

AN ANALYSIS OF INTERNATIONAL LAW, NATIONAL LEGISLATION, JUDGEMENTS, AND INSTITUTIONS AS THEY INTERRELATE WITH TERRITORIES AND AREAS CONSERVED BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

REPORT No. 15

MALAYSIA



Stockholm Resilience Centre
Research for Governance of Social-Ecological Systems



NATURAL JUSTICE

KALPAVRIKSH



*Environmental
Action Group*

**The ICCA
Consortium**

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

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Cover Photo: Dusun boys wearing traditional rattan baskets (*wakid*) as they help gather wild vegetables in the forests bordering the Crocker Range Park in Sabah.

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INTRODUCTION

Indigenous Territories and Community-Conserved Areas (ICCAs) are increasingly being recognized for their importance in sustaining biodiversity within cultural landscapes occupied by local people with long traditions of natural resource management. As ICCAs are a new concept, they are not generally acknowledged in policies and laws, yet policy provisions that support or tolerate them exist in different national contexts.

This legal review provides an overview of the laws and policies of Malaysia pertaining to community governance over resources. It explores the inter-connecting policies and laws governing environment, land, and cultural rights, and the enabling frameworks that may enable communities to assert control over lands and resources. It asks: How do these operate in theory and in practice? Do they advantage or disadvantage local communities? How are enabling provisions strategically utilized by local people? There are also policy provisions intended to safeguard Indigenous people's rights, yet many serve instead to control and marginalize rather than empower. How do people respond to contravening provisions or operational policies that undermine their resource security?

Although general information is provided on Malaysia, this review focuses in greater detail on case studies and analyses for Sabah, Malaysian Borneo. Thus far, this is the only state in Malaysia to have undertaken a state-wide ICCA Review (Majid Cooke and Vaz 2011). There is no information to indicate that other state governments are cognizant of the IUCN recognition of ICCAs or have taken the initiative to evaluate its relevance or applicability in their respective state contexts. In Peninsular Malaysia, non-governmental organizations have long campaigned for improving the status of the Orang Asli community. Orang Asli is a broad term for Indigenous people of Peninsular Malaysia. The laws and legal battles pertaining to the rights of the 18 or so ethnic groups that are grouped under the category of Orang Asli have been well-documented and discussed. The rulings of several of these cases have bearing on cases being brought to court by Indigenous people across the nation.

In this context, the ICCA Consortium conducted two studies from 2011-2012. The first (the *Legal Review*) analyses the interaction between ICCAs and international and national laws, judgements, and institutional frameworks. The second (the *Recognition Study*) considers various legal, administrative, social, and other ways of recognizing and supporting ICCAs. Both also explored the ways in which Indigenous peoples and local communities are working within international and national legal frameworks to secure their rights and maintain the resilience of their ICCAs. The box below sets out the full body of work.

1. Legal Review

- An analysis of international law and jurisprudence relevant to ICCAs
- Regional overviews and 15 country level reports:
 - *Africa*: Kenya, Namibia and Senegal
 - *Americas*: Bolivia, Canada, Chile, Panama, and Suriname
 - *Asia*: India, Iran, Malaysia, the Philippines, and Taiwan
 - *Pacific*: Australia and Fiji

2. Recognition Study

- An analysis of the legal and non-legal forms of recognizing and supporting ICCAs
- 19 country level reports:
 - *Africa*: Kenya, Namibia and Senegal
 - *Americas*: Bolivia, Canada, Chile, Costa Rica, Panama, and Suriname
 - *Asia*: India, Iran, the Philippines, and Russia
 - *Europe*: Croatia, Italy, Spain, and United Kingdom (England)
 - *Pacific*: Australia and Fiji

The *Legal Review* and *Recognition Study*, including research methodology, international analysis, and regional and country reports, are available at: www.iccaconsortium.org.

This report is part of the legal review and focuses on Malaysia. It is written by Justine Vaz, an independent researcher affiliated with the Global Diversity Foundation. She conducted the Sabah review of ICCAs with Fadzilah Majid Cooke and has recently been involved in drafting the Sabah Biodiversity Strategy which has an unprecedented focus on public participation and acknowledges the special importance of indigenous communities and territories for biodiversity conservation.

1. COUNTRY, COMMUNITIES & ICCAS

1.1 Geography and Government

Malaysia is situated in the center of Southeast Asia. It comprises Peninsular Malaysia which extends south of Thailand and is divided into 11 states. Across the South China Sea is Malaysian Borneo, the large states of Sabah and Sarawak. Malaysia's total land area is 329,847 km². Both Peninsular Malaysia and Malaysian Borneo have distinct histories and ethnic populations. The Federation of Malaya, built upon the historic Malay sultanates, obtained independence from British rule in 1957. Sabah and Sarawak were incorporated into the Federation of Malaysia in 1963. Although all Malaysian states come under the authority of the federal government, both Sabah and Sarawak have a certain level of autonomy and have distinct laws and governance systems inherited from previous colonial administrations. The British North Borneo Company controlled Sabah from 1878, while the White Rajahs ruled

Sarawak from 1842. Both states briefly became British protectorates in the intervening period following the Second World War.

Malaysia has a unique system in which a king is elected from among the nine hereditary Malay rulers for terms of five years. The powers of these sultans and the heads of the state (for the other four states) are limited by the Federal Constitution. Democratic elections are held for both state and federal governments approximately every five years. The federal government exerts influence on the states through its policies, development plans, and disbursement of funding. It also has control of 95 percent of the revenue from oil and gas resources. State governments, however, have authority over resources of land, minerals and forest, which are the main means of deriving the revenue needed to administer the state.

According to the 2010 Population and Housing Census, the population of Malaysia stands at 28.3 million. Of this, over 22 million are from the Peninsula where the country's largest urban centers are located. Sabah's population is 3.2 million while Sarawak's population is only 2.5 million. Both the Bornean states have the lowest population densities in Malaysia, 42/km² for Sabah and 19/km² for Sarawak although their populations are growing. The urbanization rate for Sabah stands at 58 percent which is low compared to an urbanization rate of 71 percent for the whole country.

Malaysia is one of a dozen nations considered to be global megadiversity hotspots. Together the natural ecosystems of these countries contain an estimated 60 percent of the world's plant and animal species. Over millions of years, an astounding diversity of plants, animals, fungi and micro-organisms have emerged in a range of distinctive rainforest habitats – dense lowland forests, mist-covered montane forests, floodplain forests with massive meandering rivers, coastal mangroves and swamps, and vibrant marine kingdoms. Within each of these ecosystems are found dynamic assemblages of plants and animals connected by a delicate web of relationships. Many of these species are found nowhere else in world.

Sabah is the only Bornean state to have notable populations of orang-utan, Asian elephant, Malayan sun bear and proboscis monkey, all species that are under pressure throughout their natural range in Indonesian Kalimantan and elsewhere in Southeast Asia. It is widely acknowledged that conserving forest habitats here provides the best hope for the survival of these species. Some of these endemic species are cherished national and state symbols and draw millions of domestic and international visitors each year. Biodiversity rich areas are also healthy and productive ecosystems providing essential ecological services such as supplies of fresh water, and wild food resources. They enable Sabah to sustain the economic

sectors that are based on its environmental and cultural heritage such as tourism which has helped to diversify the state's economy.

1.2 Indigenous Communities

Malaysia has a multi-cultural population, partly a legacy of its strategic location as a trading center between east and west, and also as a British colony which attracted migrant workers to work in its plantations and mines. Despite considerable variation and inter-marriage, the dominant population in Peninsular Malaysia is generally defined as the Malays, followed by the ethnic Chinese and Indians, and other less numerous groups. In Sabah and Sarawak however the ethnic composition is quite different and indigenous people form the majority of the populations of both states. Many of the indigenous communities in Malaysia continue to be closely associated with particular ancestral domains and have distinct cultures, languages, lifestyles and traditions.

1.2.1 Peninsular Malaysia

In Peninsular Malaysia, the Orang Asli, which means 'original people' in the Malay language, number about 150,000, less than one percent of the total population of 28.4 million. They are grouped broadly into three main categories – the Negrito, Senoi and Proto-Malay within which there are about 18 sub-ethnic groups with their own language, culture, occupations and ways of life. The Orang Laut, Orang Seletar and Mah Meri live close to the coast and derive their living from the sea. Other groups have ventured into permanent agriculture, for example the Temuan, Jakun and Semai have smallholdings of rubber and oil palm. About 40 percent of the population depends to some extent on forested areas (Semai, Temiar, Che Wong, Jah Hut, Semelai and Semoq Beri). They typically engage in swidden farming and gather forest products such as petai, durian, fruits, rattan and resins to earn cash used for other needs. These days only a very small number can be considered to be semi-nomadic. As urbanization continues, traditional livelihoods are increasingly being set aside as more become engaged in waged labour and salaried jobs¹.

1.2.2 Malaysian Borneo

Sabah in Northern Borneo has about 32 ethnic and sub-ethnic indigenous groups that make up close to 60 percent of the state's population. The Kadazan-Dusun group is the most numerous and together with the Murut and Kota Belud Bajau they are mostly swidden farmers occupying the lowlands and hills, and lower slopes of Mt. Kinabalu. Coastal groups consist of the boat dwelling Bajau Laut in the east coast and other groups such as the Suluk, Idahan and Tidung. Along the large rivers in the

¹ Centre for Orang Asli Concerns (COAC) website, accessed on 5 April 2012.

north and northeast are the Orang Sungai (river people) who were previously involved in fishing and small-scale logging. Today most are engaged in plantation agriculture. The Lundayeh of the remote Upper Padas region are from the Central Bornean group and maintain links with similar indigenous groups such as the Kelabit of the Kelabit Highlands in Sarawak and the Lun Bawang of Central Kalimantan that are rice farmers and forest dependent communities. In Sarawak there are about 38 sub-ethnic groups that make up 50 percent of the state's population; among the major groups are the Iban, Bidayuh, Kayan, Kenyah, Kelabit and Lun Bawang are mainly farming communities in the interior alongside the forest dependant semi-nomadic Penan. These communities form the majority of the rural population. Melanau groups are found closer to the coast and used to be associated with sago palm cultivation (Payne 2005).

1.3 Drivers of Change & Challenges to Indigenous People

Indigenous communities throughout Malaysia have faced enormous challenges in their bid to have their customary rights to land recognized. Although, there are provisions in state and Federal laws that acknowledge the existence of *adat* (customary laws) and native land rights, these have not consistently translated into secure tenure. Rather, it has been the norm, to greater or lesser degrees, for these rights to be limited in their interpretation. The strength of claims is watered down in tandem with increasing competition for land and natural resources.

The modernizing Malaysian state is preoccupied with economic development and deriving revenue from its primary resources to meet the needs of a growing population and administration. This has manifested in massive forest exploitation and highly-visible infrastructure projects. Where the lands of indigenous communities have been in the way, these have been appropriated for large agricultural schemes, infrastructure projects such as dams, highways, pipelines, and even airports. Laws enabling land acquisition for public purpose have been used to force the resettlement of communities; often scant compensation (if any) is offered for the loss of livelihood and disruption to their lives.

In other cases, where compensation is offered, what seems like a windfall is whittled away in time, and the communities, now dislocated from their resource catchment, find themselves destitute, disconnected and facing an uncertain future (Hong 1984). For communities whose identities are inextricably linked to the cultural landscapes embedded with the history of their forefathers, being removed from their lands has profound long-term impacts and in some cases has precipitated the disintegration of their society (Yong 2003).

Under Malaysia's Federalism, timber and agricultural land became the the main source of revenue to substitute for the loss of royalties from natural gas which goes

to the Federal Government. Earnings from land based development (logging, oil palm and from other cash crops such as rubber) forms the major source of revenue for state administration and development initiatives. Beginning in the 1960s, revenue from logging has provided the states with the bulk of their revenue and a support base for political elites through licences and contracts. For example, in the 80s and 90s, Sabah became among the world's largest exporters of tropical timber (Majid Cooke 2006). In the post-logging era, large scale development of oil palm and associated industries has replaced logging as the dominant development driver in many states.

Since the 90s, Sabah and Sarawak have become the focus of plantation expansion. Together they have a total land area of just over 198,069 km². Presently, Sabah has the largest area of oil palm at 1.4 million ha, while Sarawak is considered the new frontier for expansion. In 2010, the total area under oil palm in Sarawak grew by 9.5 percent, compared to just 3.5 percent in Sabah and 1.4 percent in the Peninsular. The Sarawak state government has grand visions for boosting its current area of 0.9 million ha to two million ha of oil palm by 2020. According to the Sabah Development Corridor Blueprint (IDS, 2007), Sabah aims to position itself as a center of excellence and trade for agricultural products by 2025, and to multiply the contribution of agriculture to GDP by four times to RM17 billion. Palm oil has been singled out as the main driver of this growth (Majid Cooke, Toh and Vaz 2011).

Today, after almost two decades of oil palm expansion, most State Land in Sabah and Sarawak that is suitable for agriculture has already been converted to oil palm plantations by large companies. In Sabah, since plantations already occupy 90 percent of land planted with industrial crops (IDS 2007: 73-75), any future expansion will either use up the remaining ten percent of areas under crops, or expand into lands not under industrial crops, such as those claimed under customary rights. These lands mainly comprise village forest reserves, farms and fallows belonging to native communities. As Sabah reportedly has the highest incidence of poverty in the country², poverty alleviation continues to feature prominently in justifications for rural land development initiatives that are premised on assisting communities develop oil palm on their land through joint ventures with the statutory bodies and state-linked companies (Majid Cooke 2006; Ngidang & Selamat 2006).

² 19.7 percent compared to 3.8 percent for Malaysia as a whole (As of December 2009 and listed in the 10th Malaysia Plan 2010).



Oil palm seedlings awaiting planting on hills stripped of natural vegetation; oil palm projects are usually bundled with road infrastructure projects which contributes to their appeal to rural communities.

In both Peninsular Malaysia and Malaysian Borneo, indigenous communities have had to resort to the courts to seek recourse for land conflicts. There are hundreds of court cases still ongoing against state agencies and development corporations for the alleged appropriation of customary lands. As the legal process is intimidating and interminable, many do not have the endurance and resources to sustain their appeals. When they do, success is not always assured. Despite many setbacks, there have been some landmark judgements in favour of native plaintiffs; these have set important precedents pertaining to indigenous people's rights to lands in common law. Examples of this are set out in **Section 5**.

1.4 Indigenous Territories and Community Conserved Areas (ICCA) in Sabah



There is substantial variation among the various ethnic groups and the ways in which they manage and relate to the ecosystems from which they derive many of their needs both in terrestrial areas as well as seascapes. However, most communities possess resource management systems developed over many generations to sustain communal resources in the the 'natural' landscape. These precede the existence of the colonial powers and the modern state. One factor that they have in common is the difficulty in reconciling their concepts of stewardship and wise use encapsulated within *adat* and traditional customs with the intentions of governments to commodify resources and put land into 'productive use' by transforming it from its natural state.

1.4.1 Establishing a Claim

In terrestrial landscapes, the process of staking a claim to resources according to timeheld customary practices is surprisingly similar across a range of ethnic communities that farm and depend on forest resources. This process is concisely captured in the following account.

When a man fells old growth forest for farming, usually assisted by family members and close friends, he acquires rights to that land. Virtually all traditional communities in Borneo recognize his authority to cultivate the land in the future, or pass authority on to his descendants. Rights to any trees he plants are also retained by him and his descendants.

Traditional communities regard surrounding old growth forest as their possession. The boundaries of community land are delimited and communally accepted, but are not apparent to outsiders because they are not mapped on the ground or on any maps. Community members normally seek approval from others before felling old growth forest within the limits.

Many communities traditionally retained patches of old growth forest fairly near to the community centre, within large tracts of fallow land under secondary forest... They may be steep land unsuitable for cultivation, places where there is a spring of water, places with unusual rock formations or massive strangling figs, or with an abundance of wild fruit trees. In many cases, these forest patches are associated with the existence of spirits.' - (Payne 2005: 50)

1.4.2 ICCAs Within the Managed Landscape

Community-based natural resource management in this context deals with managing the fertility of the rainforest soils, so that they are farmed for a short period, and then left to fallow until they can be used again. Patches of old growth forest areas, often simply referred to as *hutan kampong*, *pulau galau* or village

forest, are maintained close to settlements as renewable sources of building materials and firewood, refuges for game animals, sources of forest foods and medicines, protection of sites which may contain graves or monuments, and recreation sites. Most remote local communities also have practices for protecting forested water catchment areas to maintain piped water supply to their homesteads.

These natural areas are presently not enumerated within the formal network of Protected Areas but they play a vital and underappreciated role in protecting productive ecological systems, supporting community livelihoods, and also providing habitats for biodiversity. Presently, there is no indication of how extensive such unofficial community-conserved areas might be but it is almost certain that wherever there are intact forest patches adjacent to communal settlements, there is a community playing an active role in its protection (Majid Cooke and Vaz 2010). Gaining a better insight of the actual contribution of ICCAs is an important priority for future study. This is becoming more urgent an endeavour as many communities continue not to have secure tenure over communally-held lands, either individually and collectively.

Community-based resource management in marine environments is inadequately studied and poorly known. Nevertheless recent preliminary studies in the proposed Tun Mustapha Park have revealed active community arrangements to protect fishing grounds from commercial vessels in order to protect the renewability of shared fisheries resources. These findings warrant further study if they are to be successfully incorporated into a management regime (Thanda 2008).

1.4.3 Challenges of Asserting Ownership

There is a danger that communal lands may be targeted for logging and land use change unless communities can assert ownership over them. This has been a recurring source of conflict which has prompted protests, blockades and civil action by local people in recent decades when all avenues for appeal have been exhausted. At the heart of the impasse between state governments and native communities is the fixed view within the government machinery that land can only be owned by communities once the forest on it is removed, and the land is converted to other uses. Local communities know that the intact forest is a sustainable source of countless basic needs and a valued part of their identity, history and culture, yet it is difficult to support this paradigm within rigid interpretations of current government legislation on land and forest.

In the past, this seemingly unwinnable scenario has contributed to the decision by individuals and groups to participate in deals in with outside parties who have the connections to approve their native title applications. However, in return for this

assurance of ownership, land is logged and only reverts to them once the timber has been removed. There are also records of local communities selling Land Application certificates or Titles. Government officials often use this as anecdotal evidence to justify a paternalistic state-centered development approach – they contend that indigenous people, if given Native Title, will simply sell the certificate and become landless and continue in poverty³.

1.5 Nationalization, Globalization and Impacts on Indigenous Cultures

In the current day, there is scarcely a place in Malaysia that is not integrated in some way into the nation state, its political framework, and its ambitious development aspirations which are disseminated through television and radio. School children are required to attend formal education which is conducted in the national language, Bahasa Malaysia. They learn the national culture while their own is less emphasized. Traditional lifeways and languages receive less attention and in some ways a connection with the natural environment is diminished as most children are instructed to focus their efforts on achieving the ideal of a modern urbanized life. Traditional rules and regulations for the sustainable use of shared resources have also tended to fall into disuse in some communities as community governance over these resources is not recognized and social sanctions to enforce rules and regulations for sustainable use are weakened.

However, change does not only go in one direction. In this period in history, unprecedented access to information via the internet has helped to stimulate greater awareness of the global movement for indigenous community empowerment and has given the younger generation a greater sense of pride in their ethnic ancestry. This, and the ability to learn from indigenous empowerment networks, has renewed the drive to assert ownership and governance of traditional lands among the younger generation, as well as the right to pursue endogenous development priorities.

As will be shown in the Case Studies in **Section 10**, these influences have also awakened interest among indigenous communities to participate more actively in biodiversity conservation and local resource management initiatives. It should not therefore be assumed that traditional lifeways are being diminished by the assault of globalization and popular culture. Rather, they are finding new expression and relevance for the current indigenous populations as they grapple with current social and economic realities.

1.6 Initiatives to Document ICCAs

³ Daily Express (2010) *Second Communal Title Next Year*. 6 August: p.1.

This legal review focuses mainly on the state of Sabah which is the first state to have conducted a Review of Indigenous and Community-Conserved Areas (ICCAs).⁴ Although the state government is at a relatively initial stage of familiarizing itself with the concept and its implications, Sabah has the potential to be among the more forward looking of the Malaysian states with regards institutionalizing community participation in safeguarding biodiversity areas. This is creating opportunities for fruitful discussion of the potential for indigenous communities to be active partners in the care of biodiversity areas on their customary lands. Most notably the draft of the new Sabah Biodiversity Strategy 2012-2022⁵ closely follows the CBD Strategic Plan 2011-2020, and an Action Plan has been devised for implementing the *20 Aichi Biodiversity Targets* in the Sabah context. **Target 18** deals specifically with indigenous people: “By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels”.

The receptivity to exploring the existence and relevance of ICCAs in Sabah has arisen from a combination of push and pull factors. Sabah has a fairly mature network of NGOs and community-based organizations that work diligently despite their limited resources to help articulate the needs of communities to government authorities, and educate and empower local people of their rights under the National Constitution, state laws and ordinances, and also international rights such as the UN Declaration of the Rights of Indigenous Peoples (UNDRIP). In recent years, the state government, recognizing the skills and resources present within such organizations, has begun working closely with them to connect with grassroots concerns. This is likely due in no small part to the commitment and leadership of progressive members within the civil service, many of whom have traditional roots themselves. People of indigenous ethnicities are fairly well-represented in the state government.

The pull factor has come from international initiatives such as the Bornean Biodiversity Ecosystem Project (Phases 1 and 2) funded by JICA which has over the past ten years provided technical support and impetus to the state government to

⁴ This Sabah Review of ICCAs was an output of a project entitled *Traditional Ecological Knowledge in Sabah: A Consolidation of Issues and Experiences related to Biodiversity Conservation and Sustainable Resource Management (2009 – 2010)*, which is a collaborative initiative between the Global Diversity Foundation and the Bornean Biodiversity and Ecosystems Conservation Phase II Programme (BBEC II), funded by the Japan International Cooperation Agency (JICA). The project contributes towards the implementation of the Convention on Biological Diversity (CBD) in Sabah, and Malaysia in general.

⁵ The author has participated in the stakeholder workshops and focus group discussions to help formulate the Strategy and Action Plan and drafted sections of the Strategy as part of the BBEC II initiative funded by JICA.

enhance its Protected Area network in order to fulfil its commitment to the Convention on Biological Diversity. Findings under BBEC have played a significant role in steering the government towards working with communities in line with greater alignment with landscape and ecosystem approaches to conservation. These are discussed in greater detail in **Section 3**.

Information from Sarawak and the struggle of Orang Asli in the Peninsula will be drawn upon where relevant to illustrate landmark judgements in case law which pertain to the bid by native groups to have their rights and ownership of land recognized in court. See **Section 6**.

2. LAND, FRESHWATER AND MARINE LAWS & POLICIES

2.1 Sabah's Resource Management Policies

A review of legislation and policy guidelines on resource management and environmental conservation was conducted with the Sabah Review of Indigenous and Community Conserved Areas (ICCAs). It draws on interviews with representatives of government departments and agencies responsible for managing forests, land and water resources, and also stakeholder workshops and focus groups held with local communities, government, academics, NGOs and CBOs between 2009 and 2011. Given that the management of land and resources is primarily a state concern this review concentrates mainly on Sabah's enactments and policies rather than national policies which are viewed more as guidelines. The review evaluates existing policy provisions and explores the ways in which they can be used in their present form to accommodate, strengthen and invigorate community-based contributions to conserving natural resources for the benefit of local communities and the state.

Land and resource management in Sabah is highly sectoral in nature. Individual state agencies and departments each have a specific focus. The main agencies supervising terrestrial areas are the Sabah Forestry Department (SFD) which oversees the Forest Reserves and the Department of Lands and Surveys (DLS) which manages all issues pertaining to land. Both agencies report to the Natural Resources Office (NRO) within the Chief Minister's Department and have a key role in revenue generation. The SFD also plays a significant role in safeguarding protection FRs, and in ensuring that all Commercial FRs, now parcelled within Forest Management Units (FMUs), are managed according to rigorous Sustainable Forest Management (SFM) guidelines. The agencies focusing mainly on conservation are Sabah Parks and the Sabah Wildlife Department which both report to the Ministry of Tourism, Culture and Environment in light of the importance of tourism business to the state. Outstanding

biodiversity areas, indigenous cultures and geological landscapes are the main focus of Sabah's unique tourism offerings.

