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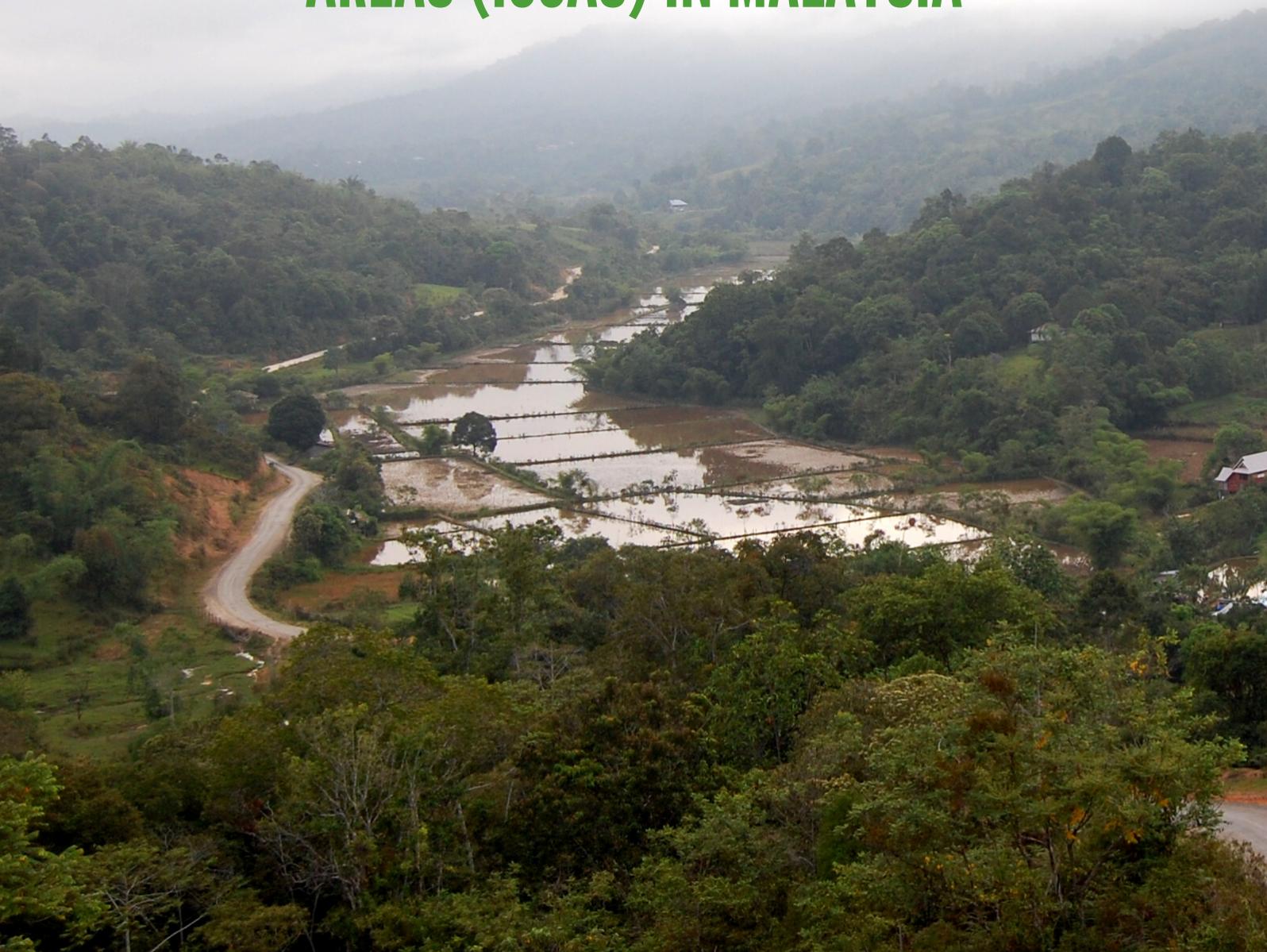


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LEGAL ANALYSIS

TO ASSESS THE IMPACT OF LAWS, POLICIES AND INSTITUTIONAL FRAMEWORKS ON INDIGENOUS PEOPLE AND COMMUNITY CONSERVED TERRITORIES AND AREAS (ICCAS) IN MALAYSIA



