Commission opened a submission process. Key government departments and agencies, indigenous peoples organisations and NGOs were invited to send in views on matters pertinent to the land rights of indigenous peoples in Malaysia. A total of 57 submissions were received by the Inquiry.

Public Consultations

1.15 The Commission, through a public consultation process, also gathered information on areas of conflict pertaining to indigenous land and related evidence, as well as applicable laws, procedures and policies. Invitations were sent to all stakeholders including, but not limited to, key government departments and agencies, indigenous communities, the private sector, NGOs and the media, to participate in the consultations.

1.16 For the purpose of the public consultations, the Inquiry team divided Malaysia into three main regions namely Sabah, Sarawak, and Peninsular Malaysia. For the Peninsular Malaysia region, consultations were conducted in Kelantan, Perak, Pahang, Selangor and Johor. The

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consultations began in Sabah in June, 2011, after which the Inquiry team headed to the various states in Peninsular Malaysia in July 2011 before concluding in Sarawak in September 2011. The public consultations were conducted at several venues in 23 districts around Malaysia, totaling 34 days.

1.17 The consultations process involved a briefing on the Inquiry, followed by a short dialogue session with the indigenous peoples present. The Commission's officers then recorded statements from those who

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wished to provide one, either individually or in groups. At the same time, the Commissioners consulted representatives of the government in a more informal manner to get feedback on cases raised during the dialogue and its perspectives and experience pertaining to land issues and recognition of land rights of Indigenous peoples, and to ascertain measures that have been taken thus far. Meetings were also held with some NGOs, the private sector and key individuals.

1.18 The consultations received overwhelming response from the public with more than 6,500 indigenous peoples participating in the sessions. A total of 892 statements were recorded - 407 statements from Sabah, 198 statements from Sarawak and 287 statements from the Peninsula.

1.19 These statements were then categorised into broad categories. Table 1 shows the number of statements in each state received according to these categories.

TABLE 1: NUMBER OF STATEMENTS RECEIVED BY THE INQUIRY BASED ON CATEGORIES/ISSUES

CATEGORIES/ NO ISSUES	PENINSULAR MALAYSIA										TOTAL
	SABAH	SARAWAK	SELANGOR	PERAK	PAHANG	JOHOR	KELANTAN	NEGERI SEMBILAN	MELAKA		
1. Administration	221	101	113	131	24	15	2		1		437
2. Plantation	51	10	4	8	13	8	17	-	-		111
3. Logging & Forest Reserve	50	11	8	8	5	3	8	-	-		93
4. Inclusion into National or State Protected Areas	22	6	1	3	2	1	-	-	-		35
5. Community Land Development	17	-	-	1	3	1	-	-	-		22

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Scheme										
Commercial										
6.	Development Projects	16	8	187	12	10	1	-	-	72
7.	Compensation	6	36	4	3	3	1	2	-	55
8.	Others	24	26	4	9	2	-	2	-	67
	TOTAL	407	198	507	071	48	45	2	1	892

Public Hearings

1.20 The public hearings were a continuation of the consultations where specific witnesses will appear before a panel to give further information or to verify certain facts. The Public Hearings, which were held between April and June 2012, were conducted in several areas around the Peninsula, Sabah and Sarawak.

1.21 Bearing in mind the pattern of issues identified through the public consultation process, the Inquiry selected a number of representative cases that were recorded at the public consultations and submissions to be further examined by the Panel at the public hearings. The cases selected were based on the availability of valid supporting documents and evidence.

1.22 A total of 132 cases were selected covering a wide range of issues from, among others, administrative, plantation, logging & forest reserves, inclusion of land into state & protected areas, indigenous land development schemes and commercial development projects. The Public Hearing is an open process and was conducted in accordance with Part III of the Human Rights Commission of Malaysia Act 1999.

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Scope of the Inquiry

1.23 In identifying who are the indigenous peoples of Malaysia, the Inquiry referred to the Federal Constitution, relevant State laws and the working definition used by the United Nations. While the Inquiry recognises that the Malays of the Peninsula are indigenous to Malaysia, it decided, in adhering to the United Nations' definition of the term, to focus on the aborigines or Orang Asli of Peninsular Malaysia, and the natives in Sabah and Sarawak.¹

In carrying out its Terms of Reference (ToR), the Inquiry is committed to assess the implementation of laws and procedures and administrative practices in Malaysia in respect of native land against the customary concept of ancestral land and the relevant international standards. In doing so, the following steps were taken:

- i. Identifying issues pertaining to elements of violation in depriving, restraining the rights of indigenous peoples over their customary land, including understanding indigenous peoples' perspective of customary land;
- ii. Examining relevant laws and legal provisions, and current policies, practices and procedures by the authorities and individuals that infringe on the rights of indigenous peoples to land;

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iii. Analysing recent judgments and decisions taken by the Courts when tackling issues pertaining to land acquisition by state authorities and adequate compensation being awarded further, including tackling issues on communal ownership and collective rights of indigenous peoples to land;

iv. Examining the effectiveness of policies, practices, recommendations and special measures implemented in rectifying violations on indigenous peoples' land rights;

v. Examining whether relevant bodies and/or agencies which are responsible for protecting the rights of indigenous peoples have been successful in carrying out their respective tasks towards remedying complaints on violation of land rights highlighted by affected indigenous peoples;

vi. Considering the question of resource exploration and development and make recommendations on ways of accommodating the legitimate concerns and compensating for the impact of such development on indigenous peoples; and

vii. Making recommendations on the appropriate terms and conditions upon which indigenous land should be recognised and titles issued.

Public Awareness and Empowering Process of the Inquiry

1.24 It was also the aim of the Inquiry to create and promote more public awareness on the indigenous peoples' rights to land and their way of life (ToR 4). Towards this end, media involvement is vital to promote transparency for the process, to play an educative role and to provide some form pressure on the relevant authorities. The media, particularly the local media, played an active role throughout the process. However, media self-censorship resulted in considerably lower coverage than expected.

A report of the media coverage can be found in the Annex.

1.25 In addition to creating public awareness, the Inquiry is seen as a major empowering platform for the indigenous communities, thereby mobilizing themselves towards protecting their customary land.

Communities came together to trace historical evidence to substantiate their stories and claims of

NCR land to be presented before the Inquiry. For some, it also meant that a number of villages had to select one representative to speak on their behalf. Women too, also rose to the challenge despite the fact that some have never stood in public to speak.

1 Although there is no consensus on a universal definition of "indigenous peoples" primarily because of the diverse legal recognition and socio-political situations of indigenous peoples worldwide, the United Nations and other institutions have adopted a working definition to guide their work with indigenous peoples. In this working definition, the common characteristics include historical continuity since before pre-colonial societies; their non-dominant or marginalised situation; self-identification and distinctiveness from the dominant

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society; determination to preserve their rights and identity; intricate relationship with land, territories and region; and presence of customary, social and political institutions.

CHAPTER 2

INDIGENOUS PEOPLES OF MALAYSIA

2.1 The term “Indigenous Peoples” is often used to describe groups of individuals who enjoy certain characteristics such as a common historical tradition, ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and a common economic life. In addition there must also be a will/consciousness of being a people; and institution(s) to express the identity of the people.

2.2 Although there is no consensus on a universal definition of “Indigenous Peoples” primarily because of the diverse legal recognition and socio-political situations of indigenous peoples worldwide, the United

Nations and other institutions have adopted a working definition to guide their work with indigenous peoples. These include the Cobo Report,² the International Labour Organisation (ILO),³ the World Bank⁴ and the Asian Development Bank.⁵ In this working definition, the common characteristics include historical continuity since before pre-colonial societies, their non-dominant or marginalised situation, self-identification and distinctiveness from the dominant society, determination to preserve their rights and identity, intricate relationship with land, territories and region, and the presence of customary, social and political institutions.

2.3 Articles 1 and 2 of the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) state that indigenous peoples have the right to enjoy all human rights and freedoms from discrimination, not only as individuals but also as a collective. Indigenous collective rights stem from the way indigenous peoples organise themselves as a group or community.

2.4 In Malaysia, based on the UN working definition, “Indigenous Peoples” would include the aborigines of Peninsular Malaysia and the natives of Sabah and Sarawak, who are also recognised as such by the Federal Constitution and relevant State laws.

Orang Asal or Indigenous Peoples of Malaysia⁶

2.5 The majority of the Indigenous Peoples of Malaysia still live in rural and in many cases, remote areas, although more and more also live in the periphery of the urban areas. Many survive by hunting and

²The Cobo Report’s working definition of Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. On an individual basis, an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group). This preserves for

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these communities the sovereign right and power to decide who belongs to them, without external interference.” (United Nations, 1986).

3Article 1 of ILO Convention 169 definition applies to both “tribal peoples” and “indigenous peoples”:

(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)peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the 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.”

4In the World Bank’s Operational Directive 4.20, IPs should among others include the following functional criteria:

- (a)A close attachment to ancestral territories and to natural resources in these areas;
- (b)Self-identification and identification by others as members of a distinct cultural group;
- (c)Often, use of a language different from the national language;
- (d)Presence of customary social and political institutions;
- (e)Primarily subsistence-oriented production; and,
- (f)Vulnerability to being disadvantaged as social groups in the development process.

5The Asian Development Bank specifies the characteristics, either main or additional, of IPs as follows:

- (a)Descent from population groups present in a given area, most often before modern states or territories were created and before modern borders were defined;
- (b)Maintenance of cultural and social identities; and social, economic, cultural, and political institutions separate from mainstream or dominant societies and cultures.
- (c)Self-identification and identification by others as being part of a distinct indigenous cultural group, and the display of a desire to preserve that cultural identity;
- (d)A linguistic identity different from that of the dominant society;
- (e)Social, cultural, economic, and political traditions and institutions distinct from the dominant culture;

(f) Economic systems oriented more toward traditional systems of production than mainstream systems;

(g) Unique ties and attachments to traditional habitats and ancestral territories and natural resources in these habitats and territories.

6The Malay language term “Orang Asal” is often used by indigenous peoples of Malaysia as a collective term to refer to the Orang Asli of Peninsular Malaysia and the natives of Sabah and Sarawak. This term is accepted and used by the Malaysian Human Rights Commission, but there is still debate among some government agencies.

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gathering, fishing, swidden farming, arboriculture, and by trading forest products. A significant number, especially in Sabah and Sarawak, now work in the civil service or in the private sector, but by and large indigenous peoples are still a rural population. Land development projects and government programmes have turned many into rural peasants or labourers.

2.6 Indigenous peoples of Malaysia have a close relationship to their lands, territories and resources.

Their lands and resources are significant not only as a means of livelihood but also as part of their spiritual and cultural life, and form part of their identity as peoples. Indigenous knowledge, innovations and practices on natural resource management are rarely understood. The main concept underlying such resource management is that of use and protect, which incorporates a keen awareness of the environment, an appreciation for conservation and continuity.

2.7 Indigenous Peoples have distinct spiritual and material relationships with their customary land, which forms part of their identity as Peoples. The recognition, and the promotion and protection of rights over indigenous peoples’ customary lands and resources are vital for their development and cultural survival. Because of this close relationship and the need for land for the survival of most indigenous peoples, the economic, psychological and social impacts of land loss are therefore especially serious among indigenous peoples.

2.8 Indigenous communities have their own age old customs or adat related to the use and protection of lands, territories and resources. Adat also forms the foundation of life and existence, and serves as a blueprint in the maintenance order and social system, assertion of identity, education of the younger generation and upholding of traditional belief system and interpretation of reality. Indigenous peoples’ definition of adat includes both written and unwritten customs, rules and norms that govern every indigenous person and community. Adat encompasses customary laws, concepts, principles and practices, and the customary institution that implements and regulates such laws, concepts, principles and practices. In short, it can be called a holistic set of indigenous system of governance.

2.9 Adat in turn, is governed by traditional institutions, which typically comprise knowledgeable and respectable elders. The members of such institutions are also responsible for ensuring that community members understand and adhere to adat and for continuity in the inter-generational transfer of knowledge. Over time however, the respect for, and composition of, traditional institutions have changed particularly with interference from the government and the creation of new forms of institutions.

Natives of Sabah

2.10 For Sabah, Article 161A(6)(b) of the Federal Constitution provides that for a person to be considered a native of Sabah, the following must be fulfilled: (a) a citizen of Malaysia (b); is the child or grandchild of a person of a race indigenous to Sabah; and (c) was born either in Sabah or to a father domiciled in Sabah at the time of the birth. However, the Federal Constitution does not provide an enumeration of who constitutes a native of Sabah.

2.11 Under the Sabah Interpretation (Definition of Native) Ordinance s(2)(1),⁷ a “native” refers to any person who is indigenous to Sabah; one of whose parents or ancestor is indigenous to Sabah and living as a member of a native community; and any Malaysian citizen who is a member of a people indigenous to Sarawak, Brunei, Indonesia, Philippines, Malaya or Singapore.⁸ For those under this

7 No.12 of 1952 (Cap 64) Laws of North Borneo, amended in 1958.

8 Section 2 of the Interpretation (Definition of Native) Ordinance (Sabah Cap.64) state the following:

(1) Wherever the word “native”, used as a substantive, occurs in any written law in force at the commencement of this Ordinance, other than the Ordinances set out in the Schedule to this Ordinance, or in any written law coming into force after the commencement of this Ordinance, unless expressly otherwise enacted therein, it shall mean either –

(a) any person both of whose parents are or were members of a people indigenous to Sabah; or

(b) any person ordinarily resident in Sabah and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or

(c) any person who is ordinarily resident in Sabah, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the State of

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last category, it is a requirement that any declaration of the status of a native should be based on proof of good character, and that the applicant must have lived, and been a member of the native community for at least three to five years, and his stay is not limited by the Immigration Act 1959/63

(Act 155). Such declaration must be made by a Native Court in Sabah.⁹ A “native community” is defined as any group or body of persons the majority of whom are natives and who live under the jurisdiction of the local authority,¹⁰ or under the jurisdiction of a native chief or headman.¹¹

2.12 The population of Sabah is 3,206,742 as of the last census in 2010, with indigenous groups apparently making up 61.22 percent of the total population. Despite the clarity provided by the provisions under the Sabah Interpretation (Definition of Native) Ordinance, a large controversy exists with respect to who are the natives of Sabah, particularly due to the sudden jump in population over the last 10 years and discrepancies in official data.

2.13 Based on official statistics, the population of Sabah has grown from 929,299 in 1980 to 3.2 million in 2010. In the 2010 Census of Population and Housing, the three major groups of Kadazandusun,

Murut and Bajau as well as ‘Other Bumiputera’ numbered 1.6 million or 50% of the total population

(Table 1). It is worthwhile to note that in the 2000 census, there was a significant proportion of indigenous groups categorised as ‘Other Bumiputera’ who formed 15% of the population, and the ‘Malay’ category who numbered 12% of the population. The ‘Malay’ category included Bugis groups whose migration could be traced to the post-World War II period or earlier, to work in logging camps and in the 1960s in the oil palm plantations of Sabah.¹²

TABLE 1 : Total population for Sabah as of the last census 2010

No	Race	Population	Percentage
1	Malay	184,197	5.74
2	Kadazan Dusun	568,575	17.71
3	Bajau	450,279	14.00
4	Murut	102,393	3.20
5	Other Bumiputera	659,856	20.57
6	Chinese	295,674	9.20
7	Indian	7,453	0.23
8	Others	48,527	1.51
9	Non Citizen	889,779	27.74
	Total Population	3,206,742	100

References: http://www.statistics.gov.my/portal/download_Population/files/census2010/Taburan_Penduduk_dan_Ciri-ciri_Asas_Demografi.pdf

Sarawak or the State of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63

[Act 155.]:

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Provided that if one of such person's parents is or was a member of any such people and either lives or if deceased is buried or reputed to be buried in Sabah, then the qualifying period shall be reduced to two years; or

(d) any person who is ordinarily resident in Sabah, is a member of a people indigenous to the Republic of Indonesia or the Sulu group of islands in the Philippine

Archipelago or the States of Malaya or the Republic of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63 [Act 155.].

(2) In the definition of "native" set out in subsection (1) hereof-

(a) "ancestor" means progenitor in the direct line other than a parent;

(b) "native community" means any group or body of persons the majority of whom are natives within the meaning of paragraph (a) of subsection (1) and who live under the jurisdiction of a Local Authority established under the provisions of the Rural Government Ordinance* [Cap. 132.] or of a Native Chief or Headman appointed under the provisions of that Ordinance;

(c) "parent" includes any person recognised as a parent under native law or custom.

9 No claim by any person to be a native by virtue of the provisions of paragraphs (b), (c) and (d) of subsection (1) shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under section 3.

10 Established under the provisions of the Rural Administration Ordinance 1951.

11 Appointed under the provisions of the Sabah Native Court Ordinance 1993 or the Native Court (Labuan) Ordinance.

12 Majid Cooke, Fadzilah (2007). Interim Report prepared for the World Wildlife Fund Malaysia, Kota Kinabalu in lieu of the Sabah Land use Project, Sociology Component, Part

1. Unpublished.

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2.14 There are differing data on who are bumiputera and who are not. According to the Sabah Museum, together with the major Bumiputera groups of Kadazandusun, Bajau and Murut, there are altogether

72 ethnic and sub-ethnic groups. In the Sabah Museum's category of 'Other Bumiputera', there are ethnic and sub-ethnic groups that include Bisaya, Brunei, Cagayan, Gana, Idahan, Iranun, Kalabakan, Kedayan, Kimaragang, Kwijau, Lotud, Lun Dayo, Makiang, Begahak, Minokok, Nulu, Paitan, Rumanao, Rungus, Serudong, Suluk, Sungai, Tidung and Tindal. By

contrast, according to the Federal government list, major ethnic and sub-ethnic groups who make up the Bumiputera category totaled only 28.13

2.15 Not included in the Sabah Museum list as Bumiputera is the ‘Malay’ category which is listed in the compilation of the Federal government. Similarly, the groups referred to by the Federal government as ‘Indonesian’, ‘Sino-campuran’ (mixed Sino), ‘Filipina-campuran’ (mixed-Filipino), ‘Sarawak indigenes’ and Bugis – all considered Bumiputera, were not included in the Sabah Museum categorisation of Sabah’s indigenous peoples.

2.16 The discrepancy in naming who is indigenous (and therefore Bumiputera) and who is not is an ongoing part of a larger process of identifying who is a citizen and who is not, as Bumiputera is a political category denoting the rights for accessing entitlements associated with citizenship.

13 Budianto (2008). Attachment A (Sabah Museum List) and B (Federal Government List), pp. 160-161.

CHAPTER 3

INDIGENOUS PEOPLES' PERSPECTIVE OF LAND

Sabah

Indigenous Traditional Territories and the Adat¹⁸

3.1 Communities from distinct villages in Sabah refer to their territory as Kampung (or now popularly referred to as wilayah adat), which includes the settlement area, backyard gardens, farms, old farms/ village sites, cemetery, grazing area, ceremonial spots and forest within a defined village boundary.

3.2 Kokompungan or Kawalaian (in Dusun), Pamahunan (in Murut) or kampung (in Paitan) refers to the village settlement area, whether individual houses, hamlets or longhouses, which are customarily organised. For most kampung, the houses, hamlets or longhouses are grouped together with each household having a small plot as their vegetable gardens or other short-term crops. Social recreation areas such as football or takraw field and other village amenities such as the balairaya (village hall) are usually found within the settlement area.

3.3 Beyond the settlement areas are the pongugumaan (in Dusun), pantahumaan (in Murut) or pongumaan (in Paitan), which are areas that revolve around rice cultivation, and are owned by individuals or families. For wet rice cultivators, rice fields or ranahon (in Dusun), lanau (in Murut) or ranau (in Paitan) are usually located in a specific area that does not change as long as irrigation water is available.

3.4 Hill rice fields are rotated, having specific names according to the agricultural cycle. The tumo (in Dusun), umo (in Murut and Paitan) refers to farming land which is currently planted, while tomulok (in Dusun), amug/naumoh (in Murut) or repa (in Paitan) refers to land left fallow on which there are secondary growths (1 – 5 years). Areas that have undergone jungle regrowth (5-10 years) but still considered as part of fallow period in the traditional agricultural cycle, are referred to as kapanggor (in Dusun), katanaan (in Murut) or nokakas (in Paitan). Unlike the practice of the Sarawak natives, where any village member is free to take resources from land under fallow, Sabah natives restrict such collection only to the household who owns the field or has been granted permission by the owner.

3.5 Kabun (in Dusun, Murut and Paitan) refers to areas often planted with long-term commercial crops such as rubber, fruits, coconuts and/or oil palm depending on the type of crop which currently fetches good price in the market. In kampungs where land is scarce, families may buy such land referred to as tana' pongindopuan or pangakanan (in Kadazan) or land for income generation.

3.6 Pogun or Pogun laid (in Dusun), namahunan (in Murut) or pogun (in Paitan) are abandoned sites of old family houses/longhouses/hamlets and gardens, but where various types of fruit trees still grow.

3.7 The kalabangan (in Dusun), kalavangan (in Murut) or taw (in Paitan) is designated community cemetery for the kampung or village. Cultivation or development of land

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designated as cemeteries are strictly prohibited and in some communities like the Sungai of Kinabatangan, outsiders are strictly prohibited from entering caves which are used as communal burial areas. Areas also designated with such reverence are ceremonial spots referred to as tempat pamaabaza/ponogitan (in Kadazan), pulung (in Murut) or nyadu (in Paitan). Numerous ceremonial spots for different functions may be conserved within the kampung such as the sogindai/labot (related to headhunting ceremonies), tovud or springs, tobobon or salt licks, sungkadon bohuntung (rainbow ends), pamamaganaan do jangkil (“notice board”

18 Information are based on field interviews by Doris Losimbang and Galus Ahtoi of PACOS Trust.

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of kampung prohibitions). Ceremonies to perform the monubak are held to appease the spirits of the forest so that hunting expeditions are successful. Among the Paitan people, if serious violations of the adat occur, a pusangag will be set up for the monogit (cooling of the earth) ceremony.

3.8 Talun (in Dusun), himbaan (in Murut) or imbaan (in Paitan) is an area of primary forest within the boundaries of a particular village or kampung, and is normally owned and managed collectively by the community. Rights to the forest and the resources therein reside exclusively with the community that owns it, and people from neighbouring villages or outsiders are not allowed to hunt, collect wild vegetables and medicines, and cut bamboo, cane, creepers or timber.

3.9 In many villages, paun or communal grazing areas still exist. Rivers and streams are also communally managed and are considered open for access, although when management systems such tagal is imposed, community members are expected to abide by the rules that were agreed by all the members.

Rights accorded to individuals/households

3.10 Generally, the individual or household within the kampung who first opens a certain forest area secures rights over that specific piece of land. Such rights are permanent and heritable. Individual plots are marked by natural boundaries such as streams, watersheds or ridges, and with markers which were planted (eg rolok plant) or erected (eg hugu or menhirs), much the same way as an inter-village boundary. Specific trees (eg mengaris) with wild bees nests) or caves with birds nest can be owned, and the descendants of an original tree or birds nest cave finder have rights over these resources.

3.11 The adat guides the community with regard to rights within a village territorial domain, individual acquisition of land for cultivation, land boundaries and inheritance. Boundary is an important point of reference when a dispute arises between groups or individuals.

Gaps between Traditional Land Tenure System and the Sabah Land Ordinance

3.12 When the North Borneo Chartered Company was established in North Borneo (now Sabah) in 1881, its main mission was to achieve economic growth through the exploitation of

the territory's natural resources. However in doing so, it was obligated to respect native rights and customs. There were inherent conflicts between these two considerations as the very property rights and native legal institutions that Company officials were charged to respect soon became an obstacle to the expansion of commercial agriculture. As a result, the Company instituted a system of legal pluralism in which some native customary laws were supported while those that hampered the commercial exploitation of land were replaced with western legal concepts.¹⁹

3.13 Legal pluralism was basically through the incorporation of native customary laws into the Sabah Land Ordinance (SLO). The conflicting situation and concepts which remain a legacy today were captured in Section 15 of the SLO.

Criteria on NCR (Section 15)²⁰

3.14 Section 15 of the SLO 1930, which defines Native Customary Rights (NCR) to land was adopted from a standard British India land law and has not changed much over the years despite many attempts

¹⁹See Amity Doolittle, *Native Struggles over Land Rights: Property and Politics in Sabah, Malaysia*, University of Washington Press, 2005, p82.

²⁰Section 15: Definition of customary rights.

Native customary rights shall be held to be -

- (a) land possessed by customary tenure;
- (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- (c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
- (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
- (e) land that has been cultivated or built on within three years;
- (f) burial grounds or shrines;
- (g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

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to redefine and reflect the actual meaning of customary land rights as elaborated earlier in the earlier section.

3.15 One contentious element in the definition of NCR is found under section 15 (b) and (c). They prescribe the number of fruit trees per hectare of land (section 15 (b)) and isolated fruit trees, and sago, rotan, or other plants of economic value (section 15 (c)) to be found when ascertaining NCR. Traditional native agriculture usually involves planting a diversified number of crops and useful plants using inter-cropping techniques in a particular area. This was done to ensure a steady supply of food for the family and for other purposes. Fruit trees

may be interspersed with trees for firewood, medicines, crafts, or as building materials. As such, to specifically define NCR to cover only fruit trees and plants of economic value will not capture the actual customary land use.

3.16 In the definition of “customary tenure” in section 66 of the SLO 2011, which is linked to section 15 (a), lawful possession of land by natives was deemed to be either through continuous occupation or cultivation for three or more consecutive years. Hill rice cultivation involves a cycle of one cultivation year followed by a fallow period of 3 – 10 years to restore soil fertility (see 3.4 above). NCR claims on hill rice fields are therefore not recognised as fallow period is not considered to part of the planting cycle, and do not fulfill the three consecutive years of continuous cultivation.

3.17 Communities recognise the importance of maintaining clean water supply not only for domestic use but also for irrigation and recreation, and would ensure that community water catchment within their NCR areas for gravity water supply are conserved. However, section 15 does not include this as a criterion for NCR. It is useful to note that the Water Resources Enactment 1998 under section

16 has a provision for private right to take, use and control, sufficient for household and subsistence agricultural purposes.

3.18 Another missing NCR criteria under section 15 is with respect to rivers and coastal areas within any native territory that are used and managed by the community. Rivers and coastal areas are customarily demarcated and managed as they represent a source of food and mode of transportation. Usually rights over rivers and coastal areas are shared with other communities, and also involve shared management responsibilities. The traditional Tagal system, a traditional fish management practice, is now incorporated within the Sabah Fisheries Enactment, yet section 15 of the SLO has not been harmonised. Similarly, the State has adopted the integrated coastal management plan with some elements incorporated in the Sabah Conservation Enactment. Coastal communities and some inland communities continue to manage specific areas as these represent important food sources and settlement areas.

3.19 While the Sabah Forestry Enactment 1968 under section 41 allows communities to harvest forest produce for its use, section 15 of the SLO only recognizes isolated fruit trees, and sago, rotan, or other plants of economic value that can be claimed by individuals as part of their NCR.

3.20 An important economic and social activity for natives is hunting, and recognition of communal hunting areas should be included under section 15. The Sabah Conservation Enactment 1997 recognises community hunting areas (section 32) and honorary wildlife wardens (section 7) from the community.

3.21 Conservation and management areas within a customary territory are also getting increasing attention and support. Protection of traditional knowledge associated with conservation of biological resources are very clear in the Sabah Biodiversity Enactment 2000 under section 9(1) (j), with clear provisions for protection of resources in NCR land in section 16(b).

21 Section 65: “Customary tenure” means the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years or by title under this Part.

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Collective Ownership

3.22 Traditionally, land was collectively held by the community. Now, apart from communal forests and village settlement reserves, and rivers, most agricultural land or grazing areas are registered as individual properties. Section 15 (c) of the SLO clearly spells out that the land is a private rather than collective resource. Apart from the provision for Native Reserves under section 78 of the SLO, in reality no other section provides for community collective ownership. Although section 76 deals with Communal Titles, it is hardly used to recognise collective ownership.

Sarawak

Adat and Land Tenure²²

3.23 The adat²³ is the guiding principle with regard to rights in establishing a village territorial domain, individual acquisition of land for cultivation, boundary and inheritance. The territorial domain held by a distinct longhouse is known in Iban as pemakai menua²⁴ (Topat Pimung in Bidayuh) and includes farms, gardens, old longhouse sites, fruit groves, cemetery, water and forest within a defined boundary

(garis menua).²⁵ Boundary is an important point of reference when a dispute arises between groups or individuals. The process of creating pemakai menua involves the ceremony of panggul menua.²⁶

When the Brookes established a government in Sarawak in 1841, this system of land tenure had long been in existence and during its 100-year rule, this system of land tenure was maintained and practised in the Native Courts.

3.24 Tanah umai includes all lands that are cultivated as farms, gardens, and fruit groves, including land left fallow or temuda. As a general rule, the household within the village that first felled the forest secures rights over specific pieces of land. These rights are heritable, passing down from one generation to the next household members. Individual plots are marked by natural boundaries (garis umai) such as streams, watersheds, ridges and permanent landmarks.

3.25 Temuda²⁷ (in Iban, Tiboie in Bidayuh) refers to farm land left fallow on which there are secondary growths. When a temuda plot is under forest-fallow, any longhouse member is free to take firewood from it, or cut bamboo, cane, or gather shoots, wild fruits, edible leaves, fungi, tuber, or other uncultivated stuffs, without necessarily consulting the members of the household having cultivation rights over the land. There are various classifications of temuda, indicating its age.²⁸ It should be noted that forest-fallow no matter how long it lasts is a form of land management system practised by the indigenous communities.

3.26 Fruit groves are an important aspect of indigenous resource tenure. Mawang or Tibawang (in Bidayuh) refers to a fruit garden or orchard and old abandoned settlement sites with various types of fruit trees growing around them.²⁹ Mawang can be established on a communal or individual land. An individual who plants a fruit tree on a communal land establishes rights to it and those rights are inheritable by his descendants, but rights to the land resides with the community. Members of the community may collect fruits from the tree, but only with permission of the planter or his descendants. Failure to do so will render the person liable to provide pingasung, a form of restitution for a breach of the adat.

22 Based on the Sarawak research report commissioned by the National Inquiry (see Annex).

23 A. J. N. Richards' 1992, *An Iban-English Dictionary*, Penerbitan Fajar Sdn Bhd. Bhd., Petaling Jaya (Second Impression) p. 2 defines adat as a "way of life, basic values, culture, accepted code of conduct, manners and conventions". Eric Jensen 1974, *Iban Religion*, Oxford: The Clarendon Press p. 5 observes that adat involves an indigenous "system of agriculture". The Malaysian Criteria and Indicators for Forest Management Certification [MC&I (2002)] defines adat as "native customs which include way of life, basic values, system of belief, code of conduct, manners, conventions and cultural practices according to which indigenous society is ordered".

24 The same concept is known as torun tanak upuo in Bidayuh, tana' sengayan in Kayan, tana' kanan in Kenyah, tana' bawang in Lun Bawang and Kelabit, tana' pengurip in Penan etc. In this paper, Iban terms or terminologies are used; where terms or terminologies from other communities are used, these will be indicated.

25 Gerunsin Lembat 1994, "Native Customary Land and Adat", a paper presented the Seminar on NCR Land Development, Kuching, Sarawak, September 29 – October 3, 1994.

26 Panggul menua refers to the ritual ceremony performed to mark the opening of a territory for settlement, farming, and other activities.

27 Known as talun in Kayan Belaga and Western Penan, jekau in Kenyah and Eastern Penan, amug in Lun Bawang and Kelabit etc

28 For example, Adet Kayan-Kenyah 1994 classifies temuda as ba'e if the secondary growth is one year old, talunuk 8-15 years, talunaya' 16-25 years, and talun gang 25 years and above.

29 See Robert S. Ridu 1994, "Mawang: Bidayuh resource tenure," a paper presented at Workshop on Resource Tenure in Southeast Asia: Legal and Customary Aspects, RELC International House, 30 Orange Grove Road, Singapore 1025, August 10-12, 1994.

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Where an individual plants fruit trees on his own land, he establishes rights over both the trees and land. If at a later stage, there is more than one descendant investing their labour in the maintenance of the mawang, each will have equal rights of access to the fruits. If one of the descendants collects and sells the fruits without informing the others, he will lose rights to collect the fruits in the next season. If one of the descendants moves to another village through marriage or migration, he will lose rights to both the fruit trees and land.

3.27 Tembawai are old longhouse sites which have been abandoned, but contain various types of fruit trees. The person who planted the fruit tree on the tapak bilik (family apartment lot) and his descendants retain rights to it, but rights to the land are held by the community.

3.28 Another important category of land is pendam, a designated community cemetery for the longhouse or village. It is located within the pemakai menua and is established with appropriate rituals on land held in common by the community concerned. Rules pertaining to a cemetery are clearly explained in the codified adat of the different Dayak communities, and the violation of any of the rules is dealt with by the appropriate sections of the adat. For instance, there are rules which prohibit the cultivation or development of land designated as cemetery.

3.29 Pulau (also referred to as pulau galau or reserved forest) is an area of primary forest outside the cultivated area, but within the pemakai menua of the longhouse. Pulau is normally owned by the community. Rights to it reside with the community that owns it. People from other longhouses may hunt, collect wild vegetables and uncultivated foodstuffs or cut bamboo, cane and creepers in the pulau, but may not extract timber or climb fruit trees where exclusive rights to these resources rest with the longhouse community that owns it.

3.30 Pulau (in Iban, Obut in Bidayuh) can be broadly divided into pulau papan, pulau ban and pulau buah. Pulau papan, pulau ban provides the longhouse essential items such as timber for house construction and for building boats, jungle vegetables, rattan and other jungle produce. It is a hunting ground for the community as well as an important water catchment. Within the pulau papan, pulau ban area, individuals during the pioneering days had stake their claims over rights to a number of different trees. These included kayu ban (timber), especially teras or belian (ironwood), engkerebai, fruits of which are used to produce dyes, engkabang and other oil-yielding trees, tekalong, bark of which is used to make bark cloth and carrying straps, and tapang which provide a place for bees to produce honey. Claims to trees were created in two ways.³⁰ Firstly, the first person to find a tree claimed it by clearing the undergrowth around its base. When this act was drawn to public attention, the claimant established exclusive rights over the tree. Such rights are inheritable and passed down to the descendants of the claimant. Secondly, a tree was planted, and the planter established rights to it which are inheritable by his future descendants.

3.31 All descendants of an original tree finder or planter share rights of harvest of its fruits. These rights extend to their husbands, wives and other household members. Pulau buah is a fruit grove which contains different types of trees, growing wild or planted. Claims to fruit trees are created in similar way as claims to other trees discussed earlier, and rights of inheritance follow the same principle as those of tree tenure.

3.32 Fruit trees, are commonly planted in the longhouse precinct, usually behind the planter's apartment. Rights over such fruit trees continue to be recognized in former longhouse sites which serve as community fruit-tree reserves. During the pioneering days, fruit trees were also planted at the riverside forest corridors and in the pulau area. These fruit trees serve not only as an evidence of the planter's rights to the trees or plots of land, but also the community rights to a particular area which is next to a neighbouring longhouse or village.

30 For detail see Clifford Sather 1990, "Trees and tree tenure in Paku Iban Society: the management of secondary forest resources in a long-established Iban Community",

Borneo Review 1(1) pp. 16-40.

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Penan resource tenure

3.33 The Penan are traditionally a nomadic people. Although no more than 400 individuals are still nomadic, the majority of them have only settled down in the 1970s. In most cases, these settled Penan are settled only in name, as a large number still depend on the forest for food and economic activities. Whether nomadic or settled, their relationship with the land is quite different from that of the other indigenous communities in Sarawak. Traditionally, the Penan do not cut the forest to establish customary rights to the land. Instead, they establish rights to resources within the territory they occupy. To appreciate the Penan relationship with the landscape, it is helpful to look at their nomadic lifestyle and how that relationship with the land is maintained when they settled down.

3.34 Nomadic Penan live in lean-tos, they call lamin.³¹ When they move, new lamin are built, and the former lamin site is referred to as la'a.³² La'a are not forgotten, they are frequently visited, and in the circular migration of a nomadic band a new lamin may be built at a former site or close to it. It should be noted that the term nomadic is in some ways misleading as their migration over the same territory is cyclical, returning to previously harvested areas that have regenerated. In other words, the same resource site may be occupied more than once within the life of an individual.

3.35 Penan refer to the numerous la'a scattered across the landscape of their home river system area as their uban,³³ marks or footprints. When they refer to la'a as uban, they are talking about its cultural significance, past events, connections, relationships, and rights within an area and all that it encompasses. Nomadic Penan move within a home territory that could have, for example, river systems, as boundaries. As they migrate each band leaves traces through the la'a. Through years of migration, a band would have left numerous la'a over the landscape.

3.36 Surrounding the lamin or la'a is what the Penan call tana' pengurip;³⁴ the land that provides the essentials of life, food and other resources that they collect for barter trade or convert into handicrafts for domestic use or for sale. In the tana' pengurip Penan stake claim to forest resources such as wild sago, rattan, fruit trees, ketepe (a wild rubber), various species of useful trees such as tajem trees (*Antiaris toxicaria*) that provide poison for their blowpipes, trees to make blowpipes, to build boats, houses (for those who adopted the settled life) and to make coffin. Clusters of wild sago are called birai uvud, and stands of rattan birai wai. These are two of the most important resources that Penan would stake a claim to. In the la'a may be found fruit trees growing from seeds that their ancestors ate. Such fruit trees become common property of the group, and are inherited by its descendants. Ancestral graves may also be found in the la'a. All these serve as evidence of former occupation and of rights to the area and resources therein.

3.37 As the tana' pengurip was first utilised and taken care of by their ancestors, Eastern Penan sometimes refer to it as tana' pohoo,³⁵ or ancestral land, to which they are rightful heirs. Penan say that their adet (custom) is different from those of their neighbours, Kayan, Kenyah, Kelabit or Iban. Their neighbours cut the forest for cultivation and create what is

known in Sarawak as native customary rights land. However, the Penan create la'a in the landscape and stake a claim to resources in areas they refer to as tana' pengurip or tana' pohoo. When groups of Penan settle down, part of the tana' pengurip or tana' pohoo is cultivated with food crops such as rice and cassava, sugar cane, fruit trees

31 Lamin refers to any dwelling place; it also refers to a nomadic camp comprising several family huts or lean-tos.

32 La'a (or laa lamin in Western Penan) refers to a former site of a lamin tana' or nomadic camp. A lamin may be occupied from a period of several weeks or months depending on the amount of food resources in the surrounding area. During that occupation Penan would have eaten all sorts of fruits and seeds thrown all over the camp. When these seeds become fruit trees, ownership resides with the group as a community. These trees also help future generations identify former lamin sites or la'a or laalamin occupied by their ancestors.

33 When writing about uban in the case of Western Penan, Brosius (2001:38) says that: "In its broadest sense, uban refers to an empty place left behind by the withdrawal of an object or being. For instance, pig tracts are referred to as uban mabui, young men often speak of former lover as their uban, and an empty place in a hut left by someone who is away or has died is referred to as the person's uban. In the later case, and in reference to former lamin sites or other places where past events occurred, uban is an evocative and emotionally laden word." With regard to Eastern Penan, uban carries the same meaning as described by Brosius for the Western Penan.

34 Tana' =land and forest, and pengurip, from the root word urip=life. Tana' pengurip can be defined as the land that provides food and other essential resources for survival, or foraging area. It conveys the same meaning as that of the Iban pemakai menua described earlier by Gerunsin Lemat (1994).

35 Western Penan refer to this as Tana' puu or tana' asen.

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etc, and the remainder conserved for regeneration of resources such as sago, rattan and fruit trees to complement cultivated crops.

3.38 Each group of Eastern Penan refers to specific areas as okoo bu'un or place of origin, from the word okoo (place), bu'un (beginning). Okoo bu'un is used in a variety of situations. It is used to assert one's rights to a place one was born in; and one can trace one's ancestral roots to other places and connect relationships and ties. When Penan speak of okoo bu'un they are making a statement about identity, sense of place and belonging.

3.39 Penan would lay claim all sorts of resources in the tana' pengurip. This practice is known in Penan as molong. Molong is not only to lay a claim to a resource, but most importantly it means to foster it for the future. For example, when an individual molong a wild sago, he will extract the mature tree and conserve the bud for the future. They also rotate their harvest of sago from one clump to another such that it allows for regeneration of a previously harvested clump. Penan emphasize this point by saying that "if we don't molong the sago, and allow indiscriminate harvest, we will not have any more sago for the future." Molong has two

obvious functions: it serves as a monitoring device to account for the quantity of resources in the forest where they exercise stewardship, and prevent over-exploitation of resources.

3.40 When an individual molong a resource, a sago clump or a rattan stand, he places an oroo (mark or sign) on it to indicate 'ownership'. Such a mark or sign is known in Penan as oroo along or 'claim sign'. Once an individual molong a resources, he is responsible for its upkeep and sustainable management.

He also establishes exclusive rights to the resource. These rights are heritable and pass down from one generation to the next of household members. Other members of the community may harvest the resource with permission of the person who molong it. Molong can be done individually or communally; the basic principle is the same. Penan rights to the land and forest resources are thus established through molong, a form of resource tenure similar to the Iban tree tenure system.³⁶

3.41 The Penan expresses tawai or a particular sentiment to the landscape. Tawai is an expression of nostalgia, fondness and longing for the landscape, its wholeness and memory of events, important or inconsequential, that took place there, of group activities, of life in general, with food aplenty or not, successful hunt or not, sad times and happy times. Tawai binds the group and individuals to the landscape. Penan insist that tawai differentiates their relationship with the landscape from the way others relate to the same. For instance, a timber company and its workers do not have tawai for the land. Once they get what they want they leave, having no feeling for the place. The Penan feeling for the land is told and retold in tosok (oral narratives) to succeeding generations. It is also expressed in sinui or jajan sung for entertainment.³⁷

3.42 Penan argue that their rights and attachment to the land are more solid than the mere felling of trees to open up land for cultivation to create customary rights land. In their relationship with the landscape, they continue to visit hilltops and depression between and connecting two hills, sites of former nomadic camps (la'a) to collect fruits that grew out from former occupations. They also frequent clusters of wild sago, rattan stands and wild fruit orchards which they nurture in the vicinity of campsites. Man-made jungle tracks are maintained with nicely resting places (lasan) creating a sense of 'kinship' with the environment.

36 See Clifford Sather 1990, "Trees and Tree Tenure in Paku Iban Society: the Management of Secondary Forest Resources in a long-established Iban Community", *Borneo Review* I(I), pp. 31 and 32 where he says that claims to trees are created in two ways. First, the first person to find a tree claims it by clearing the undergrowth around its base. When this act is drawn to public attention, the claimant establishes exclusive rights over the tree. Such rights are heritable and pass down to descendants of the claimant. Second, a tree is planted and the planter establishes rights to which is inherited by his future descendants.

37 Sinui is a popular tune sung by the Western Penan of Belaga District and Silat River, Baram District. Singing without instrumentation, the main singer sings an impromptu narrative in poetic rhyme that is accompanied by a form of choral 'harmony'. Sinui often expresses feelings of love, happiness, merriment, sadness, loneliness or grief in praise or remembrance of a person, an event or a landscape. The beauty of the sentiment expressed in rhyme and narrative is often equally matched by the vocal style. The incredible skill of the

lead singer's improvised story-telling have no match in the modern or western musical world. The Eastern Penan jajan is sung by one person, and lacks the poetic rhyme and harmony of the Western Penan sinui. Like sinui, jajan is a vehicle for an individual to express his or her feelings on any topic, including the landscape.

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Gaps between Traditional Land Tenure System and the Sarawak Land Ordinance

3.43 The Sarawak Land Ordinance has created several challenges for native communities seeking to secure their native customary rights over lands. In general, these challenges relate to (a) the statute's failure to recognise traditional forms of occupation according to native customary laws, and (b) the State's broad authority to extinguish NCR.

Failure to Recognise Traditional Forms of Occupation

3.44 This entails a discussion on the definition of NCR with primary reference to section 5 of the Sarawak Land Code (SLC). Section 5, and in particular sub-section (2), defines occupation for purpose of creating NCR as of 1 January 1958 in a limited manner failing to take into account the traditional practices and cultural essence by which natives have occupied lands, which include the maintenance of uncultivated jungle within their territories that they use for hunting, gathering, and other practices that record their customs, traditions and history. Some of these native customs have been recognised by the courts.³⁸ Section 5(2) sets out a narrow category of occupation, primarily by settlement or cultivation. Although a residual category authorising the creation of NCR "by any lawful method" captured other methods of occupation based on native customs, that provision was deleted in 2000.

3.45 The narrow definition of occupation requires evidence of primarily cultivation and settlement, disregarding the central traditional feature of the customary land laws of some natives (eg. Kelabit, Iban and Penan) where forest areas are kept uncultivated and preserved within their territories for hunting, gathering, recording their history and commemorating significant events or/and people. The definition in section 5 primarily disregards traditional feature such as pemakai menoa³⁹ and pulau galau⁴⁰, the important native criteria in establishing NCR.

The State's broad authority to extinguish NCR

3.46 Section 2 of the Land Code 1958 defines State land as "all land for which no document of title has been issued", suggesting that lands held by natives under native title are also State lands. Section 12 on the other hand, states that "the entire property in and control of State land and all of rivers, streams and canals, creeks and water courses and the bed thereof is and shall be vested solely in the Government." There is no provision saving the rights of those who are in customary occupation. The definition in section 2, in combination with section 12 seems to have a significant impact on NCR land.

3.47 Considering the central importance of land to natives as the essence of their community and spiritual life and the key input in their economies, any termination of land rights could cause irretrievable damage to native communities. The only statutory restraints on the extinguishment authority require that compensation be paid to the native owners and the

Director provides notice in the Gazette, on the notice boards of the Superintendent and District Officer for the area where the land is located, and in the case of NCL, in a newspaper circulating in Sarawak.⁴¹

Peninsular Malaysia

Orang Asli Boundaries and Territoriality

3.48 Every Orang Asli community is identified with a particular ecological niche that it regards as its customary or traditional territory. The Orang Asli have several specific terms for this communal

38 In Superintendent of Lands & Surveys, Bintulu v Nor Nyawai [2006] 1 MLJ 256, 263. The Court of Appeal acknowledged the Iban tradition of pulau or pulau galau which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce.

39 Refers to a particular area as communal or territorial domain of an indigenous village.

40 Means a preserved protected virgin forest by the indigenous community.

41 Land Code 1958 s 48(2) (c). Section 15(2)(b) also requires that before signing a deed of surrender, the Superintendent must post a notice in the District Office and “other Government places in the neighbourhood where the land is located” inviting objections to the intended surrender of NCR. The Superintendent must also serve a copy of the notice on the Headman of the area where the land is located. Objectors are given 21 days from the date of the posting in the Gazette to submit an objection in writing to the Superintendent. Presumably, the reference to notice in the Gazette is the notice required by s 48(2)(c).

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territory, including tanah dan wilayah adat, nenggirik and pesaka’. For the Orang Laut communities, the sea and coastal fringes constitute their traditional lands, waters and territories.

3.49 Because the customary land (and waters) of an Orang Asli community is very localized and site-specific, it is not surprising that this specific ecological niche invariably becomes the basis of the community’s subsistence, spirituality, culture, history and identity.

3.50 An important aspect of Orang Asli customary lands is that it is uniquely exclusive to each indigenous community. That is to say, the extent of one community’s traditional boundaries does not overlap or encroach into that of a neighbouring Orang Asli community.

3.51 The demarcation of an Orang Asli community’s traditional boundaries usually follows geographical features such as rivers, mountains and hill ridges. In 1936, H.D. Noone, the British anthropologist who was responsible for Orang Asli affairs before the Japanese Occupation, observed that, “it is fairly certain that any group of Sakai⁴² has a country or area which it regards as its own and which follows land marks usually well-defined on existing maps. Local knowledge should be quite sufficient for marking these areas on the map and they could then be gazetted.”⁴³

3.52 Some Orang Asli groups have additional considerations for the determination of the extent of their traditional boundaries. The Semelai of the Bera River in Pahang, for example, regard all territories that they can access within a single day – as in a return journey by a perahu⁴⁴ or wooden boat – as theirs.

Land use categories and tenure rights

3.53 Within the bounded customary land of an Orang Asli community, the territory is divided into various land use categories, with varying usages, tenure rights and cultural obligations accorded to each category.

3.54 Among the Semai, for example, the customary land of a community is called the nenggirik, which loosely translates as ‘country’. Within a Semai’s nenggirik, there are several types of areas that are categorised by geographical features, land-use and cultural significance. These would include the village proper (genei), swiddens or hill-rice fields (selai), orchards (cetnet), old swiddens (pabel), foraging areas (lepnep), forest/resource areas (jeres), virgin forest (darat), taboo or sacred areas (ne’enduk), water catchments (pendeg/gencolteiw), gravesites (penep) and such.⁴⁵

3.55 The members of the community concerned enjoy varying tenurial and usufructuary to these areas.

In essence, as long as the land is used for a particular activity (dwelling, swidden, smallholding), the rights to that part of the customary land is held by the family group working it. Such lands can also be bequeathed to future generations. However, once the land is abandoned, it then reverts to the community whence any other member is entitled to work it subject to the local adat or customs being complied with. Other areas within a Semai’s nenggirik – such as the ne’enduk and jeres – are not ‘alienable’ and are always held communally.⁴⁶

3.56 Similarly, the Temiar, have also similar categories of land-use such as their homesteads (kampuq), swiddens (selai) and smallholdings (ladang). Apart from these, the Temiar have particular cultural areas with accompanying rules and taboos, and with differing tenurial rights accorded to the villagers.⁴⁷

42 Sakai was the generic term used before 1960 to refer to the Orang Asli. The Orang Asli regard it as a derogatory term.

43 Cited by the District Officer of Kuala Selangor, D. Headly, to the State Secretary on 1 June 1948 (Sel. Sec. 675/1948, 3)

44 Testimony of Batin Mohamad Nohing in the Temerloh High Court in the case of Mohamad Nohing and 6 Ors v Pahang State government and 3 Ors, 2012.

45 Interview with Mohd Sharul Irwan@ Kato by Colin Nicholas in January 2013.

46 Testimony of Bah Tony, expert witness, at the SUHAKAM public hearing. Semai terms from interviews with

47Field interviews by Colin Nicholas and Reita Rahim in January 2013. Some of the land use categories cited here refers particularly to communities in the Pos Dakoh and Pos

Balar areas in Gua Musang.

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These include:

- Teiqwei/teiqneiwei/pendraq – a previous hamlet or site where they no longer live or hunt due to poor harvests, poor hunting opportunities, or where an incident in the area caused them to move out e.g. a devastating flood (na-deg).
- Teiqchareq – areas where the land is not fertile for crops;
- Teiqkeramat – sacred areas, where spirits have their abode, where you are not allowed to hunt or fish. This includes certain pools in the river which may have bountiful stocks of fish;
- Teiqjendrap – areas where blood was spilled (as in where a tiger had killed a man);
- Teiqselumbang – the abode of water dragon (naga); usually swampy areas or large pools of water where the water is reddish in colour, the colouration being so due to the red faeces of the dragon. Also associated with a sewang ritual/song that is performed to avoid the bah merah (red flood); and
- Teiqnemdep – areas in the forest where the hunting rights belong to specific families, with no overlapping claims. Others may enter the area but they cannot hunt or set traps there without permission from the owners of the hunting grounds.