Overall, ICCAs are a new concept to Sabah's laws. Community conserved areas and community-based natural resource management are hardly mentioned in most enactments and ordinances. The laws are generally mute on the potential role of communities in conservation. The view reflected in most laws is that it is the state's responsibility and prerogative to manage land and resources as it deems fit for the benefit of the state and its population. Where local people are mentioned, it usually has to do with regulating behavior: awarding licenses for access, or imposing fines and penalties for breaking laws. Despite this, most laws have specific sections that provide their respective agencies the mandate and latitude to work with local partners toward conservation goals or sustainably managing land and other natural resources. Although this invariably stops short of full community governance, there is actually considerable scope for agencies to support local management of ICCAs within their specific contexts as a starting point for progressive community engagement.

Several agencies and departments have already taken tentative steps towards greater engagement with communities as active partners and stakeholders in conservation. As the state continues to participate in international discussions of new mechanisms to promote the retention of natural habitats and the rehabilitation of degraded areas (sustainable forestry, reducing emission sform deforestation and forest degradation, Payment for Ecological Services, Roundtable on Sustainable Palm Oil, and other initiatives) it is anticipated that with the right exposure and support, attitudes towards working with communities can continue to evolve. Suggestions for updating policies and legislation to better facilitate community roles can be found in **Section 9**.

2.2 Land

Native claims to customary lands in Sabah are based on complex traditional laws or *adat* many of which are not formally recorded but are nevertheless observed and held in the collective memories of local communities. The Sabah Land Ordinance (SLO) (Cap. 68) 1930 is the operational legislation for the Sabah Department of Lands and Survey (DLS). This law inherited from the period under the British North Borneo Company makes an attempt to codify traditional land claim practices, but it is imperfect in translation. Following the Torrens system, land must be registered for ownership to be accorded by the state. Section 88 states that "No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been

registered in accordance with the provisions of this Part”.

The North Borneo Company was clear in its intention to facilitate territorialization and commodification of resources. For Sabah, the territorialization project was to intensify when it became part of the Federation of Malaysia in 1963. In the 70s and 80s, aerial photography and new mapping technology were utilized to draw boundaries around parks and forest reserves. The 1976 Land Capability Classification based on a comprehensive geological overview of the state served as a guide to identifying land suitable for agriculture. This land would be earmarked for alienation and developed for agriculture (McMorrow and Talip 2001: 217). This planning process also effectively created ‘treasure maps’ pinpointing the locations of timber resources (Mannan and Yahya Awang 1997). Land Titles provide rights only to resources on the surface. All materials from river and sea, and minerals are considered to belong to the government (Section 23-25).

The SLO reflects a strong orientation toward transforming an unruly landscape into one of productive commercial agricultural. This is perceived to be an improvement on the disorderly and haphazard practice of swidden or rotational farming which is the dominant form of agriculture practised by indigenous groups here in combination with cash crops. However, the land laws were also conceived (to some extent) to ensure that native communities would become landowners, co-opted into modern agriculture. Consequently customary lands would become titled so as to facilitate their active participation in commercial land use.

Provisions were made within the land legislation to recognize traditional adat laws that govern native peoples’ customary claims to land within their communities.

Section 15. Definition of customary rights.

Native customary rights shall be held to be

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

In addition, the Native Courts Enactment 1992 constituted the native court system to adjudicate adat laws throughout Sabah. These tend to focus on moderating intracommunity interactions under native law but are increasingly seen as being relevant for conserving sites of historic-cultural importance, and verifying the ownership and rights to land and resources. Legal pluralism (the existence of both traditional and formal laws pertaining to land) is problematic as in practice unless land is titled it is regarded as State Land to be managed as the state sees fit (Majid Cooke 2003; Doolittle 2003). Below is a description of some of the ways in which native communities can claim land under the Land Ordinance 1930.

2.2.1 Native Title

Natives of Sabah are eligible to apply for Native Title on State land if they are able to demonstrate continuous use or occupation (Section 70 of the SLO). Although the entitlement of 15 acres is considerably less than the area some communities 'own' under customary tenure, for the most part, native communities have been pragmatic in outlook and have diligently filed Land Applications according to provisions in the Land Ordinance in order to convert traditional claims into Title. Unfortunately, despite this compliance, it has not been easy to secure tenure either individually or communally.

There are several reasons for this:-

- *Overlapping claims* – the prospect of obtaining *individual* title engenders a situation where there are multiple overlapping claims, which make it difficult to ascertain the rightful applicant. Speculative land applications by outsiders have also added to complications.
- *Survey costs* – another reason given for the slow processing of land applications is the time and cost needed to survey land boundaries.
- *Land is within protected area boundaries* – in the mapping process mentioned earlier boundaries were drawn to form Forest Reserves and Parks; some of these have incorporated customary lands into protected areas, making it impossible for these lands to be given tenure.
- *Environmental protection zoning* – the advancement of some guidelines on water catchment and slope protection makes some areas not applicable for alienation.
- *Operational policy* – In recent years, with the growing realization that the land reserve in Sabah is finite, the award of Title has slowed as the DLS has adjusted its policies to favor the award of Communal Title bundled with a land development program which is regarded as a more efficient and

productive use of native land⁶ (see below).

- *Processing time* – Processing claims takes a long time; cases of claims still not processed even after 20 years are common. The reasons given are related to the first bullet and also a shortage of resources. Applicants generally feel a sense of mounting insecurity that policies could change and their applications could be rendered worthless.

2.2.2 Communal Title (Section 76)

Indigenous and community-based organizations have long held that the sustainable long-term management of community territories is better supported when land is managed as a collective. Organizations such as PACOS Trust have advocated for lands to be held communally as this is more supportive of traditional systems of land and resource management, reciprocity and collective decision making. Group titling is important for preventing fragmentation arising from piece-meal selling of titled land by individuals. It also provides communities with the flexibility of assigning land to legitimate constituents more equitably and according to changing needs and circumstances. Both Sections 76 and 77 of the SLO provide for Communal Title which is a form of collective ownership. Section 76 describes land on which customary tenure has been established, being held for 'common use and ... not assigned to any individual as ... private property'. The provision also stipulates the appointment of the Collector of Land Revenue as Trustee but without power of sale. Section 77 enables subdivision of such lands wholly or in part to individual owners which may be useful to some. Such sub-division is undertaken through the subsequent awarding of Native Titles by authority of the Collector.

The Communal Title provision had hardly been used. This may be due to the appeal of holding individual title, and also Department policy has not previously emphasized this provision. However, in December 2009, the DLS announced that it would hasten the process for awarding recognition of customary claims to land through Communal Title. Consequently, amendments were made to Section 76 to help fast track the issuance of Communal Title. Although this seemed to be a welcome solution to the long period of tenure irresolution, it would soon become clear that the purpose of awarding Communal Title was quite different from that intended by indigenous community advocates. In 2010, the DLS reported that 350,000 ha of idle and 'non-development' land have been identified to be put into productive use through Joint Venture (JV) agricultural development schemes. The primary intention behind the development thrust is to help local people "to develop the land for agriculture and reap lucrative income to boost their social and economic standards." Clearly, oil

⁶ Daily Express (2010) *Sabah Leads in Land Reform*. 30 May.

palm expansion in Sabah is seen as the main means of bringing development and opportunities to rural communities (IDS 2007: 67).

At the time of writing, it is not clear as to whether Communal Titles will be issued to communities that simply wish to manage their resources for conservation and sustainable use. With these recent developments, the usefulness of Section 76 to secure ICCAs on customary lands under communal management is now in doubt. Communal titling which is bundled with compulsory land development would not have any conservation benefit and could deprive communities of environmental services and products that they presently receive from village forest resources.

2.2.3 Provision for Native Reserve (Section 78)

Community ownership under Native Reserve (Section 78) captures similar elements of supporting communally held areas to safeguard the interests of indigenous communities. The line of authority however differs, with the highest responsibility being the Yang Dipertua Negeri, and Trustees being directed either by the Secretary of Natural Resources or the District Officer. Subdivision within the Reserve is more restricted. No other form of titling is allowed within Native Reserves except as deemed 'fit' by the Yang di-Pertua Negeri.

Section 78. Native Reserves.

The Yang di-Pertua Negeri may, if he thinks it necessary to protect the present and future interests and well-being of the natives of Sabah or any community thereof, declare any area of State land, the boundaries of which have been surveyed, to be a Native Reserve for any purpose approved by him.

Although the Native Reserve provision is substantially better than having a situation of ambiguous tenure, there are provisions within Section 78 that are considered problematic for those communities that possess Native Reserves, as well as those that have applied for them. Section 78 requires Trustees to be identified by the state to ensure that the Reserve is well-managed. It further states that if it is proven that "the members of the native community in whose interest and for whose benefit a Native Reserve has been declared wilfully or without reasonable cause will not comply with the conditions to which such reserve is subject, he (the Trustee) shall certify his opinion to the Director who shall recommend to the Yang di-Pertua Negeri that such reserve be revoked."

Finally, "(5) The Yang di-Pertua Negeri may, if he thinks fit, at any time by order revoke and cancel the declaration of any area of State land which has been declared a Native Reserve or a Provisional Native Reservation under this or any former

written law and may add to, vary or revoke any terms or conditions attached to such a Reserve or Reservation”. Local communities find it unsatisfactory that such decisions could potentially take place without the consultation of the local community by parties which may have vested interest in wresting control over land and coveted resources⁷. The provision for Native Reserve is hardly operationalized by the DLS. It has been years since the last Native Reserve was gazetted, and some communities such as the Lundayeh of Long Pasia have been long waiting for the approval of their application which was first filed in 1999 (Majid Cooke and Vaz 2011).

2.2.4 Potential for Recognizing ICCAs on State Land

The desire among local communities for their role as resource managers to be recognized and supported has resulted in renewed interest in utilizing the provisions for Communal Title and Native Reserve within the Land Ordinance. In administrative terms, Sections 76, 77 and 78 could potentially reduce the backlog of individual title applications to be processed and surveyed. Placing customary lands under some form of communal management also soothes official concerns that local people will sell their titles and become landless. Positive outcomes for conservation may be possible through group titling as evidenced by the case study of the Bundu Tuhan Native Reserve.

In areas that are already actively managed by local communities, ICCAs could offer a means of endorsing local conservation and resource management initiatives. For those who already possess individual titles and are actively engaged in biodiversity conservation, the ICCA designation would help justify their decision to leave the area under natural vegetation instead of complying with the Land Ordinance requirement that titled land be cleared for agriculture as a demonstration of ‘active management’ in order not to have the title revoked.

Section 70. Applications for State Land

Cultivation conditions: When an application for State land under this Part has been approved, ‘bona fide’ cultivation shall be commenced within six months and the whole area shall be brought into cultivation within three years. In the event of failure to comply with the terms of this subsection there shall be reserved to the Government the right to re-enter on the land in question and to resume such portions thereof as are not then under cultivation.

⁷ As expressed by community leaders responsible for the management of the Bundu Tuhan Native Reserve in ICCA Review Stakeholder Workshops in 2010, 2011.

This provision is woefully out of date and does not reflect the importance of restoring habitat connectivity across customary lands for purposes of biodiversity conservation which has already been highlighted in other studies presented to the state government, most recently via the BBEC project which is coordinated with the Natural Resources Office (Payne 2006).

Furthermore, interpretations of 'cultivation' within the Land Ordinance do not recognize traditional land management under the rotation system of shifting cultivation, in which sections of land are rested for years, in order to renew their fertility. This makes it difficult for applicants to claim land, and also demonstrate active management or improvement.

2.3 Forest

Forests located within Forest Reserves in Sabah are managed by the Sabah Forestry Department (SFD). It is estimated that of the total land area of 7,362,000 hectares in Sabah, close to 53 percent or 3.9 million hectares are inside Forest Reserves and within Parks under the management of Sabah Parks. The SFD is empowered to manage Forest Reserves by the Forest Enactment 1968. When the Forest Reserve boundaries were demarcated on maps, many were drawn around existing settlements. Consequently, there are over 20,000 people living within Forest Reserves in Sabah (UNDP 2008:16).

There are no provisions within the Forest Enactment to allow for the recognition of areas that are managed by indigenous or local communities living within Forest Reserves or adjacent to them. These communities do not have legal rights to land within the Forest Reserve and are considered illegal squatters under the Enactment (UNDP 2008:21). Section 41 of the Enactment recognizes the right of indigenous people to cut and remove forest produce but only from un-owned State land forests. Insecurity of tenure therefore is a prime issue for such communities. In 1984 the amendment to the 1968 Forest Enactment allowed for the consolidation of all existing Forest Reserves and the formation of a number of new ones. The process of consolidating and establishing new forest reserves created some ambiguities for those already living in the area before the creation of the Forest Reserves. They are now viewed as 'illegal settlers'.

There are some potential ICCAs that are located in Forest Reserves because of initiatives taken by SFD in collaborative management, referred to as social forestry or community forestry (CF) initiatives. With the Sabah government's adoption of the Sustainable Forest Management Licensing Agreement (SFMLA) system in 1998, there has been a shift towards larger consolidated Forest Management Units (FMUs) and

the long-term management of the forest estate. With this development, local communities are perceived as viable partners in the management of FMUs. SFD's community forestry projects emphasize the joint management approach. A mechanism was found in the existing Forestry Rules for the recognition of rights to remain in Forest Reserves.

The legal framework for the joint management approach is based on Rule 20A of the Forest Rules, 1969 that allows occupation of Forest Reserves (via Occupational Permit), upon issuance of Form IX by the Director of Forestry. Such an occupation is subject to specific conditions which are mutually agreed upon. One requirement is the payment of an annual fee⁸. In return, Rule 20A creates a framework for community participation in conservation. Such participation is translated into practice through community forestry projects.

2.3.1 Community Participation in Social Forestry Projects

Community forestry projects are funded by a tax (referred to as a "cess") established in 1989, set at RM0.83 (US\$0.27) per cubic metre for all logs processed or exported. Other funding sources have also been obtained from the 9th Malaysia Plan (Federal Government) and UNDP community forestry programs. Altogether, there are 15 active and potential community forestry projects, seven of which are run by SFD. An estimated RM4 million (USD1.3 million) has been spent on community forestry in Sabah so far.

Under the Sustainable Forest Management Licence Agreements (SFMLA), holders of licences are required to set aside compartments within their FMUs for community use. SFD has issued directives for licence holders to prepare for obtaining certification by 2014. It is hoped that the stipulation concerning upholding equity and welfare requirement of forest dependent communities that accompanies certification will hasten the implementation of the social project within FMUs⁹.

Efforts by the SFD to deal with resettling communities from within Forest Reserves and support integrated development have had an uneven record of success despite significant amounts of resources devoted to these activities. More recently, with greater emphasis on community participation in decision-making, these projects are showing forestry can perform a social service through co-management and the promotion of socioeconomic development. Assistance sought from non-government organizations to implement capacity building to promote participation has also

⁸ Correspondence from Director, Sabah Forest Department, 4 May 2010. Interviews at SFD indicate that, wherever feasible, the license is charged at a rate of RM250.00 per hectare and is chargeable to the individual applying for the license.

⁹ Based on interviews in SFD, 14-15 April 2010.

proved to be beneficial. SFD's interest in timber certification may also promote community participation within FMUs. It would be beneficial for SFD to independently assess levels of community engagement using measurable indicators and external assessors. Such assessments would help to qualify its community forestry projects in relation to ICCAs.

2.3.2 The Issue of Tenure and Compliance with the Law

Tenure issues are at the center of discussions of concerning the relationship between forestry activities, local communities, and social responsibility. For those living adjacent to Forest Reserves, their greatest fear is being accused of, or caught, encroaching into the Reserves as a result of their lands having been included in Forest Reserves. For those involved in social forestry or community initiatives being undertaken by the SFD, Forestry Rule 20A does not provide those living within Forest Reserves with sufficient security of tenure. Some additional measures may have to be explored (Toh and Grace 2008, Ng 2000). Section 14 of the Forest Enactment allows for the admission of rights or the conceding of privileges not previously admitted in Forest Reserves. The power for according such rights lies with the Yang di-Pertua Negeri by notice in the Gazette. However, the means of implementing this Section is not yet in place. A suggestion has been made that a Procedure for a Normal Enquiry be adopted to concede these privileges (see Toh and Grace 2008). When such Procedures are in place, the special prescribed privileges as allowed in Section 14 may be useful in providing for local communities to continue to reside within Forest Reserves and to undertake forestry or rehabilitation work in accordance to programs negotiated with the Forestry Department. At the time of writing, the Sabah Forestry Department was cooperating with an inquiry into native customary rights claims in Malaysia conducted by the Malaysian Human Rights Commission (SUHAKAM). It is likely that more detailed recommendations will emerge from this study.

It is important also to highlight that aside from legitimate cases where customary lands of indigenous communities has been zoned within protected areas, there is also a problem of migrant workers originally brought in to work in logging taking the opportunity to open up forested areas and settling within Forest Reserves with the view to assert the same Native Title privileges given to native Sabahans. These people have no history of occupation nor customs of resource management and in such cases, the Forestry Department has little choice but to enforce the law and remove these groups in order to protect the Reserves, lest such behavior set a dangerous precedent.

2.3.3 Community Conserved Areas in Forest Reserves

In a number of non-commercial Forest Reserves and in Protection/Amenity compartments within FMUs, there are areas that are designated for conservation purposes. These are mainly areas of steep topography which cannot be logged. In many instances, local communities have a stake in ensuring that forest within these compartments are well protected and sustainably managed. Some examples include forested hills that contain the water catchment areas for village Gravity Feed Water Systems. For example, Bukit Rimau which lies within the Sabah Forest Industries concession provides water to the Lundayeh villages of Long Mio and Long Pasia. In other areas, local people have an interest in conserving and sustainably developing tourism resources to generate alternative income earning opportunities. In Batu Puteh in the Lower Kinabatangan which is a nature tourism hotspot, this land is leased from Forestry. In Ulu Padas, the Lundayeh community continues to manage biodiversity areas largely without either support or interference from the authorities. Beyond community forestry, and in line with its greater push for community development, it would be opportune for SFD to look into developing and documenting local community initiatives based on shared conservation goals in Sabah's Forest Reserves.

2.4 Freshwater

The Water Resources Enactment 1998 enables the Department of Irrigation and Drainage (DID) to manage water catchments in Sabah. The primary purpose of the Water Resources Enactment 1998 is to protect 'environmentally sensitive' zones. The zones cover a) Water Protection areas and b) Water Conservation Areas. Water Protection areas are areas where land use change is not permitted. These can cover both State Land and Forest Reserves. Water Conservation Areas are areas where certain activities such as housing and limited agriculture may be allowed. Issues relating to water resources may be addressed by the state Water Resources Council which facilitates cross agency coordination and advises the Chief Minister on the management and use of water resources.

2.4.1 Catchment Management by Remote Communities

Thousands of local communities depend on clean water from Gravity Feed Systems (GFS) serving their villages. First introduced in 1972 by the Health Department as part of its Rural Environmental Supply Program, Gravity Feed Systems are an effective low-cost means of supplying clean water to Sabah's scattered and isolated communities using an impoundment of a stream or river and pipes to channel water to the village concerned (Matthews 1995). A 1993 study estimated there to be several thousand Gravity Feed Systems in operation serving approximately 200,000 people.

In a study in Ranau District, the size of each of the catchments studied ranged from 36 to 104 ha. Most had forest cover and traditional use. None were occupied by village development (Matthews 1995). As the quality of vegetative cover is important for the abundance and quality of water, local communities have devised their own community-based systems for protecting the catchment, and maintaining the impoundment section and pipes that carry water to the village, often rotating responsibility for this among different household clusters. Local communities coordinate closely with the Department of Irrigation and Drainage, at times taking the initiative to identify and maintain these water supply sources.

Gravity Feed Systems and even micro-hydro stations are insecure for several reasons. General mechanisms for land use control in the two zones are not in place. There is also a need for greater cross-sectoral cooperation between government departments. Some water catchments occur within Forest Reserves and others occur in State Land; these would fall under the management of SFD and DLS respectively. In the past, logging of catchments in both of these forest categories has caused damage to water catchments and affected water supply.

2.4.2 Securing Vital Water Resources

Gravity Feed Systems and their associated water catchments are mentioned in the Sabah Conservation Strategy (1992) which recommends that the Water Department and the Health Department compile a database of GFS systems in the state. It also states that the DLS should restrict titles for land from being alienated within these catchment areas. With the establishment of the Water Resources Council under the Water Resources Enactment 1998 there is much more scope for greater coordination among government departments. All the major agencies responsible for managing land and forest are members of the Council.

Under Section 4 of the Enactment, the Water Resources Council is to:

- a) advise the Minister on the management and use of water resources;
- b) make recommendations on the improvement of the quantity and quality of water for the benefits of human use, the aquatic flora and fauna and the aquatic environment, including wetlands and floodplains;
- c) adopt and review plans for the orderly and effective development of water resources;
- d) set priorities for, ensure the development of, recommend for approval and review catchment management plans developed under Part VI and other plans for the improvement of the management of water resources;
- e) develop and issue, with the approval of the Minister, State policies and guidelines for the management and protection of water resources; and
- f) take action to implement the recommendations of an approved catchment management plan including taking enforcement action where relevant; and

g) act to minimise or prevent harm to water resources.

GFS water catchments can be actively managed as ICCAs by local communities under a shared tenure arrangement. NGOs such as PACOS Trust, JOAS and GDF have already been playing a role in assisting communities in mapping village resources and conservation areas including GFS water catchment areas. PACOS Trust in particular is currently consolidating its database on community-conserved areas. Information on water catchments that support current and future GFS should be consolidated from various sources to provide a better representation of water catchment protection gained from ICCAs in Sabah. These should be centralised coordination that is also communicated to the District Land Utilization Committee (LUC) so that essential resources are not affected by land use change activities.

2.4.3 Traditional Systems for Sustaining Freshwater Fisheries

Tagal is an indigenous system for sustaining riverine fisheries and conserving the river environment which has been practiced by Sabah communities for generations. *Tagal* systems are broadly similar but their strength is in their diversity and adaptability. They are informed by location specific knowledge of fish ecology, and the participation of resident communities that collectively enforce norms and regulations. Longstanding traditions provide both the strength and adaptability behind the systems. Whenever the *tagal* system is in force, no fishing is allowed within particular zones for a specific length of time. Fish are harvested communally at the appointed time and the catch is shared equally among its members. Anyone found guilty of breaching *tagal* regulations will be fined heavily, for example a 50kg pig and RM200 (US\$65) cash. If a case cannot be solved by the Village Chief, it will be brought to the Native Court.

Historically, in various parts of Sabah fisheries resources had begun to decline from the 1960s as logging and the opening up of land for agricultural impacted riverine environments. Uncontrolled fishing, often with the use of explosives, poison or electricity, also became more widespread. In 1997, villagers in Kg. Notorus, in the Penampang District decided to more actively enforce a *tagal* system to reverse the worrying decline of fish in the Babagon River. Based on anecdotal evidence, word of the restoration of fisheries in Babagon River prompted many other communities to follow suit by reinstating communal management of sections of the river. By 2008, 179 villages had reportedly revitalised their *tagal* systems (Lasimbang, J. 2009).

The Department of Fisheries has been very supportive of *tagal* as a form of stakeholder participation. Section 35 of the **Inland Fisheries and Aquaculture Enactment 2003** specifically allows for the declaration and recognition of the indigenous system of resource management (*tagal*). This recognition of indigenous

management of fisheries resources has been an important milestone for the incorporation of traditional knowledge into conservation in Sabah. It is source of pride to all Sabahans and has noticeably increased the productivity of riverine fisheries and improved the quality of streams and rivers, although more research is needed to verify this. The Department of Fisheries website reports that there are now 212 *tagal* managed areas involving 107 rivers in eleven districts, although this figure may need to be revised upward to reflect the latest information.