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INTRODUCTION

The term “ICCA” is an abbreviation for “territories and areas conserved by indigenous peoples and local communities” – or simply known as “territories of life”. The International Union for Conservation of Nature (IUCN) defines ICCAs as “natural and/or modified ecosystems containing significant biodiversity values, ecological services and cultural values, voluntarily conserved by indigenous peoples and local communities through customary laws or other effective means”.¹ Broadly, ICCAs refer to collectively governed lands.² Throughout history, indigenous peoples and local communities have depended on the natural environment and its resources for their livelihoods and cultural and spiritual purposes. Their long association and reliance upon the resources available to them have resulted in the accumulation of local and traditional knowledge and development of practices, institutions and strategies to ensure the continuity of these resources. The territories and areas of indigenous peoples which cover about 22% of the world’s land surface, is estimated to contain 80% of the world’s biodiversity. It is almost trite now that the inextricable link between indigenous peoples’ communities and their territories and their dependence on the natural resources on their lands. Many communities continue to be dependent on the forests, and the increased loss in biodiversity through various extractive industries undermines their existence, independence, cultural cohesion and survival.

ICCAs are a global phenomenon – they are exceptionally diverse, span all types of ecosystems and cultures, and have thousands of local names. However, they have in common three main defining characteristics:

- A community with a close and profound connection with a territory, area or species’ habitat (due to historical and cultural reasons and/or because of survival and dependence for livelihood).
- That community is a major player in decision-making and implementation of decisions (governance and management) regarding that territory, area or habitat. It has a community institution with the capacity and de facto power to develop and enforce regulations.
- The community’s governance decisions and management efforts lead to the conservation of nature in the territory, area or habitat, and the conservation of cultural values and community well-being, even when the main objective may not be conservation per se. For example, their primary motivation may relate to livelihoods, water security, and safeguarding cultural and spiritual places.

Over the past few decades, indigenous people’s contribution to the protection and conservation of biodiversity has been increasingly recognised. The International Union for Conservation of Nature (IUCN) for instance, has recognised ICCAs as fundamental to conservation and has sought to promote the participation of indigenous peoples in decision-making processes as well as the recognition of their rights over land and natural resources. In 2003, participants at the 5th World Parks Congress in Durban stated national and international recognition of ICCAs as an urgent necessity. The Durban Accord and Action Plan was adopted, which further “urged commitment to recognise, strengthen, protect and support community conserved areas”. Furthermore, the United Nations Convention on Biological Diversity, a legally binding treaty established in 1992 and to which Malaysia is a signatory, called for the recognition of ICCAs as one governance type of protected areas in its Programme of Work on Protected Areas (PoWPA) agreed in 2004.

¹ Warf, B. 2014. *Indigenous and Community Conserved Areas*. *Encyclopedia of Geography*.

² Kothari, A. 2006. Community conserved areas: towards ecological and livelihood Security. *PARKS. The International Journal of Protected Areas and Conservation*, Vol. 16 No. 1, pp. 3–13.

In 2015, the UNDP GEF-Small Grants Programme (SGP) as part of its OP6 strategic initiatives launched the Global Support Initiative to Indigenous Peoples and Community Conserved Territories and Areas (ICCA-GSI) in partnership with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), Germany. The main objective of the global initiative is to expand the range and quality of diverse governance types of protected areas and sustainable livelihoods of indigenous peoples and local communities through improved recognition, capacity building and empowerment, and on-the-ground support to ICCAs. These actions are targeted to contribute to achieving the Convention of Biological Diversity (CBD) Aichi 2020 targets:

Target 11: increasing protected areas coverage;

Target 14: safeguarding essential ecosystem services; and

Target 18: protection of traditional knowledge.

The global initiative has been implemented in 26 SGP countries, including Malaysia, with the United Nations Environment Programme's World Conservation Monitoring Centre (UNEP WCMC), the International Union for the Conservation of Nature's Global Programme on Protected Areas (IUCN GPAP), the ICCA Consortium, and the Secretariat of the CBD as core technical partners. It was executed through three distinct but mutually reinforcing "Work Packages" (WP):

- (i) WP1 - Provide direct support to community-based action and demonstration on sound ICCAs stewardship for ecosystem protection, sustainable livelihoods and poverty reduction;
- (ii) WP2 - Legal, policy and other forms of support for ICCA recognition and conservation (including governance assessments of protected areas and landscapes); and
- (iii) WP3 - Networking, knowledge production and exchange between national civil society organisation (CSO) initiatives at regional and global levels.