3.57The Semelai of Tasik Bera, Pahang not only have a concept of land ownership over their customary lands but also over the water and plant habitat therein. The main channel and one large tributary of the lake are divided by the Semelai into segments called lubuk which means “open pool of water.” The Semelai know exactly where the lubuk are and each have their own name. Most lubuk are said to have one or more tuhan (lord or owner). The tuhan lubuk (“Owner of the open water”) would be the oldest living descendant(s) of the first Semelai settler at that segment of the swamp channel. Other tributaries or bodies of water are called jrolor (large arm of lake), solok (small arm), padar (field of swamp rushes) and ranoq (swamp forest). These can also have tuhan.

3.58The tuhan lubuk controls access to water and land resources. Their permission is required, foremost, if people want to poison fish in that lubuk, for any kind of fishing (trap or line) in that lubuk, placing a swidden on the land adjacent to that lubuk, or hunting on the land near that lubuk.

3.59Ownership of the lubuk devolves to the children. A sibling cohort would all become tuhan lubuk but gender and physical distance matter. While people identified as tuhan lubuk tend to be male, inheritance can be bilateral through either the mother or father.⁴⁸

3.60 Similarly, the Orang Seletar (also known as Orang Laut, or Sea People) of Johor, assume custodianship of sea and coastal fringes as their traditional lands and territories.⁴⁹ While the practice of living on house-boats has almost completely died, partly in response to the government's efforts to sedentize the people, the Orang Seletar still regard their sea as their traditional (resource) territory, apart from the coastal spaces they now occupy.

3.61 Among the Negrito groups of Orang Asli, the Batek of Kelantan and Pahang still lead a semi-nomadic way of life. Even so, every Batek has a sentimental attachment to the river valley in which he or she grew up. This area is pesaka'. The concept of pesaka' can refer to a person's actual place of birth, a whole river valley, or a generally-defined region, depending upon the context of discussion. Batek do not have any special individual proprietary rights in their pesaka' but it is a place they are especially familiar with and where they feel 'at home.'⁵⁰

48 Rosemary Gianno (1989), Presented at the 88th Annual Meeting of the American Anthropological Association, November 15 -19, 1989

49 Cynthia Chou (1997), Contesting the tenure of territoriality; The orang Suku Laut, Bijdragen tot de Taal-, Land- en Volkenkunde, 153 (1997), no: 4, Leiden, 605-629.

50 Kirk Endicott & Karen Lampell Endicott (1988), The question of hunter-gatherer territoriality: the case of the Batek of Malaysia. In: Megan Biesel et al (1988) (Eds.), The Past and Future of Kung Ethnography, pp 139-162.

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3.62 The Batek traditional territory is marked out by landscape features such as pathways, rivers, campsites and geo-ecological zones or spaces which form the spatial framework around which the Batek organize their society. Apart from various classes of forest cover, often defined by the level of ease of travel through these areas – eg te' langedh (mountain or high ridge forest, hardest terrain to travel in) – there are also other important geo-cultural markers that identify the Batek's customary land. These include ray (lightning scar in forest patch), batu' cénel (mythicized rocks), padang (single specie grove), and móh'óng (source of a river), hépléy (both disturbed and undisturbed forest with which the other categories are compared with).⁵¹

3.63 A Batek dialect group is usually associated with a particular area. If a person moves to a different area, because of marriage or for some other reason, he or she would normally adopt the dialect spoken there and would eventually come to identify with that dialect group, as would any children born and brought up there.⁵²

Kawasan Rayau and Territoriality

3.64 Orang Asli territoriality is thus not merely a relationship between people and their land or resources, but also between people and other people. The implicit recognition of a community's traditional territory by other (especially neighbouring) communities is in itself testimony to the historical presence and occupation of an Orang Asli community to their customary land.

3.65 Territorial ownership confers on the owner, the right to be asked for permission to enter and for the owners to be accorded due respect. Equally important is the facts that over this traditional territory, the Orang Asli exercise autonomy and control. This is their manifestation of ‘self-determination’.

3.66 For this reason, the occupation, use, ownership and enjoyment of a traditional territory and its resources found therein is always subject to the customs, rules, and traditions of the indigenous group in control of it.

3.67 A traditional territory is also one where its constituent geo-cultural components are known and identifiable to the inhabitants. When an individual enters the resource area, it is for a specific purpose

– whether to hunt, forage for food, locate a certain medicinal plant, and gather resource materials or to conduct a spiritual activity.

3.68 Foraging areas or what is often referred in Malay as *kawasan rayau* are precise areas within an Orang Asli traditional territory, which are non-residential or non-cultivated. The size of a foraging area will depend on the degree in which a particular Orang Asli community rely on the forests for food and other needs, and the overall size of their traditional territory.

Gaps between Orang Asli Customary Tenure and the Aboriginal Peoples Act

3.69 The Aboriginal Peoples Act is the only law that specifically refers to the Orang Asli. The Act regards the Orang Asli as a homogenous people, subject to control and administration by the state, rather than treating them as autonomous social units.

3.70 This is particularly so in its treatment of the Orang Asli’s ownership and tenure of their customary lands. The traditional interpretation of the Act has been that, while the Orang Asli may reside in their traditional areas or reserves, this is not a permanent right, but rather one that is no more than that of a tenant-at-will – that is, at the will of the state authority.⁵³

51 Lye Tuck-Po (2005), *Changing Pathways: Forest degradation and the Batek of Pahang, Malaysia*. SIRD, Petaling Jaya.

52 Kirk Endicotti & Karen Lampell Endicott (1988), *op cit*.

53 Section 8(2)(c), Aboriginal Peoples Act 1954.

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3.71 Furthermore, while the state is required to compensate for loss of crops on Orang Asli lands that are being acquired or alienated to others, the state authority is not obliged to pay any compensation for the land itself, or to replace it with suitable alternative land.⁵⁴ This interpretation has often been used by the state authority to provide the legal basis for the appropriation of the Orang Asli’s traditional territories. That is, in matters concerning Orang Asli land, the state authority is perceived to have the final say.⁵⁵

3.72 This perception of the state's rights over Orang Asli customary lands unfortunately persists. This is despite, as discussed in Chapter 4, recent court decisions being categorically proactive and clear as far as the recognition of Orang Asli rights to their traditional lands and territories under common law and in compliance with the Federal Constitution.⁵⁶ The failure of the state to regard these court decisions as binding precedents to be adopted in similar instances of Orang Asli land claims is also contrary to its own declared policy to recognise and protect the cultural identity and customary lands of the Orang Asli.⁵⁷

3.73 Called the Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia, this 1961 Policy Statement, among other things, states that:

S.1(c) The aborigines shall be allowed to retain their own customs, political system, laws and institutions when they are not incompatible with the national legal system.

S.1(d) The special position of aborigines in respect of land usage and land rights shall be recognized....

Aborigines will not be moved from their traditional areas without their full consent.

3.74 It is therefore evident that there is a clear variance between the recognition of Orang Asli rights at the policy level and in the application of the Aboriginal Peoples Act at the practical level.

⁵⁴ Sections 11(1) & 12, Aboriginal Peoples Act 1954.

⁵⁵ Colin Nicholas, Jenita Engi, Teh Yen Ping (2010), *The Orang Asli and the UNDRIP: From Rhetoric to Recognition*. COAC, Subang Jaya, p. 77.

⁵⁶ Colin Nicholas (2010), *Orang Asli: Rights, Problems and Solutions*, A study commissioned by SUHAKAM, p.7. See also Chapter 4 (Legal Framework) for a discussion of the recognition of Orang Asli native title rights under common law.

⁵⁷ Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia. Department of Orang Asli Affairs (JHEOA), 1961.

Chapter 4

LEGAL FRAMEWORK OF INDIGENOUS PEOPLES' RIGHTS TO LAND

4.1 This chapter examines the legal instruments and legislation that deal with the rights of indigenous peoples to their lands and territories. It looks first at international instruments that prescribe the rights of indigenous peoples, followed by domestic laws and legislation on native and aboriginal rights to lands.

Sources of international law on indigenous peoples' rights to lands, territories and resources and their authority

4.2 International law and standards on indigenous peoples' rights to lands, territories and resources are found in a myriad of international, regional and domestic instruments, decisions and policies. These include the UN Declaration on the Rights of Indigenous Peoples (UNDRIP); international human rights treaties; ILO Convention No 169; regional human rights treaties such as the Inter-American Convention on Human Rights and the African Convention on Human and People's Rights; and interpretations of international law by authoritative bodies such as courts, commissions and UN human rights treaty bodies.

4.3 Provisions of international human rights treaties such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) ratified by Malaysia are directly relevant.

4.4 International law on the rights of indigenous peoples has explicitly and implicitly recognised the importance of their lands, territories and resources to indigenous peoples, especially their cultures.⁵⁸ Contemporary international law on indigenous peoples' rights to their lands, territories and resources is developing in the direction that indigenous peoples have the right to their traditional lands held under their own indigenous laws and customs. Article 26(3) of the UNDRIP requires that states give legal recognition and protection to these lands, territories and resources.

4.5 Recognition of indigenous peoples' rights to their traditional lands, territories and resources is required by an interpretation of the fundamental principle of non-discrimination and also the right to property, especially when both are read together.⁵⁹

4.6 When there are competing claims to lands, indigenous peoples' rights are often not given due recognition. Article 27 of the UNDRIP requires that states establish processes to adjudicate disputes over indigenous peoples' lands, territories and resources, including those traditionally owned, occupied and used. Moreover, the right to redress in Article 28 of the Declaration covers lands, territories and resources "which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

4.7 Free, Prior and Informed Consent (FPIC) is one of the key principles in relation to indigenous peoples' rights to their lands, territories and resources. The duty of states to obtain, or in some cases seek to obtain, indigenous peoples' FPIC is clearly expressed in the UNDRIP, especially in relation to indigenous peoples' interests in lands, territories and resources eg articles 10, 19 and 32(2). Article 6 of ILO Convention 169 also reflects this

principle. Numerous international bodies have been engaged in elaboration of the meaning of free, prior and informed consent, and especially the circumstances in

58J Martinez Cobo “Study of the Problem of Discrimination against Indigenous Populations”.

59Awas Tingni and Committee on the Elimination of Racial Discrimination UN Doc. CERD/C/NIC/CO/14 of 19 June 2008.

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which consent is necessary. These include the Inter-American Court of Human Rights,⁶⁰ the African Commission on Human and People’s Rights,⁶¹ the Expert Mechanism on the Rights of Indigenous

Peoples,⁶² the UN Human Rights Council,⁶³ the Special Rapporteur on the Rights of indigenous peoples and the UN Permanent Forum on Indigenous Issues.⁶⁴

4.8It is clear that consultation should be undertaken with the objective of obtaining indigenous peoples’ free, prior and informed consent, particularly in cases of large-scale development or investment projects that would have a major impact on indigenous peoples’ territories, or relate to matters of fundamental importance to indigenous peoples. While there may be specific circumstances which require free, prior and informed consent of indigenous communities, these circumstances should not be considered exhaustive or exclusive. The Special Rapporteur on the rights of indigenous peoples has, in numerous statements and commentaries highlighted that there may be situations beyond those enumerated in which the impact of a project is significant and direct enough to require consent before a project may move forward. Moreover, consultation should be undertaken in good faith with the participation of indigenous representatives and the State should provide all relevant information well in advance of the decision-making process.⁶⁵

4.9Dam projects, plantations, logging and other forms of exploitation of natural resources often have a particularly negative impact on Indigenous peoples’ lands and territories. The importance and need to set guidelines for extractive industries when dealing with indigenous peoples has been highlighted in different international workshops, including those organized by the Permanent Forum on Indigenous Issues (Mandaluyong City 2009), and OHCHR (Geneva 2001 and Moscow 2008).

United Nations Declaration on the Rights of Indigenous Peoples

4.10Indigenous peoples have persisted in demanding that the United Nations formulate a declaration on the rights of indigenous peoples. As a result of this, the Working Group on the Draft Declaration (WGDD) was formed in 1995 under the auspices of the Sub-Commission on Human Rights. Both indigenous peoples and governments were engaged for eleven years in the WGDD’s work. Indigenous leaders strove for the inclusion of substantive articles in the Draft Declaration on the inherent rights of indigenous peoples to self-determination and to their lands, territories and resources. These remained very contentious throughout the eleven years as states strove to qualify, limit, weaken or erode those rights. Finally, in June 2006, the UN Human Rights Council adopted the Draft Declaration, with some revisions

from the Chair of the WGDD. Then in September 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples.

4.11 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a comprehensive list of rights of Indigenous Peoples. The Declaration contains 46 articles covering both individual and collective rights. Common themes in the articles include non-discrimination, land rights, indigenous customs, and state obligations to obtain the ‘free, prior and informed consent’ of the community prior to taking actions that threaten indigenous interests in traditional lands.

4.12 The preambular paragraphs of the Declaration provide important background information regarding the need and purpose of the Declaration. After reiterating in multiple ways that discrimination in any manifestation, whether based on race, culture, national origin, ethnicity, or religion, is unequivocally prohibited, the Declaration explains that indigenous people ‘have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources’, a

60 See Case of the Saramaka People v. Suriname.

61 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya.

62 Expert Mechanism on the Rights of Indigenous Peoples, Final report on the study on indigenous peoples and the right to participate in decision making (May 2011) UN Doc A/HRC/EMRIP/2011/2.

63 See, for example, UN Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review: New Zealand, UN Doc A/HRC/WG.6/5/L.7 of 11 May 2009.

64 See, e.g., Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, UN Doc A/HRC/12/34 of 15 July 2009; UN Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc E/C.19/2005/3 of 19 January 2005.

65 See, e.g., Case of the Saramaka People v. Suriname.

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situation that has precluded them from exercising their right to development according to their own priorities. The preface to the Declaration also notes the ‘urgent need to respect and promote the inherent rights of indigenous peoples’, rights that emerge from their political, economic, social, and cultural traditions and philosophies, ‘especially their rights to their lands, territories and resources’. The need for indigenous control ‘over developments affecting them and their lands, territories and resources’ to maintain ‘their institutions, cultures and traditions’ is also recognised.

4.13 Article 2 states that indigenous peoples are equal to others and have the right to be free from discrimination in the exercise of their human rights. Article 5 provides that

‘[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.’ Article 7(1) protects the right to life. Article 10 prohibits the forced removal of indigenous peoples from their lands and requires that governments obtain ‘free, prior and informed consent of the indigenous peoples’ prior to relocation. Such relocation must also be based on an agreement providing for ‘just and fair compensation’ and if possible, providing the option for return. Article 11 protects the right to practice and revitalize cultural traditions and customs. This includes the right to protect archaeological and historical sites. States must provide redress where indigenous cultural, intellectual, religious or spiritual property is taken without free, prior and informed consent.

4.14 Article 12 provides the right of indigenous peoples to practise their traditions and customs. Article 20(1) protects the right to maintain and develop indigenous political, economic, and social institutions. Article 21 protects the right of indigenous people to improved economic and social conditions and requires states to take measures to ensure such improvement. Article 34 protects the right to promote, develop and maintain distinctive customs and traditions in accordance with human rights standards.

4.15 Article 18 guarantees the right of indigenous peoples to participate in decisions that may affect their rights. Article 19 requires states to consult and cooperate with indigenous peoples before adopting legislation that may affect their interests.

4.16 Article 25 notes the right of indigenous peoples ‘to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands’. Article 26(1) secures the right of indigenous peoples to the lands and resources they have traditionally owned, occupied, used, or acquired. Article 26(3) requires that states provide ‘legal recognition and protection’ for indigenous lands and that ‘[s]uch recognition shall be conducted with due respect to the customs, traditions and land tenure systems of’ indigenous peoples. Article 27 requires states, in cooperation with indigenous peoples, to establish and implement ‘a fair, independent, open and transparent process’ to recognize and adjudicate indigenous rights to lands and resources traditionally owned, occupied, or used. This process must provide ‘due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems’.

4.17 Article 28(1) secures the right to remedies in the event of the confiscation, occupation, use, or damage to the traditional lands of indigenous people without their free, prior and informed consent.

The available remedies include restitution, but if not available, just, fair and equitable compensation must be paid. Article 28(2) requires that compensation shall be in the form of lands equal in quality, size, and legal status or of monetary compensation.

4.18 Article 32(2) requires states to consult and cooperate in good faith with indigenous people and obtain their free and informed consent before approving projects affecting indigenous lands, ‘particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’ Article 40 ensures the right to prompt resolution of conflicts with states or others and effective remedies for infringements on individual or collective indigenous rights. These decisions must provide ‘due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned’. Article 38 requires

states to consult and cooperate with indigenous peoples in adopting appropriate measures to achieve the goals of the Declaration.

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International Covenant on Civil and Political Rights (ICCPR)

4.19 The ICCPR is the foundational international human rights instrument elaborating on the civil rights protected under the UN Universal Declaration on Human Rights. The multilateral treaty, which entered into force on 23 March 1976, has been signed or ratified by 152 states.⁶⁶

4.20 Article 27 of the ICCPR prohibits state parties from denying persons belonging to minority groups, their rights, 'in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'⁶⁷ Article 27 rights are distinct from the right to self-determination under Article 1(1) of the ICCPR and supplement the other rights under the ICCPR.⁶⁸ While Article 27 rights do 'not prejudice the sovereignty and territorial integrity of a State party', they may, nonetheless, be 'closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities constituting a minority.'⁶⁹

4.21 Positive actions (eg. enactment of legislation) may be necessary to protect Article 27 rights.⁷⁰ Furthermore, although article 27 rights belong to individuals, their protection may depend upon the minority group's ability to maintain their culture, language, and religion.⁷¹ Consequently, states may be required to take positive measures to protect both minority groups and their members' rights to culture, language, and religion.⁷²

4.22 Culture, according to the UN Human Rights Committee, is expressed in a variety of ways, 'including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.'⁷³ As a result, positive measures authorizing, for example, the right to practise traditional activities, such as hunting and fishing, and 'the right to live in reserves protected by law' may be required.⁷⁴ A state's positive measures must 'ensure the effective participation of members of minority communities in decisions which affect them.'⁷⁵ The aim of protecting Article 27 rights is to ensure 'the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.'⁷⁶

International Covenant on Economic, Social and Cultural Rights (ICESCR)

4.23 Article 11(1) of ICESCR talks about the right to adequate housing, which, the Committee on Economic,

Social and Cultural Rights in its general comments⁷⁷ expanded the meaning to include forced evictions from their lands. It further states that indigenous peoples are often discriminated with regard to evictions and urged states to ensure that such activities do not take place.⁷⁸

ILO Convention No. 169

4.24 Like the Declaration and the Committee's interpretation of Article 27 of the ICCPR, ILO Convention No. 169 contains protections for indigenous customs and land rights and requirements for indigenous participation in decisions affecting those rights.⁷⁹ Article 4 of ILO Convention No. 169 requires states to adopt measures to secure indigenous peoples' property, institutions, and cultures, consistent with

66 Office of the United Nations High Commissioner for Human Rights, 'Status of Ratifications of the Principal International Human Rights Treaties' (2004) <<http://unhcr.ch/pdf/report.pdf>> at 1 February 2008.

67 ICCPR art 27

68 United Nations Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27) (1994) 1, 3.1, CCPR/C/21/Rev.1/Add.5 ('HRC, General Comment No. 23').

69 HRC, General Comment No. 23.

70 Ibid

71 Ibid

72 Ibid

73 Ibid

74 Ibid

75 Ibid

76 Ibid

77 ICESCR, General Comment 7.

78 Ibid

79 Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989 (entered into force 5 September 1991), International Labour Organization, ILOLEX Database of International Labour Standards <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>> at 1 February 2007.

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the desires of the community concerned. Article 5 requires that indigenous social, cultural, religious and spiritual values and practices be recognised, protected, and respected in applying the Convention.

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4.25 Article 8(1) requires state parties to have ‘due regard’ for indigenous customs and customary laws in applying national laws and regulations. Article 8(2) secures the right of indigenous peoples to their customs and institutions. Article 9 requires state parties to respect traditional indigenous procedures for addressing criminal offences. Article 23(1) requires state parties to recognise the importance of community-based, subsistence economies and traditional activities, such as hunting, fishing, trapping and gathering, in maintaining indigenous culture and economic self-sufficiency and development. State parties must ‘ensure that these activities are strengthened and promoted.’

4.26 Article 6(1)(a) requires state parties to consult with indigenous peoples on legislation or administrative measures that may affect their interests. Consultations with indigenous peoples must be in good faith, in appropriate form, and with the goal of reaching agreement or consent to proposed measures.⁸⁰

Article 13(1) requires state parties to respect the ‘special importance for the cultures and spiritual values of the peoples concerned of their relationship with the land or territories ... which they occupy or otherwise use, and in particular, the collective aspects of this relationship.’ Article 14(1) requires states to recognize indigenous peoples’ ‘rights of ownership and possession’ over their traditional lands and, with respect to lands not exclusively occupied, to safeguard rights to use and access those lands. In this regard, ‘[p]articular attention shall be paid to the situation of nomadic peoples and shifting cultivators’.⁸¹ Article 14(2) requires governments to identify the lands traditionally occupied by indigenous peoples and to protect rights of ownership and possession.

4.27 Article 15(1) requires safeguards for indigenous peoples’ rights to use, manage, and conserve natural resources associated with their lands and to participate in decisions affecting use and management of the resources. Where states retain rights in lands of indigenous peoples (eg ownership of minerals or rights to resources), before a state can develop or permit others to develop resources pursuant to those rights, the state must consult with indigenous peoples to determine the extent that the state’s activity may prejudice indigenous interests.⁸² Where possible, indigenous peoples should participate in benefits of such development and be paid compensation for any damages they sustain as a result of the development.⁸³

4.28 Article 16 addresses the relocation of indigenous peoples from their lands. States may remove indigenous peoples from their lands only ‘as an exceptional measure’, in which case the consent of the people concerned is required. If possible, they should be given the option to return to the lands from which they are removed. If return is impossible, the state should provide substitute lands of a quality and legal status equal to that from which they were removed. Compensation should be provided for loss or injury incurred as a result of relocation. Article 18 requires that there be penalties for trespass or unauthorized use of indigenous lands and that states take action ‘to prevent such offences.’

Convention on the Right of the Child (CRC)

4.29 Article 30 of the CRC provides for indigenous children to learn and practise their own culture. In its General Comment No. 11, the Committee on the Rights of the Child discusses the link between Article 30 of the CRC and Article 27 of ICCPR, i.e. that the right to enjoy culture is closely associated with the use of traditional territories and its resources. Denial of land rights for the indigenous peoples will directly affect their right to practice and transmit

their culture, thus denying indigenous children of this experience and subsequently violating Article 30 of the CRC.

80ILO Convention No. 169, art 6(2).

81ILO Convention No. 169, art 14(1).

82ILO Convention No. 169, art 15(1).

83ILO Convention No. 169, art 15(2).

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Convention on the Elimination of All Forms of Discrimination

Against Women (CEDAW)

4.30 Article 15 of CEDAW discusses equality before the law and the entitlement of non-discrimination, including on matters referring to land. Provisions of CEDAW are particularly important bearing in mind the multiple forms of discrimination that indigenous women face.

Convention on Biological Diversity

4.31 The Convention on Biological Diversity which was ratified by Malaysia in 1994, also endorsed the Programme of Work on Protected Areas,⁸⁴ which among others, requires that "...the establishment, management and monitoring of Protected Areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities ..." (para 22).

Declaration on the Right to Development

4.32 The right to development is an inalienable human right, which belongs to everyone, individually and collectively, with no discrimination and with their full participation. The human right to development also implies the full realization of the right of peoples to self-determination, which includes the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. Article 8(2) of the Declaration urges States to encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.⁸⁵

RECOGNITION OF LAND RIGHTS UNDER MALAYSIAN LAWS

4.33 In Malaysia, the Federal Constitution protects rights critical to attaining the special relationship between native and aboriginal communities and their lands. This relationship underlies the spiritual, cultural, economic, and social existence of native communities. The right to property, livelihood, and equality before the law, safeguards for native interests, the fiduciary obligation of government officials and recognition of customs as law, all play a role in the recognition and protection of what is referred to in this chapter as native title, a term that includes aboriginal title and native customary rights to land. Native title arises out of native customs, and these customs, which define the content of native title, are part of the law

of Malaysia and are protected under the Federal Constitution. Clearly, the recognition of native title based on native law and customs ensures the preservation of native communities.

4.34 The Constitutional protection for equality before the law requires recognition of native and aboriginal customary title on an equal basis with non-native property rights. What this requires is not merely formal equality but substantive equality. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.⁸⁶ The principle of equality requires that customary laws that form the basis of these rights are interpreted in their own context, incorporating indigenous perspectives into the law.

4.35 Once recognised, native title must be afforded the same protection provided to non-native property interests. This may mean that methods for registering and protecting native title must be implemented on an equal basis with non-native property interests. In practical terms, this requires surveying lands, properly registering native title interests, and issuing documentary titles to natives and native communities once they have established NCR. In sum, in terms of proprietary rights, equality between natives and non-natives will only be achieved when comparable protection under native law and customs take their rightful place alongside the other sources of law as stipulated under Article 160 of the Federal Constitution. Anything short of full recognition for the relevant native law and customs would perpetuate the discrimination that has resulted in the erosion of their rights to land as a fundamental human right.

⁸⁴<http://www.cbd.int/programmes/pa/pow-goals-alone.pdf>

⁸⁵http://www.ohchr.org/Documents/Issues/Development/DeclarationRightDevelopment_en.pdf

⁸⁶Per Suffian LP in *Datuk Harun Idris v Public Prosecutor* [1977] 2 MLJ 155.

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4.36 As a proprietary right under the Constitution native title cannot be taken or terminated except in accordance with law and upon payment of just compensation. Recognition and protection for native title is also required as part of the constitutional right to livelihood, which guarantees native title based on the essential role of land in the economies and cultural identity of native communities. In determining adequate compensation for deprivation of native title, the role of land in the livelihood of native communities is a relevant factor. In addition, damages other than money compensation may be necessary in cases where the deprivation of property also constitutes a deprivation of livelihood, and right to life under Article 5 of the Constitution.

Native title represents a non-documentary title held by the community. Natives may only transfer the land subject to native title to other natives or the government. The next part of this chapter deals with domestic laws that provide for native or aboriginal rights.

RELEVANT STATUTES IN SABAH, SARAWAK AND PENINSULAR MALAYSIA

4.37 The following sections will provide a brief outline of relevant statutes related to indigenous peoples' land rights in Sabah, Sarawak and Peninsular Malaysia. It also presents the historical evolution of the laws that deals with land.

Sabah

Historical Evolution of Land Laws

4.38 From the time that the British North Borneo Company acquired the various territories, native customary laws were recognised by the British administrators. This was incorporated and enshrined under Article 9 of the Royal Charter that was granted by the British Crown on 1 November 1881. The company was enjoined to give careful regard to the customs and laws of the class or tribes or nation to which the parties respectively belonged. The provision bears reproducing here:

In the administration of justice by the company to the people of Borneo, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands and goods, and ... other rights of property and personal rights. (emphasis added).

4.39 In 1883, the Governor sent a circular letter prohibiting all dealings in land between natives and foreigners. This was later embodied in the Proclamation No.2. In September 1888 by notification No.76, legislation was passed to protect native holdings.

4.40 The condition was for them to remain in occupation of their holdings, otherwise the government could resume possession after a year of being abandoned by native holders. The premise was that the land was the property of the state.⁸⁷ Notification No 76 was followed by the Land Proclamation 1889-1902.

4.41 The Native Rights to Land Proclamation of 1889 was passed to deal specifically with "the protection of Native Rights to land". Native rights was described in the Land Proclamation of 1889 as:

- a) land under cultivation or containing houses together with a Reserve of adjoining or neighbouring land;
- b) land planted with at least twenty fruit trees to each acre;
- c) isolated fruit trees;
- d) grazing land that the owner agreed to keep stocked;
- e) wet and dry paddy cultivated within three years;

⁸⁷Prior to this, the Land Proclamation of 1885 under articles 26 and 27, no native could sell lands to foreigners unless such transactions took place through the state, thus placing the ultimate authority over land in the state. As Amity Doolittle pointed out, this set the stage for later laws which placed the property of all lands in the state and "native rights to land would

subsequently have to be mediated by the state and made compatible with the broader state agenda of commercial development of the territory.” See Amity Doolittle, *Native Struggles Over Land Rights: Property and Politics in Sabah, Malaysia*, University of Washington Press, 2005, 35-36.

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f)burial grounds; and

g)usual right of way.

4.42These descriptions have generally been retained in the existing law. Despite the acknowledgements of native rights, native claims could not be carried out because of the shortage of manpower.⁸⁸ The 1889 Proclamation was followed by the Abolition of Poll Tax Proclamation IX, 1902, whose objective was to abolish Poll-Tax. Despite its title, the Proclamation IX set out to establish a system of Land Tenure by natives.⁸⁹ They were encouraged to take up land for permanent cultivation. They could apply and were given a certificate of tenure in perpetuity, but it was not compulsory.

4.43A certificate of tenure would confer upon the holder a permanent, heritable, and transferable right of use and occupancy but such rights were subject to regular payment of rent. It was necessary that there had to be continuous cultivation of land. Non -cultivation for three consecutive years might cause the land to be forfeited and revert back to the government. Under the rules made under the Proclamation, a Register of native holdings was to be kept in each District, and a certified copy of the entry in the Register, which is called the Extract, shall be given to the native land holder. No claim to or interest in any land would be valid unless it had been registered with the Land Office.

4.44In 1903 through Proclamation XXIII, the laws made in 1889, 1894 and 1901 were repealed and re- enacted. A native who held land under customary tenure might exchange his title for a lease in which case, it would not be subject to prohibition against dealings with foreigners. The 1903 proclamation defined customary tenure as:

(a)land in possession of land by natives with the consent of native chiefs;

(b)the land was occupied and cultivated;

(c)customary lands cultivation must be commenced within six months; and

(d)the land had not been abandoned for three consecutive years.

4.45Then in 1913, a further consolidation of the laws and amendments were made where repealed provisions of earlier legislation were re-enacted with amendments, together with inclusion of new provisions.⁹⁰ Notably there were amendments on native rights and a new definition of “native “was introduced. The Land Proclamation 1913 introduced a new part to deal with native lands. Titles granted under that part were called native titles. A native could apply for the grant of state land as native title but any grant of native title was not to exceed 100 acres. Significantly, for the first time, the 1913 Proclamation gave power to the Governor to proclaim areas for settlement of native rights.

4.46 In 1922,⁹¹ the 1913 Proclamation was amended. A new provision was included such that adverse possession of state land for however long a period would not give rise to any rights against the state. It was further provided that questions of native customs and native succession cases were to be dealt with by the Native Courts and not by the Collector. A further amendment in 1928, introduced the term “native customary rights” in place of “native rights of customary tenure”, and it gave a new definition to customary tenure.

4.47 The latter would now confer on the native holder a permanent, heritable and transferable right of use and occupancy in land as opposed to the previous legislation when that right was conferred only by native title or by a certificate of tenure. This definition of customary tenure continued under the existing Ordinance with some minor amendments.⁹²

⁸⁸Doolittle, n 30 above, noted that with fewer than thirty Company administrators and 30,000 pounds for annual expenses ... the administration found itself unable to settle native claims adequately.

⁸⁹An earlier statute called the Poll Tax Proclamation was passed 1886. This was abolished by the 1902 Proclamation. This was initiated by Governor Birch and modelled on the Selangor Land Code, 1891 for customary lands.

⁹⁰This was the Land Proclamation (Amendment 1913).

⁹¹Land (Further Amendment) Ordinance 1922

⁹²Section 65 of SLO

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The Sabah Land Ordinance 1930

4.48 The legislation that applies in Sabah today is the Land Ordinance No.10 of 1930, which consolidated and revised many of the provisions from earlier legislation.⁹³ From the very beginning of legislation on lands in Sabah, a central thread that ran through each legislation and a principle underpinning the law is the protection of natives' rights to their lands as well as the recognition that natives practised their own customs and laws. Administrators had to give careful regard to those customs. There was also a very clear emphasis on cultivation of the land such that lands that were not cultivated or unoccupied within a certain period reverted to the government.

Native Customary Land Rights

4.49 Only natives are entitled to lands subject to native customary rights (NCR). These are lands that have no documentary titles but have been occupied by natives under their own customs. Native rights to land in Sabah are defined by section 1594 and if established, they are to be dealt with either by grant of land or by money compensation. The next part will deal Part IV of the Ordinance, on customary tenure. It will also deal with native claims and other rights that are provided for natives including communal lands and native reserves.

Customary Tenure

4.50 One of the most common ways to establish native customary rights is through customary tenure. Section 65 defines what customary tenure is and section 66 states what customary tenure confers. "Customary tenure" means "the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years under the Ordinance or under the Poll Tax Ordinance⁹⁵ or Part IV of the Land Ordinance 1913." This definition accords with the English law where an occupier (that is, a person who is physically present on or in actual control of land) is accorded possession in the absence of circumstances which show that possession is in another. In other words, occupation is prima facie proof of possession.⁹⁶ When a person enters into occupation of land, the occupant is accorded not only possession but a "title by occupancy" as well. This in part, is what is recognized as customary tenure. Customary tenure confers upon a native a permanent heritable and transferable right of use and occupancy in his land even if he does not hold a documentary title.⁹⁷ So long as a native person is able to establish one of the stated rights under section 65, by submitting his claim through the headman or directly to the collector, in the absence of any other claim, he acquires a permanent interest in land.

Native Title

4.51 Apart from continuous occupation, a native may also apply for alienation of state land directly to the Collector, under section 70(1) of the Ordinance. Land applied for under this part may not exceed 20 hectares and may only be used for agricultural purposes,⁹⁸ which includes the cultivation of any crop (including trees cultivated for the purpose of their produce), herbs, market gardening, the breeding and keeping of honey bees, livestock and reptiles, and aquaculture or any combination thereof". Upon the approval of such application, bona fide cultivation must commence within 6 months and the cultivation of the whole area be completed within three years. These terms, together with the

⁹³The Ordinance was brought up to date by provisions taken from the Land Code 1926 of the Federated Malay States. In February 1953, the Land (Unification and Amendment) Ordinance was passed and the 1930 Ordinance was made applicable to Labuan and the whole of Sabah.

⁹⁴Native customary rights shall be held to be -

- (a) land possessed by customary tenure;
- (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- (c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
- (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth; (e) land that has been cultivated or built on within three years;
- (f) burial grounds or shrines;

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(g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

95The Poll Tax Ordinance was repealed by Ordinance No.14 of 1962.

96Kent McNeil, *Common Law Aboriginal Title*, Clarendon Press, 1989, 73.

97SLO section 66.

98A new definition of agricultural purposes is introduced in section 4 through Land Amendment (No.2)(Enactment) 2002.

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perpetual nature of the title and the exemption from stamp duty on transfers, charges and subleases are generous terms accorded to native title.⁹⁹ Like any other native interests, native title lands, cannot be transferred to non-natives. Where natives required land for commercial purposes, they may apply for lands to be alienated under leases to which the normal terms would apply.

Communal title

4.52A communal title was given for land held for common use, particularly in areas where villages existed without demarcated individual boundaries, common grazing land for cattle and other domesticated animals, for burial grounds or shrines. In effect, the communal title was a formal recognition of a tradition of collective rights that has been practised by the natives on their territories since time immemorial. It serves to keep lands in native hands and facilitates the management of their collective resources, agricultural areas, water catchment and communal forests. Section 76, which provides for communal title, was amended in 2009 by the Land (Amendment) Enactment 2009. The amendment to section 76 in 2009 has given rise to apprehensions on the part of some members of the native communities, particularly with regard to its implementation.

4.53The open-ended phrase “any state land planned by the government” does not specify the purpose, giving absolute discretion to the state to decide on the plan and purpose. The communal title is held there under the name of the Collector as trustee without power of sale.¹⁰⁰ This is in line with the original intent of the communal title as a means of long term protection, to keep lands in the hands of the natives and to prevent transfers by individuals, so no one would be quick to sell their lands. Under section 77, a communal title may, with the sanction of the Collector, be sub-divided and wholly or in part, assigned to individual owners who shall receive native titles in their own name. In such instances, the collector transfers and signs on behalf of the community.

Native Reserves

4.54Under section 78, the Yang diPertua Negeri or Governor (YDP) may if he thinks it necessary, create Native Reserves to protect the present and future interests and well-being of the natives of Sabah upon certain conditions and for specific purposes. The boundaries of the reserve would have been surveyed and the declaration shall fully describe the land declared to

be a reserve, including the purpose, the terms and the conditions upon which reservation is made. These reserves would be held by trustees who are appointed to control and manage the reserves subject to the directions of the Secretary of Natural Resources or the district Officer. A native reserve may at any time, at the discretion of the YDP be revoked, cancelled or the terms varied.

Procedures for Establishing Claims to NCR

4.55 The procedures regulating applications, alienation of land, and conditions in respect of titles including

NCR are contained in the Ordinance. Section 9 gives the Director of Lands and Surveys the power to alienate state land subject to any general or specific direction of the Cabinet.¹⁰¹ This takes away the power from the Minister acting alone, to the collective decision of the Cabinet. The first point of claim for any claimant of NCR is prescribed under section 14. Claims to NCR shall be taken down in writing by the headman or by the Collector and shall be decided by the Collector. The collector is under a duty to determine whether the claim is genuine by conducting a check on the ground.

4.56 The procedure to make NCR claims is provided under section 69 of the SLO which reads:

Claim to land based upon customary tenure shall be decided by the Collector acting under section 82 subject to the appeal provided for in sections 41 and 84. Section 82 states: The Collector shall enter in a register all claims submitted within the period assigned in the notification and being guided by

⁹⁹Tan Sri Thomas Jayasooria, “Development of Land Law in Sabah” in Ahmad Ibrahim & Judith Sihombing (eds), *The Centenary of the Torrens System in Malaysia*, *Malayan Law Journal*, 1989, 213 at 228.

¹⁰⁰SLO section 76

¹⁰¹Section 3 of the Land (Amendment) Enactment 1996 substituted “Minister” with “Cabinet.”

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the conditions laid down in the definitions of customary tenure and native customary rights in this ordinance he shall record his decision as to the ownership of the land and the claims to other native customary rights.

4.57 Put simply, claims to NCR are to be heard and decided by the Collector, “being guided by the conditions laid down in the definitions of customary tenure and native customary rights” and any appeal from the Collector’s decision would go to the Director of Lands and Surveys.

Determination of NCR under section 13

4.58 Whenever any application for state land is made to the Director or the Collector, it must be determined whether NCR exists on land. Upon receiving any application for unalienated country land, it shall be the duty of the Collector for Land Revenue, to publish a notice calling upon any claimants to NCR who are not yet in possession of a documentary title, to make or send a statement of claim within a date specified in the notice. A native claimant need only to establish any of the rights provided for under sections 15 and 65 by submitting his claim to the Collector, who would register his claim and the claims by other natives, if any.

The Sabah Land Use Policy 2010

4.59 The Sabah Land Use Policy (SLUP) which was adopted in 2010 was an attempt at providing a land use orientation that balances social, environmental and economic functions. The Policy is conventional in the sense of adopting the ‘administrative view’ in considering all lands that are untitled as State land. However, the Policy advocates for the formalisation of the concept of native community domain. As a concept, native community domain refers to a need for policy to be more sensitive to ‘the traditions and needs of native communities’.

4.60 In practice, native community domains are deemed by the drafting committee, to be an answer to the need for tenure security and cultural needs for maintaining hill rice cultures. Boundaries for community domains are to be agreed upon by native communities in collaboration with the relevant government departments. With respect to security of tenure, the Policy supports the formation of more Native Reserves (under the existing section 78 of the SLO 1930) so that traditional farming of hill rice could continue.

4.61 Given the process of achieving compromise and consensus that the Policy had to go through, SLUP is a step forward. The fact that hill rice is even taken into account as an agricultural system is an achievement, given the strong modernisation impulse that thrives in state agricultural development agencies. The modernisation impulse is one that regards hill rice cultivation as unsystematic and wasteful in terms of land-use, a legacy of the colonial era, but remains entrenched in the belief system of many change agents in government (field notes SLUP meetings 2009). More importantly, SLUP leaves open the invitation to operationalise in finer form, the concept of native community domain, beyond what it has done, which is the formation of more Native Reserves and the allowing for rights to remain in Forest Reserves and state Parks.

The Sabah Forest Enactment 1968

4.62 Under the Forest Enactment 1968, natives of Sabah may have rights or “conceded privilege”. These are rights that are generally given to traditional users or occupiers of the forest to use the forest resources for their livelihood. While the Land Ordinance deals with alienation of State land, removal of forest produce on state land as well as alienated land is subjected to the Forest Enactment. The latter also deals with creation (and abolition) of forest reserves and protected forests which may affect indigenous inhabitants. There is a saving provision under section 41, allowing natives to take certain forest resources for their own use from any State land. Under section 12 of the Forest Enactment, when any land is to be declared as or included in a Forest reserve, a reservation notice may set forth

rights and privileges which the YDP thinks is just to admit, or concede within the reserve, to any person or group of persons.

4.63 Prior to any creation of forest reserves however, a notification of proposal for constitution of forest reserves is to be published in the Gazette and enquiry to be made by the District Officer or Collector under sections 8 and 9. The notification shall state the consequences of the reservation. Any person with objection to the reservation of such land, or who applies to exercise any right or privilege which is being or has been exercised on the land, should apply within a period of not less than three months to appear before the DO and Collector and produce in written or oral statements the extent of the objection, right or privilege. The District Officer or Collector shall enquire into all objections and applications made and into the rights and privileges concerned, and forward a report to the Minister through the Director of Forests.

The Sabah Land Acquisition Ordinance (1950)

4.64 The amendment of section 2(e) on “public purpose” in 2009 further broadened the purpose to include corporations.¹⁰² Under section 2, any land may be subject to compulsory acquisition by the state if it is deemed to be for a “public purpose”, including for townships, roads, resettlement, or conservation and exploitation of natural resources.¹⁰³ Untitled NCR lands are often not recognised nor compensated when alienation under this section takes place. Section 9 on Claim of Person Interested to have acquired or abandoned allow only three months for the owner to register their interest and provide notice to the authorized officer.

The Sabah Parks Enactment 1984

4.65 This statute governs the administration and gazettelement of park areas in Sabah. Section 3 provides that the YDP may declare any land as a Park and Nature Reserve.¹⁰⁴ According to section 5, during the period between the YDP’s declaration and gazetting of the park, the said land cannot be alienated, be built upon, cultivated and hunted upon.¹⁰⁵ Section 10 allows the YDP to compulsorily acquire land for a public purpose and include it within the limit of the Park or Nature Reserve.¹⁰⁶

4.66 Under section 12, the YDP may convert any reserve or sanctuary area into to be a Park or Nature Reserve.¹⁰⁷ As per section 13, the Parks Board shall hold the land on a leasehold for a period of 999 years free from all liabilities¹⁰⁸ and according to section 18, an area may only cease to be Park or Nature Reserve once a scientific research or investigation is conducted to justify the degazettelement.¹⁰⁹

4.67 Section 48 prohibits various activities regarding cultivation, development, etc in a Park or Nature Reserve. Section 58B grants the Director or any Park officer authority to pass through any private land for the purpose of administrating their duties.¹¹⁰

The Sabah Inland Fisheries and Aquaculture Enactment 2003

4.68 Under Part V of the Enactment on Riverine Fishing and Fisheries, sections 35, 36 and 37 relate to Community Fisheries Management Zones. Section 35 allows for the declaration and recognition of

102Section 2 “public purpose” means any, or any combination, of the following purposes (e) for or in connection with any public utility undertaking or the provision of any public service, undertaken or provided, or about to be undertaken or provided, by the Government, the Federal Government, a local authority or any corporation incorporated directly by written law or private enterprise or otherwise howsoever;

103Section 2(h) .. for or in connection with the conservation, improvement or exploitation of natural resources.

104The Yang di-Pertua Negeri may, with the advice of the Minister, by notification in the Gazette, declare his intention to constitute any land as a Park or Nature Reserve.

105During the interval between the publication of a notification of intention (such notification not having lapsed as provided in section 4) and the date fixed by the notification declaring a Park or Nature Reserve as in section 13, no land shall be alienated... no new house shall be built... plantation formed... no fresh clearing for a cultivation... no hunting shall take place...

106If the Yang di-Pertua Negeri considers it expedient to include in a Park or Nature Reserve any land leased or granted to, or otherwise lawfully occupied by any person, he may cause such land to be acquired as for a public purpose under the provisions of the Land Acquisition Ordinance [Cap. 69.], and may thereafter include such land within the limits of the Park or Nature Reserve.

107The Yang di-Pertua Negeri may, with the advice of the Cabinet by notice in the Gazette, declare his intention to convert any forest reserve, game sanctuary or bird sanctuary or any other reserve or sanctuary declared under any written law, in whole or in part, to be a Park or Nature Reserve

108(5) All land which is specified in a declaration shall, with effect from the date fixed by such declaration and by virtue thereof, vest in the Board for an estate in leasehold for a period of nine hundred and ninety-nine years free of all liabilities and encumbrances

109The Yang di-Pertua Negeri may, with the advice of the Minister, by notification in the Gazette, declare his intention to rescind the constitution of a Park or Nature Reserve after a scientific research or investigation had been carried out to justify the degazettement of a portion or the whole of the said park or nature reserve or part thereof.

110The Director or any Park Officer may enter into or pass through any private land with or without workmen and equipment for the purpose of administration of this Enactment.

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indigenous system of resource management, while sections 36 and 37 create a new protocol by providing for the creation of a committee to administer such zones, and by introducing punishment related to the Community Fisheries Zone.

The Sabah Forestry Development Authority Enactment 1981

4.69 The statute governs Sabah Forestry Development Authority (SAFODA). According to section 24, one of the functions of SAFODA is to carry out any activities, which aims to develop lands which have had timber extracted from it.¹¹¹ Under section 39, SAFODA may request the YDP to compulsorily acquire any land which is not State Land.¹¹² SAFODA cannot sell, exchange, or dispose of this land unless with the written consent of the Minister.¹¹³ Section 40 the YDP may also transfer any state land to SAFODA.¹¹⁴ Under section 47, the statute confers SAFODA the same legal rights as a 'native'.¹¹⁵ As such, SAFODA may deal with land that requires special native rights.

The Sabah Rubber Industry Board Enactment 1981

4.70 The statute governs the Rubber Industry Board (formerly known as the Rubber Fund Board), which deals with the matters related to rubber in Sabah. Section 39 authorises the Board to request the YDP to compulsorily acquire any land which is not State Land¹¹⁶ for its use. The Board cannot sell, exchange, or dispose of this land unless with the written consent of the Minister.¹¹⁷ As for State Land, section 40 empowers the YDP to transfer any state land to the Board.¹¹⁸

The Sabah Land Development Board Enactment 1981

4.71 This statute governs the Sabah Land Development Board (SLDB). The duty of the Board, according to section 24, is to carry out development and settlement projects of land in the State.¹¹⁹ According to section 41, the Board may request the YDP to compulsorily acquire non-State Land if the Board feels they require the land.¹²⁰ Via section 42, the YDP may at any time vest any State land to the Board.¹²¹ With regard to the lands acquired by the Board, section 50 (a) permits, subject to written law and the approval of the Minister, the Board to transfer or dispose any land to any corporation, body or person.¹²²

The Sabah Drainage and Irrigation Ordinance 1956

4.72 The statute deals with areas deemed as drainage and irrigation areas. In regard to how land can be deemed as such, section 3123 of the Act allows the YDP to declare any land to be a drainage and irrigation area, whether alienated or not. Also for unalienated land, section 5124 provides the Committee, as the authority, to set conditions on the unalienated land and the YDP can prevent the said land from being alienated unless for the set purpose. Under section 6(3),¹²⁵ the YDP may also order any land declared as a drainage and irrigation area for padi cultivation. As such, the land may

111s24(3) to carry out or supervise the development of suitable areas from which timber has been extracted and other suitable areas including planting or replanting

112Where any immovable property, not being State land, is needed for the purposes of the Authority and cannot be acquired by agreement, the Authority may request and the Yang di-Pertua Negeri may, if he thinks fit, direct the acquisition of such property,

113(2)(b) the Authority shall not, without the written consent of the Minister, sell, exchange or otherwise dispose of such land or any interest therein.

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114The Yang di-Pertua Negeri may at any time by order vest any State land or movable property of the Government in the Authority where it appears desirable to do so to enable the Authority to carry out its duties and responsibilities.

115For the purpose of any law relating to land the Authority may be deemed a Native.

116Where any immovable property, not being State land, is needed for the purposes of the Board and cannot be acquired by agreement, the Board may request and the Yang di-Pertua Negeri may, if he thinks fit, direct the acquisition of such property,

117(2)(b) the Board shall not, without the written consent of the Minister, sell, exchange or otherwise dispose of such land or any interest therein.

118The Yang di-Pertua Negeri may at any time by order vest any State land or movable property of the Government in the Board where it appears desirable to do so to enable the Board to carry out its duties and responsibilities.

119It shall be the duty of the Board to promote and assist the investigation, formulation and carrying out of projects for the development and settlement of land in the State.

120Where any immovable property, not being State land, is needed for the purposes of the Board and cannot be acquired by agreement, the Board may request and the Yang di-Pertua Negeri may, if he thinks fit, direct the acquisition of such property

121The Yang di-Pertua Negeri may at any time by order vest any State land or movable property of the Government in the Board where it appears desirable to do so to enable the Board to carry out its duties and responsibilities.

122Notwithstanding the provisions of any written law to the contrary, subject to the approval of the Minister, the Board shall have the power to transfer or dispose of all or any part of its undertakings, movable or immovable property or rights to any corporation, body or person upon such terms and conditions as the Board may determine.

123The Yang di-Pertua Negeri may declare any land in Sabah within the area affected or to be affected by any drainage or irrigation works, wholly or in part carried out or sanctioned by the Government, to be a drainage area or an irrigation area or both.

124The Yang di-Pertua Negeri may declare in respect of any unalienated State land within a drainage or irrigation area that such land shall not be alienated for any purpose other than such as may be approved by the Committee for that area.

125The Yang di-Pertua Negeri may order that any area or areas of land within a drainage or irrigation area shall be subject to the provisions of this section

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only be used for padi cultivation. Use for other purposes must obtain permission of the Committee (section 6(1)).126

4.73 Section 7 similar to section 6, gives authority to the Committee to classify what the land in the drainage and irrigation area may be utilised for.

4.74 Under section 14,¹²⁷ an Executive Officer¹²⁸ may enter any land, whether it is declared a drainage and irrigation area or not, to conduct drainage and irrigation related activities. The land owner is to be paid for any loss, damage or inconvenience and the compensation amount can be disputed in court.¹²⁹ Under section 15 the executive officer may by written notice, order the owner or occupier of land in a drainage and irrigation area to remove trees and plants in the said land.¹³⁰ Besides this, the executive officer may also prohibit the planting of trees and plants in the area¹³¹ and if the owner/occupier does not comply, the executive officer is authorised to enter the land to remove the plants¹³². The owner/occupier is only eligible for compensation¹³³ for valuable trees and plants once, even though removal activities are done multiple times. Section 16 allows an executive officer to compel a land owner to construct bunds on land in drainage and irrigation areas¹³⁴. Section 18¹³⁵ prevents the use of water vessels in any land declared to be a drainage and irrigation area unless permission is given in writing by the executive officer. It also prevents any the placement of fishing traps. The executive officer can also close that area to prevent the removal of fish.¹³⁶

The Sabah Wildlife Conservation Enactment 1997 and the Wildlife Regulation 1998

4.75 The Wildlife Conservation Enactment 1997 recognises community hunting areas (section 32) and honorary wildlife wardens (section 7) from the community. As in the all the other Ordinances and Enactments to reserve land for specific purposes, the Wildlife Conservation Enactment under section 9 outlines the necessity for a notice to explain the purpose and call for settlement of claims. Section 9(2)(c) in particular requires explanation of “native or traditional rights that will continue to be exercisable after the coming into effect of the declaration of the proposed sanctuary”. Section 9(2)

(d) also requires a summary of representations made by communities likely to be affected.