The Department's receptivity to *tagal* is an example of what can be achieved for conservation when communities are actively engaged in natural resource management. The Fisheries Department supports, facilitates and promotes the system by serving as a technical advisor to the various *Tagal* Committees, carrying out research to further improve the system, conducting training and public education, and providing material assistances to the *Tagal* Committees such as signboards and fish fry. More needs to be done, however, to document the highly localized nature of customary laws and different *tagal* systems so that the traditional values inherent in the practice are not lost in the enthusiasm to 'scale up' the approach through standardization and commercialization.

Tagal systems have broad similarities but they are also diverse; they vary according to different biogeographic settings and cultural settings. Longstanding resource management practices and on-going observation provide the strength and adaptability behind the systems. There is concern that the institutionalization of *tagal* through the formation of a state-wide Tagal Committee weakens local governance which is based on adat and TEK (Lasimbang, J. 2009). The standardization of Tagal rules by the central Tagal committee by definition, cannot possibly reflect the traditional and localized nature of customary laws.

For example, the recent focus on commercialization (sports fishing) and emphasis on the sale of fish are contrary to the traditional practice of dividing the catch among community members. These new programs detract from the traditional practice and may in the long-term diminish ownership and commitment to the system.

The reinvigoration of Tagal fishing prohibitions has been a huge success for the Fisheries Department in partnership with stakeholders from indigenous communities throughout Sabah. It is hoped that this trend will continue. However, it is timely to ensure that the grassroots elements which contributed to its revival in the first place are not forsaken in enthusiastic efforts to 'scale-up' the practice. The Fisheries Department can continue to play an essential role by documenting the rivers where Tagal is enforced by local communities and maintaining on a database of these as ICCAs in conjunction with other departments and agencies.



The designation of areas where fishing is restricted, and where fishing can be conducted with particular kinds of fishing gear is what contributes to the maintenance of rivers and fisheries resources. (Images from the Global Diversity Foundation, SEA Regional Program)

2.5 Riverine and Seashore Reserves

The SLO also vests the management of riverine and seashore reserves with government. There is no specific mention of community participation on these issues but certainly there are no sanctions against CBNRM and objections to local management if suitable opportunities arises.

Section 26. River and seashore reserves, and ridges of hills.

(1) Unless otherwise expressly provided in any title, the entire property in and control of the waters of all rivers, creeks, streams and watercourses, and of the seashore below high water mark is and shall be vested solely in the Government.

(2) The Government also has power to reserve such portion of land as may be deemed

advisable along the banks of rivers, streams or creeks, or along the seashore above high water mark, or along the ridges of hills. Such reservations shall be shown on all documents of title.

Subsequently, the Sabah Water Resources Enactment 1998, was passed “to provide for the sustainable management of the water resources of the State of Sabah ..”.

Section 40 of this Enactment addresses River and shore reserves:

- (1) from the date of the commencement of this Enactment, river reserves and shore reserves are established on land which is .. within twenty metres of the top of the bank of every river ... where the river channel is not less than three metres in width ..”
- (2) does not apply to an artificial watercourses ..
- (3) river and shore reserves are established for the purpose of protecting the volume or flow of water .. and preventing the degradation of the quality of water resources and damage to the aquatic environment ..”

The above provisions came into force in June 2000 and are intended to incorporate a level of environmental and water course protection which would have been overlooked in the Land Ordinance which, having been drafted in 1930, was largely concerned with rivers as systems of transport and maintaining administrative access. In the current scenario, while there is increased understanding of the importance of riverine reserves, there seems to be no active enforcement of Section 40, even in cases such as the Kinabatangan floodplain where riverine reserves harbor critical remnant habitat for endangered species such as the proboscis monkey (Payne 2006).

2.6 Islands, Coast and Fisheries

As most important marine biodiversity areas are contained within State Parks. Section 3 sets out the issues, particularly pertaining to the management of proposed marine protected areas.

3. PROTECTED AREAS AND ICCAs

3.1 Sabah’s System of Protected Areas

Information on the protected area system in Sabah is fairly current due in large part to the support from Bornean Biodiversity and Ecosystems Conservation (BBEC) program supported by the JICA (Japanese International Cooperation Agency) from 2002 to 2012. BBEC’s primary aim has been to assist the Sabah state government in its efforts to conserve biodiversity and to achieve a balance between development and conservation by integrating biodiversity conservation into state governance processes. A key study on the coverage of the state protected area network according to IUCN categories was conducted in 2005-2006 with the active

participation of officers from state government agencies, NGOs and civil society experts (Payne *et al.* 2006). It reviewed the effectiveness of *in-situ* conservation via the existing protected area network and the extent to which it was able to protect the full spectrum of ecosystems. This was followed by an evaluation of the collective efforts of the respective agencies tasked with conservation roles.

The study also briefly explored scope for more integrated approaches to address areas of overlapping jurisdiction, filling gaps, and also broadening conservation impact in partnership with a wider range of government and non-government stakeholders. To add a further layer of understanding, a review of Indigenous and Community Conserved Areas (ICCAs) was implemented in 2010 to document the contribution of community-based conservation to the state. The Sabah Review of ICCAs, which was completed in 2011, is the first study in Malaysia to specifically grapple with the concept of ICCAs and community governance of biodiversity significant areas (Majid Cooke and Vaz 2011).

The IUCN defines a protected area as “An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.” There are seven categories of protected areas with four representing essentially undisturbed natural areas, and three comprising areas modified and utilized by local residents.

IUCN Protected Area category	No. of PAs	Land area (ha)	Brief Description
Ia Strict Nature Reserve	10	5,016	All small VJRs
Ib Wilderness Area	0		
II National Park		409,003	5 State Parks (including 2 marine & islands), 4 Protection Forest Reserves / Conservation Areas
III Natural Monument	22	101,694	1 Wildlife Reserve, 1 Bird Sanctuary, 20 other Forest Reserves in three types
IV Habitat/Species Management Area	60	658,685	All Mangrove Forest Reserves (counted as one PA), 54 other Forest Reserves in four types, 1 Wetland Center, Lower Kinabatangan (Wildlife Sanctuary + 3 other types of land status), 1 Wildlife Conservation Area, 1 Wildlife Reserve, 1 State Park
V Protected Landscape/Seascape	1		Tun Sakaran Marine Park

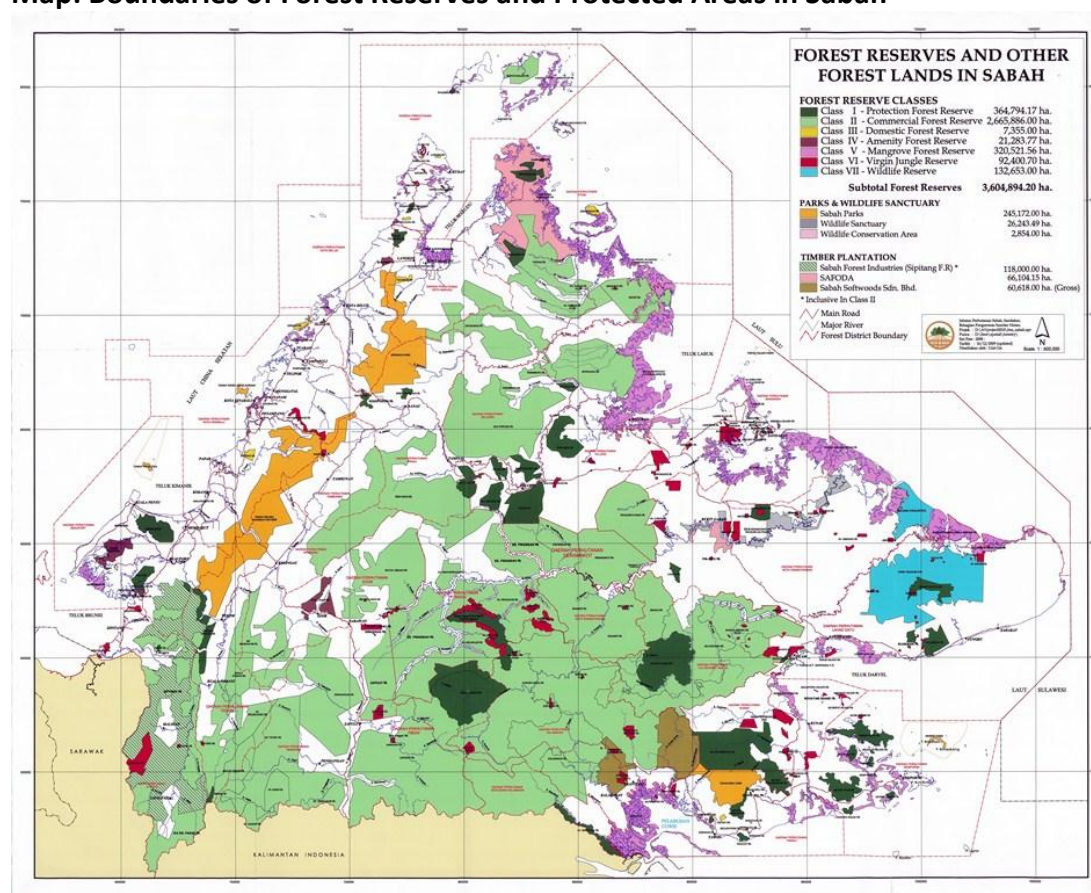
VI Managed Resource Protected Area	0		
TOTAL	93	1,174,398	

A summary of the recommended master list of Sabah protected areas is presented in the table above. The 93 named protected areas cover approximately 1,209,398 hectares of land, estimated to represent over 15.95 percent of Sabah's land area.

Sabah's Protected Areas enumerated within the IUCN Categories

The majority of protected areas in Sabah are owned by government, managed by a specified government authority and designated according to specific legislation. State Parks which are strict protection areas are areas gazetted using the Parks Enactment 1984 and managed by Sabah Parks. The Land Ordinance 1930 also contains provisions for the designation of various 'reserves for conservation purposes'. Wildlife Sanctuaries¹⁰ are established under the Wildlife Conservation Enactment 1997 under the purview of the Sabah Wildlife Department (SWD).

Map: Boundaries of Forest Reserves and Protected Areas in Sabah



¹⁰ Wildlife Sanctuaries are slightly different in that both State land and alienated land may be designated as Sanctuaries under the Wildlife Conservation Enactment 1997.

There are seven categories of Forest Reserves gazetted under the Forest Enactment 1968, a total of 3,350,000 ha or 45 percent of Sabah's total land area. This however includes both protective and productive designations; Commercial Forest Reserves accounting for the most extensive proportion of the permanent forest estate. These are now divided into large Forest Management Units (of approximately 100,000 ha each) under long-term Sustainable Forest Management License Agreements. High Conservation Value Forest (HCVF) is required to be set aside in compliance with the move towards timber certification and applies to areas designated as having biodiversity values of being of importance to local communities. In general, these Enactments are heavily influenced by the strict protection paradigm with government officers as enforcement agents. There is longstanding tendency of perceiving local communities as a management issue, not as potential partners or co-managers.

3.2 Limited Coverage and Connectivity

A follow up study to the formulation of the Master List was implemented to identify the important and potential areas to connect and extend the protected areas in order to secure the continuity and integrity of ecosystems in Sabah and feasible mechanisms for the integration of the protected areas (Payne 2006b)¹¹. According to the report, the protected area network in Sabah consists of ecologically separate pieces of forest, island or sea arising from the fact that the location and purpose of each protected area "derives from a long historical background, rather than from a single identification and planning process" (Payne 2006). In the present day, whether these areas are sufficient in size to maintain breeding populations of all or any of the native flora and fauna species is in question. It is already known that there are some species of fauna (for example, freshwater fish) that occur outside any form of protected area and others that rely on State or alienated land without any form of conservation provision.

Sabah's protected area system is weakened by high levels of fragmentation. Isolated individual sections are increasingly vulnerable to the impacts of climate change, edge effects and degradation from illegal exploitation and land use change. Areas which are small are also more vulnerable to shocks. For example, in 1997 the Ulu Membakut sections of the Crocker Range Foothills were being investigated as potential conservation areas; most of these were completely destroyed during the 1998 forest fires which easily razed through the disturbed hill dipterocarp forest which was dried out following a protracted drought (Greer 1998). Similarly,

¹¹ The importance of ecological linkages and corridors to strengthen the integrity of the protected area systems is highlighted in numerous studies (Brown & Mitchell 1997, Berkes 1998, CBD 1998, Meffe et. al. 2002).

extensive areas of Peat Swamp forest within two Forest Reserves were destroyed by fire in 1998 and again in 2003¹².

The analysis and recommendations from this study are contained within the report *Protected Areas in Sabah: Proposed Ecosystem Connections and Extensions* (Payne 2006). A number of corridors and extensions are highlighted as being important to link the fragmented protected areas as depicted on the map. The areas identified are paired with recommendations for their protection. Almost all of these connecting areas have some communities present which suggests that some level of community participation will be important if not essential to the successful establishment of these corridors. It also indicates that the establishment of a strict protected area would be unlikely.

3.3 ICCAs and their Potential Contribution

In the original Master List of Protected Areas in Sabah many different land categories were not included. Notably, there were no areas assigned to IUCN Category VI for Managed Resource Protected Areas – defined as “(a)reas containing predominantly unmodified natural systems, managed to ensure long term protection and maintenance of biological diversity, while providing at the same time a sustainable flow of natural products and services to meet community needs”. This would be a definition synonymous with Indigenous and Community-Conserved Areas.

3.3.1 Managed Resource Protected Areas

The addition of the proposed Tun Mustapha Park, a marine protected area under Sabah Parks in the Sulu Sulawesi Marine ecoregion which encompasses over 50 islands will add over 1 million ha of sea to the protected area network (the land area is approximately 35,000 ha). In the discussion section, Payne (2006) observes that “there is no reason why “community forests” cannot exist either as parts of Forest Reserves or Native Reserves” highlighting the proposed Ulu Padas Native Reserve as one example of an area rich in biodiversity which is a defacto community-managed resource area (Payne *et al* 2006).

3.3.2 Conservation on Alienated Land

Also among the recommendations put forward at the integration workshop was the need to create provisions for private land owners to devote areas to conservation and to ease land royalties for this purpose. Similarly, large scale concessionaires of commercial Forest Reserves should be encouraged to do the same, beyond the requirements of the minimal requirements to set aside HCVR areas.

¹² Sabah Forestry Department CAIMS Accessed 2 June 2012.

Conservation Areas and reforestation programs on parts of Forest Management Units managed by Sustainable Forest Management License Agreement (SFMLA) holders could potentially be assigned as either category IV or VI PAs depending on whether they involve local communities. The report also cites the relevance of designating riverine reserves throughout Sabah as a standard feature to protect riparian areas from erosion and also to provide corridors for wildlife movement. ICCAs could potentially occur in these riverine areas as a form of local management.

3.3.3 Community-managed Extensions and Corridors

Based on this evaluation, ICCAs have the potential to substantially increase the size and efficacy of Sabah's protected area network by adding multiple use, community-managed areas of complementary use. The proposal to more effectively link Kinabalu National Park and the Crocker Range National Park through a patchwork of community-managed areas with complementary land use is one example of how this could work¹³. Another would be the extensions to the vegetated corridors along the Kinabatangan River for the safe passage of wildlife.

3.3.4 Water Catchment Protection Areas

Community organizations have long played an active and underappreciated role in protecting the water catchments for the tributaries serving their gravity feed impoundments – this could be a substantial area if adequately recorded. Maintenance of the quality of the catchment is essential as this water is utilized by these communities in an untreated form. Gravity Feed Systems, which were initially introduced in Sabah in the early 70s are the main source of water for hundreds of villages which have a forested catchment feeding water into tributaries. Hundreds of villages in Sabah are served by Gravity Feed Systems (GFS) which supply piped water to their homes. Precise information on the number and distribution of these GFS catchments has not yet been compiled, although documenting the GFS network has been a specific recommendation of the Sabah Conservation Strategy 1992 and a 2007 UNDP Study on *Policy Strategies for the Conservation of the Highlands of Sabah and Sarawak*. It is understood that the Department of Agriculture has undertaken a Sabah-wide study on GFS distribution. Collectively, the benefit of water catchment protection in these community conserved areas accrues to Sabah's urban population centers.

¹³ A detailed feasibility on the Kinabalu Eco-linc was completed in 2011 and proposals have been prepared for follow up.

These recent studies and workshops have served to catalyse useful discussion which blurs the previous perceptions of conservation being the sole responsibility of the state and opening up constructive discussion on the ways in which local communities with affinity to natural areas and long histories of association and residence could assume a more prominent role in conservation and sustainable use given the right policy environment and incentives.

3.4 ICCAs within Protected Areas Systems

3.4.1 Communities within Park Boundaries

When the boundaries of the Crocker Range Park were drawn in 1984, they included small settlements in the Ulu Papar and Ulu Senagang areas into the Park. When local communities came to know of this, they vehemently opposed the park. Park officers, although sympathetic to the plight of these communities, were constrained by the rigid provisions with the Parks Enactment. This period of unresolved tension was to continue for some years, until more conciliatory approaches emerged in conjunction with the development of the Crocker Range Management Plan. This was influenced by studies that had documented traditional ecological knowledge and local use, and the discussion of relaxing the Park statutes to allow for Community Use Zones (CUZ) within the Park specifically for the communities concerned (Nais 2006, Wong 2009). See Case Study in **Section 10**.

3.4.2 Establishment of Wildlife Sanctuaries and Conservation Areas

The Wildlife Conservation Enactment 1997 contains provisions that may be useful to provide a layer of protection to community-conserved areas that are also important as wildlife ranging areas and the protection of key species of flora and fauna. The Enactment has provisions for the establishment of both Wildlife Sanctuaries and Conservation Areas if these areas are deemed important for the conservation of flora and fauna. Importantly, in the case of Conservation Areas, there is no restriction on local residence and local use as long as these are described in the proposal.

The Section 20 headed, “Exceptions to restrictions and prohibitions relating to Wildlife Sanctuaries” reads: “Subject to this (1) Enactment, the native or traditional rights specified in a proposal may continue to be exercised in the Sanctuary described in that proposal, except where under agreement between the Director and the persons entitled to exercise those rights they cease to be exercisable in return for compensation.”

Conservation Areas

Section 21. Where the Yang di-Pertua Negeri is satisfied that a measure of control is required in an area for the purpose of protection of wildlife, wildlife habitats, migration sites, migration corridors and sites of scientific or other importance or value, for the purpose of ensuring the security of the wildlife or its habitats of a neighbouring Wildlife Sanctuary, or for the purpose of the control of the smuggling of animals, animal products or plants in areas bordering neighbouring states or countries, he may by order published in the Gazette declare that area to be a Conservation Area.

Section 21(2) states that the Yang di-Pertua Negeri may, by regulations, provide for control of (a) development projects. This is the case whatever the status of the land, be it State Land or alienated land. It also states that (3) The Minister may, from time to time, restrict entry of non-residents without a permit into any part of a Conservation Area for the purpose of the protection of vulnerable wildlife populations including migrating or breeding wildlife or for the restoration or protection of flora or a wildlife habitat provided that no such restriction shall be imposed for a period of more than one year at any one time.

Although, the Act has not recently been used for this purpose, it is clear that the intention of the Enactment is to empower the Wildlife Department to act decisively to protect habitat and ecosystems which is threatened. These may also be important community-conserved areas. The declaration of Conservation Areas does not restrict local residence and traditional activities as long as these are described in the proposal, and it can also provide a means to restrict outside access for periods of time.

Such a framework could provide an excellent basis for partnership between the Wildlife Department and local communities to control activities that are detrimental to community resources and environment quality and biodiversity conservation. The Conservation Area provision could provide an expedient means to safeguard threatened community-conserved areas which are not securely held by local communities. This is particularly relevant as community and wildlife areas are increasingly coming under pressure from aggressive land conversion and plantation development. This provision could be used to protect ICCAs which comprise grazing areas, migratory bird habitat, riverine wildlife corridors and areas adjacent to important protected areas.

3.5 Sacred and Heritage Natural Sites as a Specific Type of ICCA

As indicated in earlier discussions, many communities conserve areas because of their historic, cultural, and spiritual significance. The Sabah Museum which comes under the Ministry of Tourism, Culture and Environment has been playing a role in documenting and affording protection to some significant sites together with local communities. There are undoubtedly many more sites of importance which are

protected by local communities without government involvement. Many of these have not been officially recorded and it is important that more research is undertaken on these areas.

Although not all sites may be important for biodiversity and many are small, some of them would certainly be important refuges for particular species. For example, a burial cave could harbor rare and endemic forms of cave flora and fauna which have not yet been documented. In the Banggi Island case study, the sacred sites, communal prayer areas and grave sites which are recognized by the Bonggi people are not disturbed because of cultural taboos (see Case Study in **Section 10**). These beliefs help contribute to conservation and provide forest links and ecological stepping stones for wildlife.

Increasingly, communities throughout Sabah are realizing the need to be more proactive about ensuring protection and recognition of historic sites and even cultural landscapes. Some have looked to the Native Courts to have these officially recorded so that they are not alienated or damaged in the course of land use change. There is also an increasing consciousness of indigenous cultural and spiritual links to key sites located within protected areas – the most prominent of these is Mt. Kinabalu which is a sacred mountain to the Kadazandusun. Beginning in 2010, Sabah Parks has reserved a special day each year for the *Return to the Mountain* event in which communities of the foothills of Kinabalu, the original caretakers of the mountain, conduct sacred rituals and are able to climb the mountain without charge. We turn now to some of the policy provisions which may be used to secure sites of importance to communities.

3.5.1 Cultural Heritage Enactment (Conservation) 1997

The Cultural Heritage Enactment was adopted in 1997 to conserve, rehabilitate and enhance local cultural and heritage sites which are defined as “(a) any cultural heritage the character or appearance of which it is desirable to preserve or conserve, to enhance or to be subject to preservation or conservation; and (b) any area as conservation area to be preserved or conserved as a cultural heritage.” A Council was formed to advise the state government and to administer as well as manage heritage sites.

Section 5. Jurisdiction for control etc. of cultural heritage and conservation areas

The jurisdiction for the control, enforcement, development, preservation or conservation of every cultural heritage and conservation area shall be vested in the State Government.

Although the Enactment states that authority over these sites is vested in the state government, it does not state which agency is involved and how it is resourced. It does not seem conceivable for the government to protect heritage sites without the close cooperation of the relevant communities and their organizations. Section 14 allows for the creation of a fund to manage and improve heritage sites which custodians of the sites may apply for. It is not known how well this provision is utilized. Certainly, there is a need for management arrangements to be made more explicit and some financial support to ensure that these sites are well-maintained.

So far, a total of 19 heritage sites have been gazetted under the Act. Sites considered of value as cultural heritage could be expanded to include natural resource areas in the spirit of conserving biocultural diversity. Aside from the the ancient Lumuyu Rock carvings at Ulu Tomani which are protected under the Enactment, the rock carvings of Ulu Padas, stone monoliths in Ulu Papar, and the Bonggi sacred sites in Pulau Banggi are other examples of sites that deserve similar recognition and protection under the Enactment with concomitant benefits to biodiversity which may occur in the vicinity of these sites. Of particular interest are the salt trails of the Crocker Range and elsewhere which were important trading routes for hundreds of years; some are still used today by remote communities and they also appeal to adventurous tourists.

3.5.2 Native Court Enactment 1992

The Native Court Enactment may be useful for the protection of community-conserved areas although it has not yet been used extensively for this purpose. Section 6(1) deals with cases arising from breach of native law or custom. With this provision, the Native Court Enactment has been used to safeguard sacred sites such as the caves at Batu Balas. These caves are used by the Dusun Subpan community near Lahad Datu as a burial site where thick jungle is allowed to grow. The preventive power of the Native Court Enactment may be useful for the protection of sacred sites such as those now protected by the Bonggi on Banggi Island or recorded by the Lundayeh in Ulu Padas and the Dusun in Ulu Papar. As a member of the Land Utilization Committee (LUC) at District level, the Native Court is well-placed to ensure that important heritage sites are not affected by development plans. However, they need to be provided with reliable information that has been verified by a credible authority in order to play their role.