This national-level legal analysis, under WP2, seeks to assess the impact of laws, policies and institutional frameworks on indigenous peoples and community conserved territories and areas (ICCAs) in Malaysia and how the existing legal framework and institutions support or undermine recognition and support for ICCAs. It will also provide recommendations and strategies for reforms to improve the recognition and support to ICCAs in Malaysia. The analysis will focus on Sabah and Sarawak (Malaysian Borneo) and Peninsular Malaysia in the hope that it will add to the existing research and the local-to-global understanding of these dynamics and what legislative and institutional reforms can be made to recognise and support ICCAs more effectively.

PART 1: COUNTRY, INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

1.1 Country background and legal system

1.1.1 Background

Malaysia is a federation in South East Asia comprising 13 states and 3 federal territories. Eleven states, as well as two federal territories, are situated on the Peninsular (West Malaysia); whereas two states, Sarawak and Sabah and one federal territory are on Malaysian Borneo (East Malaysia). The capital city is Kuala Lumpur, while the seat of government is in Putrajaya. West Malaysia shares borders with Thailand and maritime borders with Singapore, Vietnam and Indonesia while East Malaysia borders Brunei and Indonesia and shares a maritime border with the Philippines.³ Malaya, as it was formerly known, became independent from British colonial rule in 1957 and was established as Malaysia six years later, through the merger of Malaya and former British Singapore, and Sabah and Sarawak in September 1963. In August 1965, Singapore separated from the union and became an independent republic.⁴ A map of Malaysia appears below⁵:



1.1.2 Legal and political context

The Malaysian political system is based on the Westminster style parliamentary democracy and the bicameral parliament and consists of the House of Representatives and the Senate. The Yang Di-Pertuan Agong (the King) is the Head of State, a largely ceremonial role and the Prime Minister is the Head of Government.⁶ The current Malaysian Head of State is YDPA Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah. The Prime Minister, Tan Sri Muhyiddin Haji Muhammad Yassin, was sworn in on 1 March 2020 as the eighth Prime Minister of Malaysia following a Malaysian political crisis that saw the

³ Statista, see Malaysia <https://www.statista.com/topics/2383/malaysia/>

⁴ Encyclopaedia Britannica, see <https://www.britannica.com/place/Malaysia>

⁵ Encyclopedia Britannica, see <https://www.britannica.com/place/Malaysia>

⁶ The Malaysian Legal System. Hamzah, W.A. and Bulan, R., 2002, Kuala Lumpur: Oxford Fajar (page 23)

unprecedented resignation of the seventh Prime Minister Tun Dr Mahathir Mohamad (who was elected for the second time in 2018 after having been the fourth and longest-serving Prime Minister of Malaysia ruling from 1981 to 2003). The Malaysian legal system is based on common law, a legacy of British colonial rule. Malaysia has a written constitution (Federal Constitution) which is the supreme law of the land providing the legal framework for the legislation, courts and other administrative aspects of the law. Article 121(1A) of the Federal Constitution recognises a plural justice system, with civil and Syariah as well as native courts with their specific jurisdictions. Syariah courts deal exclusively with matters pertaining to religious and family issues involving Muslims, whereas the Native Courts in Sabah and Sarawak administer native customary laws that apply to the indigenous peoples of the two states. Article 76 (1) (a) of the Federal Constitution vests power in the Parliament to make laws to implement any treaty, agreement or convention including human rights treaties.⁷

1.1.3 Socio-economic context

Malaysia is a multi-ethnic and multicultural country with a population of 31 million comprising Malays and Indigenous Peoples (referred to politically as Bumiputra) or “sons of the soil” (61.7%), Chinese (20.8%), Indians (6.2%), others (0.9%) and non-citizens (10.4%).⁸ Bahasa Malaysia or Malay is the official language, while English is the second language in Malaysia. Both are compulsory subjects taught at all levels of education. English is generally the *lingua franca* for business communication purposes and used in the higher courts (High Court, Court of Appeal and the Federal Court) and is spoken by most urban Malaysians to varying degrees. The other spoken languages are Mandarin, Cantonese, Hokkien, Hakka, Hainan and Foochow, spoken by ethnic Chinese Malaysians; Tamil, Hindi, Telugu, Malayalam, Panjabi, spoken by ethnic Indian Malaysians; and several languages spoken by indigenous peoples and ethnic minorities of East Malaysia. While Islam is the official religion of Malaysia and practised by 61.3% of the population, Buddhists make up 19.8%, Christians 9.2%, Hindus 6.3%, while Confucianism, Taoism, other traditional Chinese religions make up about 1.3% of the population.⁹

