

Logging In Sarawak and the Rights of Sarawak's Indigenous Communities

A report produced for JOANGO HUTAN by IDEAL, authored by Carol Yong.

Acknowledgements and Disclaimer

This report was prepared for JOANGO HUTAN by Carol Yong on behalf of IDEAL. This report aims to provide useful insights into how logging in Sarawak and timber legality/illegality issues are affecting indigenous peoples customary land rights and related human rights and gender issues. Both IDEAL and the author do not claim this report to cover all the issues or indigenous communities. It would be presumptuous to claim a report such as this to be exhaustive, not least because of constant changes, e.g. land-related court cases filed by indigenous peoples and the Sarawak Government's actions/reactions. Nevertheless, it is a reminder of the long and complex struggle by Sarawak's indigenous peoples to assert their rights, and of opening avenues for their voices to be heard.

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Introduction

Since January 2007, Malaysia has been negotiating with the European Union (EU) to enter into a Voluntary Partnership Agreement (VPA) on *Forest Law Enforcement Governance and Trade* (FLEGT).¹ The EU-initiated VPA is aimed at establishing a trading system and a licensing mechanism to curb the sale of illegal timber products to the EU. A number of social and environmental non-governmental organisations (NGOs) as well as indigenous peoples organisations in Sarawak, Sabah and Peninsular Malaysia, otherwise known as JOANGO HUTAN, have consistently stressed that recognition of indigenous peoples' native customary rights (NCR) to land has to remain a top priority in the continued discussions and negotiation processes on the FLEGT-VPA.²

Whether Malaysia will accept the VPA remains to be seen. At the time of writing the picture is still sketchy and uncertain. In August 2009, the Malaysian Timber Council (MTC) was reported as saying: "Timber deal with EU Soon" and that "the signing of the Forest Law Enforcement Governance & Trade Voluntary Partnership Agreement (FLEGT VPA) signaled Malaysia as the first country whose timber products could be sold in the European Union (EU) without further legality requirements."³ The MTC statement is false – Malaysia will in no case be the first country to sign the VPA with the EU as Cameroon, Ghana and Congo have signed already. So this shows how the MTC and/or the press misinterpret facts. More recently, in November 2009, the Sarawak Timber Association (STA) released a 106-page book entitled, "Myth, Facts & Reality Of EU FLEGT VPA: Sarawak's Perspective."⁴ This book was distributed amongst all Federal Cabinet Ministers and Deputy Ministers, the Sarawak Cabinet, Sabah Cabinet, all the top civil servants in the Federal and State Ministries, and the key figures in the Malaysian team dealing with FLEGT. The STA book stressed that Sarawak government and agencies involved in the timber industry oppose the FLEGT-VPA if the negotiations include issues of native land rights and sustainability. It also said the FLEGT-VPA must be accepted in conformity with Sarawak's laws and procedures. However, as will be elaborated later, actions and amendments made by the Sarawak state to the laws, and more particularly land laws, have diminished native rights to lands. The latest twist to the FLEGT-VPA has the advisor to the Ministry of Plantation, Industries and Commodities, Freezailah Che Yeom flashing out that "Substantial progress has been made in negotiations between the European Union (EU) and Malaysia on the Voluntary Partnership Agreement (VPA)" and that "there was strong commitment from Malaysia to conclude the agreement."⁵

Contrary to assertions in the STA book, the recognition of Sarawak's native rights to lands and territories is a critical issue. Many native communities in fact are dependent on this land, natural resources and productive ecosystems for their livelihoods and other needs, directly or indirectly. Yet many of Sarawak's indigenous populations - and also certain segments of the local Malay and non-native communities - have been adversely affected by the activities of logging, plantations, dams and other large scale projects. These projects have caused massive destruction of the forests and environment on one hand, and affected indigenous peoples losing their lands, forests and resources on the other hand. Often, the licences and leases for logging and plantations are issued by the state-level government to rich tycoons in these businesses and to certain individuals with political links, without prior notice or any attempt to obtain the consent of the affected communities. The concessions remain largely invisible until the machinery arrives to clear the land and fell the timber. This manner of issuance of licences and leases has continued up to now.

Many of the above points have been raised in JOANGO HUTAN's previous and ongoing submissions to the government and relevant authorities, including the then Minister in the Prime Minister's Department (Zaid Ibrahim) in July 2008 on legal position of the Ministry, the Malaysian Minister of Plantation and Industrial Commodities (MPIC) in August 2008, and the Ambassador-Head of

¹ See for more information on the VPA-FLEGT issue in Malaysia, Yong, Carol (2006), *Forest Governance in Malaysia: An NGO Perspective*. A Joangohutan Report for FERN, Moreton-in-Marsh. This report and also other reports on the same series on Ghana and Congo (DRC) are available at www.fern.org. For detailed description of the EU's FLEGT Action Plans, see, Council of the European Union (2003), Communication from the Commission to the Council and the European Parliament on Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan – Council Conclusions, Brussels.

² Prior to the FLEGT-VPA consultations, JOANGO HUTAN – a collective network formed in 2001 - had already been vocal in underlining the problems of the forest certification scheme under the Malaysia Timber Certification Council (MTCC; formerly known as National Timber Certification Council, NTCC Malaysia). For more specific examples concerning JOANGO HUTAN's statements and demands on the MTCC scheme and FLEGT-VPA, see; <http://www.loggingoff.info>, <http://www.rengah.c2o.org>.

³ "Timber Deal With EU Soon: MTC" LH Cheng, 17.08.2009, http://www.easterntimes.com.my/index.php?news_id=2&news_content=12674

⁴ The report can be downloaded from www.sta.org.my.

⁵ "Ministry: Progress in M'sia-EU timber negotiations," 25 Jan 2010, <http://www.malaysiakini.com/news/122802>. Freezailah Che Yeom is also the Chairman of the MTCC, the body that certifies "sustainably managed forests" under the Malaysia Timber Certification Scheme (MTCS).

Delegation, Delegation of the European Union to Malaysia, Vincent Picket⁶. JOANGO HUTAN's efforts are largely to suggest positive ways forward to ensure indigenous peoples rights are not ignored. But the Malaysian authorities often avoided addressing the specific concerns raised and instead argued, *inter alia*, "the national law confers power to the authorities to issue logging licences and hence, the operations should be deemed lawful," or "when people are poor, you can't stop them from felling trees."⁷ Ironically, logging in Malaysia is dominated by rich companies and politicians, not by the poor peoples. To date, there are many unresolved conflicts in timber concession areas between indigenous communities and state-licensed logging companies, particularly in Sarawak.

Despite considerable efforts from the outset to integrate into the government-initiated consultations on FLEGT-VPA, JOANGO HUTAN often find themselves at the peripheral whenever they voiced the need to discuss in detail substantive issues relating to the NCR question. JOANGO HUTAN's position is that indigenous peoples' rights to customary lands and territories cannot be denied. Thus, in March 2008, JOANGO HUTAN walked out of a government-initiated multi-stakeholders' consultation in protest against the failure of the process in recognising native customary rights. Specific to the latest media report, cited above, that Malaysia views the EU is ready to sign the timber trade agreement with Malaysia, this position unfortunately do not encompass the grave concerns of JOANGO HUTAN. The EU's response has also been vague: "There were several technical matters pertaining to the VPA that needed to be resolved [...] We hope to conclude the VPA in June or July." JOANGO HUTAN have objected to the fact that Malaysia specifies the requirement that defines the source of timber as legal based merely on existing laws and the narrow interpretation of legal standards in the proposed agreement, ignoring the fact that logging licences have often been issued on NCR lands.⁸ Yet, when it comes to the issue of NCR, the Malaysian authorities have plenty of excuses, principally that NCR is irrelevant to the FLEGT-VPA or that the nonparticipation of NGOs would not derail the July deadline.

About this research/report

The research underlying the production of this report is coordinated by the Institute for Development of Alternative Lifestyle (IDEAL) on behalf of JOANGO HUTAN. In this report, we argue that Malaysia, and more cogently the Sarawak state government, are in violation of national, state and international laws in recognising NCR, despite clear court decisions upholding NCR. We draw examples of land cases brought by Orang Asli and Sarawak indigenous communities and court decisions recognising NCR. Our analysis of the intersection of NCR and legal justice reflects the importance of developing new understandings of land issues rooted in the lived experiences of indigenous communities and how the Courts have begun to address and improve legal justice at the same time protect the rights of indigenous peoples. We also examine the activities of logging concessionaires authorised by the Sarawak government and the disproportionate impact of hardships on indigenous peoples caused by the loss of their lands and forests. Finally, we assert that in order for the ongoing FLEGT-VPA negotiations between Malaysia and the EU and the VPA to be legitimate, it must include the recognition of indigenous peoples' customary and collective rights over their lands and territories, respect for their adat (or customs) and application of adat law to deal with land claims and disputes. This report is one of the many ways in which JOANGO HUTAN are making a contribution to strengthen our collective capacity to advocate for protection and respect of the rights, including rights to NCR lands, of indigenous peoples in Malaysia, and more specifically in Sarawak.

This research has involved a combination of desk research and fieldwork in Sarawak. The desk-research involved a review of existing literature on issues related to indigenous peoples, human rights, resources governance, logging and laws, both with reference to Sarawak and more broadly Malaysia and globally. Study of UN agencies and NGOs (esp. BMF, FERN and IDEAL) reports have also been undertaken to supplement information. Fieldwork in Sarawak took place between 14 and 22 March 2009. An appointed consultant conducted data gathering in Sarawak, including interviews to complement those conducted by IDEAL, and also examined some state Environmental Impact Assessment (EIA) reports. A series of small-group and focus group discussions (FGD) as well as interviews have been conducted with affected indigenous communities and individuals in Sarawak. Further consultations took place with Sarawak and national NGOs that work in related areas including to identify case studies for the research.

⁶ These statements and related information can be found at: <http://www.loggingoff.info> and <http://rengah.c2o.org>.

⁷ "Malaysia's position," *The Star*, Lifefocus, 17.07.2007, <http://thestar.com.my/lifestyle/story.asp?file=/2007/7/17/lifefocus/18012436&sec=lifefocus>. Accessed 19.07.07.

⁸ "NGOs upset with EU's stand on disputed timber", 27.01.2010, <http://thestar.com.my/news/story.asp?file=/2010/1/27/nation/5550007&sec=nation>. Accessed 27.01.10.

Part 1: Malaysia's Indigenous Peoples, Land Rights and the Laws

1.1 Provisions in the Federal Constitution on native rights

Article 153(1) of the Federal Constitution 1957 (and amendments) states that it is the responsibility of the Yang di-Pertuan Agong (King of Malaysia) to safeguard the special position of the Malays and natives of States of Sabah and Sarawak. Article 153(2) provides for the reservation of the said communities, quotas in respect of positions in the public service, scholarships, educational or training privileges or special facilities given by the Federal Government as well as permits or licences for the operation of any trade or business. These special privileges are justified on historical grounds that these groups have been economically disadvantaged.⁹ At the state level, safeguarding the special position of natives in Sarawak and the legitimate interests of other communities is granted to the Yang di-Pertua Negeri (State Government) and is enshrined in the Constitution of the State of Sarawak under Article 39, provisions identical to Article 153 in the Federal Constitution. There are also provisions related to fundamental liberties, as spelled out in Part 2 of the Constitution, *inter alia*, liberty of the person, equality before the law, freedom of movement, freedom of speech, expression, assembly and association, and freedom of religion.¹⁰ However, these rights are not guaranteed but subject to the express limits within the Constitution and to ordinary laws.

Article 161A of the Federal Constitution provides additional protection to the special position natives of Sarawak and Sabah by giving them preferential treatment for alienation of land by the State (Article 161A(4)). The rights to property are also clearly spelled out in the Constitution under Article 13, which reads:

- (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.

Finally, women have been able to achieve some recognition of equality through the law defined by reference to non-discrimination on the grounds of religion, race, descent, gender or place of birth (Article 8[2]). However, there are no clearly defined and obligatory provisions of non-discrimination and gender neutrality with respect to land matters. In practice, land tenure regimes can discriminate against women due to the unequal status of women in society, in the community and in family life, although indigenous women may enjoy considerably better access and inheritance rights than their mainstream counterparts. However, gender discrimination with regards to land can happen in indigenous societies where there is a dominant prevailing patriarchal culture over major decisions regarding the family and other matters. These are, of course, important issues that need further attention, although not within the scope of this current report.

1.2 Domestic laws and native rights to lands

Malaysia has a two-tier structure of government - federal system and state systems, thus the division of jurisdiction between the federal and state authorities is written into the Federal Constitution. The federal government principally deals with matters such as foreign affairs, defense and internal security, finance, communications, transportation and education. Each of the 13 states has jurisdiction over land, forests, fishery, agriculture and minerals, water resources and local authority areas, including the power of disposal, principally through the state legislations and state organs.¹¹ At the end of the day the power rests simply on the state government. As will be examined in Part 2 of this report, there are many situations where indigenous peoples are raising concerns over the abuse of the state exercising power over land and other natural resources matter. There are also concerns that, in

⁹ Unlike the Malays who were accorded this special position and privileges upon Malaysia's independence from the British in 1957, the natives of Sarawak and Sabah were incorporated later, vide the Constitution (Amendment) Act 1971 (Act A30). In contrast, the Federal Constitution is less clear with respect to rights of the indigenous Orang Asli (original peoples) of Peninsular Malaysia, as the constitutional guarantee is not for special privileges but rather 'protection' empowered to the Department of Orang Asli Affairs to look after their welfare, under Article 8(5). This department was in fact set up in 1954 under the Aboriginal Peoples Act 1954 by the then British colonial government. Both the Act and Department were retained by the post-independence government, although progressively amended over the years.

¹⁰ See, Laws of Malaysia (Reprint) Federal Constitution (Incorporating all amendments up to 1 January 2006), Commissioner of Law Revision Malaysia and Percetakan Nasional Malaysia Bhd, Kuala Lumpur, 2006. Available at: [http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20(BI%20text).pdf), downloaded on 13 January 2010.

¹¹ Under Part VI, Ch.1, Article 74(2) of the Federal Constitution which states: (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

practice, the State can exercise control over land use and forestry resources through ruling party policies, representing some of the most powerful and wealthy interests. This is most clearly illustrated in the context of Sarawak, the geographical focus of this report. Citing Baru Bian, a native rights lawyer and Sarawak leader of the People's Justice Party (PKR): "Taib Mahmud has made himself into one of the richest men of South-East Asia during his 28 years as Chief Minister of Sarawak."¹² This is not a new argument; it has been mentioned in the writings of numerous researchers, political analysts, eminent economists and so forth.¹³

For present purposes, it is useful to know that the rights of natives to their customary lands and their land tenure customs have been recognised and protected under various governments of Sarawak: the Sultan of Brunei, the Rajah Brooke rule (1841-1946), the British colonial government (1946-1963) and the Sarawak state government (1963-present).¹⁴ Specifically, native customs are recognised as part of the Laws of Malaysia, under Article 160(2) of the Federal Constitution and statutory provisions such as the Land Code (Cap. 81) of Sarawak under Sections 5, 15, 18 & 18A, the Native Courts Ordinance 1992 and the Native Customs (Declaration) Ordinance 1996.

The Sarawak Land Code 1958 (Cap 81), with amendments, is the main legislation on land, which represents a watershed in Sarawak indigenous peoples' relationship to customary lands. The Land Code has developed in Sarawak from colonial times to the present, nevertheless it contains very specific stipulations that recognise NCR in written law. Section 2(a) defines 'Native Customary Land' to mean 'land in which native customary rights (NCR), whether communal or otherwise, have lawfully been created prior to the 1 January 1958, and still subsist as such.' The Land Code further recognises NCR land through classification of lands into Mixed Zone, Reserved land, Native Area Land, Interior Area Land and Native Customary Land.

Similarly, Section 5 of the Land Code specifically recognises that NCR may be created by indigenous tribes, groups, families or individuals. Although not referring directly to native title as *sui generis*,¹⁵ Section 5(2) of the Land Code has identified six ways to establish rights over NCR land:

- (1) The felling of virgin jungle and occupation of the land
- (2) Planting of land with fruit trees
- (3) Occupation of cultivated land
- (4) Use of land for a burial ground or shrine
- (5) Use of land for rights of way
- (6) Any other lawful means (this category was deleted in 2000)

Hence there is overt recognition of the rights of natives to establish their customary lands. In addition, Sections 5(3) & (4) & 15 of the Land Code hinder the acquisition of NCR lands even for public purposes without due compensation paid. Further, if compensation of extinguished NCR land is deemed inadequate, the landowners can call for their dispute over compensation or any decision of the Superintendent of Lands & Surveys to be referred to arbitration by arbitrators appointed by the Chief Judge of Sabah and Sarawak. Corresponding state laws also declare that natives can seek judicial review of executive action or decision which affects their rights or obtain a declaration of their rights, to which Section 25 of the Courts of Judicature Act 1964 and Section 44 of the Specific Relief Act 1950 refers. In theory, indigenous peoples' rights of access to the Courts to safeguard their land rights are contained in existing relevant laws.

¹² BMF's Exclusive interview with Baru Bian, 12 January 2010. The full interview with Baru Bian is posted on the Bruno Manser Fund's website: www.bmf.ch

¹³ See, for example, Jomo, K. S., Chang Y. T., Khoo K. J. and others (2004). *Deforesting Malaysia – The Political Economy and Social Ecology of Agricultural Expansion and Commercial Logging*. Zed Books and UNRISD, London and Geneva; Ross, Michael L (2001). *Timber Booms and Institutional Breakdown in Southeast Asia*. Cambridge University Press, Cambridge; Bruno Manser Fund [www.bmf.ch] and Rengah Sarawak (Sarawak News) [<http://www.rengah.c2o.org>]

¹⁴ Malaysia's Constitution, national and state laws are primarily based on the English legal system. Like most countries once under British dominance, Malaysia has a pluralistic legal system encompassing customary law, Islamic law and the English common law. After independence, Malaysia collected and amended the existing body of laws and norms under British jurisdiction – legacy of the British colonial system – into the Laws of Malaysia. Nevertheless, for the natives of Sarawak and Sabah, the application of traditional customs and customary law has been entrusted to the Native Courts and related authorities in the respective state. For a detailed report on Sarawak indigenous peoples' customary rights to land and related legal issues, see, Ramy Bulan & Amy Locklear (2008), *Legal Perspectives on native Customary Land Rights in Sarawak*, A report prepared for the Human Rights Commission of Malaysia (SUHAKAM), Kuala Lumpur. The full report can be downloaded from SUHAKAM website (<http://www.suhakam.org.my>).

¹⁵ *Sui generis* means "a kind by itself", "unique." Native title is *sui generis* because it is a collective right, inalienable (means "not transferable outside the natives) and inherent.

1.3 Customary legal system

Like indigenous peoples globally, Sarawak's indigenous peoples have their own institutions, laws, practices, rights, obligations and system of government. These features differ from the systems of governments and mainstream groups in the state and national levels. There are two broad categories of customary laws: personal laws and customary tenure laws, but this report focuses on the latter.

According to customary tenure laws, specified rights over lands, forests, water bodies and other natural resources are invested in the community, although certain rights can also be vested in individuals. For example, among the Ibans, the community has rights to a particular territory that has been handed down from their ancestors which they call *pemakai menoa* and this includes the *pulau galau* (higher forests). However, individual families have rights of use and occupancy to some areas that could be cleared for cultivation (in Iban, *temuda*) as needed and as agreed by the community. Other indigenous groups such as the Penan, Lun Bawang, Kenyah and Kayan all have their own way of identifying or distinguishing their customary lands, territories, forests and resources. Further, each indigenous group recognises and respects the autonomy of their own territories as well as those belonging to their neighbours and shared territories between groups. For instance, the Iban custom:¹⁶

In the past, when pioneering families of Iban opened a virgin forest area, they would perform an important ritual known as *panggul menua*. It was only after the ceremony was first performed that the first cutting of virgin forest for settlement and farming could commence. From then onward, the community can establish its rights to the felled area, and forest within the general area, as their *pemakai menua* (also spelt as *menoa*) or communal land. The Iban custom of 'Pemakai Menua' encompasses an area of land held by a distinct longhouse or village community, and includes farms, garden, fruit groves, cemetery, water and forest within a defined boundary (*garis menua*). Pemakai Menua also includes *temuda* (cultivated land that have been left to fallow), *tembawai* (old longhouse sites), and *pulau* (patches of virgin forest that have been left uncultivated to provide the community with forest resources for domestic use).