It is understood that this Enactment is also currently being used to enforce *tagal* (fisheries management) among some local communities. Although so far only a few groups have used provisions in this Enactment to protect areas of cultural significance, it is anticipated that this aspect of the Court's work will expand as

awareness of the need to conserve heritage and managed resource areas increases among local communities. The Native Court should also investigate the need to assume a more prominent role in the identification and conservation of these kinds of heritage areas. It is best placed to interpret *adat* laws and practices, and may need to be expanded in order to play this role.

3.6 Other Protected Area-related Designations

Sabah has one wetland which has been recognized as a Ramsar Site – the Lower Kinabatangan-Segama Wetlands (78,803 hectares) which is the largest Ramsar site in Malaysia. The Kota Kinabalu Wetland Centre, a 24 hectare urban wetland important for waterbirds and a popular recreational area run by a consortium of NGOs is also being proposed as a second Ramsar site. It has one UNESCO World Heritage Site, Kinabalu National Park and two more are being nominated – Maliau Basin and Danum Valley inside the Yayasan Sabah concession. The Crocker Range Park has recently been nominated as a UNESCO Man and the Biosphere (MAB) Reserve in recognition of the communities that are residing on the fringe of the Park and rely on the Park's resources. The MAB program is considered a vehicle for knowledge-sharing, research and monitoring, education and training, and participatory decision-making. Within the concept of MAB, the Sabah Biodiversity Centre which is advancing the nomination seeks to address land use issues in protected areas in which traditional communities exist so as to sustain biodiversity conservation, improve local livelihoods and ensure environmental sustainability.

Not much is known about the consultation process involved in preparing sites for nomination. However, it is possible that expedience can play a role in finalizing nominations and that local people can be pressured to accede in some form with the perception that the designation will be beneficial to them in some way without fully understanding its full implications. It is necessary for government agencies to be familiarized with best practices and respecting people's rights to free, prior and informed consent, full and effective participation, benefit-sharing, and respect for cultural and spiritual values.

4. NATURAL RESOURCES, ENVIRONMENTAL AND CULTURAL LAWS & POLICIES

4.1 Community Governance

In this section, we explore local community governance of resources and the influence of laws and policies that impinge upon these. Most communities in Sabah have a *Ketua Kampung* (headman) who represents the community and oversees adherence to *adat* laws. The headman is typically someone respected and selected by the community and it is common for this leader to come from a long line of village headman before him. In addition there is a Village Security and Development

Committee which has a *Pengerusi* (chairman) who is responsible for representing the village at government meetings and liaising with relevant agencies on resource management and development initiatives. This post tends to be a political appointment and this can sometimes be problematic when there are conflicts between the government plans and the interests of the community. More generally however, the dissemination of agricultural subsidies and marketing assistance, development funds, infrastructure projects, education, health services and others are coordinated by local village leadership for the benefit of the community.

4.2 Natural Resources & Environment

4.2.1 Conflicts Arising from Resource Exploitation and Development Plans

In the earlier sections which discuss laws and policies pertaining to resources, it was demonstrated that the mandate given to the state to utilize resources (timber, land, minerals and others) for development objectives has had an impact of Indigenous peoples' and local communities' ways of life and local governance and management of territories, areas and natural resources. Specific examples of this include the delineation of the Forest Reserve and State Park boundaries which cordoned resource areas and in some cases encircled customary lands and existing homesteads. In marine areas, the award of licenses to well-equipped fishing trawlers has seriously impacted marine fisheries resources and disadvantaged traditional fishing communities.

Most conflicts arise from situations where native tenure claims have not been supported or kept in limbo due to lack of resources and bureaucratic process. While lands remain State Land, they have been vulnerable to logging applications through the issuance of Temporary Occupation Licenses (TOL) or worse, large scale agricultural development which replaces natural vegetation with monocultures. Almost all the enactments and policies have some provisions which enable the government to acquire land and resources for a reserve or some sort of public purpose. This has been used for roads, dams and similar kinds of infrastructure projects or development initiatives. In some cases required the resettlement of local communities as in the case of the Babagon Dam in Penampang. More recently, the proposal to construct the Kaiduan Dam which would have submerged several Ulu Papar villages and require their resettlement prompted strenuous objections from these communities and their supporters. They face great insecurity as long as tenure issues persistently remain unresolved.

4.2.2 Issues in Integrated Coordination

The establishment of the Sabah Biodiversity Council within the CM's Department using provisions in the Sabah Biodiversity Enactment 2000 provides an opportunity for all major resource management agencies and departments to coordinate more closely on development programs. However, some bodies and agencies seem to occur outside this system; their programs are fast-tracked, well-funded and implementation is expedited with minimal checks and balances. Prominent among these is those intended for poverty alleviation such as the Agropolitan and Mesej schemes supervised by the Ministry of Rural Development. These are focused on large-scale ventures for oil palm and a total transformation of the landscape. Local communities only have marginal participation in the administration of these initiatives and are expected to benefit from stipends which emerge from the sale of the crop once the palms produce fruit. However, profitability is contingent on how well run the enterprise is by the designated statutory body (Majid Cooke, Toh and Vaz 2011).

Despite attempts to boost coordination and communication between government agencies, problems of poor integration persist. Certain agencies seem to assert more power than others and are able to ignore the views of other government agencies and also NGO and community stakeholders. Prominent among these is the Department of Lands and Surveys. It is clear that more holistic approaches to planning based on local consultation and consensus building according to a hierarchy of priorities, which could occur along the following lines.

1. Ensure collective tenure of customary lands in consultation with the community and to ensure equity and sustainability
2. Ensure that vital ecosystem services and forest or other natural resources are set aside (such as water catchment protection for GFS and micro-hydro and amenity forest close to the village); these would usually help protect sacred sites and cultural landscapes.
3. Important areas which are adjacent to protected areas or serve as corridors to wildlife should also be identified under suitable vegetation cover.
4. Ensure that the local community has sufficient land devoted to producing its own food through swidden on less fertile soils, and other crops on fertile soils.
5. Provide training and support for local smallholders to be involved in cash crops or tourism (depending on area) to help generate economic returns

Because of the dramatic changes to the Sabah landscape in the last 30 years, it is widely acknowledged that integrated approaches are needed to provide conditions favourable to biodiversity conservation. Agencies responsible for biodiversity conservation need to be more pro-active and vocal about conserving biodiversity

where it occurs, including looking for ways to work alongside communities involved in conservation on customary lands, engaging private land owners and ensuring that HCVF in the commercial Forest Reserves is also set aside.

It also implies that agencies that are oriented towards generating revenue (all those under the supervision of the Natural Resources Office (NRO)) should also be expected to ensure that ecosystem and social sustainability are not compromised by their development programs. Moreover, agencies which seem to occur outside the supervision of all the government authorities mentioned above, specifically statutory bodies responsible for rural development implementation, and federally funded bodies such as SEDIA, all need to report to the NRO to ensure that they do not undermine other considerations and natural values. These consideration are explored in more detail in **Section 9**.

4.3 Traditional Knowledge, Intangible Heritage & Culture

Many communities conserve areas because of their historic, cultural, and spiritual significance. The Sabah Museum which falls under the Ministry of Tourism, Culture and Environment has been playing a role in documenting and affording protection to some significant sites together with local communities. There are undoubtedly many more sites of importance that are protected by local communities without government involvement. Many of these have not been officially recorded and it is important that more research is undertaken on these areas. The discussion on policy tools for areas in this category is found in Section 3.3.

4.4 Others Laws and Policies

The Review of ICCAs conducted under BBEC II is effectively a place and resource base representation of Access and Benefit Sharing. The Sabah Biodiversity Center within the Chief Minister's office has also developed an access and benefit sharing law which will be launched in 2012.

5. HUMAN RIGHTS

5.1 International Conventions

Indigenous communities in Sabah have the same rights as all citizens of Sabah, which includes the right of cultural expression and choosing their religion. In addition, they can expect to have access to government services, national education for their children, the opportunity to own property, participate in development and generally uplift the quality of their lives. Malaysia is a signatory or party to the resolution to the UN Declaration on the Rights of Indigenous People adopted at the UN Assembly in September 2007. UNDRIP contains a comprehensive array of articles which deal

with both individual and collective rights. Further, Malaysia is also a signatory to the United Nations Convention on Biological Diversity (CBD) signed in June 1992 in Rio de Janeiro. The CBD contains specific Articles which elaborate the rights and interests of indigenous peoples. It acknowledges the importance of traditional knowledge to conservation and sustainable resource use. Article 10(c) supports the "customary use of biological resources in accordance with traditional cultural practices" and is taken to encompass a respect for indigenous tenure, management and governance of its resources. Malaysia therefore has an international obligation to enact these conventions at both national and state levels.

5.2 Infringement of Rights in Sabah and Sarawak

Infringement of the rights of indigenous communities in Sabah is closely associated with difficulties in having claims to communal lands and resources recognized by the government. Conflicts have arisen over the loss of livelihood, and impacts on quality of living arising from the degradation of natural ecosystems by resource extraction activities and the acquisition of customary lands for projects which are deemed important for public purposes such as dams, energy plants and roads to name a few (Yong 2003, Yong 2010). These have been described in previous sections. Injustice experienced in Sabah has ranged in severity from forced resettlement with inadequate compensation, to the more common issue of poor consultation in decision making or persistent issues of corruption in which individuals or groups have used their connections in government to profit themselves to the detriment of fellow community members.

Serious human rights abuses towards indigenous communities continue to occur in neighbouring Sarawak (Hew 1987, Yong 2010). Aside from the persistent refusal of the state to recognize the pre-existing rights of indigenous communities to their ancestral territories, there is an even more troubling record of disappearance and untimely deaths of individuals and leaders that have challenged incursions onto customary lands (Yong 2010). Local communities report of threats and intimidation by companies and their contractors, and physical abuse and detention by the police which gives them the impression as being entirely isolated and abandoned by the state and even civil society. The Eastern Penan, who are still highly dependent on the forest have suffered some of the worst abuses in the defence of the forest even as logging concessions continue to be issued. More recently, the sexual abuse of Penan women and girls by logging workers has come to light, although the government has tried to deny and suppress this information even though an independent taskforce confirmed it to be true. So far, no one has been prosecuted for assault¹⁴.

¹⁴ Penan girls and women were sexually violated By Ding Jo-Ann | 09 September 2009
<http://www.thenutgraph.com/penan-girls-and-women-sexually-violated/>

In Sabah, the track record of disconcerting abuses is not so extreme. It is true, however, that local communities in Sabah are disadvantaged by a lack of voice and representation. They also feel defenceless against partnerships of state bodies and their corporate partners that are able to facilitate access to resources on customary lands despite local protests. There is a strong correlation between a community's level of education, experience and networks with their ability to assert a greater role in managing resources; indigenous minorities like the Bonggi of Pulau Banggi that do not have educated spokespersons and leaders have been less successful in preventing large scale land development that has impacted their lives and also damaged sacred burial sites (Majid Cooke and Vaz, 2011). Organizations working to empower local communities are hampered by insufficient resources to achieve wider coverage. Assistance with enabling local communities to participate in peer networks and capacity building is one way in which government can help to facilitate constructive engagement with local resource managers throughout the state.

5.3 Problems Facing the Orang Asli in Peninsular Malaysia

There is insufficient space to adequately discuss the ways in which Orang Asli communities in the Peninsula states have suffered a denial of their basic rights enshrined in multilateral conventions as well as the *spirit* of laws in the Federal Constitution. These are covered much more comprehensively in the recent report written by Colin Nicholas commissioned by SUHAKAM¹⁵. It lays out compelling evidence of how the Orang Asli have been denied their rights to livelihoods, identity and self-determination by both formal and informal government policies and programs. The inability to defend their lands and resources coupled has worked in the favor of government and elites seeking to remove indigenous minorities from land and coveted resources with little resistance. More insidious however is the program of assimilation and 'mainstreaming' Orang Asli which threatens to erase traditional knowledge, culture and identity, and affinity to the land of their forefathers. The report covers the denial of rights in these broad categories:

- Right to land and natural resources;
- Right to development;
- Right to self-determination;
- Right to culture and identity; and
- Right to security.

6 JUDGEMENTS

¹⁵Nicholas, C. 2010. *Orang Asli: Rights, Problems and Solutions*. SUHAKAM report
http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=30507&name=DLFE-11801.pdf

6.1 Taking Cases to the Courts

Aside from the laws relating to land resources, there are judgements pertaining to native customary rights that have emerged from common law. This refers to case law developed by judges through the decisions of courts of the Commonwealth rather than through legislative statutes. Significant weight is given to precedential cases, which future decisions must follow. In Malaysia as a whole, the precedent includes landmark decisions that have reaffirmed the recognition of native rights that arise out of native laws and customs (Bulan and Locklear 2008).

Most cases which have been brought to the courts have occurred after local communities have exhausted all other means of seeking recourse which includes reports to the police and local government, appeals to local representatives, appeals through the media, and even the setting up of blockades to prevent access to forested lands by bulldozers and heavy machinery. The majority of cases involve the acquisition of, or entry into, customary lands by corporations and government entities almost always without the knowledge or consent of native communities. There are a over 200 cases of this nature now ongoing in Sabah, a similar number in Sarawak and a sizeable number being brought by the Orang Asli in Peninsular Malaysia. These cases would be impossible for indigenous communities to have pursued without the commitment and persistence of pro bono lawyers and social justice NGOs. The exhausting, frustrating and frequently demoralizing process typically drags for years and even after a successful judgement, results can be overturned in the extended appeals process.

For these reasons, it is common for plaintiffs to abandon the process mid-way. They feel intimidated by the unfamiliarity of the court process and the sustained drain on resources from repeated court appearances. Many cases outlive their plaintiffs. Court cases impose a heavy burden on the judiciary to uphold the letter and the spirit of the law in cases which are most frequently against the government and its agents. Despite many disappointing outcomes, there have a handful of significant judgements in case law that today form the strongest basis for reinforcing rights to customary land in Malaysia.

6.2 Landmark Decisions from Peninsular Malaysia

For Peninsular Malaysia, the cases told here demonstrate how Orang Asli communities and their supporters have drawn on international legal frameworks to assert their rights to land based on their history of continuous occupation. This excellent account is given by Nah (2008). The cases involve the recognition of native title and usufructuary rights as recognized in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (1997); and *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors*

(2002). As explained by Colin Nicholas of the Centre of Orang Asli Concerns (COAC), the practice of most state governments has been to use the 1954 Aboriginal People's Act as the legal basis for compensating the Orang Asli only for their crops and dwellings whenever their lands are confiscated from them: "The 1954 Act has also been used to argue that the Orang Asli do not hold proprietary interest in their land, and that the state governments exercise wide powers as to the disposal and compensation of these lands. The Orang Asli as such are only tenants-at-will, living on state land at the state's largesse" (Nicholas, 2005: 39).

The government has the right to gazette lands as Orang Asli Reserve and to degazette the same. However this excerpt from a 2010 Report commissioned by SUHAKAM (the Human Rights Commission of Malaysia) presents how administrative foot dragging lends itself to the appropriation of customary lands by the various state governments.

A review of the land-ownership status of the 149,000 Orang Asli living in 869 villages in the peninsula will immediately reveal not only the general non-recognition of Orang Asli rights to their customary lands but a worrying trend whereby whatever security the Orang Asli may have to some lands in the past, even this is being whittled away.

Orang Asli are also said to be occupying 9,873.04 hectares of land without authorisation while 644.17 hectares are said to be legally owned by Orang Asli by way of individual lands titles. That is to say, as of 31 December 2003, only 0.5 per cent of Orang Asli had titles to their lands (and most these Orang Asli have done so on their own accord).

The dismal fact is that only 15.1 percent of all recognised Orang Asli lands were duly gazetted as Orang Asli reserves. Another 22.5 percent (28,760.86 hectares) had been duly approved for gazetting as reserves but, alas, the actual administrative gazetting was not done. In some cases, according to the JHEOA's Data Tanah of the early 1990s, the approval for gazetting was given in the mid-1960s and mid-1970s, but to date the actual gazettment was never effected. In other cases, such as in Kuala Krau, Pahang, such lands that were approved for gazetting in the past eventually became re-classified as "Tanah Kerajaan" (JHEOA Data Klasifikasi Kampung 1997) —frequently without the information or consent of the Orang Asli concerned. (Nicholas, C. 2010)

In fact, even the limited area that has been gazetted as Orang Asli Reserve land has dwindled over the years. Based on the figures provided by the Department of Orang Asli Affairs, a total of 1,444.81 ha of gazetted Orang Asli reserves were de-gazetted from 1990 to 2003.¹⁶

¹⁶Nicholas, C. 2010. *Orang Asli: Rights, Problems, Solutions*. KL: SUHAKAM
http://www.suhakam.org.my/c/document_library/get_file?p_l_id=30217&folderId=30507&name=DLFE-11801.pdf

This situation was among the concerns highlighted by the United States government in its 2011 report. The report surmised that “in practice federal laws pertaining to indigenous people of the peninsular region, known as the Orang Asli, vested considerable authority in the non-Orang Asli minister for rural development to protect, control, and otherwise decide issues concerning this group. As a result indigenous people in peninsular Malaysia had very little ability to participate in decisions that affected them. The government did not effectively protect indigenous persons' civil and political rights”¹⁷.

6.2.1 Defining Rights to Live on the Land: The Adong Kuwau Case

In this case, 52 plaintiffs of the Jakun tribe living in Linggiu Valley were displaced from their traditional and ancestral land when the land was alienated by the Johor state government and the Johor Director of Land and Mines for the building of a dam. The plaintiffs claimed that the compensation they received as recommended by the Department of Aboriginal Affairs (in accordance with Sections 11 and 12 of the Act) was inadequate.

New judicial concepts were introduced in this landmark case, in particular, that of native title. The judge laid down his understanding of native title, drawing upon precedents in the United States, Canada and Australia, stating that ‘it is the right of the native to continue to live on their land as their forefathers had done’, a right ‘acquired in law’ and *not based on any document or title*. This also meant that ‘future generations of the aboriginal people would be entitled to this right of their forefathers’. Specifically, he defined this ‘right over the land’ to include: the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.

He ruled that compensation had to be given not just for rubber and fruit trees, but ‘for what is above the land over which the plaintiffs have a right’, that is compensation ‘for the loss of livelihood and hunting ground’. These, he established, were protected under Article 13 of the Federal Constitution (concerned with proprietary rights to land), and could not be excluded by the Act. Compensation was thus given for five types of deprivation: of heritage land, of freedom of inhabitation or movement, of produce of the forest, of future living for the plaintiffs and their immediate families, and of future living for their living descendants. Compensation was valued at MYR26.5 million for 53,273 acres of land. When this was reviewed in

¹⁷ United States human rights report 2012.

the Court of Appeal, the presiding judges upheld the decision, and reaffirmed that 'deprivation of livelihood may amount to deprivation of life itself and that state action which produced such a consequence may be impugned on well established grounds'. This judgement was affirmed by the Federal Court.

6.2.2 Proprietary Rights in and to the Land: the Sagong Tasi Case

In this case a portion of land upon which several Temuan families lived was acquired for construction of a portion of a highway joining the Kuala Lumpur International Airport to the North-South Highway. These families were evicted, with only minimal compensation given for their loss of fruit trees, crops and homes – not for the value of the land upon which they resided. They brought the Selangor state government, the federal government, the highway authority, and the private construction company to court, and argued for the recognition of native title with attendant full compensation. Part of the land in question had already been gazetted as aboriginal land under the Aborigines Peoples Act of 1954 while another part of it remained ungazetted due to persistent inefficiency within the Department of Orang Asli Affairs.

The presiding judge, Mohd Noor Ahmad J, affirmed that the plaintiffs held native title to the gazetted land as was recognized in the Adong Kuwau High Court judgement, which included usufructuary rights (that is, the right to possess and enjoy the land), as well as interest in and to the land. These rights, he decided, were proprietary rights under common law which were protected by Article 13 of the Federal Constitution. Specifically, the Judge ruled: "Apart from the Orang Asli and the native people of the Borneo states, there are no other classes of people in Malaysia who occupy the said lands on the basis of customary right except the lands occupied under the tribal adapt in Negeri Sembilan and Malacca [...] Thus, the Act speaks of aboriginal reserve land and aboriginal occupied land. The latter refers to hereditary land or customary land."

Therefore, he ruled that when native title was revoked, it warranted the same compensation awarded to other title holders under the Torrens system, as specified by the Land Acquisition Act of 1960. This judgement was subsequently upheld and extended by the Court of Appeal. Several important points were made in this written judgement. The judges ruled that the Aboriginal Peoples Act be read in a purposive manner, *as a human rights statute*. Further, the judgement dealt with the interpretation of Section 12 of the Aboriginal Peoples Act, modifying it in order to bring it in accord with the Federal Constitution. Specifically, the judges added two words, rephrasing it to say, 'the State Authority "shall" grant "adequate" compensation therefore'. In doing so, they confirmed that Section 12 does not

merely confer discretion on the state authority to decide whether compensation should be paid, it becomes the duty of the state authority to ensure that compensation is made. Finally, and most significantly, the Orang Asli were also deemed to be in possession of customary community title for the lands that had not yet been gazetted. The judges ruled that the failure or neglect of the Selangor state government, the first defendant, to gazette the area they inhabited was a breach of fiduciary duty, for the state had not fulfilled its commitment to protect the rights of Orang Asli in relation to their lands.

The 59-page judgment of Gopal Sri Ram in the Court of Appeal is more than just an affirmation of the rights of the Orang Asli to their traditional lands. It was a condemnation of the way the Orang Asli have been treated by the authorities and a wake-up call to the government to fulfill its fiduciary responsibility towards the community. In his words, "Here you have a case where the very authority – the State – that is enjoined by the law to protect the aborigines, turned upon them and permitted them to be treated in a most shoddy, cruel and oppressive manner" (Nicholas 2005, 40).

Applied properly, this has resounding implications for the current status of Orang Asli customary lands, many of which have not yet been gazetted despite numerous and repeated appeals by Orang Asli communities for this to be done (Williams-Hunt 1995). This judgement reinforces that state authorities are held responsible for protecting the land rights of the Orang Asli. While these developments in case law bode well for the Orang Asli, the wide powers of the Land Acquisition Act of 1960 still permit government authorities to acquire Orang Asli customary land. As Wui Ling Cheah (2004) also notes, this landmark decision does not take into account the spiritual, religious, cultural and communal dimensions of Orang Asli customary lands; it merely treats the land as a possession or commodity to be compensated at monetary value.

6.3 Landmark Decisions from Sarawak

6.3.1 Claim Over Traditional Territories in Sarawak: Rumah Nor¹⁸

In Iban practice, the cultivated landscape consists of ancestral lands that have been planted with food crops and hill rice and forested fallow land or *temuda*, interspersed with fruit trees. There are also uncultivated cultural landscapes, comprising 'islands' of primary forest called *pulau galau*, reserved and maintained for hunting and gathering and for timber for building materials, and sacred sites. The Iban regard their territorial domain or *pemakai menoa* to include areas of *temuda* and *pulau galau* (Ngidang 2003, Ishikawa 2007).

¹⁸ <http://borneoproject.org/our-work/rumah-nor-a-land-rights-case-for-malaysia>, see participatory video featuring accounts from Rumah Nor residents themselves. Accessed on 25 April 2012.

Legally, however, the Sarawak Land Code (SLC) 1958 limits the recognition of native customary lands or 'native customary rights' (NCR) to a strict legal definition, where 'land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January 1958 and still subsist as such'. NCR in this statutory sense is 'created' when land is planted with at least 20 fruit trees per acre, or land has been continuously occupied or built upon for three years; there are several other conditions. However, these claims are only applicable if the NCR land was created prior to 1 January 1958. Effectively, no new NCR can be created after this cut-off date except with a permit from the Superintendent of the Lands and Surveys under section 10 of the SLC.