Malaysia has one of the highest standards of living in Southeast Asia and a very low unemployment rate (3%).¹⁰ Since the 1970s, Malaysia has transformed from a producer of raw materials into a multisectoral economy¹¹ and now is an upper-middle-income country. Malaysia’s economy has been on an upward trajectory since the Asian financial crisis of 1997-1998 and has had a growth average of 5.4 per cent since 2010. Malaysia is forecasted to transition from an upper-middle-income economy to a high-income economy by 2024.¹² The gross domestic product (GDP) value of Malaysia represented 0.57 per cent of the world economy and was worth 358.58 billion US dollars in 2018, and 365.3 billion US dollars in 2019.¹³ The Malaysian economy increased at a measured pace of 5.4% in the first quarter of 2018, from 5.9% in the fourth quarter of 2017 but is forecasted to decelerate to 4.3% in 2020 due to weaker external trade performance and softer domestic demand growth.¹⁴

⁷ Federal Constitution, see <http://www.commonlii.org/my/legis/const/1957/6.html>

⁸ CIA, The World Fact Book, see <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>

⁹ Department of Statistics, Malaysia

¹⁰ Nordea, Country Profile Malaysia, see <https://www.nordeatrade.com/en/explore-new-market/malaysia/economical-context>

¹¹ CIA, The World Fact Book, see <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>

¹² The World Bank, see <http://www.worldbank.org/en/country/malaysia/overview>

¹³ Statista, see <https://www.statista.com/statistics/319024/gross-domestic-product-gdp-in-malaysia/>

¹⁴ The Edge Markets, see <https://www.theedgemarkets.com/article/malaysia-gdp-growth-slow-43-2020-%E2%80%944-marc>

1.2 Indigenous communities in Malaysia

1.2.1 Terminology

The term “indigenous” generally refers to aboriginal peoples, natives, and other ‘original people’ around the world who occupied territories which were later claimed by European colonisers.¹⁵ In Malaysia, the term indigenous refers to the Malays,¹⁶ the aboriginal peoples or Orang Asli and the natives of Sarawak and Sabah. Collectively they are categorised as “Bumiputera”, meaning “princes or sons of the soil”, a classification that has been used as a basis for affirmative action policies, including the reservation of employment positions in the civil service.

Article 160(2) of the Federal Constitution defines a “Malay” as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay customs. The Constitution defines an “aborigine” or “Orang Asli” only as “an aborigine of the Malay Peninsula”.¹⁷ However, the Aboriginal Peoples Act 1954 s 3 (2) states that an aborigine is a person whose parents are both aborigines or either parent, is or was, a member of an aboriginal ethnic group, speaks an aboriginal language and habitually follows an aboriginal way of life, customs and beliefs.

The term “native” refers to the heterogeneous indigenous peoples of Sabah and Sarawak. Under Article 161A (6) and (7) of the Federal Constitution, a “native” in Sarawak is an indigenous person who is born of parents who are both natives¹⁸ or a person who is a citizen and either belongs to the races specified in clause (7) of Art 161A as indigenous to the state or is of mixed blood deriving from those races. This list is based on the schedule to the Sarawak Interpretation Ordinance 1958, amended in 2005. A person may also apply and be deemed a native by the Native Courts under section 20 of the Native Court Ordinance 1992 to hold native lands (if he or she satisfies the criteria under that section, including residence, assimilation, knowledge of language and culture of the specific community). This section is merely to fulfil entitlement for holding lands under sections 8 and 9 of the Land Code which prohibits a non-native from so holding. In Sabah, a native is a citizen who is a child or grandchild of a person of a race indigenous to Sabah and born either in Sabah or to a father domiciled in Sabah at the time of the birth.¹⁹ The Sabah Interpretation (Definition of Native) Ordinance 1958 establishes additional requirements for native status.

¹⁵ Bulan, R. & Locklear, A. 2008a. *Legal Perspectives on Native Customary Land Rights in Sarawak*. Suhakam Publication, Kuala Lumpur.

¹⁶ There are some contestations against classifying Malays as indigenous because they do not fall squarely into the characterisation of indigenous peoples, including vulnerability, non-dominance that are generally used internationally.