The existence and application of adat laws are accepted by the community, since the customs and rules of the adat law of each indigenous group have largely been passed down from one generation to the next through oral stories and practice. The rules, obligations and procedures of the adat laws are generally known by all members of the community. In particular, the community elders are vested with the responsibility for regulating the adat laws, procedures and land-related matters, or fining whoever violates the laws especially those governing land use and resources management. These unwritten laws are dynamic and can be defined, transformed or amended by the people/community over time to make them applicable to changes within the community. Likewise, if any disputes arise relating to land or other matters, the adat laws and procedures are equally applied to all parties to the dispute and through an open, community-level forum.

The states of Sabah and Sarawak both have their own Native Court systems stipulated in the Native Court Ordinance 1992. These systems have been established by legislations passed by virtue of constitutional authority conferred under Item 13 of List IIA. In addition, Supplement to State List for States of Sabah and Sarawak in the Ninth Schedule to the Federal Constitution also accord recognition, protection and enforcement of native customs, including native marriages, divorce, maintenance of children of customary marriages between natives, distribution of properties and disputes over land held under customary tenure. Nevertheless, the customary systems of many of Sarawak's indigenous groups are under constant evolution, and particularly customary land tenure systems continue to be influenced by the State and other factors that often have far-reaching impacts.

1.4 State controlling NCR lands

As seen above, the laws provided for the creation of NCR lands through native customs and compensation in instances where NCR granted to the native in such areas are affected by acquisition or revocation. The Sarawak Government, however, refuses to respect NCR. To a very significant extent, the land problems faced by Sarawak's indigenous peoples are anchored in the centralisation of political powers in the hands of the past and present Chief Minister of Sarawak, Rahman Yaa'kob and Taib Mahmud respectively.

¹⁶ Testimony of Mr. Nicholas Bawin ak Anggat, in the Judgement of the case *Agi Ak Bungkong & Ors versus Ladang Sawit Bintulu S/B & Others*, available at: http://rengah.c2o.org/pdf/Rh_Agi_Judgement_21012010.pdf

When logging began to expand in Sarawak in the 1970s, especially to the interior, the government effectively exerts control over indigenous communal lands and forests to allow exploitation of timber and other resources therein. Meanwhile the government began enacting a series of laws and policies that limit or reduce the recognition of land rights of indigenous communities and other local communities. As well, it created various policies and agencies to execute the recommendations relating to land matters especially customary land tenure. For instance, in 1981, the Land Custody and Development Authority (LCDA) was set up to promote 'development projects' by the private sector. The LCDA, mooted by Taib Mahmud, was empowered to acquire both state-controlled land and NCR lands for private estate development, largely oil palm. In addition, a 'New Concept' (*Konsep Baru*) for the development of plantation lands has been modelled on a Joint Venture Corporation (JVC scheme) wherein private investors are encouraged to open plantations on NCR lands. The lands are then leased to the private company for 60 years – equivalent of about two full cycles of oil palm development – which holds 60% shares. Apparently to reflect that native land owners are shareholders, they are allocated 30% share for their contribution of lands whilst the state holds the remaining 10%. However, the state through appointed agencies such as LCDA holds the communities' 30% in trust. That the State takes on the role of Trustee over the communities' land has been justified by the Ministry of Land Development, then the ministry tasked with implementing the *Konsep Baru*, as an arrangement favoured because this "will give absolute right to the implementing company to manage the plantation WITHOUT interference from the NCR landowners over a period of 60 years."¹⁷

Sarawak's indigenous peoples have seen their rights to lands worsened as a consequence of the introduction of land legislations and their amendments during the Rajah Brooke and British colonial rule.¹⁸ Many of these colonial land laws were retained even though Sarawak joined the Malaysian Federation in 1963 and subsequent creation of the Sarawak state government. Laws are enacted or amended in the Sarawak state assembly through which Taib Mahmud can exert considerable control and political influence. Invariably, the Sarawak government has progressively tightened these land laws, generally narrowing the definition of customary land rights thereby decreasing the amounts of NCR lands entitled to indigenous peoples. Subsequent legislations sought to give the authorities more power to acquire native lands for logging, commercial plantations or any other land utilisation activity. Modern laws and regulations to govern lands and other resources have undermined indigenous land tenure systems which have been in place for a long time, even before any government existed. Native customs, for instance the Iban custom of 'pemakai menua' is legally recognised. The government's conduct contravened national and state laws, as well as native customs controlling access to these same resources. More importantly, NCR established through native customs has been reaffirmed by the Malaysian and Sarawak courts, as shown in the land cases won by indigenous communities.

1.5 Court battles and indigenous land rights: selected Malaysian cases

Recognition of NCR is particularly important for indigenous peoples in maintaining their origins, way of life, cultural and spiritual traditions, community structure and self-determination. As such, they have been resilient in defence of their customary rights to land. Indigenous peoples have mobilised themselves to submit countless appeals to the relevant state and national authorities, made police reports, staged peaceful demonstrations and set up adat blockades. Invariably, most of these community actions did not have positive responses from the authorities and private companies involved. In fact, affected indigenous communities and individuals often face many obstacles in their attempts to claim rights to their NCR lands and traditional territories, as we will see in Part 2 of this report. Having exhausted these means, indigenous communities have begun to seek the help of lawyers to bring the matter to court to settle disputes, especially over their rights to customary lands.

Legal cases can be time consuming and expensive and even daunting for indigenous communities, as modern court procedures differs from Native Courts systems. Yet, an increasing number of Sarawak indigenous communities and individuals affected by logging (and other large scale projects) are resorting to the courts to challenge the government, government agencies and private companies for violations of NCR and other human rights. The Courts have made some landmark court judgements that have ruled favourably on cases involving indigenous peoples and their land rights. Some of the landmark court cases of particular relevance to this report are highlighted here.¹⁹

¹⁷ Ministry of Land Development website, nd., 'Issues and Responses' page 1, emphasis in original. Website accessed 2.2.2008, <http://mrlid.my-onestop.com/index.pl?action=viewcontent&cat=ncr&id=30>

¹⁸ This study does not look at land legislations enacted under colonial rule, or new laws and amendments to existing legislations in colonial history and after independence. The key legislations relating to land and forests in Sarawak, including the colonial land laws are discussed extensively in Ideal (1999), *Tanah Pengidup Kitai: Our Land is our Livelihood*, pp16-33.

¹⁹ Information on these cases are reproduced, with original footnotes omitted, from Bulan & Locklear, 2008:60-74, unless otherwise stated.

(a) *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418 - 436. Upheld: [1998] 2 MLJ 158*

This case concerns the Orang Asli who brought to court the State Government of Johor and its Director of Lands and Mines. The Orang Asli claimed that some 53,273 acres of land within the vicinity of Sungei Linggui acquired by the state government for the construction of a water dam 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. The court accepted into evidence various historical and judicial documents, which established that the Orang Asli plaintiffs had inhabited or occupied the area since time immemorial. The learned judge surveyed the state of native title law in various common law jurisdictions from North America, Africa and India as well as the Australian High Court's decision in *Mabo (No 2)*. In a decision later affirmed by the Court of Appeal and the Federal Court, the learned judge concluded that the Orang Asli have their rights over their ancestral land protected under common law, based on a continuous and unbroken occupation and enjoyment of rights to the land since time immemorial. More importantly, 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. Nevertheless, the judgement delivered only on compensation for loss of livelihood, hunting and foraging ground but not for the land (ie. only what is above the land but not in the land).

(b) *Sagong Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591; [2005] 6 MLJ 289*

This case is the suit by the Orang Asli Temuan in Bukit Tampoi, Dengkil, against the then BN state government of Selangor and three others (United Engineers (M) Bhd, Lembaga Lebuhraya Malaysia and the Federal Government). The matter before the court concerned a strip of 38,477 acres of Orang Asli land running through their gazetted aboriginal reserve, as well as other lands they customarily occupied which the state government had acquired for the construction of part of a highway to the Kuala Lumpur International Airport. The government maintained they were not entitled for compensation since the land in question was state land. However, the Orang Asli based their claims on rights under common law, statute and the Federal Constitution. This case sets an important precedent on Orang Asli land rights, and the court's decision has established that:²⁰

- 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*;
- 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;
- The *APA 1954* [Aboriginal Peoples Act] 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'; and
- The Governments of Selangor and Malaysia owed fiduciary duties and had breached those duties towards the plaintiffs.

(c) *Nor anak Nyawai & Ors v Borneo Pulp Plantations Sdn Bhd v Superintendent of Lands and Survey & Anor [2001] 2 CLJ 297, [2006]²¹*

This is a case in which the plaintiffs were residents of Rumah Luang and Rumah Nor, two Iban longhouses located along the Sekabai River in Bintulu, Sarawak. The plaintiffs, led by Headman Nor anak Nyawai claimed that companies operating within the boundaries of their land had in fact trespassed and damaged their ancestral land. This land rights case involved the Bintulu Superintendent of Lands and Survey (third defendant) who had issued a provisional lease to Borneo Pulp Plantations Sdn Bhd (first defendant), covering the disputed land. Borneo Pulp Plantations Sdn Bhd then subleased the land to Borneo Pulp & Paper Sdn Bhd (second defendant), the contractor company responsible for clearing the land for a tree plantation. The landowners sought declarations confirming the validity of their NCR. In a 2001 landmark court ruling, the High Court of Sabah and Sarawak acknowledged that the Iban community under headman had native customary rights not only over their farmland but also over primary rainforests. The learned judge, Ian Chin J found that the 'native customary rights of an Iban to do things associated with the terms *temuda*, *pulau* and *pemakai*

²⁰ Cited in Bulan & Locklear, 2008:63.

²¹ Cf. Ramy & Locklear (2008), pp.63-67. This case was contested by the defendants, see, *ibid.* for summary of the case and counter case: *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241, 245 ('*Nor Nyawai I*'), *aff'd in part, Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another* [2005] 1 MLJ 256 ('*Nor Nyawai II*'); *Amit Bin Salleh & Ors v The Superintendent, Land & Survey Department Bintulu & Ors* [2005] 7 MLJ 10, 22 ('*Amit*')

Author: At the time of writing, the Sarawak Indigenous Peoples' network (TAHABAS) issued a media release to announce that a Sarawak Land and Survey enforcement team, with assistance from Malaysian army personnel and the police, demolished about 25 houses of Headman Nor's community, without prior notice being given to the community. Most of the occupants were left without any place to live and their belongings were also intentionally destroyed by the enforcement team. The full text of the media release (dated 20 January 2010) and pictures are available at: www.bmf.ch

menoa have not been abolished' but survived through the Brooke orders and ordinances of the colonial period up to the present. The court referred to *Mabo v. Queensland No. 2* [1992] 66 ALJR 408 and *The Wik Peoples v The State Of Queensland And Ors* ('Wik Peoples'), as well as the Malaysian case of *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997]. The court thus held that common laws respected the pre-existing rights of indigenous peoples under native law and custom.

(d) *Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak* [2005] 3 CLJ 697²²

In this case, the declaration being sought by the plaintiff was for claiming damages for the State of Sarawak's extinguishment of NCR rights that he had acquired to certain land in Miri. The Federal Court, the highest court in Malaysia, had ruled that the state was acting 'illegally' in taking over a communities' land without community consent or due compensation. The Court's landmark legal decision issued in October 2007 ruled that the principle of common law applies in Sarawak, which the former State Attorney General had argued against. The court found that even though the government had reserved or gazetted the land by government order for another purpose, this did not weaken or reduce native customary rights in the land. The communities' rights in the land remained, since the government did not expressly extinguish the prior owner's rights, nor paid due compensation for such as agreed by both parties. On 5 May 2009, the Court dismissed an appeal by the Sarawak State Government,²³ and further held that communities have rights over communal forest and territory, not just over orchards and longhouses.

From the preceding cases, it is clear that recognition of NCR as part of law and the rights of indigenous peoples to land by virtue of customary law is consistent with provisions in Federal and State Constitutions and laws passed by Parliament or State Legislatures. The Kuching High Court judgement also reaffirmed NCR lands in two more recent court cases, namely the ***Agi Ak Bungkong & Ors versus Ladang Sawit Bintulu S/B & Others*** and ***Mohd Rambli Kawi versus Lands & Surveys Kuching & Another***. In both cases, the High Court Judge, Datuk David Wong, declared that the local communities (Iban in the first and Malay in the second case) had native customary rights over land unlawfully claimed as state land by the Sarawak State government.²⁴ In the case filed by Mohd Rambli Kawi, the Court declared that the customary practice of Malays must be given the force of law, which is a landmark decision. In *Agi Ak Bungkong & Ors*, the learned Judge referred to the High Court and Court of Appeal ruling in the suit *Nor Nyawai & Ors V Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 and held that the rule does not stipulate that NCR must be established first in a trespass action. Moreover, he said:

Both the High Court and Court of Appeal held that native title requires an examination of the customs and practices of each individual community and this involves a factual enquiry and not whether the customs appear in the statute book. This view is consistent with the intention of Federal Constitution as native customs are accorded the status of law under Article 160(2) of the Federal Constitution which defines law to include 'custom or usage having the force of law in the federation or any part thereof.'

Immediately after the High Court judgment, all the losing defendants in the Agi lawsuit – the oil palm plantation contractors, the provisional-lease landowners (Tabung Haji) and the Sarawak Government – filed an application with the Kuching High Court for a Stay Order on the January 21 judgment, to prevent the land from being surrendered to the 15 Iban communities, pending appeal. However, the Kuching High Court has thrown out the state government's application for the Stay Order on February 23. The state government has argued that it needed a stay of judgement in order to "exercise its powers to extinguish the native customary rights of the plaintiffs."²⁵ The High Court Judge Linton Albert was reported as not amused by the state government's stance of attempting to use the government's administrative powers to negate the High Court's January 21 instructions, and his Lordship ruled:²⁶

²² See, Ramy & Locklear (2008) pp.67-69, for the details concerning this case [*Madeli Bin Salleh (Suing as Administrator of the Estate of the deceased Salleh Bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak* [2005] 5 MLJ 305, 330 ('*Madeli II*'), aff'd, *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006 (Q) (Unreported) 29].

²³ Federal Court of Malaysia (Appellate Jurisdiction) decision on Department of Land and Surveys Miri Division and others vs Madeli bin Salleh, 30 October 2007, upheld on appeal 5 May 2009. The then Sarawak Attorney General's legal position has been made known to the Malaysian Human Rights Commission (SUHAKAM) (Attorney General 2007). A copy can be viewed at <http://www.rengah.c2o.org/assets/pdf/de0157a.pdf>. This position has been repudiated by a number of Sarawakian NGOs in a position paper available at <http://www.rengah.c2o.org/assets/pdf/de0162a.pdf>

²⁴ "Sarawak gov't humbled by Iban villagers," Keruah Usit, 21.01.2010, <http://www.malaysiakini.com/news/122458>. See, for the full judgement of the Rumah Agi case, http://rengah.c2o.org/pdf/Rh_Agi_Judgement_21012010.pdf, and Ramli Kawi judgment: http://rengah.c2o.org/pdf/Ramli_Judgement.pdf.

²⁵ "Sarawak gov't says High Court was wrong", <http://www.malaysiakini.com/news/123677> 04.02.2010. See also, "NCR land: Strike 3 against S'wak govt, allies," Keruah Usit, 24.02.2010, <http://www.malaysiakini.com/news/125037>

²⁶ "Time for Sarawak natives to bring out the tiger in them?" Feb 24, 2010,

“The fact that that is relied on as a ground indicates that the 4th and 5th Defendants [the Sarawak Government] are not above invoking the statutory power to frustrate the consequential order. It stands to reason, therefore, that on this ground alone, the stay ought to be refused because the court should not act in vain.”

Earlier, on 21 February 2010, the Federal Court sitting dismissed an application by the Sarawak Government to review its own decision delivered in October last year in the **Amit Salleh and others** lawsuit. The case involving more than 600 Sarawak native landowners of the Kedayan/Melanau/Malay communities of Kuala Nyalau and Ulu Nyala, Suai in Bintulu had gone through the High Court, the Court of Appeal and the Federal Court, with judgment given in their favour.²⁷

The victory for the indigenous landowners, especially Sarawak NCR landowners, clearly reflects that they are entitled to the rights of access to the Courts to protect their special rights including rights to land and property, rights to practise their customs and traditional way of life. Article 13(2) of the Federal Constitution further requires the government to pay adequate compensation of extinguished customary land rights. All these ground-breaking judgements set out important legal interpretations concerning indigenous rights to customary lands and rights to property, and adequate compensation where that customary right is extinguished. In addition, the Judiciary has reaffirmed indigenous peoples' legal rights to their NCR land and customary practice, based on Malaysian law and taking into account international law. These landmark court decisions are opening up new opportunities for indigenous peoples to turn to the courts for recourse to legal justice regarding NCR lands, especially against any projects imposed by the state government and its agencies and private sectors on those lands. These court decisions thus can provide valuable precedents for Sarawak NCR landowners who have filed, or are in various stages of being filed in the courts. There are over 100 cases reported as filed by indigenous plaintiffs in the Sarawak courts over infringement of their NCR rights by logging and oil palm plantations.²⁸ (Appendix 1 contains the list of court cases relating to logging).

1.5.1 Fiduciary duty of governments

Other courts that use English Common Law have concluded that the government's power to extinguish native title (NCR) is subject to a fiduciary obligation.²⁹ In other words, indigenous peoples' rights are also guided by jurisprudence from many different countries under regional human rights instruments. Precedents set at the regional level emphasise that these rights pre-date the formation of national jurisdiction, for example, in the ruling through the Inter-American Court of Human Rights (IACHR) of *The Saramaka People vs Suriname*,³⁰

“The judgement reaffirms the Court's and IACHR's prior jurisprudence, which holds that indigenous and tribal peoples' property rights do not depend on domestic law for their existence, but, rather, are grounded in and arise from customary laws and tenure. This means that the property rights of indigenous peoples exist even if they do not hold titles to the ancestral territories they have historically used and occupied. These property rights include natural resources. States have corresponding obligations to recognise, secure and protect indigenous and tribal peoples' property rights, *inter alia*, through demarcation, delimitation and titling, conducted in accordance with the norms, values and customs of the indigenous peoples concerned, and must adopt or amend their domestic laws to this end where necessary. The Court has also held that indigenous peoples have a right to restitution of traditionally owned lands which have been taken or lost without their consent, including where title is presently vested in innocent third parties.”

Similarly, the Malaysian Courts have held that governments have a fiduciary duty to protect the rights and interests of natives including customary and ancestral lands rights, and not to act in a manner inconsistent with those rights. For example, in the aforementioned case of *Sagong Tasi & Ors vs. Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, the High Court in Shah Alam proclaimed:

<http://hornbillunleashed.wordpress.com/2010/02/24/5877>.

²⁷ Another Victory for the Sarawak NCR Landowners”, Feb 23, 2010, <http://hornbillunleashed.wordpress.com/2010/02/23/5855>.

²⁸ Statement by Baru Bian, NCR lawyer and newly-appointed Sarawak PKR (Opposition Coalition) chief: “Over 100 NCR land cases still pending” 29.10.2009, <http://thestar.com.my/news/story.asp?file=/2009/10/29/nation/4994833&sec=nation>.

²⁹ Cases cited here are reproduced from the paper by JC Fong, et.al. “Globalisation: Access to Justice - International Covenants and Protection of Native Rights” (see, fn15, for full reference). For other examples, see, Bulan & Locklear (2008).

³⁰ *Indigenous Peoples' Rights and Reduced Emissions from Reduced Deforestation and Forest Degradation: The Case of the Saramaka People v. Suriname*, Forest Peoples Programme, March 2009.

And in the *Wik People's case [The Wik Peoples vs. The State of Queensland & Ors [1996] 187 CLR1]* it was reiterated that the fiduciary must act consistent with its duties to protect the welfare of the aboriginal people. The remedy where the Government as trustee or fiduciary has breached its duties, is in the usual form of legal remedies, namely by declaration of rights, injunctions or a claim in damages and compensation.