A landmark case, *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* has challenged the limitations in the interpretation of native customary lands under the SLC. The plaintiffs were residents of Rumah Luang and Rumah Nor, both Iban longhouses along the Sekabai River in Bintulu. The headman, Nor anak Nyawai, asserted that the companies had trespassed onto their ancestral lands. According to the plaintiffs, the Superintendent of Lands and Survey Department had issued a provisional lease that enabled Borneo Pulp Plantations Sdn Bhd and its sub-contractor Borneo Pulp & Paper Sdn Bhd to clear land for an industrial tree plantation as part of a concession of 300,000 ha. The plaintiffs said they had opened up this land and could prove that they had continuously occupied it for generations.

In the 2001 ruling, the High Court of Sabah and Sarawak recognized that the community had native customary rights over their farmland, *and* also fallows, and reserves of old growth forest according to traditional resource management practices. The ruling essentially set a precedent by recognizing *temuda*, *pemakai menoa* and *pulau galau* as forms of native customary rights over land, and not just in the strict sense of the Sarawak Land Code 1958. The judgement confirmed that common law respected the pre-existing rights of indigenous groups under native law and custom (Yong 2010, 11).

In 2005, their victory was partially overturned in State Appeals Court due to "lack of evidence of occupation of the disputed area". Confusingly, all their lands outside the disputed area were still considered by the court to be valid native customary rights lands. In 2008, the federal court declined to hear the case. This means that questions of native customary land rights continue to be decided arbitrarily, on a case by case basis. Though many High Court decisions since 2008 have chosen to uphold native land rights as defined in the Rumah Nor 2001 decision, hundreds of indigenous communities across Sarawak continue to face land grabs by corporations linked with the state government.

6.4 Recent Perspectives from Sabah

Differing interpretations of what constitutes native customary rights in Sabah is a powerful point of contention between native communities and the Department of Lands and Surveys. Indigenous communities in Sabah experience similar kinds of problems in having the full extent of claims to land and resources recognized. The as the Sabah Land Ordinance 1930 has similar limitations in definition as the Sarawak Land Code 1958, although it has no stated 'cut-off' point for making valid claims.

Despite this, in 2011, the state attorney general make the shocking claim that the Land Ordinance only applied to native customary lands that were in existence in 1930. Fortunately, this assertion was treated as laughable and shot down by an indigenous NGO called Pusaka (which means 'heritage' or 'birthright') which referenced the many previous judgements that debunked this interpretation of the law. Additional critique of this narrow interpretation was also levelled articulately by PACOS Trust and NGO that advocates the rights of indigenous peoples in Sabah.¹⁹

Excerpt from press statement by Anne Lasimbang of PACOS Trust, 13 Feb 2012

"We urged the attorney-general and the state government to cooperate fully with the ongoing national inquiry into the land rights of indigenous peoples being conducted by Suhakam and seriously implement the recommendations made when the report comes out," she said.

Lasimbang said that it is the courts that have the authority to interpret laws, adding that there has not been any interpretation by the court that 1930 is a cut-off point for the creation of NCR land. She said that documents of the British colonial government had strongly argued to continue accepting NCR claims because the NCR land settlements had never been completed. Besides, the registration of NCR claims was limited because of the lack of understanding of the concept of native land use and ownership.

"This lack of understanding persists to this day and is seen in the processes adopted by the state in issuing native titles.

Daily Express: *No NCR cut-off date, says Pusaka*; 11 Feb 2012²⁰

Kota Kinabalu: State Attorney General Datuk Roderic Fernandez's view that new claims of

¹⁹ Fee Malaysia Today: 'All of Sabah belong to the Natives' says PACOS, 13 February 2012
<http://www.freemalaysiatoday.com/category/nation/2012/02/13/all-of-sabah-belongs-to-the-natives-says-pacos/#ixzz20B5HlHHX>

²⁰ Daily Express: *No NCR cut-off date, says Pusaka*; 11 Feb 2012
<http://www.dailyexpress.com.my/news.cfm?NewsID=80631>, accessed on 20 April 2012.

Native Customary Rights (NCR) cannot be established after 1930 is not consistent with the existing law on the matter, claims spokesman and pro-tem head of the Pusat Sumber Adat dan Mediasi Kaum Anak Negri (Pusaka, Sabah), Martin Idang.

"It is unfortunate that the Sabah Government's highest ranking legal officer can make such a broad, sweeping statement as it is misleading.

"Further, Pusaka would like to know whether Roderic's statement is made on behalf of the Sabah Government or whether the views expressed are his alone," he said in a statement, Friday. Idang also expressed the view that it was not for the State Attorney General to decide what the law is. Rather, he said, the law is what the courts says it is, as provided for by the Federal Constitution.

"The question whether Native Customary Rights are recognized by Malaysian law is well settled in the affirmative. The Federal Court, in fact, has recognized that NCR pre-exists legislation.

"As a matter of law NCR can only be extinguished through a specific provision contained within the legislation. This must be clearly expressed in no uncertain terms.

"This was the view of the Court in the cases of **Nyawai, Madeli and Rambilin** as affirmed by both the Court of Appeal and the Federal Court," he said.

The position of the law as stated by the Court of Appeal in Nyawai and subsequently by the Federal Court in Madeli was that; the common law respects the pre-existence of rights under native laws or customs though such right may be taken away by clear and unambiguous words in a legislation; and the **native customary rights do not owe their existence to statute**. They exist long before any legislation and the legislation is only relevant to determine how much of those Native Customary Rights have been extinguished.

"In the earlier High Court case of Rambilin it was held that there was never any intention by the State to "wipe out" native laws and customs either under the 1889 Proclamation by the North Borneo Chartered Company or in terms of the subsequent enactment of the 1902 Proclamation and the 1913 Land Rules."

In fact, Idang said Justice Ian Chin in Ramblin said that: "There is no need for a native to (even) seek permission from the Government to enter State land for the purpose of establishing NCR since such rights were exercised since time immemorial."

Chin went on to state that although it was established that the land was the property of the State, it did not mean that a new native right to the land cannot co-exist and that if such a right was to be extinguished then it would be up to the 'native legislators' to do so by a specific and unambiguous legislative provision.

Idang said that unlike in Sarawak, there is no cut-off date for the establishment of new NCR

rights in Sabah. In the Sarawak Land Code, new NCR rights cannot be established after 1958 (Section 5, Sarawak land Code).

"Additionally, in contrast to Roderic's view, Section 88 of the SLO cannot exclude the creation of equitable title in respect of new claims of NCR. This was clearly stated as early as 1964 in the case of Lin Nyuk Chan and in the subsequent case of Borneo Housing and Mortgage v. Time Engineering in the Federal Court 1996."

"This position is shared by other civilised jurisdictions, like Australia and Canada, where the legal systems have recognized that Native Customary Rights are not extinguished simply by the enactment of that country's law.

"In fact in Australia, following the decision of the Australian High Court in Mabo it was held that Native Title is inalienable unless specifically legislated against by the Crown."

"The view of the Malaysian courts is also entirely consistent with the Doctrine of Continuity, which holds that the State does upon acquiring sovereignty intend to extinguish native rights that pre-exist any legislation. Accordingly, those pre-existing rights remain enforceable."

"This position also affirms the fact that the Government of Sabah stands as a fiduciary - a trustee and protector - of the rights of all Natives. This is in tandem with guarantees provided for by Articles 161A and 153 of the Federal Constitution."

"Further, sections 13, 15 and 65 of the SLO clearly provide the manner in which new rights of NCR are to be established. There is nothing in the SLO to suggest that these right only exist prior to 1930 and are incapable of subsisting after that date."

"Roderic's statement that the simple enactment of the SLO extinguishes the potential to establish new claims of NCR after 1930 is simply incorrect and an unfortunate misconception of the law.

"To date the Attorney General's position is wholly unsupported by court decisions, unsustainable in law, contrary to the Doctrine of Continuity and is wholly inconsistent with international jurisprudence on the matter."

"Clearly, if NCR after 1930 is to be abolished, then it is for the State Assembly to do so. Such a move is undesirable as it reduces the already endangered rights of the Natives of Sabah. "

"Pusaka will fervently resist any move to abolish the right to establish new rights of NCR and calls upon all 'Native Legislators' to make known their stand on the matter.

"In any event, the future of NCR in Sabah is a matter for the Malaysian courts and strictly not the province of the State's Attorney General," he said.

7. IMPLEMENTATION

7.1 Sabah's Commitment to Implementing the CBD

It is fair to say that the Sabah government has been fairly pro-active in demonstrating its commitment to implementing the Convention on Biological Diversity. As a world-renowned biodiversity center, the state has received considerable exposure to conservation networks and support for capacity building specifically for CBD implementation from international donor organizations and research partners. As the state's outstanding geological and biodiversity values and its culturally diverse communities are the mainstay of its tourism industry, Sabah has significant vested interest in maintaining the quality of these aspects and demonstrating its credibility in conservation and sustainable resource management. As a legacy of being provided with the resources for planning and training, Sabah has a strong foundation for CBD implementation, not merely because of its organizational set up, but also because of the number of committed and experienced individuals working in both government and NGOs to advance the cause of biodiversity and biocultural diversity.

Sabah is an active participant in regional conservation programs such as the Coral Triangle Initiative in the Sulu-Sulawesi Marine Ecoregion and the Heart of Borneo initiative in Central Borneo demonstrate a commitment to conservation. With investments in planning, collaboration and capacity building, Sabah is ahead of other Malaysian states in terms of the quality of its protected area network, the implementation of Sustainable Forest Management and its management of wetlands and marine protected areas. The state also continues to seek international recognition for its outstanding areas through the UNESCO World Heritage program, the UNESCO Man the Biosphere program and in identifying new Ramsar sites.

7.2 Bornean Biodiversity and Ecosystem Conservation Programme

The sustained commitment of the BBEC (Bornean Biodiversity and Ecosystems Conservation) Program²¹ in developing an integrated and durable system for biodiversity and ecosystem conservation in Sabah has played a significant role in these advances. With the preparation of the *Sabah ICCA Review* in 2011 Sabah is also the first state to document Indigenous and community-conserved areas in the state and to grapple with the potentials and challenges of incorporating local participation

²¹ The BBEC Programme is a joint technical cooperation among the Sabah State Government, Malaysian Federal Government and Japan International Cooperation Agency (JICA) under Japan's Official Development Assistance (ODA). Since its inception in 2002, BBEC has contributed to the development of a state-wide conservation system to allow a smooth operation of adaptive management based on the ecosystem approach.

as part of its biodiversity conservation system. Most recently, BBEC has supported the participatory drafting of a Sabah Biodiversity Strategy 2012-2022. The Strategy pulls together studies done of the coverage, adequacy, and resilience of the protected area system and outlines opportunities to enhance it both operationally, through greater integration of efforts, and spatially, through expanding participation in conservation beyond protected area boundaries. Naturally, Indigenous and community conserved areas feature prominently within this new framework (see below) which is a significant paradigm shift from top-down policy implementation and management of natural resources. These new developments provide a framework in which local communities can obtain some of the recognition and security they have long been seeking for the resource management contributions.

THE SABAH BIODIVERSITY STRATEGY 2012-2022

The Sabah Biodiversity Strategy represents Sabah's commitment to protecting the irreplaceable biodiversity present within the diverse spectrum of ecosystems that occur within the state. The Ten-Year Strategy charts Sabah's commitment and contributions to fulfil the pledges made by Malaysia to implement the CBD. It is closely aligned with the directions of the CBD Strategic Plan for Biodiversity 2011-2020 which was launched in Nagoya, Japan at the Conference of Parties in 2010. The Strategic Plan acknowledges that globally biodiversity and ecosystems continue to face heavy pressure and it advocates for broadening participation in biodiversity conservation to all sectors of society. It will also mainstream biodiversity concerns in all processes of resource governance in its member countries.

Why the need for a Biodiversity Strategy?

The biodiversity of Sabah emerged over millions of years. Over this time, an astounding diversity of plants, animals and micro-organisms emerged in a range of distinctive ecosystems. The state with its diverse habitats from mist-covered mountain forests, to meandering rivers and floodplains and vibrant underwater kingdoms has become synonymous with nature. Within these ecosystems, we find dynamic assemblages of plants and animals which are remarkably inter-connected. Many of these are found nowhere else in world. If they are lost, they are lost for good. Some of these species have become cherished symbols of Sabah and draw millions of domestic and international visitors each year contributing billions to the state economy.

An exceptional element of biodiversity in Sabah is its long association with the indigenous communities. Over generations, people have accumulated knowledge of plant and animal diversity, ecological relationships and seasonal rhythms. Indigenous communities draw upon this knowledge to extract food, materials and medicines from their surrounds, and retain a remarkable living archive of knowledge. This close connection to nature has richly influenced cultural traditions and spiritual beliefs, and this unique biocultural diversity is inextricably linked to the identity of its people. Biodiversity-rich ecosystems provide essential services enjoyed by the people of Sabah. Forested hills and mountain ranges serve as water catchments that supply clean water; while its wetland and coastal habitats provide a bounty of fisheries resources. Biodiversity enables Sabah to sustain its economy.

At the turn of the last century, Sabah was covered with dense forests teeming with wildlife and along its extensive coastline featured healthy wetlands and coral reefs. However, in a matter of decades, human activities have exacted extensive damage. Large forest areas were cleared to make way for agriculture. Wildlife species are now more vulnerable to poaching and illegal trade, and the list of threatened or endangered plant and animal species continues to grow. This pressure is particularly evident in coastal areas where the fisheries is showing signs of collapse due to overfishing, pollution and the prevalence of bad fishing practices. Without concerted action, we are in danger of wiping out biodiversity formed over millennia.

Sabah is at a historic turning point where urgent and decisive actions taken now could potentially restore the state's biodiversity. By facing up to the need for urgent conservation interventions, we may yet establish a stronger foundation for achieving the state's vision of leveraging off Sabah's geographical location, natural resources, cultural heritage and biodiversity for balanced growth. **The Sabah Biodiversity Strategy 2012 – 2022** is expected to provide a framework for all in Sabah to play a part in reversing negative trends and promoting restoration of degraded habitats. Biodiversity is indeed our shared heritage; it must also be our shared responsibility. If everyone sees biodiversity conservation as a shared concern, we will be successful in this mission for the benefit of future generations in Malaysia and the global community.

7.3 Addressing the Issues in an Integrated Manner

One of the factors impeding conservation and natural resource management in Sabah has been a lack of integration across government sectors. This occurs between the arms of government responsible for conservation and protected area management, and those responsible for development and income generation. For example, programs to enhance the economic status of Indigenous communities in biodiversity areas through participation in tourism are undermined by those intent on transforming these same landscapes into industrial tree plantations or commercial monocultures. Coordination among agencies working in conservation also needs to be improved to increased effectiveness and the optimization of limited staff resources.

A degree of cooperation and also ranking of priorities needs to take place in order to achieve the right balance of sustainable use, management and development. To some extent, this was the purpose of gazetting the Sabah Biodiversity Enactment 2000. The Enactment provided for the establishment of the Sabah Biodiversity Council which has the role of advancing issues of conservation and sustainable use of biological resources in the state. The Council is chaired by the Chief Minister and comprises the State Attorney-General, the Secretary of Natural Resources, the directors of all the key agencies in charge of conservation, environmental protection, and resource management, and not more than seven other members who "shall be persons having extensive experience and expertise in biodiversity, conservation and management and all of whom shall be appointed by the Minister". The Council,

therefore, provides a strategic avenue to achieve greater synchrony on biodiversity conservation issues by calling upon the main actors and institutions to work together. Recognizing governance of conservation areas by communities stands to be an important milestone in resource management for Sabah. Each of the Sabah Biodiversity Council members is in a position to incorporate new community-based perspectives and approaches in the interpretation and implementation of their ordinances and enactments.

7.4 Obtaining Expert Advice and Input

To enhance implementation of ICCA-related recommendations such as those within the Sabah Biodiversity Strategy, support will need to be given to establish a framework and strategies for integrating ICCAs into state conservation planning. To this end, the Council should involve individuals, institutions and organizations that would also be able to connect the Council with the shared vault of international ICCA resources in which experiences with community governance are being shared.

Provisions already exist in the Enactment for this, as set out in the following box.

- (1) The Council may, at its discretion appoint from among its own members or other persons who are not members of the Council one or more committees consisting of persons who may or may not be members of the Council for purpose which in the opinion of the Council, would be better regulated and managed by means of such committees;
- (2) The Council may appoint any person with the requisite experience, expertise and knowledge in biological resources, as adviser or consultant for the Council, and may form a Panel of Advisers or Consultants to advise the Council on the discharge of its functions or duties.

It is advisable that the Sabah Museum Department and the Native Courts are also invited to share their expertise and institutional memory within the Sabah Biodiversity Council.

7.5 The Sabah Biodiversity Centre

The Sabah Biodiversity Centre (SaBC) has also been established under the Enactment with the responsibility for compiling accurate information on the biodiversity of the state, carrying out activities for the improvement and enhancement of conservation and management of biological resources, formulating programs for biodiversity surveys, and identifying research priorities for the conservation and sustainable utilization of biodiversity and biological resources.

SaBC is also charged with “establishing or causing to be established a system for the protection of biological resources so that the indigenous and local communities shall, at all times and in perpetuity, be the legitimate creators, users and custodians of such knowledge, and shall collectively benefit from the use of such knowledge”. (Section 9(1)(j) Sabah Biodiversity Enactment 2000). A broad interpretation of this provision is that the SaBC is in a position to enhance the role of the Sabah Biodiversity Council by boosting familiarity with the concept and approaches, and frameworks for consultation which include an understanding of free, prior and informed consent and subscribing to the ideals of access and benefit sharing. It can provide training and resources for capacity building by local community counterparts and government and NGO stakeholders alike. The SaBC can also be responsible for maintaining a voluntary Registry of ICCAs in Sabah, so that the contributions of ICCAs as corridors and links to protected areas are well-documented.

Finally, SaBC would be an appropriate conduit for directing support for national and international sources for the conservation of nature on community-conserved areas in a well-regulated and transparent manner. Payment for Ecosystem Services (PES), REDD and REDD+ schemes as well as other GEF-Small Grants Programs are increasingly being directed at strengthening community management of forest resources, or enlisting their active cooperation through community forestry programs. An important prerequisite for many of these donor schemes is that local communities are assured of secure tenure, governance and access. SaBC is ideally placed to assist community-based organizations and Council members alike in accessing these sources of funding for joint initiatives on ICCAs.

7.6 Addressing the Issue of State Revenue

As indicated in 7.4, funding to support the rehabilitation and proper management of biodiversity areas is an inescapable consideration. To be truly effective, it is also necessary for the state to be less dependent financially on pursuing the continuous opening up of new areas for agricultural expansion. A reduced reliance on the primary sector for revenue should also be part of a strategy for long-term sustainability. This can be achieved through the development of a stronger services sector, and also pushing for greater efficiency in the use of land and greater returns through downstream processing. Finally, Sabah is playing such a prominent role in upholding Malaysia’s international obligations to biodiversity conservation, it is only just that the Federal government allocate adequate financial resources to the state to fulfill these roles. Alternatively, it is important for the state to negotiate for other revenue streams such as the right to an increased share of oil and gas revenues from

Sabah's territory or a direct allocation from service taxes collected by businesses in the state²².

In summary, Sabah has a good basis for a framework to incorporate ICCAs into its governance systems and processes. There is sufficient evidence that ICCAs can be utilized to safeguard important natural landscapes and ecosystems in partnership with committed local managers that have a vested interest in ensuring their sustainability. However, this goal will need the strong leadership of the Chief Minister and Natural Resources Office to ensure the compliance and participation of both the productive and protective sectors of its administration. Furthermore, it will also be necessary to engage politicians, and Federal agencies to align them with the state's priorities for managing its natural resources.

SABAH BIODIVERSITY STRATEGY ACTION PLANS

B1.3.5 Supporting Community-Based Conservation

Local communities in Sabah have long engaged in community-based natural resource management (CBNRM) in fulfilment of their cultural practices. Indigenous and Community-Conserved Areas (ICCAs) are an integral part of Sabah's protected area landscape. Many areas outside the formal PA network are managed by communities and these help fulfil valuable conservation functions. We will support the initiatives of local communities to conserve biodiversity and ecosystem services on customary lands and privately owned land. We will document and recognise ICCAs as well as traditional community-based natural resource management systems that are used by communities both within and outside the Protected Area network.

We will support local communities in the implementation of the various forms of traditional resource management such as *tagal* which has proven to be effective in sustaining the health and productivity of riverine fisheries resources. We will support local communities to develop income generating activities based on the conservation of outstanding cultural landscapes and biodiversity areas and promote related recreational use. We will also disseminate information on and promote the use of the Sabah Regulations for Access and Benefit Sharing to guide all aspects of research and potential commercialization of findings.

8. RESISTANCE AND ENGAGEMENT

8.1 Norms in Confronting Issues

Despite the rapid pace of change experienced in the state, the majority of indigenous groups are relatively isolated from mainstream communications because they are scattered in remote rural areas. Access to modern media, newspapers and the internet, is limited or sporadic. Information enters villages mainly via extension activities of government agencies, word of mouth from neighbours or people visiting

²² Presently, a five percent government tax is charged for services but is channelled to the Federal Government, not the state governments.

from town, and to some extent via the radio. This has certainly hampered the development of a more powerful and vocal indigenous political movement and local communities have tend to be preoccupied with their own concerns despite there being a broad similarity of problems facing Indigenous Sabahans across the state.

Most native communities are primarily worried about tenure over farms and forest, and defending customary lands from encroachment. They also want better infrastructure, services and development prospects. They generally pursue issues through 'proper channels' and few are pushed to such an extent that they are incited to openly demonstrate against injustice. Sabah's print media is considered to have a more independent voice than national Malaysian newspapers; a wide range of views are carried, even those that are critical of government.

8.2 Community Education and Empowerment

Over the past two decades or so, community advocacy groups and environmental and social NGOs have gradually increased their reach. They have proven their commitment and earned the trust of indigenous communities through capacity building programs targeted at nurturing a crop of young leaders and improving the socio-economic status of these communities. Well-informed young people can play a vital role in educating their own communities of their rights under the law (including international declarations and conventions) and by enhancing the capacity of village organizations. In some areas, Sabah is beginning to see a bold and engaged generations of new leaders with the confidence and clarity of purpose to articulate the interests of their communities. These developments have been strongest among the Kadazandusun but have expanded to reach other groups, although there are minorities that have not yet been reached.

Organizations such as PACOS (Partners of Community Organizations) and JOAS (Jaringan Orang Asal SeMalaysia) have proven themselves to be invaluable partners to government agencies needing specialized advice on people and resource issues both at policy level, and on the ground. In addition, the focus on developing essential services to rural communities, such as the establishment of mini-hydro generators which have helped to generate electricity in remote villages has shown that these groups have much to contribute to grassroots development initiatives in the state if given the right support.

8.3 Assimilating New Forms of Community Engagement

Although community-based organizations and NGOs in Sabah do not hesitate to take a strong stance on issues of importance (such as supporting cases being taken to court), they are equally engaged in stakeholder discussions with government. Such

interactions have provided the opportunity for NGOs to improve awareness of the concerns and aspirations of indigenous communities and the need to comply with international human rights and social justice commitments. Local organizations have also grown in sophistication and they are in a position to influence positive developments since their views and expertise are increasingly being sought by government. They have demonstrated their ability to mediate conflicts and enable communities and government agencies find mutually acceptable compromises.

This is perhaps in conjunction with the participatory approaches to consultation and planning required as part of international best practice in conservation, forestry and agriculture. This includes initiatives such in the Program of Work for Protected Areas, Access and Benefit Sharing, as well as RSPO (Roundtable for Sustainable Palm Oil) and various forestry certification programs. It has become necessary for state governments to establish new norms in its policies and processes in order to prioritise consultation, collaboration, FPIC and meaningful participation in resource management.

It has been noted elsewhere that all Commercial Forest Reserves are to be fully-certified by 2013. There are also various REDD++ and Payment for Ecological Services (PES) programs ongoing or proposed. Considerable funding already comes into Sabah from international donors in support of research, habitat rehabilitation and biodiversity conservation programs. All of these usually require the participation of local communities. Sabah's identity as an international nature and adventure tourism destination also encourages progressive approaches to caring for nature and working with local people. These factors have all favourably influenced the state governments to be more circumspect about its economic activities, although it is true that a certain level of environmental degradation or land use intensification continues unabated.