¹⁷ Orang Asli is a collective term used for eighteen sub-ethnic groups. The eighteen sub-ethnic groups generally classified for official purposes under Semai, Negrito, Senoi and Aboriginal-Malays. Each group has its own language and culture

¹⁸ Native is defined in the Constitution, Art 161A, as well as the Interpretation Ordinances of each state of Sabah and Sarawak. In Sarawak, a native is a person listed in clause 7 or a child born of native parents “exclusively” from the races specified under Art 161A clause (7). Under state law however, it is possible for a person who was not born a native to apply to the Native Courts to be “deemed” a native and be subject to its personal law under. For an in-depth discussion on “who is a native”, see R Bulan, “Native Status and the Law” in Wu Min Aun, *Contemporary Public Law in Malaysia*, Longmans, 1999.

¹⁹ Art 161A clause 7 Federal Constitution, and Interpretation (Definition of a Native) Ordinance 1953. There are about 38 known major groups in Sabah.

1.2.2 Significance of determination of indigenous status

A determination of aboriginal or native status is necessary because customary laws apply as personal laws in Malaysia. The entitlement to native customary title, which originates in native law and customs, is a right under personal law that establishes a full beneficial right of ownership in property. The terms “native customary rights” or “customary title” describe the interests of the natives of Sarawak and Sabah in their traditional lands,²⁰ whereas the term “aboriginal customary title” or “aboriginal title” is generally used to describe the interest of the aborigines in Peninsular Malaysia to their lands.²¹ Although land laws in Peninsular Malaysia, Sarawak and Sabah have developed differently and in some instances independently of each other, the Malaysian courts have described “native customary rights” in Sarawak as synonymous with the aboriginal title of the Orang Asli in Peninsular Malaysia. As such, “native title” is often used as an umbrella term encompassing these two concepts.

1.2.3 Composition of ethnic groups

In Peninsular Malaysia, the aboriginal people known as the Orang Asli form about 0.5 per cent of the population,²² whereas the indigenous groups in Sarawak comprise about 69.1 per cent, and in Sabah, about 60.7 per cent of the respective states’ population.²³

Peninsular Malaysia

There are approximately 150,000 Orang Asli in Peninsular Malaysia, roughly less than 1 per cent of the total population. The Orang Asli are broadly divided into three groups, which are 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 Negrito, Senoi and Temoq speak related languages known as Aslian, which belong to the Mon-Khmer family, while the Proto-Malay speak languages that belong to the Austronesian family of languages, like Malay. The Proto-Malay group are similar in appearance to Malays, but are of diverse origin. They live along the Straits of Malacca and in southern Johor. Some adopted Islam and absorbed into the Malay community.²⁴ The Orang Laut, Orang Seletar and Mah Meri live close to the coast and derive their living from the sea through fishing. Roughly half of the Orang Asli live in or close to forests and may be involved in hill rice cultivation or traditional hunting and gathering activities, whereas other groups have ventured into permanent agriculture. For example, the Temuan, Jakun and Semai have smallholdings of rubber and oil palm. About 40 per cent of the population depends to some extent on forested areas (Semai, Temiar, Che Wong, Semelai, Jah Hut 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 small number can be considered to be semi-nomadic, such as the Negritos. As urbanization continues, traditional livelihoods are increasingly set aside as more become engaged in waged labour and salaried jobs.²⁵

²⁰ Bulan, R. 2007. Native Title in Malaysia: A ‘Complementary’ Sui Generis Proprietary Right under the Federal Constitution. *Australian Indigenous Law Review*, Vol. 11 No. 54, p. 62.

²¹ *Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors* [2005] 6 MLJ 289, 308.

²² Colin Nicholas estimates the figure to be 147,412 individuals in 2003. See Colin Nicholas, Centre For Orang Asli Concerns, <http://www.coac.org.my>. Cited 2 November 2009

²³ Department of Statistics, Malaysia, State/District Data Bank 2005.

²⁴ Centre for Orang Asli Concerns website, available at https://www.coac.org.my/main.php?section=about&page=about_index [accessed 2 May 2019]

²⁵ Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Malaysia : Orang Asli*, January 2018, available at: <https://www.refworld.org/docid/49749ce85.html> [accessed 4 February 2019]

East Malaysia (Malaysian Borneo)

Sarawak, the largest state in Malaysia, has a population of more than 2.6 million people and approximately 38 sub-ethnic groups that constitute 50 per cent of the state's population. The groups that form the majority of the rural population are the Iban and the Bidayuh, who are primarily farming communities in the interior. The Melanau are commonly found closer to the coast and are associated with sago palm cultivation.²⁶ The Kayan and Kenyah, found in the upper interior, typically live in longhouses and practice shifting cultivation and engage in fishing to supplement their diet if located by a river, whereas the Kelabit and Lun Bawang are rice farmers and forest-dependent communities. There are very few Penan, who continue to live a nomadic lifestyle in the rainforest.