It is clear from the above judicial pronouncements that legal remedies are available where the Government fails in fulfilling its fiduciary duties in the protection of indigenous peoples, as in the Australian case. In the case of *Kerajaan Negeri Selangor & Others vs. Sagong bin Tasi* (Civil Appeal No. B-02-419-2002 – CLJ Bulletin 39/2005), the Court of Appeal awarded damages or compensation to the Orang Asli over land which they claimed to be their traditional territories. This is despite such lands not gazetted as Aboriginal Reserve under the Aboriginal Peoples Act 1954. The Court held, *inter alia*, that “the failure or neglect of the first defendant (Government of Selangor) to gazette the area in question also amounted to a breach of fiduciary duty”.

Likewise, the Court of Appeal held in *Superintendent of Land & Surveys, Bintulu vs. Nor anak Nyawai & Ors [2005] 3 CLJ 555* that “the common feature which forms the basis of claim for native customary rights is the continuous occupation of land” and that “although the natives may not hold any title to land and may be termed licencees, such licence 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”.

In sum, the Federal Constitution protects indigenous peoples rights’ to their customary lands, the right to property and livelihood, and equality before the law. Rights to customary lands cannot be taken away except in accordance to the law and upon payment of just compensation. It is a fiduciary obligation for government to consult and obtain consent from indigenous communities prior to taking actions that may infringe their rights, in particular rights to customary land. Malaysian courts have drawn on existing jurisprudence from other countries in understanding Malaysia’s fiduciary obligations with respect to recognition of NCR and they should continue to do so. Furthermore, the fiduciary obligation as described in jurisprudence from other different countries can be precedent-setting cases for Malaysian courts to develop equivalent standard for recognition of NCR in Sarawak. Landmark court cases and judgements such as those presented above have been used by human rights and land rights lawyers to substantiate concerns of indigenous peoples over loss of the NCR lands and further legal actions to seek justices for indigenous peoples. Moreover, the protection and recognition of indigenous land rights as guaranteed under Constitutional and common law jurisdictions are consistent with developments in international human rights law. What are the international human rights laws and UN documents Malaysia has ratified? This is discussed in more detail below.

1.6 International legal framework

Of the nine core human rights international treaties Malaysia has only ratified two: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC), albeit with certain reservations.³¹ Malaysia opted the Declaration on Education for All, Declaration on the Right to Development, Declaration on Indigenous Peoples’ Rights, and signed the Convention on the Rights of Persons with Disabilities (CRPD) in April 2008. But further than this, Malaysia has not ratified the other binding human rights treaties. This dismal record shows a lack of commitment and state obligations towards the civil and political rights of the individual, even though the Government of Malaysia in supporting the inclusion of the Declaration on the Right to Development as part of the International Bill of Human Rights and other international instruments had proclaimed that “such an action would be a big step in making human rights an agenda for all, and towards realizing the fuller enjoyment of human rights worldwide.”³²

³¹ Information based on Human Rights Commission Of Malaysia, Suhakam’s Report For The Universal Periodic Review (UPR) On Malaysia, 4th Session, February 2009, available at: www.suhakam.org.my. Reservations on CRC were made to Article 2, 7, 13, 14, 15, 28(1)(a) and 37, as well as on CEDAW to Articles 5(a), 7(b), 9(2), 16(1) (a), (c), (f) and (g) and 16(2). Government reports submitted to the UN Committee on CRC and CEDAW were overdue. The Child Act 2001 was one of the first major efforts to implement the CRC but it suffers from weak enforcement. The Act is presently under review. While Article 8(2) of the Constitution was amended to recognise gender as not being a ground for discrimination, Malaysia has yet to provide an Act that translates fully the provisions of CEDAW into domestic law. Malaysia’s accession to CEDAW is ultimately subject to the understanding that its provisions do not conflict with the provisions of the Islamic Syariah law and the Constitution. [Author: The UN Committee monitors compliance with the particular treaty and then provides substantive input on how state policies might be improved or altered to meet international standards. Individual reports filed by countries under human rights treaties, Committee responses and the complete text of the relevant treaties can be found at: United Nations Documentation Research Guide, www.un.org/Depts/dh/resguide/.]

³² United Nations Economic and Social Council. Distr. GENERAL E/CN.4/1998/28/Add.1, 12 March 1998 English. Commission

A discrete body of international human rights law upholding the collective rights of indigenous peoples and other instruments applicable to indigenous peoples have emerged in recent times and are rapidly developing. One of the most forceful document is the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) adopted by the 61st Session of the United Nations Assembly on 13 September 2007, which Malaysia is a signatory or party to the resolution.³³ Although laudable that Malaysia supported the UNDRIP, there seem to be little progress in implementation of the protection and respect for the collective rights of indigenous peoples at domestic level, which this report also takes issue in section 1.7. UNDRIP is not legally binding but it draws from all the existing international laws that are binding – that is, UNDRIP restates existing international law and customary international law of which international obligations apply for each state party.³⁴

UNDRIP 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.³⁵ UNDRIP can thus be used as a standard setting tool for the promotion and recognition of indigenous rights, specifically various articles that affirm indigenous rights (Articles 25-32). Moreover, UNDRIP’s emphasis on the important and continuing role of the UN in the recognition and protection of indigenous peoples’ rights does provide added support for the creation of international norms on indigenous rights. Specific state obligations in UNDRIP’s provisions pertaining to indigenous peoples’ rights to lands, territories and other resources that are consistent with and restate existing international law.

1.6.1 International and national instruments on environment and development

Malaysia is a signatory to the United Nations Convention on Biological Diversity (“CBD”), one of the multilateral environmental agreements (MEAs). Malaysia signed the CBD with 154 other states and the European Union during the Earth Summit in Rio de Janeiro, Brazil, in June 1992. The Malaysian Parliament ratified the Convention on 24 June 1994. To date, the CBD has been signed and ratified by over 170 states, making it one of the most accepted internationally legal instruments. The CBD aims to conserve the earth’s biological diversity, promote the sustainable use of these resources, and promote equitable sharing of benefits arising from the use of these genetic resources.

The CBD deals with indigenous peoples’ rights and interests in a number of different ways, notably in Articles 10(c) and 8(j). Article 8(j) acknowledges the importance of the knowledge of indigenous and local communities in the conservation and sustainable use of biological diversity and encourages their wider application as well as equitable benefit sharing arising from the use of such knowledge and practices. Whereas Article 10(c) protects indigenous peoples’ “customary use of biological resources in accordance with traditional cultural practices ...”. Article 10(c) has been interpreted to require recognition of and respect for indigenous tenure over terrestrial and marine estates, control over and use of natural resources and respect for indigenous self-determination and selfgovernment.³⁶

The CBD specifically underlines the obligation of parties to develop national strategies which will then be translated into action plans from national down to the community level. As a party to the CBD and in implementing Article 6 of the Convention, Malaysia conducted a Country Study on Biological Diversity and formulated the *Assessment of Biological Diversity in Malaysia* in 1997. The Assessment presents a status report of the current level of knowledge, understanding and capacities with regard to biological diversity conservation and utilization in Malaysia. Based on the Country Study on Biological Diversity the *National Biodiversity Policy on Biological Diversity* was formulated and launched in 1998. The National Policy provides the direction for the nation to implement strategies, action plans and programmes on biological diversity for the conservation and sustainable utilisation of its resources. At the state level, Sarawak enacted the *Sarawak Biodiversity Centre Ordinance 1997* and the *Sarawak*

on Human Rights Fifty fourth session Item 6 of the provisional agenda, Question of the Realization of the Rights to Development, Report of the Secretary-General submitted in accordance with Commission resolution 1997/72, Addendum.

³³ GA Res 295, 61 UN GAOR (107th and 108th plen mtgs), UN Doc A/RES/61/295 (2007); UN Permanent Forum on Indigenous Issues, *United Nations Declaration on the Rights of Indigenous Peoples Adopted by the General Assembly 13 September 2007* <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>> at 1 February 2008. Four members, Australia, Canada, New Zealand, and the United States, voted against the Declaration, and eleven members abstained, although later, Australia voted to support it.

³⁴ The author owes this point to Fergus MacKay, a leading indigenous human rights lawyer and Coordinator of the Legal and Human Rights Programme of the Forest Peoples Programme (FPP).

³⁵ Ibid. Bulan & Locklear (2008), p.138.

³⁶ CBD (Convention on Biological Diversity). 1997. *Traditional knowledge and biological diversity*. UNEP/CBD/TKBD/1/2, October 1997, p.18.

Biodiversity (Access, Collection and Research) Regulations 1998. The Ordinance and the Regulations provide for administrative and regulatory mechanisms to facilitate and authorise access to and promote sustainable utilisation of the state's biological resources as well as to ensure the state and its people receive appropriate economic and other benefits from access to its biological resources.³⁷

The Rio Declaration, which Malaysia also adopted in June 1992 at the UN Conference on Environment and Development, recognises the important role of indigenous peoples as partners in achieving sustainable development, amongst others, Principle 22 states, 'Indigenous people and their communities ... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their effective participation in the achievement of sustainable development'. Similarly, Agenda 21, a programme of action designed to implement the Principles agreed at Rio, contains a chapter that recognises the importance of the territorial rights of indigenous peoples and of their self-determination in matters of development (Chapter 26). In addition, a statement of principles on sustainable forestry ("Statement of Principles on Forests") sets out the importance of respecting the rights and interests of indigenous peoples and of consulting them on forest policies (Points 2d, 5a, 13d).³⁸

Legislation such as the Wild Life Protection Ordinance 1998, National Parks and Nature Reserves Ordinance 1998, Forest Ordinance 1954 and the Federal Environment Quality Act 1974 for wildlife conservation are applicable to Sarawak as well. It is worth mentioning in passing that in respect to eco-environmental systems protection and conservation, Sarawak's Chief Minister Taib Mahmud has been reported as saying that Sarawak.³⁹

- Recorded significant research on its wildlife mainly orangutan, largely populated in Batang Ai National Park (BANP) and Lanjak Entimau Wildlife Sanctuary (LEWS);
- Is an active party in trans-boundary conservation initiatives and development via the establishment of Trans-boundary Conservation Areas, a pledge to devote combined areas of nearly one million hectare for conservation;
- Worked closely with the International Tropical Timber Organisation (ITTO) for developing LEWS as in-situ natural resource conservation, biological diversity, research and study;
- Worked with BIMP-EAGA (Brunei Darussalam-Indonesia-Malaysia-Philippines East Asean Growth Area) to seek coordination of the management of ecosystems and common resources to ensure sustainable development in the respective sub-regions; and
- Committed towards ensuring 10% of its areas as totally protected areas (TPAs) and conformed to the World Conservation Union standards. With 29 national parks, 4 wildlife sanctuaries and 6 nature reserves in the state, Sarawak claims it has the most number of TPAs in Malaysia.

With the above in mind, we now see if Sarawak's approach and treatment of the indigenous peoples and land issues locally is matched by the state commitments to these instruments and standards.

1.7 Domestic laws and applicable international legal obligations relating to Sarawak indigenous peoples' rights: A Brief Assessment

The above sections have outlined some of the domestic laws and applicable legal obligations that apply or pertain to Malaysia as party to these international instruments. In Malaysia, the violations of indigenous peoples' rights has not been framed as a human rights issue. Further, domestic laws has had only limited successes in the protection of indigenous peoples' rights over traditional lands and territories. Sarawak depicts an even gloomier picture on the recognition, protection and support of indigenous peoples rights, as the case studies and overview of the situation of Eastern Penan in Parts 2 and 3 will illustrate. Within the framework of legal and human rights, it is contended here that the Sarawak government has failed to take adequate steps to protect, respect and fulfill their fiduciary duty

³⁷ Information here is reproduced from a paper on "Biodiversity Management in Sarawak" by Eileen Yen Ee Lee (Sarawak Biodiversity Centre), presented at A Roundtable Conference on Biodiversity and Indigenous Knowledge, co-organised by the Law Faculty, University Malaya (UM) and the Indigenous Peoples Network of Malaysia (JOAS/Jaringan Orang Asal SeMalaysia), 7-8 March 2001, Faculty of Law, UM Kuala Lumpur.

³⁸ Respectively: *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, Annex 1, UN DocA/CONF.151/26/Rev.1(Vol1)(1993); *Agenda 21*, UN Conference on Environment and Development, Annex 2, UN DocA/CONF.151/26/Rev.1(Vol1)(1993); and *Non-Legally Binding Authoritative Statement of principles for a Global Consensus on the Management, Conservation and Sustainable Development of All types of Forests*, UN Conference on Environment and Development, Annex 3, UN DocA/CONF.151/26/Rev.1(Vol1)(1993). Available on the website: <http://treaties.un.org/Pages/Home.aspx?lang=en> or <http://untreaty.un.org/ENGLISH/access.asp>.

³⁹ "Mechanism needed to increase awareness of conserving environment: CM." The Borneo Post online, 03.11.2009, available at: <http://www.theborneopost.com/?p=61181>

of promoting indigenous rights. The legal suits brought by indigenous communities against the state government, logging companies, oil palm plantation contractors and the likes, coupled with victories in the court cases cited above, indicate that the government's conduct in taking away native lands and awarding them to partners in the state BN government is illegal. In not recognising the NCR of the traditional landowners, the state has also failed to respect the natives' traditions, culture and custom as contained in constitutional provisions and national laws. In short, the Sarawak government's refusal to recognise NCR is in violation of native customs, common laws, Federal Constitution and applicable international obligations that apply to Malaysia relating to indigenous peoples and their rights to lands, territories, resources and FPIC – thematic issues that cut across this report.

Even Suhakam, the Human Rights Commission of Malaysia, has also indicated that many of its recommendations based on public inquiries, factual research and fora have not been accepted and implemented by the Government. Some of Suhakam's fact-finding field visits are significant in connection with Sarawak and issues of logging infringement upon the ancestral land rights of the Penan from Long Benalih and of logging and oil palm plantation upon the ancestral lands of the Ulu Belaga Penan.⁴⁰ Yet, as Suhakam explained:

Part II of the Federal Constitution of Malaysia provides, *inter alia*, for the protection of such fundamental liberties as liberty of the person; equality before the law; freedom of movement; freedom of speech, assembly and association; and freedom of religion. Under the Act 597, regard is to be had to the Universal Declaration of Human Rights (UDHR) only to the extent it is not inconsistent with the Federal Constitution. The fundamental liberties are however circumscribed by laws which have been applied not infrequently in the name of public order and national security. Resort to the use of ouster clauses appearing in various legislations further strengthens the hand of the authorities.

Both the former Sarawak Chief Minister, Rahman Yaa'kob and his successor nephew, Taib Mahmud who came to power since 1982, have apparently been very strong in curtailing Sarawak natives rights or claims to their lands. State laws on lands and forests have been enacted but the Sarawak government has in fact used and abused conflicting clauses in the laws to extinguish NCR. Even though the Malaysian Courts in landmark rulings have upheld NCR in accordance with native customs and adat laws, as reaffirmed in international laws and case laws, the Sarawak government has largely ignored these decisions. Instead, the government, logging companies and oil palm developers have consistently deprived the traditional native landowners their rights to lands and territories. They can even resort to use of force to intimidate the natives. A case in point is the arbitrary demolition of 39 houses of the Iban village of Sungai Sekabai, under headman Nor anak Nyawai in the Sebauh sub-district in Bintulu Division. On 20 January 2010, a Sarawak Land and Survey enforcement team assisted by the Malaysian army personnel and the police demolished the houses and all the affected natives' belongings inside.⁴¹ However, in 2001, headman Nor had won a landmark court case (*Nor Nyawai & Ors V Borneo Pulp Plantation Sdn Bhd [2001] 2 CLJ 769, 777*) when the Kuching High Court ruled that Nor's Iban community held NCR over both their farmland and primary rainforests. Yet, as was reported by a local news service (www.bintulu.org), the Iban area had been earmarked for plantation development by Tatau Land Sdn Bhd and a subsidiary of ASSAR, a state-owned investment holding company "directly under the care of Sarawak Chief Minister Taib Mahmud."⁴²

Ironically, the interpretation of the law used by the Sarawak government has been narrow and largely based on statute, ignoring the role of traditional law, case law and international law. The former State Attorney-General (AG), and currently legal adviser to the state government, Datuk Fong Joo Chung produced revealing evidence of this in a public presentation: "That under Item 13 List IIA (Supplement to the State List for States of Sabah and Sarawak) native laws and customs are matters within the sole legislative competence of the State Legislative Assembly."⁴³ While in the same presentation he acknowledged that compensation must be paid in cases where native land title is extinguished, he consistently maintained that this right lies primarily with the state government. Although recognised by court precedents, the then AG continues to argue that there cannot be NCR unless the same is embodied in statutes and that the natives must prove ownership and lawful occupation of NCR lands first. However, the Malaysia High Court interpreted otherwise, as in the case of *Nor Nyawai & Ors V*

⁴⁰ The reports are found in Suhakam's website: www.suhakam.org.my

⁴¹ For more on this issue, see, <http://rengah.c2o.org>, www.bmf.ch, and <http://www.malaysiakini.com>. The latest update on this issue is that a local court in Kuching has ordered the Sarawak authorities to halt the demolition of a native village until a full trial is held on their pending court case fixed on 9 February 2010.

⁴² "Malaysian court halts Borneo rainforest village demolition" BMF Media Release, 27 January 2010, available at: www.bmf.ch

⁴³ Datuk J C Fong, presentation on *Land Laws And Creation of Native Customary Rights (NCR)*, undated, downloaded from <http://sarawaktimber.org.my> on 20 May 2009.

Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241, or the Federal Court decision in Superintendent of Lands & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh [2007] 6 CLJ 509. (see section 1.5).

International laws and their applicable international obligations that apply or pertain especially to Malaysia, as mentioned above, are the UNDRIP and the CBD, particularly Articles 8(j) and 10(c), and a number of legally binding decisions of CBD's Conference of Parties (COP), including Decision V11/15.23 on Protected Areas. In addition, Malaysia is a member of the Human Rights Council and the UN General Assembly and, therefore, Malaysia is obligated to uphold the highest standards in the promotion and protection of human rights including indigenous peoples' rights and local communities' rights to customary lands and territories. However, in practice the human rights of Sarawak's indigenous peoples, and to some extent other local communities, are often being violated. The selection of case studies in Part 2 and of the Eastern Penan in Part 3 show indigenous communities and individuals have allegedly been physically abused and detained by the state authorities for blockading roads in peaceful manner, trying to stop loggers from destroying their traditional forests. Sarawak's indigenous peoples have experienced and continue to experience the adverse impacts of logging, witnessed brutality and experienced mysterious disappearances and deaths, even alleged rapes and sexual abuse of minors and women. In essence, Malaysia and especially Sarawak have yet to take appropriate steps to implement as part of its domestic law and/or policy many of the international obligations and UNDRIP's provisions pertaining to indigenous peoples' rights to lands, territories and resources (UNDRIP, Articles 25-32).

1.7.1 EU FLEGT-VPA without recognition of NCR is not legitimate

We now turn to discuss the issue of NCR pertaining to the FLEGT-VPA, although some of the issues have already been dealt with in the Introduction. As noted earlier, the STA issued a book on Sarawak's perspectives on the myth, facts and reality of the EU FLEGT-VPA, citing, for instance, that Sarawak will reject the VPA if it needs to consider the NCR issue when, in their view, is already spelled out in existing state laws and policies. In any case, there are real difficulties for Sarawak to accept a VPA that puts NCR high on its agenda, which is also enshrined in the constitution and various laws. This is particularly because the spread and boundaries of concessions and provisional leases for logging and oil palm plantations frequently encompass NCR lands. Logging in Malaysia is mostly operated by big and rich timber companies closely linked to politicians and authorities in charge of issuing the leases and licences,⁴⁴ which often occur in areas occupied by indigenous peoples, as in Sarawak. Some of these rich loggers also control the state media, and therefore can and have blacked out news about violations of indigenous peoples' rights, expropriation of their forest resources, scarring the environment, to name just a few examples.