8.4 Progress in Participation and Planning

In the past year, a number of concerned organizations have been invited to participate in formulating various policies, projects and plans that would influence the future of indigenous participation in resource management. These include the *Sabah ICCA Review*, the ongoing development of management approaches to the proposed Tun Mustapha Park which will be a Class VI Marine Protected Area, the proposal for the Kinabalu-Ecolinc corridor which would comprise a network of ICCAs, and the development of Community Use Zones in the Crocker Range State Park. A good cross section of stakeholders has also been called upon to participate in determining the priorities and actions plans for the new Sabah Biodiversity Strategy 2012-2022 which encourages greater levels of civil society and community engagement.

Aside from shifts which seem to be stimulated from outside and initiated on a top-down basis, local communities have also been expanding their outreach and flexing their governance capabilities. The recent Ulu Papar Congress held in April 2012 is one such demonstration of the ways in which local groups are being pro-active in collectively outlining their frameworks and terms of engagement with outside groups. This falls under the use of more contemporary utilization of Biocultural Protocols to help elucidate local priorities and aspirations more clearly and to clearly set out an endogenous development agenda.

8.5 Uncertainty in Implementation

Where communities involved in conserving or sustainably managing resources face conflicts with the private sector or government agencies, these typically arise from contested claims over who has rights to an area. Invariably, local communities are at a disadvantage due to the fact that tenure security continues to elude them as a result of the slow registration process with the Department of Lands and Surveys. This often puts companies working closely with land development bodies at an advantage as they are able to offer tenure security to communities to facilitate their plans for agricultural expansion. These issues have not yet been resolved satisfactorily despite protests being raised, and some cases have now been brought to the courts. As long as the perception of what productive management of land and forest entails expands to embrace traditional resource management and governance, large scale commercial agriculture will continue to be seen as the only attractive option for land development in Sabah.

8.6 The National Inquiry Into the Land Rights of Indigenous Peoples

The long irresolution or denial of land rights claims has been a persistent hindrance to the status and wellbeing of indigenous people throughout Malaysia. This has given rise to the National Inquiry into the Land Rights of Indigenous People undertaken by the Human Rights Commission of Malaysia (SUHAKAM) over 2011 and 2012. This research is being conducted by independent researchers from major universities in Peninsular Malaysia, Sabah and Sarawak. The Inquiry will gather evidence from indigenous communities, government departments and agencies, NGOs and the general public through a series of interviews and public hearings. The final report emerging from this study which will include recommendations to improve the current status of land rights for indigenous communities.

While it is remarkable that such an inquiry has been allowed to proceed, and various parties are cooperating with some aspects of the study, it remains uncertain how the recommendations will be received and taken up by the respective state governments once these are made public. SUHAKAM has made a commitment to continue to monitor implementation of the recommendations from the inquiry

report. Unfortunately, the body does not have the power to enforce these recommendations and must rely on the various arms of government to take them up. In this regard, political will and leadership from senior government officials and policy makers are key, but support for these remains unknown for the time being. There is a strong likelihood that where these recommendation pose and inconvenience to government authorities, they will simply be ignored.

Rationale and Terms of Reference for the The National Inquiry Into The Land Rights of Indigenous Peoples²³

RATIONALE

The National Inquiry on the Land Rights of Indigenous Peoples is chosen based some rationale as follows:

- Since 2000, SUHAKAM has received various complaints and memorandums from the indigenous communities alleging various forms of human rights violations on the land rights of Indigenous Peoples in Peninsular Malaysia, Sabah and Sarawak. The solution is very complicated and time consuming.
- Article 161A (5) of the Federal Constitution allows laws in Sabah and Sarawak to provide reserve land or indigenous to the land of the indigenous reserves or give priority to the issue of indigenous land ownership by the State Government.
- Article 8 (5) (c) of the Federal Government provides laws for "*protection, peace and development*" of indigenous peoples, including the land reserve. The Federal and State Governments in Peninsular Malaysia has a fiduciary / trustee to ensure the rights of indigenous peoples, particularly relating to customary land, to be given the appropriate attention.
- Article 26 of The Declaration of Rights of Indigenous Peoples of the United Nations states that the Indegenous Peoples have the right to lands, territories and resources which are owned or occupied or used or acquired by them.
- This article also states that the Government should gives recognition and protection of the laws of the lands, territories and resources in relation to the customs, traditions and land tenure systems of indigenous peoples.

THE TERMS OF REFERENCE

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

²³ The Official Website of The National Inquiry Into The Land Rights of Indigenous Peoples
<http://www.suhakam.org.my/web/682315/1>

1. To determine the constitutional, legal, administrative and political recognition of the Indigenous Peoples' right to land and their effectiveness in protecting and promoting the Indigenous Peoples' right to land.
2. To inquire into the land rights situation of the Indigenous Peoples and the impact of the recognition or non-recognition of the Indigenous Peoples' right to land on their social, economic, cultural and political rights, taking into consideration relevant international and domestic laws.
3. To identify the constraints which impede the full enjoyment of the Indigenous Peoples' right to land in accordance with their needs and requirements.
4. To create and promote more awareness, knowledge and understanding of the Indigenous Peoples' right to land and their way of life.
5. On the basis of the facts and determinations arising from the National Inquiry, to develop recommendations to the Federal and State Government relating but not limited to the following:-
 - the review of domestic land laws and other related laws and policies, with a view to incorporating a human rights focus therein, addressing, in particular ,the problems faced by Indigenous Peoples in their land claims; and
 - the formulation of strategies and a plan of action with the aim of protecting and promoting the Indigenous Peoples' right to land as an indivisible and integral part of the protection and promotion of their other human rights.

9. LEGAL AND POLICY REFORM

9.1 Mainstreaming ICCAs in Government Policies and Processes

ICCAs have the potential to make a significant contribution to conserving biodiversity as well as ecosystem services that support local communities and Sabah society in general. If they are to fulfil this potential, it is necessary to create a conducive policy environment by reviewing existing policies and operating procedures that undermine and threaten ICCAs. Using the ICCA concept should not require the setting up of a new agency or necessarily require new legislation. Most enactments and ordinances of Sabah's lead resource management agencies contain provisions for working with local communities towards conservation objectives. What is needed however is a paradigm shift from the longstanding top-down approach of implementing both development and conservation policies and programs to one that engages a broader range of participants including indigenous communities.

The Natural Resources Office (NRO) has the power to enact meaningful change by providing leadership towards expanding the range of approaches to resource management and biodiversity conservation adopted in the state. In addition it has the mandate to set our priorities and require greater integration of efforts among agencies. There is a need to ensure that the proposals of land development agencies do not seriously undermine environmental and conservation imperatives and programs which are ongoing. A useful first step would be to require all Sabah Biodiversity Council members to identify community-conserved areas and community-based resource management initiatives to be supported within the ambit of their respective ordinances and enactments.

The first priority to support ICCAs would be to **reduce negative impacts**, specifically by:-

- redressing disincentives to local communities to maintain their community-conserved areas and communal resource management strategies; and
- giving due priority to conserving biodiversity where it occurs (both within Protected Areas and outside them) in conjunction with resident communities.
- promoting greater integration and coordination among government resource managers so that ongoing conservation efforts are not undermined by land development policies.

The second step is to **create a more enabling environment** for both government agencies, NGOs and communities to engage with ICCAs and CBNRM strategies (such as *tagal*). This would include:-

- enhancing the capacity of government agencies to engage with communities towards resource management and conservation goals
- enhancing the incentives and support given to communities to restore or strengthen their ICCAs and reinstate CBNRM practices.
- creating greater awareness of ICCAs in civil society and recognition by efforts being made by communities, NGOs and government partners alike towards achieving successful collaborations.

9.2 Establishing an Effective Implementation Framework

To achieve the above policy reforms, it is important that an effective implementation framework is established at the highest levels of the state government in order to provide the leadership and impetus to enact these reforms and support collaborative conservation efforts.

- i. The Sabah Biodiversity Council to recognize a role for ICCAs in the state's

- resource management and conservation framework.
- ii. A Sabah ICCA Working Group to be formed to provide specialist advice to the Sabah Biodiversity Council should be established. It should comprise experts on community-based approaches to conservation and resource management, traditional laws and customs, and natural and cultural heritage.
 - iii. The ICCA Working Group, together with Sabah Biodiversity Centre to establish the Sabah ICCA Registry in order to maintain a record of functioning ICCAs in Sabah, review ICCAs regularly to ensure continued eligibility and admit new ICCAs as these become eligible.

9.3 Reducing Negative Impacts of Development and Disincentives to Conservation

- i. Lead government agencies involved in planning land use, the Department of Lands and Survey, Department of Town and Country Planning, and Land Utilisation Committees at district level, can support ICCAs by ensuring that important areas of village forest are not alienated to individual titles. Areas designated as Gravity Feed System water catchments, amenity forest, sacred sites and other reserves should be restricted from alienation to individual title for the wellbeing of the community as a whole. This information should also be made more readily available with the cooperation of the Sabah Museum, Department of Irrigation and Drainage, Department of Agriculture and the Native Courts for the respective districts.
- ii. All community-based initiatives to protect and manage traditional territories should be given immediate consideration for secure tenure under provisions within the Land Ordinance. Of highest priority should be applications for Native Reserves under Section 78 of the Land Ordinance.
- iii. Initiatives to conserve biodiversity on Native Titled land should be supported by relaxing rules requiring land development for agriculture.
- iv. The Department of Lands and Surveys should review its enforcement guidelines which provide disincentives to land owners to conserve forest on land held under Native Title. In view of the serious need for forested links and extensions to sustain biodiversity in Sabah, and the specific intention to maintain environments that support tourism investments or areas of significance for biodiversity conservation - the desire of landowners to keep such lands in an undisturbed state should be supported by the DLS.
- v. State Land with forest cover to be prioritised for water catchment protection, and nature corridors to support greater connectivity of natural areas.
- vi. The Department of Fisheries to be responsible for documenting, monitoring and promoting Tagal as an indigenous resource management system. Information on Tagal locations should be supplied to other Sabah Biodiversity Council members so they are able to restrict activities that threaten these

river conservation areas.

9.4 Create a More Enabling Environment

- i. The Sabah Biodiversity Center together with the ICCA Working Group to organise a series of training and capacity building activities either in-house, or across departments in order to boost familiarity with the ICCA concept and capacity to utilize it effectively in their operations.
- ii. The ICCA Working Group can also provide direct assistance to government departments and agencies on specific initiatives which they are undertaking.
- iii. An ICCA Network of community-based organizations to be established in order to share knowledge and experiences from within the network of ICCAs for the benefit of potential ICCAs. The network should be designed to facilitate greater exposure to community-based planning and management tools, mechanisms for consultation and consensus building.
- iv. A Sabah Biodiversity Center Fund should be established specifically for ICCAs and the Sabah Biodiversity Council should convene a discussion on the sourcing of funds from a variety of national and international sources to support initiatives related to community-conserved areas.
- v. Community participation to be encouraged in the management of ICCAs within Parks, Forest Reserves, Wildlife Sanctuaries and Wildlife Conservation Areas and others.
- vi. Both government agencies and community-based organizations that are actively supporting ICCAs and CBNRM approaches to be given funding support to enhance and expand their initiatives. Disbursement of incentives and funds should be performance driven.

10. CASE STUDIES

These case studies are selected from the *Sabah Review of ICCAs* (Majid Cooke and Vaz 2011). They reflect the different contexts, communities and conservation values present in Sabah. The cases taken from multiple locations in the state indicate that despite indigenous communities not previously being seen as having a direct role in conservation and resource management, there is considerable scope within Sabah's existing laws for engaging resident managers of community-conserved areas in order to secure local livelihoods and development aspirations, safeguard ecosystem services, and conserve threatened biodiversity values. These examples point toward constructive and practical partnerships that can be forged through enhancing understanding between government and community resource managers.

Having said that, while the alignment of objectives between conservation agencies and local people suggests obvious synergies, in other cases where the rights of communities to land and resources are being eroded by limited interpretations of

the Sabah Land Ordinance or deliberately ignored by land development programs by departments and statutory bodies oriented toward opening large blocks of land for agriculture, conflict appears likely.

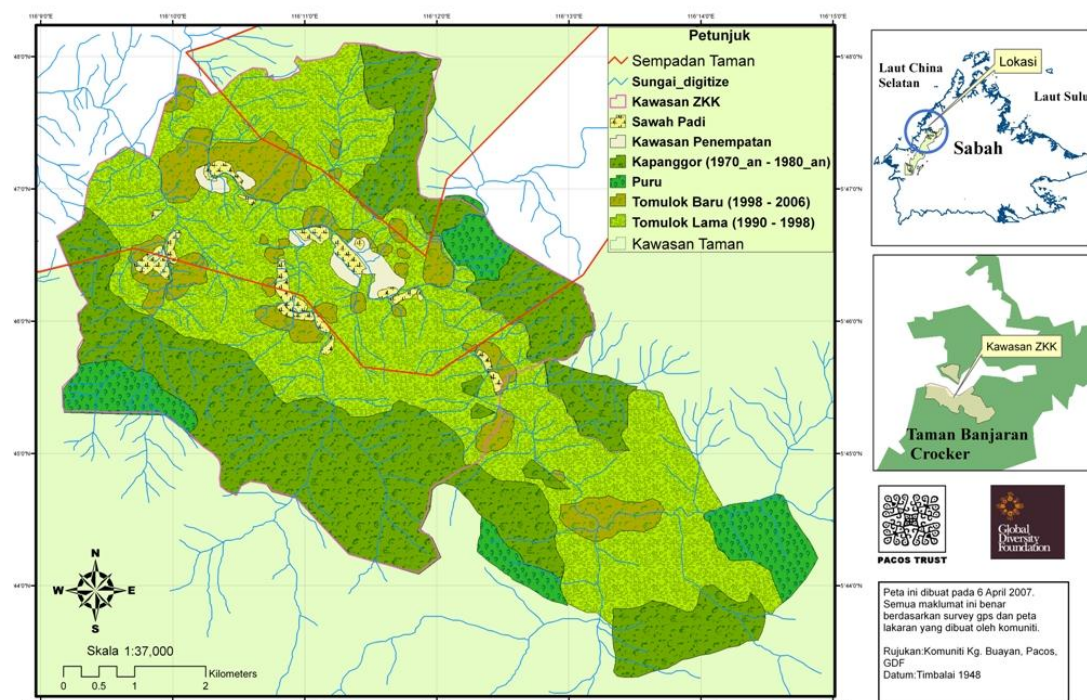
10.1 Community Use Zones and Collaborative Management in Crocker Range Park

Context: ICCAs within a strict protected area

Legislation: Sabah Parks Enactment 1984

Agency: Sabah Parks, under the Ministry of Tourism, Culture and Environment

The introduction of and support for Community Use Zones (CUZs) within Parks in Sabah represent a forward looking advancement in legal recognition of indigenous communities living within, or reliant on resources within, a strict protected area. This move succeeded in building a bridge to collaboration and mutual understanding between the park managers and local communities. However, the initial enthusiasm and goodwill generated by assurances to formalize agreements with local people to jointly manage the area may wane if the unexplained delay in progress continues.



Map: Distribution of different forest and land categories within the Buayan-Kionop Resource Catchment Area in Ulu Papar – below.

Crocker Range Park (CRP) comprises 139,919 ha of mostly pristine highland forest. It is a biodiversity center of global significance. The range extends over eight districts and provides water to both rural and urban populations in the West Coast and

interior. However the area's protected status, as a Forest Reserve in 1968 and subsequently under the Sabah Parks Enactment 1984 for the purpose of conservation is not without controversy. Several Kadazan, Dusun and Murut communities were already living within this area, and had been doing so for generations. Due in large part to the remoteness of their villages many are highly dependent on their farms and natural resources in the CRP for their livelihoods.

The Sabah Parks Enactment, however, prohibits any human modification of natural landscapes and extraction of natural resources – agriculture, hunting, fishing, gathering of forest products are technically illegal within the Park. Faced with this difficult situation, Sabah Parks has historically tended to maintain a 'soft' approach of permitting the villages to exist within the Park. However, the quandary is that as long as these villages are seen to be 'illegal settlements' the government cannot provide them with infrastructure and facilities such as roads, schools and health care facilities. Essentially, communities can continue to assert their customary claims to land by staying inside the Park, but without legally recognized tenure and the power to manage their ancestral lands.



Aerial view of Kg. Buayan depicting rice fields and forest resource areas.

When the introduction of Community Use Zones (CUZs) was first proposed in the Zoning Plan for the Crocker Range Park Management Plan (2006) it seemed to offer a promising solution to the impasse. The CUZ proposal emerged from a five-year

consultative process supported by the Bornean Biodiversity Ecosystem Conservation Project (2002-2007) supported by JICA in order to enhance the Protected Area network and implementation of the Convention on Biological Diversity (CBD). The Project sought to explore possible solutions to manage the CRP from both biological and socio-cultural aspects.



Stages of preparation in reproducing three dimensional model representing resource use in the proposed Ulu Papar Community Use Zone produced by the villagers.

The legal framework for the establishment of CUZs was eventually proposed to the State Legislative Assembly and approved as an amendment to the Parks Enactment which would enable the communities to legitimately access their traditional territories which fall within the boundaries of the Park. In addition to legalising access to these resource areas, the CUZ would provide avenues for local participation in managing this area, and enable the settlements to be furnished with facilities and infrastructure. This decision to 'integrate' local communities in Park management is a milestone in protected area management policy in Sabah and is in

line with international policy shifts which acknowledge the potential of indigenous and community-conserved areas as a legitimate form of governance in IUCN Category V and VI protected areas that integrate local community resource needs with biodiversity conservation priorities (see also Borini-Feyerabend *et al*, 2004).



Ulu Papar is a managed cultural landscape in which local knowledge has been passed down from previous generations in order to ensure the sustainability of resources (Photos by InancTekguc).

The next step is for a CUZ Management Agreement to be developed by Sabah Parks with the respective communities involved. The groundwork has already been laid by the Darwin Initiative participatory documentation project which has been active in the proposed Buayan-Kionop CUZ in the Upper Papar region for almost ten years. This is a comprehensive landscape-level study of subsistence activities within the Resource Catchment Area (RCA) which includes swidden farming, hunting, freshwater fishing and harvesting forest products. In addition to capturing the intricacies of traditional resource management, the project also improved

knowledge of the historic and archaeological sites which makes this a truly distinctive cultural landscape and part of the area's biocultural diversity heritage.

With much time and resources now sown in these studies and consultations, local people have high hopes that they will have customary claims recognized and be given a role in managing the Buayan-Kionop CUZ in collaboration with Sabah Parks. It is important that this process is not delayed further so that the positive impetus for collaborative management is not lost. Moreover, as the Crocker Range Biosphere Reserve has recently been nominated as a UNESCO Man and the Biosphere (MAB)²⁴ site by the Sabah Government, local participation in the management of the area, tenure security and access to natural resources are important criteria for selection.

²⁴ Only one other Biosphere Reserve is found in Malaysia – Tasik Chini, Pahang.

10.2 Testing the Waters – New Approaches to Working with Communities in Marine Protected Areas

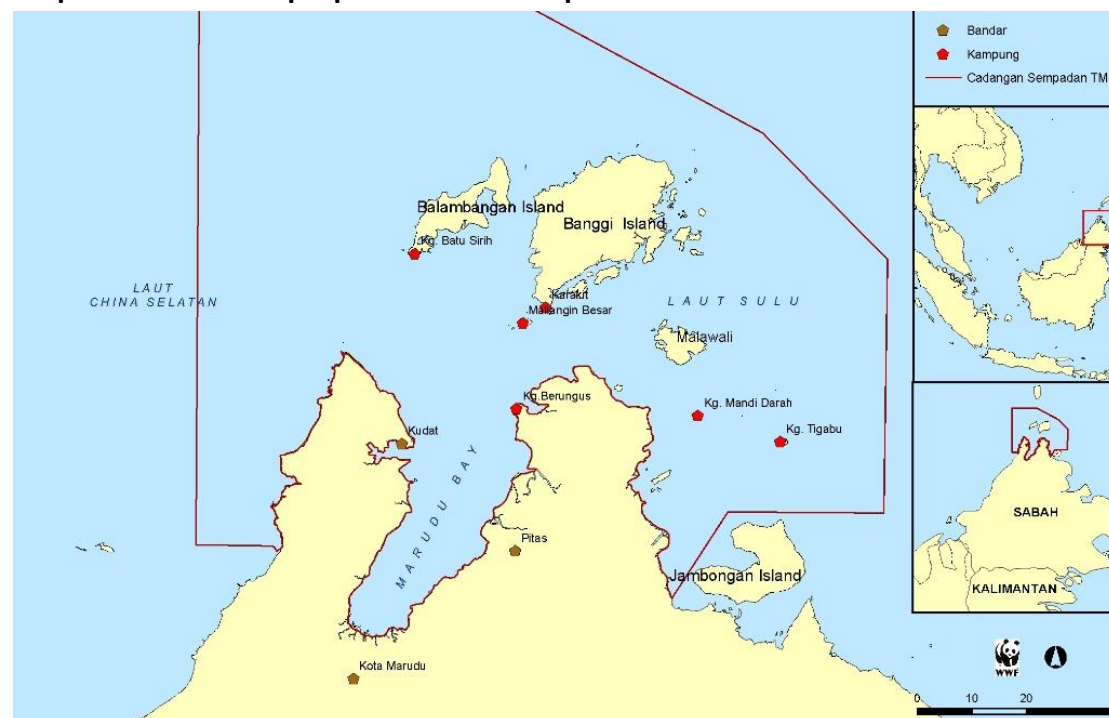
Context: ICCAs within first Managed Resource Protected Area

Legislation: Sabah Parks Enactment 1984

Agency: Sabah Parks, under the Ministry of Tourism, Culture and Environment (in conjunction with other marine agencies)

Under IUCN definitions, the proposed Tun Mustapha Marine Park (TMP) will be a Class VI Managed Resource Protected Area in Sabah. Those charged with managing the TMP are in uncharted territory in the Malaysian conservation context and they must draw upon experience from other countries in working with communities to promote sustainable use of this important part of the Coral Triangle. The ICCA approach provides a context for local collaboration, however complex issues such as unsustainable exploitation and the presence of undocumented people that operate outside the law pose serious management challenges.

Map Location of the proposed Tun Mustapha Park within the SSME



The proposed Tun Mustapha Marine Park (TMP) will be the largest marine park in Malaysia with a size of 1,028 million hectares (including a land area of 35,000 hectares). It is within the Sulu Sulawesi Marine Ecoregion's Kudat-Banggi Priority Conservation which is recognized as being globally important for biodiversity conservation because of its coral reefs, seagrass beds, mangroves and fisheries

resources as well as a role as a migratory corridor for whales and sea turtles. It encompasses around 50 islands including Pulau Banggi, and is home to a diversity of ethnic groups from the coastal communities of the Bajau, Ubian, Suluk, Kagayan, Balabak and Bajau Laut to the inland communities of Rungus, Bonggi and Dusun among others. Approximately, 80,000 people live in and around the proposed TMP; a large number of these are undocumented. Marine resources are important to local livelihoods; one of the main objectives of the park is to protect habitats and support livelihoods for artisanal and commercial fishers (Jumin & Kassem 2008).



As Tun Mustapha Park will be a Managed Resource Protected Area, a balance must be achieved between conserving biodiversity and tapping marine resources in a renewable manner (Clown fish and anemones © Wongsrikul; Fishing boats © Shahizal Rizwan Ahmat Raslan).

Since 2003, several research and consultation activities have been undertaken to help shape the management approach to the proposed park. This region faces serious threats from overfishing and the use of harmful fishing methods such as poison and explosives. These methods tend to be employed by trawlers which compete with the local communities for fisheries resources. Successful social engagement is seen to be a major factor impinging on the successful management of marine protected areas (Thanda 2008:4). Sabah Parks, as the lead management agency, has been working closely with the local communities and WWF Malaysia in developing the foundation for managing the Kudat-Banggi region²⁵. Following the principles and objectives of Ecosystem Based Management of Fisheries (EBMF), this work has included participatory mapping of ecosystem features and values, identifying and developing stakeholder profiles, and consulting with identified stakeholders to build a shared vision around the proposed management regime.