Sabah, in Northern Borneo, has more than 30 ethnic and sub-ethnic indigenous groups that comprise close to 60 per cent of the state's population. Together with the Murut and Kota Belud Bajau, the Kadazan-Dusun group is the most numerous; they are predominantly swidden farmers occupying the lowlands and hills, and the lower slopes of Mount 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 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.

1.3 Environmental change and challenges to indigenous peoples

1.3.1 Impact of colonial and neo-colonial histories and policies on indigenous peoples and local communities

Much of the existing legislation on land and forest have their roots in British colonial policies which are archaic and outdated. However, as they have been amended over time and tightened by post-independent federal and state governments, the collective customary rights of forest peoples over their lands have steadily been eroded.²⁷ Pre-existing customary land rights of forest peoples have not been given adequate protection; extractive and logging companies have been favoured in the name of economic development. Further, laws enabling land acquisition for public purposes have led to the resettlement of whole communities with inadequate compensation given for loss of their livelihood, thus resulting in displaced, impoverished and disconnected communities with no real recourse.²⁸

1.3.2 Main drivers of biodiversity loss and land/resource appropriation sovereignty

As a developing nation, Malaysia is focused on economic development and generating revenue from its natural resources as it progresses towards its planned target of high-income country status by 2024.²⁹ As a result, there has been massive forest exploitation in favour of large agricultural schemes, infrastructure projects, such as dams, highways, pipelines, and even airport.³⁰ These economic developments, industrial extraction of resources on the lands by powerful conglomerates, have adversely affected indigenous peoples whose livelihoods depend on their ancestral lands and territories. Indigenous peoples are generally perceived by the Malaysian government to be 'backwards' and in need of 'modernisation', prompting socio-economic policy attempts to develop their lands and resources commercially and, in the process, affecting their land-based culture. In some cases, inappropriate legislative amendments and judicial decisions have effectively marginalised, challenged, and weakened their ability to respond to external threats.

²⁶ Payne, J. 2005. *This is Borneo: Sabah, Sarawak and Kalimantan*. New Holland, London.

²⁷ Yong, C., SACCESS, S.A. & JKOASM, J.K.O.A.S.M. 2014. *Deforestation drivers and human rights in Malaysia: A national overview and two sub-regional case studies*. Forest Peoples Programme.

²⁸ Yong et al., *Deforestation drivers and human rights in Malaysia: A national overview and two sub-regional case studies*.

²⁹ Hidekatsu Asada, Kiang Tan Kay, Espinoza Ricardo & Vand Marieke, 'OECD Economic Surveys Malaysia Overview', no. July, 2019, p. 8.

³⁰ Vaz, J. 2012. *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, Bangalore, Pune and Delhi.

This has been met with various forms of resistance as indigenous peoples do not want to relinquish their rights to their lands and their links to their identity and culture in the name of economic development.³¹

Degradation of forest resources and loss of land and biodiversity is evident as a result of resource exploitation in the form of: both legal and illegal industrial logging; agribusiness expansion in the form of industrial tree plantations; oil palm plantations to sustain the biodiesel industry; large-scale infrastructures, such as large dams; urban development projects, such as the construction of roads and highways; extractive industries, such as mining and quarrying (e.g. open pit, blasting) and mining-related activities, such as the processing facilities and the tailings; and land development and other land schemes.³²

These drivers of change have far-reaching consequences on indigenous peoples and infringe on their human rights. The recognition of their customary rights to land and community conserved areas is at the forefront of their challenge, as their rights to native land tenure (NCR lands) is weakened or removed; landowners and communities' free, prior and informed consent (FPIC) is often not sought, and ancestral lands are acquired without fair due payment and without remedy. Further, in situations of land-conflict, there have been reported use of violence by the authorities and companies against the communities in question. It cannot be overstated that, as a result of deforestation and land acquisition, many indigenous communities are deprived of their traditional livelihoods, their means of subsistence and income and that this has a significant impact on the socio-cultural systems, traditional knowledge and oral traditions³³ that underpin their identity.