In addition, a number of logging concessions certified by the Malaysian Timber Certification Council (MTCC) as sustainable under its Malaysian Timber Certification Scheme (MTCS) are seen as legally-harvested timber by the Malaysian Government. Two of the MTCS-certified areas are Samling's Selaan-Linau FMU (expired by December 2009) in Baram and Shin Yang's Anap Muput FMU in Bintulu. However, the MTCS cannot be the basis for verifying legality under a VPA agreement as it has not been established by a multistakeholder process as done in Indonesia, Ghana, Cameroon and Congo, under an agreed protocol. As well, the adviser to the Plantation Industries and Commodities Ministry on the EU FLEGT-VPA negotiations, Datuk Dr Freezailah Che Yeom, has recently announced that the ongoing VPA negotiations involved user rights and did not involve land ownership. This can be read as not fully implementing in practice the formally recognised legal rights of indigenous peoples to their NCR lands.

The question thus remains: Is logging in Malaysia legal when it violates NCR, when it excludes question of land ownership, or when the definition of timber legality ignores how logging licences have often been issued on land claimed by indigenous communities without their free, prior and informed consent at best and violations of their human rights at worst? Moreover, the Auditor-General's Report of 2008, Activity of Ministry/Department/Agency and Sarawak State Government Corporation also showed that illegal logs were found. The audit data noted the confiscation of some 272,588 logs believed to be illegally harvested, for the period 2006 and 2008. The audit also revealed that the

⁴⁴ See, for instance, Jomo, K. S., Chang Y. T., Khoo K. J. and others (2004). *Deforesting Malaysia – The Political Economy and Social Ecology of Agricultural Expansion and Commercial Logging*. Zed Books and UNRISD, London and Geneva. See also, IDEAL (1999). *Our land is our livelihood – The undermining of indigenous land rights and the victimization of indigenous people in Sarawak*. IDEAL, Sibui, and Sarawak Rengah (Sarawak News) for a detailed account of the cases, available from: <http://www.rengah.c2o.org>.

number of confiscated logs have significantly increased: from 29,179 units in 2006 to 108,413 units in 2007 (an alarming 271.5% increase) and further increased by 24.5% in 2008 (134,996 units).⁴⁵

1.7.2 Environmental and social concerns, with emphasis on EIA law in Sarawak

Sarawak started to enforce a law governing the Environmental Impact Assessment (EIA) only in 1994 when there was strong opposition against the state government's decision to implement the 2,400 MW Bakun Hydroelectric Project.⁴⁶ As a way out, the EIA environmental legislation was passed in 1993 when the State parliament amended the Natural Resources Ordinance 1949, enacted during the colonial era, to become the Natural Resources and Environment Ordinance 1994 (SNREO). The Natural Resources and Environment (Prescribed Activities) Order came into force on 1 September 1994, under which the EIA process of prescribed activities that have environmental impacts have to be submitted to the Natural Resources and Environment Board of Sarawak (NREB).⁴⁷ Before the enforcement of that Order, the EIA process of certain projects in Sarawak came under federal provisions of the Environmental Quality Act 1974.

The EIA is an important environmental management tool and a fundamental element is the provision for public participation in the EIA process. In the Federal EIA regulations, at least in theory, there are references to public participation and all detailed EIA reports are made public.⁴⁸ The Sarawak legislation is a step backward from its federal counterpart, as stated in the Sarawak regulations; "*the public may be invited to comment on the proposed project which have been subjected to Detailed EIA, on the initiative of the project proponent and where it affects public interest.*"⁴⁹ So ordinary people, and more crucially project-affected peoples can only participate in the EIA process if the project proponent so desires. This means that projects of any kind can proceed without the need of public participation, especially if it is a highly controversial project and there is a considerable degree of opposition to it (e.g. the Bakun dam). This raises serious question about the accountability and transparency of the project and, by extension, the whole EIA process. It cannot be overemphasised how important it is for EIAs to be effective, the process itself must be transparent, open to public view, allow good access to information and there must be clear structures of accountability. In most cases in Sarawak, a very important principle – the public's right to know and to access information – has been violated. And therefore, this is not in accord with the Rio Declaration, specifically Article 10 which states that,

environmental issues are best handled with the participation of all concerned citizens, at the relevant level... at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... States shall facilitate and encourage public awareness and participation by making information widely available.

The Sarawak EIA process is also open to manipulation since the EIA report is submitted to the NREB which gives the written permission for the activity. It is important to point out that the NREB is chaired by Chief Minister Taib Mahmud, who is also Minister of Planning and Resource Management. Further, the Sarawak legislation on EIA makes it easier for private and state-owned companies to by-pass or ignore the participation of indigenous peoples in the EIA process for projects in and around their communal forests and lands. As noted above, there is a range of violations of indigenous peoples rights to land and resources following the issuance of timber licences within their communal territories. We now look at weaknesses in the SNREO and the regulations made under it, especially those that concern logging.

Amongst the certain categories of projects that require an EIA in Sarawak, the following subsections are those which apply to logging activities, and only indirectly:⁵⁰

⁴⁵ Auditor-General's Report of 2008, Activity of Ministry/Department/Agency and Sarawak State Government Corporation., p.81. Original report in Malay [Laporan Ketua Audit Negara, Aktiviti Kementerian/Jabatan/Agensi Dan Pengurusan Syarikat Kerajaan Negeri Sarawak, Tahun 2008, Jabatan Audit Negara, Malaysia], p.85. Available at: <http://www.audit.gov.my/>, filename Sarawak2008.pdf.

See also, "Illegal logging along highway" The Star Online 22 Oct 2009, available at: <http://thestar.com.my/news/story.asp?file=/2009/10/22/nation/4954017&sec=nation>.

⁴⁶ Information based on Sahabat Alam Malaysia - Friends of the Earth, Malaysia, Briefing Paper II, Modern Forest And Land Legislation And Native Customary Rights In Sarawak. *Submission for the European Union delegation for Forest, Law, Governance and Trade (FLEGT)*, January 15, 2007.

⁴⁷ See NREB website- http://www.nreb.gov.my/main_legis.html

⁴⁸ See, *A Handbook of Environmental Impact Assessment Guidelines* 1992, Malaysian Department of Environment, p.9.

⁴⁹ Natural Resources and Environment Board (NREB) (sarawak) 1995, *A Handbook of the Policy and Basic Procedures of EIA in Sarawak*, p.24.

⁵⁰ Sahabat Alam Malaysia - Friends of the Earth, Malaysia, Briefing Paper II, Modern Forest And Land Legislation And Native Customary Rights In Sarawak. *Submission for the European Union delegation for Forest, Law, Governance and Trade (FLEGT)*, January 15, 2007.

- 11A(1)(c) – the carrying out of logging operations in forest areas which have been previously logged or in respect whereof coupes have been previously been declared to have been closed by the Director of Forests under the provisions of the Forests Ordinance; and
- 11A(1)(g) – activities which may cause pollution of inland waters of the state or endanger marine or aquatic life, organism or plants in inland waters, or pollution of the air, or erosion of the banks of any rivers, watershed or the foreshores and fisheries.

The *First Schedule of the Natural Resources and Environment (Prescribed Activities) (Amendment) Order, 1997*, a subsidiary legislation of SNREO, elaborates that logging activity will require mandatory EIA only if it meets the following criteria.⁵¹

- (1) Extraction or felling of timber from any area exceeding 500 hectares which have previously been logged or in respect of which coupes have previously been declared to have been closed by the Director of Forests under the provisions of the Forests Ordinance (Cap. 126 (1958 Ed.))
- (2) Extraction or felling of any timber within any area declared to be a water catchment area under section 8 of the Water Ordinance, 1994 (Cap. 13)

The EIA law in Sarawak limits itself by categorising forests into logged-over areas and virgin areas, which is not found in the Federal EIA, and furthermore does not demand an EIA for logging in untouched primary forests. Thus, logging activity will require mandatory EIA only if it is for logging of secondary forests but not if an area is being opened up for logging. So vast tracts of forest can be logged, or re-logged in and around the concession previously worked (re-entry), without any environmental or social impact study being conducted. This means that the Sarawak legislation does not even fulfil the minimum national and internationally accepted standards to assess the EIA process.

In addition, logging concessions of under 500 hectares do not require an EIA, even if they are contiguous with other concessions. In order to avoid having to conduct an EIA, logging concessionaires often package logging coupes into blocks of less than 500 hectares each and operate them under different subsidiary companies, as has been highlighted in the Auditor-General's Report of 2008.⁵² The Auditor-General's Report further noted that, between 2006 and 2008, the Sarawak Forestry Corporation had issued 79 Permit To Enter Coupe (PEC) for re-logged areas. Of this, 49 PEC were licence areas of less than 500 hectares and 30 PEC more than 500 hectares. Even so, among the 30 PEC, the Auditors could not confirm if EIA studies were conducted prior to the licence holders commencing re-logging activities because there were no records of their EIA reports being submitted to the NREB for the period between 2006 and 2008.

The Auditor-General's Report, quoted above, also randomly audited 178 PEC, already closed, in the Forest Department in Sibu, Bintulu and Miri districts. The results showed that an EIA was demanded in 117 PEC whereas the remaining 61 PEC obviously avoided the process being less than 500 hectares. Of the 117 PEC in question, only 17 EIA reports were given approval for the Forest Department to grant the timber licence for coupe area over 500 hectares. Another 19 of the total 117 PEC were randomly audited whereby it was found that four licence holders – two in Miri and two in Bintulu - in fact had logging coupes into blocks of less than 500 hectares to avoid submitting an EIA report, although the extent of the areas totalled 5,762 hectares. Specifically, the two Bintulu licences T4321 and T3180 were issued for coupe area 1816 hectares and 1494 hectares, respectively, and the Miri licences T0229 and T9093 involved 1587 hectares and 856 hectares, respectively.⁵³ Clearly, this loophole in the Sarawak EIA regulations encourages logging companies to manipulate the PEC in order to avoid preparing the detailed EIA reports. Finally, the later subsection includes projects that affect water resources as part of the process of EIA, but the *First Schedule of the Prescribed Activities* fails to mention *logging* under the list of activities that are categorised as having the potential to pollute inland water or affect sources of water supply.

⁵¹ Natural Resources and Environment (Prescribed Activities) (Amendment) Order, 1997 (Made under section 11A(1)). First Schedule 2. Logging (i) and (ii).

⁵² Auditor-General's Report of 2008, Activity of Ministry/Department/Agency and Sarawak State Government Corporation., p.81. Original report in Malay [Laporan Ketua Audit Negara, Aktiviti Kementerian/Jabatan/Agensi Dan Pengurusan Syarikat Kerajaan Negeri Sarawak, Tahun 2008, Jabatan Audit Negara, Malaysia], p.81. Available at: <http://www.audit.gov.my/>, filename Sarawak2008.pdf

⁵³ Auditor-General's Report of 2008, p.80.

1.8 Conclusion: Obstacles to recognition of Sarawak natives' rights

As the preceding discussion illustrates, recognition of Sarawak's indigenous peoples' rights to lands, territories and resources have yet to be realised in practice. Sarawak's population is estimated as 2.1 million people,⁵⁴ the majority of whom classify themselves as indigenous. Culturally distinct as forest-dependent peoples, indigenous land and territorial domains are protected under Native Customary Land (NCL) rights, or NCR lands defined under the Sarawak Land Code 1958, as well as under the Federal Constitution and international law. Yet the former Attorney-General of Sarawak has argued that: "The creation and acquisition of native rights over land had been regulated, from time to time, by written laws, originally, in the form of Orders or Proclamations made by the Rajahs and later, by laws passed by the Legislature."⁵⁵ As has been mentioned frequently in this report, even the highest court in Malaysia has upheld these rights against appeals by the Sarawak State Government, for instance, in the case of *Federal Court Judgement on Madeli Salleh vs Superintendent of Land and Surveys, Miri Division and others*, 30 October 2007, and further upheld on appeal on 5 May 2009. The disputed land cases in Sarawak clearly show that many of the problems encountered by indigenous peoples are related to their right to lands. By extension, this means that a Voluntary Partnership Agreement (VPA) between the EU and Malaysia that does not clearly recognise NCR would encourage further violations of the rights of Sarawak's indigenous peoples.

Further, the Malaysian and Sarawak governments are making claims to act in the best interests of indigenous peoples, through adoption of instruments and legislations on human rights, environment and development. However, these claims are seriously misleading when we examine how the Sarawak state uses its power to justify dispossessing indigenous peoples of rights to customary lands, territories and natural resources especially forest resources. Additionally, the state concedes that indigenous peoples do have some customary rights on lands around their settlements and nearby cultivated lands. At the same time it often decides in direct contravention of its human rights obligations to indigenous peoples, for instance, when it chooses to reject the communities' claims to NCR lands. Despite a number of landmark legal decisions by the Malaysian and Sarawak courts that challenge the State's interpretation of the legislation, thus restoring the rights of indigenous peoples, this has happened after violations have taken place. Further, the State continues to grant or renew timber licences, even in contested areas, thus causing much hardships to communities which live within the concession area. This argument is further explored in the following Part 2 and Part 3.

⁵⁴ According to Sarawak Government website, <http://www.sarawak.gov.my/seg.php?recordID=M0001&&sscontent=SSM0049>, accessed 18 May 2009.

⁵⁵ *Land Laws and the Creation of Native Customary Rights*, presentation by Sarawak State Attorney General Datuk J C Fong, available from www.sarawakforestry.org, downloaded 23 May 2009.

Part 2: Conflicts Over Land and Resources: Selected Case Studies

This report highlights cases in Sarawak because it is the geographical area of greatest concern relating to logging and violations of indigenous peoples' rights particularly in the interior areas. However, this is not to say that there are only logging problems in Sarawak. On the contrary, although the problems in Sarawak are more severe, similar logging-related problems and consequences are experienced by indigenous peoples and other local communities in Peninsular Malaysia and Sabah as well. In order to gain a better understanding of the cases discussed, this section has included background on the communities' ancestral lands and forests, some of the issues at stake, the primary actors involved and associated responses, where relevant.

2.1 The Case of Kampung Sungai Limo

Kampung Sungai Limo (hereafter Kg. Sg. Limo) is a predominantly Iban community. It is located about 80kms from Lundu and west of Kuching, the capital city. The community asserts they have NCR over the communal lands which have been handed down from the community's ancestors, for not less than seven generations. This was long before the rule of Rajah Brooke, the British and present government of Sarawak. They have valid documents from two traditional leaders: one, the late Penghulu Kalong anak OK Jumat, chieftain of the Iban in Lundu District at the time confirming the legal inheritors and; two, KK Goh Joo Seng, the headman of Kg. Sg. Limo certifying the boundary of their NCR.⁵⁶

A signed declaration of the late Penghulu Kalong, dated 23 April 1988, had confirmed the Ibans in Lundu have established boundaries with neighbouring communities including the Chinese, which were maintained and respected until now. The customary areas belonging to the Ibans and Chinese in Lundu extended as far as the area of Gunung Serenggok, Sungai Langir, Sungai Tebuk, Sungai Kualii Kecil, kawasan Gunung Kualii, Sungai Kualii Besar, Sungai Limau, Sungai Likup, Sungai Hua, Sungai Nguan, Sungai Chupin Besar to the area of Bukit Chupin (Bukit Tunggul). The Iban communities have established their settlements and cleared their lands, passed from generation to generation, and cultivated hill rice, fruit trees such as durian, cempedak, coconut and other trees. Whereas the Chinese cultivated gambier plant, black pepper, coconut, rubber, fruits and so on. Both the Iban and Chinese communities have been engaged in these activities since the 1800s, before the Sampadi Forest Reserve was created in 1923.

Moreover, the Iban origins and line of ancestors and their descendents with rights to inherit customary areas were traditionally known to the community leaders. In his written testimony, aforementioned, Penghulu Kalong had identified the Iban leaders in Lundu from the 1800s who knew the oral story of their origins - Orang Kaya Pemanca Jugah (during the reign of the Sultan of Brunei, around the early 19th century), Orang Kaya Pemanca Kalong (Tua), Orang Kaya Pemanca Langi, Orang Kaya Pemanca Bajak, Orang Kaya Pemanca Jumat, and himself, Penghulu Kalong. The leader of the time is vested with the authority over matters pertaining to communal lands and resources and, therefore, must ensure that the customary laws are observed when governing the tenure system and handing down the lands to the rightful descendents according to that law. Prior to being elected, the candidate will be handed down the oral stories of their communities' origin and the extent of ancestral areas.

As further evidence, many durian and cempedak trees can still be found in the areas previously cultivated by their ancestors. The big pan used by the Chinese to process gambier can also be found at its original site. A number of hideouts to shelter from enemy attacks, which were built during the reign of the Sultan of Brunei and Brooke, still remain. Today these are regarded as sacred sites where the villagers perform their rituals and religious obligations. These oral stories continue to be passed down through the generations. Interestingly, in 1988, Penghulu Kalong had the foresight about Iban origins and clear boundaries of communal lands and territories from the community's ancestors to be passed down through the generations to avoid future conflicts regarding land matters, when he concluded his written statement. Unfortunately, the NCR lands of the Iban Lundu, particularly in Kg. Sg. Limo were granted as logging concessions by the state authority. Community representatives are unclear when this took place, but official documents revealed that three timber licences had been issued to the area.

⁵⁶ Statutory Declaration Kalong anak Jumat, Chieftain of the Dayak Iban in Lundu District, confirming the rights of the Kampung Sungai Limo peoples over land inherited from generation to the next known as 'jerami' and 'temuda', dated 23 April 1988. Translated from the original in Bahasa Malaysia, "Asal Usul Tanah Temuda Jerami serta Pengesahannya," Statutory Declaration KK Goh Joo Seng, signed on 13 January 2003 and witnessed by KK Layang Ak Engot, head of Kampung Kangka Sempadi Lundu and KK Noni Akan Anyi, head of Kampung Klaho Lundu. These documents are available on file.

In the process of submitting an application to the Lundu District Office over their NCR lands, in 1992, the Kg. Sg. Limo peoples were told their rights to *pemakai menoa* had been extinguished after the area had been constituted as the Sampadi Forest Reserve mentioned earlier. Yet, the Sarawak Land and Survey Department had issued concessions to FELDA, a Federal land development agency and, after FELDA, to other loggers,. Thus the villagers' application was rejected.⁵⁷ The villagers were opposed to this decision and decided to challenge it by filing a civil law suit against FELDA and the Sarawak Government at the Kuching High Court, but this filing [Suit No. 22-126-2004-III(II)] was struck out due to insufficient map provided by the people. However, three village communities are now in the process to re-file the case.

For several years now, villagers from Kg. Sg. Limo have written numerous letters to the Sarawak Forestry Department, the Lundu District Officer and various ministers complaining about the loggers encroaching into their customary lands and destroying the resources therein.⁵⁸ They demanded that the licences which encompass their *pemakai menoa* be cancelled and, moreover, these have been mapped and submitted to the courts in their case filed against FELDA. They also made numerous police reports about the loggers encroaching into their *pemakai menoa*.

However, the Sarawak Forestry Corporation (SFC) argues that the Sampadi Forest Reserve was constituted on March 10, 1923 (GN. NO. XXVII 1923) by the then Brooke administration. As aforementioned, colonial legislations were retained, periodically amended and used by successive Sarawak government to limit NCR. As such, the SFC argues that all rights/claims are extinguished once the area has been constituted as a Forest Reserve unless specified under 2nd Schedule. It further argues that the 1923 notification revealed that there was no 2nd Schedule, or evidence that the rights/claims have been compensated. So the state issued three forest timber licences to the area: first was the Salmas Woodworkings Sdn.Bhd (T.0016), then the Sanyan Lumber Sdn.Bhd (T.0089) and now the Misi Gagah Sdn-Bhd (T.8387). Whereas two forest timber licences have been issued to stateland areas – these are areas outside the forest reserve which include secondary forest and shifting cultivation areas – namely to Syarikat Sg. Hujan Co (T.0085) and then Lim Sang Huat Sawmill Sdn Bhd (T.8410).⁵⁹ The disputed area highlighted in this case study involves some areas of concession under Misi Gagah Sdn.Bhd. and Lim Sang Huat Sawmill Sdn.Bhd. The Lim Sang Huat licence was issued on 10 November 2005 for coupe area 447 hectares, while the Misi Gagah licence was issued on 13 February 2006 for coupe area 425 hectares.