The Sabah Water Resources Enactment 1998

4.76 The Enactment recognises private water rights, which includes the water rights of indigenous peoples.

It takes into consideration the economic and social impact on the owner or occupier of the land when making a water resources management decision, implying the necessity to examine land ownership and occupation rights of indigenous peoples. A requirement for consultation also means that the

¹²⁶Notwithstanding anything to the contrary contained in the Land Ordinance [Cap. 68], or any other written law, no land within an area subject to the provisions of this section shall be used for any purpose other than the cultivation of padi without the consent of the Committee for the drainage or irrigation area within which such land is situated.

¹²⁷The Executive Officer may, if it appears to him that it will be of benefit to the drainage or an irrigation works in his charge so to do enter upon any land and fill up, construct, widen or drain any canal, watercourse, drain, ditch, pond or swamp whether within or without a drainage or irrigation area:

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128s12 Every drainage or irrigation area and the works therein shall be in the charge of an Executive Officer.

129 Provided that there shall be paid to any owner or occupier thereof reasonable compensation for any damage, loss or inconvenience arising therefrom, and if the parties fail to agree as to the amount so payable the question shall be referred to the Committee whose decision thereon upon any claim for a sum of less than five hundred ringgit shall be subject to appeal to the Magistrate and in any other case be subject to appeal to the High Court.

130(1)(a) The Executive Officer may, by notice in writing, require the owner or occupier of any land within any drainage or irrigation area to clear the banks or sides of any drainage or irrigation works on such land of any trees, plants or weeds growing thereon

131(2)(a) The Executive Officer may, by notice in writing, prohibit the owner or occupier of any land within such area from planting any tree or plant on the banks or sides of any drainage or irrigation works on such land

132(2)(b) If default is made in complying with the provisions of a notice issued under this subsection the Executive Officer may enter upon such land and cause action to be taken to clear any tree, plant or weed from such banks or sides or to remove any such refuse

133s15(3) In cases in which the Executive Officer requires the destruction of, or destroys, valuable trees or plants he shall, unless notice has been issued on a previous occasion under this subsection in respect of the land on which such trees or plants are growing, pay the owner or occupier reasonable compensation for the same; n cases in which the Executive Officer requires the destruction of, or destroys, (emphasis added)

134 The Executive Officer may, by notice in writing under his hand, require the owner or occupier of any land within such area to provide, either individually or jointly with other owners or occupiers, proper banks or bunds to specified levels and distribution or drainage channels for the supply, drainage, retention or exclusion of water:

135(1) Any person who:

(a) drives, draws or pushes, or causes to be driven, drawn or pushed, on the banks or sides of, or uses or causes to be used any boat, vessel, raft, float, timber or other material on any drainage or irrigation works without the written permission, which may be general or specific, of the Executive Officer; or

(b) uses, sets or places any fish trap in any canal, watercourse, drain, ditch or pond within a drainage or irrigation area, shall be liable to imprisonment for one month and to a fine of one hundred ringgit.

136(2) In respect of any drainage or irrigation works the Executive Officer may declare any part of such works to be a closed area and shall give public notice of such closure in such manner as the Chairman of the Committee for such drainage or irrigation area shall approve, and during the period of such closure any person who:

(a)encroaches on or fishes or attempts to take fish out of a drainage or irrigation tank, canal, channel or watercourse;

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government is obliged to involve indigenous peoples in the management of catchment areas and water bodies. The process for, and right to, appeal are also stipulated in the law. (Section 16 on private rights to water states that the owner or occupier of land or premises may, free of charge and without requiring a licence under this Enactment, exercise a private right to take, use and control, sufficient for household and subsistence agricultural purposes.)

The Sabah Biodiversity Enactment 2000

4.77The law contains eight important sections that are relevant to indigenous peoples. Section 9(1)

(j)of the Enactment provides for a system to ensure that the indigenous peoples and other local communities are, at all times and in perpetuity, the legitimate creators, users and custodians of traditional knowledge, and collectively benefit from the use of such knowledge. It also recognizes rights to biological resources in land claimed under NCR [section 16(b)], and has provisions to ensure that any activities related to the collection of biological resources do not negatively impact the livelihood, quality of life and the way of life of indigenous peoples [Section 20(3) and Section 25(1)(b)].

Sarawak

Historical Evolution of land laws

4.78When Sarawak was under the reign of the Brooke family, there was an implicit recognition of customary rights. They honoured and did not interfere with the customary rights of the Dayaks and the Malays who were allowed a form of self governance in relation to their customary lands.¹³⁷ During the early years of Brookes reign, land alienation and development were exercised in respect to lands where no rights or claims whether documentary or otherwise existed. Noting the need to regulate land administration, Land Regulations were introduced in 1863, under which all unoccupied and waste lands were treated as belonging to the government.

4.79Up to 1920, a number of other Land Orders¹³⁸ were made which dealt only with land within the town of Kuching and land within one mile radius of the Court House. Order VIII of 1920 consolidated the preceding Land Orders and defined State land as all lands which were not leased or granted or lawfully occupied by any person. Natives could occupy land free of all charges in accordance with their customary laws provided that “where possible, claims shall be registered”. The Land Orders, however, did not apply in interior areas, which to all intents and purpose were entirely inhabited by natives.¹³⁹

4.80In 1931, the Brooke government introduced the Land Order 1931¹⁴⁰ which redefined State land as “all lands for which no document of title has been issued but includes all lands which may become forfeited or may be surrendered ... by the lawful owner”. Presumably, occupation by virtue of native customary law was subsumed under “lawful owner” since the

earlier term “lawfully occupied” had been omitted.¹⁴¹ This 1931 order was followed by the Land Settlement Ordinance 1933 which provided for settlement of legal and customary rights to land and required all dealings to be registered in a Land Registry “on pain of nullity”. Contrary to the Land Order 1931 which provided for a system based on registration of deeds, the Land Settlement Ordinance 1933 marked the introduction of the Torrens system - a system of title by registration – which in principle provides an indefeasible title to land and facilitates dealings in lands. The implementation of the Torrens system and the protection of customary land relied heavily on the clear demarcation of land boundaries. The work of recording boundaries

137Porter, AF, *Land Administration in Sarawak: An Account of the Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time (1841-1967)* (Kuching: Sarawak Government Printers, 1967).

138There were some regulations dealing with sago land in 1870 and 1876. The Land Order of 1863 as revised in 1872, was again amended in 1882. There were other orders and regulations regarding mining issued at this time.

139For a summary of the development of the Land Regulations and discussion of the continued development and recognition of customary rights, see Ramy Bulan, “Statutory

Recognition of native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place, (2007) *Journal of Malaysian and Comparative Law*, 21-84. Much of the materials in this part are contained in that article.

140The Land Order 1931 repealed all previous orders relating to land.

141The Land Order 1931 reclassified land as Town and Sub-urban Lands, Kampung or Village Lands and Country Lands. The power to classify vested in the Superintendent of Lands.

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and registration of customary land was obstructed by the inadequacy of machinery and staff of the Land Administrator and further aggravated by the Japanese Occupation in 1941-1945. When Japanese occupation ended, the Brooke family ceded Sarawak to the British Monarch. The Cession of Sarawak Order 1946 transferred all rights of the Brookes and the State Government of Sarawak in all lands to the Crown “but subject to existing private rights and native customary rights”.¹⁴²

4.81With the cession, English common law and doctrines of equity were received afresh through the Application of Laws Ordinance 1949¹⁴³ but they were to be applied only to the extent permitted by local circumstances and customs and subject further, to such qualifications as local circumstances and native customs render necessary.¹⁴⁴ This signified the continued recognition of native customary laws, as the Brookes had done through the Rajah’s Order No L-4 in 1928. Notably, these provisions are reproduced in the Civil Law Act

1956.¹⁴⁵ As such, all the legislation on land should be interpreted in the light of this foundational principle.

4.82 The first notable legislation passed by the colonial government was the Land (Classification) Ordinance 1948 (the 1948 Ordinance).¹⁴⁶ The stated aim was to “regulate land use in a multiracial society and to define and protect the land rights of the indigenous people.”¹⁴⁷ The Sarawak Annual Report 1951 reported that it was intended to “control non-native colonisation, and also to protect native interests in land.”¹⁴⁸ The Land (Classification) Ordinance 1948 gave “statutory recognition to a system of land classification which had in fact been created by rules of doubtful validity promulgated under the Land and Land Settlement Ordinances.”¹⁴⁹

4.83 That system of land classification had continued to this day under the present Land Code 1958. It classifies all land in Sarawak into one of six categories:

- (i) Mixed Zone Land (“MZL”) which may be held by any citizen without restriction),
- (ii) Native Area Land (“NAL”) which is land with a registered document of title but to be held by natives only,¹⁵⁰
- (iii) Native Communal Reserve (“NR”) which is declared by Order of the Governor in Council for use by any native community, regulated by the customary law of the community,
- (iv) Reserved Land (“RL”) which is land (1) the Government reserves under s 38 of the Land Code 1958 or prior law, (2) located within a National Park, Forest Reserve, Protected Forest, or Communal Forest, (3) occupied by the Federal or
- (v) Interior Area Land (“IAL”) which is land that does not fall under Mixed Zone or Native Area Land or Reserved Land for which title cannot be registered),
- (vii) Native Customary Land (“NCL”) (land in which customary rights whether communal or otherwise, have been created).

The Sarawak Land Code 1958

4.84 The primary legislation on land in Sarawak is the Land Code 1958. The Land Code took effect on 1 January 1958 and was an integral part of the land law system when Sarawak joined Malaysia in 1963. The preamble to the bill stated that its aim was to consolidate the existing land laws into one piece of legislation, to fill the gaps in the existing law by amending those parts that were found to be unworkable or overlapping. One of the objectives of the law was to clarify the law relating to NCR.¹⁵¹

¹⁴² Order No C-24, Sarawak Government Gazette, XXXV (7) Notification No 111, dated 25 May 1946, Laws of Sarawak, id at p 34. See Notification No 113, Laws of Sarawak, id at p 35.

¹⁴³ Ordinance No 27 of 1949. The ordinance came into force in 1949. English law was originally received under the Sarawak Application Ordinance 1928.

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144Cap 2 of Laws of Sarawak, Note that this is a restatement of the Rajah's Order No L-4 of 1928 which had adopted the law of England as the law of Sarawak subject to modifications by the Rajah and, as was applicable, having regard to native customs and local conditions. The official acknowledgement of customary law as a restriction on statutory law was thus perpetuated.

145Act 67 (Revised 1972).

146No 19 of 1948, Sarawak Government Gazette, Vol III, No 44, Notification No 1356, 16 December 1948.

147Porter, *supra*, n 80 at p 60.

148See Annual Report on Sarawak For The Year 1951, Kuching, Government Printers at p 143.

149Hickling, R H, Hansard, Land (Classification) Amendment Bill, Council Negeri Sitting on 21 May 1952.

150Land declared as such under the Ord. No 19/1948 remains. Native Area Land may also be declared as such under s 4(2) or (3) or (4)(b) or s 38(5) of the Land Code 1958.

151Hansard, The Land Code Bill Reading, Council Negri Sitting, Wednesday, 22 May 1957.

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The Code is largely made up of previous legislation with further imports from existing ordinances at home and abroad. This raised doubts about its suitability.¹⁵² Indeed it is a contradiction in terms. It is based on a Torrens system of title by registration, where a person claiming ownership or interest must have a document of title in the form of a grant, lease or other documentary evidence of title or interests. It also provides for a system based on customary rights for which no registration is envisaged. The Torrens system envisages the survey and permanent markings of individual boundaries of land held under title and imply government guarantees of both boundaries and title. This guarantee however does not extend to native customary lands.¹⁵³

Creation of NCR after 1957

4.85Section 5 (1) of the Land Code prohibits the creation of native customary rights after 1January 1958, except in accordance with the requirements of the statute.¹⁵⁴ NCR can be created in Interior Area Land (IAL) if a permit is acquired from the Superintendent under section 10. The methods by which native customary rights may be created are :

- i. felling of virgin jungle and the occupation of the land thereby cleared;
- ii. the planting of fruit trees;
- iii. the occupation or cultivation of land,

iv.the use of land for burial grounds or shrines, or

v.the use of land of any class for rights of way; or

vi.any other lawful method (deleted in 2000).

4.86The residuary provision for the creation of NCR ‘by any lawful method’ was deleted from the law in 2000,¹⁵⁵ but is yet to be enforced. The occupation of NCL or RL other than according to requirements of law is unlawful occupation.¹⁵⁶ Until the Government issues a title, natives in lawful occupation of State land are deemed licensees.¹⁵⁷ The Code however recognises NCR created prior to 1 January 1958.¹⁵⁸

Rights Based on Occupation

4.87The recognition of NCR on land is primarily based on occupation The most common way NCR is created is by way of felling of virgin jungle, occupation and cultivation. The use of land for burial ground or shrine is related to and is evidence of occupation of land. Where occupation is recognised, it is only reasonable that the occupiers be given rights of way over the territory that is occupied by the community.

Nature of the Right Under the Code

4.88Permit Holder and Licensee: The term “permit” or permission implies that no proprietary rights exist.¹⁵⁹ A permit expires by lack of renewal and is revocable at any time. In practice, the issuance of permits is rare if they are given at all. Permits had formally been discontinued through a government directive in 1964¹⁶⁰ further restricting creation of NCR. The requirement of a permit restricts the customary land use practices that have traditionally been part of native life and agricultural practices. By so doing, it makes certain native occupiers potentially “illegal occupants” on their own land. Be that as

¹⁵²See Richards, AJN, Sarawak Land Law and Adat: A Report (Kuching: Sarawak Government Printers, 1961) Part II para 38, 11. The new legislation covers land registration, settlement of customary rights, alienation and land acquisition. In formulating the Land Code, the government took into consideration existing ordinances at home and abroad. These included: The Land Ordinance (Cap 27); The Land Settlement Ordinance (Cap 28);The Land (Classification) Ordinance of Sarawak 1955 ;The Land Act of 1948, New Zealand; The Land Code, Federated Malay States (Cap 138); The Land Transfer Act 1952 of New Zealand; The Property Law Act 1952 of New Zealand; The Land Acquisition Ordinance of Brunei; The Transfer of Land Act (Victoria) Australia

¹⁵³See Ramy Bulan, *supra*, n 82.

¹⁵⁴Land Code 1958, s 5(1).

¹⁵⁵A78/2000.

¹⁵⁶Land Code 1958, section 10(2).

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157Land Code 1958, section 5(2)(i). Superintendent of Lands and Surveys v Nor anak Nyawai & Ors [2006] 1 MLJ 256, 269-270, held that native title confers a property interest in and over land. Contrary to the definition of proprietor in section 2, which excludes those persons holding land under a licence from the Government, natives holding their lands pursuant to a licence do have a property interest in those lands.

158Land Code 1958, section 5(2)(ii).

159Note that the Superintendent may permit the temporary occupation of State land under temporary licences under s 29 of the Code. The licence is not transferable or transmissible and is not registrable in the Register. This is a separate provision from s 10 which provides for a specific permit for creation of NCR.

160Zaidie Zainie, “Native Customary Land: Policies and Legislation”, Paper presented at the Seminar on Native Customary Land, Santubong Kuching Resorts, 29 September – 3 October 1994. In 1961, Richards wrote, “I know of no permits issued under s 10 of the Land Code or of any recently established rights denied under section 5.”

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it may, it must be noted that even if their right was called a license, the High Court in *Nor Nyawai v Borneo Pulp Plantation* has held that “such license cannot be terminable at will.” This view was endorsed by the Court of Appeal in *Superintendent of Lands, Bintulu v Nor anak Nyawai*. That means that holders of native customary rights have proprietary rights that cannot be taken summarily or extinguished except in accordance with laws and that also after payment of compensation.”¹⁶¹ This constitutes recognition of a proprietary right to the land which is protected under Article 13 of the Federal Constitution.¹⁶² Where a proprietary interest based on occupation is recognised, a case for trespass could be maintained against a third party.¹⁶³

A Grant in Perpetuity

4.89The area claimed as NCL usually does not have documentary title but a native can apply for a grant in perpetuity title from the Lands & Surveys under section 18 of the Code where he has “occupied and used any area of unalienated state land in accordance with rights acquired by customary tenure amounting to ownership, of land for residence and agricultural purposes,¹⁶⁴ he may, subject to section 18A. As to what is customary tenure amounting to ownership, it has been suggested that where an individual or family has the right to exclude other individuals or families from the occupation or use of a piece of land, the rights in that land must be regarded as amounting to ownership.

4.90This underscores the point that ownership under customary laws is best understood through considering indigenous history and patterns of land usage because indigenous systems have their own precision and enforceability.¹⁶⁵

Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976

4.91One of earlier legislation in relation to development of native customary lands in Sarawak is the Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976.

That Ordinance established the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) which had the object of developing agricultural land in situ. Owners of NCL entered into joint venture with SALCRA to develop their lands and to plant the land with cash crops. As these lands are declared as lands under Development Area, the legal ownership or any customary rights on the land would not be affected. Participating households retained ownership to their lands. Here, an owner is defined as the proprietor of the land as defined under the Land Code and includes any natives lawfully occupying NCL. SALCRA's function is to rehabilitate the land, plant the cash crops, provide advisers and training facilities in various aspects of farming and land management. The owners pay for the costs. Upon completion of the development and when it appears that the participants have acquired the know-how, under section 19 of the Ordinance, the government may direct that land be alienated to such persons or body, thus enabling them to obtain a demarcated piece of land to which they will be given a grant in perpetuity under section 18 of the Land Code.

4.92 Where lands are acquired for SALCRA under section 22 of the Ordinance, any NCR that are affected may be extinguished and such lands would be deemed to be for public purpose. The expense and compensation of any land acquired shall be borne by the authority.

4.93 A parallel scheme to SALCRA was set up under the Land Consolidation and Development Authority or Lembaga Pembangunan dan Lindungan Tanah (PELITA) which was established in 1981. Unlike SALCRA which was only for agricultural development, this new authority was set up to promote the

161 [1970] 1 MLJ 164. Following *Nyalong and Udin anak Lampon*, [1949] SCR 3, the respondent was said to have lost her right to her *temuda* because she had left it for 20 years. She had no power to alienate it, and the land was declared as *tanah orang pindah* and left for the people in the area.

162 Art 13 of the Federal Constitution states:

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

163 In Peninsular Malaysia, where aboriginal customary rights of aboriginal peoples were in question, the court in *Sagong Tasi v Kerajaan Negeri Selangor* [2001] 2 MLJ 591 had recognised *Temuan* (Orang Asli) customary interests in the lands occupied by them and they could maintain a case for trespass against intrusion of a third party.

164 Section 18 was amended in 1963 following a report by the Land Committee in 1962 to allow for replacement of customary tenure by a lease for 99 years. This was amended in 1974, reverting the position to providing for a grant in perpetuity where the rights "amount to ownership".

165 *Re Southern Rhodesia* (1919) AC 211.

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development of both agricultural and non-agricultural projects and it was established under the Land Consolidation and Development Authority Ordinance 1981.

Sarawak Land Consolidation and Development Authority Ordinance 1981

4.94The Ordinance gives powers to LCDA to acquire land for private estate development on both state controlled land, as well as NCR land. It has powers to act as intermediary between land-owners and corporations where private investors would be invited to participate in land development, subject to allocation of shares in those companies. The Land Code was amended in 1988 and 1990 to allow corporations including foreign companies to purchase land, including NCL for development. The formation of LCDA was a further step in governmental involvement in large scale land development as it became an agency and a conduit to ‘harness private capital for developing the land as estates’¹⁶⁶ paving the way for the introduction of the Joint-Venture Company (JVC).

4.95The Joint Venture Company introduced as a Konsep Baru. The JVC was introduced and labeled as a Konsep Baru or New Concept, a term that is self explanatory and presupposes no knowledge or practice on the part of its beneficiaries. The concept of the joint venture is premised on the assumption that NCR land which is now unorganised and fragmented could be turned into an economic asset through the creation of an NCR Land Bank. As a prerequisite, there should be contiguous blocks of land of not less than 5,000 hectares which may cover land spanning the territorial domain of several longhouse communities. Once pooled it is assumed that large scale plantation development and optimum returns could be realized. It also assumed that large areas of NCR are attractive and viable for investment by private investors.

4.96This ‘new model’ Joint-Venture Company is a type of development trust which is a ‘facilitative commercial trust’.¹⁶⁷ Creating a trust circumvents the requirements for a person or persons to be a party to the contract in order to enforce it. Unlike a contract, a third party can enforce a trust even though he was not party to it. The beneficiaries include persons whose names appear in the appendix of the trust deed, their respective heirs, successors in titles, executors, administrators, personal representatives, trustees and any other person claiming title or interest in the name or on behalf of the NCR owners. The trust also does away with the need to get into a partnership which will require the parties to contribute equally in order to share equally in the profits.¹⁶⁸ As most native land owners do not have the financial means to develop the land, vesting the land in trustees is arguably one of the most appropriate mechanisms that can be used. This was however without its controversies.¹⁶⁹

4.97The JVC and the Nature of the Beneficiaries’ Interests. The terms of the trust deed presume that the NCR owners have acquired the rights through one of the means prescribed under sections 5(2), 7A, 7B or 7C or have obtained a permit under section 10 of the Land Code, or that there is evidence or records kept by the Land Office pertaining to the land, so that a registerable document of title may be issued in favour of the company.

4.98This arrangement is different from some property development ventures which are financed through the marketing of shares in land trusts where the shares have clear proportions. In this case, while the beneficiaries may be entitled to the land as set out in the appendix of the trust deed, their respective interests, rights, shares are undivided interest.

With one master title, the owners cannot apply for sub-division for as long as the company is the registered proprietor.

4.99A fundamental aspect of the JVC is that native NCR ‘owners’ become partners in these ventures without having to provide financial capital. Their equity in the joint ventures would be based on the

166The Sarawak Chief Minister, Datuk Patinggi Tan Sri Haji Abdul Taib Mahmud, Handbook, New Concept of Development on Native Customary Rights (NCR) Land, Ministry of Land Development, Sarawak, 1997.

167Bryant, 2001.

168Ladbury, R. A., 1987. ‘Commentary’, in Finn (ed). Equity and Commercial Relationships, LBC, p 39.

169For a detailed discussion on the repercussion of this see Bulan, R, Native customary Land: The trust as a Device for Land Development in Sarawak, in Fadzillah Majid Cooke, (ed) State, Communities and Forests in Contemporary Borneo, ANU E Press 2006, 45-64.

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area of their land; and the idea that their land would be returned to them when the government has no more use for it.¹⁷⁰

Sarawak Natural Resources and Environment Ordinance 1993 (Cap 84 Laws of Sarawak)

4.100 Another statute that has some bearing on native land rights is the Natural Resources and Environment Ordinance 1993(NREO). This legislation needs to be considered along with the federal Environment Quality Act 1974 (EQA). The latter was enacted to ensure prevention, abatement, control of pollution and enhancement of the environment. In 1993, the NREO Sarawak amended the Colonial Natural Resources Ordinance 1949 to include “environment” in the Ordinance and it became the present NRE Ordinance 1993. The areas of jurisdiction under the two statutes are demarcated in accordance with the respective legislative lists in the Ninth Schedule of the Federal Constitution.

4.101 In Sarawak the parent law, NREO provides for the enactment of subsidiary legislation specially related to the procedure of Environmental Impact Assessment report to be made. Under section 11A the Natural Resources and Environment Board may, subject to rule made under section 18, require any person undertaking certain prescribed activities to submit to the Board a report from an expert or authority on the impact of certain activities on the natural resources and environment. These prescribed activities include development of agricultural estates or plantations, clearing of forest areas for establishment of plantations, carrying out of logging operations in forest areas, exploration of minerals, mining, farming, development of commercial, industrial and housing estates, extraction of minerals, activities that may cause pollution of inland waters and establishment of or use of land as landfills or treatment of wastes and other activities that may damage the environment or natural forests.

4.102 Many of the areas that are affected by the foregoing activities and development are ancestral lands occupied by native communities whose livelihoods are often affected by such activities. Thus these statutes are important to the native communities.

Peninsular Malaysia

The National Land Code 1965

4.103 Land law in Peninsular Malaysia is governed by the National Land Code 1965. Section 4(2) provides for recognition of customary tenure. It states:

Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act,

Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this act... be subject to the provisions of this Act.

(2) Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of –

(a) any law for the time being in force relating to customary tenure;

(b) any law for the time being in force relating to Malay reservation or Malay holdings;

(c) ...

(d) any law relating to sultanate lands; ...

(i) the Land (Group Settlement Areas) Act 1960, ...

And, in the absence of express provision to the contrary, if any provision of this Act is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall to the extent of the inconsistency, be void.

170 Jitab, Kris with James Ritchie, Sarawak Awakens, Taib Mahmud's Politics of Development, Pelanduk Publications (1991).

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4.104 Judith Sihombing in her book National Land Code: A Commentary 171 opines that there is nothing novel about section 4(2). It is merely illustrative of the traditional recognition given to personal law which, from the First Charter of Justice in 1807 in Penang, continues today in the Civil Law Act 1956, 172 which specially recognises local laws. Section 3(2) of the Civil Law Act provides that the law applicable to Peninsular Malaysia is that of common law and equity as is in force on 7 April 1956 in England, provided that the said common law, rules of equity and statutes of general application shall be applied "so far as the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

4.105 Sihombing states further:

[W]here the incidents of tenure protected refer to the rights of citizens, the rights protected are not those of Malay customary tenure alone but refers to special statutory rights relating to land provided for in the Constitution and other enactments.¹⁷³ (emphasis added).

4.106 This statement reflects the intent of the National Land Code that is supposed to deal with all aspects of land matters in Peninsular Malaysia. It is to be noted that the term “customary tenure” has often been used to refer to Malay customary tenure under the National Land (Penang & Malacca) Titles Act, as well as to adat perpatih or tribal adat in Negeri Sembilan. Thus Sihombing is of the view that since Malay customary tenure is now mostly dealt with by the enrolment in the Mukim Register,¹⁷⁴ customary tenure, which is given paramountcy by section 4(2) refers to tribal adat. The main effect of the reservation in section 4(2) is that unlike dealings in other mukim lands which are solely regulated by the National Land Code, dealings in customary land must also conform to the customary rules. Sihombing makes a further significant observation, and that is, the fact that a close reading of this provision would mean that when there is any conflict, customary law prevails.¹⁷⁵ This is a very vital observation. This leads us to the question: What is the relevance of the National Land Code to Orang Asli?

4.107 It is contended that the lack of reference to Orang Asli may be a clear indication of how the Orang Asli appeared to have been treated as an invisible population in Peninsular Malaysia. As the principal legislation on land in Peninsular Malaysia, there is no reference in the Code pertaining to their presence on the land. Was it because they were regarded as having no legal system that could be given force to? If the stand taken by Tun Mahathir in his book *The Malay Dilemma* is reflective of the then prevailing attitude, it is not surprising that the National Land Code has no reference to Orang Asli. This attitude and his assertion that the definitive people of the Malay Peninsula are the Malays and not the Orang Asli came as a slight, and a great disappointment to the community.

4.108 Such an outlook towards certain tribal groups was reflected in decisions of the colonial courts as expressed by Lord Sumner in *Re Southern Rhodesia*, where he said “[S]ome tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institution or the legal ideas of civilised society.”

Be that as it may, Lord Sumner in the same case did recognise that some groups had legal systems which were recognised. His Lordship said:

On the other hand, there are indigenous peoples whose legal conceptions, though differently developed are hardly less precise than our own. When once they have been studied and understood, they are no less enforceable than rights arising under English law.

4.109 It is quite probable that the attitude of the state at the time was one that saw the Orang Asli as being “so low down in the scale of civilisation” that they were not regarded as having any rights at all. Thus

¹⁷¹Judith Sihombing, *National Land Code: A Commentary*, 2nd Edition, at p 81.

¹⁷²Act No.67

173Judith Sihombing, National Land Code: A Commentary, 2nd Edition, at p 81.

174E.g. The Land (Group) Settlement Areas

175Judith Sihombing, National Land Code: A Commentary, 2nd Edition, at p 81.

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only Malay customary tenure and adat perpatih were mentioned. Despite this misconception, it does not negate the fact Orang Asli have pre-existing customary rights that could be recognised under the general provision of section 4(2) on “customary tenure” and also under “custom and usages” under the Federal Constitution. The fact is that Orang Asli have pre-existing rights to the lands that they have traditionally occupied, and that right is held and regulated by the aboriginal customs of the different Orang Asli communities.

4.110 The Malaysian courts have called this right a customary title or customary community title. As Gopal Sri Ram JCA (as he then was) rightly noted in the case of *Sagong Tasi v Kerajaan Negeri Selangor*, Orang Asli have a form of customary tenure that is recognized under common law and “[T]here is nothing in the Code, which is the principal statute that regulates titles and dealings in lands and interests in land that strikes at the recognition of land held under customary title”.¹⁷⁶ This just means that the National Land Code does not abrogate the existence of an Orang Asli customary tenure.

The Aboriginal Peoples Act 1954 (Revised 1974) (“APA”)

4.111 The principal Act that governs Orang Asli administration including some reference to their occupation of land is the Aboriginal Peoples Act 1954. The purpose of the APA is found in its preamble. It is an Act to provide for the protection, well-being and advancement of the aboriginal peoples of Peninsular Malaysia. It is interesting that at the introduction of the Bill, Dato’ Onn Jaffar said in his speech in the Federal Legislature:¹⁷⁷

(a)Now I bring this bill for the protection and welfare of a community – a comparatively large community – who are peoples of this country,

(b)The aborigines are human beings with human reactions and the idea of this bill is to provide for their protection as human beings and not as museum pieces or exhibits.

4.112 The latter statement is ironical, which seemed to address or to counter a general, adverse public sentiment. The Act defines the Orang Asli identity, and provides for creation of areas that are reserved for Orang Asli that will “protect” them from “undesirable” persons whose presence in those areas might be detrimental to them. The word “protect” partly explains the background of the legislation where during the Communist Insurgency and the period of the Emergency, it was deemed needful to protect the Orang Asli from subversion. It is questionable if such a provision is still relevant when the state of emergency is no longer in existence. It does however reveal the kind of approach that the State has often taken towards Orang Asli, treating them as wards of the State. This suggests the tacit acceptance of a fiduciary relationship to the Orang Asli.¹⁷⁸

4.113 Under the APA, all matters pertaining to land, including the gazetting and de-gazetting of aboriginal reserves come under the purview of the State, who may by notification in the gazette, declare any area exclusively inhabited by aborigines to be

(a) an aboriginal reserve, 179

(b) an aboriginal area, 180 or

(c) an aboriginal inhabited area. 181

4.114 An area to be declared an aboriginal reserve is any area exclusively inhabited by aborigines and where the aborigines are likely to remain permanently. Such an area is to be gazetted. Within an aboriginal reserve, no land may be declared a Malay Reserve land, a sanctuary for wild animals, or reserved forests, neither shall lands be alienated, granted or leased except to Orang Asli who are resident there, and no temporary occupation of the land is permitted.

176 *Kerajaan Negeri Selangor Sagong bin Tasi* [2005] 6 MLJ, 289

177 As reported in the Malay Mail Newspaper published on 28 November 1953, cited in *Sagong Tasi v Kerajaan Negeri Selangor* [2005] 6 MLJ 289, 302-303

178 This was discussed in Ramy Bulan with Amy Locklear, *Legal Perspectives on Native Customary rights in Sarawak* (SUHAKAM, Kuala Lumpur 2008) 155. See also Rusaslina Idrus, "From Wards to Citizens: Indigenous Rights and Citizenship in Malaysia", (2010) 33 (1) *Political and Legal Anthropology Review* 89.

179 APA, s 7(1).

180 APA. s 6

181 Any place inhabited by an aboriginal community

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4.115 An aboriginal area may be declared in an area predominantly or exclusively inhabited by aborigines, which has not been declared as a reserve. Within an aboriginal area, no land shall be declared as Malay Reserve land, as a sanctuary for protection of animals or birds, or as forest reserve, or be alienated, granted or leased except to aborigines normally resident in the area. Furthermore, no licence for collection of forest produce shall be issued in an aboriginal area to a person not being aborigines normally resident in that aboriginal area, or for any commercial undertaking, without consulting the Director General. 182

4.116 Any place that is inhabited by Orang Asli which has not been declared to be an aboriginal area or reserve is called an aboriginal inhabited area. The relevant State Authority may grant rights of occupancy, free of rent or subject to conditions in a grant, within any aboriginal area or reserve to Orang Asli individually, to members of any family of aborigines, or to members of the community but such rights would not confer on any person "any better right than that of a tenant at will". 183 In each case, the State Authority may revoke wholly or

in part or vary any declaration of an aboriginal area or aboriginal reserve. There appears to be no provision of any obligation imposed on the State Authority to replace any land taken or de-gazetted as such.¹⁸⁴

4.117 According to figures released by Department of Orang Asli Development (JAKOA), as of 31 December 2010, there are 145,379.67 hectares of lands that are held for or by Orang Asli. Of this number, lands gazetted under sections 6 and 7 of APA amount to 20,670.83 hectares or 14.21 per cent. Lands approved for aboriginal reserve but yet to be reserved is 26,288.47 or 18.08 per cent, and lands that are under application and awaiting approval by State Governments are 85,987.34 hectares or comprising 59.14 per cent.¹⁸⁵ Lands held under individual titles make up 1,424.31 hectares which comprise 147.42 hectares under housing and 1,276.89 hectares under agriculture.¹⁸⁶ It is to be noted that computation of figures for Orang Asli Lands always include the category of lands that have been applied for but yet to be approved.

Statement of Policy Regarding the Administration of the Orang Asli of Peninsula Malaysia of 1961 (“Policy Statement”)

4.118 The Policy Statement¹⁸⁷ was issued by the Jabatan Hal Ehwal Orang Asli (the Department of Aboriginal Affairs) for the administration of Orang Asli in 1961. With regard to their land rights, the policy states:

(d)The special position of the Orang Asli in respect of land usage and land rights shall be recognised. Thus, every effort will be made to encourage the more developed groups to adopt a settled life and this is to bring them economically into line with other communities in the country. Aborigines are not to be moved from their traditional areas without their full consent.

4.119 Recognising the nomadic lifestyle of some of the groups, the Policy Statement relaxes forest policies in favour of Orang Asli. Nonetheless, the ultimate aim of the policy is for settled agriculture and that entails providing “the necessary land ... where they are willing to settle.” If the policy was taken as a guiding principle, it is ironical that Orang Asli communities have for a long time been excluded from the government’s development schemes. These schemes include the Federal Land Development Authority (FELDA) schemes¹⁸⁸ for the development of oil palm under the Land (Group Settlement Areas) Act 1960. This will be dealt with later.

¹⁸²Now referred to as the “Director General of the Department of Orang Asli Affairs (JHEOA).” The Department of Orang Asli Affairs is a Federal department set up to manage all the affairs of Orang Asli. Previously it was placed under the Ministry of Home Affairs, but it is now under the Ministry of Rural Development. Orang Asli are the only people in Malaysia solely managed by a government department.

¹⁸³APA. S 8.

¹⁸⁴Colin Nicholas maintains that this is the only plausible explanation for the decline in acreage of gazetted Orang Asli reserves from 20,666,96 ha. to 17,963,00 ha. between 1990-1994.

185According to Nicholas, approval for gazettelement has been withdrawn from 7,443.8 hectares out of 36,076 hectares originally approved before 1990. See Colin Nicholas, "The Law on Natural Resource Management As It Affects the Orang Asli" paper presented at the UNDP-RIPP/PACOS workshop on Indigenous peoples and Natural Resource Management Laws, 10 November 2005, Donggongon, Sabah. <http://www.coac.org.my> cited on 12 November 2009.

186Pelan Strategik Kemajuan Orang Asli, 2011-2015, Jabatan Kemajuan Orang Asli, 2011 at p 56.

187Jabatan Hal Ehwal Orang Asli (1961).

188This is a resettlement scheme which received funding from the World Bank and other institutions, where participants were given ten acres of land with housing and all the amenities, to encourage landless peasants to settle down. The Government prepared the settlement sites, ploughed the lands, constructed houses, and planted the crops which were almost ready by the time the settlers arrived. The settlers would pay back the costs of development as their revenue grew.

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National Forestry Act 1984

4.120 One of the questions that arise in Orang Asli land claims concerns the extent to which they may claim rights under the National Forestry Act. In the case of *Adong bin Kuwau v Kerajaan negeri Johor*¹⁸⁹ the courts recognized Orang Asli usufructuary rights and right to things on the land. Compensation was given based on their *kawasan saka* or foraging lands in aboriginal inhabited lands. When rights are established through traditional occupation, they are proprietary rights protected under the Federal Constitution, which according to the courts, must be compensated for, if taken or extinguished.

4.121 The general rule is that customary rights or titles are not extinguished unless there is clear and unambiguous intention to extinguish. In Peninsular Malaysia, sections 14-15 of the National Forestry Act 1984 vest the entire property of all forests produce, within a permanent reserved forest or State land, in the State Authority and no person can take forest produce from State land or permanent reserved forest. This is a vesting provision and not an extinguishment provision. It makes an exception where rights have already been disposed of by any written law which could involve the grant of licenses.

4.122 The State Authority or the executive may under section 40(3) grant privileges to Orang Asli in respect of removal of forest produce and these are for limited purposes. Section 62(2) gives the Director of Forestry discretion to waive or exempt Orang Asli from any payment of royalty for forest produce that is taken for maintenance of fishing stakes and landing places, fuelwood for domestic purposes, or construction or maintenance of any work for common benefit of Orang Asli. These provisions would only give use rights to Orang Asli in the forests. Ironically, Orang Asli are often employed as gatherers or harvesters of forest produce for traders who possess the licences to harvest forest produce, whereas for themselves, provision is made only for their domestic use.

National Land (Group Settlement Areas) Act 1960

4.123 Another legislation that must be mentioned is the National Land (Group Settlement Areas) Act 1960. Under that legislation, land agencies, such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies such as the Pahang Tenggara Development Authority (DARA), may take over State land to develop it for the purpose of land settlement, which culminates in the issue of land titles to the settlers. Although many of these early programmes and plantations have been established in areas traditionally settled by Orang Asli, Orang Asli as a community have not enjoyed the benefits or been participants in these programmes.¹⁹⁰

4.124 Orang Asli have however, been resettled under Regroupment Schemes or what is normally referred to as “Rancangan Pengumpulan Semula” or RPS, with the primary aims of poverty eradication, modernizing their way of life and provisions of social amenities, to regroup and reorganize Orang Asli in suitable centres in their traditional areas, and for security of Orang Asli from subversive and anti-national elements.¹⁹¹ This involves relocating Orang Asli to new areas with the view of transforming the participants into settled self-sufficient and productive farmers. They are required to plant cash crops like palm oil or rubber. This has meant not only a relocation of Orang Asli from their traditional areas but also a loss of ownership and control over their lands and territories.¹⁹²

INDIGENOUS LAND RIGHTS AND THE FEDERAL CONSTITUTION

4.125 The content of the legislation in each of the regions must be examined in the light of the Federal Constitution which is the supreme law of the land. Although land is a state matter, Article 76(4)

189[1997] 1 MLJ 418

190Kirk Endicott, “The Impact of Economic Modernisation on the Orang Asli (Aborigines) of Northern Peninsula Malaysia, in JC Jackson and Martin Rudner,(eds) Issues in Malaysian Development, (1979, Spore, Heinemann,). 167-204 at 192.

191For examples of cases of regroupment and resettlement, see Colin Nicholas, “Orang Asli Rights, Problems, Solutions”. Suhakam Report, 2010, 26.

192Dentan, R.K. K Endicott, A.G Gomez and MB Hooker, Malaysia and the Original Peoples: A Case Study of the Impact of Development on Indigenous Peoples, Allyn and Bacon 1997above n 8.

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empowers the Federal Government to make laws affecting lands for the purpose of ensuring uniformity of such law and policy. This applies throughout Peninsular Malaysia. Article 91 also allows laws for the recognition and protection of Orang Asli customary land rights to be introduced through the National Land Council, but this does not apply for Sabah and Sarawak. There is thus, ample constitutional basis for the contextualised recognition and protection of Orang Asli customary land and resource rights.

4.126 It is established law that the deprivation of Indigenous land rights is a deprivation of the right to livelihood and a right to life under Article 5 of the Federal Constitution. It is also established that native title represents full beneficial ownership of land and is a proprietary right. Article 13 of the Federal Constitution provides that any deprivation or acquisition of Orang Asli lands must be adequately compensated. Where that property or interest is extinguished, the government must pay adequate compensation according to of Article 13 of the Federal Constitution.

4.127 Recognition and protection for native title is also required as part of the constitutional right to life and livelihood. This takes into account the essential role of land in the economies and cultural identity of native communities. In determining adequate compensation for deprivation of native title, the role of land in the livelihood of native communities is a relevant factor. In addition, damages other than monetary compensation may be necessary in cases where the deprivation of property also constitutes a deprivation of livelihood, and right to life under Article 5 of the Constitution.

4.128 Further, Article 8(5)(c) of the Federal Constitution permits the Federal Government to legislate for the “protection, well-being and advancement” of Orang Asli including “the reservation of land”. This provision is an overt recognition by the framers of the Constitution of the special position of Orang Asli in existing constitutional arrangements. As for Sabah and Sarawak, Article 161 A(5) provides for preferential treatment to natives of Sabah and Sarawak

4.129 Underlying the recognition and protection of native title or customary rights to land is the fiduciary obligation of the Federal and State Government towards natives and aboriginal peoples. To meet the fiduciary obligation, government officials must not take actions that are inconsistent with the interests of its beneficiary and may not delegate its discretionary power to a third party. Furthermore, the fiduciary obligation requires that government officials consult with and obtain the consent of native communities prior to taking action that may infringe on or extinguish their native title rights.

4.130 Given the interplay between the common law, the legislative provisions, the Federal Constitution, the existence of indigenous customary practices and the native and aboriginal conception of property, a morally defensible concept of native customary rights must not only look to the common law and the statutory provisions, but must fully incorporate the native perspectives. Where the rights are provided by statute, any inadequacy must be compensated by reference to the constitutional provisions to give full recognition of the customary rights to land.

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CHAPTER 5

JUDICIAL DEVELOPMENT



JUDICIAL DEVELOPMENT

5.1 There is an emerging body of judicial authorities affirming recognition of and protection for native customary land rights arising out of traditional laws and customs. The Malaysian courts have, in several judgments, recognized native title to indigenous lands, territories and resources. These include the judgments in the cases of Adong Kuwau,¹⁹³ Nor Nyawai,¹⁹⁴ Sagong Tasi,¹⁹⁵ Rambilin,¹⁹⁶ Madeli Salleh¹⁹⁷ and more recently, the case of Bato' Bagi.¹⁹⁸ There is also the case of Andawan Ansapi¹⁹⁹ which was a case related to forest reserve. These judgments confirm that customary land rights are based on native law and customs and that the customs of the various communities, define the content of the customary title. The “customs and usage” are part of the laws of Malaysia, as defined under the Federal Constitution. Customs are also recognized and may be proved under common law.²⁰⁰

5.2 The Malaysian courts have developed the principles of common law native title through cases and in litigations brought by indigenous peoples against state agencies, the private sector or private individuals. The courts have referred to and followed precedents from other common law jurisdictions while developing local jurisprudence in dealing with claims to land or forests by indigenous peoples based on their customary rights. These cases are dealt with by region.

5.3 In this chapter, the terms native customary rights to land (NCR), customary title, aboriginal title and native title are used interchangeably. Since these principles have been developed based on common law principles, the term “common law native title” is used.

Native Customary Land Rights in Sabah

5.4 One of the earliest cases in Sabah on native customary land rights was the case of Naung Felix Sitom

vPedakwa Raya.²⁰¹ There it was established that persons having native customary tenure as defined under the Sabah Land Ordinance 1930 (SLO) are to be accorded the same status as one in possession of a title deed. In Sabah, natives may enter state land for the purpose of creating customary rights through the methods stipulated under section 15 of the SLO. These generally comprise traditional occupation under customary tenure, use land for cultivation, grazing lands.

5.5 This was well illustrated in the landmark case of *Rambilin binti Ambit v Assistant Collector for Land Revenues Pitas*,²⁰² which was heard together with another two actions, namely *Rambilin binti Ambit*

*v Director of Lands and Surveys, Sabah, Assistant Collector for Land Revenues, Pitas Registrar of Titles*²⁰³ and *Rambilin binti Ambit v Ruddy Awah*.²⁰⁴ The dispute in that case involved a parcel of two plots of land measuring a total of 15 acres situated in the District of Pitas. *Rambilin Ambit's* father purchased the two plots of land from two different parties in 1982, and gave the plots to his daughter, *Rambilin*. On the facts, *Rambilin* had occupied those plots. Although at some point she did move

¹⁹³*Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*, No. 24-828-1994 (High Court, Johor Bahru, November 21, 1996).

¹⁹⁴*Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn. Bhd. & Ors*, No. 22-28-99-I (High Court of Sabah and Sarawak, Kuching, 12 May 2001).

¹⁹⁵*Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors*, No. MTI-21-314-1996 (High Court of Malaya, Shah Alam, May 27, 2010).

¹⁹⁶*Rambilin binti Ambit v Assistant Collector for Land Revenue, Pitas*, No. K 25-02-2002 (High Court of Sabah and Sarawak, Kota Kinabalu, September 28, 2010).

¹⁹⁷*Superintendent of Land & Surveys Miri Division & Anor v Madeli Salleh*, No. 01-1-2006 (Q) (Federal Court, Putrajaya, October 8, 2007).

¹⁹⁸*Bato Bagi v Kerajaan Negeri Sarawak* [2011] 6 MLJ 297

¹⁹⁹*Andawan Ansapi & 5 Ors v Public Prosecutor*, No. K41-128-2010 (High Court of Sabah and Sarawak, Kota Kinabalu, March 5 2011)

²⁰⁰*Ramy Bulan and Amy Locklear, Legal perspectives on Native Customary land Rights in Sarawak*, Human Rights Commission of Malaysia (SUHAKAM), Kuala Lumpur, 2008.

²⁰¹[2002] 7 MLJ 605.

²⁰²Three cases were heard together in the High Court in Sabah and Sarawak at Kota Kinabalu: *Rambilin binti Ambit v Assistant Collector For Land Revenues Pitas* (Judicial Review K 25-02-2002); *Rambilin binti Ambit v Director of Lands and Surveys, Sabah, Assistant Collector For Land Revenues, Pitas Registrar of Titles* (Judicial Review K 240-2002); *Rambilin binti Ambit v Ruddy Awah* (Civil Suit K 22-71-2000 in open court, 9 July 2007).

203Judicial Review K 24-240-2002

204Civil Suit K 22-71-2000 (in open court, 9 July 2007).

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away to join her husband who was transferred to another town, she came back periodically to see the land. Her application for the land to be alienated and registered in her name was made in 1989 but the Assistant Collector of Land Revenue (ACLR) did not make any decision on her application. However, unbeknown to her, the ACLR had rejected her application in 1992. The letter and notice of rejection was neither posted nor served on Rambilin in the manner as required by Rule 8 of the Land Rules. In the meantime, the two plots of land were registered and titles were issued in the name of one Ruddy Awah and another person in November 2001.

5.6In an action for judicial review, at the High Court, the court had to determine a number of questions including whether:

- a)Rambilin had acquired rights by purchase of land?
- b)Whether natives could enter state land without approval of the state to create customary rights?
- c)Whether customary rights existed when there is a failure to register the customary right under the procedure prescribed by the Ordinance.

5.7It was established that the land was purchased by Rambilin's father and transferred to her. Since customary tenure is heritable, she had acquired customary tenure. Section 88 of the SLO expressly exempts from registration, land that is still held under customary tenure. Although, she did not continuously stay on the land - on occasions she went back to the land to cultivate it and to stay in the house that was erected on the land - the court held that what was required, was not necessarily physical possession, but exclusive acts of dominance. The kind of acts and how many, can be accepted as proof of exclusive use, must depend to a great extent on the manner in which the particular kind of property is commonly used.²⁰⁵ It was declared that Rambilin was entitled to possession and /or to recover possession. Her occupation of the land was lawful and she proved her claim for trespass against the defendant, Ruddy.

5.8Tracing the development of the law since the time of the North Borneo Company, to the colonial administration and to the present government, Justice Ian Chin declared that there had not been any "plain and unambiguous" intention to extinguish the customary rights of native "to enter state land to create native customary rights". Thus, natives who entered state land for that purpose were not guilty of trespass under section 164. Ian Chin J declared that there was no need for a native to seek permission from the government to enter state land for the purpose of establishing NCR since such rights were exercised from time immemorial without having to seek permission from anyone.

5.9The Collector may require a holder of a customary tenure to take out title by entry in the Native Title register that is kept in each district. Any such entry requires payment of the

prescribed fees and a copy of the entry, on a prescribed form signed by the Collector, to be given to the owner.²⁰⁶ If immediate demarcation of the area is impracticable, the Collector shall authorize an entry into the Field Register, regarding the use and occupancy of such land. Like a provisional lease, such entry will specify the extent of the right and describe as nearly as may be the situation of the land, and after demarcation, an entry is then made in the Native Title Register. Prior to demarcation, the entry in the Field Register is as good as a Native Title.

5.10 The High Court in 2007 ruled that Rambilin was entitled to possession of land, directed Ruddy to deliver vacant possession to her and awarded damages and mesne profits to Rambilin since 2006. The High Court ordered a proper inquiry to be held. At the inquiry, in the face of the High Court's determination of the facts, the ACLR accepted that the land was state land, but the Director as an appellate tribunal determined otherwise, which meant that Rambilin could not establish NCR on that land. Rambilin again appealed to the High Court in *Rambilin v Magudar bin Ambit, Director of Lands*

²⁰⁵Referring to Pollock & Wright's, *Possession in the Common Law*, at p 30

²⁰⁶SLO 67(2)

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and the ACLR.²⁰⁷ Dato' Abdul Rahman Sebli J held that Rambilin had acquired native customary rights to the subject land and was entitled to be issued with the appropriate and necessary document of title to the land. On the appeal, the Court of Appeal did not disturb the ruling of the High Court that natives have a right to create NCR without the permission from the state.²⁰⁸

5.11 This point was further explored in *Andawan bin Ansapi & Ors v Public Prosecutor*,²⁰⁹ which dealt with the status of native occupiers of forest reserves. In that case, the Kota Kinabalu High Court decided that natives have the right to stay on the land to which they have asserted NCR, even in forest reserves established under the Sabah Forest Enactment 1968. Under section 20 (1) of the Enactment, unless a person is expressly authorized to cultivate or to clear or dig up any land or to remove forest produce in a Forest Reserve, he is guilty of a crime. The judge overturned the Tenom Magistrate Court's imposition of fines on six indigenous Imahit villagers who were accused of encroaching into the forest reserve to grow hill rice in 2009. They were held to have "express authority" to remain on the land as they possessed customary rights in the land. The High Court struck out the charges and directed the Forest Department to return the fine of RM6,000 to the villagers. This was a clear statement of the continued existence of native customary rights in forest reserves not only as rights and privileges that are conceded under the enactment but also as pre-existing rights under their customary laws. David Wong J spoke of native connection to land and how they are "part of the land".