The Department of Fisheries, the Marine Police and the District Offices of Kudat, Pitas and Kota Marudu are key partners in this endeavour. Local communities in Karakit, the main administrative centre in Banggi and other islands represent the largest user group and their involvement is particularly important in park

²⁵ Based on interviews with WWF Malaysia; unpublished reports and articles in Currents, the SSME Newsletter for Malaysia, 2009-2010.

management (Jumin & Kassem 2008). Under this mode of management, various resource uses, such as fishing, recreation, and mariculture will be included in a multiple-use zoning plan. Working with coastal communities and fishermen, community mapping was conducted to document important traditional fishing areas, sea turtle nesting beaches, distribution of biodiversity such as sea turtles and dugongs based on community observations, and common environmental issues in the area.

At community stakeholder workshops involving more than 50 villages and towns, including Kudat, Kota Marudu and Pitas there was strong consensus on the need for stricter enforcement of fisheries regulations to control overharvesting and resource depletion. Local fishers specifically faulted the trawling activities and the use of fine mesh nets in the coastal zone. Although some communities felt it was the government's responsibility to enforce fishery rules and regulations, in the Pitas region over 85 percent of the respondents supported a partnership between the government and the fishing community.

In Kampung Mempakad Laut, Pitas the strong leadership and united JKKK have set up *adat* rules that have been recognized by the Native Courts. Encroachments into traditional fishing grounds are monitored and trawlers and other outsiders are confronted and asked to leave. This monitoring system has reduced the number of encroachers into their traditional fishing grounds and locals report that there have been no cases of fish bombing in the five years since its implementation. In Kampung Berungus, village members patrol coastal waters to prevent cyanide fishing and fish bombing (Thanda 2008). NGOs involved in promoting community participation in the proposed Tun Mustapha Park have been able to tap into the inherent desire of the coastal communities to support and help enforce fisheries rules and regulations.



Local communities participating in a WWF Malaysia program for the Coral Triangle

There has been a positive response to efforts to build capacity among local communities to play more prominent roles in resource management. The Sabah Wildlife Department has helped to train local communities from the three districts of Kudat, Kota Marudu, Pitas and sub-district of Banggi in the enforcement of the Sabah Wildlife Conservation Enactment. In 2008, 30 locals were trained and 16 were appointed as Honorary Wildlife Wardens. Wildlife Wardens are also expected to be educators and role models within their communities, and provide vital information to assist the Department. Wildlife Wardens are equipped with important tools to help them perform their role – GPS units, digital cameras and binoculars are used in policing their areas.

In order to demonstrate the benefits of a collaborative-management system for sustainable fisheries, a model site has been established on Maliangin Island by Sabah Parks, WWF-Malaysia and the Maliangin community. Working through groups like Persatuan Pemilik Kapal Nelayan Kudat (PPKNK), the park management hopes to build support for the establishment of no-take zones and compliance to non-fishing areas in TMP, which includes voluntary catch monitoring to compliance monitoring. Meanwhile, educational programs have been organised for young people to raise awareness of marine conservation. The reliance of local communities on fisheries as the primary source of income and subsistence makes them highly motivated to ensure the sustainability of the resource. Studies have shown that customary practices and traditional knowledge can be effectively integrated with contemporary management approaches for conservation impact. Efforts to lay a foundation for community management within the proposed TMP has been a useful demonstration of the ability of government agencies to magnify their reach by empowering local people as resource managers using provisions in their respective enactments that advocate for working with local people.

10.3 Batu Puteh: Community Rehabilitation and Management of an Area of Protection Forest Reserve

Context: ICCAs within a Class I (Protection) Forest Reserve

Legislation: Forest Enactment 1968

Agency: Sabah Forestry Department

Local communities in the Lower Kinabatangan have been working closely to rehabilitate a degraded Forest Reserve and for over a decade. The natural areas and iconic wildlife species of this area attract a sizeable number of tourists to this area annually. Community cooperatives have developed a number of tourism-related businesses which rely on the availability of quality wildlife habitat in the vicinity of the village. A successful eco camp has been constructed within the Forest Reserves

and is managed wholly by the community. There are factors that make Batu Puteh a model that is not easily replicated. However, it does provide an example of a case where cooperation has yielded benefits for conservation as well as local livelihoods.

Satellite map of Batu Puteh and surrounds along the Kinabatangan River



Batu Puteh in the Lower Kinabatangan was chosen as a case study because it is an important example of community empowerment and the development of an indigenous community-based organization which is making an active contribution to conservation and improving its socio-economic status through community and nature-based tourism. What began in 1996 as the Model Ecologically Sustainable Community-based Conservation & Tourism Project (MESCOT) in the Orang Sungai villages of Batu Puteh, in the Lower Kinabatangan is today a full-fledged ecotourism operation that demonstrates that communities can be strategic partners in biodiversity conservation. KOPEL, a cooperative with over 200 members and six full-time staff, coordinates and administers the ecotourism initiatives and related village associations focussing on habitat rehabilitation, homestays, boat services, nature guides, cultural performances, and handicrafts. There are 35 homestay homes and 32 active forest guides; almost all households derive some income from tourism either directly or indirectly.



Tourists observing wildlife along the Kinabatangan River (©Cede Prudente); Orang Utans rely on the riverine forest (©Cede Prudente), as do the proboscis monkeys that are increasingly threatened throughout their natural range in Borneo (© [Kjersti Joergensen](#) | [Dreamstime.com](#))

Although the Lower Kinabatangan is renowned for its biodiversity-rich wetland habitats, it is also heavily disturbed. Areas around Batu Puteh have previously been logged and large areas have been converted to oil palm plantations. The MESCOT initiative was driven by interest among segments of the community to develop sustainable income generation through tourism based on forested areas surrounding the village. In 1998, when forest fires razed these forest remnants, the group dedicated itself to rehabilitating the degraded wetland forests and critical wildlife habitats.

Through a process of learning and experimentation, floodplain rehabilitation methods were pioneered and by 2008 more than 60 ha of degraded habitat had

been restored. Forest restoration has since become a core activity of MESCOT and has led to a close collaboration with the Sabah Forestry Department (SFD) with a focus the Pin Supu Forest Reserve where the community has also spearheaded the rehabilitation of an oxbow lake severely infested with water hyacinth (*Salvinia molesta*). One of three clear-water oxbow lakes in the floodplain, Tungog Lake is a natural sanctuary for more than 150 native freshwater fish species and a host of other rare aquatic birds and wildlife. The infestation negatively impacted fisheries and native wildlife such as the oriental darter (*Anhinga melanogaster*) and otters were no longer seen. Although, the process of removing the weeds was arduous and there were many setbacks, after two years of concerted effort the lake was clear once more. Regular maintenance keeps the weeds at bay and the lake is a wildlife haven again. In view of their experience and proven track record, the community has been enlisted by Sabah Forestry Department (SFD) to rehabilitate 400 ha of forest in the Pin Supu Forest Reserve.



The signboard to the Tungog Rainforest Camp acknowledges the collaboration between KOPEL and the Sabah Forestry Department. Tungog Lake. The gradual removal of *Salvinia* weeds. (Photos from KOPEL)

In 2010, the village has achieved a major milestone in launching its Tungog Rainforest Eco-camp which has been constructed by KOPEL with funds and labour contributed from a number of national and international organizations. Through an agreement with SFD, the community manages a 3.4 ha area of the Pin Supu Forest Reserve for building the A-frame style eco-camp accommodation on a network of wooden platforms. Eco-conscious construction includes rainwater collection, solar power and composting toilets. No food is kept at the camp (because of the wildlife) and the village service includes sending fresh meals by boat each day. The Tungog Rainforest Eco-camp is doing well and is booked all year round.

The struggles and disappointments faced by KOPEL members in their journey have contributed to a strong sense of ownership. Thanks to fruitful interactions with government and local and international organizations, the ecotourism initiative, together with the habitat restoration programs, has improved household incomes

and invigorated community life. Fewer community members choose to migrate to seek work elsewhere.

This case study demonstrates that ICCAs come in many different and sometimes unlikely forms. Initially, one would not expect a community-conserved area of any note to be found in this highly devastated and modified landscape. Unity and consensus would seem to be difficult among this non-homogenous scattered community with some members actually illegally harvesting timber from the forest. And yet, over the past 15 years KOPEL-MESCOT has proven its mettle in becoming a passionate force for conservation. In this case, concern for environmental conservation and stewardship of natural resources has emerged in the contemporary context in connection with tourism values as opposed to subsistence needs. It suggests that support for conservation can be revived among like-minded people if they see it as relevant to meeting their basic needs and aspirations for economic development.

A key factor in the development of the conservation and ecotourism mindset of the village has been the involvement of external agents in building community capacity. In this case, a WWF Malaysia project provided the support for this community initiative which was first mooted by community members interested in developing nature and community-based tourism. Progressive change often comes with the support of civil society, donors and dedicated conservation and community-development practitioners. It also suggests that change does not always have to emerge from within a group; new ideas and concepts can invigorate enthusiasm for local culture and initiatives. This provides a more optimistic and positive scenario for other areas where the fates of communities and conservation are closely interwoven. Together with the KOPEL-MESCOT management of the Rainforest Ecocamp on Forest Reserve under the administration of SFD, these two project areas provide a clear case of ICCAs that fall under a shared tenure arrangement in which both parties participate in the protection and sustainable management of an important wildlife area.

It is worth noting also that the Sabah Forestry Department was able to generate the necessary flexibility and openness to community collaboration without having to make any amendments to the Forest Enactment.

10.4 Sacred sites on Pulau Banggi, on State Land and within Forest Reserve

Context: ICCAs within a Class I (protection) Forest Reserve/on State land

Legislation: Sabah Parks Enactment 1984/ Sabah Land Ordinance 1930/Cultural Heritage Enactment 1997/Native Courts Enactment

Agency: Sabah Forestry Department 1968/ Department of Lands and Surveys/Sabah Museum/Native Courts

On Pulau Banggi, an island off the northern coast of Sabah, the indigenous Bonggi community, is known for its belief in sacred sites. These burial or communal prayer sites should not be entered into, except on rare occasions. This practice has long contributed to the maintenance of biodiversity-rich areas. Today, some of these sacred sites have been gazetted within a protection Forest Reserve which restricts their access, while others are on State land which may be vulnerable to alienation to outsiders. Some of these have been lost or damaged as they have no protection at present. Although the Bonggi are not as exposed to conservation as other communities, they have a vested interest in preserving and managing areas sacred to them. This section discusses the ways in which forestry policy and also land use planning processes can be modified to accommodate biodiversity areas with strong spiritual and cultural heritage significance.

Pulau Banggi Location Map

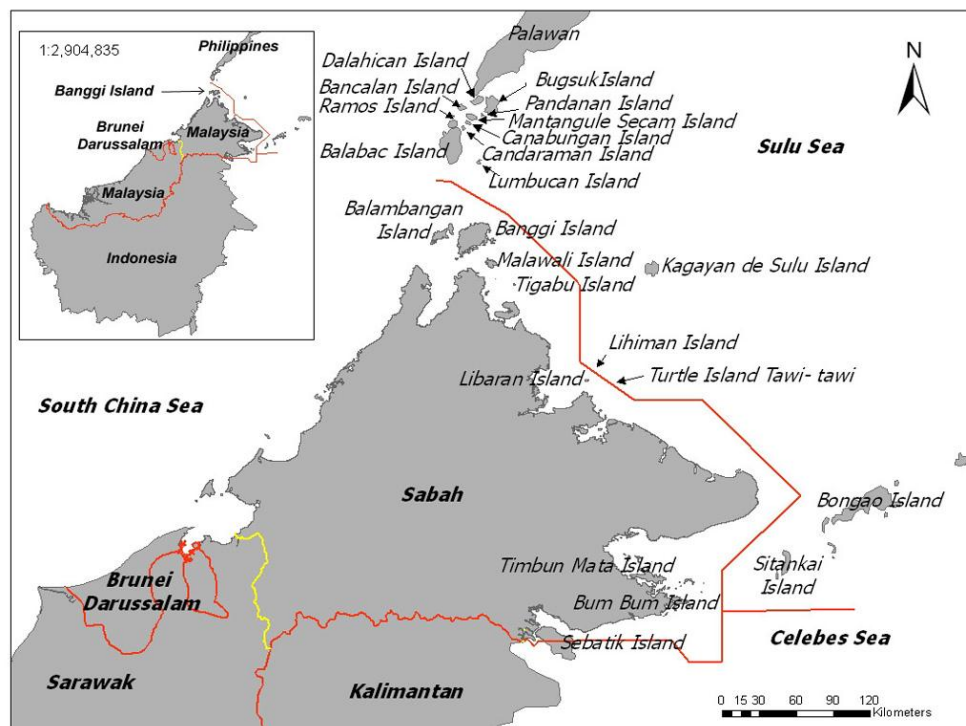


Fig. 1: Location of Banggi Island in Relation to Borneo

Pulau Banggi is the largest island in Sabah with an area of 440.7 km². It is located off the northern coast of Sabah and is accessible by ferry from Kudat. The traditional

people of the island are the Bonggi. In contrast to the previous three case studies which have involved communities that have benefitted from involvement with outside parties, the Bonggi of Pulau Banggi are an indigenous minority that have not had the same level of interaction with government and civil society organization. They do however have unique cultural and belief systems that endure to the present day. These involve the reverence and protection of sacred sites in much more distinct ways than those practiced by other ethnic groups. They number approximately 2,000 people, while the overall population of Pulau Banggi is estimated at 10, 000. Site visits and dialogues with the local people, two northern villages of **Kapitangan** and **Kalangkaman** as well as **Limbuak Darat** in the southern part of the island took place in 2009/2010 as part of the Sabah Review of ICCAs (Majid Cooke and Vaz, 2011). In discussions, local people described specific areas that demonstrated elements of being ICCAs. Specifically, these occurred in the form of sacred grave sites, congregational prayer and ritual sites as well as areas managed for maintaining access to natural resources, water catchment areas, beaches and rivers.

Map: Location of Bonggi Villages on Banggi Island

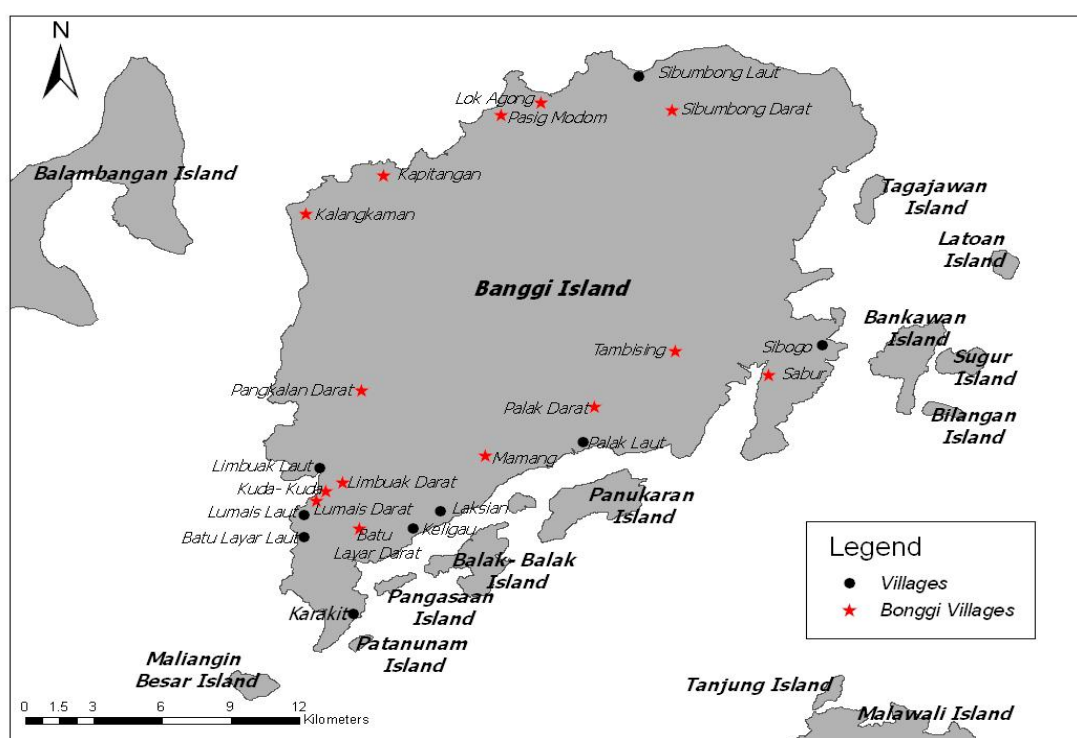


Fig. 2: Villages on Banggi Island

Although, many Bonggi have converted to Islam or Christianity, the Bonggi belief system continues to exert a powerful influence on the practices and observations of the Bonggi people. The grave sites where their ancestors are buried are considered off-limits to all people, including themselves. The size of these sacred grave sites vary from between 2 to 10 acres. Another type of sacred site is those specifically managed for community congregational prayers. Bonggi prayer sites are usually

large enough to accommodate all Bonggi villagers on the island; in other words they are not limited to the use of only one village. Rituals may last for weeks, so these areas have to be sufficiently large (8 to 10 acres) to accommodate populations that will stay *in situ* over a period of time. However, such large meetings are held very infrequently, perhaps once every 1 to 3 years. At all other times, entry into these sites is forbidden to outsiders and Bonggi alike – and by virtue of these taboos, these sites remain under natural cover.

Near Kapitangan village, a prayer site is located in the forest locally known as **Hutan Pitangan**. Next to the site is the village grave site; together they measure approximately 10 acres. Given that entry is forbidden, it is not possible to ascertain the state of the vegetation (see photos). However, from a distance one can see large *belunuk* trees which are used as markers for the site. Village leadership expressed a desire for an additional 10 acres to accommodate the needs of all 10 Bonggi villages. The grave and prayer sites are located in the vicinity of Sungai Kapitangan and can be a useful extension to a riparian reserve if one were to be implemented. The Bonggi of these areas seek greater recognition and acceptance of the importance of these sacred sites and ancestral territories to their ethnic community.

Most of these sacred sites are located on State Land and there are concerns that they may be alienated to outsiders. There have also been several incidences of the sites being destroyed or damaged by developers. The Bonggi do not have as much exposure as other ethnic groups, and are less aware of their rights under both state and international law. However, given the importance of the sacred sites they have mentioned, there is a need for the Sabah Museum to ascertain their whereabouts and authenticity and issue some form of protection under the Conservation of Heritage Enactment 1997 or using provisions in the Native Courts Enactment 1992. There is also a need for indigenous organizations to assist them with capacity building which would help them defend their rights and map a path to achieving their aspirations. Addressing the persistent problem of tenure insecurity is an important priority for local Bonggi as it would provide them with a stronger platform from which to diversify their economic activities. The provision of Communal Titles to the various Bonggi villages could provide a stronger impetus for collective planning and consensus building among the local Bonggi leadership and organizations.



Mount Sinabung at Kalangkaman is located within the Banggi (Class I) Forest Reserve. Outdated Forest Reserve Signboard at Road Side Entrance to the Kalangkaman Waterfall does not yet reflect that it has been reclassified as **Protection Forest in 2010**.

The island has one fairly sizeable protected area in the form of the Banggi Protection Forest Reserve, an area of 11, 206 hectares, which was successfully reclassified as Class I (Protection) in 2010. The Bonggi people also revere this forested area for its sacred sites. Characteristic of their belief system prior to Christianisation, many Bonggi prayer and grave sites (because of being out of bounds and unmarked) are located at the foothills of Mt. Sinabung may be found in the Banggi Forest Reserve.

Bonggi would welcome a role in helping to assure its continued protection. Subject to the interest and cooperation of the Sabah Forestry Department, there may be grounds for an ICCA involving shared governance. At Kalangkaman village the water catchment area lies to the north of Sungai Kalangkaman. The village's water storage plant lies about 1 km outside Kalangkaman going north on the road to Kapitangan. The water for the plant comes from Mt. Sinabung. In line with changing times and influences, there is also some nascent interest in managing attractive sites for local tourism at Kalangkaman where the waterfall at the back of the village lies within the Banggi Protection Forest Reserve.

10.5 A Community in Charge: Bundu Tuhan Native Reserve

Context: ICCAs gazetted as a Native Reserve

Legislation: Sabah Land Ordinance 1930

Agency: Sabah Department of Lands and Surveys

Bundu Tuhan is a Kadazandusun village in the district of Ranau. It comprises several hamlets spread over hills and valleys at the southern foothills of Mount Kinabalu. It has a population of approximately 3,600 people. Bundu Tuhan is exceptional among Sabah's villages in that it possesses a sizeable Native Reserve of over 1,263 hectares. Roughly 60% of this area has been voluntarily set aside by the community as a village forest reserve. The benefit to biodiversity conservation is also significant. Together

with the adjacent Tenompok Forest Reserve, Bundu Tuhan Native Reserve remains the most significant block of upland montane forest left between the boundaries of Kinabalu Park and Crocker Range Park. The overall area is considered an important link between these two world renowned biodiversity hotspots. The Bundu Tuhan Native Reserve is completely community managed according to collectively recognized rules and regulations. It provides a compelling example of the desire for communities to conserve forest as well as their determination to sustain its wise use in perpetuity despite pressures and obstacles faced. This Case Study demonstrates that Native Reserve provision within the existing Land Ordinance document has been successfully used to provide security to ICCAs comprising customary lands on State land. It poses the question why this provision is not used more regularly. Gazetted Native Reserves are rare in Sabah. However, despite strong management capabilities being demonstrated by the local managers, stipulations within the Ordinance impose government-appointed Trustees to supervise the management of the Reserve which exposes the community to outside interests and top-down interventions, although this has yet to happen.

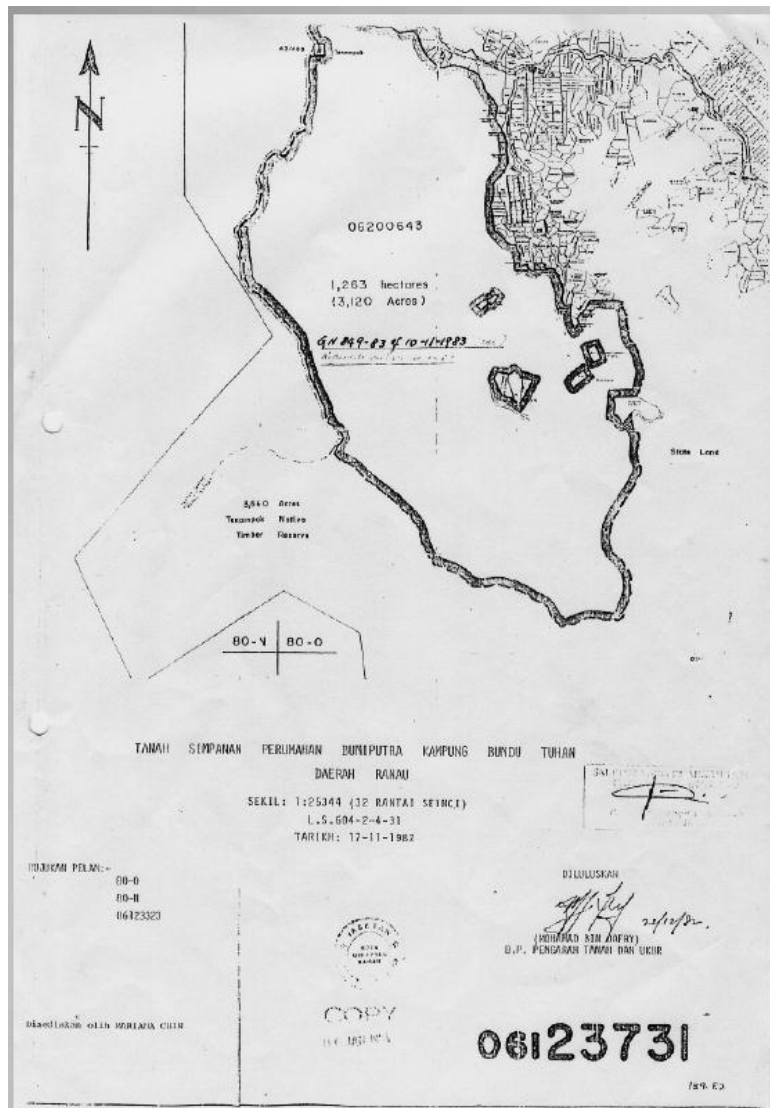


The Bundu Tuhan hamlets with Mount Kinabalu in the distance.