The state authorities do not recognise the rights of the Kg. Sg. Limo peoples to the NCR lands. The Sarawak Forestry Department had issued a letter dated 4 August 2006 to the villagers stating that:⁶⁰

The Timber License No.T/8387 (Misi Gagah SB) is within Forest Reserve Sempadi and no rights given to local peoples, FELDA's oil palm plot is the site of the old Forest Reserve Sempadi whose status has been nullified and awarded to FELDA. Community has no claims to NCR within these sites. Timber License No. T/8410 (Lim Sang Huat Sawmill Co Bhd) located near to Kampung Serenggok in Ulu Sg Ah Seng hence far from Sungai Limo and Sungai Chupin areas.

Likewise, the Superintendent of Land and Survey Department Kuching recommended to the District Officer Lundu that, "*Based on our investigation NO Native Customary Rights Claim subsist over the land and therefore any such claim should not be entertained.*"⁶¹ Apparently this "decision" was based on a 1956 photo that they would not release to the community, despite repeated requests. The final blow to the peoples was when the Lundu District Officer accepted the report from the Land and Survey Department and reiterated that, "*Therefore the residents of Kampung Sungai Limo have no right or privilege to stop the logging operator from harvesting timbers within the Timber Licence area. Any act*

⁵⁷ Report on Logging Activity and Verification of claims of the Residents of Kampung Sungai Limo, Sampadi, Lundu, Sarawak Forestry Corporation (see Appendix 3).

⁵⁸ For instance, on 17 December 2002, the Chairperson of the Lundu Joint Area Action Committee (Askar anak Ayon) submitted wrote to the Sarawak Forestry Department expressing their concerns regarding licence issued to Sy Sanyan Lumber SB to log Gunong/Bukit Kualii areas. On 17 July 2006, the Committee again wrote to the State Forests Department complaining about logging concessions encroaching into their *pemakai menoa*.

⁵⁹ See for more details, Report on Logging Activity and Verification of claims of the Residents of Kampung Sungai Limo, Sampadi, Lundu, Sarawak Forestry Corporation.

⁶⁰ The villagers agree with the Forestry Department that Timber License No. T/8410 is in the area of Kg Setenggok in Hulu Sg Ah Seng, however, both the areas of Kg Serenggok and Kg Sg Limo/Chupin have related families. This is because Kg Serenggok was the first settlement of the peoples now living in Kg Sg Limo and Sg Chupin areas.

⁶¹ Official Memorandum from the Superintendent of Land and Survey, Kuching (Abdullah bin Julaihi) to the District Officer Lundu (Baseri bin Jack), dated 16 August 2007, emphasis in original.

*of obstruction such as blockage is deemed to be illegal and contrary to the rule of law. Any person or who ever commits such acts will be liable to be prosecuted in Court...*⁶²

In short, the state authorities interpreted that the Kg. Sg. Limo peoples have no right over their NCR lands. Although the Forest Department says it has control over forest areas, the peoples of Kg Sg Limo have their own *adat* which they have lived by for many generations. However, the state enacted the Sarawak Forest Ordinance 1953 to determine how forests are used and by whom and this has weakened community control over land and natural resource use. Logging companies also enjoy state support in interpreting the law and using practices that are unfair and prejudicial to the local peoples.

Regarding the gazetted forest reserve in Sampadi, Kg. Sg. Limo headman Goh Joo Seng recalled that, "...the surveyors came almost to the village, just to make a forest reserve. They were two Malays; this was before the Japanese time [1942-1945]. Later, they stopped building the road (to the reserve) but they proceeded with the reserve. In 1978 logging started for one year. The contractors were Rimbunan Hijau and Salmas."⁶³ The peoples of Kg. Sg. Limo and neighbouring Kg. Sg. Chupin contended that no one in the community at the time was informed about the gazetment, nor was there prior consultation with the peoples who had stayed for a long time in the areas of Serenggok, Bukit Kual and Sg Limo/Chupin. They said that this has never been their customary practice, since the community leaders have to inform the entire village and obtain their agreement/consensus to ensure that the decisions made represented the community.

In accepting the community mapping of the area as evidence in the suit against FELDA, the court had expressly recognised the right of Kg. Sg. Limo residents to demarcate and document the boundaries of their NCR lands, currently being logged by Misi Gagah Sdn. Bhd. Yet, the state authorities never informed or consulted the villagers about the Timber Licence which they issued to the company in February 2006, or about the date when logging actually commenced. After the villagers heard initial rumours – with no official notification – they wrote to the Forestry Department repeatedly in 2006, and were clearly informed in a written response dated 18 January 2007 that the concession did not extend to their NCR lands.⁶⁴ This merely reiterated general conditions on all concessions.

It is also important to note that the company had come to the village and brought 30 crates of Cola, just before the harvest celebration (*Gawai*) on 1st June. A Village Committee member said the Cola was "presumably offered by the company as compensation" to the villagers. As eventually, sometime in June 2007, the villagers found out that logging was taking place by discovering loggers near the boundary of the land now under dispute. One of the villagers mentioned they had approached the workers at the site. There were three workers, whom the villagers saw on the way to their orchards. So the villagers told the workers this was their land and they shouldn't come in.

Subsequently, on 28 June 2007, the local authorities called for a dialogue session at Kg. Sg. Limo chaired by the District Officer (Lundu) and attended by company representatives (Misi Gagah and Lim Sang Huat) who were accompanied by several police personnel from Lundu and the Deputy Kuching CID (Supt William Poro). Around 100 villagers attended this meeting, including women, youths and elderly people. A villager remembered that, at the meeting, company representatives warned them not to halt the logging, as the company had a licence. When the villagers asked to see the licence and map of the concession, the loggers said they just wanted to get to work.⁶⁵ The meeting concluded with no mutual agreement, "as both sides keep on exchange of words and arguments" so the District Officer decided the dispute to be settled at the district level.⁶⁶ He also informed the community that a license had been awarded and they should not interfere with the logging.

Dissatisfied, the villagers tried to stop the loggers themselves using their *adat* rules. They set up an *adat* blockade, which is a blockade that derives its power from the invocation of the spirits, indicated by pieces of cloth and string, rather than a physical blockade across the logging road.

⁶² Letter from the District Officer Lundu (Baseri bin Jack) to the Head of the Lundu District Police, dated 30 August 2009, regarding "Report on Logging Activity and Verification of claims of the Residents of Kampung Sungai Limo, Sampadi, Lundu."

⁶³ Fieldwork data.

⁶⁴ Letter from the Director of State Forestry Department (o/b Haji Ali Yusop) to Encik Askar ak Ayon, Kg. Sg. Limo/Sg.Chupin, regarding "Lesen Pembalakan No.T/8387 (Misi Gagah Sdn. Bhd.) and T/8410 (Lim Huat Sang Sawmill Co. Bhd, dated 18 January 2007 (Ruj. Kami: DF.681.441(K)(V) – 37).

⁶⁵ Fieldwork data.

⁶⁶ District Officer Lundu "Report on ground verification of claim made by the people of Kg Limo, Sampadi Lundu" dated 26 July 2007.

At a subsequent district level meeting held on 13 July 2007 in the Lundu District Office, various state agencies including health, sanitation, forestry and land and survey were ordered to conduct quick surveys of the area. As well, the police told the people they could not prevent the logging and asked them to open the blockade after such obstruction was made illegal under provisions in the Land Code and subjected to threats of arrests, even if the local peoples' forests and resources are being damaged or destroyed by the logging. The villagers said they would not because it needed to be agreed by the community. However, they were willing to open the adat blockade if the company also agrees not to go into the land, to which the company agreed until the case was resolved. The District Officer issued a memorandum to the Land and Survey to make a site inspection on the residents' objections and grievances that: "*The logging operator has entered into NCR land or temuda of the kampung people without informing or getting prior consent from the land owners.*"⁶⁷

After three days, the villagers went to the site and saw that the offerings (adat blockade) had been obliterated, and the logging continued. The loggers even started intruding further into the village land. Fearing that such activities would eventually spread to the rest of the border, including the watershed areas, a second blockade was built with timber that had been logged. The community had also used the 30 crates of 'Gawai' Cola bought by the company in the construction of this second blockade across the logging road set up on 29 July. This blockade lasted until the end of September. At that time, the villagers received a letter from the authorities stating that they had no right to obstruct the logging company, as such obstruction was illegal, but hoping that a resolution could be found legally to the matter.

To date the community has not been given a chance to negotiate for compensation, as the company asserted it has been given a concession. The implicit assertion is that this nullifies NCR rights over the land, while in law and according to the existing concessions, the rights nullify the concession in as far as the land is not State land, but belongs to the community. And, as yet, the community has not been fairly and adequately compensated and no other form of negotiations have ever been discussed. Meanwhile, logging in the disputed area continues. The peoples of Kg. Sg. Limo want to reclaim their NCR lands since the state has failed to follow the Iban customs and *adat* law on NCR, which has also been incorporated in common law and reaffirmed in court decisions. At the time of the fieldwork survey, the peoples were considering filing a court case. As in precedent cases in the courts in Malaysia and Sarawak, the community wants to use their knowledge of the Iban historical origins, adat law and customs to challenge the occupation of their NCR lands by the logging companies.

2.2. The Case of Kampung Bait Illi, Pantu, Sri Aman

Kampung Bait Illi is an Iban village situated in Pantu district about 160km west of the town of Sri Aman in the Second Division of Sarawak. According to their adat law and oral stories about their origins and customs, all of which are passed on from one generation to the next, the community's Communal Forest lies within Bait Illi-Kempas and is subjected to NCR. These territorial boundaries (*pemakai menoa*) had been established by their pioneering ancestors several centuries ago. As mentioned earlier, *pemakai menoa* includes not only ancestral forests but also *temuda* (fallow farm lands), *tembawai* (old longhouse site), sacred sites (e.g. spring), graveyard, cultivated gardens and orchards with rubber, *engkabang* (illipenut), *isu* (a wild durian) and a variety of local fruits including *uchong*, *temedak*, *rembai*, rambutan, langsung and other species.

These communal territories have clear boundaries with neighbouring villagers, agreed through meetings following the communities' *adat* rules.⁶⁸ One border of the communal territory from Ai Tumbak, Munggu Penyau to Igir ends at a rubber garden land belonging to someone called Nyambang, and this area of land marks the boundary land with the villagers of Kg. Kara. Another boundary line established the border between Bait Illi and Bait Ulu, starting from the point at Pengkalan Tuat and extending almost in a straight line until it reaches Bukit Pulau Ganali. Whereas the land marks at Tingkar, Darung Kok, Sepan Temedak and Tinting Beringgin established the boundary line between Kg. Bait Illi and Kg. Sg. Besia. Finally, the territorial boundary line with Kg. Empili is predominantly the flow of the river Tenggiling. Their ancestors acquired NCR over these areas by being the first occupants and started to clear the thick forests and to open up the lands. Ever

⁶⁷ See, Official Memorandum, From the District Officer Lundu (Baseri bin Jack). To the Superintendent of Land & Survey, Kuching Division, Report on Logging Activity and Verification of claims of the Residents of Kampung Sungai Limo, Sampadi, Lundu, Dated 8 August 2007.

⁶⁸ Information on the boundaries of communal territories of Kg. Bait Illi and neighbouring villagers is provided by the villagers, based on notes to file case against Tasinmas Project Management SB (Forest Timber license No.T8376), Director of Forest Sarawak, Government of the State of Sarawak, General Manager, Sarawak Forestry Corporation in the High Court of Sabah and Sarawak at Kuching.

since these communal lands and forests were inherited to their descendents, and by virtue of rights recognised under the common law. Individuals and families who belong to the same community have rights to access individual or family owned areas within the boundaries of these communal territories but this had to be prior agreed by the whole community. Additionally they are permitted to only clear as much forest or open up as much land as needed to support their livelihoods.

On 3 May 1988, the Forest Office in Kuching had written to a headman called T.R.Ganing anak Wa in Sg. Ran that, "The area applied for Communal Forest by T.R. Ringkai ak. Jimbai [Headman of Kg. Bait Illi] was the vicinity of your licence area" and hence not to continue logging therein.⁶⁹ Presumably the forestry department had given a licence for an area that included NCR land owned by the Kg. Bait Illi community. In the first place, as stated in the Forest Office letter, there was recognition of the customary areas belonging to village chief TR Ringkai and his longhouse community. The villagers even received subsidy in the form of fertilisers and weedicides from the Agriculture Department, further indicating there was recognition of their farm lands (*temuda*).

However, in early November 2004, the villagers discovered that logging contractors and workers had trespassed their lands to carry out logging activities and caused extensive damages. Despite the area being recognised as part of Kg. Bait Illi's customary communal forests, a logging company was given a licence. There was no prior information or consultation with the Bait Illi headman TR Ringkai and his people ensuring there is consent, as expressed in various national and international laws and court jurisprudence. Like the Kg. Sg. Limo community, this community was not informed about the licence issued to the logging company - Tasinmas Project Management Sdn. Bhd. (Forest Timber License No.T8376) - until they found out workers started logging in their reserved forests. The community was also not informed when the company started logging until they found their fruit trees were destroyed.

As the encroachment continued, the villagers lodged police reports with the local police station in Pantu on each encroachment.⁷⁰ However, no action was forthcoming from the police or other authorities such as the Forestry Department. The villagers then decided to set up blockades to stop the logging operations that proceeded without regard for their property and fruit trees. Consequently, seven villagers were arrested by the police and remanded in custody for one week on grounds of disturbing the company's logging operations and alleged arson of the logs. However, they claimed these logs were taken from their community's Bait Illi-Kempas Communal Forests which is subjected to NCR. The seven Ibans had since their release highlighted the issue to the media. They also brought their case to a lawyer to sue the company and its contractors for damages and theft of logs from their communal forest, as well as the Director of Forest Sarawak, Sarawak Government and the General Manager of the Sarawak Forestry Corporation (SFC).

This case is not only about Tasinmas intruding into the community's Communal Forest. The more contested issue is that the company had obtained the logs illegally. During the press conference in Kuching on 15 October 2005, representatives of the community explained that the company had laid rail road tracks into the communal forests and also laid 118 logs nearby. The workers were stopped by the villagers when they tried to take the logs out. This was not the first time the company had attempted to take logs out of their communal forests; in June 2004 the company tried to enter the area but was restrained by the villagers from entering. However, the villagers found out the loggers then entered their forest from another direction and had lodged three police reports on the incident. Their numerous complaints have fallen on deaf ears, as the logging has continued. When the authorities ignored their complaints, the affected villagers had no choice but to burn some of the logs. TR Ringkai added, citing a press report, "We would not resort to burning all the logs, because we need the logs for ourselves for the repair of our own longhouse, as we have no other means to obtain our supply."⁷¹ Even so, the company entered to remove some of the remaining 80 logs when the seven people were held on remand. The community doubted whether the authorities, in this case the local police in Pantu, had conducted any investigation and taken appropriate action against the company and its workers.

Likewise, instead of openly and formally charging the company and the loggers for illegal removal of logs from the community's forest, the authorities appeared to have allowed the company to remove the logs. A village representative said these logs were mixed with logs from other coupes and other logging ponds and were then indistinguishable from legally harvested timber. In fact, the villagers

⁶⁹ Letter to T.R. Ganing ak. Wa, Sg. Ran, Mile 98 Kuching/Sri Aman, Sri Aman, concerning "Communal Forest To Be Excluded From Licence Area T/8172" signed by Haji Saidi bin Wahib, Section Forest Officer, Kuching Dated 3rd May 1988 .312SMG(I)-81 and copied to T.R : Ringkai ak. Jimbai, Bait Illi, Pantu, Sri Aman.

⁷⁰ The villagers had kept copies of these police reports and other related documents. See also, "Iban 'arsonists' to sue logging firm" in *Malaysiakini*, October 15, 2005.

⁷¹ "Iban 'arsonists' to sue logging firm," *Tony Thien, Malaysiakini*, October 15, 2005.

found these logs bore SFC tags and log pond number, but the coupe number was visibly missing. These logs have not been accounted for yet, and this is not surprising. As TR Ringkai told reporters, the area being logged is swampy forests so the logs are of high commercial value with species including *ramin*, *alan batu*, *meranti*, *kepayang babi*, *nyatoh*, *rengkas*, *kerumtum*, *jelutong* and *sepitir*.⁷²

So far logging was stopped by the community blockades. Also because the SFC has issued an order that logging halt pending resolution to the conflict, since the land being logged belonged to the community and after it was declared illegal. However, until now, no compensation has been offered or given to the villagers for the damages done by the activities of the logging company. The company has also not entered into negotiations with the community to pay compensation, despite the legal obligation to do so consistent with common laws and international laws.

On 23 April 2007, a 59-year old farmer and member of the Bait Illi longhouse community lodged a police report against Tasirmas for encroaching into his property in 2005 and causing serious damage to the land which included 30 rubber trees, 6 rambutans and 6 *temedak*, and demanded the company to compensate him RM5,000 for the losses suffered.⁷³ The community wants the state government and the logging company to respect their adat and recognise their rights over the customary forests. The community wants the right to a fair negotiation and be adequately compensated for losses and damages as a result of the illegal logging, and not just be paid a nominal or tokenistic amount, in cash or in kind. At this point, the Kg. Bait Illi longhouse community, through their headman TR Ringkai and two others, are in the process of preparing to file a legal suit against the company, Tasinmas Project Management Consultant & Another, including to claim for fair compensation.

2.3 The Case of Kampung Sual, Simunjan, Samarahan

Approximately 80km to the east of Kuching lies an Iban village called Kampung Sual. Administratively, the village is part of the Simunjan District in Samarahan Division. The longhouse has 36 households (*pintu* in Iban). Their main source of livelihood is rice cultivation for subsistence. In between the rice planting season, usually around August, most families also intercrop the rice with maize, tapioca, and various kinds of vegetables. Various kinds of trees are found in parts of their communal forests, including fruit trees previously planted by their ancestors such as *isu* (wild durian) and *temedak* (*cempedak*) as well as *engkabang* (illipenut). Being indigenous, the Ibans of Kg. Sual rely on the forests and natural resources within their communal areas and customary lands, for instance, gathering non-timber forest products including rattan, roots, tubers, mushrooms and many medicinal plants, mainly for use within the community and by individual families. Community members only harvest or collect what they need to ensure that they preserve the forest for the benefit of the present and future needs. Thus, land reserved for communal use (*pulau galau* in Iban) and land used for agriculture, hunting, fishing and jungle produce (*pemakai menoa*) – all part of NCR lands – are maintained and preserved. [This way of managing their customary lands and natural resources is following the community's traditional forest management system and is regulated by *adat* rules.]

Sometime around 30 September 2006, the community discovered that loggers had been trespassing on their land and logging in their communal forests, and lodged a complaint to the area chieftain (*Penghulu*). Although the villagers said the *Penghulu* responded to their complaints, it was not specifically addressing the issue of the encroachment. The Kg. Sual community is deeply concerned over the accidental discovery of the logging encroachment. Firstly, they were perplexed by the fact that a logging concession for a neighbouring community had been granted by the Sarawak Forests Department to Kuching-based company First Binary Sdn. Bhd. (Timber Licence T/8404) since 6 July 2005 until 5 July 2006, which allowed the company to log the area of about 1,400ha in Gunung Temian State Land adjacent to Ngili Forest Reserve. The Kg. Sual peoples did not recall any discussion or consultation with them by the local authorities and the neighbouring village regarding the presence of logging nearby the boundary of their communal territories. Under native custom, the neighbouring village chief has the obligation to inform the other village heads within the area about the logging, to ensure that the logging concession area is well understood and accepted, or rejected, by the surrounding villages.

Secondly, the community is troubled that the company showed that the concession had been renewed and expanded into their communal forests. The concession and the renewal of the timber licence were both issued without any prior notification to or agreement with the Kg. Sual community. Furthermore, if the logging had not been discovered by the Kg. Sual people, the authorities may not even have

⁷² Ibid.

⁷³ Polis DiRaja Malaysia, Repot Polis, Balai Patu, Sri Aman. No repot/Rujukan: PATU/000081/07, Tarikh: 23/04/2007.

considered this an issue. The community discovered logging on their lands on 30 September, but they were officially informed of the logging concession on 4 October 2006. It was at the District Police Station in Simunjan, in a meeting with the Police OCPD, the Penghulu and a company representative and therefore was not a conducive atmosphere for the community to discuss and negotiate in an equitable manner. Also, little further information was given. However, the Kg. Sual peoples requested the logging and trespassing be discontinued until boundaries could be determined.