5.12 The state also cannot revoke an established native reserve without paying compensation. In the case of *Johnson bin Sipulou & 5 Ors v The State of Government of Sabah & Anor*, a revocation of a native reserve known as the Kampong Kayu Madang Native Reserve was challenged by native occupiers of the Reserve. They sought a declaration that the state's revocation of the reservation of 115 acres of land in the Reserve and the vesting of that

portion of land in another was null and void. Furthermore, they sought the issuance of a title for the whole of the land in the Reserve to Penampang Grazing Cooperative Society Limited, who represented the natives in Penampang and Telipok. Having regard to the historical events leading to the publication of the gazette notification, the plaintiffs had customary tenure over Kampong Kayu Madang Native Reserve.

5.13 Following Naung Felix's case the court declared that persons having native customary tenure as defined under the SLO should be accorded the same status as one who was in possession of a title deed. It was not within the state's right to disregard the plaintiffs' rights and interests or to degazette any part of the area that was gazetted as a native reserve. Since the plaintiffs had proven their customary tenure over the lands, it was wrong for the defendant, the state of Sabah, to ignore the proprietary rights and interests of the natives in the Kampung Kayu Madang Native Reserve which still subsisted.

5.14 With regard to procedure, the case of Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Berhad²¹⁰ made it clear that the High Court does not have original jurisdiction to hear cases on native customary rights. A claimant would have to seek the Court's assistance through appellate jurisdiction from a decision of the Director, which is appealed from the decision of the ACLR. This procedure has the potential to cause "bottlenecks" and have been a cause of complaints and distress as seen in

Rambilin's case.

Native Customary Land Rights in Sarawak

5.15 The concept of customary land rights was tested in the case of Nor Nyawai v Borneo Pulp Plantations & Ors. The plaintiffs who were residents of Rumah Luang and Rumah Nor, two longhouses located

207 OM No. BK1-25-1/1 of 2012

208 File K41-128 of 2010

209 File K41-128 of 2010

210 [2009] 7 MLJ 214. This decision was in line with other High Court decisions including *Burhan bin Ating & Ors v Directors of Lands & Surveys & 2 Ors* [1992] 2 CLJ 1203 which held that High Court had no original jurisdiction over NCR and State Government of Sabah v *Francis Lim & 5 Ors* (K24-62-93 Unreported judgment) 30 December 1993, which held that claims for NCR must be decided by the ACLR in the first instance.

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along the Sekabai River in Bintulu, Sarawak, claimed that the defendant timber companies had trespassed and damaged their ancestral land. The Bintulu Superintendent of Lands and Survey, the third defendant, had issued a provisional lease to the first defendant, Borneo Pulp Plantations Sdn Bhd, covering the disputed land. The first defendant then subleased the land to the second defendant, Borneo Pulp & Paper Sdn Bhd, the contractor company responsible for clearing the land for a tree plantation.

5.16 The plaintiffs did not hold documentary title to the land. Their claim rested on their exclusive use and occupation of the land under a customary system of territorial control. More particularly, they claimed that under Iban custom, they had acquired native customary rights to lands that they regarded as pemakai menoa, (land to eat from) part of which had been encroached upon by the defendants. The plaintiffs argued that under Iban custom, their pemakai menoa covered territorial rights within the garis menoa (boundaries) which included their tanah umai (gardens), temuda (secondary jungle), tembawai (old longhouse sites) and pendam (burial grounds) and pulau (reserved forest for use of the community). They argued that their customary rights to their lands were protected under the common law and constituted statutory rights recognised by the Land Code 1958 and its predecessors.

5.17 The High Court acknowledged the existence of the Iban custom and held that the disputed area fell within the boundaries of the longhouse, occupied and accessed by the plaintiffs' ancestors for hunting, fishing and collection of forest produce in exercise of NCR. The High Court further held that this right was passed down through the generations. Each claimant's rights arose by virtue of being a member of a community in lawful occupation and possession of the claimed lands. Ian Chin J held that the customs presently practised were the same customs practised by the plaintiffs' ancestors. Evidence of present occupation was, the court held, proof of past Iban occupation of the land. Ian Chin J made references to other customary rights of the Iban. Beyond the rights to clear virgin jungle for cultivation, which formed the temuda and tanah umai within the pemakai menoa, they could access the lands for hunting, fishing and collection of forest produce.

5.18 The court chronicled the extensive history of the regulation of customary land use and occupation, starting with the Rajah's Orders from 1863, 1875, 1899, 1921, 1931, the subsequent Land Settlement Rules 1934, the Land (Classification) Ordinance 1948 and the Land Code 1958. Fishing rights of the natives were clearly recognised by the Brooke government.²¹¹ Hunting in the jungle was also acknowledged as a customary right of the Dayak.²¹² The right to collect jungle produce was also preserved by early orders of the Rajah.²¹³ References were also made to other legislation, including the Native Courts Ordinance of 1955 and its successor of 1992. The High Court concluded that the 'pre-existing rights' had not been extinguished by the legislation.²¹⁴

5.19 Furthermore, the High Court noted the Brooke administration's regular acknowledgement of the existence and importance of customary laws, referring to them as "the indefeasible rights of the Aborigines".²¹⁵ The High Court also noted that 'James Brooke was "acutely aware of the 'prior presence of the native communities, whose own laws in relation to ownership and development have been consistently honoured"'.²¹⁶ Native customary law existed and operated side by side with the Orders

²¹¹Nor Nyawai I [2001] 6 MLJ 241, 265. See the Tuba Fishing Order 1900 and the Tuba Fishing Ordinance 1949. Under Malaysian law, the Fisheries Act 1985, which applies in Sarawak through the Fisheries (Adoption) Ordinance 1994, and the Sarawak Inland Fisheries Rule 1995 contain no prohibition against natives with regard to fishing in any river in exercise of their native customary rights. In general, the rules only forbid the use of certain equipment and devices. The Resident may grant an exception to the prohibition on fishing certain species.

212Nor Nyawai I [2001] 6 MLJ 241, 265. The orders and ordinances existed only to regulate or modify that right. In 1884, the Pig Traps Order prohibited the setting of pig and deer traps in the jungle. This order was modified in 1924 by the Pig and Deer Traps Ordinance to allow the setting up of traps in or on the boundaries of rice fields or cultivated gardens.

213Nor Nyawai I [2001] 6 MLJ 241, 265-66. Order XIV 1921, rule 11, for instance, allowed for removal of any timber or other forest produce required for a person's own use and not for sale, exchange or profit. That right was protected under the Forest Ordinance 1934 s 55(1) and, although restrictions were imposed by way of the Forest Rules 1947, the underlying protection remains. The Forest Ordinance 1934 was replaced by the Forest Ordinance 1953, but s 65(1) retained the same right. Similarly, the Forest Rules of 1954 did not abolish the native customary right of taking forest produce, but only prohibited the felling of certain trees or injuring of trees for the purpose of collection of fruits and damar. These rights are retained as 'pre-existing rights and privileges' of natives.

214Nor Nyawai I [2001] 6 MLJ 241, 284.

215Nor Nyawai I [2001] 6 MLJ 241, 267.

216Nor Nyawai I [2001] 6 MLJ 241, 267.

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of the Rajah. Those orders explicitly recognized and referred to matters relating to temuda, pulau and pemakai menoa.

5.20To the extent that the natives could show they exercised jurisdiction over a certain area at the time of acquisition of sovereignty, first by the Brookes, the British colonial government and then Malaysia, they were entitled to a form of native title at common law. Citing the decisions in *Mabo (No. 2)*, The

Wik Peoples v The State Of Queensland And Ors ('*Wik Peoples*')²¹⁷ and *Adong*, the court held that the common law respected the pre-existing rights under native law and custom. The court declared that 'native customary rights are similar rights to those under native title of the Australian Aboriginals .

... enforceable as common law rights.'²¹⁸ Extinguishment of this title could only occur as a result of 'clear and unambiguous words' of the legislature.²¹⁹

5.21Despite increasingly comprehensive regulatory legislation, the court found that the government had not indicated a clear intention to eliminate customary rights. *Ian Chin J* found that the 'native customary rights of an Iban to do things associated with the terms temuda, pulau and pemakai menoa have not been abolished' but survived through the Brooke orders and ordinances of the colonial period up to the present.²²⁰

5.22On appeal, in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors* and another

(‘Nor Nyawai II’), the Court of Appeal affirmed the High Court’s conclusions on the law saying:

In respect of the other expositions of the law by the learned judge in relation to native customary rights, we are inclined to endorse them. And briefly, they are as follows:

(a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;

(b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;

(c) that the Sarawak Land Code ‘does not abrogate whatever native customary rights that exist before the passing of that legislation’. However, natives are no longer able to claim new territory without a permit from the Superintendent of Lands and Surveys’ under s 10 of that legislation; and

(d) that although the natives may not hold any title to the land and may be termed licensees, such license ‘cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation.’²²¹

5.23 The Court of Appeal affirmed the fact that the Iban customary practice of pemakai menoa existed as an established custom relating to land. It however, overturned the High Court’s ruling that they had a right to the disputed area on the grounds that there was insufficient evidence to show occupation of the area.²²² The trial judge’s finding of occupation of the disputed land was based on evidence adduced that the area in question was the pemakai menoa of the plaintiffs, which included the temuda, tanah umai, tembawai and the pulau-galau.

5.24 The Court of Appeal’s focus, however, was on the existence of temuda in the disputed area, thereby shifting the emphasis to cultivation of the land and modifying the basis upon which the High Court’s decision was made. The Court of Appeal accepted the finding that Iban customs of pemakai menoa,

²¹⁷Wik Peoples [1996 – 1997] 187 CLJ 1.

²¹⁸Nor Nyawai I [2001] 6 MLJ 241, 251.

²¹⁹Nor Nyawai I [2001] 6 MLJ 241, 245.

²²⁰Nor Nyawai I [2001] 6 MLJ 241, 267.

²²¹Nor Nyawai II [2006] 1 MLJ 256, 269-70.

²²²Nor Nyawai II [2006] 1 MLJ 256.

temuda and pulau formed part of the laws and customs of the plaintiffs; however, as regards the application of concept of pemakai menoa it focuses only on evidence of past cultivation or temuda.

5.25 In its decision, the Court of Appeal affirmed that the doctrine of native title required the group to be in continuous occupation of the land in dispute. It then quoted with approval its own decision in *Kerajaan Negeri Selangor v Sagong Tasi*, and held that native title existed but was limited to the area upon which their settlement was found, and did not include the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of settlement and its size, it was a question of fact in each case.²²³ However, it should be noted that the situation in the two cases are different since the claim in *Sagong Tasi* is not in foraging lands but in settled areas. ²²⁴

5.26 It appeared that the Court of Appeal considered that allowing such a claim would mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed and foraged in the areas.

5.27 After *Nor Nyawai*, the Federal Court in *Madeli bin Salleh (Suing as Administrator of the Estate of Salleh bin Kilong, dcd) v Superintendent of Lands and Surveys, Miri Division & Anor*²²⁵ reiterated and affirmed the principles established in *Nor Nyawai*. It reaffirmed that native customary rights were not created by statute but were pre-existing rights under native law and customs. Furthermore, proof of occupation need not necessarily be actual physical occupation. What was needed to be shown was “sufficient measure of control to prevent strangers from interfering”.²²⁶ *Madeli bin Salleh* was a Malay, who claimed NCR over a piece of land in Miri.²²⁷ The case went up to the Federal Court, where it was held that the plaintiff established occupation through evidence that he visited the land once a month; he had correspondence with the government with regard to the land; and there was evidence of planted fruit trees. Merely because the appellant did not live on the disputed land, did not mean that he was no longer in control or did not occupy it. An unduly strict interpretation of the term ‘occupation’ would have the effect of unjustly and automatically depriving those people of their rights.

5.28 *Madeli bin Salleh* also clearly established that common law, which recognises native customary land rights, has the same effect as written law and comes within the meaning of “existing law” under Article 160(2). Upon acquisition of sovereignty, the Crown and its successors obtained radical title, but not absolute beneficial ownership of land. That radical title is encumbered by native customary rights.

5.29 Further applications of customary laws are illustrated in a few cases after *Madeli bin Salleh*’s case. *Agi Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd* confirmed the court’s recognition of the customary practice of pemakai menoa. Two provisional leases were granted to the defendants and the plaintiffs claimed that their land was within the defendant’s parcel. The High Court followed the Court of Appeal’s decision in *Nor Nyawai* holding that pemakai menoa was an Iban custom and practice. The fact that it was not codified in the *Adat Iban* was not an issue as “native title requires an examination of the customs and practices of each individual community and this involves a factual inquiry and not whether the customs appear in the statute book”.²²⁸ Justice Wong said that this was consistent with the intention of the Federal Constitution which defines law to include “custom and usage having the force of law in the federation or any part there of”.

223Nor Nyawai II [2006] 1 MLJ 256, 269.

224See Bulan R, “Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place”, (2007) JMCL 21 and also Bulan, R with Amy Locklear, *supra*.

225[2005] 5 MLJ 305.

226Following Newcastle City Council v Royal Newcastle Hospital, [1959] 1 All ER 734.

227For a comprehensive discussion of this case please see, Ramy Bulan (with Amy Locklear), *Legal Perspectives on Native customary Rights in Sarawak*, 2008, Suhakam Report

2008.

228[2010] 4 MLJ 204,215

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5.30In *Mohd Rambli bin Kawi v Superintendent of lands, Kuching*,²²⁹ Wong J considered whether Malays had customary rights to their kampong lands and the lands on which they foraged, including the swamp land on which they depended for their livelihood. Narratives of respected members of the community and oral evidence were adduced to show that according to Malay customs, a pioneer who occupied an area for farming, planting and generally for “cari makan” in (foraging and general use of the land for livelihood) would have a claim over the land and that land could be inherited by the descendants. Such land may also be inherited or acquired through “serah”, that is to be surrendered to another Malay or native person. “Serah” had developed to an extent that it involved documentation in the form of Surat Perjanjian Menyerah Tanah, and this was upheld on grounds that there was nothing in their customs that prohibited it.

5.31The legality of certain development schemes involving native customary lands was the subject of a judgment handed down by Justice Yew Jen Kie, High Court Judge Sibul on the 30 of April 2012, in the case of *Kadam ak Embuyang & 4 Ors v. Pelita Holdings Sdn Bhd & 4 Ors*²³⁰ involving five Iban plaintiffs, representing 163 other claimants of NCR land situated at Sg. Kelimut, Kanowit, Sarawak. Their NCR lands were recognized by the State Government of Sarawak and were to be developed jointly by the State Government through its development agency the Land Custody Development Authority (LCDA), under a joint venture development scheme called the “New Concept” or “Konsep Baru”. Based on the said “Konsep Baru”, participants would have equitable shareholding in the Joint Venture (JV) Company with LCDA or PELITA holding 40% (10% for LCDA and 30% in trust for the native landowners) and the investor holding 60%. The plaintiff landowners would be deemed to have paid their shares of 30% through the surrender of their NCR lands for the scheme. The official launching was on the 19th of August 1996 by the Chief Minister. On the 14th of January 2002, a Principal Deed was signed between the plaintiffs and Pelita Holdings Sdn Bhd which described the terms and conditions of the Konsep Baru and the operation of the JV company.

5.32 The plaintiffs claimed that Pelita Holdings Sdn Bhd and/or the Superintendent of Lands & Surveys, or the State Government of Sarawak, and/or their servants or agents had represented, and guaranteed to the plaintiffs that in consideration of the plaintiffs assigning absolutely to Pelita Holdings Sdn Bhd, as trustee, their respective interests, rights, shares and estate in the said NCR Lands at Sg Kelimut, the plaintiffs would benefit or profit through the development of the said NCR Lands into an Oil Palm Plantation, and the said profits or benefits would be given after four years of planting oil palm on the said NCR Lands.

5.33 It was held that the “Konsep Baru” to develop NCR lands, was null and void or illegal vis-à-vis section 8 of the Sarawak Land Code. The said NCR lands were therefore handed back to the natives. An injunction was given against the defendants and their servants ordered to vacate the said NCR Lands. A similar decision was handed down in the case of *Masa Nangkai & Ors v. Lembaga Pembangunan Dan Lindungan Tanah & Ors*,²³¹ where Justice Albert Linton (now Judge of Court of Appeal) said that such agreement (Principal Deed) had been ‘cleverly devised with legal mechanism and legalistic language which are mere fig leaves too scanty to conceal their violations of Articles 5 and 13 of the Constitution’. In His Lordship’s opinion, ‘the sum total of the rights of the landowners, to put it crudely, and for want of a better word, is zero. They have been deprived of their native customary rights land, which is a source of their livelihood and lost the rights to their property, which are violations of Articles 5 and 13 of the Constitution’.

5.34 Further discussions on loss of livelihood and extinguishment of NCR were the subject matter of *Bato Bagi v Sarawak State Government and Jalang Paran v Government of Sarawak*. The case raised the issue of whether extinguishment of NCR is ultra vires Article 5, read together with Article 13 of the Federal Constitution. The appellants contended that extinguishment of their rights pursuant to section

229[2010] 8 MLJ 441

230Sibu HC Summons No 21-7-2009

231[2011] 1 LNS 145

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5(3) of Sarawak Land Code was void as it violated their constitutional rights to life and livelihood (Article 5), equality (Article 8) and property (Article 13). Alternatively, they claimed adequate compensation having regard to their inextricable link to customary lands. The court at first instance and the Court of Appeal held that the extinguishment was done in a proper manner. The appeal to the Federal Court was dismissed. Raus Shariff FCJ agreed wholly with the courts below, but both Zaki CJ and Malanjum CJSS declined to answer the question saying that the court could do so “when it is fully ventilated instead of being made just a side issue”.

5.35 Malanjum CJSS gave some pointers for the courts in dealing with sections 4(3) and (4) of the Sarawak Land Code. He said “the courts below should have been put on guard as to the adverse effect of the impugned sections to the livelihood and the very existence of the natives”. As to right to life under Article 5, “it does not refer to mere existence but

incorporates all those facets of life which go to form the quality of life including their right to be gainfully employed.”

Orang Asli Land Rights in Peninsular Malaysia

5.36 One of the earliest cases on Orang Asli rights was the case of *Koperasi Kijang Mas & 3 Ors v Kerajaan Negeri Perak*.²³² In that case, the State Government of Perak gave a concession to Syarikat Samudera Budi Sdn Bhd (the company) to log certain areas which included lands previously approved by the State Government as Aboriginal Reserves, for the regroupment schemes of RPS Sungei Banun and RPS Pos Legap.²³³ The High Court in Ipoh held that the State had breached the Aboriginal Peoples Act, 1954 (revised 1974) (APA).

5.37 The company had no rights to carry on logging activities in those reserves and that only the Orang Asli as defined in the APA had the right to do so. The fact that the lands had yet to be gazetted did not preclude the Orang Asli from exclusive rights to forest products in those areas. The judge opined that gazettelement was not a mandatory requirement. The crucial factor was the approval by the state government that those areas were to be declared as aboriginal reserves.

5.38 In *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* (‘Adong I’),²³⁴ the 52 plaintiffs were representatives and heads of Orang Asli families living around Sungei Linggui catchment area in the state of Johor. The defendants were the State of Johor and its Director of Lands and Mines. The defendants had acquired a total of 53,273 acres of land for the purpose of constructing a dam to supply water to Johor and the Republic of Singapore. The plaintiffs claimed the compensation that Singapore had paid to Johor on the ground that the lands within the vicinity of Sungei Linggui were their traditional and ancestral lands upon which they depended for their livelihood. They claimed rights to the lands both under common law and statute, as well as property rights under the Federal

Constitution.

5.39 The High Court accepted as evidence various historical and judicial documents, which established that the plaintiffs had inhabited or occupied the area since time immemorial. The learned judge considered authorities from various common law jurisdictions from North America, Africa and India,²³⁵ and finally referred to the Australian High Court’s decision in *Mabo (No 2)*.²³⁶ In a decision which was affirmed by the Court of Appeal and the Federal Court, Mokhtar Sidin JCA determined that the Orang Asli have a common law right to their ancestral land based on a continuous and unbroken occupation and enjoyment of rights to the land since time immemorial.

²³²[1991] CLJ 486

²³³RPS is the Malay acronym for Rancangan Pengumpulan Semula which is a regroupment settlement scheme aimed at alleviation of Orang Asli poverty.

²³⁴[1997] 1 MLJ 418

²³⁵For example, the court referred to *Worcester*, 31 US 515 (1832), *Re Southern Rhodesia* [1918] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, *Calder* [1973]

SCR 313, and *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 107 DLR (3d) 513.

236(1992) 107 CLR 1. Mokhtar Sidin JCA quotes at length from *Pareroultja & Ors v Tickner* (1993) 117 ALR 206, where the main findings of the High Court of Australia in *Mabo (No 2)* are summarised. *Adong I* [1997] 1 MLJ 418, 429.

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5.40 In reaching this conclusion, the court noted that the Malays had traditionally occupied the coastal areas, while the Orang Asli lived in the interior areas of Peninsular Malaysia, in some cases, exclusively and indisputably occupying those areas. In his decision, Mokhtar Sidin JCA noted:

Before the introduction of the Torrens land system, these lands were unclaimed land in the present sense but were ‘kawasan saka’ to the aboriginal people. On the introduction of the Torrens system, all the kawasan saka became state land but the aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. Some of these lands have been gazetted as forest reserves. The plaintiffs, however, continue to live in and/or depend upon this unalienated land. It was not denied that some of them had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done.

5.41 In further explication of the term native title, Mokhtar Sidin JCA said that, “although in the general sense, title denotes a document of title, native title consists not of a document of title, but a right acquired in law”²³⁷. The court gave a wide interpretation to proprietary rights, and held that the plaintiffs’ rights were proprietary rights protected under Article 13 of the Federal Constitution. Their right was, however, a right to the produce on the land but not a right to the land. Thus, the holders of the title had no right to convey, lease out or rent the land. Nonetheless, deprivation of the rights by the defendants without compensation was unlawful.

5.42 In *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* (‘Adong II’), the Court of Appeal agreed entirely with the views expressed by the High Court, stating that “[t]hose views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect”.²³⁸ *Adong* was soon followed in *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*, where the principles in *Adong* were reiterated and other issues clarified.

5.43 In *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* (‘Sagong I’), the plaintiffs were Orang Asli families of the Temuan tribe evicted from a strip of 38,477 acres of land running through their gazetted aboriginal reserve, as well as other lands they customarily occupied.²³⁹ The land was situated at Kampong Bukit Tampoi, Dengkil, Selangor and was classified as an aboriginal area or aboriginal inhabited place. In March 1996, the land was acquired for the purpose of the construction of a portion of a highway to the Kuala Lumpur International Airport.

5.44 The plaintiffs based their claims on rights under common law, statute and the Federal Constitution. At common law, they claimed native title and usufructuary rights over the land

based on customs. The land was customary and ancestral land occupied by them and their forefathers for generations; hence, they had customary and proprietary rights in and over the land.

5.45 In that significant decision, Orang Asli were held to have a right in and on the land. The lands were customary and ancestral land belonging to the Temuan based not only on present occupation, but also a traditional connection that had existed for generations. The lands had been continuously occupied and maintained by the plaintiffs to the exclusion of others in pursuance of their culture, and inherited by them from generation to generation in accordance with their customs and thus fell within the meaning of 'land occupied under customary right' within the meaning of the Land Acquisition Act 1960. The APA 1954 did not extinguish the common law rights, and therefore the eviction of the plaintiffs from their lands was unlawful. The first and second defendants were thus liable in trespass against the possession of the land by the plaintiff.

5.46 The defendants adduced evidence to suggest that the plaintiff's cultural life had been so altered by modernisation that they should no longer be considered traditional Temuan. These included, for

237 Adong I [1997] 1 MLJ 418, 428.

238 Adong II [1998] 2 MLJ 158, 162 (Gopal Sri Ram JCA). The Federal Court issued a decision awarding interest on the compensation awarded to the respondents.

239 Sagong I [2002] 2 MLJ 591, 597.

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instance, the fact that some or all of the plaintiffs or members of the Temuan no longer depended on the land to forage for their livelihood in accordance with their tradition; cultivated the lands with non-traditional crops such as palm oil; in addition to Temuan, spoke other languages; had embraced other religions and/or married outsiders; and worked outside the aboriginal reserves or inhabited areas prior to and after acquisition.

5.47 Modernization, intermarriages and speaking of other languages do not affect their aboriginal identity.²⁴⁰ Under s 3(2) of the APA 1954, conversion to another religion does not affect Orang Asli ethnic identity, neither did election of a leader to the JKKK (Village Development and Security Committee) constitute abandonment of their adat as the 'Balai Adat' remained the custodian of their adat.

5.48 At the Court of Appeal in *Kerajaan Negeri Selangor v Sagong Tasi and Ors*²⁴¹ (Sagong II) the court employed the language of 'customary communal title' to refer to the aboriginal rights to land. Gopal Sri Ram SCA held that under the common law doctrine of indigenous title, the plaintiffs had ownership of lands in question under a customary community title of a permanent nature.²⁴² They had proprietary rights and were entitled to be compensated under the Land acquisition Act 1960, and that included compensation for part of the land that was un gazetted land. They were also entitled to damages for trespass and to exemplary damages. In 2006, leave was granted to the defendants to appeal to the Federal Court on points of law but the appeal was postponed pending negotiations for settlement between the

parties. After settlement negotiations, the claim was settled amicably on 26 May 2010 on the terms that the Federal Government and other defendants withdraw their appeal and the highway authorities agree to pay compensation in the sum of RM6.5 million to the plaintiffs.²⁴³

5.49 The Adong and Sagong Tasi decisions are significant because they established that

a) The radical title of the State is subject to any pre-existing rights held by Orang Asli.²⁴⁴

b) The common law recognizes and protects the pre-existing rights of the Orang Asli in respect of their rights and resources.²⁴⁵

c) Oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land are admissible, within the confines of the Evidence Act 1950; ²⁴⁶ For customs to be admitted as evidence they must be of public or general interest, made by a competent person, and the statement must be made before the controversy as to the right customs has arisen.

d) The Temuan held a proprietary and full beneficial interest in and to the land, albeit only to areas of settlement and not to the areas used as foraging lands; ²⁴⁷

e) The APA 1954 does not extinguish the rights enjoyed by the aboriginal peoples under the common law and in order to determine the extent of the full rights, the common law and the statute had to be looked at ‘conjunctively’, for both rights were ‘complementary’; ²⁴⁸ and

f) The Governments of Selangor and Malaysia owe fiduciary duties and were in breach of those duties when they failed to gazette lands for Orang Asli. ²⁴⁹

g) Where customary rights are extinguished, there must be adequate compensation.

²⁴⁰Sagong I [2002] 2 MLJ 591, 607.

²⁴¹[2005] 6 MLJ 289.

²⁴²[2005] 6 MLJ 289.

²⁴³See M Mageswari, ‘Justice at last,’ The Star (Malaysia), 27 May 2010.

²⁴⁴Sagong Tasi v Kerajaan Negeri Johor, at 612; Kerajaan negeri Johor v Sagong Tasi, at 301-301

²⁴⁵Adong bin Kuwau v Kerajaan Negeri Johor at 430; Kerajaan Negeri Johor v Adong bin Kuwau, at 162-163; Sagong Tasi I, at 301-302; Sagong Tasi II, at 612.

²⁴⁶Sagong I [2002] 2 MLJ 591, 623-24.

²⁴⁷Sagong I [2002] 2 MLJ 591, 613; Sagong II [2005] 6 MLJ 289, 308.

²⁴⁸Sagong I [2002] 2 MLJ 591, 616.

249Sagong I [2002] 2 MLJ 591, 619; Sagong II [2005] 6 MLJ 289, 312.

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5.50The law on aboriginal land rights as laid down by Sagong Tasi remains intact. In recent years, more cases have been brought to the courts, touching on different aspects of aboriginal life. In *Yg di Pertua Majlis Daerah Gua Musang v Pedik bin Busu (Pedik)*, 250 Orang Asli in Kampung Jias, RPS Kuala Betis Kelantan, had their church building demolished by the local authority who objected to the building being erected without the necessary approval under the Street, Drainage and Building Act 1974. Orang Asli applied for, amongst other things, declaratory relief claiming confirmation of their customary title and damages for the demolition. The court held that Orang Asli were owners of the land in question although title had yet to be issued. Damages were given to Orang Asli as the proper notice was not given to them. The Court however held that RPS Regroupment lands were not customary lands.

5.51In *Wet Ket v Pejabat Tanah Daerah Temerloh (Wet Ket) Jah Hut* applicants sought judicial review of the local authority's refusal to grant the supply of water and electricity for a multipurpose hall constructed on land which they had occupied since 1920. The local authority issued a notice for demolition on the ground that the building was on state land and not gazetted as aboriginal lands. The court held that there was neither gazettement of aboriginal lands nor approval for aboriginal inhabited lands. As the land concerned was state land, the court dismissed the application with costs. On appeal, a consent order was recorded for the provision of water and electricity with the issue of customary lands to be decided in separate proceedings.

5.52In the case of *Kalip bin Bachik v Pengarah Tanah & Galian Johor*, the Orang Laut (Seletar) were resettled to Kuala Masai by the Johor government in 2003. They were promised that the new lands would be gazetted as aboriginal reserves. Although approved, the lands were not formally gazetted. They were also given the assurance that they could build a church on the land. However, a chapel that was built there was demolished on the ground that no approval was obtained to build the structure. They filed an action for declaration that they were holders of customary title and that the demolition was unlawful. The Court declared that the demolition was unlawful, ordered damages for trespass and further ordered damages for delay and failure to gazette the Kuala Masai lands and the loss of their original lands in Kuala Stulang. The Court also declared that the state had breached its fiduciary duty in failing to gazette the new lands.

Key Features of Aboriginal and Native Customary Rights

5.53The forgoing cases have illustrated the main features of customary title as developed through the Courts. These features have been summarized in the decision of the High Court and Court of Appeal in *Sagong Tasi* as well as the Federal Court in *Madeli bin Salleh*. The latter is a Federal court decision and hence, the common law principles would apply in all three regions.

5.54Malanjum CJSS provided some pointers in *Bato Bagi v Government of Sarawak* which would lend some guidance to courts in future. On the matter of compensation it is pertinent that His Lordship said:

“[C]ompensation should not be merely adequate but should be sufficient and reasonable based on the long term effect that extinguishment would inflict on the natives. In considering the quantum of compensation, the relevant authority should not attempt to evaluate native customary right purely from monetary aspect but take into account all relevant factors including the fact that the natives belong to the land and are part and parcel of the land instead of being mere owners and how their total dependency is on the land and its surroundings and how their daily livelihood depends on the land.”

5.55 Malanjum CJSS reiterated the importance for the courts to consider in “pragmatic, liberal fashion the constitutional provisions to safeguard not just the textual but the implicit rights.”

CHAPTER 6

FINDINGS - SABAH

6.1 The chapter, which will discuss the findings for Sabah, contains three sub-sections that correspond to the Terms of Reference of the National Inquiry (ToR). These are issues related to land rights of the natives of Sabah (ToR 2); constraints that impede rights to land (ToR 3); and the effectiveness of responses to land claims (ToR 1). The issues raised in section (i) of this chapter were from submissions and public hearings that were conducted, while section (ii) on the constraints and section (iii) on the effectiveness of responses to land claims were based on analyses based on after considering all the available information.

6.2 During the Consultations in five districts in Sabah, 407 statements were recorded, of which 24 were considered outside the scope of the Inquiry. For the purpose of the Public Hearings, the statements were categorised and 33 representative cases were selected. It should be noted that since the statements were mainly from the perspective of the communities, the categorisation can only be regarded as a general guide for the purpose of selecting cases during the Public Hearing. Many of these cases also involved more than one issue.

i. ISSUES RELATED TO NATIVE LAND RIGHTS Introduction

6.3 The information from the public hearings in Sabah was categorised into seven issues having impact on native land rights:

i. Administration;

ii. Plantations;

iii. Community Land Development Schemes;

iv. Logging and Forest Reserves;

v. Inclusion of Indigenous Lands into National or State Protected Areas;

vi. Commercial Development Projects; and

vii. Compensation from Land Acquisition.

6.4 The findings for each category are supported by the cases presented at the Public Hearings. The summaries of these cases can be found in a CD in the Annex.

i. Administration

6.5 This category is about the processes and procedures of land offices in dealing with land applications by native communities and individuals. Common issues include the slow processing of land applications, issues on survey and land inspection, and recording of Native Customary Right (NCR) lands and territories by the Sabah Lands and Surveys Department

(LSD). Based on the statements received, 221 cases fell under this category, the highest among all the other issues.

6.6 The natives of Sabah tend to rely on individual land applications for land tenure rights, although communal land rights are recognized in the form of native reserves and communal titles under the Sabah Land Ordinance (SLO). Two main reasons may be cited for this state of affairs. First, because of the consistent campaign over the years by the LSD for individuals to “apply” for individual land titles rather than communal land titles. Second, the acceptance by financial institutions of individual titles as collaterals.

6.7 However, land title applications for state land under section 12 of the SLO are not without problems.

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Approval for such applications is dependent on the availability of land and is subject to comments from at least 12 departments in the Land Utilisation Committee (LUC). As such, application for a title under section 12 involves a lot of delays.

6.8 Problems with processing of land applications make up the highest number of complaints (88 cases) under this category. The majority of these were made through community representatives, which means that the actual number of complaints may involve most, if not all, of the residents in a particular community. Most complained about the long delays without getting any feedback from the LSD, with the delay in some cases exceeding more than 10 years.

6.9 According to LSD Deputy Director, Mr Lee Chun Khiong (W3), any NCR claimant is entitled to make a claim for unalienated country land by himself or through the village head or the Assistant Collector of Land Revenue (ACLR) in writing. In accordance with section 14 of the SLO, once an NCR claim is recorded, the ACLR should conduct an investigation, including doing a ground check on the validity of the claim. Apparently in the past, the Land Survey Form (LSF) 1898 has been relied upon as a means of verifying the status of the land when investigating NCR claims, but this form is no longer made available.

6.10 When dealing with land applications from indigenous communities, Mr Galus Ahtoi (W10), an expert witness, told the Inquiry that the land office usually directs the applicant to apply under section 12 of the SLO even though the special provision to deal with NCR claims under section 14 exists. He explained “... (land) applications differ from (land) claims but what villagers know is only about applications even though they have been living in a particular area for a long time and would qualify for NCR claims. According to Section 14, native customary land claims can be made through a letter to the PPHT by the headman, where the PPHT would then make a decision”.

6.11 Based on the SLO, NCR under section 15 as well as customary tenure under section 65251 confer upon the holder a permanent, heritable and transferable right of use and occupancy in the land.²⁵² Therefore, issuing a native land title is not necessarily the only option for natives to secure ownership of their traditional land.

6.12 However, more recently, a statement by the state Attorney General (AG) regarding the 1930 cut-off point for establishing NCR has created concerns. LSD witness, W3, in his statement to the Inquiry said that in order to ensure that an application for land claim was genuine, the LSD would look into the occupation of the land before 1930, that is, prior to the enactment of the Sabah Land Ordinance, as opined by the AG, before according recognition of NCR based on sections 6 and 88 of the said Ordinance. However, this is merely an opinion and is yet to be tested in court.

Loss of Records and Overlapping Land Applications

6.13 The Inquiry received 62 cases regarding overlapping applications, which not only occurred among private individuals but also in the supposedly systematic land schemes of the government. Nine complaints were also made about lost applications. In such instances, the Land Office usually issues an instruction to re-apply although it admitted to the Inquiry that this was procedurally incorrect. Although the Inquiry could not confirm allegations that some companies applied earlier than the natives' second land application, these cases warrant further investigation.

6.14 Speaking on behalf of his wife, Mr Yunus Kimin (W11) (case no. KG12) said that an application for title over their NCR land was made in 1975 pursuant to which they received a directive from the Keningau LSD to clear the land boundaries. In 1988 however, they were asked to re-apply because the plan which they had earlier submitted was unclear, to which they dutifully re-applied. However "... sometime in 2003, I was surprised and disappointed when informed by the Keningau Lands and Surveys Department that a Registered Survey Plan (RSP) on my NCR land has been approved to three individuals whom we

251 "Customary tenure" means the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years or by title.

252 Section 66 of the SLO.

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do not know". The land has since been sold by these individuals to a company, which then harvested the oil palm planted by W11's family. According to W11 who is a Native Chief, any notice under section 13 would have come to his attention since his office (the native court) is in the same building as the land office.

6.15 In response, Keningau ACLR, Ms Kamsiah bt Abdul Jalil (W101) said that because the plan with the 1975 application was unclear, the application was rejected. The second application was also rejected on 27 September 1997 because by then, they had received an earlier application made by one Jeny bt Kabun. W101 advised W11 to take the matter to court.

6.16 Such problems of overlapping land applications not only occurred among private individuals but also in supposedly systematic land schemes by the government. Mr Marain Undat (W14) (case no. P61) of Kg. Mangkadait, Ranau told the Inquiry: "The land was surveyed for a settlement scheme to give an opportunity to the hardcore poor to cultivate in accordance with their traditional agricultural practices.

The processing and division of titles into lots were carried out in the office without detailed monitoring and investigation of the land to ascertain whether there were NCR claims, and without informing the original settlers on that land”.

6.17 Mr Mahalil bin Mutalib (W16) (case no. SD10) of Kg. Kenang-Kenganan, Tongod lamented that “... the customary land applied for was surveyed by Lands and Surveys in 1997. In 2002, the Lands and Surveys cancelled that survey in 1997 and we were asked to make a new application”. W16, together with other villagers subsequently submitted new applications in 2003 (Land Applications no. 2003090319 – 0333) but were surprised to find out that the land had been approved to Ms. Zahara bt Abdullah and 39 others who then sold the land to Tanahmas Sdn Bhd. In this case, the Tongod ACLR (W110) explained that the loss of land applications referred to by W16 could be due of the shift of the LSD office from Kinabatangan to Tongod. W110 said the application from Zahara was received in 1975 and approved in the same year.

6.18 Besides these cases, other examples during the Public Hearings of multiple applications included those overlapping with other individuals (case number P1), and companies, GLCs or state development agencies (case numbers KM78, KM33, SD43, TW43, TW26, SD32 and P51).

Fraud and use of Power of Attorney

6.19 Complaints of fraud were also linked to overlapping applications that resulted in many individuals and in some cases, an entire village losing their land. Right until the 1990’s, Powers of Attorney (PoA) were commonly used without stringent checks on the validity of such PoA.

6.20 In case no SD32 under the Sungai Koyah Smallholders Scheme in the Kinabatangan district, the use of PoA purportedly signed by all landowners, including people who had passed away, remains a serious issue. Mr Jamal @ Jamalludin bin Sinyor (W17) later found that their lands have been sold to Bagus Maju, a company which initially applied for the land but was rejected in favour of the smallholder scheme. “...the problem related to the scheme participants started in 1993 when Bagus Maju submitted an application for an area of 4,900 ha, which included the Sungai Koyah Smallholders Scheme”

6.21 In many cases of land abuse, questions arise as to the process of putting a check and balance on approval of land applications and particularly ground verification by the LSD. In case SD43, the Kadazan Labuk community from Kg Baba, Telupid in Beluran represented by village head Mr. Jitoh Abdul (W52) alleged that their previous village head, KK Salati Salupan committed fraud by replacing the land applications of the residents of Kg Baba with those of 33 outsiders. Once land titles were issued to KK Salati and the outsiders, the land was subsequently sold to a company and thereafter resold to IJM Meliau Estate, the current landowner. IJM Meliau Estate said that it has not violated any community rights and consider the Kg Baba community as illegally occupying company land.

6.22 In case KM33, Janlin Maidar (W44) contested on behalf of his community in Kg Samparita Laut, the sale of their NCR land by Mr Maipop Pangasip and 57 others to a company through a land broker named

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Mr Victor Lim. According to the Surveyor for the region (W51), the Pitas ACLR apparently confirmed to the survey office that there were no other applications apart from Mr Maipop Pangasip and 57 others and thus survey was carried out accordingly in 2009. He also added that no sale of land should occur until the land titles are issued and can only be done by landowners themselves.

6.23 In a number of cases, the Inquiry was told that land applied for by natives was assigned to the staff of the LSD, giving rise to allegations of nepotism or abuse of position. In case KG12 above, the Keningau ACLR W101 admitted that the three pieces of land that had been applied for by Mr Kimin's wife was approved by three different staff of LSD.

Notices and Follow-up

6.24 Another serious breach of indigenous peoples' right to land that the Inquiry considered was in relation to the notices under section 13 of the SLO to summon claimants on any state land prior to the alienation of the said land. Such notices, if properly posted and the claims investigated in a proper manner taking into account indigenous peoples' constraints to monitor applications by others for their land, could have avoided the loss of many NCR lands.

6.25 Mr Galus Ahtoi (W10) elaborated on issues faced as follows: "Section 13 is really problematic. But if implemented in a transparent manner, it is critical in protecting NCR because if we look at Schedule 3 of section 12, Part D (of the SLO), which is to be completed by the ACLR, it will ascertain whether the notice was issued. A simple Yes or No. If yes, were there any NCR claims received? Yes or No".

6.26 While it cannot be disputed that the LSD may have issued such notices, it is doubtful that the manner in which those notices have been posted does effectively serve the purpose of informing the affected natives of applications made by third parties. The LSD admitted to the Inquiry that the notices were merely posted on the notice boards on their premises without any other efforts to identify those who had made prior applications with respect to the same land and to proactively communicate the notices to them.

6.27 The Inquiry heard and empathised with communities who had to travel long distances, incurring high costs, to travel to district LSD offices or to the LSD headquarters to check on their land applications only to be told to return again as their applications were still being processed. In case no. SD43, village head Mr Jitoh Abdul (W52) said that in 1980s, a trip to the Beluran LSD office took one week by sampan and another two hours by car. The Inquiry found that the authorities had failed to appreciate this and to pro-actively find a better way to inform people on the status of their land applications.

6.28 The Inquiry was told that because of the thousands of applications to be processed by the Land Offices in the districts, notices were posted on their notice boards in a haphazard manner, often overlapping each other. Despite recommendations from various studies and complaints to remedy this situation, nothing has been done except that the notices are now in Malay (whereas until the 1990s, notices were only in English).

6.29 The highest proportion of the complaints received by the Inquiry was on the delay in processing land applications. Much of the follow-up after the submission of the application is expected to be done by the applicants themselves despite inconveniences for those living in rural and remote areas. Nevertheless, some individuals or community leaders have made several visits to follow up on their applications but typically, these queries were done orally. The LSD does not record oral inquiries, so it is often easy to deny that such follow-up was done. The fact that the LSD has never considered an effective way to inform rural applicants is itself a failure to proactively assist communities.

Land Enquiries and Appeals

6.30 The Land Enquiry (LE) provided under section 13 is an important avenue for redress by which the ACLR can take to address the issue of contesting land applications. After the end of the 30 days' notice, the

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ACLR is expected to deal with overlapping applications through an LE. However, the process of calling the LE is neither very clear nor automatic as many witnesses complained about the extreme difficulty to get a response from the ACLR to their call for a LE.

6.31 To the credit of some ACLRs, investigations and mediations have been conducted after receiving complaints from communities of decisions that were not in their favour. However, ACLRs are often reluctant to call for an investigation as the process is often long and complicated.

6.32 For communities with NCR claims who are contesting with rich, well-connected or better educated applicants, an LE may not necessarily yield positive results. Mr Wilson Kulung (W31) (case P1), representing 328 villagers from Kg Rumantai, Ranau was among a few who managed to undergo such a LE after persisting with their request to the ACLR for two years. The community has been living in the area since 1940's and has even received support from the Sabah Rubber Industry Board (LIGS) to develop their land. According to the Ranau ACLR, Mr Bernard Kimin@Joseph (W32) who conducted the LE, the land which the Rumantai community is claiming as their NCR land was applied for by, and approved to, Mr Masugal Kimburu and nine others in 1987. The community had to go through a difficult and expensive LE process but in the end, they lost their bid to secure their NCR land.

6.33 Although there is also provision for appeals against the decision of the ACLR or Director of LSD,²⁵³ the period of one month after the decision is insufficient given the remote location of the communities and the failure on the part of the Land Office to expeditiously communicate the decision. Most of the witnesses in the cases heard at the Inquiry did not receive any notification of the ACLR's decision within one month, thus depriving natives an important avenue to contest the applications of third parties and to appeal against the decision of the authorities.

Information on proposed projects or alienation of land

6.34 Most communities were not informed about proposed projects or alienation involving their NCR lands. The Inquiry observed that providing information is not a consistent or

established norm with government agencies, the private sector or the Land Offices, and neither is there awareness or realisation among those concerned of the need to consult the affected communities. The right to development according to the needs of the communities does not appear to be a policy of the government nor is it a legal requirement, resulting in misunderstandings and dissent among the communities concerned. Any form of questioning has often been treated as opposition to the government and requests for dialogues are generally ignored.

6.35 In case no. KM78, the Kudat ACLR (W39) said that when the government decided to gazette land in Banggi Island to Ladang Sejaterah Tohok in 1979 (GN56479 under section 28254 of the SLO), individual land applications which were received prior, and subsequent, to the gazette were cancelled. The communities in the Island, represented by Ms Salmah Marail (W37) said they were not aware of the gazette nor did they understand its purpose.

6.36 Expert witness, Dr Fadzillah Majid-Cooke (W30) said development has resulted in many land conflicts, particularly when involving large-scale projects. At the United Nations, the Malaysian government has committed itself to adopting development models that do not violate the rights of citizens, particularly indigenous peoples. W30 also stressed the importance of obtaining the free, prior and informed consent (FPIC) of communities where their participation is a must. Pre-feasibility studies with inbuilt community visits and capacity building can be part of an FPIC process. Successful development models are those that give opportunities to communities to collaborate and participate in decision-making.

253 Section 41(1): An appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court.

254 S28 Reserves for public or residential purpose

(1) The Yang di-Pertua Negeri may reserve any State lands which in his opinion are required for any public purpose or for a residential reserve. Such reservation shall fully describe the land and the purpose for which it is reserved and shall be conclusive evidence that the land is reserved for a public or residential purpose.

(2) When any land has been reserved under this or any previous Land Ordinance and such reservation has not been revoked, every disposition thereof, except for the purpose for which such reservation was made, shall be void.

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Surveying

6.37 The Inquiry received 41 complaints regarding delays in surveying and issuing titles even though their land has been surveyed. The role of land surveying in the land application process was not well understood or evaluated. Many land applications from natives were rejected by the LSD because the sketch maps in their land applications were not accurate. The communities were expected to indicate the location of the land under application on a topographical map. The Inquiry found that such expectations for the communities to be

“surveyors” were unreasonable, particularly when topographical maps where community applicants could easily locate their land are restricted.

6.38 Witnesses also raised issues relating to the manner in which land surveys were conducted. The Inquiry was told by the district surveyors that the applicant and the village head were not required to be present during the actual ground inspection. This testimony, however, was in conflict with information from the ACLR that village heads were informed to be present. Community witnesses expressed that it was critical for them to be present during inspection and surveying. Examples of cases quoted earlier involving allegations of fraud and approval of land to others instead of NCR claimants indicated that the presence of the applicants during the survey could have prevented the problem.

6.39 Mr Wilson Kulung (P1) from Kg Rumantai, Ranau disclosed the findings of the LE as follows: “(1) Based on the land inspection report conducted on 12.12.2007, almost all the land area is found to be virgin or secondary jungle. (2) Crops in the area are planted in haphazard manner and far from each other. (3)

The plaintiff’s claim does not fulfil the definition under Section 15, and additionally, no protest made within the notification period under Section 13. (4) The defendant agreed to excise 500 acres from the 1000 acres for the residents’ housing area (ie village area)... (5) The effort by the community was not sustained.”

The findings of the land inspection are by themselves actually proofs of the community’s existence in the area, yet the decisions of the LE went against the community. These points in the report also indicate that there is lack of understanding by surveyors of community farming lifestyles and the weakness of the interpretation of NCR under section 15 by the surveyor.

6.40 The oft-quoted reasons for delays in deciding on land applications were the lack of human resources and funding for surveys. An important remedial action taken in the past through the formation of survey task forces was unfortunately discontinued, indicating a lack of commitment by the state government. The current response of clearing backlog of land applications by allowing overtime to surveyors is inadequate to remedy the urgent and serious situation faced by indigenous peoples.

Dealing with complaints

6.41 The Inquiry found mechanisms to deal with complaints haphazard and very much on a case-to-case basis. There were no record books of complaints nor were oral complaints systematically recorded by the Land Offices. Robotic responses to queries, and promises, or even threats were indicative of inefficiency and a non-caring attitude of some LSD staff.

6.42 More serious and organised form of complaints from communities were treated with disdain or as being not genuine, and were frequently attributed to instigation by NGOs, instead of recognising that complaints and criticisms were legitimate rights of people, and taking the necessary actions to remedy the situation. In case no KG24, although the Tuaran ACLR expressed full support in resolving NCR land issues, he nevertheless said that communities should go directly to him rather than going to NGOs. The Inquiry pointed out that it is because various communities did not get the response in a timely manner from

relevant departments that they had to go to other bodies. The Inquiry also stressed that it is the right of any person or community to seek help wherever they could.

6.43 Most communities also often channel their complaints to their respective members of the legislative assembly or to parliament. But in most cases, the response was slow or complainants were instead

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influenced to accept a project and drop their complaints. In case KM24, the ex-legislative assembly member for the area, YB Jornah Mohizim, wrote to the MRD that the communities had accepted the conditions of the MESEJ project in Kg Minikodong, which is contrary to the statement by W34.

6.44 Many communities also complained about the legalistic and administrative approach taken by the ACLR and the Director of LSD, especially with regard to the recognition of NCR to land. On a suggestion from the Inquiry about making proposals for legislative changes, the LSD and other departments responded that they would just abide by the policies of the government and instructions from policy-makers.

6.45 There were numerous complaints regarding the use of force in evicting communities, including arresting community members for encroachment. Expert witness, Mr Ram Singh (W42) said natives often do not know their rights when they are arrested by the police or forestry enforcement officers. These include the right to a lawyer, the right to know the charges for the arrest, and the right not to be forced or threatened to give statements.

ii. Plantations

6.46 The Plantations category, in which 51 statements were recorded, refers to allegations that commercial plantations had encroached on, or were introduced into, land claimed as NCR, without the community's knowledge or in line with the principles of free, prior and informed consent. This category also looks into the regulations on Social and Environmental Impact Assessments (SIA and EIA) and the responsibilities of a company if it is found that any part of the licensed area is being claimed by natives.

6.47 A specific concern under this category are the roles of the Ministry of Rural Development (MRD), government agencies and government-linked companies (GLCs) in recognising NCR land and in excising NCR land before titles or permits to open up plantations are given. As such, there are more than the 51 cases under this category involving complaints of encroachment by plantations as many more have also been categorised under "Administration".