1.3.3 History of and/or on-going initiatives by peoples/communities to preserve their cultural and territorial sovereignty

Political representation of indigenous peoples in Malaysia

Malaysia practices a parliamentary democracy with elections every five years. Historically, political parties were established along ethnic and racial lines and, as such, there were opportunities for indigenous peoples to participate in government to represent their communities. Indigenous peoples of Malaysia, except for the Orang Asli, have, by and large, had a reasonable representation in the political process of the nation.³⁴ The political landscape in Malaysia is one that has seen tremendous fluidity and uncertainty in the last few years. After 60 years of being ruled by the Barisan National Coalition, a shock election victory at the Fourteenth General election saw the incoming of a new coalition of four parties called Pakatan Harapan ("Alliance of Hope"), which won on the promise of increased government accountability and is led by the former Prime Minister Tun Dr Mahathir Mohamed.³⁵ In Pakatan Harapan's 2018 election manifesto, the government had pledged to implement numerous human rights reforms, including the recognition and protection of the dignity and rights of the indigenous peoples of Malaysia, and to "work to implement the proposals of the National Inquiry into the Land Rights of Indigenous Peoples report by SUHAKAM".³⁶

³¹ Aiken, S.R. & Leigh, C.H. 2011. In the Way of Development: Indigenous Land-Rights Issues in Malaysia. *Geographical Review*, Vol. 10 No. 4, pp. 471–496.

³² Yong et al., *Deforestation drivers and human rights in Malaysia: A national overview and two sub-regional case studies*.

³³ Yong et al., *Deforestation drivers and human rights in Malaysia: A national overview and two sub-regional case studies*.

³⁴ Bulan, R. 2010. Indigenous Peoples and the Right to Participate in Decision Making in Malaysia.

³⁵ World Bank Malaysia Economic Monitor, see <http://www.worldbank.org/en/country/malaysia/publication/malaysia-economic-monitor-navigating-change>

³⁶ The National Human Rights Commission had carried out a National Inquiry on Rights of Indigenous Peoples to their lands in 2010-2013 and had concluded that their rights to land were not well protected. The Commission had 18 proposals to address the weaknesses, which the Pakatan Harapan government had agreed to implement. But with the new government that has taken over midway, it is yet to be seen if the same policy will be pursued.

The manifesto further promised to give recognition to the lands of the indigenous peoples of Peninsular Malaysia, Sabah and Sarawak, and to “establish a redress mechanism to ensure the affected party is adequately compensated” in cases where land has been unfairly appropriated. This should involve returning the original land to its owners, or if this is impossible, providing alternative land of equal quality.

Through a series of tumultuous events involving resignations and realignments in party memberships as recent as March 2020, that coalition came to an abrupt end, bringing in a new coalition called Perikatan Nasional that took over the government under the current Prime Minister Tan Sri Muhyiddin Yassin.³⁷ This political arrangement is fraught with uncertainty at present, with the countries’ future hanging in the balance. It is unclear whether the government of the day will uphold or overturn the many policies put in place by the previous government. Be that as it may, Gabungan Parti Sarawak (GPS) which is the dominant coalition in Sarawak, and has many native individuals representing majority-native constituencies, is now part of the ruling party at both the federal and state level. As such, it is hoped that indigenous people’s voices will be heard and represented in a meaningful way.

Although the Orang Asli have not formed their own political party, they have a senator appointed to the Senate. Even though indigenous representation in government has given indigenous peoples some voice, the natives of Sabah and Sarawak and the Orang Asli of Peninsular Malaysia remain among the most marginalised and vulnerable groups in Malaysia, with the main challenge revolving around their rights (or the lack thereof) to traditional lands and resources.

On-going initiatives by peoples/communities

Outside of politics, there have been several initiatives taken by each of the indigenous groups to form national or state-level non-political indigenous associations to advance their social, cultural and educational interests. The main ones include the KDCA (Kadazan Dusun Cultural Association) and Kadazandusun Language Foundation in Sabah, the Dayak Cultural Foundation in Sarawak, and the Orang Asli Association of Peninsula Malaysia (POASM) and Jaringan Kampong Orang Asli.³⁸ Several other ethnic community associations have slowly expanded their roles to become representatives of their communities in government and non-governmental stakeholder consultations on issues that affect their communities.³⁹ This has become necessary as the traditional leadership often is unable to deal with the complex commercial, and sometimes international, issues that affect their communities. Apart from the ethnic associations, several social NGOs including the Jaringan Orang Asal SeMalaysia (JOAS), a network of indigenous NGOs, have also sprung up to be a voice for the community in issues locally and internationally. They have also tried to raise awareness of issues concerning the communities, including the importance of conserved areas for community use or community forests managed by communities which fall into areas known as Indigenous Peoples and Community Conserved Territories and Areas (ICCAs).