Five days later, on 9 October, 15 people from Kg. Sual were arrested by the police and detained in Simunjan police lock-up for 24 hours for allegedly threatening the loggers; five were detained while collecting jungle produce in the forest, six on the way to their gardens, near the disputed area, and four while on the way to the police station to lodge a report against the timber company encroaching into their NCR lands and logging activities damaging their trees. Despite the villagers' police report against the logging company on the same day, no action was taken. Also, the 15 people were not told why they were detained, even when they were released the next day, but as one of them later told reporters: "For the last three months, the company has been working day and night. Trucks have been transporting logs out at night. So, we decided to stake out the area to monitor the activities."⁷⁴

On 11 October the logging company agreed to stop logging until the dispute could be resolved. However, the community was also denied access to the forest and was unable to gather forest produce during this time. So far, no compensation has been paid to the community for the violation of their NCR lands and destruction of the resources. However, First Binary director Lau Pung Sung was quoted in the press as saying his company "was already compensating natives living in Kampung Temiang, which lies within the concession area ... They are paid RM20 for every tonne of timber taken out."⁷⁵ Agreeing to a decision reached at a recent meeting chaired by the area penghulu which "determined that the Ibans from Kg Sual had no right to claim NCR land within the concession area" Lau held that the company is paying the rightful claimants compensation at the agreed rate and the dispute between the two longhouses was not their concern. Despite the company's claim that it has paid one party (Kg. Temiang), it has failed to ensure the full and effective participation of Kg. Sual since the expansion of its concession area encroached into their territory. The company did not comply with the proper procedures to negotiate and obtain the consent of the Kg. Sual community prior to starting logging in their traditional territory. The authorities also did not seek the consent of Kg. Sual before renewing the concession for another year that affected their communal forests. Instead it acted the opposite and colluded with the company to harass the Kg. Sual villagers. It is not known what happened to the logs that were harvested by the company and repeated attempts to obtain more information from the SFC have been unsuccessful.

The Ibans from Kg. Sual want the authorities to revoke the timber licence, and specifically the police to respect their human rights and NCR while carrying out their duties. They have filed a legal case in 2006 against the logging company, the forest department and Sarawak Government for illegal encroachment into their NCR lands. However their case, as with the vast majority of cases filed in the courts of Sarawak relating to land disputes, is awaiting trial. A recent media report states that, "All court cases involving native customary rights (NCR) to land have been put on hold until September to allow the Sarawak government to bring in topography experts to dispute claims by complainants."⁷⁶ The report furthermore quoted 68 year old farmer, Mat anak Taggon's response to the news over the delay of their case, representing some 30 people from Kg. Sual in Simunjan – he was one of the 15 Ibans arrested in October 2006 and was the oldest in the group: "*It is not fair to us who are poor farmers. We came all the way from Simunjan to find that the case has been postponed again [...] Maybe the court is waiting for me to die.*"

2.4 The Case of Thomas Lebak ak Mangai, Rumah Naong, Balleh, Kapit

Rumah (Rh.) Naong is an Iban longhouse situated along the Balleh, a tributary of the Rajang River in the Kapit district in Central Sarawak. Rh. Naong is reachable by river and via the logging road. The longhouse head is TR Naong Baling Anak Sirai. For several years now, one of the villagers, Thomas Lebak anak Mangai has mounted a challenge against logging companies that have violated his rights to NCR lands within the Rh. Naong territory, *Menoa Batu Bansu*. There is evidence of an existing document on his case namely, the Kapit District Office had, on 31 March 2006, issued a verification

⁷⁴ "Ibans held for 'threatening loggers'," Tony Thien, *Malaysiakini*, October 11, 2006.

⁷⁵ See, "Ibans held for 'threatening loggers'," Tony Thien, *Malaysiakini*, October 11, 2006.

⁷⁶ "NCR court cases on hold for five months," Joseph Tawie, *Malaysiakini*, May 5, 2009. Available at: <http://www.malaysiakini.com/news/>, accessed on 5 May 2009.

letter to the logging companies confirming Thomas Lebak's NCR land.⁷⁷ This case is significant as the affected areas that belonged to him and his family are legally recognised customary land and it involves the large logging company, Rimbunan Hijau Sdn Bhd.

Thomas Lebak had inherited the lands from his father, Mangai Anak Ajun. A traditional signing ceremony was held in Rh. Naong on 25 September 1982 to confirm that Mangai Anak Ajun had handed down the customary lands to his son, Thomas Lebak, as well as to inform the Rh. Naong community of this decision. The ceremony was witnessed by the headman TR Naong.

The conflict between Thomas Lebak and the companies stem from agreements he had originally entered with several companies to allow them rights of access to his land, in exchange for agreed payments for three barges to transport logs between different logponds and for the timber companies to pass his land with their lorries. The lease of his customary land then had been agreed by Thomas Lebak and, subject to reaching agreements with the companies, expressly recognised the land rights remained in the hands of the landowner, which is himself. The contract lasted from 1988 until 2005.

In 2005, Thomas Lebak sought to renegotiate the contract including a revision of freight rate for transporting of the timber logs as fuel costs had increased (at the time from RM0.75 to RM2.40 per litre). One of the subsidiaries of the Rimbunan Hijau Group, Jaya Tiasa Holding Bhd agreed to Thomas Lebak's request for revision. However, without any prior discussion or consultation with him on a mutually agreeable rate, the company offered the rate of RM30 per ton, effective 1 August 2005.⁷⁸ The last contract fee was RM25 per ton, which meant that the increase was only RM5. On 20 October 2005, Thomas Lebak through a lawyer wrote to the companies, and more specifically to Rimbunan Hijau, for a counter-offer of RM60 per ton. The letter explained that if Rimbunan Hijau disagreed with the increase of the contract fees from RM25 to RM60, then Thomas Lebak would withdraw the barges (*tongkang*) to transport the logs in return to be replaced by three lorries. If the company further disagreed, Thomas Lebak considered the contract void, thus revoking earlier permission for Rimbunan Hijau to transit through his NCR land from Nanga Mujong to Taman Balleh logpond.⁷⁹ Despite being given two weeks to respond, the company ignored his notification.

In practice, although the companies have to consult the landowner to ensure his informed consent to agreements, and re-negotiation of the same upon expiry, this had not been Thomas Lebak's experience. In fact, Thomas Lebak had originally entered into an agreement with the company but when this was to be re-negotiated, in violation of the terms of the original contract, the company attempted to claim that it had extinguished his entitlement to the land. Furthermore, the companies did not even hold any meaningful dialogue and negotiation with him. Consideration of fair compensation in return for access to his NCR land was also completely ignored.

The local authorities, and more particularly the police, created obstacles to Thomas Lebak because they did not do anything beyond taking down his complaints. Existing documents dated from 13 March 2006 to 8 January 2007 show that Thomas Lebak and his son, Joseb anak Thomas Lebak, have made a total of eight police reports claiming that the logging companies were using his land as access road without his consent or payment. The police reports also demanded the police to take action to demand the halting of the logging lorries trespassing his customary lands and asking them to use another way. However, Thomas Lebak stated that all his complains and police reports were systematically ignored.

Thomas Lebak could not understand why his rights to the area were ignored by the companies even when he possesses historical papers endorsing he is the rightful owner of the NCR lands, including the above-mentioned verification letter by the Kapit District Officer. After the original contract had expired in 2005, the logging lorries continued to pass his lands. Deeply concerned over the companies continual usage of his land without his consent and without fair compensation, he staged a blockade but was arrested on court order on 22 December 2007 and served time in jail. However, Thomas Lebak is steadfast in demanding the companies to respect his rights, and most importantly that they adhere to the original contract as agreed by both parties that he is the rightful owner of the NCR lands. He had provided the company with evidence, such as previous contracts signed with the company and

⁷⁷ "Pengesahan Hak Milik Tanah Temuda Atau NCR Land" from the District Officer Kapit (Simon Japut Tiok) to logging companies concerned, Ref. PD7/307/9/(127), dated 31.03.2006. Original in Malay.

⁷⁸ See, Letter from Jaya Tiasa Holding Bhd to Thomas Lebak, dated 18.7.2005.

⁷⁹ Agreement between Transport Resources Sdn. Bhd. (the Vendor) and Jasinar Development Sdn. Bhd. (the Purchaser), made on 6 August 1999, for two vessels for the transportation of timber logs for the Rimbunan Hijau groups of Companies from Mujong Logpond to Taman Balleh Logpond, Kapit.

his complaints to the authorities and police, to show that the land was his community's NCR land and he has rights over it. The companies should only be entitled to licensed access and rights to trespass his lands subject to his free, prior and informed consent. The companies that were operating within his NCR lands and listed in the police reports lodged by Thomas Lebak and his son included Subur Tiasa Holding Bhd, ARD Sdn. Bhd., Reliable Sdn. Bhd., Fasplus Wood Sdn. Bhd., Usaha Bina Sdn. Bhd., Tanjung Halaman Sdn. Bhd., Yiu Plus Sdn. Bhd., Hubwood Sdn. Bhd., Rimbunan Hijau, Jaya Tiasa, Aktif Jaya Bumi Sdn. Bhd., Bakun Lodging Sdn. Bhd., MP Lodging Sdn. Bhd.

On 13 April 2007, Thomas Lebak and his son filed their case against the logging companies and the Sarawak government for granting logging concessions on his NCR lands. But like other cases filed by the community peoples to assert their rights to land encroached by the State and loggers, Thomas Lebak's case is still pending in court.⁸⁰ This is simply to make it hard for indigenous peoples to seek legal justice and therefore subject the unscrupulous companies, especially large and powerful companies as well as the government to comply with the law. The Courts of Malaysia and Sarawak have in several landmark decisions declared that laws exist that recognised NCR and these laws have to be upheld. The Sarawak government however refuses to properly acknowledge and implement these court decisions, but instead consistently subscribes to its literal and narrow interpretation of NCR while disregarding fundamental rights and liberties in the constitution and laws.

2.5 Summary of case studies

2.5.1 Applicable minimal international standards on FPIC

Information/ action status	Affected community or Individual / Date logging took place or found out			
	KgSg Limo/June 2007	Bait Illi/Nov 2004	Kg Sual/Sep2006	Rh Naong/2005
Prior informed before work started/licences awarded	No	No	4 days after logging was discovered.	Yes, landowner-company contract agreement from 1988 to 2005.
Full & timely information on project impacts	No	No	Information only from reports that logging company chairman said the villagers had no rights to the land being logged.	No
Equitable environment for compensation negotiations	No	No	No (meeting was held in police station with company). Police arrested villagers to intimidate them, but all were later released without charge.	No (letter from company)
Projects are halted pending resolution	Some talks & negotiations failed. Logging in disputed area continues despite community adat blockade. Villagers filing court case.	Logging halted due to community blockades and SFC orders.	Yes logging halted until dispute could be resolved but community also denied access to their forests.	No
Paid adequate compensation	No. Company just gave 30 crates of cola.	No	No	No
Project halted	No, logging continues.	Yes, only after SFC declared logging illegal.	Yes, after court decision was issued.	No

2.5.2 Using domestic laws and applicable international obligations to define rights

The judicial landmark decisions on court cases related to land matters filed by indigenous communities and individuals, highlighted earlier in the report, have confirmed that the practice of extinguishment of NCR is discriminatory and contravenes a number of other human rights guarantees. Among others, the jurisdiction of the Malaysian and Sarawak courts have upheld that *pemakai menoa* and *pulau galau* are part of NCR lands and the common law respects the pre-existing rights of indigenous peoples under native law and custom. On the basis of the principle of common law, native law and constitutional provisions, indigenous peoples are entitled to rights over their ancestral lands and territories, contrary to the views of government and companies that they have no rights. This report reiterates that the emphasis on the recognition and validation of NCR lands have been argued

⁸⁰ Case filed on 13 April 2007, suit no. 22-12-2007, Plaintiff- Thomas Lebak Ak Mangai & Joseb Ak Lebak. Defendants- Rimbunan Hijau, Bakun Logging, Subur Tiasa Holdings, Jaya Tiasa Holding, ASP Pradeep a/l Sritharan @ Srigraran, Inspector Mohd Nazrol bin Hj Bongsu, Federal Government & Sarawak State Government.

at length by JOANGO HUTAN and other indigenous peoples organisations. The main concern here is that the proposed FLEGT-VPA agreement has no concrete reference to recognising NCR, which is the most important feature of a VPA. It is also a cause for concern that the interpretation of the law used by the Sarawak Government has been narrow and largely based on statute, ignoring the role of traditional law, case law and international law.

Land conflicts between indigenous communities and government-corporation partnership are very common today since customary land tenure is difficult to verify without any written records. Even Suhakam has confirmed that “land-related matters topped the list of complaints received” by its Sarawak office. Of the 78 complaints received in 2008, 45 were land-related matters and up to September 2009, 22 of the 42 complaints were also about land. Suhakam thus recommended that “the rights of the indigenous people to their customary land, which included cultural and burial sites be upheld... and state legislation on indigenous communities should be reviewed and land rights prioritised.”⁸¹ However, evidence of documented land titles is inconsistent with native custom and practice based on oral testimony and oral stories. The case studies show that the government, on this basis, has given priority for companies to carry out logging and other activities without much regard for the recognition of NCR. Often, there is a lack of prior notice and attempt to consult with or obtain the prior consent of the traditional landowners. Although UNDRIP is not legally binding, UNDRIP is informed by existing law and restates what binding human rights treaties require. For instance, Article 32(2) specifically deals with FPIC in relation to indigenous lands and territories, including sacred sites:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

Conflicts over logging on indigenous peoples’ lands have led to further violations of their human rights, as the case studies illustrate. Court judgements in several of the land cases also make explicit reference to the problem of logging encroachment and violation of NCR. The NCR question and other social and environmental concerns expressed by JOANGO HUTAN and indigenous communities need urgent attention, as recognition of NCR are fundamental to indigenous peoples’ survival and their own vision of development. Numerous international declarations have stressed the importance of ensuring that indigenous peoples have the right to determine their own development, in one formulation or the other, including the Rio Declaration (1992), the Declaration on Right to Development and UNDRIP. For instance, the Declaration on the Right to Development, adopted by the UN General Assembly in its resolution 41/128 of 4 December 1986, and affirmed in the 1993 Vienna Declaration and Programme of Action through, inter alia, its article 10, part I, which reads, “The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.”⁸² Malaysia adopted these international instruments, thus the government has the obligation to continue and strengthen measures aimed at the implementation, promotion and protection, not violation, of their provisions. As previously noted, where indigenous peoples’ NCR lands and territories have been extinguished without their knowledge and consent, there is a right to fair and adequate compensation for rights violations. Article 28 of UNDRIP states that: “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” Again, citing some of the landmark court cases on native lands in dispute with the state and logging companies, the court in Malaysia and Sarawak have held that indigenous peoples have the right to be compensated in connection with being forced to leave or have otherwise lost possession of their NCR lands without their prior knowledge and consent.

⁸¹ “Suhakam: Top gripes are all about land” 09.11.2009, available at: http://www.nst.com.my/Current_News/NST/articles/15ater/Article/index.html. See also, <http://www.suhakam.org.my/home>, http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=30507&name=DLFE-5417.pdf SUHAKAM operates in an advisory capacity and most of its recommendations deriving from public inquiries, research and fora have not been accepted and implemented by the Government. The annual reports of SUHAKAM submitted to Parliament were never debated upon. A Minister in the Prime Minister’s Department publicly said that SUHAKAM would not be given “teeth”.

⁸² Available at: <http://treaties.un.org/Pages/Home.aspx?lang=en>

Part 3: Overview on the situation of the Eastern Penans in Baram⁸³

3.1 The Eastern Penan

The Penan are estimated to number around 15,485 people today, and often classified either as Eastern or Western Penan.⁸⁴ The Eastern Penan have traditionally lived in the Baram, Tutoh and Limbang river systems, and refer to themselves as Penan Selungo, after their core settlement area near the Selungoh river.⁸⁵ By contrast, the Western Penan, also called Penan Silat after the Silat river, have traditionally lived West of the Baram in the Belaga district as well as Suai District of the Bintulu Division. In this report, the 'Penan' refers exclusively to the Eastern Penan, who because of historical and cultural reasons, have resisted logging whilst the Western Penan, with few exceptions, opted for acquiescence to logging.⁸⁶ Traditionally, up to the 1950s, the Penan lived in small bands of extended families and is distinguished from other indigenous groups in Sarawak by their practically nomadic way of life. Thus, the Penan are well-known for their adept skills in hunting and jungle trekking, even by other indigenous groups in Sarawak. The staple of the Penan is sago flour (*Apo* in Penan) gathered from the wild sago palm and cooked to make starch (*na'ö*). Today however, to a large extent, sago flour has been replaced by hill rice (*para*) because of the depletion of sago palm due to the forest being logged, among other reasons. The Penan make most of their things as required for hunting, cooking, sago-making, travelling and so on from forest products, namely mats, baskets, baby carriers, shelter covers, dart containers and other implements.

There is no consensus as to the number of Penan people still leading an entirely nomadic way of life because the rainforests are increasingly damaged, predominantly through logging activities and consequently the forest assets of the Penan have also been stripped. So although the Penan still depends to a large extent on the rainforests for their survival, almost all of them also do some kind of farming out of necessity. Today, less than 200 continue to live a traditional life of nomadic hunter-gatherers while all others have adapted to a settled or semi-settled way of life.⁸⁷ As discussed below, life for the remaining nomadic Penan is increasingly difficult due to devastated forests and environment through logging, often with the police, political powers, legal system and other forces doing little to prevent outsiders from taking timber from Penan customary lands. Even for the sedentary Penan, life is not easy because of lacking basic skills in agriculture and animal husbandry required for a settled mode of life compared to the Iban, Kayan or Kenyah, for example, who have cultivated for generations. There are also cultural limits to animal husbandry, as in Penan tradition, domesticated animals would never be eaten. Consequently, these Penans remain primarily dependent on hunting and collecting whatever wild sago, fruits and edible shoots they could find for their survival.

The fact that the Penan practice hunting and gathering in the forest means that they have their own ways to identify and establish rights and responsibilities to particular boundaries between various Penan communities or even the other indigenous groups. The Penan customary area extends as far as the territory which each Penan community hunt and gather in the surrounding jungles along with a number of key sites to carry out their daily activities. Within their own communities, they have clearly demarcated rights to forests for hunting and gathering (*tana' pengurip* in the Penan language) as well as native customary rights to land, *inter alia*, rights extending to their longhouses or huts, the graves of their ancestors, the primary and secondary forests within their boundaries and, for the settled and semi-settled Penan, their cultivated farms. Rivers are also included and have a deep spiritual significance for the Penan. Other important cultural sites include poison-dart trees (*tajem*), trees used to make blowpipes (*keleput*), and salt springs (*sungan*).

Discussed below is a selection of Penan communities struggling against continuous logging that has taken place in Ulu Baram and the adverse impacts on their distinctive way of life, which in many

⁸³ Background information is largely based on media reports (internet and print), documentations of Bruno Manser Fonds (BMF) in Basel, Switzerland; Ideal (2000) "Not Development but Theft – The Testimony of Penan Communities in Sarawak" also available at: <http://www.rengah.c2o.org/assets/pdf/de0066a.pdf>

⁸⁴ Except for the estimated Penan population based on SUHAKAM's report on Penans in Ulu Belaga: right to land and socio-economic development, 2007, p.1, the "grey literature" background documents and newspaper articles referenced herein are on file in the library of BMF (www.bmf.ch), also based on Ideal's publications especially *Not Development but Theft – The Testimony of Penan Communities in Sarawak* (Ideal 2000).

⁸⁵ Straumann, Lukas (2008), *Political Strategies to Support the Penan's Struggle for Rainforest Biodiversity Conservation in Sarawak, East Malaysia*, Thesis for Certificate of Advanced Studies in Environmental Diplomacy, University of Geneva and United Nations Environment Programme, p.5.

⁸⁶ Brosius, J. Peter (1997), *Prior Transcripts, Divergent Paths: Resistance and Acquiescence to Logging in Sarawak, East Malaysia*, in: *Comparative Studies in Society and History* 39, pp.468-510.