6.48 While the witnesses from companies highlighted their policy of respecting indigenous rights, their position was simply that the land at issue had been alienated or leased to them legally and that any excision of NCR land would have been done by the land offices concerned. Most of these companies testified that there were no expressed conditions in their titles to exclude NCR land. However, the Sabah Natural Resource Office confirmed that such conditions were stated on the titles.

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6.49 Mr Deny Vitus (W97), the FELDA Land Planning Officer, said that FELDA only enter an area if it has already been legally alienated to them and would not encroach on settlement areas. In case no. TW43, he received confirmation from the LSD that 916 acres of land were already surveyed for the community. Accordingly, FELDA subsequently released that area to the community. However, according to Mr Batulotong bin Bagkang (W66), a Dusun Begahak representing Kg Ulu Taburi, in Tungku, Lahad Datu, the actual area applied for was 1,260 acres. W97 said the claim for additional land came too late and in any case, the LSD should be the right avenue for such claims.

6.50 In case no KM33 involving the Asian Forestry Company Sabah (AFC), which was formerly known as Begaraya, Mr Drew Boshel (W45) said the 1997 agreement between Begaraya and the Sabah government provided for the exclusion of NCR land from the area under the agreement. AFC has been working with the LSD using 1997 satellite imagery as well as the latest remote sensing technology to identify NCR land and its villages for excision. The Inquiry deduced from the information provided that the delay in excising NCR land rested with the LSD.

6.51 In other cases, NCR land claims appear to be a lost cause as companies have been granted title over the land and the authorities are not willing to take further action.

6.52 In case no SD43, the Beluran ACLR (W70) was not open to investigating the allegation of fraud as the proper process had been followed in approving the land applications, and that the community had received two buffaloes as a sogit from the company for the destruction of gravesites.

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6.53 In case no T9 involving three Murut Tagol villages in Ulu Tomani, Tenom (Kg Kaang, Kg Alutok and Kg Malutut), the Senior Manager for Forest Operations of Ballarpur Industries Ltd (BILT), Mr Guy Thornton (W56) denied that the community NCR land was within its concession. BILT is managing the forest concession awarded to the Sabah Forest Industries (SFI). W56 said BILT is however working with the communities in the area through their CSR efforts, including socio-economic projects. Mr Marusin Peliten (W55) was extremely dejected to hear this denial, and also from the statement of the Tenom District Office saying it has no power over NCR lands that were included within the Sabah Forest Industries (SFI) concession area as these are under the purview of the SFI and the Forestry Department. Nevertheless, Mr Pui Pindurn@Clarence Quint (W107) said the district office could look into areas outside the SFI area and areas where a Registered Survey Plan (RSP) has been issued. In such a case where both the government and company are unwilling to deal with NCR land issues, communities can find themselves pushed from one party to another.

6.54 Generally, communities affected by private plantations or government projects informed the Inquiry that no discussions took place prior to the opening of the plantations, or if there were discussions, these were only held with the village leaders -- the village head or Ketua Kampong (KK) or the Chairman of the Village Development and Security Committee (PJKKK). There were also allegations of KK or PJKKK being "bought over" or threatened with sacking if they opposed the projects.

6.55 With respect to concerns about pollution of the environment, particularly river pollution due to oil palm effluents, the companies claimed to be EIA- and SIA-compliant. Many communities who rely solely on rivers for their everyday use and water supply are therefore not able to get any relief. EIAs and SIAs are not done comprehensively, and rarely are cumulative impacts looked into. In addition, communities living outside the project area are not taken into account. As such, the effectiveness of an EIA or SIA that was conducted may be questionable.

iii. Community Land Development Schemes

6.56 Land that have been recognised or earmarked for natives have often been handed over to government agencies or GLCs as land development schemes. These schemes are often linked to poverty eradication programmes. The complaints received under this category concern issues surrounding the payment of dividends, particularly insufficient and/or non-receipt of dividends from developers.

Agropolitan and MESEJ projects for hardcore poor

6.57 Many of the indigenous land development schemes are related to poverty reduction through the introduction of plantations and infrastructure. The Ministry of Rural Development (MRD) together with District Offices in the State has been tasked with the identification of hardcore poor communities, while the Sabah Economic Development and Investment Authority (SEDIA)²⁵⁵ channels funds it receives from the Federal government under the Sabah Development Corridor (SDC). Poverty eradication programmes focusing on indigenous land development projects include the Agropolitan and Mini Estet Sejaterah (MESEJ) projects.

6.58 Communities affected by these projects describe them as top-down programmes with no consultations or consent-making mechanisms for the project. The Inquiry noted and commented on the lack of verifiable and adequate information to the affected communities on an ongoing basis, as well as a transparent process to select the hardcore poor. Taking land from other members of the community and giving it to landless hardcore poor could lead to intra-community conflicts. The Inquiry fails to see how such projects could ensure social and sustainable development, which is among the main objectives of the project and of SEDIA.²⁵⁶

6.59 In case no KM24, Mr Marajim@Ejim b Mangkong (W34) representing two villages in Indarason Darat and Minikodong in Kudat said 733.4 acres of land for their livelihood had been taken for the MESEJ project

²⁵⁵ SEDIA was established in 2009 for the purpose of promoting the Sabah Economic Development Corridor (SDC) and governed by the SEDIA Enactment.

²⁵⁶ Section 6(b) of the SEDIA Enactment, 2009

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by MRD in early 2006 without any LE or proper consultations. When the contractor started work, their crops and graveyards were destroyed and each time the road to the project was

upgraded, their water pipes were disconnected and destroyed. No compensation was paid for these acts of destruction.

6.60 Ahmad Shah bin Kalon, West Coast District Surveyor in responding to the W34 said “...MRD applied for

500 acres of land in Kg Minikodong and followed the normal process whereby the land application was brought to the LUC and was supported. Subsequently, a survey order was made to the district surveyor dated 3 August 2009, a file opened in 2005 SP0558220 and the survey completed. On 28 November 2006, the survey plan 05125665 was approved with an area of 526.3 acres. For the next process, we submitted to the Natural Resource Office and MESEJ Minikodong was gazetted under gazette number 356/2008It was gazetted under Section 28 of Sabah Land Ordinance for “public purpose” that is Mini Estet Sejatera (MESEJ) project”

6.61 In a similar case (TW26), Mr Sappari Saidal (W67) from Kg Bakong-Bakong, Semporna, expressed dissatisfaction in the slow process of obtaining approval for his community’s land application, which he submitted in 1994, but which resulted in their NCR land being gazetted under section 28 of the SLO in favour of MRD for conversion into a MESEJ project. According to the Tawau district surveyor, Mr Abdul Manap b Aneh (W75), the LSD was aware that Kg Bakong-Bakong was occupied but the LSD Director himself gave the go-ahead to MRD to enter the area.

6.62 In case no KM78, in responding to Ms Salmah bt Marail (W37) from Kg Timbang Dayang, Banggi in Kudat, the Director General of FELCRA, Tuan Haji Samian Hj Mohd Ali (W38) said that discussions regarding the Agropolitan project in Banggi Island were held with village heads, the District Office and the MRD. The Inquiry found that in the FELCRA EIA report, it was stated that they would plant rubber, however, oil palm was grown instead. As such, the reliability of EIAs can be brought to question here as the downstream effects of oil palm as compared to rubber are different.

6.63 The development programmes under the Sabah Development Corridor have the element of urgency as funds from the Federal government have to be returned if unused by end of the fiscal year.

6.64 Mr Iwan Hermawan bin Masrul (W8) of SEDIA admitted that opposition to the proposed projects did occur but their role was to ensure the project follow the schedule. “... for Agropolitan in Lalampas- Tongod, consultation process was conducted at the community level. IDS (Institute for Development Studies) as a consultant was appointed to conduct preliminary study before the project started. We cannot deny that there were several opposition but there were also those who agreed. I believe during the consultations, the majority won... that’s why the Lalampas-Tongod project started. Other places which have been identified are still in the process of consultation. We recognise the need to push for projects that were suggested and the initiative of the state government so the area is developed for the community. SEDIA is only a caretaker to ensure that the project be implemented as scheduled”.

6.65 In view of the many issues that the Inquiry heard, many of which are common to land schemes in other parts of the country, it became obvious that policy-makers like the State

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Economic Planning Unit and MRD did not draw lessons from past programmes from within or outside the state. There are also no built-in mechanisms for assessments and complaints. According to SEDIA, alternative land had never been offered to affected communities who wanted to opt out of the project.

6.66The Inquiry finds that plantation projects by government agencies or GLC appointed by the government are often bureaucratic and do not address the root problems of NCR claims. Often contrary to the objectives of the government to develop an area, communities found that not only have they lost control and ownership over their land, but also found themselves losing traditional livelihoods, which have sustained their simple ways of life all these years.

6.67In the Banggi Island case (KM78), the government alienated the land for a “public purpose” to Ladang Sejaterah Tohok in 1979. Initially, SLDB started a project to plant coconuts but the project failed and in

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2005, MRD invited FELCRA to develop 4,500 ha under the Agropolitan project. In responding to W37’s complaints of destruction of crops by contractors, FELCRA’s Director General (W38) said communities must go through the proper channel for their claims i.e. through the LSD office which would then assess such claims before any payments could be made by FELCRA. This information was contrary to that given by the Kudat ACLR (W39) who said claims should be made to FELCRA.

6.68From the information provided by the community representative (W37) and the responses by both W38 and W39, the Inquiry found that the Agropolitan project in the Banggi Island had not benefited the communities, and had resulted in the loss of their NCR land. The Inquiry found that the use of section 28 to gazette a large area of land for a public purpose in Banggi Island has not only failed to recognise NCR lands but also further deprived the native peoples of their traditional livelihoods. This case is particularly serious as it involves small native communities like the Bonggi people.

6.69In case KM49, Mr Jeffrey Makap representing 13 villages with the SAFODA reforestation project in Pitas said that acquisition of land through the Bengkoka Resettlement Scheme 32 years ago had several noble objectives but were never realised. Only 200 families out of the 2,000 original inhabitants were included in the scheme. In response, Mr Asan b Beluar (W47) of SAFODA and the Pitas District Officer, Mr Sapdin Ibrahim (W103) said that 32,000 ha out of 60,000 ha originally gazetted to SAFODA were excised in 2005 to be returned to the community. However, land that has been excised but not developed by the individuals will be taken back by SAFODA.

Communal Titles

6.70The Inquiry was told by the Deputy Director of the LSD, Mr Lee Chun Khiong (W3) that the issuance of Communal Titles (CTs) is a new strategy of the government after seeing that past policies of approving Native Titles (NTs) to natives have only ended in sale of NTs. Approvals of CTs are also part of a poverty eradication policy, and thus the LSD also considers it important to facilitate land development for the CTs that have been issued (see witness statements Summaries on “Laws & Policies”).

6.71 The rapid issuance of CTs that started after the amendment of section 77 of the SLO was immediately followed by conversion of the land into oil palm plantations. From the start, communities were divided by this new strategy of land development since the divisions of lots do not follow traditional ownership boundaries and do not maintain crops that have been planted by NCR land claimant. With the merging of NCR lands to form one large plantation, conflicts regarding traditional village administration also ensued. The thirteen cases that were recorded through the Inquiry involved these issues and the dissatisfaction with the introduction of the CT concept by the government without considering the peoples' concerns.

6.72 In case SD4, Mr Kani Delian (W86) of Kg. Mangkawago, Tongod said that they disagreed with the new CT concept as they would be mere "beneficiaries" and not the owners of their NCR land. Furthermore, land under a CT cannot be passed down to family members. Mr Thomas Logijin (W110), the Tongod District Officer, said the matter of issuing a CT was brought before the Land Utilisation Committee in May 2011 and discussed with JKKK Chairman and village head who have both agreed as the processing of CT is faster compared to individual applications. The process is now at the level of the Natural Resource Office

6.73 In case T1, the Tenom District Officer (W107) informed the Inquiry that four villages – namely Kg Mangkalias, Kg Kabintaluan and Kg Pongolobon 1 & 2 had been issued CTs. However, Mr Rainus Sagulau (W76) claimed that the four communities in Kg Ponglobon, Kg Abingkoi, Kerolok and Ahuron in Mukim Rundum, Kemabong, Tenom who had been living in the area for generations wanted to manage the area themselves and rejected the issuance of CTs.

6.74 The Inquiry finds the Special Terms (see box below) attached to the issuance of CTs to have violated the rights of natives, and may not necessarily serve the interests of those who already have NCR over that area. These Special Terms escaped the scrutiny of "beneficiaries" because they were lured

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with payments of RM300-500 upon signing of a document, which they later found was a joint-venture agreement to develop their land.

6.75 Mr Galus Ahtoi (W10) gave the example during the signing ceremony of the Lalampas Communal Title in Entilibon, Tongod. The beneficiaries were given RM500 immediately after they had signed the agreement, and because it was a formal ceremony where all the beneficiaries were present, they did not have the opportunity to read the agreement. Neither were they given a copy of the agreement beforehand. W10 believed such a ceremony and the giving of cash was organised to lure people to agree without their full knowledge of the situation.

6.76 While the beneficiaries are listed in the CTs, they do not know the actual location of their plot of land within the CT as this is not specified. When a joint-venture agreement is signed between the beneficiaries and the JV company, the beneficiaries are not expected to work on his/her plot, and allegedly not allowed to enter the area. The Inquiry finds that in one generation, the beneficiary and the heir to the plot of land would lose their link to the land. This could prove to be detrimental to natives claiming NCR to land as Malaysian courts do require proof of a continuous use of and link to the land in question.

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SPECIAL TERMS (For the issuance of Communal Title)

The said land is demised herein expressly as a Communal Title for the purpose of cultivation of agricultural crops of economic value.

The said land shall be cultivated, developed and maintained in accordance with good husbandry practice as stated hereunder throughout the whole period of tenure of the said land.

Only plants or trees approved by the Director of Agriculture shall be cultivated or planted on said land. The Collector shall act as Trustee for said land for the beneficiaries.

Transfer or charge of said land is prohibited.

Sublease of the said land is prohibited except to a State government agency, a company or body corporate registered under Malaysia (sic) law, which shall be first approved by the Director of Lands and Surveys with the sanction by the Minister.

Subdivision of the said land is prohibited except with the written permission of the Director of Lands and Surveys.

The government may at any time, excise from any lot, an area for use and benefit of the community without compensation.

The beneficiaries shall at all times comply with the directions of the Collector in relation to the use and occupation of the said land by the beneficiaries and their families and also in all matters relating to rights of way, drainage, irrigation canal, bridges or any other easements and allocation of lots shall determine any lot boundary disputes.

The addition, removal or replacement of any beneficiary to the said land shall be subject to the approval of the Director of Lands and Surveys upon due enquiry by Collector.

No dealings by the beneficiaries of their interest shall be recognized unless and until approved by the Director of Lands and Surveys and no beneficiary or other person shall have any caveatable interest over the said land save in respect of an interest claimed by the government.

Source: flyer entitled 'Special Terms'.

Department of Land and Survey, undated.

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iv. Logging and Commercial Forest Reserves

6.77Fifty cases were recorded under this category which involves the inclusion of NCR land into Forest Reserves. It touches on issues of the gazettal of forest reserves, harsh treatment by enforcement officers on communities living within forest reserves, co-management initiatives by the Sabah Forest Department, and impacts on the lives of affected communities.

Land within Forest Reserves

6.78 The Forest Enactment 1968 (Sabah No 2 of 1968) is the principal legislation containing provisions on the preservation of forests and dealing with forest produce. Both section 8 and section 9 of the 1968 Enactment provide for notice and enquiry relating to the gazetting of forest reserves. However, these provisions were not complied with in most cases resulting in indigenous communities not being informed about the proposed forest reserves that would affect their lands, including the exercise carried out in and after 1984 to regazette forest reserves throughout the state. A large-scale land re-gazetting exercise was carried out that year which led to the increase in the number of forest reserves and amendments to the 1968 Enactment.

6.79 Forest reserve boundaries were not drawn and marked on the ground until very much later and in most cases only after the year 2000. Therefore, many affected native communities were not aware that their lands were within the forest reserves until the arrival of logging companies or the posting of notices by the authorities to warn against trespassing, as was evident in all the cases under this category (KG50, W76, KG14, SD4, KM158, SD29, TW48 and TW10). Most of the communities affected have been living on or farming the areas for generations.

6.80 In case T1, Rainus Sagulau (W76) claimed that four communities in Kg Ponglobon, Kg Abingkoi, Kerolok and Ahuron in Mukim Rundum, Kemabong have been living in the area for generations but only started submitting their land applications in 1969. Only when logging started in 1983 did they realise that all four villages were inside the Mandalom and Kuala Tomani Forest Reserves. Between 1983 and 2004, indiscriminate logging caused extreme hardship to the communities. In 2006, the communities received an eviction notice and subsequently, the Forest Department started to act aggressively, with one villager arrested and remanded for seven days. The communities are in a state of constant fear and doubt about maintaining their traditional ways of life.

6.81 Similarly in case KM158, Ms Rusmina bt Jamula (W83), representing villagers from Kg Batangon Darat in Paitan said that they only got to know that their NCR land was within the Paitan Forest Reserve when the District Forest Department cleared the boundaries in 2006. In June 2012, they were served with an eviction notice.

6.82 Some are more recent settlers who settled and farmed lands within forest reserves because land has become extremely scarce when large tracts of land were approved to companies. One example is case SD29 in Beluran involving communities from Kg Dorom-Dorom who moved to the area between 1985 and 1994. As these areas are within the Batutiung and Bonggaya Class 1 Forest Reserves, which are strictly protected, village representative Mr Nasri b Tahir (W85) said the youths were forced to migrate to town.

6.83 In all the cases above, the communities have tried their best to resolve the issue through their state assemblyman and Member of Parliament but without much success except for case T1 where the Forest Reserve has been degazetted through a letter from the Natural Resource Office dated 17 April 2012. Nevertheless, in this case, there is no guarantees that the land will be given to the community in the form of NTs as part of the degazetted area has already been converted into a CT as mentioned earlier.

6.84 Since the establishment of many Forest Reserves did not involve ground survey to exclude communities and their NCR territories, the Forestry Department issued a circular in 1998 allowing communities living with the boundaries of Class 2 Forest Reserves to continue staying and carrying out their farming

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activities. However, they were not allowed to expand their farms. In addition, no livelihood options were offered to the growing number of residents in those areas.

6.85 The Inquiry finds the harsh and extreme measures taken by the Forestry Department, such as the burning and destruction of crops and properties belonging to native communities allegedly living and farming within forest reserves to be a contravention of human rights.

6.86 Expert witness, Mr Galus Ahtoi (W10) said that many communities never received any notice about the proposal to gazette certain areas as forest reserves. There were cases of house burning and destruction of properties as well as persons arrested and charged with trespassing in their own customary land. The role of communities in resource management is not acknowledged.

6.87 In case TW48, OKK Nasir @ Mohammad bin Manaf (W88) representing communities of Kg Gua Madai in Kunak informed the Inquiry that the oil palm which they planted were cut down by 70 police personnel. However, District Forest Officer, Mr Sofean Mohd Saibi (W93) said this stern action had to be taken because the Occupation Permit which was approved was for the production of artificial birds nest, and not for planting oil palm.

6.88 The Inquiry was also told that while certain companies were given permission to plant oil palm within the forest reserves, villagers who have planted oil palm before they came to know that the land they planted on was within a forest reserve, either had to have their trees cut down or were prohibited from harvesting the fruits of their labour.

6.89 In case TW10, Pg Karil bin Pg Kurani (W86) of Kg Tanjung Nagos in Semporna, the community planted oil palm once they have submitted a land application amounting 3,000 acres. At that time, they were not aware that the area was within the Tanjung Nagos and Monpok Forest Reserves. In 2005, a company named Warisan Jaya Makmur was given an Occupation Permit by the Forestry Department to harvest the oil palm planted by the community. In the same year, 100 houses were burnt and bulldozed and their animals confiscated. Defending the Sabah Forest Department's action, W93 said that both areas are Class One Forest Reserves but Warisan Jaya Makmur, a subsidiary of Saham Amanah Sabah Berhad was allowed one cycle of 25 years to plant oil palm before starting the tree plantation. Asked why the Department decided to collect the crops (instead of cutting them as in TW48), W93 said it was related to government policy and was confidential.

Logging

6.90 Group application for land for logging by outsiders, and then subsequently selling the land was one reason why many communities lost their land. Many communities were unaware of the consequences of not contesting such applications. In case KG14 in Kg Balaron Sapulut, Nabawan. Mr Jubilik Sunok (W81) representing two villages in Balaron and

Pulungan said it started with the application for a licence to log the area in 1979 by outsiders, Mr Kelasan Kalatung and 194 others. The villagers later found that his son, Apaun Kelasang, who continued logging managed to get a native title of the land and subsequently sold it to Mr Hairel Ibniameen @ Benjamin. The community complained that gravesites and fruit trees were destroyed and that they also suffered from the effects of pollution from the use of chemical pesticides and fertilizers once an oil palm company, Seri Jutaya was appointed by Mr Hairel started work in the area.

6.91 In response, Nabawan ACLR, Mr Ranchong Amin (W109) said all the processes of approving the application of Mr Kalasang and 194 others were complied with, and he would not conduct any investigation on the sale of the land to Mr Hairel Ibniameen as this was a private matter between buyer and seller.

Weaknesses of co-management efforts

6.92 The Community Forest Management in Sabah by the Forest Department is one of the positive provisions of the Forest Enactment and encouraged to be included in Sustainable Forest Management Licensee

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Agreement (SFMLA) of Forest Management Unit (FMU) holders. However, although some initiatives were taken to set aside areas for co-management, there was an absence of a structure to ensure effective participation in the management of the community forest areas.

6.93 In case SD4, Kani Delian (W86) of Kg Mengkawago, Tongod, and the District Forest Officer (W96) said that this area was within the Mengkawago Forest Reserve and was part of the Community Forestry Project. The project was aimed at improving the income of the community through the planting of rubber, but it would not involve excision of land. He admitted that there was no management structure and that management was based on dialogues. Nevertheless, the bureaucracy involved in attending dialogues called by the community appeared to have hampered good communications between the community and the Forest Department.

6.94 FMU holders, despite their efforts to build relations with communities found within their concessions, normally fall short in their understanding of Corporate Social Responsibility (CSR), which is seen as merely providing support in kind and donations to affected communities.

6.95 None of the companies or government departments were aware of the United Nations Business and Human Rights Principles²⁵⁷ to respect the rights of communities. Two FMU holders told the Inquiry that their working relationship with communities within their FMU had not been easy but efforts were being made to improve such relationship as it was a requirement under the SFMLA. Community witnesses on the other hand said that they had been engaging with the FMU holders to respect their NCR claims.

6.96 In case KG50, where Bornion Timber was awarded an area of about 77,000 ha in the Ulu Sungai Melian Forest Reserve, their responsibility to the community was outlined in the Forest Management Unit-Sustainable Forest Management Licensee Agreement between

Bornion Timber and Sabah Forest Department Mr Ho Hong Check (W80), Operations Manager of Bornion Timber agreed with statements by Ms Moilin Unsing (W78) and Mr Dahalan @ Ulin Abdullah (W77) that serious dialogues have been lacking for some time, as a result of which, misunderstandings and destruction of property have occurred. While Bornion Timber has been focusing on providing support such as planting materials to the community, the community has been more concerned about the excision of the land from the area.

v. Inclusion of Indigenous Lands into National/State Protected Areas

6.97 The Inquiry also heard from affected communities that notices were not put up as required by law prior to the gazettal of State protected areas (parks, wildlife sanctuaries, strictly protected forest reserves and water catchment areas). There was also a lack or absence of discussions regarding the proposed parks and other protected areas with them. As laws governing protected areas are strict and generally do not allow communities to reside inside a park or carry out activities therein, once parks and other strict protected areas are gazetted, communities lose both ownership and use rights over their NCR land.

6.98 Boundaries of such protected areas were not marked until later and many communities were not aware that their lands were within the Park. The authorities (Sabah Parks, Water Supply and Water Conservation Departments) admitted that they had informally allowed communities to continue living in Parks and strict protected areas (eg Class 1 Forest Reserves, water supply reserves), and granted them access to their cultivated land. However, repeated warnings and limitations have been imposed on the types and expansion of activities within the park boundaries.

6.99 Because the Crocker Range Park boundaries²⁵⁸ were not marked on the ground, Mr Juspin Sijan (W23) on behalf of 47 residents from Kg. Beriawa Ulu (case KG34) said they settled and started a farm in the area in 1971 and applied for the land to be titled. ACLR, Ms Kamsiah bt Abdul Jalil (W101) said their applications were accepted by the Keningau LSD office and land was surveyed in 1978. But once it was confirmed to be within the Park boundaries, the LSD could not proceed. Stern warnings from the

²⁵⁷<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

²⁵⁸The same area was previously a forest reserve in 1966, before it was gazetted as a park in 1984.

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Park authorities have dissuaded the natives from tapping rubber, thus depriving them of their source of livelihood.

6.100 A general issue raised by affected communities was the absence of a recognised or formal conflict resolution mechanism and an avenue to discuss their predicament. There was no acknowledgement that the government had erred when the notification prior to gazettal was not carried out, although eviction was not conducted (except more recently by the Forest Department for Class 1 Forest Reserves). Administratively, however, NCR within these protected areas are not recognised and a stalemate has prevailed.

Parks

6.101 The most positive move with respect to NCR claims in protected areas came through the Sabah Parks when it reviewed its management plan for the Crocker Range Park (CRP) in 2000. After almost ten years of negotiations, the new governance structure of the CRP recognized Community Use Zones (CUZ) and included members from the community into the CUZ Management Committee Sabah Parks has also acknowledged that the CRP model would be used for all the parks in Sabah.

6.102 Mr Radin Ontolui (W24) (case KG1) from Ulu Senagang informed the Inquiry that the MoU between Sabah Parks and the community is an important first step but can be enhanced by considering the future needs of communities and sustainability of the CUZ. At the moment, the area agreed to be included within the CUZ only includes settlement areas and existing farm areas. There is no agreement as yet on the area to be used as a community hunting area and foraging area despite assurances from Sabah Parks and despite protocols already established by the community to protect and manage this area sustainably.

Wildlife Corridor/Sanctuaries

6.103 The Inquiry heard several objections to the proposed wildlife corridor as it was not adequately discussed with affected communities, and initial suggestions by communities were not taken on board. Sabah Parks, in responding to the issue, informed the Inquiry that this was a voluntary initiative and one which the community should be fully involved in the management.

6.104 Mr Sintiah Samanding (W61) (in case no P27) and Mr Duali Guraat (W12) (case no KG24) both expressed their concern about the possibility of the access to their farms being restricted once the proposal for the wildlife corridor was implemented. Communities are convinced that wildlife will not necessarily follow the corridor/path as envisaged but would go through their farms, and they may once again have to give up more land to accommodate the project.

6.105 The Inquiry noted that in initiatives like park buffer zones, wildlife sanctuaries and wildlife corridors, which were often suggested by environmental NGOs and adopted by the government, it is the communities who were often the ones asked to give up their land.

Water Catchment

6.106 The Inquiry was informed that laws governing water catchment areas would become more stringent, with no settlements being allowed within the gazetted catchment areas. The permitting of settlements in areas meant for broader conservation purposes would however be more flexible.

6.107 In case no KG33 regarding the community catchment area in Kg Tiga, Mr Eging Sasai (W20) said a compromise was being worked out to convert the gazette from a strict protected area to a conservation area. Although an advantageous compromise could be worked out, communities (eg in Kg Tiga) are still wary in the absence of a MoU that would allow them to continue living in the conservation area. Furthermore, the communities are still opposed to the water catchment if all or large areas of their land are included within the catchment areas.

The representative from the communities in Kg Tiga also expressed disappointment that the numerous discussions and consultation did not culminate into

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a decision and plans on how they can benefit from, and contribute effectively to co-management of, the catchment area.

vi. Commercial Development Projects

6.108 The Inquiry recorded 16 cases under this category, which involves NCR land taken for infrastructure development (dams, housing, or road construction). The key issue is the manner in which the state Ministry of Infrastructure Development made decisions to embark on such projects without informing or consulting affected communities.

6.109 Issues also brought up under this category include the lack of a mechanism to provide feedback on the proposed commercial development projects. The Inquiry heard complaints about EIAs and SIAs being badly conducted, where in one case, a company awarded with the contract appointed their own consultant to conduct the EIA/SIA study. Another issue raised was the practice of the government to propose projects without any independent study on actual needs.

6.110 Dusun communities in Upper Papar in the Papar and Penampang districts (case no P34) and Kg Tambatuon, Kota Belud (case no P51) stated that they were neither informed nor consulted about the proposal to build the Kaiduan and Tambatuon dam in their respective villages. Both communities have protested against the construction of the dams and initiated several dialogues with the authorities. However to date, no clear decision has been taken to stop the said construction or to hold proper consultations.

6.111 In case no P34, Mr Edgardo Apines (W100), chief engineer of the Sabah Water Supply Department said that after the Infrastructure Development Ministry appointed WCT Sdn Bhd to conduct a feasibility study on the Kaiduan dam, the same company presented their assessment on the projected water supply needs for Kota Kinabalu. No independent study about actual water supply needs was done by the Ministry and alternatives to the Kaiduan Dam which were presented by the communities were not considered.

6.112 WCT Sdn Bhd Project Director, Mr Mohd Roslan Sarip (W98) admitted mistakes on initial information regarding the number of affected villages. After receiving complaints that the SEIA study was not conducted properly and did not comply with the Sabah EIA Guideline, W100 said that it was in the process of re-appointing another consultant.

6.113 In case P51 on the proposed Tambatuon, Mr Imus bin Onsiang (W59), a representative of the state Agriculture Department informed the Inquiry that the proposed Tambatuon Dam is under the Federal Ministry of Agriculture and Agro-Based Industry. The final draft report of the preliminary EIA was completed in January 2011 where it outlined positive and negative impacts of the dam. W59 added that state departments were not involved in the EIA and he could not confirm whether the federal government consultant organised a consultation with the community.

vii. Compensation from Land Acquisition

6.114 The Inquiry recorded six statements under this category on compensation. The issues include acquisition of native title (NT) land for development purposes where the procedure to claim compensation usually took a long time and in some cases, compensation went unpaid. Apart from procedures, many also complained about the meagre amount of compensation for NTs under the Land Acquisition Ordinance which is based on an outdated system of crop valuation that does not take into consideration the loss of revenue or loss of communal life. There is also no procedure under the Ordinance for a pre-acquisition hearing.

6.115 Currently, there are no provisions in any law to compensate NCR land even though section 66 of the SLO deems land under customary tenure as permanent, heritable and transferable. Natives affected by reservation of lands over their NCR land – whether for development under section 28 of the SLO or

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various sections in other enactments for the purpose of conservation are seldom paid compensation. The Inquiry finds that the failure of the LSD to serve a notice under section 13, or invoking sections 80, 81 and 82 of the SLO on settlement of NCR claims amount to infringement of right to property as enshrined in Article 13 of the Federal Constitution.

6.116 Acquisition for land under section 28 of the SLO, particularly for MESEJ and Agropolitan projects, is not likely to be compensated. In the Bakong-Bakong MESEJ project in case no TW26, Tuan Haji Jilis Hj Ismail (W69) of the Sabah Land Development Board, said it was very rare for compensation to be paid for land taken under this section. There is also no possibility for perennial crops such as rubber and fruit trees to be paid compensation if these are cut down in the clearing process. From the cases heard by the Inquiry, the process of gazetting land for “public purpose” under Section 28 also do not enquire into the existence of NCR claims.

ii. CONSTRAINTS THAT IMPEDE SABAH INDIGENOUS PEOPLES’ RIGHT TO LAND

6.117 Land, to indigenous peoples who greatly depend on it, is not only a necessity for their livelihood but is also for their spiritual and cultural wellbeing and continuity, and for their survival as a people. Constraints impeding the full enjoyment of indigenous peoples’ right to land in accordance to these needs and requirements mainly revolve around the legal framework and its implementation, government policy and administration, and cultural perceptions.

6.118 In analysing what constitutes a constraint in relation to indigenous peoples’ right to land described in the preceding section, the Inquiry took into account domestic and international laws and norms. Most were garnered from the issues in the preceding section, while others were from the analysis of cases from the research work.

6.119 Non-recognition or gaps in the law regarding the native’s cultural attitude with respect to land rights from the pre-colonial era through to independence and to the present day have made access to justice for indigenous peoples difficult. Throughout these periods, laws and

policies have failed to fully recognise indigenous peoples' own concept of land use and ownership.

6.120 The Inquiry was concerned about the number of complaints specifically on the slow and often negative administrative responses from authorities to those who had applied for land titles. Difficulties in getting an opportunity to be heard and the lack of avenues to obtain effective remedies were also among common constraints.

6.121 Current development models that are proposed or practised by the authorities are mainly large-scale and exploitative in nature, and do not meet the needs and requirements of indigenous peoples. Poverty eradication models that involve indigenous peoples' lands do not guarantee land tenure security, and instead can actually result in loss of land by indigenous peoples. There has been no monitoring or evaluation of poverty eradication programmes that have begun in the 80's up to current date. There should be a Cost Benefit Analysis conducted on any poverty eradication programme.

Legal Constraints

6.122 A review of the court decisions in favour of indigenous peoples showed that these decisions were not applied or not given recognition by the government when applying/interpreting laws related to NCR. According to officials from the LSD, their administrative decisions are based only on the relevant written land law. The departments do not take into account court decisions in interpreting the Sabah Land Ordinance in support of native customary rights to land. Court decisions have not been followed through administratively in the LSD.

6.123 There are challenges in seeking redress through the courts especially when the ownership structure of the holding companies changes midway, making it necessary for native communities to file afresh with each entity change.

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6.124 Successive amendments to laws, particularly the land and forestry laws in Sabah, as well as other laws related to indigenous peoples as elaborated in Chapter 4 have resulted in the progressive erosion of indigenous peoples' right to land.

6.125 Although provisions recognising NCR in the Sabah Land Ordinance 1930 do exist (sections 13, 14, 15, 16, 65, 66, 69, 76, 77, 78, 80, 81, 82, 83, 84, 85 & 86), and specific guidelines have been made, many of these were neither applied nor given priority when promoting the recognition of land rights of the natives.²⁵⁹ Sections 14260 and 66,261 which allow for the registration of NCR claims that confer a permanent, heritable and transferable right, are not used. Instead, section 12 of the SLO is mainly applied in registering land ownership through the issuance of Native Title (NT), which is a more complicated process and has to go through the Land Utilisation Committee for approval. This process puts many natives living in rural areas at a disadvantage, especially when competing with companies and influential individuals willing to invest in large-scale land development.

6.126 Persistent campaigns by the government since the British era to register individual ownership has led to the acceptance of NT, which has also been accepted as collateral by

most financial institutions for loans. To most natives, putting in a land application is tantamount to recording or registering ownership of their land, whereas as far as the government is concerned, the granting of title to land is their prerogative. As such, land applications do not necessarily lead to the granting of NT to the native applicant. The LSD also automatically believes that indigenous peoples want NT over their land, and thus natives are not informed of their option to record claims under section 14.

6.127 The Inquiry noted the confusion created by the interpretation of the Sabah State Attorney General on the 1930 cut-off point on NCR claims, with which the LSD now concurs. However, the Assistant Collector of Land Revenue (ACLR) in the districts confirmed they have been accepting land applications based on NCR.

6.128 The Inquiry also received numerous complaints about the effects of the amendments to Section 76 of the SLO on Communal Titles, which have undermined NCR to land (see box below). Although the amendment did not remove NCR as a basis for the issuance of issue Communal Titles, often the state tends to favour applications for land for the purpose of fast-track, joint-venture development programmes over applications for NCR-based Communal Titles.

S 76 Communal titles.

In cases where [any State land planned by the Government of Sabah or] a claim to customary tenure of land has been established or a claim to native customary rights has been dealt with by a grant of land and such land is [to be] held [or is held] for the common use and benefit of natives and is not assigned to any individual as his private property it shall be lawful for the Minister to sanction a communal native title for such land [to be issued in accordance with the relevant provisions of this Ordinance] in the name of the Collector as trustee for the natives concerned but without power of sale. Such communal native title shall be held to be a title under this Part, but shall be subject to such rent as the Minister may order.

Amendments added in italics

259 See Chapter 4 of this Report.

260 Collector to decide claims.

Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

261 Rights and obligations of customary tenure.

Customary tenure shall confer upon the holder thereunder a permanent heritable and transferable right of use and occupancy in his land subject only, in addition to the general provisions of Part I of this Ordinance to –

(a) the duty of preparing his padi fields and planting padi, cleaning, working and cultivating his garden, orchards or sago lands in such manner as may be prescribed;

(b)the liability to give his labour free, when required by the Collector or Native Chief or Headman, for the performance of such works and duties for the common benefit of himself and neighbouring land holders as may be prescribed.

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6.129 The amendment to the Land Rules (1930) on land applications meant that it is no longer necessary for village heads to verify land applications or NCR claims.

6.130 Research on the laws relating to land and indigenous peoples shows numerous gaps which could impede the full enjoyment of the indigenous peoples' rights to land in accordance with their needs and requirements. Additionally, some sections are outdated or inadequate or in conflict with other provisions, for example section 15 and section 28 of the SLO. Recommendations to amend these laws made from a study commissioned by the government to the Institute for Development Studies (IDS)²⁶² have not been implemented.

6.131 Consent and redress mechanisms such as provisions for notices, appeals and land enquiries have not been reviewed to make them more effective. The Inquiry was told countless times that notices under section 13 of the SLO for land claimants to come forward were not received because of the short timeframe (30 days) or inappropriate location (notice boards of the LSD offices) and language (English). Most land enquiries and appeals were denied or delayed citing administrative difficulties.

Policy Constraints

6.132 The principles in the UNDRIP, the Right to Development and other relevant international instruments are not applied, let alone incorporated into local laws and policies, by relevant government agencies, such as the LSD, Forestry Department or SEDIA. This means that review of policies related to indigenous peoples' land rights have not benefited from more progressive developments as seen in countries like the Philippines and Bolivia.

6.133 A general policy constraint on land is the delineation of boundaries into "neat lots" that do not follow cultural and natural boundaries. These boundaries signify the close relationship to land and the environment. Equally important is the indigenous perspectives to collective land ownership and development, which should be taken into consideration when designing policies on land development, forest, protected areas, etc.

6.134 Community witnesses told the Inquiry that encroachment into land claimed by them centered on the failure of the government to fulfil its duty to consult affected indigenous communities aimed at obtaining consent for any development programmes. This failure stems from a key policy constraint of not having a clear policy on FPIC.

6.135 Many business enterprises established by influential and rich individuals have been granted licences and permits to establish land-scale land development projects, often on NCR land claimed by indigenous peoples. Environmental and economic risks of agribusiness (oil palm, rubber or tree plantations), dams and intensive industries have not properly been studied. The Inquiry was concerned that many companies who appeared before the Panel did not understand their corporate responsibility in respecting human rights. Most government

agencies dealing with companies and development were also unaware of the UN Guiding principles on Business and Human Rights.

6.136 There is also a strong link between poverty eradication programmes that relate to land and land development programmes. No cost benefit analysis has been conducted on any of these programmes. Neither have these land development programmes been planned with any in-depth study on the needs and requirements of indigenous peoples. The Inquiry also found that these programmes do not have any in-built periodic assessments or programme reviews, and neither are measures put in place if projects have drawbacks. In addition to this EIAs were viewed as feasibility studies, when in fact, EIAs are conducted for a project to be approved. Feasibility Studies prior to commencement of development should be conducted at the planning stage and not before a project is approved.

262 Strategic Study on Land Matters by the Institute for Development Studies, 1991, unpublished. Besides Land Legislation the study also provides pertinent findings and recommendations on Land Administration, Native Land Rights, Alienated Idle Agricultural Land and Land Policies.

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6.137 Currently there is no policy on restitution of NCR (untitled) land that is taken for development, including for private interests, or protected areas as long as they are considered for “public purpose”. Indigenous peoples informed the Inquiry that they were not satisfied with the quantum of compensation which to them was not just, fair or equitable.

6.138 The research conducted for the Inquiry on Sabah’s land policy shows that native rights to land have eroded with each successive change of governments. The research also revealed that despite current positive provisions in the Sabah Land Utilisation Policy 2010, there are numerous gaps in the land use policy relating to natives, including the policy that all untitled lands are State Land.

6.139 The Inquiry is concerned that individual applications for land will no longer be entertained or given priority. This administrative change is based on the Lands and Surveys Department’s observation that natives would sell their land once they obtained their native title documents. While there is some truth in this, the Inquiry also heard about incidences of fraud where many natives were unwittingly tricked into selling their lands or where they had to sell their land for various reasons linked to poverty.

6.140 The Inquiry also found that policies on land development schemes relating to poverty eradication can become serious constraints which could impede the full enjoyment of natives’ rights to land in accordance with their needs and requirements. The Sabah Economic Development Investment authority (SEDIA), the state investment arm, together with the Sabah Rural Development Ministry, have initiated several in-situ land development schemes to assist hard-core poor. However, projects that involve NCR land that has been developed and applied for by local communities and the vesting of this land in a development company, could in fact render these “non-hard-core poor” poorer.

Administrative Constraints

6.141 Research on the historical evolution of land administration from pre-colonial times to the present era has shown that land administrators no longer play a proactive role in promoting and protecting indigenous peoples' rights to land.²⁶³ There are numerous records of British land administrators arguing for NCR to be upheld and the implementation of native land settlements. Current land administrators admitted to the Inquiry that they had to promote the development agenda of the government and they were not in a position to propose policies to the government.

6.142 The role of the village leaders like the ketua kampung in relation to NCR lands has been reduced over the years as they are no longer required to verify any land applications or accompany surveyors when conducting surveys in their village. The selection of the Ketua Kampung is made from among the educated individuals within the community, some of whom do not fully understand the customs and culture of their own people or who do not live in their community. This situation has led to development planning or decisions that do not reflect the real aspirations of the indigenous communities. This arrangement may also compromise their independence in executing their roles as penjaga adat, including on issues related to NCR land.

6.143 Acquisition of NCR land involving large-scale development projects that involve politicians and influential people have impacted indigenous peoples negatively. Community witnesses told the Inquiry that they face constraints in obtaining support from political leaders for the application of the NCR land. They also claimed that they were denied their rights vis-a-vis any development because many decisions regarding these development projects were made without their free, prior and informed consent.

6.144 The lack of monitoring by relevant government agencies with regard to the licences and permits that have been issued to companies also affects NCR claims. The absence of periodic monitoring to ensure that companies comply with the specified conditions determined by the land office pose serious

263Dolittle, Amity. 2011. Native Customary Land Rights in Sabah, Malaysia 1881-2010. <http://www.forestpeoples.org/sites/fpp/files/publication/2011/11/divers-paths-justice-cover.pdf>

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constraints for communities to protect their rights to land. There were also cases where companies appeared to have the support of the police in protecting their interests.

6.145 In addition, lack of information on land application procedures has contributed to the problems and delays in processing of information. There were complaints on the difficulty of accessing information especially gazette notifications, approvals of licences, development projects and topography maps that could help provide more precise information for their applications, and the reluctance of some government servants to provide assistance.

6.146 The method used by the land office to designate boundaries of NCR land also poses constraints, as in the reliance on aerial photos to determine whether the land was cultivated. The Inquiry was told that due to the lack of understanding of the indigenous ways of life and their sustainable land use, the interpretations from aerial photographs cannot capture hunting

and gathering activities, and traditional burial, ceremonial or community catchment areas. Hence, the credibility of this method to prove, or disprove, indigenous claims is questionable.

6.147 There are many natives without personal identification documents, and without such document they do not have the right to own property. There are also cases of confusion and uncertainty of identity due to marriages with foreigners. This situation is especially acute in remote areas where access to transportation is a problem leading to late registration of births, resulting in whole families without documents.

6.148 The Inquiry was told that delays in processing land applications were due to budget constraints faced by land offices in conducting surveys. In the meantime, economic development projects were given priority over the recognition of NCR land.

6.149 The Inquiry was also told that the use of Form LSF 1898 to assist in expediting the recording of NCR claims has been discontinued, and should be reinstated. The use of LSF 1898 complies with the provision to record NCR claims under section 14 of the SLO.

6.150 The Inquiry also heard of cases where village chiefs acted as an intermediary to sell NCR land without the consent of the community. This often involved the use of Power of Attorney authorising the sale or lease of land belonging to natives of Sabah to individuals and developers without their knowledge and consent. There were also cases where a few indigenous individuals were forced to sign an agreement that was written in English without getting any translation.

6.151 With regard to NCR in forest reserves, the Inquiry was told that the Forest Department had not put up the appropriate notice in compliance with section 9 of the Forest Enactment prior to the gazetting of many forest reserves. Hence, community members were not able to provide their opinion and objection towards the proposed reserve. This seriously impeded rights to land and had lasting negative impacts on the affected communities. The Inquiry heard a number of cases in Sabah where the houses, crops and ceremonial sites were burned by the Forest Department because the department accused the communities of trespassing into forest reserves.

Gaps in Perceptions and Understanding

6.152 Gaps in the understanding of native perspectives to land persist because of limited open fora to discuss such perspectives and the needs of indigenous peoples.

6.153 In general, indigenous peoples are also considered poor, uneducated and therefore unable to develop their land, and the subsistence economic activities practised by them on their land are considered unproductive. The concept of poverty that focuses mainly on the economic situation (or lack thereof) and the conclusion that a subsistence-level economy will not be able to uplift people from poverty has thus led to policies and programmes which take away ownership and control of land from indigenous

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peoples. Such constraints in perception are considered major impediments to indigenous peoples' rights to land.

6.154 Most indigenous peoples consider their land to belong to them either individually or collectively by virtue of continuous occupation, and do not see the need to register ownership. This is a serious constraint to their rights because the state only recognises ownership of land which has been registered or issued with documentary titles or gazetted as a reserve.

6.155 Collective ownership of land is generally still preferred, as this is in line with the way in which indigenous communities organise themselves, and as governed by their adat. Collective ownership of land also assures cohesiveness as a community and identity. Even in Sabah where individual land ownership is now accepted, only agricultural plots are registered for individual titles while resources which are used collectively are registered under communal provisions within the SLO such as native reserves and communal titles.

6.156 As more land claimed by indigenous peoples is developed for large-scale plantations and other activities, communities have taken action to pressure authorities. These include submitting memoranda to the government, and using the United Nations special procedures, NGOs and the Human Rights Commission. Invariably, the government's perception of these actions has been negative. The government has tended to blame NGOs for inciting such action or often admonished communities who seek help from NGOs.

6.157 The conclusion by the Sabah LSD that indigenous peoples tend to sell their land has led the state government to adopt a policy in 2010 to not issue individual titles and to now fast track the issuance of communal titles. The Sabah LSD has not been able to provide any data in support of such a conclusion and there have been numerous calls to study the situation and to ascertain the reasons indigenous peoples were selling their land. Research conducted on this issue and information revealed during the hearing showed that a large number of land sales were due to fraud by brokers using powers of attorney and other means. Such policy changes based purely on perceptions is a constraint that impedes indigenous people's rights to land.

6.158 Another constraint is the lack of response to requests for information regarding proposed development projects. Calls for dialogues by communities to get more information before the commencement of projects or to resolve issues that have emerged are often not responded to by the LSD, other relevant departments and companies. Even where dialogues were held, the purpose was often to get the communities to accept the projects as opposed to listening to the perspectives of the indigenous peoples themselves. As a result, mistrust between parties becomes common.

Other Constraints

6.159 Land and forest laws of Sabah and the rules that accompany them, which were enacted by the British and adopted by the state, are still only available in English. It is only the amendments that have been introduced over the years that are available in Bahasa Malaysia. This poses serious constraints for natives handicapped by such a language barrier in understanding and claiming their rights as provided by these laws. The Inquiry also heard many communities lamenting on the difficulty of obtaining copies of official records, maps and information on land status.

6.160 Additionally, most remote villages have poor road and communication systems, so it is difficult to travel to government offices regularly to check the status of their lands.

6.161 Community witnesses informed the Inquiry that they made most of their enquiries or complaints orally to relevant departments. However, since such departments do not have a proper record book to document such oral enquiries or complaints, it cannot be ascertained what action has been taken when authorities are queried or questioned.

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6.162 There is still inadequate mechanism to lodge complaints or provide effective access to justice for indigenous peoples. Filing cases in court is very expensive and takes a long time to be resolved. Many indigenous peoples reported at the Inquiry that such action is often seen as a last resort for them. As long as such inadequacies exist, this will continue to be a major impediment to the full enjoyment of indigenous peoples' rights to land.

6.163 Another constraint is the way some indigenous community leaders are seen to be easily bought over by private companies, or threatened with sacking or actually sacked for not supporting projects planned in their communities. Village leaders (Ketua Kampung and JKKK Chairman) under the employ of the state are seen to be the ears and mouth of the government.

6.164 The fact that many indigenous peoples do not have identity cards, and are therefore unable to own land legally, is another important constraint. Late registration of births by communities which do not have easy access to clinics or district offices have resulted in some being denied citizenship or issued papers with unconfirmed citizenship. Both types of status deny rights to land or inheriting land from their parents. The presence of a large number of undocumented immigrants in Sabah, some of whom have taken over indigenous peoples' land forcefully, is becoming a major cause for concern.

6.165 The Inquiry was concerned with the high frustration level among indigenous peoples mainly due to non-fulfillment of promises by the government. New officers or state governments frequently ignore or overturn the promises made by their predecessors.

iii. EFFECTIVENESS OF GOVERNMENT RESPONSES TO NATIVE LAND CLAIMS

6.166 In analysing the effectiveness of measures taken by the Sabah government, the Inquiry took into consideration both international standards with respect to land rights of indigenous peoples and the acceptance by, and impact on, target communities.

6.167 The Inquiry is conscious of the fact that there seems to be very few legal, administrative and political measures that can be considered effective responses in so far as protecting and promoting indigenous peoples' right to their land is concerned.

6.168 Most of the responses from the government are in the form of amendments to laws, but while these may primarily facilitate development in a particular area, it could curtail indigenous peoples' right to land.

Legal Responses

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6.169 A positive amendment to the Sabah Parks Enactment (and Rules) approved in 2011 has enabled communities to participate in the Park management through the Community Use Zones (CUZ). Sabah Parks informed the Inquiry that this amendment was a result of a series of discussions with communities and the Sabah Parks, facilitated by a local NGO, PACOS Trust, at a pilot project area in Ulu Senagang and Mogool Baru. With this amendment, the concept of the CUZ will be applied to all communities living within state parks.

6.170 A traditional resource management system, Tagal, which was incorporated as a provision within the Fisheries Enactment, while commendable, was weakened by not recognising that this is an indigenous peoples' system. This response to ensure sustainable management of fish in rivers was made ineffective as the responsibilities were transferred from a traditional institution to a Committee which may not necessarily have the interests of the community or to continue the original Tagal concept. Also, by not recognising Tagal as a traditional practice of indigenous peoples, and incorporating the concept within the Fisheries Regulations often posed jurisdictional conflicts typical of legal compartmentalisation.

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6.171 An amendment to section 76 SLO 1930 on Communal Titles in 2009 and the Fast Track Land Alienation Policy in 2010 has changed the process of land applications. The village heads are no longer required to verify land applications. The effects are twofold; first, the time taken for a land application has been reduced contributing to the overall efficacy of the process, and secondly, indigenous participation has been reduced resulting in a further reduction of channels that can act as a conduit for indigenous peoples to provide input in the process.