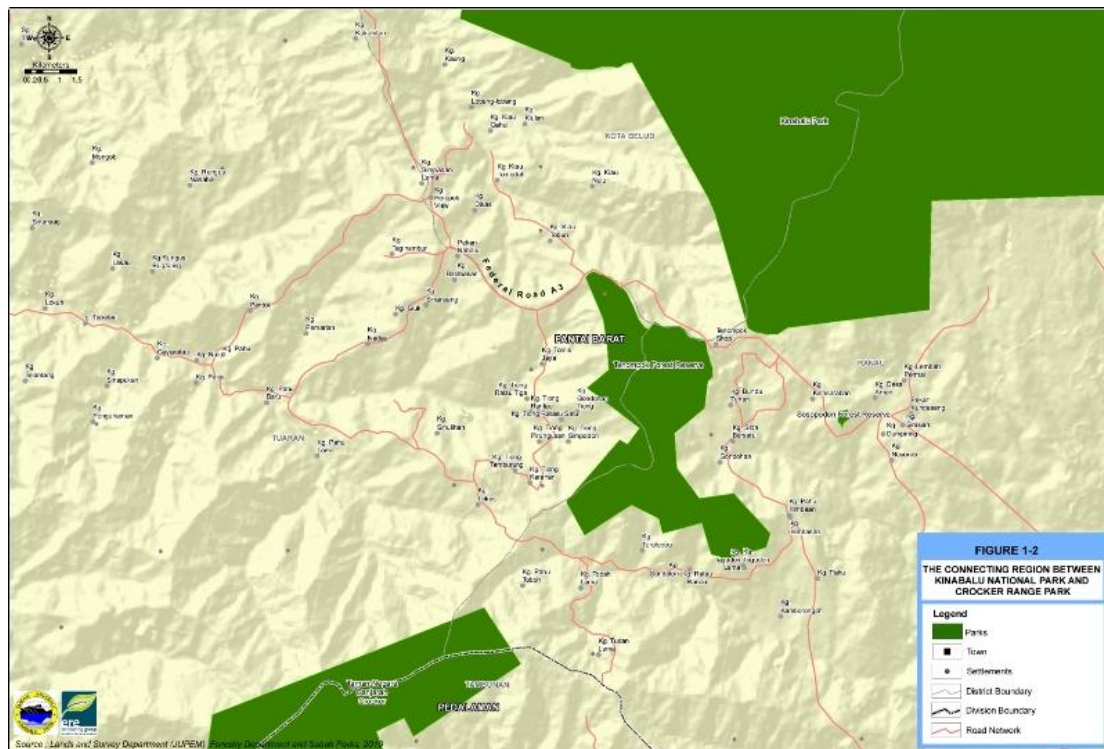
The Bundu Tuhan community first began to consider using the Native Reserve provision in the Land Ordinance in 1961 as a means of securing the long term needs of the community. It was seen as a way to retain essential village forest an area under collective management to prevent internal conflict arising from competition for Native Titles. Village leaders with the support of the District Officer submitted their application in 1966 and pursued the process unstintingly until the Reserve was finally gazetted in 1983. In the decades since, Ranau has undergone dramatic changes and forested areas have given way to commercial vegetable farming and tourism development. Nevertheless, as a result of this visionary action, Bundu Tuhan

retains a pleasant forested setting which attracts visitors to its homestays; it also enjoys an abundant supply of clean water for its households and farms.

Map shown in the Bundu Tuhan Native Reserve Title Document



Map showing Bundu Tuhan Native Reserve and Tenompok Forest Reserve in relation to Kinabalu Park and Crocker Range Park



According to household interviews (2009/2010), 80% of households continue to engage in some form of agriculture. However, paid employment has now surpassed subsistence agriculture as the main source of livelihood. Many households have members who are working in the civil service as teachers or nurses, while other households boast members with professional qualifications as accountants, lawyers and doctors. Some residents work locally in the private sector such as in the hotel industry associated with tourism to Kinabalu Park and at nearby attractions such as the Poring Hot Springs and Sabah Tea plantation. Others are self-employed or run small businesses.

Education is a priority for the people of Bundu Tuhan in general. Many believe both the primary and secondary schools at Bundu Tuhan to be the best in the District of Ranau. Bundu Tuhan also has the highest number of graduates compared to all other villages in rural Sabah and the Bundu Tuhan Graduates Society considers finding innovative ways to support community livelihoods as one of its major objectives.

Bundu Tuhan has one of the more unique leadership systems seen in Sabah communities. The community upholds eight Ketua Kampung (Village Chiefs), whose roles date back to the historical clan divisions of each major hamlet that comprises the overall Bundu Tuhan community. There is a Ketua Anak Negeri (Native Chief) and his representative, who together with the Ketua Kampung, are considered to be repositories of traditional knowledge and Adat of the Bundu Tuhan community. At another level, Bundu Tuhan is also subdivided into three administrative units under

the JKKKs (Village Safety and Development Committees) of Sokid, Siba and Gondohon. Combined, the Native Chief, Village Chiefs and JKKK Chairmen and JKKK Executive Committee members form the frontlines of the Bundu Tuhan leadership. These leaders report to a Community General Assembly that provides the mandate for the leaders to act. It is a rare system of local governance, which has synergised both customary and modern elements in a genuine effort to democratise decision-making processes in their community.



Bundu Tuhan community leaders play a key role in managing communal lands and resources.

Following the gazettelement, the Bundu Tuhan community leaders have taken pains to codify key aspects of *adat*, customary rules and regulations governing the use of both the forested area and the village area. This community-drive process has been participatory in nature and the rules are well understood by locals ensuring a high level of compliance. Within the forested area there are zones drawn up for different land use: water catchments, no take zones (*kawasan Bombon*), as well as multiple use zones and community use zones where prescribed activities are permitted. In the village land area, agricultural and housing sites for the present as well as for future generations have been outlined. Each household has a copy of the management plan and the rules and guidelines established by the community.

Conservation of the forest area is achieved through an application of *Bombon*, which is a customary practice of regulating access and use of resources based on seasonality and intensity. In the *Bombon* area access and use are completely

prohibited. While in the community use zones, controls are less prohibitive; here wild food plants, medicinal plants and certain bamboos are allowed to be collected, but timber and endangered plant species may not be extracted at all. There are also designated timber reserve areas for community use, where the cutting of timber is allowed for specific purposes. *Bombon* is also applied to the conservation of rivers, where riverine reserves are areas 30 metres to the left and right of rivers (15 metres for tributaries), which is even better than those recommended by the Sabah Water Resources Enactment. Hunting is not currently allowed in any zone as a management approach to enable the animal population to recover.



Clean water within the Bundu Tuhan Native Reserve: access to clean and reliable water supply is one of the most important benefits to the local community.

Although the Bundu Tuhan community is substantially better off than many other communities in having fairly secure tenure to community forest, they feel that the Native Reserve designation has a specific weakness - the community is not the ultimate authority in managing the area. The Land Ordinance states that Native Reserves must have Trustees to oversee the management of the area. In the case of the Bundu Tuhan Native Reserve, the composition of the Board of Trustees has been stipulated in the land title as being chaired by the District Officer and membered by the Ketua Anak Negeri (Native Chief) and other village leaders, which are all government appointed positions. In the view of the existing village leadership, this disadvantages the local community as differences may emerge in the views on development held by the government appointed Trustees and the views held by the Community General Assembly, which represents the voice of the community at large. Presently, this is not a problem because the existing leaders are all from Bundu Tuhan and share common aspirations. However, there is a clear worry that future

problems may arise should routine changes in leadership result in government appointed Trustees that are not from Bundu Tuhan. The Bundu Tuhan leaders want their management and governance structures recognized and respected by all levels of government from the District Office up. They are not in favour of co-management. As they see it, their forefathers have stewarded forest here since even before the formation of Malaysia and they have proven their commitment to these values; “we have our own committees, rules and regulations and we have our own Adat”.

For reasons that are not entirely clear, the Tenompok Class I Forest Reserve which was gazetted in 1984 overlaps with the Bundu Tuhan Native Reserve in a fairly significant way. Bundu Tuhan’s leaders believe that mistakes were made when the Sabah Forestry Department gazetted the Tenompok Forest Reserve. Ideally a dialogue and enquiry should be initiated to resolve this matter.

Given that the Native Reserve application was made in 1966 and received a title for the Native Reserve in 1983, their claim to the Reserve should be given primacy. In principle, as both the Native Reserve and the Forest Reserve are intended for conservation, there is an alignment of goals and grounds for working closely to reinforce the protection of the area. The Bundu Tuhan community has concerns that the Forest Reserve status could always be changed from Class I to Class II which would permit logging.

The community had already registered their protest about the overlap with the Sabah Forestry Department. They would prefer to stand by their conviction that the Native Reserve should be solely managed by them and the Forest Reserve boundaries should be resurveyed to reflect this.²⁶ The Bundu Tuhan leaders feel that being recognized as an ICCA would provide due recognition for their conservation efforts.

10.6 Ulu Padas, an Area Rich in Culture, Heritage and Biodiversity

Context: ICCAs within Class 2 (Commercial) Forest Reserve and State land (proposed Native Reserve)

Legislation: Forest Enactment 1968/Sabah Land Ordinance 1930

Agency: Sabah Forestry Department/ Department of Lands and Surveys

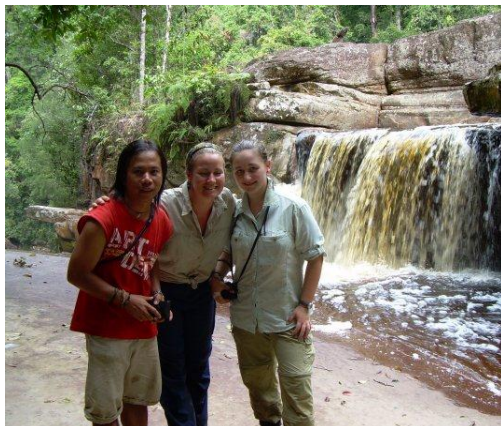
Ulu Padas is an example of an area in which the presence of a local forest-dependent community and their impassioned collective action from the 90s has helped to ensure that biodiversity-rich habitats that harbor rare endemic plants and wildlife endure today. Tourism has helped to raise the profile of the area and ensure that logging activities are restricted, at least with constant vigilance. The main concern for local

²⁶ The recognition from SFD may be difficult to come by because, it is administratively difficult to de-gazette a Forest Reserve once it has been gazetted (field notes, village meeting 20 June 2010, representative of SFD being present).

people remains the need for a stronger assurance of protection for areas that are important for maintaining ecological services, food and forest products. Many of these occur in the Proposed Native Reserve along the Matang River (within State Land), on the slopes of Bukit Rimau and other smaller hills, and in the immediate forest hinterland surrounding Long Pasia and Long Mio, much of which is within Commercial Forest Reserves. The community here is highly motivated to manage these areas for conservation and tourism. In particular, the community is well-placed to be given a special role in caring for compartments in the SFI forest concession that are set aside for conservation, amenity forest and recreation in collaboration with the state Forestry Department. The lack of tenure security, either in the form of Native Title or the final gazettelement of lands within the Native Reserve constrain local authority over these areas which would enable them to restrict exploitation and unsustainable use from those not regulated by local rules and regulations.



Long Pasia is situated in a valley surrounded by forested mountain ranges above 1,000 meters in elevation.



Rekong Waterfall (top), Maga Falls and Senipung Lake (Bottom left and right) are all located within the Sipitang (Class II) FR. These are in steep areas that are among the anchor areas for the community-based tourism in Long Pasia.

Ulu Padas refers to the headwaters of the Padas River, an area of approximately 80,000 hectares at the southwestern-most tip of Sabah, Malaysian Borneo. This steep mountainous area, with elevations ranging from 915 to 2070 metres is among the few parts of Sabah's forest estate with extensive old-growth forest (Mannan and Awang 1997: 2). Ulu Padas is part of the larger Central Bornean Montane forests, a transboundary ecoregion that has been dubbed the *Heart of Borneo*. In the past decade, this initiative has provided the impetus for a multi-country partnership. An historic Declaration was signed in 2007 between Brunei Darussalam, Indonesia and Malaysia to maintain contiguous forest habitats over 220,000 square kms in the

island's centre. In Sabah, many previous studies of the Upper Padas have already clearly demonstrated biodiversity significance. The area comprises eleven distinct forest types and rivals Mount Kinabalu in terms of plant endemism and species diversity (Lamb and Phillips 1998). The massive contiguous oak-chestnut forest of this region supports the seasonal migration of the bearded pig (*Sus barbatus*), a major source of meat for Borneo's upland communities.

Map: Ulu Padas contains some of the last old growth forest in the highland Heart of Borneo

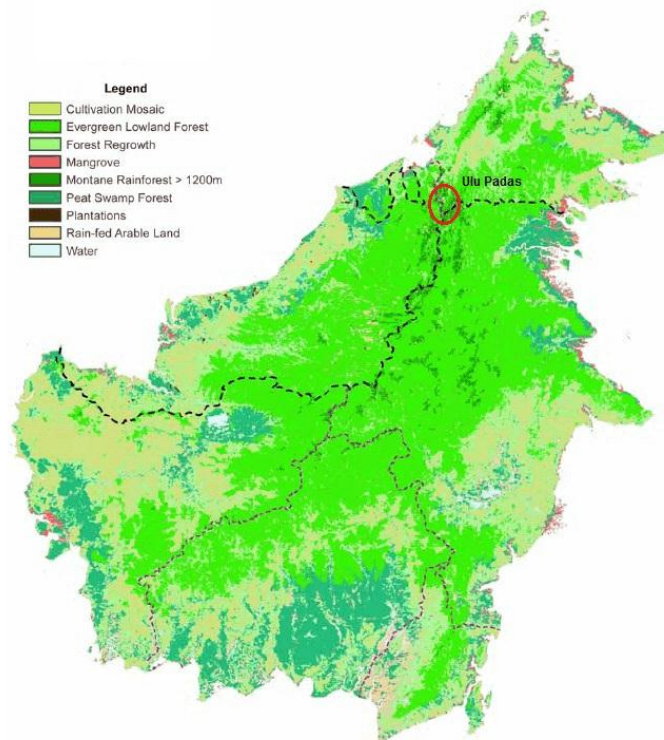
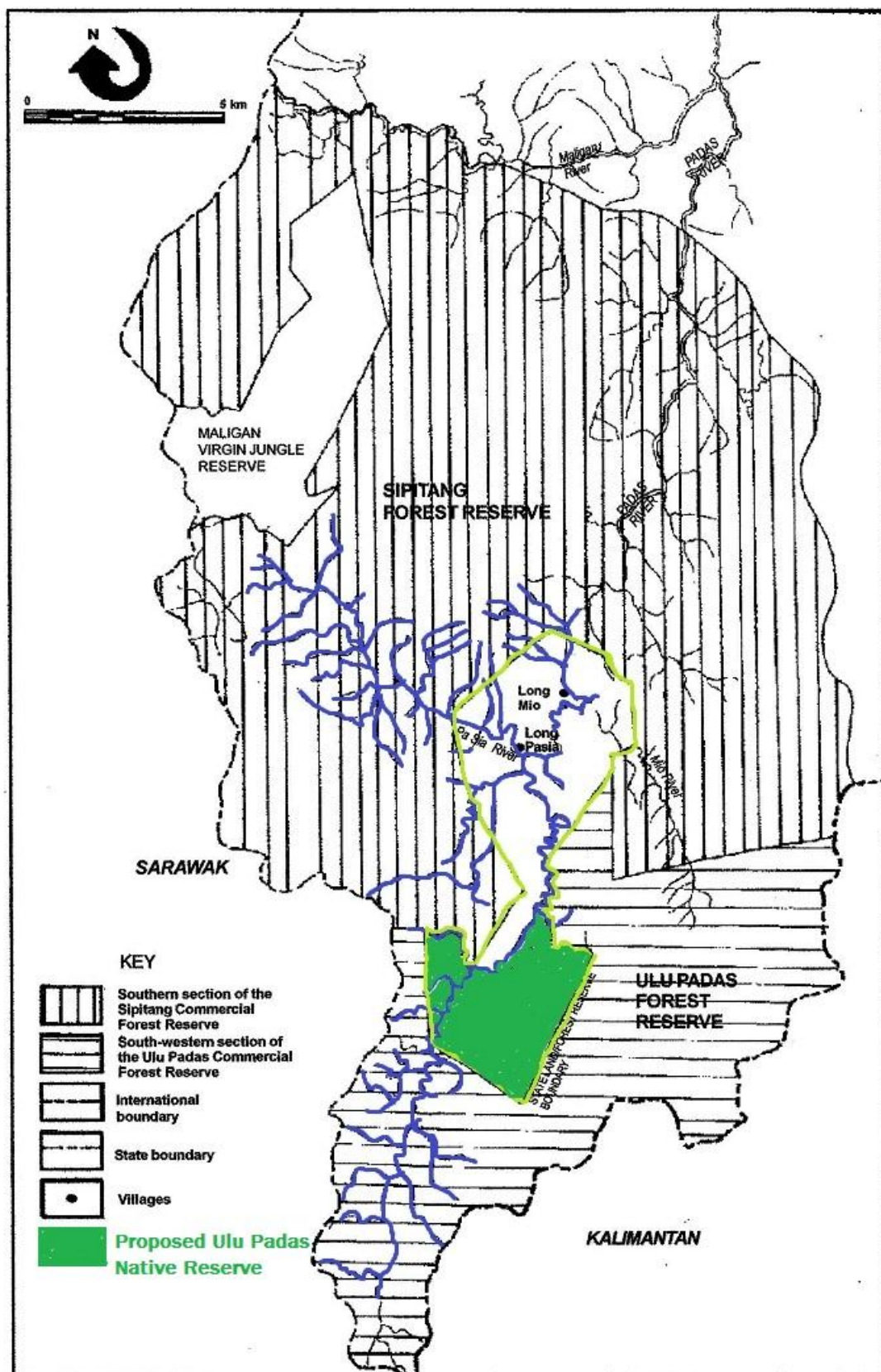


Figure 2: Major vegetation types of Borneo
Source: Langner A. and Siegert F.: *Assessment of Rainforest Ecosystems in Borneo using MODIS satellite imagery*. Remote Sensing Solutions GmbH & GeoBio Center of Ludwig-Maximilians-University Munich, in preparation, June 2005. Based on 57 single MODIS images dating from 11.2001 to 10.2002 with a spatial resolution of 250 m

The ethnic Lundayeh community of Ulu Padas, a combined population of approximately 500 people, resides in two villages - Long Pasia and Long Mio. These are centred at the mouths of the Pasia and Mio rivers, both tributaries of the Padas. Local people are mainly subsistence swidden and wet-rice farmers, although tobacco, coffee, vegetables and fruits are increasing in importance. Wild game is the primary source of protein and hunting is an integral part of Lundayeh identity. Rivers supply fresh water and fish, and the surrounding forest is a critical source of food, medicines, firewood and building materials (bamboo, rattan and wood). Older growth forest beyond existing farms and homesteads are important for medicinal (Hoare 2001: 41–73). These are also the best hunting grounds.

Map: Land Classification in Ulu Padas



The remoteness of the villages (123 km by logging road from Sipitang) and seasonality of cash incomes make the forest both a lifeline and a safety net for local people. The Lundayeh assert customary claims to land that their forefathers cleared and farmed before them. This ancestral heartland is important for maintaining aspects of their unique way of life and ethnic identity. This is a managed resource area – over generations, agricultural cycles have shaped the landscape, developing a mosaic of forest in different stages of regeneration and altering the species composition of amenity forest (Hoare 2001: 152–6). Attaining secure tenure over lands and reserves using provisions in the Land Ordinance has been a struggle for the local community. Although an area of State Land of approximately 12,300 hectares around the villages of Long Pasia and Long Mio has been demarcated ostensibly for local people to apply for Native Title, very little has been titled so far, exposing the area to applications by commercial interests.



Batu Narit – a carved rock in the Upper Matang lies within the proposed Native Reserve. Carved rocks occur throughout Central Borneo and are part of the shared legend of Upai Semaring. Aside from being a vital cultural heritage area, the forest within the proposed Native Reserve is part of the Lundayeh people's living culture - it is the resource catchment and maintained for hunting, fishing and sourcing wild plants, rattan and other forest products.

All land apart from this 'island' of State Land is Commercial Forest Reserve of close to 290,000 hectares concessioned to Sabah Forest Industries which manages a pulp and paper plant in Sipitang. Arising from advocacy and appeals in the late 90s, sections of this concession were reclassified for Natural Forest Management (NFM) instead of Industrial Tree Plantation (ITP). Forest management in the Upper Padas needs to be monitored very carefully to ensure that the concession holder and its contractors abide by the terms of their respective agreements. Fortunately, now that SFI is under new management with the entry of Indian forestry company Balarpur assuming the reigns, there are positive indications that sensitive parts of the concession will not be touched, and that opportunities for positive collaboration with the local communities will be pursued.

In the State Land, although the southern section (about 60 percent of the total area) contains evidence of previous longhouse settlements and farms, it has reverted to

mature secondary forest and plays a more general function as a forest preserve. Locals use longboats to access this area for fishing, hunting and resource gathering. It is dotted with burial sites, headhunting monuments, historic foot-trails to neighbouring villages in Sarawak and Kalimantan. A rich local folklore explains the formation of rock monuments and striking geological features and it has been long recommended that the Sabah Museum play an active role in mapping them and offering formal protection using the Cultural Heritage Enactment (Vaz 1999).

The Lundayeh villages of Ulu Padas were very much in the spotlight as protests arose over the damage to the environment from the mid-90s. In 1999, bids by well-connected companies to secure Temporary Occupation Licenses (TOLs) to log the State Land came to light. It prompted the Long Pasia community to collectively submit an application to establish a Native Reserve of 4,500 hectares to safeguard this area. If gazetted, this Native Reserve will be one of the largest areas of communal forest to be established in Sabah in recent history and a significant achievement for biocultural diversity conservation. It is now 13 years since the application was submitted. Although the Native Reserve has not yet been gazetted, one tangible benefit is that this timely action by the resident community has prevented this area of old growth forest from being logged over (Vaz 2006). Local people have also played an active role on the ground negotiating with logging contractors not to enter into important sites. One specific example is the Maga Waterfall which is close to a patch of rare kerangas forest. Noh Dawa who has been involved in tourism since the 1980s has been particularly active in protecting this site from incursion and managing a basic camp for tourists.

The Ulu Padas has been involved in nature and community-based tourism since the 1980s. Local initiatives became more organised under a government-NGO partnership to develop a village homestay program to enable local people diversify their income sources. Aside from experiencing life in a traditional Bornean village setting, nature and adventure are the main attractions – Maga Waterfall, Rekong Waterfall, Pepuken Waterfall, Senipung Lake, Batu Narit (the Carved Rock along the Matang River), historic trails and patches of Kerangas forest are highlights of camping trips. In addition to domestic travellers, today, the villagers routinely host tourist groups from Europe (UK, Denmark, Holland, Belgium, Germany, and Norway) as well as Australia, Japan, and Canada among others. Sustaining and developing its tourism businesses further depends on the ability to retain its unique combination of natural and cultural heritage which has been highlighted in the Sabah Tourism Master Plan²⁷.

²⁷ Recent updates on tourism activities in Long Pasia and surrounds provided by Lait Lakong who manages tour groups to Ulu Padas and submitted a report on conservation and tourism needs for

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the ICCA Review in 2011. Sabah is preparing a revised Tourism Master Plan; it continues to feature Long Pasia as a major asset for adventure and cultural tourism.

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