⁸⁷ *Ibid.* p.5

respects have similarities with the experiences of other indigenous peoples mentioned in the previous section. The Penans clearly do have difficulties establishing their rights to land by virtue of their nomadic way of life. This is, of course, related also to the Sarawak state government's refusal to recognise the land rights of the Penan communities, justifying that 'customary rights' means only settlements and orchards, excluding communal forests. Thus there are no provisions recognising or protecting the land rights of the Penan communities. But to the Penan, they have been living within these territories and various rivers systems since many generations back and it is their descendents who continue to inhabit these territories until the present.

3.2 The encroachment of logging into Penan territory

Many of the problems facing the Penan in Ulu Baram region today have their roots in the indiscriminate activities of logging companies that started in the 1980s. Large tracts of timber-rich dense forests in the whole Baram-Limbang area were parcelled up as logging concessions and awarded to private companies and the patronage of a powerful local elite, including the former and present Sarawak Chief Minister, Abdul Rahman Yaakub and Taib Mahmud respectively, as well as their relatives and friends.⁸⁸ Some of the current concessions were actually licenced before the former Chief Minister Rahman Yaakub stepped down, although some 25 concessions have changed hands since 1987,⁸⁹ especially since many of the licencees have contractors and subcontractors to do the logging. In turn they pay the licence holders a substantial percentage of profits earned from the timber sales. These companies had encroached into the ancestral land of the Penan, although other indigenous groups were similarly affected including the Kayan, Kenyah and Kelabit. It was said that by the end of 1986, 2.8 million hectares of forest had been cleared, most of which were on Penan land.⁹⁰

In the beginning of 1987, Shin Yang Timber, KTS, Samling Timber, Woodman and Limbang Trading were amongst the first timber companies to start operations in the remote Baram, Apoh Tutoh and Ulu Limbang areas. These areas are the ancestral territories of the Penan peoples. The State had issued timber licences to these companies for logging that trespass on the indigenous communities' customary lands and forests, or any part thereof, without any prior information or consultation with them. Thus the Penan were not even aware that logging concessions had been issued that encroached into their ancestral land. Ever since logging started in the Baram and Limbang River districts, the indigenous communities in particular the Penan have severely suffered the erosion of their rights to ancestral land and other rights .

Further, logging activities had detrimental social and environmental impacts on their lives. The Penan sources of livelihoods from the forests and many of their spiritual beliefs have already been destroyed. A case in point is Long Kawi, a Penan community located in the Middle Baram. Their forest was logged by Rimex in the late 1990s and early 2000s. Interhill is entering to re-log the area. The affected Penan are facing the impacts of logging, including river pollution, debris wood and log blocking the river thus affecting also fishing activities and boat navigation (e.g. boat capsizes).

Because of the massive destruction of the forests by the rich and powerful loggers which threatened their very survival and violated their rights to ancestral territorial domains, many affected Penan groups and other indigenous peoples in the Baram-Limbang areas have protested. For example, the Penan filed numerous verbal and written complaints about the activities of these logging companies with state and federal government authorities in an effort to stop the logging and to protect their rights. The continuing appeals by the Penan, as by other indigenous communities to the authorities to address this issue of commercial logging in indigenous lands and territories have been repeatedly ignored. At best there were a number of promises to address the issue. However, the state government has yet to take any meaningful action to rectify this situation. On the contrary, the state has amended laws relating to land and forests discussed above, that allow corporations and state agencies to continue with their activities in the logging concessions and any attempt to interfere with or challenge the operations of any of these logging companies would be punished by fines and imprisonment.

⁸⁸ For instance, logging concessions controlled by Sarawak Chief Minister Taib Mahmud were estimated to be worth about RM 10 billion (cited in Jomo, K. S., Chang, Y. T., Khoo, K. J. et al. (2004). *Deforesting Malaysia – The Political Economy and Social Ecology of Agricultural Expansion and Commercial Logging*. London and Geneva: Zed Books and UNRISD, p.211). For details on renting-seeking in Sarawak, see also, Ross, Michael L. (2001). *Timber Booms and Institutional Breakdown in Southeast Asia* Cambridge: Cambridge University Press, pp. 127–156.

⁸⁹ See, for more information, World Rainforest Movement and Forest Monitor Ltd. (1998), *High Stakes – The need to control transnational logging companies: A Malaysian case study*, Montevideo, World Rainforest Movement; Institute of Social Analysis INSAN (1994), *Logging Against the Natives of Sarawak*, Second Edition, Kuala Lumpur, INSAN.

⁹⁰ Borneo Project, <http://borneoproject.org/> Cited in SUHAKAM's Report on Penan Benalih Blockade Issue, 2007, fn.8, p.10.

The problems faced by the Penan is not an issue in relation to logging alone. Other problems they faced are connected with the lack of equal rights accorded to the Penan as citizens of this country, especially the right to own an identity card and birth certificate, access to adequate housing, healthcare services, education and basic amenities like electricity supply as well as clean and safe drinking water.⁹¹ However, the hardships of the Penan have been exacerbated due to the increased logging activities. Apart from difficulties finding food due to depleting forest resources, there is also declining fish and other river resources due to pollution from logging activities. Especially those Penan most affected by the encroachment of logging into their ancestral land and protested, they have been subjected to intimidation and other forms of violence in their struggles to protect their rights. For example, community elected Penan leaders who were vocal against logging were marginalised or removed, often against their will, and individuals who tend to side with the politicians and logging companies were installed in their place, thus breaking Penan resistance to logging in the Ulu Baram region.⁹²

3.3 The Penan struggle for protection of their rainforest and their rights

As mentioned before, for all Penan groups regardless of whether they are settled, semi-nomadic or nomadic, the forest remains one of the most crucial resources. Like many of his ancestors who led a unique nomadic lifestyle and those presently - both young and old, and men as well as women, the Penan leader Unga Paren asserts:⁹³

This jungle is everything for us. Our lives depend on it. We are rich because of this jungle and poor if it isn't there. The jungle is our supermarket and bank... If logging continues and our jungle is destroyed, the Penans will die. It will be the end of us.

This is why the struggle against logging operations continues to this day, specifically amongst the Penan peoples to defend the continuous destruction of their livelihood and depletion of resources in their traditional territories. In fact, over the last two decades these indigenous groups in Ulu Baram had been in a long struggle to protect their property, their homes and their livelihoods. After decades of resistance to stop the commercial logging and the powerful companies, Malaysian and international NGOs and civil society groups as well as segments of Malaysian public lend support to the Penan. The Human Rights Commission of Malaysia (SUHAKAM) had also conducted several field visits to investigate complaints received from the Penan.

The problem, however, is that the Penan peoples are faced with the lack of recognition and protection of their ancestral rights to land and territorial domain. The State views that the Penan have no rights over communal forests, that they were roaming carelessly in the forest, and that the lands claimed by the Penan are seen as instigated by western NGOs and therefore dismissed as fabrications. Instead, the logging industry in the Ulu Baram region is often presented by the state and the logging companies as a means of bringing progress in the likes of bridges, schools, libraries and roads to the impoverished and backward Penan. This is done both by awarding timber licences to big logging companies to log the area and by 'persuading' the Penan to give up their nomadic lifestyle and settle down to increase possibility of being provided with government social services, e.g. school, rural clinic and agricultural assistance.⁹⁴

The Sarawak State Government's position and definition of 'customary right' as earlier mentioned has been criticised by SUHAKAM:⁹⁵

The current framework of the Sarawak Land Code makes it virtually impossible for this Community to obtain legal recognition of their 'customary rights' claims over ancestral and

⁹¹ These issues faced by the Penan have been confirmed via SUHAKAM's field observations. See, SUHAKAM's Report on Penan Benalih Blockade Issue, 2007. On the issue of identity card, see, "Troublemaker Penans' find it difficult to get ICs," K Kabilan, 24.11.2009, <http://www.malaysiakini.com/news/118170>

⁹² BMF Media Release dated 9 September 2008, "Sarawak Government deposes elected Penan leaders."

⁹³ 'Penans will die if jungle is destroyed' K Kabilan, 25.11.2009, available at: <http://www.malaysiakini.com/news/118282>

⁹⁴ See, for an explicit contrast between the State's view of 'development' and what the Penan really need, the news article 'Penans will die if jungle is destroyed' by K. Kabilan, 25.11.2009, available at: <http://www.malaysiakini.com/news/118282>. To cite an example: In response to the state government labelling the Penan as being anti-development, a Penan village leader asked in turn, "Whose yardstick was being used to define development... Is clearing the jungle and destroying the Penan lifestyle development? How about providing us with basic amenities so that we too can enjoy life? How about giving us schools so that our children need not travel several hours to attend classes, and in the process being vulnerable to sexual predators?"

⁹⁵ *Suhakam's report on the Penan Benalih Blockade Issue*, Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM), Kuala Lumpur, 2007, p1.

contemporary foraging areas. This is because the Community has traditionally led a nomadic lifestyle.

However, the State Government has maintained that logging concessions granted in the lands claimed by the Penan have been granted in accordance with the law. Likewise, the Sarawak government and logging companies have consistently maintained that the land used and occupied by the Penan is state land, or even denied that there are villages and communities using the forests earmarked for logging. There has been no attempt to obtain consent. The State's definition of customary lands have recontextualised Penan relationship to their land rather dramatically, in particular the areas where the majority of logging takes place and where the majority of Penan land is situated. But as discussed below, the Penans are far from passive victims of the state and logging companies. On the contrary the Penans have taken many actions to safeguard their rights including land rights, often facing police biasness and harassment. Against this background, we will now discuss some cases of Penan struggle for land and other rights, especially in the remote Ulu Baram region affected by logging, where violations of the rights of the Penan have taken place.

3.4 In the name of logging: Violations of Penan human rights

3.4.1 Defending rights to land a criminal offence?

The Samling Group is Malaysia's second largest timber corporation and also the main logging and plantation concession holder in the Penan's traditional settlement areas, since 1987. Samling and its subsidiaries hold approximately 1.4 million hectares of forest concessions in Sarawak, which is equivalent to 24 per cent of Sarawak's total forestland of 7.7 million hectares (excluding protected areas).⁹⁶ Other players with forest concession areas awarded by the Sarawak state government and operating in the Ulu Baram region include Rimbunan Hijau, WTK, Shin Yang, KTS, Damai Cove Resorts and Limbang Trading Limited. In October 1987, the Penan together with Kayan and Kelabit communities set up their first logging road blockades and barricades in over 20 sites in the Baram and Limbang districts. These communities erected the barriers as a last resort to stop the encroachment of logging into their ancestral lands and further destruction of their forest, since their pleas to the state and federal authorities had fallen on deaf ears and attempts to negotiate had failed. More than 2500 Penan, young and old, women and men, took part in the eight-month long protests, despite facing harsh conditions and harassment from the logging companies. Throughout this period, the Penan maintained a peaceful campaign. The blockades carried out by the Penans did not only have an impact at the local and national levels but also at the global level. The peaceful protests by the Penan played a significant role in shaping the resistance against logging in the Ulu Baram area in the years following 1987. However the companies could continue operating their logging activities because state legislations are further amended or introduced that substantially limit indigenous peoples' rights. For instance, the Forest Ordinance Amendment (1987), Section 90(B)(1) states that, "*Anyone who sets up a blockade on any road constructed or maintained by the holder of a licence or permit and/or prevents any forest or police officer, or licence or permit holder, from removing the blockade, be guilty of an offence punishable by a jail sentence of up to 2 years and a fine of RM6000. In the case of a continuing offence, a further fine of RM50 will be imposed, in respect of every day during which the offence continues.*" Many indigenous peoples, mostly Penan, who repeatedly blockaded logging roads in Ulu Baram have been arrested by the authorities and their blockades dismantled.

3.4.2 "Mysterious" disappearances and deaths

In 1998, four Penan communities in the Selungo river area, with support from the Bruno Manser Fund (BMF), filed a court case against the Sarawak State Government and the Malaysian timber giant Samling over 55,000 hectares of rainforest and shifting cultivation land.⁹⁷ Kelesau Naan, headman of the Penan settlement of Long Kerong, is one of four plaintiffs and a key witness in a major Penan land rights claim that has been awaiting trial since 1998. It should be mentioned here that, meanwhile, Kenyah plaintiffs from Long Semiang and Lio Matcho have filed a counter-claim and is alleged to be assisted by Samling to do so. Because of the counter-claim, the case has been sent to the native court, a move that inevitably favours the loggers and Sarawak State Government because decisions of the native court, if ever made, are non-binding for the government. However, on 17 December 2007, Kelesau Naan was found dead near his village. After more than two months of disappearance

⁹⁶ Straumann, Lukas (2008), *Political Strategies to Support the Penan's Struggle for Rainforest Biodiversity Conservation in Sarawak, East Malaysia*, Thesis for Certificate of Advanced Studies in Environmental Diplomacy, University of Geneva and United Nations Environment Programme, p.17.

⁹⁷ *Kelesau Naan and others against Government of Sarawak, Samling Plywood (Baramas) Sdn Bhd and others*, Malaysia in the High Court in Sabah and Sarawak at Kuching, Suit No: 22-46-98 (MR). The case has been awaiting trial ever since it was filed in 1998. Another case that was filed is the Belare Jabu case by the community of Long Lamai over 31,000 hectares of rainforest and shifting cultivation land (BMF archives).

under mysterious circumstances, his skull and body bones were reportedly found at Sungai Segita, a tributary of Sg. Selungoh. The human remains revealed broken bones of his hand and signs of being hit with sharp object, suggesting possible assault before his death.⁹⁸

In the Penan peoples experience, they are convinced that their leader's death was not caused by an accident or animal attack. In the explanation of a relative, Martin, he remarked that, "*From what I know, since the time of our ancestors, nobody had died of being bitten by animals. Further, the broken bones cannot be resulted from an animal attack. Why would the animal break the late TK's wrist watch?*"⁹⁹ Another elder, Henry, added:

The late TK was very familiar with the location and could not have been lost. We are always taught and told, and it was our practice, that if we are bitten by a snake or slipped and broken our leg, we should always get back on to the path where others will be able to find us later. TK also taught and used to remind the younger Penans this before they set out on their hunting trips.

Therefore the Penans suspect their leader was murdered because of his role as a political leader. While shocked at the gruesome finding, the villagers were not completely surprised as tensions had escalated in recent months over the issue of logging in the Upper Baram region.¹⁰⁰ Indeed, the Penan in Long Kerong led by Kelesau Naan and his community had been defending their traditional lands from encroachment, especially by loggers, since the early 1980s. The Long Kerong Penan struggle has been long and persistent, but because of their defiance and strong resistance they have succeeded in keeping the loggers away and preserving parts of their communal forests for hunting and the collection of forest products.

According to the information gathered by the Penan themselves, they maintained that Samling might have had a role in the late TK's death. This claim was expressed by the communities. For instance, one relative mentioned that several months before TK Kelesau disappeared, one Samling representative had always visited Long Kerong to talk to him, saying that Samling was offering projects and assistance to the Penan settlement in return for them agreeing with Samling's logging operations and to withdraw their legal action.¹⁰¹ However, each time the TK refused to sign the papers she brought. She stopped visiting Long Kerong in September 2007. In another incident, two weeks after the TK was reportedly missing, a man named Kho Thien Seng whom locals called "Sio" from Long Akah and his relative, known as Siang (also from Long Akah) came to Long Kerong in a helicopter, with an offer of RM30,000.00 to the Long Kerong community without demanding anything in return.

Meanwhile, the late TK's son, Nick Kelesau found that the police at the Marudi station had ruled that his father's death was sudden death (*mati terkejut*), without his knowledge or approval, when he lodged the report on 3 January 2008. The question of why the police had concluded the cause of death before any investigation or post-mortem was done, and especially since it was the first time the police were notified of the TK's death and the discovery of his remains, gave rise to a strong feeling of injustice against the Penan.

According to BMF, Kelesau Naan is not the only victim of alleged involuntary disappearance in Sarawak. Two other Eastern Penan villagers involved in land disputes with logging companies in 1990s have also disappeared, as Bruno Manser himself, a Swiss activist in support of the struggle of the Penan for their land right, since May 2000.¹⁰² Likewise, in October 1994, Abung Ipui, a pastor, leader and land rights advocate from Ba Kerameu was found dead in Sungai Akwar, with his stomach cut open. Prior to his death, he had been threatened by workers from a nearby logging camp. On 30 May 1995, Upi Sipai from Long Kidah disappeared after a conflict with logging company workers. His body was found three weeks later in a creek next to a logging road. To this day, all the known and unknown

⁹⁸ See, SUARAM Press Statement dated 4 January 2008 "Death of Penan Headman Must be Investigated"; BMF Media Release dated 3 January 2008 "Missing penan chief found dead, suspected murdered" (www.bmf.ch/en/news/?show=86); Malaysiakini News, "Penan chief found dead, foul play suspected" Fauwaz Abdul Aziz, Jan 2, 08 (www.malaysiakini.com).

⁹⁹ Interview conducted by T.Malang and Mark with family and Penan villagers of Long Kerong, "Discovery of the remains of TK Kelasau Naan (80) (deceased)" on 07.01.2008.

¹⁰⁰ Malaysiakini, "Penan chief found dead, foul play suspected," Fauwaz Abdul Aziz, Jan 2, 08 (www.malaysiakini.com).

¹⁰¹ It was reported she was a Kelabit woman named Sarah, aged around 40 years old. It was alleged that another plaintiff had been put under pressure by government representatives to withdraw the claim, namely Pelutan Tiun. He was staying at Marudi in a clinic and was said to be visited by a government official and made to sign that he wanted to sign off the case. The same tactic was used in Kelesau Naan's case, when the signature of his son Nick was forged to admit that there was no foul play in his father's death. Although Nick had made a police report, the police did not make a thorough investigation into the case.

¹⁰² "Penan leader Kelesau reported missing," 8 December 2007, Media Release, Bruno Manser Fonds, Basel.

cases of involuntary disappearance in Sarawak still remain a mystery and are worrisome. The key point here is that, as the Malaysian human rights organisation, SUARAM has said:¹⁰³

This trend of development in Sarawak is worrying as it points to the taking root of the practice of enforced disappearance and extra-judicial killings, two of the most serious form of human rights violations. We call on the government to investigate immediately the death of Kelesau Naan and make the result of the investigation public. Those involved in the death should be brought to court of justice. The heinous crime of enforced disappearance and extra-judicial killings should not be tolerated at all by the government, especially since Malaysia is a member of the United Nations Human Rights Council.

3.4.3 What sustainable forest management?

On 18 October 2004, the Malaysian Timber Certification Council (MTCC) granted one of Samling subsidiaries, Samling Plywood (BARAMAS) Sdn Bhd a Certificate for Forest Management for the Sela'an-Linau Forest Management Unit of 55,949 hectares in the Ulu Baram region. The total licenced area in the Sela'an Suling Permanent Forest Estate (PFE) covered 100,650 hectares, but which was divided into two timber licences (T0412A and T0412B). There are 11 Penan villages and 2 Kelabit villages within this area, nevertheless one of the licensed area (T0412A) has been certified for sustainable logging without the informed consent of the affected Penan communities.¹⁰⁴ Despite ongoing protests by the Penan who have been living in the area for centuries and claim native customary rights in a pending court case filed by the Sela'an Linau Penan communities of four settlements, the certificate has not been withdrawn. This is a clear example of violating indigenous peoples' rights. Further, by certifying the area, MTCC is in breach of its own certification standards according to which "long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established."¹⁰⁵ Ironically, before the MTCC certification, the licence area was under the German-supported FOMISS project.¹⁰⁶ Later under the MTCC scheme, the certificate was granted despite a pending land rights litigation over the concession area (Kelesau Naan case).