Policy Responses

6.172 Policy responses such as fast-tracking land alienation through issuance of Communal Titles (Sabah) may be rendered ineffective if indigenous peoples are not in full support of such measures and elements of coercion for fear of being left out arise. This can also cause inter- and intra-community conflicts.

6.173 Mechanisms enabling the participation of indigenous peoples in external decision-making processes can be problematic for various reasons; they may operate in environments where indigenous peoples are politically, socially and economically non-dominant and, while they enhance indigenous peoples' participation, they do not occur on a level playing field with non-indigenous individuals and peoples. They also do not allow greater indigenous influence over decisions in practice because they are poorly implemented, or suffer from previously unforeseeable problems, or because they favour the participation of certain indigenous individuals over that of others, creating concerns about their ability to achieve equality between individuals.

6.174 The State Attorney General's public statement that there should be a cut-off point on Native Customary Rights at 1930 means that new NCR claims after 1930 could not be considered or do not exist. This suggestion, which the Inquiry was told by the Sabah Lands and Surveys Department (LSD) is now taken as the new guide, poses dire consequences to natives who had never been informed of this situation by the LSD nor the state Attorney General's (AG) Chambers, and render all other positive legislation recognising indigenous

rights to land, effectively useless. A cross-section of leaders – from the government and NGOs – has denounced the AG’s suggestion.

6.175 The decision to allow communities who have been living in Forest Reserves to continue residing in their traditional territory is considered to be positive. The Sabah Forest Department Circular 1988 provides guidelines to forest department personnel to ensure that such a policy is adhered to. Another measure is through the granting of Occupation Permits as temporary use rights in forest reserves but with a minimal annual premium payment.

6.176 The formation of a Committee chaired by the Natural Resource Office to consider requests to excise NCR lands from forest reserves is another positive measure to recognise indigenous peoples’ right to land. However, this measure may be made ineffective because the Sabah Forest Department is insisting that any degazetted Forest Reserve has to be replaced. Considering the competing demand for large areas of land by various government agencies and corporations, it would make the requests by indigenous peoples to excise their NCR land difficult to realise.

6.177 The Inquiry was informed that the policy change by the state government to give more emphasis on issuance of Communal Titles was made based on the observation that Indigenous Peoples tended to sell their land. Since there was no concrete evidence in support of such observation and no definitive study has been done on why sales of land were prevalent, and in view of the many rejections of communal titles presented at the Inquiry, the policy measure may be rendered ineffective or have negative impacts on indigenous peoples’ right to land.

6.178 The many positive provisions of the Strategic Land Use Policy 2010 to respond to indigenous land claims have been rendered ineffective as they were not implemented or the gaps not addressed. For example the recognition of hill padi cultivation is not implemented and fallow periods are not recognised as part of the agricultural cycle.

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6.179 As discussed extensively on the section on Constraints, poverty eradication programmes have been rendered ineffective because land rights are not properly addressed.

Administrative Responses

6.180 The use of the police in dealing with NCR land conflicts have become common but the unfortunate perception of police biasness rather than strictly maintaining law and order has only put them in a bad light and made their intervention ineffective in resolving issues. In Sabah, the SUHAKAM Public Inquiry on the land claims of indigenous Dusun in Desa Montoki, Kundasang in Ranau found police using excessive force to evict people from their land.²⁶⁴

6.181 The Inquiry received many complaints about lack or absence of response from the Land offices to their queries, or their failure to deal proactively with urgent appeals from communities about encroachment on their land. Most land offices in Sabah expect the applicants to visit their offices to check on their applications.

6.182 Land offices are also perceived to be generally ineffective in dealing with complaints from indigenous communities, often treating them with disdain.

6.183 The decision to approve land titles and indigenous land development, particularly through joint ventures, has encountered difficulties as there is no separation of power between those deciding on land ownership and those promoting development projects. Since development projects are often given priority by the state, there is a perception that applications for recognition of individual or collective land may be sidelined.

6.184 The commissioning of studies, for example the Strategic Study on Land Matters to the Institute for Development Studies (Sabah) in 1990/91, has been successfully conducted but the recommendations were not implemented. The recommendations which would have resolved many of the administrative problems that currently persist have not been implemented or acted upon. These included the clearing of the backlog of land applications (which the Sabah LSD informed the Inquiry has reached a critical state), and the abuse of power using the Power of Attorney by irresponsible people but which many departments dealing with native lands admittedly failed to recognise in the 1990s.

6.185 The response of the Sabah Parks towards excision of NCR land claims was through the creation of a Community Use Zones Management Committee (CUZ MC) and Memorandum of Understanding between Sabah Parks and CUZ MC. The significance of this committee is the creation of a structure that is formally recognised by the Parks authority. In other co-management initiatives, the absence of a formal structure makes it difficult for communities to participate in decision-making.

6.186 Among other positive responses by the government was the incorporation of community components to train staff of various departments to ensure community participation in its activities was carried out. Among important examples are community participation in determining community hunting areas, and the recruitment and training of community members as Honorary Wildlife Rangers.

6.187 The case study commissioned by the Inquiry reported on the process of alleviating poverty or revenue generation for the state, management directions of government linked companies (GLCs) change in accordance with priorities of political parties in power. The effects are felt at the local level in various ways.

264 SUHAKAM Kundasang Public Inquiry Report available at http://www.suhakam.org.my/c/document_library/get_file?uuid=f54dd7b1-c335-4903-a0f9-f593b139597f&groupId=10124

CHAPTER 7

FINDINGS Sarawak

7.1 This Chapter which discusses the findings for Sarawak contains three sub-sections i.e. issues related to land rights of the natives of Sarawak (ToR 2); constraints that impede rights to land (ToR 3); and the effectiveness of responses to land claims (ToR 1). The first sub-section contains a summary of the issues based on information gathered at the public hearings and consultations, as well as from written submissions and oral replies from the government agencies and corporate entities.

7.2 During the Consultations in five locations in Sarawak, 198 statements were recorded, of which, 26 were considered outside the scope of the Inquiry. For the purpose of the Public Hearing, the statements were categorised and 36 representative cases were selected. Most, if not all, the cases for the public hearings involved more than one issue. In all, 111 witnesses appeared before the Inquiry representing the community, government and private sector and as expert witnesses.

i. ISSUES RELATED TO NATIVE LAND RIGHTS

Introduction

7.3 The information from the public hearings in Sarawak was categorised into seven issues:

i. Administration;

ii. Plantations;

iii. Community Land Development Schemes;

iv. Logging and Planted Forest;

v. Inclusion of Indigenous Lands in National or State Protected Areas;

vi. Commercial Development Projects; and

vii. Compensation from Land Acquisition.

7.4 The findings for each category are supported by the cases presented at the Public Hearing. The summaries of these cases can be found in Annex V of the attached CD.

i. Administration

7.5 This category covers primarily the processes and procedures of land offices in dealing with land applications by native communities and individuals. The main issue relates to different definitions of Native Customary Rights (NCR) land adopted by the authorities and native communities respectively, which lead to other common issues, such as delays in processing land applications and in surveying NCR land by land offices. Issues with the

significant new initiative by the government to survey NCR land also arise from the the government's strict adherence to the definition of NCR in the Sarawak Land Code. This gap has been elaborated in Chapter 3 of this report.

Different definitions of NCR land

7.6 Significant to the hearings in Sarawak was the issue of the interpretation of NCR. This entails a discussion on the definition of NCR with primary reference to Section 5 of the Sarawak Land Code (SLC). Section 5(2) in particular, defines occupation for the purpose of creating NCR as of 1 January 1958 in a limited manner and fails to take into account the traditional and cultural practices by which natives have occupied lands.

7.7 The narrow definition of occupation in the law requires evidence of primarily cultivation and settlement, disregarding the central traditional feature of the customary land laws of some natives (eg. Kelabit,

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Iban and Penan) where forest areas are kept uncultivated and preserved within their territories for hunting, gathering, recording their history and commemorating significant events and/or people. In his statement, the expert witness Mr Baru Bian (W28) highlighted that despite the recognition of pemakai menoa²⁶⁵ and pulau galau²⁶⁶ by Malaysian courts²⁶⁷ as important criteria in establishing NCR, the authorities /government agencies have failed to give effect to the decision and continue to uphold the narrow definition of NCR as specified in the SLC.

7.8 The State authorities have failed to acknowledge the long reaching effect of the court's interpretation of NCR land and appear to be of the view that the decision of the court was confined to the facts of the case before it. In their testimonies, all officers of the Land and Survey Department stressed that they strictly adhere to the definition of NCR as provided under Section 5(2) of Sarawak Land Code (SLC).

7.9 The Inquiry was informed that nomadic and semi-nomadic Penan are in dire situation as their land use concepts such as mulong, la'aa and tana' pengurip are not recognised under the SLC, particularly after the repeal of section 5 (2)(f) of the SLC in 2000. The Inquiry noted that section 5(2)(f) included 'any other lawful method' as one of the ways to establish claim to land. The expert witness, Mr. Jayl Langub told the Inquiry that to the native communities, this subsection is crucial to their customary rights because it incorporated and codified their cultural practices in the SLC, and therefore these practices are legal in their opinion. He explained that "...this provision was previously used constantly to argue for the Penan claim to land and the repeal of section 5(2)(f) has nullified their adat system".

The Inquiry noted that this tacitly denies the native communities rights to exercise their culture which includes traditional claims over pemakai meno, pulau galau or tana' pengurip.

7.10 It is further evident during the Inquiry that the natives of Sarawak consider NCR land as one that is collectively owned by the community. Some asserted that individual allocation of NCR land is the responsibility of the Tuai Rumah or Penghulu. It was argued that since these leaders were in a better position to identify the true residents of the area that the authorities should have referred to him whenever surveys were being conducted. By the same token,

many community witnesses were of the opinion that the individual application of NCR land to the Land and Survey Department was therefore redundant.

Information on survey

7.11 The Inquiry heard allegations that information on land, in particular topographical maps and aerials photos of the land area, are not easily accessible. When asked, the Land Superintendent of Mukah, Mr Awang Zamhari b. Awang Mahmood, told the Inquiry that: “it is the policy of the Department not to disclose these documents to the public. However, in situation where an area is earmarked for perimeter surveys, these documents will be shown to the public only at certain dialogue sessions with the community.” While the Land Superintendent of Bintulu, En Ramzi Abdillah (W85) told the Inquiry that the “aerials photos are restricted document and we cannot make it available arbitrary... they will only be made available upon a court order”. He further emphasized: “[however] the information is available for those who are affected by projects at that point of time. If we have project around there we will show to the group of people with interest around the area. I don’t say everybody can have this information...”

7.12 To compound the problem, the amendments to the Surveyor Ordinance (enacted after Nor Nyawai’s case) effectively disallow the use of community maps as evidence of the boundaries of NCR land. The amendments seek to regulate and licence persons undertaking cadastral land surveys and to establish a regulatory board which would oversee land surveyors, and regulate the activities as well as conduct of surveying assistants. All cadastral land survey plans are also required to be submitted

265 Refers to a particular area as communal or territorial domain of an indigenous village.

266 Means a preserved protected virgin forest by the indigenous community.

267 See Nor Nyawai [2003] 1 MLJ 256 and Madeli bin Salleh [2007] 6 CLJ 509.

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to the Director of Lands and Surveys or any authorised officer for approval before surveying work could be carried out.

7.13 The Inquiry noted that the State Government wanted surveying of NCR land to be regularised and acceptable so that it could be coded and registered accordingly. Asked what happened to NCR land whose boundaries had been created through community mapping, the Land Superintendent of Bintulu (W85) said: “whatever land that has been mapped, it must go through a proper channel. Community mapping has never been and, with this amendment, will never be accepted and recognized by the State Government.”

Delay in processing applications for native title

7.14 The Inquiry found that the inordinate delays in processing land applications have brought about negative consequences to the natives’ claims to their right to land. Negative consequences include the issuance of provisional leases by government authorities to third parties or the gazetting of forest reserves over the native customary rights (NCR) land that

were the subject of native applications. In some cases, native claimants were just told by the Land and Survey Department that there was no record of their land applications.

7.15 At the Inquiry, a community witness Mr Josep bin Sirai (W51) case (K80) informed the Inquiry that, despite being in communication for many years with the communities regarding their claims of NCR in the land area of Parit Sirai Dit and Parit Jerit Achau, the Land and Survey Department issued a PL over the said land in favour of a company, Syarikat Sarananas.

7.16 In another case, Mr Hassim @ Hashim bin Ladis (W89) case K161 informed the Inquiry that despite being officially recognized in 1995 by the Land and Survey Department as the oldest settlements in Sibuti, nonetheless the Department in 2007 issued a PL over part of their land to a company, Syarikat Teamplete Sdn Bhd.

7.17 At best, the handling of native applications for NCR land by the authorities has been inconsistent and dissolute. The Inquiry was informed by a community witness Mr Mustapa @ Mustaffa bin Mahali (W89) that the response to his Ketua Kampung's land application which was made in year 2001 came only in 2004 with a vague statement requesting the applicant to check the status of his application with the office concerned from time to time.

Delay in surveying NCR Land

7.18 Land survey is a paramount pre-requirement in the exercise to recognise NCR land. Section 5(2)(i) read together with section 28 of the Sarawak Land Code, gives a clear indication that surveying of land is a pre-requisite for the alienation of land.

7.19 The Inquiry found numerous cases of delay on the part of the Land and Survey Department to undertake the survey of land claimed as NCR land. In case K169, Mr Ungeh Anak Jam (W100) claimed that the LSD had not responded to their application for survey. He stated "... the villagers of Telabit/Selabit made an application for land to be surveyed to the LSD in 2001, but to date we have not received any reply...".

7.20 Similarly, in the case of Mr Sumen Gasan (W40) case K77 asserted that application for their area in Kabuaw, Batang Igan to be surveyed was first made in year 1988. Documents were produced before the Panel, consisting of correspondences dated as back as 1988 between the headmen of the village and the Sarikei Land and Survey Office. Again, notwithstanding this application, PL was issued over part of their lands in favour of Syarikat Sarananas. Also Mr Sumen Gasan (W40) said that, when their area was placed under the jurisdiction of the Land and Survey Office of Mukah, their applications were not communicated to the said office: "... it is so absurd when Mr Bujang Radin, the Land and Survey

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Official of Mukah, claimed that neither application nor request for survey were made [by villagers] over the disputed land..."

7.21 In another case K8, Mr Rasid Ingee alleged that LSD had surveyed their land in 1992 but they did not hear any news thereafter. He explained: "The problem with Kampung Semawang

is that our land was surveyed in 1992 (jpb 54/92), however no title was ever issued and we have not received any feedback on the matter.”

7.22 The authorities admitted to such incidences of delay, but claimed that it was due to limited financial allocation and the shortage of surveyors. In his statement, Mr Taib bin Belal, Land Superintendent of Kuching also flagged that the existence of overlapping claims further delayed the surveying process. However, the Inquiry was informed that a directive had been issued to all land offices to expedite the survey of NCR land. It was also stressed that as section 5 of the SLC required the surveyors to confirm that the relevant area pre-existed the SLC, there was likely to be delay in the absence of aerial photos taken before 1958.

7.23 Furthermore, since surveys conducted in accordance with section 5 of the SLC would exclude areas of pulau galau and pemakai menoa recognized by the natives, disputes are likely to occur.

Perimeter Survey

7.24 The Inquiry was informed that the state government had initiated an effort, as part of the National Key Result Areas initiative, to conduct perimeter surveys to determine the boundaries of NCR land in Sarawak. Funds have been allocated by the Federal government to survey NCR land and targets have been set to complete the survey of 250,000 ha of NCR land by 2015. Surveyed areas are to be gazetted under section 6 of the SLC.

7.25 However, Mr Johny Kieh Dullah (W55) in case K87 said that this initiative may well restrict natives' claims over land because of the conditions imposed, which include the following;

-The native community must apply for the survey to be conducted. Where there are disputes among the community over the claimed NCR land, the survey will be terminated.

-Survey is limited to settlement areas and cultivated land. Pemakai menoa and pulau galau (preserved virgin jungle) are excluded.

-Once the area is surveyed, the natives are not allowed to make any other NCR claims.

Notices

7.26 Before the final processing of any land applications or the gazetting of parks and other protected areas, the law requires notices to be put up requesting people to come forward within 60 days if they have any objections. Under section 5(3)(a) of the SLC, any native customary rights may be extinguished by a directive issued by the Minister through a publication in the Gazette and one newspaper circulating in Sarawak and exhibition of a notice at the notice board of the District office. A similar provision is found under section 4 of the National Parks Ordinance. Community witnesses complained to the Inquiry that such notices were inadequate for those in the rural areas who have difficulties travelling to the District Offices or access to newspapers.

7.27 When dealing with issuance of notice under section 5(3)(a), the Land Superintendent of Kapit, Puan Norlina Bt Ra'ee (W61) told the inquiry that although the law requires

notification through gazette and one newspaper, the Land and Survey Department had administratively introduced certain procedures and guidelines. She explained “...administratively we hold dialogue sessions with residents of affected area. In addition, the notice will be sent to respective District Offices and Land and Survey Offices to be posted on their announcement boards. In order to ensure attendance at the dialogue sessions, prior notice detailing the date and time is given to the Tuai Rumah. At the same time, public service

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announcements will be made through RTM to ensure that the information regarding the dialogue session reaches everybody particularly those residents who are staying elsewhere due to work...”

Limited Functions of District Officer

7.28 The Inquiry found that the District Officers (DO) of Sarawak have limited functions with respect to resolving issues related to customary land. Their role in land matters and administration relates only to post land alienation/overseeing development and negotiating or mediating over land conflicts after the alienation of land or issuance of Provisional Leases (PLs).

7.29 According to the DO of Serian, Mr Sinde @ Akoi Anak Muling and DO of Lubuk Antu, Mr Langgong Anak Wasam who gave testimonies during the Inquiry, there was high expectation from native communities for them to resolve issues related to NCR land by facilitating negotiations. However most District Officers do not receive formal training on negotiation or mediation.

ii. Plantations

7.30 The Plantations category covers allegations that commercial plantations had encroached or were introduced in native village(s) without their free prior and informed consent. A specific issue under this category was the issuance of provisional lease (PL) on lands with NCR claims.

Large Scale Plantation by Private Companies

7.31 Under section 28 of the Sarawak Land Code, a PL, normally issued for large scale plantation, may be executed in favour of any applicant. The issuance of PL is said to expedite land development and thus generate revenue for the state. It was also asserted that before PL is issued, the Land and Survey Department would verify the available area through diligent checks on aerial photographs taken back in 1954. Nonetheless, the officers admitted that there were instances where aerial photograph may not accurately depict the actual activity on the ground.

7.32 To protect any NCR land which may unintentionally be included in the PL, the Land Superintendent of Mukah, Mr Awang Zamhari (W62) emphasized that “one of the special conditions in the PL required the holder of the PL to excise any NCR land and alienated land

from the PL”. It was also stressed that failure to adhere to this condition may result in the revocation of the PL.

7.33 The Department’s heavy reliance on aerial photographs taken in 1954 is a cause for concern as the photographs may not accurately depict the activities in NCR land over the years. There is furthermore, reluctance by the Lands and Surveys Department (LSD) to recognise virgin jungle preserved by natives as NCR land. The situation as such may result in the native community being deprived of their right to such part of NCR land.

7.34 With reference to the special condition in the PL requiring the excision of NCR land, the Inquiry found that the special condition was specified not in the PL itself but in the PL approval letter. Notwithstanding the claim that the conditions contained in the PL approval letter have the same standing as any other special conditions stated in the PL document itself, it was unclear as to whether a breach of a condition stated in a letter would have the same legal consequences as that of a condition in the PL itself.

Special PL condition

“ the holder of this PL shall not be entitled to a lease of equal size to the area above stated but only to such an area as the survey shows to be available”

7.35 Furthermore, the Inquiry noted that the PL holder was given the responsibility to excise the NCR area. It is not clear whether this applies only to unsurveyed land. This practice may lead to abuse eg, where the native community is persuaded to surrender their land for unfavourable considerations.

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7.36 According to a number of community witnesses, they were not told by the PL holders of this obligation to excise their NCR land and instead were made to enter into direct negotiations with the PL holders over what was termed as ex-gratia payments. In case K77, Mr Sumen Gasaen (W40) claimed that to their understanding, the payment of ex-gratia is considered as relinquishing their land to the company. He said “... if we don’t sell the land, they will continue to encroach on the land. As such we are forced to take ex-gratia payment of RM500 per hectare...”

7.37 Even in instances where the affected communities were informed about the conditions of PL (or LPPF), they were still expected to negotiate on the amount of payment for their land. Most community witnesses admitted that they did not have the experience to handle such negotiations and were thus at a disadvantage. Most do not have access to lawyers to give advice during the negotiation. These witnesses whose NCR lands were included under a PL, or in their language, ‘encroached by the companies’, demanded for the restoration of their land rights and payment of compensations for the damages on their land. This demand was clearly manifested by witnesses in cases K46, K17, K63, K19, K175, K177, K185, K169 and K195.

7.38 The Inquiry found that even where there was information, NCR land was not excluded at the outset before the issuance of PL. In the case of K17, Mr Peterin Anak Jimbau (W25), the witness was able to produce evidence of existence of his village since from year 1946.

Despite this concrete evidence, PL was issued over their NCR land area in favour of a company, Syarikat Subur Semari Sdn. Bhd.

7.39 Furthermore, there is no effective monitoring mechanism to address any complaints from natives pertaining to encroachment of NCR land levied against any PL holder. Almost all the complainants informed the Inquiry that reports lodged to the police were not acted upon. However, companies have often called in the police when communities are driven to stop companies from encroaching into their NCR land and ended up arrested and jailed.

EIA Reports

7.40 The Inquiry also heard complaints of environmental damage resulting from the activities of companies on land over which PL have been issued. The Inquiry noted that companies which have acquired more than 500 hectares of land are required to submit Environmental Impact Assessment Report (EIA) before commencement of any activity on the said land. Such report is to be prepared by consultants registered with its Natural Resources and Environment Board (NREB), which is responsible to ensure submission of EIA Report and compliance to the stated recommendations. The Inquiry found that there have been instances where work commenced even before EIA report had been prepared. The officer of the Sarawak Natural Resources and Environment Board, Puan Sati Anak Bandat (W86) assured the Inquiry that fines were levied on the companies concerned.

7.41 Apart from the NREB, the Water Department and Environment Department also conduct investigations into complaints, in particular complaints alleging pollutions. The Inquiry was told that while it could not be denied that environmental pollution did occur, the level of pollutants particularly in rivers was usually within acceptable limits. However, to communities who depend on the rivers daily, the pollution has made a big difference in their lives. In case K19, Tuai Rumah Alek anak Libau (W1) informed the Inquiry that "... the villagers have been using the polluted water, many villagers are suffering from skin problem...".

7.42 The Inquiry also noted that the inter-departmental cooperation and coordination seems to be lacking.

iii. Community Indigenous Land Development Schemes

Development Agenda

7.43 The Inquiry was also informed by the authorities and land development agencies that native titles would only be issued if applicants go through the government's indigenous land development scheme

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or New Concept.268 A Circular to this effect dated 26 October 2005 is still being implemented. In practice, communities who are ready to accept such proposed land development schemes would be given priority in perimeter surveys of their NCR land and those who did not agree to develop their land would not be given any priority. Such a policy may well coerce NCR landowners to accept the proposed land development scheme.

7.44The Inquiry took cognizance of the establishment of a state-owned statutory body, the Sarawak Land Custody and Development Authority (LCDA) which is entrusted with the duty to assist owners of land to promote and carry out development projects or schemes in certain areas.²⁶⁹ One of its focuses is to develop NCR land by way of establishing joint ventures between land owners and private entities. LCDA is one of the agencies authorized to act as the Trustee (with Power of Attorney) for the NCR landowners in such joint ventures. As explained by Mr. William Jitab (W38), Administrative Officer of the Ministry of Land Development Sarawak the structure of the joint-venture company is as follows: private entities 60%, LCDA 10% and NCR land owners, 30%. LCDA, as Trustee, deals with the private companies on behalf of the landowners.

7.45According to Mr William Jitab (W38), “the land title is supposed to be issued in the name of the joint-venture company for a period of 60 years. And the land will still retain its native title. It is a lease of NCR land.” Theoretically, upon expiry, the NCR landowners may apply to the Land and Survey Department for the issue of a grant over their land. Land development under these schemes is monitored by the Ministry of Land Development Sarawak.

7.46The Inquiry examined two situations where LCDA is involved in developing NCR land. The first involves landowners who being in possession of native land title, voluntarily agreed to enter into a joint venture arrangement as described in Para 2.42 above.

7.47The second situation is where an area is declared as Development Area under section 11 of the LCDA Act 1981 read together with section 18A of the Sarawak Land Code. These statutory provisions appear to give absolute discretion to the Superintendent of Land to issue a PL in favour of a corporation so approved by the Minister in an area declared as “Development Area”. A further reading of section 11 and section 12 of the LCDA Act 1981 indicates that the owner of the land (NCR land included) is given the option of joining the scheme. If he refuses, the land becomes liable to compulsory acquisition.

7.48The Inquiry was informed by Mr Hendry Anak Daris (W60) of the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) - one of the agencies involved in developing such schemes on native land - that expenses to survey NCR land are borne by SALCRA. Pocket surveys are carried out to determine individual boundaries and these form the basis for titles issued to the land owners. The Inquiry was further informed that such titles are subject to a restriction on dealings over the land for a period of ten years. According to Mr Hendry Anak Daris: “. . . inside the title there is written the clause - 10 years no dealing. That is what land survey put inside the title. So within 10 years they should not sell their land. When we develop their land, [it] is for their benefit.” The titles are, furthermore, kept by the Land and Survey Department (LSD) until SALCRA advises LSD to release the title.

Consultations and Free, Prior and Informed Consent

7.49LCDA and the Ministry of Land Development have developed guidelines with respect to preparatory procedures prior to the scheme and with respect to a conflict resolution mechanism. According to Mr William Jitab (W38), under the New Concept, any land development must be discussed at a state-level Task Force for NCR development. Once the development scheme has been decided on and approved,

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268The said New Concept or “Konsep Baru” would have its equitable shareholding in the Joint Venture (JV) Company with LCDA holding 40% (10% for LCDA and 30% in trust for the native landowners) and the investor holding 60%. The landowners would be deemed to have paid their shares of 30% through the surrendering of their NCR lands for the scheme.

269See Preamble of the LCDA Ordinance 1981.

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a one-stop Area Development Committee is set up. This Area Development Committee acts as the trustee for NCR owners. According to the Guidelines for this Committee, two levels of dialogues are to be held; the first level is a meeting with influential people and the ketua kaum, and the second level entails house to house dialogues where an enumerator is also appointed to get comments from community members. The Committee is also expected to facilitate a village-level meeting among ketua kaum, Penghulu and the villagers. All the minutes of the meetings and the list of attendees are expected to be recorded. The One-Stop Area Development Committee is also expected to address any disputes arising from the scheme.

7.50The Inquiry, however, noted that there are allegations that other than the Tuai Rumah, villagers are often sidelined from consultations conducted either by the agencies or private proponents involved. As evidence, the Inquiry found that there were a few cases where plantation schemes moved ahead with their activities without the free, prior and informed consent of all villagers.

7.51Testimonies given to the Inquiry show that the guidelines discussed in Para 2.47 were not properly followed, or were implemented inconsistently.

7.52The Inquiry noted that JV companies implicated in allegations of NCR land encroachment protested that work on the land would begin once an agreement between the company and LCDA is executed. Hence, issues involving land disputes were assumed to have been resolved by LCDA. LCDA, on the other hand, maintained that consultations with the Tuai Rumah and the community were held before the project began, and on a regular intervals during the project.

7.53Mr Benjamin Kudang (W83) an officer with the LCDA explained that: “... dialogue is done; normally we invite the headman to the dialogue. The headman will relay the information to his villagers. At times, communication may be an issue...” However, on closer examination, it was found that the Tuai Rumah made decisions without discussing with the villagers and on many occasions, information imparted at these interval consultations was not relayed to the community.

Absence of Agreement

7.54The Inquiry noted with concern that there was a lack of transparency in the processes for the formation of the JV. There is no agreement recorded between the companies and the natives/land owners; there is only the general Memorandum of Understanding between LCDA (as the trustee for the natives) and the JV company. Yet, Mr William Jitab (W38) claimed that the Ministry has always demanded for a written agreement to spell out the duties

of each party. He said: “When it comes to NCR land there is no gentleman agreement. We must come out with agreement backed by existing law. And in our case the agreement ... is done together with SAG (state Attorney-General).”

7.55 The Inquiry noted the following statement in the website of the Ministry of Land Development Sarawak stating “all rights and interest of NCR landowners which will be merged into one parcel of land will be recorded in a DEED which will be signed by the State Government, NCR landowners and the Trustee. This arrangement will give absolute right to the implementing company to manage the plantation without interference from NCR landowners over period 60 years”²⁷⁰.

7.56 Mr William Jitab (W38) when queried on the statement, replied that the agreement was signed by the Trustee [LCDA] on behalf of the landowners. When asked whether giving absolute right to the company could lead to an abuse of trust, he replied that no investor would participate in the joint venture if this condition were not imposed. There is also no rescission clause in the agreement that would allow landowners to request for their land back prior to the 60-year period.

270 See <http://www.mlds.sarawak.gov.my/modules/mobile/page.php?id=52&pid=139>

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Non-payment of dividends

7.57 A number of land owners stated that they had not been paid any dividend from the day they joined the JV programme. In other cases, the amount paid was not what was promised to them. In one particular case, Tuai Rumah Gayan anak Tupai (W56) affirmed that he and his villagers who joined the JV programmed with SALCRA were not paid any dividend for many years since they joined the scheme in 1993. He said: “We joined the scheme because we want the land title as well as the dividend. But, from 1993 until now, we have not received either.”

7.58 By way of explanation, SALCRA stated that the calculation of dividends was based on production and size of the land, and that payment would only be paid if there was profit. According to Mr Hendry Anak Daris, an officer with SALCRA: “It is based on production. There are areas we pay more and there are areas we pay less. If for instance that area is the phase doesn’t produce, so there won’t be any dividend to be shared. We only pay if there are proceeds made in that area.”

7.59 When asked about the need for an independent external auditor, the Ministry of Land Development and LCDA responded that this requirement did not arise as the JV company already had its own internal auditing process.

7.60 The Inquiry noted the view of community witnesses that apart from payment of dividends, it would also be beneficial if they would be employed in the scheme. However, very few were actually employed because preference was usually given to labourers from Indonesia.

iv. Logging and Planted Forest

7.61 Many community witnesses whose NCR lands were included in areas subject to logging licences informed the Inquiry that logging licensees had caused the destruction of the pulau galau which was their source of sustenance. Pollution of rivers, including small streams, and destruction of forests have caused acute reduction of food resources such as fish, wildlife, vegetables and the destruction of medicinal plants, rattan and building materials. In case K19, Tuai Rumah Alek anak Libau (W1) informed the Inquiry that "... the river is now polluted due to logging activities. The villagers have been using the polluted water, many villagers are suffering from skin problem..."

7.62 The issuance of licences to companies to replant forests in areas that include NCR lands has similarly resulted in the same situation. In cases where NCR land has already been planted with crops, witnesses from affected communities complained that their crops were destroyed in the clearing process by the companies. For example, in case K90, Mr Esit Anak Nalo (W41) complained that a company had cleared the crops on the community's NCR land for the planting of Acacia trees. A similar claim was made by Mr Ranying Guri (W42).

7.63 As in the case of Provisional Leases for plantations, it is the practice of the relevant government authority to transfer its duty to excise NCR land from the area licensed for Planted Forest to the licensee company. None of the affected community witnesses knew about the requirement for the licensee company to consult communities and to excise their NCR lands from the licensed area.

7.64 The representatives of licensed companies appearing before the Inquiry asserted that they had had consultations and discussions with the affected communities with regard to the suitable working areas. The Inquiry found that the companies had assumed that the Tuai Rumah/Penghulu represented the community and consultation with the whole village was therefore not necessary. Mr Edison Jalong, a Surveyor with Shinyang Group of Companies explained that: "We respect the leader and in this case the Tuai Rumah. That's why we meet him first in order to know who the owners of the land are..."

7.65 However community witnesses Mr Gebril Atong (W65) claimed that: "... not all villagers are allowed to attend the meeting, only representatives of those villagers whose lands are affected [by the project]

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are allowed..." The Tuai Rumah/Penghulu was also alleged to have made decisions without discussing the issue with the villagers.

7.66 Whilst community witnesses highlighted the negative impacts of logging and forest plantation on their right to land and livelihood, companies extolled the benefits of their presence near the community settlements. Job opportunities, proper access road and other basic amenities including access to healthcare and schools, were among the benefits highlighted by companies. Mr Andrew Wee, the Assistant General Manager at the Samling Group of Companies stated: "... , 76% of the indigenous people are employed by Samling in our camp creation. If local inhabitants want to work with Samling, we are always accommodative. Our priority is to employ locals, as both the company and the local will benefit from this arrangement. Locals like any other potential employees are employed in accordance with their ability, skills and educational level."

7.67 When requested to clarify the procedure of the issuance of timber licences, Tuan Haji Spuan @ Sapuan Ahmad (W29), Deputy Director of the Sarawak Forest Department (SFD) emphasised that only a holder of Forest Timber Licence (FTL) may carry out logging activities on land in the forest reserve, protected forest and government reserve. It was further stressed that licences would not be issued on alienated land, gazetted communal reserved, temporary occupation licence (TOL) and NCR land as certified by the LSD. While acknowledging that disputes between natives and logging companies often resulted from activities carried out in those areas, including areas claimed as NCR land, he claimed that the Forest Department together with the Sarawak Forestry Corporation would, under such circumstance, conduct their own investigation to verify the status of the disputed areas on the land. In dire situations, logging activities would be halted pending investigation.

7.68 The Inquiry was informed that the State Government had issued a directive to the Lands and Surveys Department as well as the Forestry Department through a memorandum dated 13 June 2011 requiring that all PL, FTL and Licence for Planted Forest (LPF) issued should clearly exclude all native settlement area and any land subject to NCR claim.

7.69 While the Inquiry view this directive as commendable, it is nonetheless concerned over its implementation, especially when the LSD officers who appeared before the Inquiry said they were unaware of such directive and continued to issue PL with the condition requiring the PL holder to exclude all NCR land.

7.70 The Inquiry further noted that while the Sarawak Forest Ordinance stated that forest timber licences are issued for one-year period only, most logging companies who appeared before the Inquiry said they held licences for periods between 10-25 years. When asked about this practice, the SFD officer explained this away by saying that the period of the licence was determined by the state government. It was also mentioned that there is a proviso to the Section 51(2) of the Sarawak Forest Ordinance that allows the Minister to grant licence for a period of more than one year. Section 51(2) states:

“Such licences and permits may not be issued for a period exceeding one year, except with the express permission of the Minister and under such conditions as he may approve, and shall be applicable only to the areas and kinds of produce named therein”.

7.71 The Inquiry found that in some cases, a 60-year LPF was issued to another company forthwith upon the expiry of the FTL over the same area. In most of such cases, the LPF were issued in favour of companies which were related to the preceding FTL holders.

v. Inclusion of NCR land within Protected Areas under the Forest Ordinance 1958 and the National Parks and Nature Reserves Ordinance 1998

7.72 The community witness under this category objected to the inclusion of their community land into the Batang Ai National Park and Mr Igam Anak Ingok (W20) in his case K57 insisted that the land

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was their ancestral land and proof of their continued occupancy such as shrines and old burial sites exists. The Inquiry found that a majority of the areas had not been recognised as NCR

land in certain legislation such as the Forest Ordinance. The Inquiry noted that while natives may be allowed to remain in the area, their way of life as well as livelihood were restricted by the conditions imposed within protected areas.

7.73 The community witness affected by the Batang Ai National Park said that even if the notice on the creation of the park was posted on the notice boards of the district office, people would still have missed the notice and suggested that relevant departments should come to the affected area to inform people since they have the facilities and budgets to do so. The Inquiry found that either no notice or sufficient notices were given by the authorities with regard to the inclusion of NCR land into the Batang Ai National Park.

vi. Other Commercial Development Project (Bintulu Development Authority)

7.74 The Inquiry found that the activities of the Bintulu Development Authority (BDA) in buying and selling the relevant land and the conversion of agricultural land to industrial land could have been done in a more transparent and sympathetic manner. When asked why compensation was not paid for the acquisition of NCR land, Mr Saka anak Pinki, an officer with the BDA explained: “We depend on the status of the land. The appropriate authority to confirm the status of the land is the LSD. If LSD determined that the land is not NCR, we don’t pay compensation because the land is state land”. This again highlights the disputes that can arise as a result of different interpretations of what constitutes NCR land.

7.75 For example, Mr Rapa’ee bin Bahron (W68) complained that the temuda of his village was included in the Kemena Industrial Estate Phase 1 which is under BDA. He said: “we were asked to evict our temuda and were not allowed to continue with our agricultural activities”.

vii. Compensation from Land Acquisition

7.76 The Inquiry found that there were many cases where native communities who have lost their land to private land developers had received either no compensation or inadequate amount of compensation. It is noted that the non-recognition as well as delay in processing land applications from affected natives has resulted in their becoming ineligible to obtain compensation for their loss. If at all, the only amount they receive from land developers are payments described as ex-gratia payments made as goodwill gestures. In one case K9, Mr Jalal bin Mohi (W21), claimed that his village’s NCR land was acquired in order to build a school. However, the villagers were not satisfied with the quantum of compensation offered.

7.77 In cases involving compensation of cultivated area, the affected communities were paid compensation only for the crops destroyed. Many complained about the inadequate amount of compensation. The Inquiry noted that such compensation is based on an outdated system of crop valuation²⁷¹ that does not take into account the loss of revenue on the part of the natives.

7.78 The Inquiry also noted that the consultations on the quantum of compensation for natives (whether for land or crop) were often done in the absence of government officials, thus putting the affected natives at a disadvantage as they lack the necessary bargaining power.

ii. CONSTRAINTS THAT IMPEDE SARAWAK NATIVES’ RIGHT TO LAND

Legal Constraints

7.79 The Sarawak Land Code 1958 (SLC) does not appear to give full recognition to adat, customs and practices of the natives in establishing communal land boundaries. Research shows that the garis

271 Based on the “Valuation Branch Circular No. 5/2005” issued by the Land and Survey Department.

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menoa in Sarawak, which was accepted by the Brooke colonial administration as outlined in Secretariat Circular No 12, 1939, should still be applicable. The court has also recognized and accepted garis menoa as an element in determining NCR land but this has yet to be implemented by the State authorities.

7.80 There is no legal protection for the rights of nomadic and semi-nomadic Penan communities through the recognition of their land tenure system, and no legal support for communities claiming coastal and sea areas, as there are currently no provisions dealing with them in the SLC. This was confirmed by the Sarawak LSD. It is however noted that the Penan have an elaborate customary land tenure system (see also Chapter 4).

7.81 In the event the claim for NCR land is rejected by the Superintendent of Land, section 5(4) of the SLC allows the IPs to send a notice to require the matter to be referred to arbitration within 21 days from the receipt of the decision. It is noted that, in practice, the timeframe has proven to be too short (21 days) and the mechanism of public information of any intended extinguishment of NCR to land by way of a notice in one statewide newspaper is neither practical nor adequate, especially for communities living in the rural areas.

7.82 In Sarawak, many natives have resorted to filing cases in court to determine the validity of their NCR claims. However, court cases take a long time to be heard and in the meantime evidence on the ground can be destroyed especially if a company or a development agency is not ordered to stop work through a court injunction. This slow process of redress mechanism available through judicial process is a constraint, which impedes the full enjoyment of the indigenous peoples’ rights to land.

Policy Constraints

7.83 The Inquiry was informed by the Sarawak LSD that although it is not an officially written policy, for practical considerations priority is given to the conduct of perimeter surveys on areas that are not in dispute and where the determination of cultivated areas is based on the 1958 cut-off point. The Sarawak LSD will not carry out surveys where there are overlapping claims or boundary disputes. Many communities were often forced to agree to those terms despite their disagreement on the criteria so as to take advantage of the Federal government allocation and to get security of tenure.

7.84 There appeared to be allegations that land, including land claimed by natives, which had been declared as Forest Reserves (thus extinguishing NCR) was subsequently degazetted as

Forest Reserve and later alienated under a Provisional Lease to private companies. This could lead to a serious impediment to natives' rights to land.

7.85 The Inquiry also received information and heard from witnesses who had to be resettled when their customary land was chosen for infrastructural development. There appears to be no clear policy in terms of land ownership for those communities dislocated from old areas to new settlement sites. In the resettlement of communities to Sungai Asap as a result of the building of the Bakun dam, land ownership in the current resettlement remains a thorny issue for both residents in the area and the new settlers.

7.86 Companies which are FTL or LPF licence holders are apparently expected (by the authorities) to build infrastructure for the native communities, a requirement which the companies are not particularly happy about as they feel that such responsibility should rightfully rest with the government. Further, they are required to pay a levy to the Rehabilitation Fund which is said to be used to pay for the community affected. The Inquiry noted that absence of clear policy guidelines coupled with insufficient information relayed to the native communities about this policy have led to many unfortunate tensions between the companies and native communities such as the erection of blockades in the affected areas.

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7.87 Another policy constraint that could impede native rights to land is the absence of training for company surveyors responsible for identifying NCR land that has to be excluded from the area under the company's Provisional Lease. The Inquiry heard several company witnesses who said their survey indicated no signs of houses or crops in the area, a claim which was disputed by community witnesses from the area.

7.88 The new concept of the government regarding indigenous land development schemes has given investors the right to carry out large-scale agribusiness without any intervention from the landowners for a period of 60 years. Since, a government agency is appointed as the trustee for the native landowners, it is not considered necessary to include land owners in negotiation process, although such inclusion would ensure transparency and increase their trust in the scheme.

7.89 There is also no policy on timeframes in issuing titles for NCR land in agricultural development schemes. In one example, in a land development scheme by SALCRA where people joined in order to get dividends and title for their NCR land in 1993, titles have yet to be issued. No mechanism, such as appointing a plantation advisor, has been put in place which could put back on track any company that was not making profits.

7.90 Often there is no time gap between issuance of licences in an area in order to check on NCR claims. Once logging in an area is completed, another permit and licence for planted forests or to grow oil palm is immediately granted.

7.91 Although redress mechanisms such as mediation has now been instituted, the remedies are usually short-term in nature as they do not address root causes. Once an issue is resolved with one company, other issues which crop up would need a whole new series of negotiation and mediation.

Administrative Constraints

7.92 The granting of forest concessions by the government to logging companies and the leasing of land for palm oil cultivation have adversely affected NCR land claimants. In the granting of licences such as timber licence, licence for planted forests, and oil palm cultivation permits to companies, the authorities have included conditions to excise the NCR land from the project or development area. However the LSD does not provide any clear guidelines to companies on how to determine NCR land. Furthermore, there is no proper monitoring of the companies' activities and responsibilities with the result that some companies appear to get away with only ex-gratia payment to NCR land claimants. Moreover, the Environmental Impact Assessment (EIA) seldom includes NCR land in the report and does not appear to have taken into account the views of affected communities.

7.93 Many departments are faced with shortage of staff which results in either absence or lack of cohesive inter-departmental cooperation and coordination. This, in turn, leads to either no monitoring or irregular monitoring of companies' activities on the land. Moreover, lack of or insufficient data on native communities has made it hard for the authorities to conduct comprehensive environmental assessments. Often total reliance is placed on the EIA reports submitted by the appointed consultant.

7.94 Cutting across the issues is the difficulty with information. Many community witnesses were constrained by poor literacy that impedes their full enjoyment to land rights. In most cases complaints and follow-up on the status of their land were done orally. The statements from community witnesses were met with denials or that there were no official records of their complaints. When the surveyors came to their villages, they could not explain their concept of pemakai menoa properly. There was also no central office or officer where and whom native communities could turn to for assistance in dealing with problems caused by their illiteracy and inability to communicate with surveyors when defending their NCR claims.

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7.95 Community witnesses informed the Inquiry that they faced constraints in obtaining support from political leaders in defending their NCR land, especially in the acquisition of NCR land involving large-scale development projects that involved politicians and influential people.

7.96 Community witnesses expressed to the Inquiry, their frustration that their efforts to defend their customary rights were often met with stern actions from the police and the government. Gebril Atong, a Punan Bah said "Life is centred on cash but we are still poor and all land was taken from us. We are told that this is to develop and modernise our country, so anyone who dares to question development is labelled anti-development. All lands are considered as state land." Police reports from communities were allegedly not acted upon.

Gaps in Perceptions and Understanding

7.97 Gaps in the understanding of native perspectives to land persist because of limited open fora to discuss such perspectives and the needs of indigenous peoples. These gaps are made

worse by the lack of response to requests from communities for information regarding proposed development projects.

7.98 Sarawak natives hold strongly to the notion that they do not need to apply for a title to the land that was handed down to them. Those who have lived for generations in a particular area claim ownership by virtue of possession, settlement and/or traditional use. They consider their land to belong to them either individually or collectively by virtue of continuous occupation, and do not see the need to register ownership. Collective ownership of land is generally still preferred, as this is in line with the way indigenous communities organise themselves, and as governed by their adat. Collective ownership of land also assures cohesiveness as a community and identity. This is a serious constraint to their rights because the state only recognises ownership of land which has been registered or issued with documentary titles or gazetted as a reserve.

7.99 In a number of cases, payment by companies is considered a payment for damages or saguhati and not compensation for acquisition of the land. Many claim they have no other place to go.

Other Constraints

7.100 Most remote villages in Sarawak have poor road and communication systems, so they rely on river travel, which is very expensive. Travelling to government offices to check the status of their lands is therefore rare. Community witnesses complained to the Inquiry that they often find staff of government departments unfriendly and not helpful and who did not record their oral enquiries or complaints.

7.101 Another constraint is the way some indigenous community leaders are seen to be easily bought over by private companies, or threatened with sacking or actually sacked for not supporting projects planned in their communities. There were also complaints on the use of thugs by companies, and biased police and field force personnel to threaten people. Community organisations, and NGOs who assist communities with their claims or complaints are constantly harassed by special branch police.

iii. EFFECTIVENESS OF RESPONSES TO INDIGENOUS LAND CLAIMS

7.102 The Inquiry is conscious of the fact that there seems to be very few legal, administrative and political measures that can be considered effective responses in so far as protecting and promoting indigenous peoples' right to their land is concerned. Most of the responses from the government are in the form of amendments to laws, but while these may primarily facilitate development in a particular area, it could curtail indigenous peoples' right to land.

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Legal Responses

7.103 Production of maps that assisted a number of communities in successful court actions has apparently prompted an amendment to the Surveyors Act which now requires that all maps to be used in a court of law to be produced by an authorised surveyor. This amendment

makes community maps produced by communities unacceptable in courts. It has created an unsupportive environment for participatory mapping. Such legal response is a step backward in the recognition of indigenous rights. Community maps that are produced according to required standard have been lauded globally not only by experts in the field but also governments in clarifying boundaries and land use.

Policy Responses

7.104 As part of the Bumiputera Laboratory discussions to prepare the National Key Result Areas by the Federal government in 2010, the Sarawak state government decided to conduct periphery surveys of NCR land. A grant amounting RM10 million was approved to conduct periphery surveys which the Sarawak Lands & Surveys has planned to cover 250,000 ha of NCR land by 2015. However, such an important political decision has been rendered ineffective due to non-recognition of indigenous perspective to land, inter alia the concept of pemakai menoa and pulau galau.

7.105 Due emphasis should be given to the principle of free, prior and informed consent of the indigenous communities whose NCR area will be effected or earmarked either for development or plantation or logging or any kind of reserved area. The relevant government agencies should ensure an inclusive consultations process and this should not be limited solely to the leaders of the communities.

7.106 Poverty eradication programmes, including land under Konsep Baru schemes, have been rendered ineffective because land rights are not properly addressed. As discussed in the chapter under Judicial Development and in the research report, issues related to resettlement as a result of infrastructure development such as dams will continue to persist because responses to compensation and land claims are inadequate.

Administrative Responses

7.107 The state government's effort to assure Sarawak natives of its concern about protecting NCR land has been negated by administrative responses that have brought about fear and negative repercussions such as arrests of those who stand up for their rights to land, negative statements and threats against NGOs and persons who assist the natives struggle for their land rights and appealing against court decisions that were in favour of NCR.

7.108 The policy decision to attach a condition to excise NCR land from Provisional Leases and Licence for Planted Forests is ineffective because such condition has not been stated clearly in the licences issued to companies and government-linked companies (GLCs). Only one licence that the Inquiry had sight of clearly stated this condition, while in other licences particularly that of larger corporations, such condition, if any, was rather vague. The Sarawak Lands and Surveys Department also does not have the capacity to monitor the compliance of the conditions.

7.109 The use of the police in dealing with NCR land conflicts have become common but the unfortunate perception of police biasness rather than strictly maintaining law and order has only put them in a bad light and made their intervention ineffective in resolving issues. This perception persists because the numerous police reports lodged by the natives were not acted upon.

7.110 The separation of power between those deciding on land ownership and those promoting development projects represents a positive administrative structure, which allows for check and balance in the decision-making system. However because development projects are often given priority by the state, native applications for recognition of individual or collective land may be sidelined.

CHAPTER 8

FINDINGS - PENINSULAR MALAYSIA

8.1 This Chapter discusses the findings for Peninsular Malaysia and contains three sub-sections i.e. issues related to land rights of Orang Asli (ToR 2); constraints that impede rights to land (ToR 3); and the effectiveness of responses to land claims (ToR 1). The first section on issues related to Orang Asli land rights contains a summary of the issues based on information from the public consultations, public hearings, academic research commissioned by the Inquiry, as well as from written and oral replies from the government agencies and corporate entities. The findings are supported by the cases presented at the Public Hearings. The summaries of these cases can be found in a CD in the Annex.

8.2 During the Consultations in five states in Peninsular Malaysia, 287 statements were recorded (Selangor

– 50, Perak – 70, Pahang – 71, Johor – 48, Kelantan – 45, Negeri Sembilan – 2 and Melaka – 1), of which 17 were considered outside the scope of the Inquiry. For the purpose of the Public Hearing, the statements were categorised and 60 representative cases were selected. Most, if not all, of the cases for the public hearings involved more than one issue.

i. ISSUES RELATED TO ORANG ASLI LAND RIGHTS

General Administrative Issues

8.3 Government agencies informed the Inquiry that all matters involving the Orang Asli are channelled through the Department of Orang Asli Development or Jabatan Kemajuan Orang Asli (JAKOA), formerly known as the Department of Orang Asli Affairs or Jabatan Hal Ehwal Orang Asli (JHEOA). The Department of Lands and Mines also informed the Inquiry that they only accepted applications for an Orang Asli area to be gazetted as an Orang Asli Reserve from JAKOA.

8.4 JAKOA admitted that it had insufficient capacity and resources (financial and otherwise) to meet most of the requests of the other government agencies, especially with regard to the securing of the customary lands of the Orang Asli. Compared to other financial allocation, surveying of Orang Asli land gets a relatively much lower annual budget.