In January 2007, an EU delegation visited Sarawak as part of the ongoing process of negotiations between the EU and Malaysia to reach a VPA. The Penan communities of Long Kerong, Long Sait, Long Sepigen, Long Kepang, Long Benali, Ba Pengaran, Long Sabai, Long Lamam, Long Ajeng and Long Murung representing most of the Penan of Upper Baram are seriously affected by logging and the certification of community forests in Sarawak by the MTCC. These communities had invited the EU Delegation to meet with them in Long Laman, as a direct way of getting the EU delegates to understand their concerns and have a bit of insight into what is actually happening at the ground-level, especially in the context of legality and sustainability of timber production in Malaysia.¹⁰⁷ Long Laman is a Penan village on the Sela'an River easily reached from the main logging road by foot or by longboat in less than 30 minutes and very close to Long Semiang, a Kenyah settlement where the Malaysian Government intended the delegation to meet with other communities. More importantly, the Penan wanted to meet the delegation in Long Laman because it was not possible for them to travel to Long Semiang where the headman is known to be a strong supporter of the Samling Group. When the EU delegation expressed its wish to meet the Penan, who had called for a separate meeting at Long Laman, the Malaysian officials rejected the proposal for the meeting and claimed they were unable to organise the logistics. Not giving up, the Penan representatives met the delegation briefly on the road side.¹⁰⁸

It follows from this incident that the State had intentionally blocked the communities seeking access to meet the EU delegation. In violating the Penan's rights to enter into a dialogue with the EU delegates about the impacts of logging and MTCC certification, the State has not only failed to respect the

¹⁰³ SUARAM Press Statement dated 4 January 2008 "Death of Penan Headman Must be Investigated."

¹⁰⁴ See, for more information, www.bmf.ch/en/pdf/selaan-linau-report.pdf.

¹⁰⁵ Principle 2: Tenure and Use Rights and Responsibilities.

¹⁰⁶ The FOMISS Project is a bilateral technical cooperation project launched in 1995 between the Governments of Germany and Malaysia to introduce sustainable forest management (SFM) in Sarawak with a pilot area covering 169,999 hectares of forests in the Upper Baram region of Northwest Sarawak being licensed to affiliate companies of Samling Strategic Corporation. In partnership, FOMISS and the Forest Department of Sarawak, supported by GTZ, will 'achieve SFM' through various steps, including Forest Zoning by functions.

¹⁰⁷ A number of European and Malaysian NGOs had also submitted an open letter to the EU delegation urging them to meet with the affected Penan communities (BMF Media Release, 16 Jan 2007, "EU delegation to visit Penan blockade area without meeting the Penan").

¹⁰⁸ See, <http://www.rengah.c2o.org/news/article.php?identifer=de0482t&subject=8>.

Penan's rights to community engagement with outsiders, but also with applying the principle of FPIC connected with the Penan related rights to their territories.

As their numerous appeals to the government have been unheeded, the Penan have resorted to setting up logging road blockade to prevent Samling's operations in large parts of the certified concession, namely the Penan Benalih blockade which started in 2004. The Penans were subjected to intimidation by local security forces and other Sarawak government officials (e.g. Miri Resident) who repeatedly dismantled the blockade, which were rebuilt again. The dismantling-rebuilding of the blockade structure at Long Benalih continued until 4 April 2007, when it was torched by unknown persons. Meanwhile, the Resident and District Office in Miri Division brought the issue to the attention of SUHAKAM. Among others, the government representatives claimed that Penan blockade has disrupted delivery of government-related services and assistance to other Penan and Kelabit villages within and near the area and that the Long Benalih Penan tried to profit from fuel transportation through blocking of the access road. Following this, SUHAKAM conducted an extensive investigation on the logging road blockade set up by the Penan community of Long Benalih. This had resulted in a detailed report published and it is worthwhile to mention that, among other recommendations, SUHAKAM has called for an independent review of the Sarawak Land Code "in terms of protecting the human rights of the Penan Community (...) Other ordinances which impact negatively on the Community's access to forest products and game also need to be reviewed."¹⁰⁹ SUHAKAM has also observed that the Penan villagers were lacking in basic facilities and public utilities as aforementioned.

3.4.4 Sexual abuse and rapes¹¹⁰

Another major dilemma for the Penan in remote areas where the majority of logging takes place is the vulnerability of the women and children, especially the Penan girl, to sexual abuse and other violations including rape. On 15 September 2008, the Bruno Manser Fund had informed the public on allegations of Penan women that they were being sexually abused by employees of Samling and Interhill, two logging companies operating in Sarawak's Middle Baram region. Both companies denied the allegations. Following BMF's publication of a media release related on sexual abuse of Penan girls and women by logging companies in the middle Baram region has caused an unprecedented stir and led to several official enquiries.¹¹¹ Subsequently, the report by the Ministry for Women, Family and Community Development, was compiled by a high-level task force, comprising government officials, a police representative and women's groups. However, the report was only released on 8 September 2009 under growing pressure from civil society groups and the opposition, almost 10 months after the fact-finding mission was undertaken in Penan villages in Baram.

The report confirmed that sexual harassment and exploitation by timber camp workers had indeed taken place. In fact the report had identified at least eight cases of sexual abuse of Penan girls and women by logging company workers, with several of the rape victims being schoolgirls as young as 10 years old. There have also been reports of girls being abducted and sexually abused along the logging tracks by the employees of the logging companies. Yet local politicians and the police were quick to dismiss these as mere allegations without any basis. The Sarawak press had also published pictures of the rape survivor, which is in violation of the standard practice of protecting the identity of sexual assault survivors. The lack of sincerity and interest of the authorities and police to address the long-occurring sexual abuse of the Penan girls has undermined Malaysia's enshrined constitutional support for the rights of indigenous peoples. In spite of Malaysia having signed the UN Convention on the Rights of the Child (CRC), however the area of children's rights and in particular rights of indigenous children was not addressed legislatively. Further, despite Malaysia endorsing the UNDRIP, there is a dire lack of legal safeguards to protect the Penan and other vulnerable indigenous groups in Sarawak, especially from hideous crimes such as sexual abuse and rapes. Indigenous peoples struggling to protect their land rights is a right enshrined under international laws. Likewise, respecting the dignity, cultural autonomy and identity of the Penan and other indigenous groups are undeniable, as set out in national and international human rights laws.

¹⁰⁹ I SUHAKAM's Report on Penan Benalih Blockade Issue, 2007, is available at www.suhakam.org.my. See also Straumann (2008), p.15.

¹¹⁰ Information here is largely based on several sources that have given media exposure to this issue, in an unbiased manner, inter alia, Malaysiakini (www.malaysiakini.com), the Bruno Manser Fund/BMF (www.bmf.ch), the Nutgraph, Penan Support Group via SUARAM (www.suaram.org). The issue of a number of sexual abuse and rape cases allegedly by logging company workers were first made public by the BMF in September 2008.

¹¹¹ www.bmf.ch/en/news/?show=118.

3.5 Hopes and struggles: Penan rights in the present

As mentioned above, the Penan sufferings have intensified mainly due to industrial logging encroachment dating from the 1980s. Various fact-finding missions, field investigations and documentations have highlighted that the Penan are very isolated physically. So it is not surprising that the Penan, to a great extent, faced violations in the likes of threats, killings, rapes, disappearances and hardship in their daily survival.¹¹² Nevertheless the protests against logging continued, and still continue throughout the state to this day in different ways by both indigenous and other local communities. In awarding the SUARAM Human Rights Award 2008 to the Penan communities of Sarawak's Upper Baram region, the Panel of Judges commented:¹¹³

The Penan's struggle has been long, persistent and often lonely. While the government tries to paint the struggle as one that is foreign-NGOs driven, the fact is the Penan struggle was there even before some of the foreign NGOs were established ... The root cause of the Penan issue is the non-recognition of their native customary rights over their traditional lands. This was the issue 30 years ago, and it is still the main issue today. And as long as the issue of land rights remain, the Penans have struggle against all odds and have vowed to continue to struggle until justice and human rights are attained.

These are some of the cases of 'Penan communities in their struggle for their rights especially to ancestral lands. It is far beyond the scope of this study to present all the Penan struggles for land rights in the last thirty years; the cases highlighted here merely touched upon a few communities struggling against logging companies entering and exploiting their ancestral territories. The destruction of their forests triggered the Penan to organise speaking tours, protest actions and particularly blockades, while at the same time the Penan found support and received broad attention in the media.

The Penans are becoming conscious of the injustices done to them and are determined to struggle to assume their rightful place in the forests as well as in the state. The recent achievement of the Penans to establish a Peace Park is a pointer in this direction. But however, it is only recently that the Penans have had any real hopes of their rights being redressed through their own strength of their resistance over the decades to reclaim ancestral areas that have been given away by the State to logging companies.

Specifically, on 17 November 2009, at the remote rainforest village of Long Ajeng in the upper reaches of the Baram River, 17 Penan communities and their leaders unanimously declared their intention of conserving their last remaining primeval forests as a nature reserve, where they also wish to develop tourism in their region and to protect their ancestral rights. Thus the Penan Peace Park was conceived,¹¹⁴ encompassing an area of approximately 1,630 square kilometers (629 square miles) around the Gunung Murud Kecil mountain range close to the Indonesian border. It is located between the existing Pulong Tau National Park in Malaysia and the Kayan Mentarang National Park in Indonesia. The area is considered to be a core settlement area for the Penan Selungo, or Eastern Penan, rainforest people. It is also the Penan communities' native lands fully concessioned for logging by the Malaysian timber giant Samling.

The Penan's approach to proclaiming this Peace Park will effect change that will be economic, political, ecologically and socially built, as it is based on values inherent in their community practices and culture. As James Lalo Kesoh, the former regional chief of the Upper Baram region, said at the inauguration ceremony for the Penan Peace Park, and recorded by BMF:

As nomadic hunter-gatherers, we Penan people have been roaming the rainforests of the Upper Baram region for centuries... Even though we have settled down and started a life as farmers since the late 1950s, we still depend on the forests for our food supply, for raw materials such as rattan for handicrafts, for medicinal plants and for other jungle products. Our entire cultural heritage is in the forest and needs to be preserved for future generations.

¹¹² Documentation can be found in the website of Bruno Manser Fund (www.bmf.ch), Rengah Sarawak, an independent news website related to Sarawak indigenous peoples' issues (www.rengah.c2o.org), Malaysiakini, an independent online media (www.malaysiakini.com) and SUARAM, a national human rights organisation (www.suaram.org). See also, Ideal (2000) "Not Development but Theft – The Testimony of Penan Communities in Sarawak" and reports on fact-finding missions to Penan settlements by SUHAKAM, the Human Rights Commission of Malaysia (www.suhakam.org.my).

¹¹³ SUARAM Press Release, "SUARAM Human Rights Award 2008 given jointly to HINDRAF and the Penan Community", 10 December 2008.

¹¹⁴ See, inter alia, BMF Media Release, 26 November 2009, Borneo natives proclaim tropical forest reserve; Penan Proclaim Peace Park on Native Land Set for Logging, 29.11.2009, <http://www.ens-newswire.com/ens/nov2009/2009-11-29-01.asp>.

Jawa Nyipa, headman of Long Ajeng, said, "The conservation of our forest is our highest priority. Without the forest, we cannot survive. We call this park Peace Park because peace is a very important concept in our culture."

The area where the newly inaugurated Penan Peace Park is situated is the last remaining undisturbed forests and is noted for its high biological and cultural diversity. Thus the Penan have collectively worked towards the establishment of this 'Peace Park' for the protection, conservation and sustainable use of biodiversity for the present and future generations. This community initiative clearly demonstrates that it is a potential model for community-managed protected areas and indigenous peoples conserved areas, consistent with a number of legally binding decisions of CBD's Conference of Parties (COP) and substance of the CBD's provisions and human rights norms. For instance, respect for the rights of the Eastern Penan in relation to this Peace Park is highly relevant and consistent with Decision VII/28.22 on Protected Areas, adopted at COP7 of the CBD, which, among others,

"Recalls the obligations of the Parties towards indigenous and local communities in accordance with article 8j and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation, and the full respect for the rights of, indigenous and local communities consistent with domestic law and applicable international obligations."

Agenda 21 Chapter 26 underlines the importance of recognising and strengthening the role of indigenous people and specifically provides for the participation of matters that affect them especially with regard to the protection of their lands. Other chapters also refer to the distinct legal status and rights of indigenous peoples.

Sarawak's strategy on addressing *Article 8 (j) of the Convention* has also been deemed relevant, which is to recognise the knowledge, innovations and practices of the indigenous and local communities embodying traditional lifestyles and consequently to put in place procedures to better enable traditional communities to protect and control their knowledge, innovation and practices. In this context, Sarawak is initiating programmes both to raise public awareness of the value of traditional knowledge as well as to educate traditional communities on the importance of documenting their ethno-biological knowledge as an initial step towards identifying potential benefits to be derived from ethnobiology-related research and ultimately to directing appropriate benefits back to the local communities.¹¹⁵

The Penans succeeded in establishing a viable community development project aimed at protecting the last primeval rainforests of Sarawak's Upper Baram region as well as the Penans themselves wishing to develop tourism and to protect their native rights. Yet, ironically, the Sarawak authorities now assert that "The establishment of a Penan Peace Park announced by 17 Penan Communities at Long Ajeng recently is not recognised by the government because it has no legal basis."¹¹⁶ As the Director of Forests Datu Len Talif Salleh further notes, this was not in consultation with the relevant authorities and that the Peace Park was located within Permanent Forest Estate (PFE). The state maintains that it owns all forests in Sarawak as stipulated in the Forest Ordinance 1953, incorporating all amendments.

Malaysia acceded to the CBD in 1994, yet according to the above official's statement, the state has not recognised the Penans' right to regulate and manage the new forest reserve according to their own laws and customs. This is not surprising, as with the proclamation of the new park, the Penans are challenging the Sarawak state government who have earmarked their lands for logging. The "Penan Peace Park" area is fully concessioned for logging by the Malaysian timber giant, Samling.

¹¹⁵ Ibid. fn37; "Biodiversity Management in Sarawak" by Eileen Yen Ee Lee (2001)..

¹¹⁶ "Death knell for Penan peace park" Catherine Goh, 02.01.2010, <http://www.brunet.bn/news/bb/weekend/news/jan2f6.htm>

Part 4: Conclusions and Suggestions

The objective of this study has been to provide an overview of logging in Sarawak through specific case studies and the Eastern Penan situation in the Upper and Middle Baram. While the case studies describe communities in different regions of Sarawak, there are issues and lessons common to all and to the Eastern Penan situation, inter alia:

- Indigenous communities' rights to lands, territories and resources are often encroached by state agencies and private corporations in the name of 'development' such as logging and oil palm plantation development;
- Affected communities and individuals face obstacles in insisting on respect for their right to FPIC and on applying their native customs connected to their rights to lands and territories, decision-making and representation, environmental and cultural conservation of their heritage;
- Even where the legal systems and the courts in cases filed by indigenous have delivered several landmark judgements in favour of indigenous communities and upheld their rights to lands, territories and resources, these rulings have largely been ignored by the state and logging companies, and in effect showing clear disregard by the government for its own laws;
- It frequently happens that rather than ensuring the law is being upheld, local authorities, police and loggers act in collusion to harass and intimidate indigenous communities and individuals trying to stop the logging, including through peaceful blockades;
- Difficulties in accessing information including the fact that communities are unaware that they have a right to access the Environmental and Social Impact Assessments reports before negotiating and accepting projects on their NCR lands and territories; and
- Despite Malaysia supporting the UNDRIP and signatory to the CBD, there are still issues outstanding as far as FPIC and environmental impact of logging in Sarawak are concerned. It is very telling that the Sarawak government has yet to pass environmental laws that require and regulate environmental and social impact assessments on fresh/new logging.

In short, there is virtually no respect for indigenous peoples' rights, as defined in law and upheld by the courts, and for a transparent and open process of Environmental and Social Impact Assessments on logging and other projects carried out in Sarawak. Even when indigenous communities outrightly refused to allow logging on their lands and have protested through pleas to the authorities and staging peaceful blockades, the companies as we have seen often hide behind the state with its deficient laws and environmental legislations. In this way, the loggers can evade accountability and transparency of their plans, projects and operations and, more importantly ignore native rights. Even if there are exceptional cases where the authorities and companies attempt to deal with the affected communities, they will always have the upper hand over the community peoples, as the case studies have shown.

Legal cases can be time consuming and expensive and even daunting, but many indigenous communities and individuals in Sarawak affected by logging have turned to the courts to challenge the Sarawak government and its agencies and companies for encroachment, illegal logging, and other violations. It is therefore important that land dispute cases over NCR lands that have been filed by affected indigenous communities and individuals need to be given priority in the process of law, as the current process of dealing with such legal cases are slow, often even deliberately. An example is the case of the late TK Kelesau Naan, a key plaintiff in the Eastern Penan suit awaiting hearing since 1998, who mysteriously disappeared and was later found dead. Likewise, in the Kg. Sg. Limo case, the communities' right to customary land has been established by a previous dispute involving a Federal land agency, FELDA, yet the area has been awarded as logging concession. Thus logging continues without any fair negotiation or resolution in place and arguably in violation of the law.

With regard to the negotiations between Malaysia and the EU to enter into a VPA agreement on FLEGT, the negotiations must be based on procedures in accordance with existing national and international human rights laws and instruments recognising the rights of indigenous peoples, including the right to NCR lands, the right to development and the right to conservation of indigenous cultural heritage, based on native customs and laws. The EU cannot sign a legitimate FLEGT-VPA with Malaysia without ensuring it includes a mechanism that forces the Malaysian Government to recognise the rights of indigenous peoples by the recognition of NCR and a mechanism to ensure the Government must uphold and implement all recent court judgements.

The EU has itself stated that, in order for an effective VPA-FLEGT, it must adhere to its own aims and

commitments, inter alia,¹¹⁷

- Ensuring that the applicable forest law is consistent, understandable, enforceable and supportive of basic sustainable forest management principles;
- Developing credible technical and administrative systems to make sure that harvesting operations conform with relevant laws, and to track timber from the point of harvest to the point of export;
- Developing procedures to license exports of legally harvested timber; and
- Ensuring that a VPA leads to recognition of land tenure and increased participation of civil society actors.

This report advocates that the EU examines further the issues surrounding the VPA-FLEGT and the Timber Legality Assurance System (TLAS), which were contained in a letter to the Director General of DG Environment by the NGO FERN.¹¹⁸ Relevant sections of the letter are reproduced below:

In Malaysia, the evaluation of the TLAS shows that the process fails to:

- *Distinguish the full extent of indigenous communities' land rights and privileges within their traditional territorial boundaries and claims, from 'other users' rights'.*
- *Recognise precedents established by court decisions, including those that affirm that indigenous title is recognised under common law.*
- *Recognise that indigenous peoples have customary rights to their communal forests and that the principles of common law respect the pre-existence of indigenous customary laws (a decision made by the highest court, the Federal Court).*
- *Ensure a participatory boundary demarcation of indigenous traditional territories.*
- *Recognise indigenous peoples' rights as a coherent and united body of rights although there are distinct regional statutes that govern them.*

To guarantee the integrity of the VPA process and ensure the process will contribute to general forest law reform we urge you to ensure that a VPA with Malaysia will meet the same standards as other VPAs in terms of consultation, in terms of the recognition of free prior and informed consent of communities before logging and in terms of respecting all relevant laws.

In order to do this we urge you to ensure that the VPA in Malaysia will be based on an inclusive participatory process in which civil society representatives and representatives of indigenous peoples have a seat at the table in the various working groups and in the steering committee.

Furthermore, for a VPA with Malaysia to be acceptable to Malaysian NGOs, indigenous communities and European NGOs it is essential that such a VPA provides for the following:

- *That timely notification be given to the local community prior to granting of a harvesting licence to give an opportunity for the local community to adjudicate their rights.*
- *That disputes on Native Customary Rights (as they are termed in Malaysia) be settled prior to logging, and timber harvested in disputed areas be considered illegal timber.*
- *The relevant 'existing laws' that should be verified in order to grant a FLEGT Licence should include the Land Code sections 2, 5, 6 and 15 in Sarawak, the Land Ordinance s 65 in Sabah and the Aboriginal Peoples Act 1954.*
- *That in the legality definition foreseen the applicable customary laws is not limited to codified customary laws, but includes unwritten customary practices that have been recognised as customs and usage having the force of law as envisaged by Art 160 of the Federal Constitution.*

¹¹⁷Forest Law Enforcement, Governance and Trade – Questions and Answers, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/04/194&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 27 May 2009

¹¹⁸ Letter dated 17 February 2009, see, www.fern.org