8.5 The Orang Asli's claims to their traditional lands and territories are often 'invisible' in the eyes of the District and Land Office or Pejabat Daerah dan Tanah (PDT) and/or the Lands and Mines Office or Pejabat Tanah dan Galian (PTG) at district and state levels respectively largely because the claims of the Orang Asli to their customary lands are not marked or identified in the cadastral maps of the Department of Survey and Mapping Malaysia or the Jabatan Ukur dan Pemetaan Malaysia (JUPEM).

8.6 The cadastral maps of JUPEM in the land offices are regarded by the PTG and the state government as definitive of the status of the land in the state. Typically, Orang Asli lands that have not been gazetted as Orang Asli Reserves are not indicated, marked, blocked or caveated as Orang Asli lands on such maps. So long as those lands are not marked as such on

the JUPEM maps, it is deemed by the authorities that Orang Asli rights to these lands do not exist. According to PDT, such areas can be 'blocked' or earmarked for Orang Asli in the land offices maps, but no PDT has taken the pro-active step to do so.

8.7 In case A54 involving an allegation that the Federal Land Development Agency (FELDA) had encroached on an estimated 1,880 acres of Temiar land in Kg Jeram Papan, Gerik in Perak, FELDA witness Ms Harisah bt Abu Hasan (W25) claimed that they were unclear as to the status of Orang Asli land as it

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was not marked on the PTG map. As such, no discussions were held before the opening of the rubber plantation and no compensation paid on land that was taken. Perak PTG witness, Mr Syed Mokhtar b Idris (W43) said the said land was bought by FELDA from settlers and claimed that the PTG never received an application to gazette the area as an Orang Asli reserve or any complaints from the Orang Asli.

8.8 Another problem raised repeatedly at the Inquiry is the marking of foraging areas (kawasan rayau) on maps or the lack of understanding of the kawasan rayau, which often lead to areas being awarded to other bodies. In case A34 involving traditional land claimed by Semai communities in Kg Batu Barangkai in Kampar, Perak, Mr Mohammed b Sudin (W19) representing PDT Kampar said that because the reference on kawasan rayau was neither clear in the Aboriginal Peoples Act nor clearly marked on the ground, the government approved the 123-acre wakaf site to the Perak Islamic Council. However, the Council has agreed to surrender the area and return the area to the Orang Asli.

8.9 In some cases, the Orang Asli complained that their correspondences and appeals on land-related issues to various government agencies (eg. JAKOA, PDT, and PTG) had not received any response or were dismissed. In case A253, the complaints by the Mahmeri communities who were forced to move from their original villages in Kg Kokoh and Kg Permatang Tareh in Pulau Carey, Selangor were simply dismissed by the authorities, while Sime Darby, which has been granted ownership to the land said it is the legal owner of the land.

8.10 There were also complaints of fraudulent or dishonest land deals and transfers involving Orang Asli traditional lands and territories in the land office. In case A268, a Temuan settlement in Kg Jambu, Dengkil was included in the land alienated to Syarikat Piagamas for development. Because the community refused to move and persisted in the appeal against the transfer of their land, the government cancelled the project in April 2010. However, the application for the land to be gazetted as an Orang Asli reserve could not proceed pending a court decision in the case brought by the company against the Selangor Government for cancelling the project.

Gazetting of Orang Asli lands

8.11 There are three categories of Orang Asli customary lands, as recognised by the government: Gazetted Orang Asli Reserves, Orang Asli areas approved for gazetting as Orang Asli Reserves but not gazetted as yet, and Orang Asli lands applied for gazetting but not approved yet. The approving body in this case is the State Authority, or in practical terms, the State Executive Committee or Majlis Mesyuarat Kerajaan Negeri (MMKN).

8.12 Data as presented to the Inquiry by JAKOA on the status of Orang Asli lands as at 1990 and 2010 can be summarised as follows:

Status of Land (hectares)	1990	2010	Change	% change
Gazetted Orang Asli Reserves	20,666.96	20,670.83	3.87	0.02
Approved but not gazetted	36,076.33	26,288.47	(9,787.86)	(27.13)
Applied for gazetting but not approved	67,019.46	85,987.34	18,967.88	28.30
Total	123,762.65	132,946.64	9,183.99	7.42

8.13 The data shows that there has been only a very small increase (3.87 hectares or 0.02 per cent) in the number of gazetted Orang Asli reserves over the 20-year period. The data also shows that a

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total of 9,787,86 hectares of Orang Asli lands approved for gazetting by the state authorities never became Orang Asli reserves. Some of these approvals were made in the 1960s and 1970s.

8.14 There was an increase in size of Orang Asli lands applied to be gazetted as Orang Asli reserves (18,967.88 hectares or 28.30 per cent). However, the status of such land applications to be gazetted as Orang Asli reserves is not guaranteed particularly in the context of the new Policy on the Alienation and Development of Land for Orang Asli for Agricultural and Residential Purposes or the Dasar Pemberilikan Tanah kepada Orang Asli Untuk Kegunaan Pertanian dan Kediaman (DPTOA).

8.15 Nevertheless, the overall statistics do not reveal the local situation within specific Orang Asli localities. The recognition and security of Orang Asli traditional lands and territories are being jeopardised by one or a combination of three administrative shortcomings:

Under-gazetting. This occurs when the full extent of the Orang Asli customary land is not taken into account when an Orang Asli settlement is gazetted as an Orang Asli reserve.

Non-gazetting. This occurs when lands which have been approved by the state authority to be gazetted as Orang Asli reserves are not gazetted because of an administrative shortcoming. In most cases, this is due to the failure to produce a properly-surveyed map of the area to be reserved, in compliance with normal land alienation procedures.

De-gazetting. This occurs when an Orang Asli reserve is degazetted as such, and the land reverts to the state and/or is given to another entity.

8.16 As an example of under-gazetting, Bah Jalia/l Bah Jit (W4) of Kg Batu 6, Jalan Pahang, Tapah in case A47 lamented the difference between the land sizes applied to be gazetted by the Orang Asli community, and the final area approved for gazetting. The problem according to W4 lies in the survey of the area in 1968 and 1971. W4 also complained about the allocation of land within the Orang Asli Reserve to outsiders for building of bungalows and for growing flowers. It cannot be ascertained how such project was approved.

8.17 One example of an administrative shortcoming is in case A246, where the process of gazetting an Orang Asli reserve is still pending after more than 10 years. Mr Mohamad Yasid b Bidin (W16) of PDT Kuala Langat said Sime Darby had set aside 329 acres of land in 2002 as a reserve for the Orang Asli in Kg Sungai Bumbun in Pulau Carey but because Sime Darby still owes tax to the state government and that JAKOA has failed to put in an application for the land, the land has not been gazetted as an Orang Asli reserve. JAKOA's Deputy Director General, Mr Nisra bin Asra Ramlan (W47) however denied receiving any documents regarding Sime Darby's decision.

8.18 The data in the table above only refers to lands recognised by the government as being occupied by the Orang Asli, which in 2010, amounted to 132,946.64 hectares. It is estimated that this area represents only 17 per cent²⁷² of the lands claimed by the Orang Asli.

8.19 There were some reservations expressed regarding gazetting of land as Orang Asli Reserves, strictly from an economic viewpoint. W16 in case A246 said the state government would receive not any premium from Orang Asli reserves compared to alienation of land for economic development. Case A225 is another illustration of the priority given to the economic benefits to be derived over the interests of Orang Asli. In that case, although it was aware that Kg Orang Asli Sungai Putur, Kahang, Johor had existed since 1952 i.e. earlier than the gazetting of the area as a Malay Reserve in 1954, yet PDT Kluang allowed a non-bumiputra company, Syarikat Kemasik Sdn Bhd, to operate in the area and even issued a 30-day eviction notice to the Jakun community there.

8.20 Reservations although a positive move, may not necessarily be in line with expectations of the Orang Asli. For example, the reservation of a rayau reserve in Kuala Langat North Forest Reserve, Selangor

272 Based on a calculation from JHEOA's Data Tanah (1990)

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the size of 12,900 acres (gazette no 2578). With the allocation of this area, villagers are expected to move and prohibited from entering their old areas.

8.21 Although the PDT/PTG said the process of gazetting a reserve takes about 3 months, in most cases, the process would take much longer. Some witnesses said that they were forced to submit more than one application/request after they received no feedback. Batin Ogeh bin Gandoh (W1) in case A226 told the Inquiry that several applications had been submitted to the authorities for Kg Sungai Peroh Orang Asli to be gazetted as an Orang Asli Reserve. Other than being told that their applications were still being processed, Batin Ogeh had not heard of any other progress made in the processing of the application by the authorities. In response, Mr Shahril Nizam b Abd Rahim from PDT Kluang said they received an application for the OA Sungai Peroh reservation (150.245 ha) in June 1998, which the office had processed and forwarded to PTG Johor in January 2006, but had not received any response.

8.22 There are also examples of delays in processing and/or eventual rejection of applications for Orang Asli reserves. In case A228 in Kg Pengkalan Tereh, Mukim Nyior, Kluang, Johor, Batin Jarih Bin Uni said he applied for the area to be gazetted an Orang Asli Reserve in 1976.

He produced letters saying the application had been approved but despite efforts by the PDT and JAKOA, the land was eventually alienated to non-Orang Asli individuals in 2010.

8.23 An example of an Orang Asli reserve that has been de-gazetted is case A168 involving Kg Permatang Keledang Orang Asli Reserve in Pekan, Pahang, which was gazetted in 1959 but was cancelled by the state authorities in 1970 and reverted to state land. The Inquiry deduced from information given by PDT Pekan that the government wanted development in the area that would have been more economically beneficial.

Fiduciary Duty of JAKOA

8.24 The fiduciary duty of the Department of Orang Asli Development (JAKOA) is unambiguously stated in the preamble to the Aboriginal Peoples Act: “An Act to provide for the protection, well-being and advancement of the aboriginal peoples of Peninsular Malaysia.” This is further reinforced by the appointment of a Director-General of Orang Asli Affairs with explicit responsibility for the administration, welfare and advancement of the Orang Asli.

8.25 However, it was widely and repeatedly asserted during the Inquiry that the JAKOA has not been fulfilling its fiduciary duty, as evidenced by civil suits taken by Orang Asli against the government on this matter, and that JAKOA has in fact from time to time acted against the interests, well-being and advancement of the Orang Asli.

8.26 State authorities made it clear that the application for Orang Asli Reserves must be made by JAKOA. At the Inquiry, many witnesses representing whole villages and in some cases, groups of villagers came forward expressing anger and disappointment with JAKOA that their applications for their traditional land to be gazetted were not forwarded to the relevant authorities. Among these are A206 in Kg Lebu Kangkar, Senagar, Johor; A29 in Kg Gesau, Ulu Slim, Perak; A136 in Kg Satak and A181 in Kg Sungai Mangkapor, Kuantan in Pahang. In A181, Mr Abd Rahman bin Abdullah (W6) of PDT Kuantan said PDT never received any application to gazette Kg Mengkapor as an Orang Asli reserve.

8.27 Further support for the assertion that JAKOA has failed in fulfilling its fiduciary duty may also be drawn from the number of Orang Asli lands that have been approved for gazetting as Orang Asli reserves in the 1960s and 1970s but which were never gazetted as Orang Asli reserves due to the failure of JAKOA to produce the required survey maps. As the table above indicates, of the 36,076.33 hectares that was approved to be gazetted as Orang Asli reserves between 1990 and 2010, only 3.87 hectares had actually been gazetted.

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8.28 Furthermore, of the 36,076.33 hectares that were approved for gazetting in 1990, only 26,288.47 hectares remain with the same status in 2010, leaving a question mark over the status of the balance of 9,783.99 ha (i.e. 9,787.86 minus 3.87 ha). In many of those cases, the Inquiry was informed that the lands had reverted to the state as state land or had been transferred to other entities. In some areas, these formerly approved Orang Asli lands were turned into Malay Reserves.

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8.29 In case A245, PDT Kuala Langat (W16) said that the Temuan settlement of Kg Orang Asli Bukit Serdang in Banting, which was formerly gazetted as a Malay Reserve has been approved by the Selangor government to be cancelled and gazette as an Orang Asli reserve. However, between the applications for the Orang Asli reserve in 1965 until today, there has been no follow-up action and the Orang Asli settlement area remains as state land and the surrounding areas remain a Malay Reserve.

8.30 JAKOA informed the Inquiry that the main reason for their inability to gazette Orang Asli reserves under the Aboriginal Peoples Act is that JAKOA is a federal agency while land is a state matter. JAKOA's Deputy Director General (W47) also refuted the statements by PDT and PTG that JAKOA has often failed to submit applications for Orang Asli reserves. He countered that the various PDT and PTG have reported loss of files containing applications Orang Asli reserves.

8.31 The Inquiry noted JAKOA's engagement with other parties (including government agencies, corporate interests and individuals) in deals/agreements/MOUs without the consent of or consultation with the Orang Asli because it considers itself the representative of the Orang Asli. In several instances, JAKOA referred to itself as the father/godfather/parent of the Orang Asli. However, many Orang Asli witnesses considered JAKOA as being very paternalistic, making decisions affecting the communities, without much consultation with them and expecting their full compliance.

8.32 Community witnesses told the Inquiry that JAKOA had never supported them in situations where disputes over their customary lands were brought to court. According to a senior Official of the Department, the position of JAKOA was that any Orang Asli who took any court action against the Government was viewed as their adversary.

8.33 As the department tasked to provide protection and well-being of the Orang Asli, JAKOA is expected to help bridge the Orang Asli's expectations and to facilitate consultations with the community. In case A149, the Semai community from Pos Lanai said that they were reluctant to move to Pos Pantos because the area is hilly and near to a Malay village. However, discussions on the relocation were only done with the Batin of the village, who then convinced people to move. PDT said it was not explained to them why the Orang Asli resisted. In this case, a logging permit was already issued in Ulu Lanai.

Legitimate Expectation of Orang Asli

8.34 The Inquiry heard that on various occasions, Orang Asli were led to believe that their customary lands were theirs to own and occupy. These assurances often came from JAKOA officials, politicians, government servants and those having authority over land matters in the state.

8.35 Several Orang Asli complainants reported that they were informed by the authorities that they were free to live, hunt and forage where and as they like. The Orang Asli usually took this at face value. The PDT-Pekan, for example, while admitting that there were no Orang Asli reserves in the district, told the Inquiry that the "Orang Asli are free to practise their way of life there. But not in a big commercial way." Such remarks and promises have led the Orang Asli to genuinely believe that their lands are recognised and secured.

8.36 The Inquiry was also told that promises to secure the land rights of the Orang Asli had been made by government officers whom the Orang Asli held in good stead. Letters to that effect were also

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submitted to the Inquiry. In response, JAKOA, while asserting that they did not purport to make promises outside their jurisdiction with respect to land, admitted that some officers might have had genuine intentions, but such promises remained unfulfilled largely because of the mobility of those officers and the failure of their successors to follow up on the promises made.

8.37 Orang Asli witnesses also said that the building of PPRT houses (houses for the hardcore poor) and the provision of infrastructural facilities in Orang Asli settlements, including those that were not gazetted, led them to believe that recognition had been accorded to their customary lands.

8.38 In case A120, Wan Ngah Murni Alangsodi (W8), a Temiar from Kg Jenut, RPS Kuala Betis in Kelantan, expressed her frustration and anger when the community was ordered to relocate against their will from Kg Jawa to Kg Jenut in 1986. The community had to build the houses themselves, which are now dilapidated, and they cannot rebuild as, being surrounded by plantations, they have no access to building materials.

8.39 Some Orang Asli witnesses who were resettled during the Emergency for security reasons also told the Inquiry that they held on to the promise made by the then Prime Minister, Tunku Abdul Rahman that they would be allowed to “return to their original homes and live in peace”. However, some communities were not allowed to do so and now face overcrowding and insufficient land-base in resettlement or regroupment schemes.

Inter-agency Coordination and Perception

8.40 While JAKOA denies that it is so, the general perception among government agencies is that JAKOA is responsible for all matters involving the Orang Asli, or that the agency must go through JAKOA. During the public hearings, the Inquiry heard several instances of government agencies passing the responsibility for Orang Asli matters to other agencies or to JAKOA and vice versa.

8.41 Some of the government officers who testified at the public hearings, including those from the PDT and District offices, admitted to being ignorant of the Aboriginal Peoples Act or of court decisions/ precedents favouring Orang Asli on land matters.

8.42 To ascertain the location and identity of Orang Asli customary lands, the government agencies rely on the markings or indications on the cadastral maps put out by JUPEM. Consequently, where there are no markings or indications of an Orang Asli area or reserve on those maps, the assumption is that the Orang Asli have no rights in those areas. Complaints and years of worries on the part of the Orang Asli could be avoided if markings are made in the cadastral maps which are available to the public and companies.

8.43 In case A251, the Temuan community of Kampong Orang Asli Kolam Air Bangkong, Selangor are worried about the proposed construction of the MEX Expressway, which they thought would involve their land and destroy their crops. YM Raja Azhar Raja Alias (W22) from the PDT Sepang and Hulu Langat, however, explained that the land which had been alienated (to six companies) did not include the kawasan rayau or foraging area. Apparently, the area which has been cultivated by the Orang Asli is within the Bukit Bangkong and Bukit Tampoi sakai reserve. Such an assurance, if conveyed earlier, would have allayed the concerns and worries of the affected Orang Asli.

8.44 The need for better inter-agency coordination is significant and the willingness by the relevant agencies to be pro-active in their responses can result in the resolution of many outstanding cases. In case A249 involving access to traditional burial grounds of the Mahmeri community of Bukit Perah, the complaint by Mr Arif bin Embing (W4) was resolved at the Inquiry itself. Once the Kuala Langat PDT confirmed that the burial grounds were outside the perimeters of the Ministry of Defence (MoD)

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shooting range training grounds, it was then just a matter of arranging safe access to visit the graveyards. MoD witness, Major Baharum b Ismail (W8) said there were no restrictions on access and agreed to meet with the community to resolve the issue.

8.45 There are also some glaring gaps in communication and coordination between JAKOA and other departments, including the PDT/PTG. In case A207, while the Johor Parks Board, Department of Wildlife (Jabatan Perhilitan) and Forestry Department made no admission on the excision of Kg Orang Asli Air Tawas from the Gunung Ledang Forest Reserve in 2009 (this area was gazetted as Park in 2005), Mr Suhairy b Abd Ghani (W35) said correspondences to that effect had been received by JAKOA.

8.46 Similarly, in case A223 regarding Kg Punan, Mersing, Johor, both Mr Abd Hakim b Abd Manap (W26) of PDT Mersing and Mr Khairul Adha b Mat Amin (W30) from the Wildlife Department, denied receiving any applications from JAKOA for the area to be gazetted as an Orang Asli reserve. In response, W35 claimed that JAKOA had applied for the cancellation of the Wildlife Reserve in 1985 and 2001 and to gazette the area as an Orang Asli reserve.

8.47 State PDT offices have acknowledged that the Orang Asli land issue is very overwhelming and difficult to resolve. In this regard, the Inquiry was concerned that the responsibility to solve the Orang Asli land problem is placed squarely on JAKOA, more so when the department does not allocate sufficient human and financial resources for land surveys to be done, which are critical in resolving the issue.

Rejection/Non-application of Policies and/or Legal Precedents

8.48 The first known declared policy statement of the government for the Orang Asli is the 1961 'Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia'. According to the testimony of the JAKOA Director-General in the Sagong Tasi's case, the 1961 Policy Statement is still in force and has not been rescinded.

8.49 Para 1(d) of the 1961 Policy Statement reads as follows:

The special position in respect of land usage and land rights shall be recognised. That is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically in line with other communities in the country. Also, the Orang Asli will not be moved from their traditional areas without their consent.

8.50 The Policy Statement presumes the duty of the state to recognise the right of the Orang Asli to their customary lands and for it to be given due recognition and force of law. Judicial decisions in cases involving Orang Asli land matters (e.g. Sagong Tasi, Adong Kuwau, and Khalip Bachik) have laid down legal precedents the prior rights of the Orang Asli to their customary lands are to be recognised. Such lands are to be treated as if they were the same as titled land. Such policy, declaration and legal decisions, however, are not widely known among government officers, or if known, are not followed for various reasons.

8.51 A senior official of JAKOA had admitted in his testimony to the Inquiry that the UNDRIP principles were not consciously promoted or internalised within the Department due to the different interpretation of the term “indigenous”.

8.52 The Inquiry took cognisance that the PDT is guided by the National Land Code. This further suggests that, as far as land matters involving the Orang Asli are concerned, the relevant agencies and officers tend to restrict themselves to legal provisions as prescribed under existing laws such as the National Land Code, and are not guided by government policies, international declarations and court decisions in their interpretation of the law.

8.53 As a result, the principle of free, prior and informed consent (FPIC) is not adhered to in most land matters involving Orang Asli. This was further exemplified by a document submitted to the Inquiry,

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the Aku Janji, which was being distributed by JAKOA Pahang, requiring Orang Asli land scheme participants to sign away their rights without sufficient information or discussion.

DPTOA – Policy on the Alienation and Development of Land for Orang Asli for Agricultural and Residential Purposes

8.54 JAKOA informed the Inquiry that on December 2009, the National Land Council approved the Dasar

Dasar Pemberimilikan Tanah kepada Orang Asli Untuk Kegunaan Pertanian dan Kediaman (DPTOA) or the Policy on the Alienation and Development of Land for Orang Asli for Agricultural and Residential Purposes for Agricultural and Residential Purposes, which sought to grant 29,990 Orang Asli households permanent (individual) titles to agricultural lots varying in size from 2 to 6 acres (0.8 to 2.4 hectares). Each household would also be given up to a quarter acre (0.1 hectare) for their house and orchard (dusun).

8.55 Under this Policy, it is envisaged that Orang Asli would be granted titles to about 50,000 hectares of land. This appears to be close to the sum of the Orang Asli reserves and the Orang Asli areas approved for gazetting in 2010 i.e. a total of 46,959.30 hectares.

8.56 Under the new policy, Orang Asli will not be allowed to take the government to court over those lands, nor will they be entitled to compensation. The new policy also stipulates that the newly acquired titled lands of the Orang Asli will have to be developed and managed by an external agency, and the development costs will be borne by the Orang Asli land owner himself or herself.

8.57 Despite opposition and appeals by Orang Asli not to go ahead with the DPTOA, state PTGs have already started to implement the policy. In Kelantan, the State Executive Committee (MMKN) has already approved the policy to award land vide Circular 6(89) and according to Mr Mohamad Zainudin b Mohamed (W27) from the PTG, 78 lots have already been approved individual ownership in RPS Kuala Betis.

8.58 Community witnesses expressed concerns over the absence of a guarantee that their existing individual agricultural plots will be within the customary lands of the community concerned. The state is given the option to allocate such lands as they are available for alienation. Further, the Inquiry was informed by the PTG Pahang that according to the State land policy for Orang Asli 2006, once the Orang Asli were resettled, the original settlement would revert to being state land.

8.59 There is also no consistency in the land policies of the various states towards Orang Asli, especially in the granting of leasehold rather than freehold title. For instance, as the PTG Perak explained “the Orang Asli land policy in the state is to give 99 years lease. We do not have to follow the DPTOA of the National Land Council.” In Selangor, the policy is also to grant leases of 99 years, and the existing Orang Asli reserves gazette under sections 6 and 7 of the APA will be de-gazetted to make way for the granting of individual titles except for village settlements, which will be maintained under communal reserve.

8.60 Additionally, Johor PTG said that any individual applications would be referred to JAKOA, and not to the individual applicants.

8.61 The process of implementing the DPTOA must involve a correct understanding of the Orang Asli customary rights as well as international human rights principles by JAKOA and relevant departments. Otherwise mistakes in land allocation will have long-term repercussions. In case A29, PDT Slim River said the definition of tanah adat is not clear so the land claimed by communities of Kg Gesau, Ulu Slim, Perak was then allocated to Sime Darby. Only because of the strong protests by community, was the project subsequently cancelled.

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Plantations/Agribusiness

8.62 Fifty statements recorded during the consultations in Peninsular Malaysia contained allegations against plantations/agribusinesses within the lands and territories claimed by the Orang Asli. These include private companies, government-linked companies (GLC), government agencies, and in some cases by individuals.

8.63 Apart from loss of land, many community witnesses complained that the opening of plantations has resulted in destruction of graveyards and crops, and pollution of rivers and

loss of livelihoods and traditional ways of life. The Department of Environment also confirmed that the Environmental Impact Assessments (EIA) done were incomplete. Compensation is usually not paid because the Orang Asli's right to the land is not recognized.

8.64 In case A181 involving the Semaq Beri people in Kg Mengkapor, Pahang, LKPP Corporation Sdn Bhd (a company of the Pahang Agricultural Development Board or Syarikat Kumpulan Lembaga Kemajuan Perusahaan Pertanian Negeri Pahang), opened up a large-scale oil palm plantation in an area regarded as state land by the government. LKPP, which was established among others to eradicate poverty, denied destruction of any graves and said it would excise 7 ha of Orang Asli land that had been planted with rubber.

8.65 In case A71, the encroachment by Syarikat Sigur Ros which resulted in the destruction of farmlands and crops of the Temiar community in Pos Balar, Gua Musang, and Kelantan was unlawful according to the Department of Environment (DoE). Mr Rohimi Harun (W24) of the DoE said the EIA report was not complete and Sigur Ros had also failed to submit the report based in DoE's guidelines and therefore the project should not have been approved.

8.66 In Kelantan, the Inquiry found that in five cases involving Ladang Rakyat in Kelantan (case numbers A89, A84, A71, A116 and A81), the PTG Kelantan gave an assurance that if the ground survey of the area (for alienation for plantation development) identified an Orang Asli settlement, that area must be excised. The Environmental Impact Assessment (EIA) and Social Impact Assessment (SIA) must also be conducted to ascertain the potential impact of the plantation.

8.67 In case A230 involving a company planting oil palm in land claimed by the Jakun community in Kg Bukit Pingok, Ulu Sg Tersap in Johor, W26 from PDT Mersing said that the approval given to a company was for oil exploration (carigali) and not for oil palm plantation.

8.68 A majority of the cases reported to the Inquiry accused either the government or private entities of failing to adequately consult villagers prior to their operations. Consultations with the intention of reaching free, prior and informed consent are deemed to be extremely important for the Orang Asli as the opening up of plantations have various impacts on their rights and livelihood.

8.69 In two cases in Kelantan, individuals have encroached into Orang Asli areas without informing the Penghulu or Batin (village headman). In case A105, Bateq communities of Kg Pasir Linggi and Kg Machang, Pos Lebir, complained that individuals have bulldozed their crops and taken over their land. In case A102, encroachment into the old Orang Asli settlement areas of Kg Kuala Yai and Kg Gemalah by some Malay individuals also happened in the same manner.

8.70 From the testimonies of the agencies and/or private entities, it would appear that these agencies and/or private entities perceive the Tok Batin as the decision-maker of the community without any need to consult other villagers further who may have clear and equal interests in the land and assets in question. Some also made the assumption that the Tok Batin would consult the villagers for them. In most cases, however, as testified by the Orang Asli witnesses, the Tok Batin made the decision without consulting or discussing with them.

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8.71 Related to this issue of the need for the Tok Batin to consult his or her villagers before allowing third parties to enter their land, is the question of the election of the village heads. A number of Orang Asli witnesses objected to the manner in which the Tok Batin were appointed. In most cases, the Tok Batin were appointed by JAKOA without any say on the part of the villagers. As a result, a number of Orang Asli witnesses accused their Tok Batin of not having their interest at heart while making decisions that have proven to be detrimental to the villagers and their right to land.

8.72 Orang Asli villagers who reside and live off the land which have not been gazetted face higher risks of being sidelined, or worse, not even considered to be included in any form of consultation as they are not deemed to be the rightful owners of the land. While some agencies and private entities had earlier maintained that they had consulted the affected Orang Asli communities, further examination of the witnesses revealed that the 'consultations' conducted were merely meetings with the community to inform them that the land in question had been awarded or leased to a third party. The meetings were not meant for the Orang Asli to negotiate the terms of use of their lands over which they claim to have traditional ownership.

8.73 The size of land awarded or leased to companies and GLCs can sometimes include more than one village involving vast areas of the Orang Asli's kawasan rayau or foraging areas. These areas are then destroyed for commercial logging, and subsequently, plantations. Many Orang Asli are then left without adequate livelihood options. In cases A246 and A253, the Mahmeri communities in Carey Island have found themselves encircled by oil palm estates operated by Yayasan Selangor and Sime Darby Bhd, and a golf course constructed by A&M Construction. Since they have lost their foraging areas, the Orang Asli also find it difficult to gather food and continue their traditional ways of life. In addition, water has become increasingly scarce as the rivers, which they depend heavily on are now severely polluted and not suitable for consumption.

8.74 Whilst the Orang Asli highlighted the negative impacts of plantations on their right to land and livelihood, companies and GLCs maintained that their presence had benefitted the Orang Asli settlements, even though the Orang Asli were not seen to have any legal standing to the land they were claiming. Job opportunities were among the benefits highlighted by companies.

8.75 Further inquiry, however, revealed that only a handful of Orang Asli worked with the companies, and that the majority of the workers consisted mostly of migrants. Witnesses from companies said that while priority was given to Orang Asli, they had to employ migrant workers as the Orang Asli were not interested in working for these companies. Low wages were identified by the Inquiry as the primary reason for the reluctance of the Orang Asli to take up employment with such companies.

8.76 In almost all the cases heard by the Inquiry, the Orang Asli said that they have lodged complaints with both the companies operating on their land as well as agencies such as the JAKOA and the PDT/ PTG. Most of them said that their complaints went unheeded. When asked by the Inquiry, witnesses from agencies explained that they were unable to take action because the pieces of land were legally acquired by companies. In such situations, some

agencies like the PDT had, on their own initiative, conducted and mediated meetings between communities affected and the company to find an amicable solution to their conflict. However, such initiatives were not formal mechanisms of the government.

Agricultural Development Schemes for Orang Asli

8.77 JAKOA and some of the development agencies told the Inquiry that the Orang Asli were perceived as being not capable or ready to manage their smallholdings on their own, which perhaps explain why agricultural development schemes are structured the way they are. In case A89 involving 378 acres of land in Pos Sungai Rual, Jeli in Kelantan, Federal Land Consolidation and Rehabilitation Authority (FELCRA) said that at one time Orang Asli scheme participants were given a chance to manage their

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plots for six months but as they were not successful, FELCRA resumed its corporate management style. Many Orang Asli witnesses refuted this by giving evidence of successes by individually-held smallholdings owned by Orang Asli themselves.

8.78 On the issue of providing appropriate management training for Orang Asli, Tuan Haji Mohd Zamri Bin Mustajab (W42) of JAKOA Perak said the department lacks funding and is therefore unable to provide such training. He added however, that JAKOA has requested for such allocation from the Federal government.

8.79 From the Inquiry, it became apparent that the Orang Asli was not involved in the preparation of the Memorandum of Understanding (MoU) between JAKOA and FELCRA and with the Rubber Smallholders Development Authority (RISDA). None of the Orang Asli complainants has seen or been given a copy of the MoU.

8.80 JAKOA and other development agencies informed the Inquiry that under the participatory or 'peserta' concept in agricultural development schemes for the Orang Asli, the ownership and control of the smallholdings lies with a committee or JAKOA, and not the individual who had been allocated the agricultural plot. As such, unless an individual title has been issued, the Orang Asli 'participant' is not really the legal owner of the agricultural plot allocated to him. The land is still controlled by the agency concerned or JAKOA as the case may be.

8.81 The lack of legal ownership has serious consequences for the Orang Asli, as is evident from the testimony of JAKOA-Pahang. According to the witness, upon the death of a peserta, his lot would be given to another peserta, and not necessarily to his kin or waris. Evidently, unless there is title to the plot, the Orang Asli 'peserta', does not have full control over the agricultural land allocated to him under the various development schemes of JAKOA. Not being the registered owner, he has no right to transmit the land to his heirs.

8.82 Similarly in Kelantan, the participation of Orang Asli in the Ladang Rakyat scheme does not guarantee the recognition of the rights of Orang Asli to their traditional lands and territories. The Ladang Rakyat projects are open to any Kelantanese applicant, even though they may be located within the customary lands of the Orang Asli. Like other Kelantan citizens, the Orang Asli are expected to apply to be participants ('peserta') even if such

schemes are on their own customary lands. The same is true for other states such as the FELCRA plantation in case A230 in Johor, where the scheme is open to all Johor citizens.

8.83 Clustered Replanting or Tanaman Semula Berkelompok (TSB) and Commercial Replanting or Tanaman Semula Komersial (TSK) were introduced by the Government through agencies like FELCRA and RISDA as part of its initiatives for the purpose of smallholder empowerment and poverty reduction. While the idea of empowering smallholders is indeed commendable, the Inquiry has identified flaws in the operations of such schemes, in particular, Orang Asli villages that have yet to be gazetted as Orang Asli reserve.

8.84 As in the category under plantations, Orang Asli witnesses who objected the entry or operations of agricultural development schemes on their traditional land alleged that they were not consulted. Most of the witnesses who made these allegations were from villages that were not Orang Asli reserves. Witnesses from land developers, particularly FELCRA and RISDA, explained that they developed the areas concerned at the invitation from the State Government, and consequently, as the Orang Asli were not legal owners of the land, they were not consulted.

8.85 On the other hand, Orang Asli communities within gazetted reserves also highlighted similar problems. Evidence from the developers revealed that the current procedure for the development of Orang Asli

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Reserves require the developer to deal with JAKOA as the administrator of the Orang Asli, rather than directly with the community. Thus, the Orang Asli were denied of the opportunity to negotiate with the developers on various matters such as the location to be developed, the terms upon which such development could proceed as well as dividends to be paid to them.

8.86 In case A245, the lack of consultation has resulted in confusion on development costs. Mr Johari b Biye (W19) of Kg Orang Asli Bukit Serdang, Banting in Selangor said FELCRA had promised monthly dividends amounting RM300 per month but these were never paid. However, Mr Hazrinor Hisham b Harun (W20) explained that dividends were paid only to those who were selected as participants of the scheme and only if they had signed an agreement with FELCRA. He also said the planting cycle was 25 years, and not 18 years as stated by W19. 110 acres of land belonging to the whole community were taken but not all were invited as participants.

8.87 In case A136 in Kg Satak, Raub, Pahang, FELCRA said the selection of participants was the responsibility of JAKOA. Quarterly management meetings involving FELCRA and JAKOA are also held to iron out any issues brought up by the participants. However, given the issues brought up by Mr Basir Anak Arik (W10), it is evident that the management of the plantation is far from satisfactory.

8.88 Cases related to RISDA include, among others, case A225 in Kg Orang Asli Sungai Putur, Kahang, Johor; cases TA52 in the form of a TSB in Kg Orang Asli Ulu Gerik, Hulu Perak, A60 Kg Sungai Untong, RPS Dala Gerik, A25 Kg Orang Asli Ulu Groh; and cases A140, A181 and A182 in Pahang. In case A60, Mr Musa b Mel (W13) complained about the

low buying price of rubber by RISDA which created dissatisfaction among participants of the scheme. Apparently, those caught selling to other buyers were accused of stealing by RISDA.

8.89 While these agricultural development schemes are meant to bring Orang Asli out of poverty, many Orang Asli complained that they were far from reaching that goal. Many Orang Asli do not receive dividends as promised. None of the cases heard at the Inquiry, including commercial plantations aimed at contributing to poverty eradication, made any positive comments about such a scheme. For case A89, RISDA admitted that the oil palm plantation in Sg Rual, Kelantan was experiencing losses.

8.90 Even a cooperative established specifically to assist the Orang Asli, the Koperasi Kijang Mas, has become a subject of complaint. In case A70, Mr Samad Adu (W1) informed the Inquiry that Syarikat Ringgit Saksama (a subsidiary of Koperasi Kijang Mas) has encroached Orang Asli land in Pos Tohoi. However, the allegation was denied by a representative of the Cooperative, Mr Ira Isra bin Asra Ramlan (W3).

Logging and Forest Reserves

8.91 The Forestry Department informed the Inquiry that all forest products were under the jurisdiction of the Department, including the fruit trees planted by the Orang Asli such as the durian and petai, which are important economic crops for the Orang Asli.

8.92 Witnesses from the Forest Department told the Inquiry that they had not heard of the decision in *Koperasi Kijang Mas v Perak State Government*, in which the court ruled that, in keeping with the provisions of the Aboriginal Peoples Act, the Orang Asli had prior rights to forest produce, including, timber, in their aboriginal areas. The officers, however, held the view that there was no exception for Orang Asli under the Forestry Act and that the Forestry Act took precedence.

8.93 Many Orang Asli witnesses, whose villages were included in logging concession areas within forest reserves testified that in addition to the destruction of the forest as their source of sustenance, logging licensees had destroyed their sacred areas and old grave sites that had existed for generations, thus, eliminating evidence of their continued occupation in the area.

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8.94 In case A272, the Temuan community living within Hutan Simpan Angsi in Negeri Sembilan told the Inquiry that the Gemencheh Forestry Department has marked a number of their fruit and rubber trees, supposedly to be logged. They have also been asked to move from the forest reserve. Because of this and their lack of control over outsiders who come to their village, Mr Mohsin Bin Jani (W42), as a representative of his village appealed to the authorities to gazette their lands as an Orang Asli Reserve.

8.95 In case A285, Orang Asli complained about their crops being cut down to make way for Acacia plantations. The land they have been subsisting on was declared a forest reserve in 1996. JAKOA only put in an application for the 160 acres of land to be gazetted in June 2011, while the remaining 330 acres are within the Rantau Panjang Forest Reserve. It appears that once an Orang Asli customary land has been declared a forest reserve, it becomes more difficult for these areas to be gazetted as Orang Asli reserves. The case of A286 where the

application for Kg Orang Asli Bukit Perisak to be declared as an Orang Asli reserve has been rejected is a case in point.

8.96 Loggers/foresters/administrators also declared that they were unfamiliar with or not informed of the nature of Orang Asli traditional markers (eg. graves, orchards, old village sites, sacred sites). Such a situation had resulted in the properties and sacred sites of the Orang Asli being destroyed by logging activities. However, in response, UPEN-Perak stated that Orang Asli traditional territories were neither fenced nor marked by boundaries on the ground, and hence not visible or identifiable to the loggers.

8.97 Most state Forest Departments dismiss claims of Orang Asli rights to land within forest reserve, even if Orang Asli settlements are older than the forest reserve itself. In Kelantan for instance, the State Forestry Department had insisted that the Forestry Act does not recognise Orang Asli territories within Forest Reserves as stated by the witness from the Department, Mr Yusup Bin Abdul Rahaman (W19) during the Public Hearing. “Firstly, the Forestry Law does not mention or define traditional territories.

Secondly, other than Orang Asli inhabited areas, the State Forest Department does not have any record showing Orang Asli settlements within forest reserves in the State. Most of the areas inhabited by the Orang Asli are within permanent forest reserves. While the Department understands that the Orang Asli have the right to remain on areas they have long inhabited in forest reserves, the Orang Asli are still bound by the Forestry Law.”

8.98 At the Inquiry, the Forestry Department of Pahang acknowledged that it did not apply the principle of free, prior and informed consent (FPIC) as stipulated by the UNDRIP when granting logging licence in areas where Orang Asli resided. He also said that he felt that the department did not need to obtain the consent of the Orang Asli, even though he was aware that failure to do so contradicted Principle 2.2 of the Malaysian Criteria and Indicators of the Malaysian Timber Certification Scheme for Natural Forests.

8.99 In case A186, the claims of Mr Ramli b Harun’s (W47) – that logging within the Krau Forest Reserve has affected their livelihood, bulldozed graves and destroyed the environment and catchment areas – were simply dismissed by the Pahang Forestry Department. W47 claimed that his village of Kg Penderas in Pahang was included within the 8399.47 ha gazetted as a Forest Reserve in 1992 (GN74). In case A137, involving land claimed by the Semai community of Kg Simoi Lama, in Kuala Lipis, Pahang, the involvement of individuals with influential connections and close to the loggers can also make the Orang Asli feel powerless. In another case in Pahang, the complaints of A198 about the logging in the vicinity of Kg Jibau, Muadzam Shah were also dismissed by the Pahang Forestry Department saying that only mature trees are logged and cutting of petai, setul and other useful trees are prohibited.

8.100 In case A90, the Menriq people of Kg Kuala Lah in Gua Musang, Kelantan told the Inquiry about the significance of Batu Janggut found within their traditional territories. They also complained about the

impact of logging on their source of livelihood and their life. However to the Forestry Department, there are no grounds for complaint since the company obtained the logging concession legally. He also said that the location of Batu Janggut is within state land, which means that everyone should have access to the area.

8.101 Many of the Forest Reserves in Peninsular Malaysia were established in early 1930s to 1960s, but the boundaries were never marked on the ground. Orang Asli who were already living in the area were not aware of the existence of the Forest Reserve. In case A29 in Kg Kuala Woh in Tapah, the witness from the Perak Forestry Department, Mr Mohd Shahril Bin Abd Rashid (W38) admitted this and thus the reason why the department has been lenient to the Orang Asli who live and forage within the forest reserve. However, collection of forest products for commercial purposes is prohibited. This was the reason why a man from Gerik was arrested while carrying one ton of rattan.

8.102 Although all states testified that they applied the Malaysian Timber Certification Council's Criteria and Indicators (MC&I) for all their logging concessions, Orang Asli complainants asserted that the loggers and the Forestry Department did not seek their consent when entering their customary lands, which is contrary to the requirements of the MC&I.

8.103 Mr Mohd Yusof Bin Muda (W29) of the Selangor Forestry Department said "forest management is a dynamic process which adapts according to weaknesses that have been identified. Even though the laws on forest management are strict, the Forestry Department upholds humanitarian principles when it comes to issues involving local communities". Nevertheless, it is evident that the concept of co-management of forest has not been adopted or developed in Malaysia, and that the Forest Department has yet to take a human rights approach in its dealings.

Orang Asli Land in Protected Areas

8.104 A total of 103 statements recorded by the Inquiry related to allegations of inclusion of Indigenous lands into national and state protected areas including forest reserves, national or state parks, biosphere reserves, wildlife corridors or sanctuaries and water catchments in Selangor, Perak, Pahang and Johor.

8.105 All the Orang Asli witnesses who presented their statements under this category objected to the inclusion of their land within national or state protected areas, be it forest reserves, parks, wildlife corridors and sanctuaries, biosphere reserves or water catchment areas. Orang Asli witnesses insisted that those areas were their ancestral lands with some still showing evidence of their continued occupancy such as shrines and old burial sites. As a result, while the Orang Asli can remain in the area for now, their way of life as well as livelihood are constrained by laws, particularly in relation to their foraging areas located within protected forests in which they practise hunting and gathering.

8.106 The Inquiry was concerned that Orang Asli traditional territories have also been converted into conservation and protected areas without regard to, or participation of, Orang Asli as co-managers or collaborative partners in the management of the reclassified area.

8.107 In case A178 involving Pos Iskandar in Bera, Pahang, a 50,000-acre Wetlands Conservation Area (Ramsar site) was created over much of the Orang Asli's customary lands

in 1990. However, the Orang Asli were not invited to sit in the management committee. The creation of the Ramsar site also meant that the Orang Asli were now subject to more laws and departments which further controlled and restricted their activities and access to their customary lands. These departments (and their corresponding laws) include the Forestry, Wildlife, and Environment, Fisheries and Drainage and Irrigation departments.

8.108 Another example is Case A185, Kampung Melai in Tasik Chini, Pahang. Tasik Chini was made a UNESCO biosphere reserve in 2010. However, logging and iron ore mining activities were allowed within the

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biosphere which destroyed the rubber trees of the Orang Asli and polluted the environment. No action has been taken against the companies concerned.

8.109 In case A207, about 150 acres of Temuan traditional land in Kg Air Tawas was claimed to have been included in Taman Negara Gunung Ledang that was gazetted in 2003. Park authorities said there was no record of any verbal promise by the Director of Forest Department to allow the communities 70 square miles for foraging area. However, there are no restrictions for Orang Asli to forage in the Park except for hunting and cutting of trees.

8.110 In case A62 involving the Jahai communities in RPS Banun, Gerik, Perak, a similar approach is taken by the Perak Parks Board and the Wildlife Department in managing the Royal Belum Park, and efforts have been made to engage with the two communities living within the Park. According to Mr. Mohd Tahir b Osman (W36) of PDT Gerik, a proposal has been made to excise part of the park for the Orang Asli community.

Commercial Projects

8.111 The issues under this category concern the effects of commercial development projects such as mining, dam, housing, golf courses and other urban development on Orang Asli lands. The absence of communities' free, prior and informed consent before companies began their operations was again highlighted by Orang Asli witnesses. The typical response from the companies, which is supported by the authorities, was that the land was acquired through legal means and that the Orang Asli were not the legal owners of the land.

8.112 While companies maintained that their activities in areas were licensed in accordance with and complied with the relevant Environmental/Social Impact Assessments (EIA/SIA), Orang Asli witnesses alleged that the commercial activities carried out had polluted the rivers in the areas concerned, causing various ailments apart from losing an important source of food and water.

8.113 In case A270, the Temuan community in Kg Orang Asli Sebir, Labu in Negeri Sembilan complained about the quarry operations by Malaysian Rock Product (MRP), a subsidiary company of IJM Corporation. The quarry, which started operating in 1993 after getting approvals from the Department of Environment (DoE), caused noise, air and river pollution. The community had rejected the project before it started but JAKOA and the MRP convinced (pujuk) the community that it would not have any adverse effects. Although

compensation had been given for crops that were damaged and a house built for the Batin, the community now wants to stop operations.

8.114 In case A185, Ms Yeoh Kew Moi (W11) from Kg Melai, Tasik Chini Pahang complained about mining and logging activities around Tasik Chini, which caused pollution and destruction of the land and crops of the Jakun community in the area. Witnesses from PDT Pekan told the Inquiry that although the Orang Asli have settled in the area since 1945, the area has not been gazetted as an Orang Asli reserve. Instead it was gazetted under section 62 of the National Land Code for tourism purposes in 1989. However, there is no restriction on the communities to continue living in the area. PDT Pekan added that although the Tasik Chini area is gazetted as a tourism area and a recognized UNESCO licence Biosphere Reserve, a mining license was approved to Chini Highland Mining Sdn. Bhd. PTG Pahang nevertheless said that no approval for logging in the area had been approved.

8.115 In case A226 in Kg Orang Asli Sungai Peroh in Johor, Batin Ogeh bin Gandoh representing the Jakun community, complained about serious pollution from effluents from a quarry and oil palm mills in the area. Mr Lou Sern Chern (W13) representing Syarikat Seong Thye Plantation said the levels of pollutants were being checked by the Department of Environment on a quarterly basis and they have been given a letter saying that it was within the controlled limit. The witness from the Fisheries

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Department however confirmed that the fish population in the Kahang and Semberong Rivers had declined and that a river conservation project there had been compromised. The company also denied all other allegations from the community, and claimed that it even offered jobs to Orang Asli but they were not interested.

8.116 The public consultations and public hearings heard many cases of Orang Asli customary lands being given to, or encroached upon by, commercial entities, whether individually owned or linked to influential political leaders and elites. In some instances, the commercial entities that encroached on the Orang Asli's customary lands are purported cooperatives such as the Koperasi Kijang Mas Kelantan.

8.117 In case A221, the Jakun community in Kg Jemeri, Rompin, Pahang told the Inquiry that they were protesting against their land being taken for a pineapple plantation by the East Coast Economic Region (ECER) project. The project involves land totaling about 1,500 acres of three contiguous Orang Asli villages, including 600 acres in Kg Jemeri. Although the land has not been gazetted as an Orang Asli reserve, the communities have been living there for generations and are recognized by the authorities. The witness from ECER said that 5,000 acres of land had been allocated by the government for this project, aimed among others to improve the lives of people by providing economic opportunities and basic infrastructure. He added that compensation would be paid for crops that were destroyed in the course of opening the land.

8.118 In case A275, involving Kg Orang Asli Air Kuning, Bukit Cahaya, Shah Alam in Selangor, the witness from the Temuan community, Mr Abd Rahman Shah Bin Abdullah (W23) recounted how they had totally lost all their traditional lands. First, it was taken by the Agriculture Department for the Bukit Cahaya Sri Alam Agricultural Park in 1989. This was

followed by a housing developer, Eco Asli, for the remaining 273 acres. Although as a result of their negotiations to give up their land to Eco Asli, they have been given houses worth RM25 million, the community is now asking that they be allowed access to, if not ownership of, the 73 acres of their traditional lands still within the Bukit Cerakah Agricultural Park for their daily livelihood needs. The authorities are however unclear of status and location of the 73 acres.

8.119 In A29 in Kg Gesau, Ulu Slim Perak, an ecotourism project was proposed by Sime Darby on the land belonging to the community without informing the Orang Asli. However, after persistent protests from the community, the government decided to cancel the project.

8.120 There was also apparent injustice towards the Orang Asli who used to live and forage in a large area but were moved out – some without any regard for their conditions – to make way for the rapid commercial development. The case of the Temuan from Bukit Tunggul, Dengkil (A270) who were asked to moved twice – first when the area was given to the Universiti Kebangsaan Malaysia (500 acres) and then to Bukit Unggul Resort (1378 acres). With only 20 acres of un-gazetted area for their settlement remaining, the community fear that their traditional community may soon disappear.

8.121 In a similar case (A233) in Johor, the Orang Laut/Seletar from Kg. Sungai Bulu, Pasir Gudang were forced to move to different locations because of pollution and denial of access during the construction of the Johor Port in the 1980s. They received a meagre RM1,000.00 in compensation. Some of the families who settled in Pasir Putih are now facing yet another forcible move to the Kuala Masai Orang Asli settlement. It appears from the statements from Mr Suhairy b Abd Ghani (W35) from JAKOA Johor and YM Ungku Khalsom Sofia Engku Yusoff (W9) of PTD Johor Baru, that it is expensive to accommodate the traditional ways of life of the Orang Asli, given the fast pace of development in the area. The PDT also does not have any clear procedures to reserve coastal areas for Orang Asli needs.

8.122 In case A60 where four villages in RPS Dala, Gerik, Perak were submerged during the construction of the Kendering Hydroelectric dam in 1983, the community never received any of the compensation

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that JAKOA promised. According to the privatised national electricity company, Tenaga Nasional Berhad (TNB), an EIA or SIA was not required at that time so these studies were not carried out. TNB explained that before the construction of the dam, a discussion was held with JAKOA but no complaint from the Orang Asli was ever raised.

8.123 In another dam case, A151, the proposed Ulu Jelai Hydroelectric dam would mean that the Semai from Kg Tiyat in Cameron Highlands would have to be resettled. However, the community have indicated that they do not want to move because they have to start over in the new area and that the proposed compensation is inadequate. Witnesses from TNB said all the necessary approvals have been obtained and the project will move ahead but better compensation and facilities are now being offered to the community.

8.124 Other commercial projects brought before the Inquiry are: case A54 in Kg Jeram Papan, Gerik, Perak involving FELDA where the community complained that they were not

consulted before the opening of the rubber plantation and that no compensation was given on land that was taken; case A51 in Kg Orang Asli Tisong involving the Koperasi Perbadanan Pertanian Perak Berhad; and case A170 in Kg Batu Gong, Pekan, Pahang about the encroachment by Kurnia Setia.

Compensation Issues

8.125 The Aboriginal Peoples Act provides for compensation to the Orang Asli only for the loss of their crops or dwellings, not for the land. However, the Inquiry-commissioned research and expert witnesses informed the Inquiry of the decision in Sagong Tasi that decrees that Orang Asli customary lands should also be compensated in accordance with the Land Acquisition Act. Nevertheless, such compensation if paid or accounted for, is usually on the basis of negotiations and goodwill, not as of right. Also, it is noted that the recent trend appears to be compensation in the form of another piece of land but in another locality.

8.126 A majority of the Orang Asli witnesses who had lost their land to private land developers had also complained of non-payment or inadequate amount of compensation paid. After examining the relevant agencies, the Panel of Inquiry found that the non-recognition and the delay in gazetting Orang Asli land has made the Orang Asli ineligible to obtain compensation for the loss of their land. Instead, these villagers who were not regarded as the legal owners of the land in question were only paid a sum of money as consolation (*wang saguhati*) and as a gesture of goodwill from land developers.

8.127 Other than being ineligible for compensation because of the non-recognition and delay in gazetting Orang Asli Land, the Inquiry also found that the method used for the calculation of compensation for crops destroyed to give way for development is obsolete, giving rise to dissatisfaction amongst the Orang Asli as the quantum does not reflect the current value of crops.

8.128 In case A270 (Bukit Tunggal, Selangor), while compensation was paid, this was inadequate to ensure that the Temuans concerned could build a new life or maintain their traditional ways of life. The witness from Universiti Kebangsaan Malaysia (W14) said of the miserable relocation exercise in the 1970s: "UKM paid the compensation amounting RM810,985.25 to those who lived on the land and requested them to move." W13, a representative of Bukit Unggul Resort, said that RM2 million was set aside to mainly build houses (within the 20-acre plot) but complained that Orang Asli are still entering the forest areas now belonging to the Resort.

8.129 In case A263 involving Kg Orang Asli Palebar, Labu, Negeri Sembilan, the Temuan community represented by Mr Temu Bin Tiot (W45) said the Negeri Sembilan Islamic Council (MAIP) has proposed to develop the area. MAIP has offered compensation which was not acceptable to the community but because MAIP started work in the area, they have reported this to the police, the Negeri Sembilan

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Menteri Besar and JAKOA, but have not received any feedback. The community is asking for just compensation and orderly relocation to a new area with adequate facilities. There was no witness from the authorities regarding this case at the hearing.

ii. CONSTRAINTS THAT IMPEDE ORANG ASLI RIGHT TO LAND

Legal constraints

8.130 Section 3(3) of the Aboriginal Peoples Act (APA) empowers the Minister having charge of Orang Asli affairs to determine any question whether a person is an Orang Asli. This is clearly a provision allowing for the unilateral regulation and control of membership in a community by the Executive. While it is to be appreciated that this provision was meant as a safeguard against infiltration by communist insurgents of the Orang Asli community at the time of passing of the APA in 1953, the fact that the Emergency and that period of communist insurgency has long passed raises the question as to whether this kind of legislation is still relevant or even legitimate. Its contemporary relevance is called into question as it goes against Orang Asli self-ascription and self-determination.

8.131 On the structure of land law in the country – where jurisdiction over land matters is vested in the individual states, this creates a number of issues, especially since the responsibility for the well-being and progress of the Orang Asli is vested in the Federal Government, in accordance with the Ninth Schedule of the Federal Constitution.

- Firstly, there is no uniformity in the policies affecting Orang Asli among states.
- Secondly, states are reluctant to create Orang Asli reservations under the Aboriginal Peoples Act 1954, since in so doing the state would have to assign the said land to the Director-General of the Department of Orang Asli Development, effectively losing control over the land. Instead, reservation of land for Orang Asli is usually done under section 62 of the National Land Code, as a state reserve.
- Thirdly, where Orang Asli settlements are on state land or in forest reserves, there is usually no recognition of their customary rights to the land; the land continues to be treated as state land or forest reserves as the case may be. The lack of recognition creates the risk of the land being alienated to parties other than the Orang Asli. Land is a source of revenue for states and the preference is to alienate land to persons or corporations for commercial purposes, thus attracting higher premiums. There is usually no payment of compensation for the loss of ownership of the land, it not being recognised as belonging to or being owned by the Orang Asli. In some cases, there was no consultation with the OA before alienation or revocation of the forest reserve status. If there was any consultation, it was usually through JAKOA or with the Orang Asli headman (Batin).
- Fourthly, whether an Orang Asli reserve is created under the Aboriginal Peoples Act or under Section 62 of the National Land Code, there is still no security of tenure for the Orang Asli. The state government can revoke the status of the land as an Orang Asli reserve with much ease, in contrast with revoking a piece of Malay Reserve land.

8.132 Government agencies are mostly concerned with implementing their respective legislation without too much regard to other laws. They are not too well-informed of developments in the law which impact on land areas within their purview.

8.133 There is also no legal definition or understanding or concept of ‘kawasan rayau’ (foraging areas) or ‘traditional territories’. Neither is there an appreciation as to why Orang Asli need large areas of customary lands.

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Policy Constraints

8.134 The government’s policy of integrating the Orang Asli with the mainstream society operates in a way that is similar to that of assimilation. The Inquiry was informed of a number of instances where a whole community of Orang Asli was simply uprooted from their traditional village and moved elsewhere without any regard for their right, safety and needs. Such a policy goes against Article 8 of the UNDRIP and is discriminatory, especially since a number of court decisions have found that rights to land among the Orang Asli are linked to the continuous occupation of the land.

8.135 The new Orang Asli Land Policy (DPTOA) also does not appear to recognise the concept of communally- held Orang Asli customary land or adat land. Instead, what is envisaged are individual land titles to be granted to Orang Asli. All other lands are labeled as kawasan rayau or ‘foraging areas’. There is no proper definition or understanding or the concept of ‘kawasan rayau’ in the new land policy, nor any discussion as to why Orang Asli need large areas of customary lands.

8.136 It would also appear that no new Orang Asli reserves will be created under this new Policy. The reluctance/refusal to consider both communal reservation and individual title goes against the Orang Asli’s practice of customary tenure.

8.137 The distribution of Orang Asli land, by way of individual titles, and according to the number of households in a community at a given time presupposes a static village population and does not provide for expansion of population or in the number of households. It is not surprising therefore that the majority of the Orang Asli are not in favour of the new policy, and have expressed this opposition vocally and openly. The policy and the design of regroupment/resettlement schemes do not accommodate for expansion of population or in the number of households as land allocation is determined on a household basis at a specific moment in time.

8.138 The policy for Orang Asli land development does not promote self-reliance, autonomy and self- development among the Orang Asli. Instead, it could reinforce dependency as the Orang Asli in most cases are just dividend-earners, and do not work on their own land. There is also inconsistency in the land policy on the granting of leasehold as opposed to freehold titles for the Orang Asli.

8.139 The regroupment and resettlement of many Orang Asli villages has not always brought economic improvement, particularly to those who have not received dividends from the project. Many have sought to return to their old villages. However, there is a lack of clarity in terms of the policies of land tenure for those communities dislocated from old areas to new settlement sites.

8.140 The current regroupment policy of the government is not necessarily in line with the perception and needs of the Orang Asli. Large Orang Asli reserves meant for a number of villages and to facilitate the provision of basic necessities have been rejected by communities for various reasons including disruption of social units, lack of information and consultations when the reserves were proposed.

Administrative Constraints

8.141 The administrative constraints of land rights of the Orang Asli in Peninsular Malaysia can be seen through the improper exercise by JAKOA of its duties under the law in governing the affairs of the Orang Asli. Submissions from the Bar Council and several experts called to give evidence at the Inquiry commented that JAKOA (and its previously-named entity, JHEOA) is not effectively fulfilling its fiduciary duty as provided for by the Federal Constitution and court rulings.

8.142 Most officers from the state Land and Mines Office, and District Officers are ignorant of the Aboriginal Peoples Act, and court decisions and precedents on Orang Asli land matters.

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8.143 JUPEM maps are regarded by the state Lands and Mines Office as the definitive document showing the status of titled land in the state. This is a constraint for Orang Asli claiming customary rights over land which has been alienated or dealt with by the state.

8.144 Orang Asli lands approved for gazetting in the 1960s and 1970s were not gazetted as Orang Asli reserves because JAKOA, which has the authority to produce the surveyed maps did not carry out such survey. As a result, many of those areas have reverted to the state, or made Malay reserves. The Inquiry also saw the rather large difference between the area claimed by the Orang Asli and what was presented by JAKOA to the state Land and Mines Office. The requirement that only JAKOA can apply for an Orang Asli area to be gazetted as a reserve means that any failure on its part to set in motion the process would create a serious constraint impeding the full enjoyment of the Orang Asli's right to land in accordance with their needs and requirements.

8.145 The unwritten rule followed by agencies is that all matters involving Orang Asli must go through JAKOA. Responsibilities are therefore passed to JAKOA by various other agencies (PTG, forestry, District Office, etc.) resulting more often than not in Orang Asli losing their land.

8.146 JAKOA officers who do not understand the customs and culture of indigenous communities further complicate the relationship between the two parties. Notwithstanding the efforts of the government to enhance cooperation between JAKOA and the community by increasing the number of Orang Asli serving in JAKOA (206 or 22.79%273), there is no significant improvement in the situation. With respect to the gazetting of Orang Asli Reserves, communities also rely on JAKOA to submit the application. However, according to JAKOA, the lack of human resource and insufficient funding for surveys often contribute to delays in the gazetting process.

8.147 Increasingly, the Orang Asli are losing faith in JAKOA mainly because of the failure to obtain their free, prior and informed consent before the making of decisions relating to development projects such as plantation schemes, which will drastically affect their rights. If negotiations on development projects did occur, they were limited to a top-down negotiation involving only the JAKOA and the Batin or village head.

Gaps in perceptions and understanding

8.148 The exclusion of the Orang Asli of Peninsular Malaysia as one of the groups with special positions and whose interests should be safeguarded as provided under Article 153 of the Federal Constitution can be regarded as an impediment to Orang Asli's land rights. From the perspective of the Orang Asli, Article 8(5)(c) of the Federal Constitution does not provide the same recognition as that accorded to the natives of Sabah and Sarawak.

8.149 Many of the JAKOA staff are not well-versed with Orang Asli issues and are dependent on the experience and advice of long-serving JHEOA staff, who still take an assimilationist stance rather than understanding the evolving needs of the Orang Asli. However, most government departments are of the view that problem lies with the Orang Asli's mindset, rather than that of JAKOA.

8.150 Many Orang Asli informed the Inquiry that they were already managing their own oil palm or rubber plantations and would be able to take over management of currently under land development schemes if they were given the control and ownership of such land and provided with management training courses.

273 Based on information provided by JAKOA at the Public Hearing

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iii. EFFECTIVENESS OF RESPONSES TO ORANG ASLI LAND CLAIMS

Legal Responses

8.151 While the efforts by the Ministry for Regional and Rural Development in approving the 2009 Policy on the Alienation and Development of Land for Orang Asli for Agricultural and Residential Purposes

(Dasar Pemberimilikan Tanah kepada Orang Asli Untuk Kegunaan Pertanian dan Kediaman), may seem like a step in the right direction, the failure to incorporate policies that are proactive and positive to Orang Asli land rights, for example the 1961 Statement of Policy Regarding the Administration of the Orang Asli, is a serious drawback.

8.152 The draft amendments to the Aboriginal Peoples Act to implement the 2009 Orang Asli Land Policy is expected to be introduced in Parliament soon, despite protests by a large majority of Orang Asli and many NGOs. These amendments are seen by the Orang Asli as a direct response by the government to curtail the gains made by their community in court decisions favouring them.

Policy Responses

8.153 The positive political efforts by various state governments which approved land to be gazetted as Orang Asli Reserves in the 1960s and 1970s have been rendered ineffective as the Inquiry saw no active move on the part of JAKOA and other government authorities to secure Orang Asli lands, or to gazette those already approved for gazetting or being applied for gazetting.

8.154 Malaysia has adopted a timber certification system under the Malaysia Timber Certification Council (MTCC) that includes in its Criteria and Indicators (MC&I), the requirement to ensure EIAs are conducted and also that indigenous peoples' right to land is respected. However, the system is voluntary and in Peninsular Malaysia, although all the forests within the state are considered as one Forest Management Unit (FMU), the auditing process only looks at selected permanent forest estates. The Inquiry was informed that logging companies and the forestry departments did not comply fully with the MTCC C&I on the rights of the Orang Asli to FPIC and recognition of customary rights.

Administrative Responses

8.155 Although the Inquiry received commitments from JAKOA and the PTG to hasten the process to gazette lands recognized by the government as Orang Asli reserves, there are concerns that the new Orang Asli land policy when implemented may in effect, reduce the size of Orang Asli customary lands.

8.156 The effectiveness of the policy of giving individual titles to Orang Asli may also be affected if the process is not accompanied by simple and transparent land application procedures. Furthermore, the apparent preference by most Orang Asli communities for communally-owned land may render the response ineffective.

CHAPTER 9

NON-RECOGNITION OF INDIGENOUS PEOPLES' RIGHT TO LAND

ToR no. 2: To inquire into the impacts of the recognition or non-recognition of the Indigenous Peoples' right to land on their social, economic, cultural and political rights, taking into consideration relevant international and domestic laws.

Introduction

9.1 Indigenous peoples' connection with land is a unique and complex relationship. Land means more to indigenous peoples than merely an economic and social base. Land is integral and inter-related to all indigenous systems that encompass belief, culture, health, resource management, knowledge transfer, juridical, social, economic and political systems. In short, the unique relationship that indigenous peoples have with their land is central to their ways of life and collective identities as peoples.

9.2 Present laws in Sabah and Sarawak, the Aboriginal Peoples Act 1954 in the Peninsula, and the Federal Constitution contain provisions recognising indigenous peoples' rights. Similarly, the fundamental importance of land rights of indigenous peoples and their link to other rights is emphasised in the UNDRIP, including in Articles 8 and 10 (on dispossession and relocation), 11 (on practising and revitalising cultural traditions and customs), 18 (participation in decision-making), 25 (spiritual relationship), 27 (adjudication), 29 (conservation and protection of the environment) and 32 (development and free, prior and informed consent).

9.3 Several other international instruments also underline the important link between the right to land and other rights including the Convention on the Rights of the Child (1989), Convention on Biological Diversity (1992), Agenda 21 (1992), International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural rights (1966), International Conference on Population and Development (1994), UNEP Malmoe Ministerial Declaration 21 (2000), Beijing Declaration and Platform for Action (1995) and from UNESCO, the Universal Declaration on Cultural Diversity and its programme of action (2001), Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), Convention for the Safeguarding of the Intangible Cultural Heritage (2003), Convention Concerning the Protection of the World Cultural and Natural Heritage (1972). Furthermore, jurisprudence regarding the rights of indigenous peoples being generated by the human rights treaty bodies, (the committees that monitor the implementation of human rights covenants and conventions) have given further emphasis to the importance of this connection between land and indigenous peoples' rights.

9.4 As the findings of the Inquiry point mainly to non-recognition of indigenous peoples' right to land, the focus of this section is mainly on the impacts of such non-recognition on indigenous peoples' social, economic, cultural and political rights, taking into consideration relevant international and domestic laws. To accord recognition to indigenous peoples' rights to land would therefore mean having to find redress and to remedy these impacts.

Socio-Cultural and Psychological Impacts

9.5 There is a high level of frustration, anger and desperation among indigenous communities because of the non-recognition of their rights to land, resulting in the venting of dissent or threats, and lately,

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open protests. Such forms of action have in some instances induced division among community members as well as created negative psychological impacts.

9.6 The rapid erosion of cultural identity and languages as a result of land loss has reached alarming levels. Recognition of the close connection between indigenous peoples' cultural and language rights and their rights related to their lands, territories and resources is necessary to ensure respect for indigenous peoples' right to self-determination. The Special Rapporteur on Rights of Indigenous Peoples outlined the elements of the relationship of Indigenous peoples to their lands, territories and resources as follows: (i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.²⁷⁴

9.7 The existence of sacred sites on indigenous peoples' land is central to the religious and spiritual belief systems of indigenous peoples' expressed through rituals and ceremonies. There are also sites of immense historical, spiritual and cultural importance that require protection. The enjoyment of these rights, however, has been impeded and remains under threat, particularly from desecration due to development activities. Recognising that peoples have diverse cultures and may relate to land in very different ways, States have an obligation to respect collective property rights over lands, territories and resources, the right to culture and the right to self-determination (including the right to pursue their own economic, cultural and social development).²⁷⁵

9.8 The lack of cohesive understanding within the community and reduced or weakened roles and authorities of village elders and leaders hamper intergenerational transfer of knowledge essential to preserving the indigenous peoples' identity.

9.9 When indigenous peoples' land is taken, attempts to integrate and relocate communities in new settlements often result in them being socially marginalised. Marginalisation is manifested by poor housing, and poor access to education and health care. Indigenous women in particular are exposed to the risk of violence and often denied police protection.

9.10 Rapid conversion of customary lands into plantations or destruction of habitats leading to extinction of herbs and other medicinal plants has also impacted indigenous knowledge on healing. In line with the Convention on Biological Diversity, the Sabah Biodiversity Enactment 2000 and the National Policy on Biodiversity 1998 (para 32) acknowledge the sustainable use of biological resources by indigenous peoples. However these legal and policy frameworks appear to have had limited impacts in balancing protection of cultural heritage and traditional knowledge with development.

Economic Impacts

9.11 Non-recognition of indigenous peoples' rights to land has displaced some indigenous peoples from their customary land and deprived them of their livelihood. Economic self-reliance has been progressively reduced, making indigenous communities dependent on government subsidies and handouts and vulnerable to exploitation, forcing them to become coolies on their own land. This will make it difficult to attain the international commitment made to the Programme of Action for the International Decade of the World's Indigenous People.

274E/CN.4/Sub.2/2001/21.

275 Bali Declaration on Human Rights and Agribusiness in Southeast Asia

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Programme of Action for the Second International Decade of the World's Indigenous People (A/60/270)

The five objectives for the Decade are as follows:

- (i) Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;
- (ii) Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent;
- (iii) Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples;
- (iv) Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth;
- (v) Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national levels, regarding the implementation of legal policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.

9.12 States need to accept that the right to food may be violated when indigenous peoples are denied access to land. A recent, strong affirmation of the importance of secure land, resource and tenure rights for indigenous peoples and to ensure respect for the right to food is contained in the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Voluntary

Guidelines) endorsed by the Committee on World Food Security on 11 May 2012. The Rio + 20 Outcome Document also recognises the importance of secure land tenure and traditional sustainable practices to address the needs of rural communities and food security (paragraph 109) and commits Parties to improving livelihoods by promoting secure land tenure, participation in decision-making, and benefit-sharing (paragraph 193).

9.13 Without land titles, indigenous peoples' are not entitled to subsidies and other government support schemes such as fisheries and agricultural support thus depriving particularly those who are considered poor.

9.14 In addition, when indigenous peoples' land is taken over through joint-ventures with companies, they do not have a say in the management and benefits. Once rights are recognised, the integration of

NCR rights into development programs by the State can receive support from communities. The duty of States to protect against human rights abuses of indigenous peoples by third parties, including business enterprises, should be a pre-condition for granting development licences and permits on indigenous peoples' lands, territories and resources, and must include the full participation of Indigenous peoples at all stages of decision-making.²⁷⁶

Political Impacts

9.15 The non-recognition of indigenous peoples' rights to their lands mirrors deprivation of the right to self-determination where they do not have a full voice on appropriate ways of preserving and protecting their culture and ways of life and to be able to be a visible partner or participant with decision-making powers within any development programmes or policies affecting them. It is important that indigenous peoples are given the opportunity to have control over their lands and resources, and exercise their rights to be able to develop and progress as individuals and as peoples, based on a social order that they themselves determine.

²⁷⁶ A/HRC/18/43, page 5.

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9.16 Non-recognition of indigenous peoples' lands denies them the right to participate in consultation processes on land issues or in decision-making pertaining to land development within their traditional territories. Even when there appears to be tacit recognition of indigenous peoples' claims on the land, consultations were mainly done and controlled by government agencies concerned. A key factor to better address complexity and diversity is a strong participatory approach to designing, implementing and evaluation proposed programmes so that they are responsive to local problems and to the goals and visions of indigenous peoples.²⁷⁷

9.17 Traditional institutions and community organisations are important for indigenous communities in managing their resources, particularly land. These institutions should be allowed to operate democratically, without interference on how the communities organise themselves, including the selection of village leaders.

The UN Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples, in exercising their right to self-determination, have the right to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making processes that affect them. This is crucial to their ability to maintain and develop their identities, languages, cultures and religions within the framework of the State in which they live.²⁷⁸

9.18 Conversion of indigenous territories to conservation and protected areas without regard to, or participation of, indigenous peoples is another significant consequence of non-recognition. Indigenous peoples are guardians of nature and the forest and it is imperative that the authorities take advantage of their knowledge by engaging them as collaborative partners in the management of conservation areas.

9.19 The UN Declaration on the Rights of Indigenous Peoples requires that the free, prior and informed consent (FPIC) of indigenous peoples be obtained in matters of fundamental importance for their rights, survival, dignity and well-being. The Philippines, which has incorporated provisions on FPIC and also developed Guidelines for its implementation, found that this is an advantage as it puts the situation clear for developers on the outset. If an FPIC law is put in place in Malaysia, the government will be seen internationally to respect human rights of indigenous peoples.

9.20 Recognising rights to land and associated natural resources, and according indigenous peoples the power to negotiate their uses can greatly empower communities. Such recognition should be viewed as a precondition for direct negotiation with investors.²⁷⁹ Without such recognition, indigenous peoples will continue to file cases against companies and government agencies that trespass on, and destroy, their land.

Health and Environmental Impacts

Some guiding principles related to land, territories and natural resources:

- Indigenous peoples' lands and territories should be largely recognized, demarcated and protected from outside pressures;
- All efforts should be made to ensure that indigenous peoples determine the activities that take place on their lands and in particular that impacts on the environment and sacred and cultural sites are avoided;
- Indigenous peoples' rights to resources that are necessary for their subsistence and development should be respected;
- In the case of state-owned sub-surface resources on indigenous peoples' lands, indigenous peoples still have the right to free, prior and informed consent for the exploration and exploitation of those resources, and have a right to any benefit-sharing arrangements.

Source: UNDG, Guidelines on Indigenous Peoples' Issues, 2008

²⁷⁷IFAD Policy on Engagement with Indigenous Peoples

278A/HRC/18/42

279 Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources. Principle 1 - Existing rights to land and associated natural resources are recognized and respected.

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9.21 Because land is integral to indigenous peoples' life, strong emphasis should be placed on the protection of the environment of the land. Land is respected and the soil richness is preserved through the traditional custom of shifting cultivation. Water source and catchment areas are protected and guarded.

9.22 Current land conflicts involving logging, development projects and oil palm plantation stems from the non-recognition of the native customary rights or the inherent land rights of the indigenous peoples. These activities have resulted in the collapse of the ecologies which in turn have led to environment degradation. Similarly, conversion of forests into oil palm plantations leads to the complete loss of some species of mammals, reptiles and birds, while encouraging the proliferation of others to the extent that they become pests. Plantations also infringe on the habitat of many endangered species such as the orang-utan, elephant, tiger and proboscis monkey and cause them to be killed or relocated.

9.23 Indigenous peoples are also acutely aware of the relationship between the environmental impacts of various types of development on their lands and the environmental and subsequent health impacts on their peoples. Indigenous well-being is therefore often seen as inextricably linked with their relationship to lands and traditional practices. Rivers are polluted by these activities which have negative bearing on aquatic life as well as human well being and health, in particular the indigenous peoples who rely on river as water source. Pollution and environment degradation cause a wide range of health problems for indigenous peoples.

9.24 Another possible negative impact on the environment, if indigenous peoples are deprived of their land, is the over-exploitation by the affected people of the resources around them in order to survive, particularly if they do not have other livelihood options or their low level of education prevents them finding alternative employment. The Akwe': Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities recognises this and recommends the integration of cultural, environmental, social impact assessments as a single process.²⁸⁰

280 <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

Chapter 10

RECOMMENDATIONS

ToR no. 5: On the basis of the facts and determinations arising from the National Inquiry, develop recommendations to the Federal and State Government relating to but not limited to the following:-

a)the review of domestic land laws and other related laws and policies, with a view to incorporating a human rights focus therein, addressing, in particular, the problems faced by Indigenous Peoples in their land claims; and

b)the formulation of strategies and a plan of action with the aim of protecting and promoting Indigenous Peoples' right to land as an indivisible and integral part of the protection and promotion of their other human rights.

General Conclusions

10.1 Indigenous peoples are among the most marginalised and disadvantaged groups in Malaysia. Despite having provisions which recognise their land rights in the Federal Constitution, domestic and international laws, systemic issues have denied them the full enjoyment of their legal and human rights. These systemic issues evolved mainly from the successive amendments of land laws that do not recognise indigenous peoples' perspectives of land ownership and management and therefore eroded customary rights to land. They also affected administrative decisions with respect to indigenous peoples' land claims. The issues also evolved from the adoption of policies that give priority to approving lands for large-scale development projects over indigenous subsistence economy.

10.2 There is a high degree of frustration and anger among indigenous communities for the inadequate response and ongoing violation of the rights conferred on them. As injustices in access and control of land are often central to the genesis of conflict that could be costly for the country as a whole if not addressed effectively, the Inquiry sees it as critical that such injustices are dealt with in an expeditious and holistic manner.

10.3 On the basis of the facts and determinations arising from the National Inquiry, 18 key recommendations under five main themes are set out below, with some key activities for their implementation. It is recommended that all activities involving reviews and studies be conducted with the full and effective participation of indigenous peoples. The government's commitment to adopt the recommendation to establish an independent National Commission on Indigenous Peoples will ensure that indigenous land rights issues are effectively addressed.

GENERAL RECOMMENDATIONS

RECOGNISE INDIGENOUS CUSTOMARY RIGHTS TO LAND²⁸¹

10.4 The Inquiry finds that the recognition of indigenous customary rights to land is critical in protecting and promoting these rights as an indivisible and integral part of the protection and

promotion of their other human rights. Successive amendments to land laws since the British colonial period have eroded indigenous peoples' customary rights to land. But while some positive statutory provisions do exist, much more needs to be done to enhance protection so that these are aligned with indigenous peoples' own perspectives, court decisions and international laws.

10.5 The Sabah Land Use Policy 2010, for example, refers to a need for the policy to be sensitive to 'the traditions and needs of native communities', which could help ensure full recognition of customary rights to land.

281 The term 'Indigenous Customary Rights' is used to include both NCR as terms in Sabah and Sarawak Land laws, and Orang Asli customary rights to land.

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Recommendation 1: Address Security of Tenure

10.6 The displacement of communities mainly through the implementation of development projects, poverty eradication programmes, encroachments on indigenous peoples' lands by plantation and other companies, and inappropriate dealings through powers of attorney, mostly by outsiders or by community leaders themselves, have occurred because of absence of land tenure security. It is therefore imperative that the government address land tenure security of indigenous peoples.

10.7 To ensure that security of tenure and customary rights as perceived by indigenous peoples are not compromised, it is recommended that before any alienation, reservation or licence in respect of any land is made, created or issued, the authorities concerned investigate fully the status of the land by reference to relevant documentary as well as actual evidence on the ground. Relevant notices must be posted in conspicuous places to ensure actual notification. Signed receipts of notices to call for testimonies of customary land rights claimants, particularly rural indigenous peoples, must be obtained and returned.

10.8 Recommendations for changes to laws and policies to address land tenure security, which have already been studied and/or adopted by the government, should be instituted immediately through legal and policy decisions.

10.9 Court decisions which have recognised the concept of indigenous/native customary rights to land should be instituted promptly through administrative orders, if not amendments to existing laws.

Recommendation 2: Clarity of Concepts on Customary Tenure

10.10 Proper studies to clarify concepts such as rayau and traditional territories (pemakai menoa, wilayah adat) are urgently needed. The study should also recommend the reasonable land size to enable indigenous peoples to support a sustainable livelihood and cultural life, particularly those who still rely fully on the land to make a decent living and for traditional cultural survival.

10.11 For other issues that still require further studies, discussions to clarify and review relevant laws and policies should be made and recommendations from the study should be subsequently implemented to enhance protection of indigenous peoples' rights to land.

10.12 Review current definitions and criteria for the establishment of native customary rights to land in the Sabah Land Ordinance (section 15) and the Sarawak Land Code (section 10) to include other important aspects of customary land use. The National Land Code should be amended to include clear provisions recognising Orang Asli customary land use.

10.13 To review current adopted policy provisions that are not evidence-based, legal or are problematic, including but not limited to the policy giving priority to the issuance of Communal Titles in Sabah, issuing Provisional Leases in Sarawak before NCR lands are excised, and the giving of individual land titles to the Orang Asli.

10.14 It would also be pertinent to study examples in other countries on how security of tenure for indigenous peoples can contribute to the nation's economy and to draw parallels with the contribution of indigenous peoples of Malaysia to the economy of the state. Some examples are the Waitangi Tribunal process in

New Zealand and the flexible land titling adopted by Canada for its indigenous peoples, which have already shown positive economic, political and reconciliatory results.

Recommendation 3: Restitution for Non-Recognition of Customary Lands

10.15 Legal provision for the restitution of land needs to be put in place. Where the possibility of returning indigenous customary lands that have been acquired in the past is not possible or feasible, alternative land or compensation should be considered.

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REMEDY LAND LOSS

10.16 The Federal Constitution guarantees the right to property in Article 13 and a person's property cannot be taken away unless the law allows it.

10.17 Deprivation of indigenous peoples' right to land in order to carry out poverty eradication schemes, economic development and conservation efforts, or by fraudulent means through the use of powers of attorney and other forms of illegal land transfers, has occurred without adequate mechanisms for complaints and redress. Remedying past wrongs and instituting redress mechanisms will not only restore faith in the government and reconcile conflicts, but also ensure justice and fairness to those whose land has been taken.

10.18 Reconciliatory approaches that engage with actors in the justice and administrative systems and treat indigenous communities in a respectful manner could mitigate conflicts that may arise where there is a heightened level of frustration. The role of legal practitioners and mediators who understand the concepts of indigenous customary rights is important and can be strengthened through enhanced interaction with the communities.

Recommendation 4: Redress Mechanisms

10.19 The Inquiry strongly recommends the establishment of an Indigenous Land Tribunal or Commission composed of retired judges and experts on indigenous customary rights to resolve issues and complaints related to indigenous peoples' land claims that are brought before it. The Tribunal or Commission should be empowered to decide on these complaints and issues, including appropriate settlements or redress related to a case.

10.20 In view of the high number of cases currently filed in court, the Inquiry also recommends the establishment of a Native Title Court or a special court to deal with the backlog of cases in the civil court. Depending on the powers of the proposed Indigenous Land Tribunal/Commission, its recommendations can be subsequently brought before the Native Title Court to decide on these cases. These processes will significantly reduce the time to decide on land conflicts.

10.21 Create an independent mediation mechanism eg. Ombudsman to provide assistance in land disputes involving indigenous peoples' land claims. This mechanism can link with current efforts by the judiciary to encourage mediation for cases brought before the court. Mediation using the adat of the indigenous peoples should also be considered, thereby reflecting government recognition of their cultural traditions.

10.22 Establish a mechanism to monitor the land rights situation of indigenous peoples that works closely with relevant government departments and indigenous organisations dealing with land, and the proposed Indigenous Land Tribunal/Commission and Ombudsman.

10.23 Legal aid and other forms of support for communities wanting to use strategic litigation and targeted advocacy to seek redress through the courts should also be provided. Where free legal aid is not available especially in Sabah and Sarawak, special arrangements for counsel from the Bar Council Legal Aid Service could be extended to these states. In addition, the Sabah Law Association and the Sarawak Bar should consider extending services similar to those provided by the Bar Council Orang Asli Committee.

Recommendation 5: Address Past Policies & Programmes

10.24 Review policies related to poverty eradication programmes, ensuring that acquisition of land for such programmes does not infringe on indigenous customary land rights and that independent and periodic evaluation processes are built into the programme.

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10.25 Review indigenous land development schemes and other commercial development programmes affecting indigenous peoples including the term "beneficiaries", conditions to be imposed and the way in which Memoranda of Understanding or Agreements are explained to the indigenous peoples before the signing of such MoU or Agreement. A mechanism to obtain Free, Prior and Informed Consent from affected communities must be built in.

10.26 A policy decision should also be made to ensure inclusion in all agreements and licences, both new and those which are being renewed, among others, express conditions requiring NCR lands to be excised before the commencement of any project, a timeframe within which such requirements are to be fulfilled, and a penalty if such and any conditions and timeframe are not complied with. These conditions should also be incorporated into

agreements signed between the state government or government departments (such as the JHEOA/FELCRA and JHEOA/RISDA agreements) as well as private and government-linked companies.

10.27 All areas which have been gazetted without proper survey and demarcation should be resurveyed. Areas already inhabited by people should be excluded.

10.28 There should be no eviction of communities with established customary rights, including from areas that have been gazetted as forest reserves and other protected areas.

Recommendation 6: Review Compensation

10.29 Review compensation provisions and regulations in laws relating to acquisition of land, including the rate of compensation for lands and crops. The review should take into account the livelihood and other needs of communities in the transitional period after land is taken from them until they are fully resettled.

10.30 Where possible, they should be given alternative land which is of the same value as the land acquired from them, and adequate basic facilities should be guaranteed.

ADDRESS LAND DEVELOPMENT ISSUES/IMBALANCES

10.31 The current aggressive pursuit of development in Malaysia has resulted in imbalances and negative impacts on indigenous rights. The numerous land development issues such as desecration of graves; destruction of agricultural land, crops, catchment areas and important cultural and sacred sites; water, air and noise pollution as well as unsustainable income that the Inquiry has elaborated have to be addressed to ensure development really benefits all peoples.

10.32 Government and development partners must reconcile economic growth priorities with security of tenure. Reviewing land concessions approved in the past, linking security of tenure to investment promotion, and wealth-sharing agreements are important practical measures to be considered.

10.33 The findings of this Inquiry also show that indigenous peoples are not against development or its process but their interests and concerns should be protected through their participation in development. Central to this concern is the commitment “to improving the livelihoods of the people and communities by creating the conditions needed for them to sustainably manage forest”.²⁸²

Recommendation 7: Adopt HRBA to Development and FPIC Law

10.34 The Federal Constitution in Article 5 guarantees the right to life, which the courts have elaborated to include a right to livelihood and quality of life. The Declaration on Right to Development, the UNDRIP, ILO C169, CRC, CEDAW and ICESCR all contain provisions and legal measures that promote

²⁸²These aspirations are clearly articulated under Articles 193 to 196 of the UN Conference - Rio+20 outcome document. Malaysia participated at two UN Conferences on

Sustainable Development better known as “Rio gatherings” and endorsed the Agenda 21 document emerging from the first gathering and ‘The Future We Want’ document in June 2012 Rio+20 gathering. In both there are clear global commitments towards sustainable development.

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the right of participation in various forms. The report of the UN Expert Mechanism on the Rights of

Indigenous Peoples on “indigenous peoples and the right to participate in decision-making” stressed the importance of State parties in ensuring that corporations respect the rights of indigenous peoples to give or withhold their free, prior and informed consent to operations that may affect their rights.

10.35The UNDP recommended that States adopt a human rights based approach (HRBA) to development so as to ensure such development will benefit both the state and its citizens. The UNDRIP and ILO 169 also recommend the adoption of an FPIC law in order to obtain consent from indigenous peoples and ensure that they would also benefit from development programmes.

10.36In line with international standards, the State and Federal governments must adopt such a human rights based approach to development and adopt an FPIC law outlining consent-making processes that ensure effective participation of affected indigenous communities.

Recommendation 8: Ensure Land Development Does Not Adversely Impact Indigenous Peoples

10.37Prevailing development in Malaysia leans towards the development of large-scale projects (mainly plantations) by private sector investment or government linked companies. Studies (Cramb 2007, Majid Cooke 2012, and Li 2011) have shown that implementing large-scale development projects has compounded land conflicts rather than improving land matters, and poverty among indigenous peoples has not been reduced significantly.

10.38The Special Rapporteur on the Right to Food in his report to the UN General Assembly (A/65/281) highlighted the threat to the right to food from large-scale land investments and recommended that land development schemes must be designed in ways that do not lead to evictions, disruptive shifts in land rights and increased land concentration.

10.39The findings of the Inquiry indicate that when management objectives of business or government agencies change because of changes of parties in power, the effects on the ground are felt directly by indigenous peoples through the scaling down of the project. Scaling down are done through reductions in the anticipated number of participants, the cutting down of promised entitlements which means non-delivery of promised (usually unsigned) entitlements. Worst case scenarios are in the form of abandonment of projects; government relinquishing authority over the projects to other organisations or business entities; or outright sale of assets to other organisations.

10.40 To ensure land development does not adversely impact indigenous peoples, indigenous peoples' land and land claimed by indigenous peoples which is acquired for development and poverty eradication programmes need to be reviewed with the full and effective participation of affected communities.

10.41 The government also needs to institute more stringent guidelines for poverty eradication programmes and built-in evaluation processes to ensure that they meet the targets and do not infringe on the rights of others.

10.42 A review process on the calculation and disbursement of dividends and other entitlements, and the timeframe for transfer of land ownership to participants should also be conducted for indigenous land development schemes.

Recommendation 9: Promote Successful Development Models

10.43 Adopt small scale land development models where indigenous landowners can be fully involved. Such models should ensure land ownership and management remain in the hands of indigenous peoples, but at the same time, training opportunities to enhance skills and management should be given.

10.44 Ensure better governance of land and tenure, as well as “best practices” by companies to make certification systems perform as they should. Better governance to improve conditions of timber and

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palm oil certification, housing and urban development as well as extractive industries must include the necessity to acquire free and prior informed consent from all those affected especially indigenous peoples with customary rights.

10.45 Businesses should also be made more accountable and required to respect human rights of indigenous peoples. International standards regulating timber industries to comply with the international timber certification and trade regulations should be adopted such as the signing of Voluntary Partnership

Agreements to trace where timber was harvested to ensure legality of its source and to curb illegal timber trade with particular emphasis on respecting customary land and human rights.

10.46 Timber industries should also ensure timber extraction is respectful of the rights of the indigenous peoples. International standards regulating timber industry to comply with the international timber certification and trade regulations should be adopted such as the signing of voluntary partnership agreement (VPA) to trace where timber was harvested to ensure legality of its source and to curb illegal timber trade with particular emphasis on respecting NCR land and human rights.

Recommendation 10: Policy Towards People-Centred Inclusive-Sustainable Development

10.47 The agenda for sustainable development with a balanced policy agenda for economic, social and environment agenda must be the cornerstone of public policy towards indigenous

people and the forest. It must have a very firm commitment for inclusive development which is sustainable, equitable and empowering.

10.48 The Federal and State governments must also adopt sustainable forest and oil palm management in mainstreaming economic and environment policies. This necessitates the establishment of a national action taskforce comprising all the stakeholders and indigenous representatives, human rights and civil society organisations to ensure the effective realisation of the sustainable development agenda.

PREVENT FUTURE LOSS OF NCR LAND

10.49 To ensure lasting solutions, any potential loss of land as a result of prevailing factors has to be expeditiously addressed since protecting and promoting the Indigenous Peoples' right to land is an indivisible and integral part of the protection and promotion of their other human rights.

10.50 An important strategy that the Inquiry recommends is the respect for principles of free, prior and informed consent. Various international instruments and guidelines can be useful references such as the UN Development Group Guidelines on Indigenous Peoples' Issues, the UNDRIP, ILO 169 and CBD/Akwe Kon Guidelines, EMRIP and PFII studies, UN Human Settlements Programme - Guidance

Notes for Practitioners on Land & Conflict. Other guidelines referred to earlier which relate to business and human rights are also important to recommend to both companies and government agencies to arrest future loss of indigenous customary land.

Recommendation 11: Settlement Exercise on Indigenous Customary Lands

10.51 The recommendation made in 10.7 above to investigate fully the status of any land claim or application by referring to relevant documentary as well as actual evidence on the ground is also relevant here.

10.52 Customary land claims must be settled prior to the granting of new provisional leases, licenses, projects or other land alienation.

10.53 Review and amend relevant laws to align them to universally accepted norms. It is important to mention here that the UN Guiding Principles on Business and Human Rights "Protect, Respect and Remedy"

Framework developed for transnational corporations and business enterprises place the obligation on the corporate sector to include rights-based practices in their operations. Businesses are obliged to do so even in countries where laws and policies are in place to protect human rights of citizens.

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10.54 Hold regular fora between indigenous peoples, government and parliamentarians, and other stakeholders to bridge gaps in perception and understanding. Such fora could also be used by the government and parliamentarians to clear other issues and questions relating to

indigenous lands before proposing policy changes or passing any bills that would affect indigenous peoples' customary land.

Recommendation 12: Recognition of Indigenous Lands in Protected Areas

10.55 The Inquiry found that customary lands claimed by indigenous peoples were included in protected areas for conservation purposes (parks, wildlife sanctuaries, water catchment etc). Where indigenous communities have acceded to such inclusion into protected areas for the enjoyment of the wider society, the government should recognise the historical ownership of land prior to gazetting such land as a protected area, and credit the community for conserving and contributing their land. Where possible, they should be allowed access to continue activities that would not jeopardise the area.

10.56 Remedies for failing to give affected communities adequate information and notices required by law prior to the gazetting of protected areas and forest reserves should be found such as the excision of the community lands, granting of an alternative area or exemplary joint management agreements for areas where communities can continue to stay.

Recommendation 13: Indigenous Peoples' Active Involvement in Forest Management

10.57 The information shared by relevant forest-based agencies at the Inquiry revealed that the involvement of indigenous peoples in forest management is very limited. Hence, a new policy directive is needed for enhanced and active involvement of indigenous communities in forest management programmes, especially in forest reserves. Proactive efforts to encourage community-based forest management, where clear structures, functions and decision-making processes for indigenous peoples, are recommended. This effort, which had been tested and proven successful in Nepal²⁸³, will prompt indigenous communities to take the lead and manage resources, while the government plays the role of supporter or facilitator.

ADDRESS LAND ADMINISTRATION ISSUES

10.58 Land administration plays a key role in ensuring indigenous peoples' right to land is implemented. Currently, an enabling environment including clear structures, functions and decision-making processes related to land administration that can contribute to resolving much of the indigenous peoples' land rights issues, are absent and need to be put in place.

10.59 From the findings and analyses of the Inquiry, three key recommendations to address the myriad land administration issues are set forth below i.e. capacity enhancement of land department staff, reviewing current responses to indigenous land issues, and immediate implementation of corrective measures.

Recommendation 14: Conduct Comprehensive Review of JAKOA

10.60 In view of the seriousness of complaints and apparent weaknesses of the Orang Asli Development Department (JAKOA) in protecting Orang Asli land rights as provided by the Aboriginal Peoples Act to protect and ensure the well-being and advancement of the Orang Asli, the Inquiry recommends that an independent and comprehensive review of JAKOA be undertaken at an early date. The comprehensive review should, among others, clarify whether

Orang Asli land matters should remain within the purview of JAKOA or go directly to Orang Asli communities themselves.

10.61 While such a review is underway, the Inquiry recommends that JAKOA be more proactive in resolving existing Orang Asli land issues.

283 Source:

<http://www.unep.org/greeneconomy/SuccessStories/ForestManagementinNepal/tabid/29869/1anguage/en-US/Default.aspx>. Likewise, the work of The International Union for Conservation of Nature, which is the world's oldest and largest global environmental organization, is also outstanding to reinforce this theme of community-based forest management. See:

<http://www.iucn.org/about/union/secretariat/offices/europe/work/?7332/Global-forestry-institutions-call-for-more-community-based-forest-management>.

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Recommendation 15: Capacity Enhancement of Land Departments

10.62 The Lands and Surveys Department (Sabah & Sarawak) and the Department of Land and Mines (Peninsular Malaysia), including the delegated authorities at the district level, represent the authorities dealing with land claims of indigenous peoples. Staff of these departments would benefit from capacity enhancement to ensure effectiveness in dealing with indigenous peoples' land rights. Various human resource training courses can be conducted, including on:

- skills to engage in a respectful manner with indigenous peoples
- necessary legal understanding with regards to indigenous customary rights,
- common law and indigenous customary rights
- different models of development
- free and prior informed consent and the mechanism to obtain consent before undertaking any development programme/project
- international instruments relating to rights of indigenous peoples

10.63 A network of consultants from universities, non-government organisations, the legal fraternity, government departments and knowledgeable indigenous individuals can be established to act as resources for the training as well as to provide expertise for mediation and conflict resolution processes.

10.64 For projects that involve indigenous peoples' land through joint-ventures, relevant authorities should provide training to their enforcement units to be efficient and proactive in ensuring that companies and government agencies are carrying out proper demarcation on the ground and observing other requirements according to the terms and conditions in the licence.

A fund should be set up to acquire the services of legal experts in this area to represent the indigenous peoples during negotiations and to ensure that FPIC is properly attained.

Recommendation 16: Review Responses to Land Issues

10.65 The Findings chapters dealt with reviews of constraints and administrative responses for each of the regions. Responses that have negatively impacted indigenous peoples' right to land should be examined closely by relevant authorities, and improvements and changes should be promptly adopted.

10.66 Gaps and weaknesses in administrative procedures and practices designed to facilitate the recognition of indigenous peoples' rights to land should be reviewed by relevant authorities to ensure more efficient implementation, taking into consideration past recommendations and studies.

Recommendation 17: Immediate Implementation of Corrective Measures

10.67 Land development projects, whether part of a poverty eradication programme, commercial development of indigenous and or projects on land contested by indigenous peoples, often involve several departments. When conflicts occur, these departments and other private corporations often do not want to take the responsibility for resolving such conflicts. Left unresolved, such conflicts have led to more serious confrontations. The Inquiry recommends that where a number of state departments are involved, inter-departmental coordination should be immediately mobilised to address these issues. Projects that do not have such a mechanism should include this in their administrative procedures.

10.68 Adequate financial allocations should be made for the settlement of land claims, the processing of land applications and requests for surveying reserves, including computerisation of land databases.

Land offices and other relevant departments should make budget requests for adequate funding based on the demands for land settlement they receive annually from indigenous peoples.

10.69 Suspicions and allegations of corruption and conflict of interest by staff of the land offices give a detrimental name to these departments, especially if proven in court. Land offices should adopt and practise zero tolerance for corruption, and ensure their processes are accountable and transparent.

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10.70 Relevant authorities, particularly the land offices and forestry departments need to enhance in-house complaints handling. This could include establishing a complaints desk in each district, having proper record books for oral complaints, and establishing standards to respond to complaints. Officers who are proactive and oriented to respect indigenous peoples should be equipped with proper training to handle complaints.

10.71 Regular awareness programmes and information dissemination should be organised by Lands and Surveys/Land and Mines Department, its delegated authorities at the district level,

and other relevant agencies to explain to the public their roles and functions, and the processes and procedures involved in securing ownership and the recognition of indigenous customary rights land.

10.72 Land offices need to set up a unit to address issues related to indigenous peoples' right to land, including the implementation of guidelines and principles of free and prior informed consent, community consultations prior to project approval and implementation, and Environmental and Social Impact Assessments. Establishing monitoring units to ensure land agreements between developers and communities are complied with is also necessary.

10.73 The opinion of the Ketua Kampung, Penghulu and Batin, and the native/district chiefs (of the native courts of Sabah and Sarawak) should be sought when verifying historical evidence and the demography of an area claimed under customary rights. However, in view of the negative perception about some of these leaders, alternative ways to get historical and demographic information should also be considered.

RECOGNISE LAND AS CENTRAL TO INDIGENOUS PEOPLES' IDENTITY

10.74 Indigenous peoples' close relationship to their customary lands and territories means that these are significant not only as a means of livelihood but also as part of their spiritual and cultural life, and form part of their identity as peoples. The centrality of indigenous peoples' customary lands is vital for their development and cultural survival. Effective recognition, as well as the promotion and protection of rights to land and identity would thus require time-bound, broad-based affirmative action that encompasses issues related to indigenous peoples' development and well-being.

Recommendation 18: Establish an Independent National Commission on Indigenous Peoples

10.75 The Inquiry calls for the establishment of an independent National Commission on Indigenous Peoples. The functions of the Commission, among others, should be to advise the government on laws and policies related to indigenous peoples; propose and monitor sustainable development programmes on indigenous peoples' land; promote participation of indigenous peoples at all levels; and conduct research on issues related to the well-being of indigenous peoples. The Commission members should be composed mainly of indigenous peoples' representatives that receive the support from, and acceptance by, indigenous peoples of Malaysia.

Ends

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Press Release

http://www.suhakam.org.my/documents/1168820/1253477/PRESS+STATEMENT_SUHAKAM+NATIONAL+INQUIRY+REPORT+INTO+THE+LAND+RIGHTS+OF+INDIGENOUS+PEOPLES+IN+MALAYSIA_25+APRIL+2013.pdf

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PRESS STATEMENT
SUHAKAM'S NATIONAL INQUIRY REPORT INTO THE LAND RIGHTS OF INDIGENOUS PEOPLES IN MALAYSIA

The Human Rights Commission of Malaysia (the Commission) expresses its concern over the speculations made by various parties, including the Democratic Action Party (DAP) and the "Sarawak Report", among others, regarding the alleged withholding of the Commission's National Inquiry Report on the Land Rights of Indigenous Peoples in Malaysia (National Inquiry). The Commission, as a National Human Rights Institution (NHRI) established under the Human Rights Commission of Malaysia Act 1999 (Act 597), wishes to stress that the right to release any of its reports is the sole and exclusive prerogative of the Commission. Since its inception in 1999, the Commission, on its own motion, had released various reports, including reports of its previous inquiries on alleged human rights violations.

In respect of its National Inquiry Report, and notwithstanding its past practices, the Commission, decided, after serious consideration, to defer the official release of the Report until after its first submission to the Federal Parliament. This decision is made pursuant to Section 21(3) of its founding Act which provides that "the Commission may, whenever it considers it necessary to do so, submit special reports to Parliament in respect of any particular matter or matters referred to it, and the action taken in respect thereof."

Given the importance of the findings and recommendations of the National Inquiry to the wellbeing of Indigenous communities in Malaysia, the Commission sees the strong need for the Report of this first-ever National Inquiry on the land rights of the Indigenous Peoples to be submitted to the Federal Parliament, the Legislative Assemblies of the relevant States, the Federal Government as well as the relevant State Government so as to allow Parliamentarians, Members of Legislative Assemblies, as well as policy makers, to deliberate on the issues and recommendations raised in the report. Nevertheless, given the upcoming General Election and the dissolution of Parliament and State Legislative Assemblies, the Commission has decided to defer the release of the Report until a new Parliament and a new Federal Government as well as State Legislative Assemblies and State Governments are formed. It is the Commission's earnest hope that given the importance of the findings of the National Inquiry and the many concrete recommendations contained therein, this National Inquiry on the land rights of the Indigenous Peoples of Malaysia will be fully deliberated in Parliament and the Legislative Assemblies and followed up in terms of the expeditious and effective implementation of the many recommendations and proposals contained in the report by the Federal Government as well the relevant State Governments, in the larger interests of the Indigenous communities.

As a Paris Principles-compliant NHRI, the Commission wishes to reiterate its impartiality and independence in discharging its statutory mandates relating to promotion and protection of human rights of all peoples in Malaysia.

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"HUMAN RIGHTS FOR ALL"
TAN SRI HASMY AGAM
Chairman
The Human Rights Commission of Malaysia (SUHAKAM)
25 April 2013