³⁷ BBC News Report dated 5 March 2020: <https://www.bbc.com/news/world-asia-51716474>

³⁸ There are many other cultural associations based on ethnic groups.

³⁹ See Tan Chee Beng. 1997. Indigenous People, the State and Ethnogenesis: A Study of the Communal Associations of the "Dayak" Communities in Sarawak, Malaysia *Journal of Southeast Asian Studies* Vol. 28, No. 2 (Sep., 1997), pp. 263-284

1.4 Indigenous peoples and Community Conserved Territories and Areas (ICCAs)

1.4.1 Range, diversity, and extent of ICCAs in Malaysia

ICCAs are conceptually new in Malaysia, and efforts to define and create a framework for the management of ICCAs are at the early stage. The term used in Malaysia is “community conserved areas” (CCAs) which refers to an alternative form of voluntary conservation of an adjacent natural area with significant biodiversity, ecological, and cultural values by indigenous and local communities (ILCs) ⁴⁰. The conservation objectives are achieved through sustainable use of the ecosystem guided by traditional knowledge and customary laws. Although it is a relatively new concept in Malaysia, the principles embodied by ICCAs have been given policy recognition in several national and state-level policies that recognise and support contributions of indigenous peoples and local communities to biodiversity conservation. They are covered in the target actions stipulated by the following documents:

- (i) The National Physical Plan 3 (2016-2020)⁴¹
- (ii) The National Policy on Biological Diversity (2016-2025)⁴²
 - Action 2.1: Recognise, support and empower indigenous peoples and local communities.
 - Action 6.3: Develop community conserved areas as an integral part of our PA network.
- (iii) The Sabah Biodiversity Conservation Strategy (2012-2022)⁴³
 - Target 1.3: By 2022, land that is managed as ICCAs has increased significantly by implementing actions and activities that support community-based conservation and support collaboration with indigenous communities within protected areas and forest reserves.
 - Recognises ICCAs as “an integral part of Sabah’s protected area landscape”.
- (iv) The Heart of Borneo Strategic Plan of Action (2014-2020)⁴⁴
 - Code 2.3.a: Support the establishment of an ICCA Network among local communities through the Heart of Borneo- a Declaration between Malaysia, Indonesia and Brunei to a common conservation vision.
 - Code 2.3.b: Collaborate with indigenous communities within protected areas and forest reserves to ensure the effective management of forest resources and the creation of a network of protected areas, sustainably-managed forests and land-use zones across the 22 million hectares which constitute the Heart of Borneo. This area covers almost one-third of the whole island.

While support in terms of policy and strategic plans are afoot, the legal frameworks to enable the establishment of ICCAs in Malaysia to empower indigenous peoples and local communities to act as custodians for natural resources have yet to be developed at the national level. As such, indigenous peoples’ community conserved areas (CCA) have not been defined and inventoried as yet. However, the Ministry of Water, Land and Natural Resources (KATS) in its Biodiversity Baseline Study has identified 86 conservation projects involving indigenous peoples and local communities, comprising 29 ICCA

⁴⁰ Ministry of Natural Resources and Environment. 2019. *6th National Report of Malaysia to the Convention of Biological Diversity*. December 2019, Kuala Lumpur, p. 68.

⁴¹ Ministry of Urban Wellbeing, Housing and Local Government, 2016. National Physical Plan 3 (NPP-3). Available at: <https://www.townplan.gov.my/download/RFN/NationalPhysicalPlanningFramework.pdf>.

⁴² Ministry of Natural Resources and Environment, 2016, National Policy on Biological Diversity (2016-2025). Available at: <http://www.kats.gov.my/ms-my/PustakaMedia/Penerbitan/National%20Policy%20on%20Biological%20Diversity%202016-2025.pdf>

⁴³ Bornean Biodiversity & Ecosystems Conservation Programme Phase II, a joint programme of the Sabah State Government, University Malaysia Sabah, and Japan International Cooperation Agency, Sabah Biodiversity Strategy (2012-2022). Available at: <http://ww2.sabah.gov.my/phb/wp-content/uploads/Sabah-Biodiversity-Conservation-Strategy-ilovepdf-compressed1.pdf>.

⁴⁴ Sabah Forestry Department, 2013. The Heart of Borneo Strategic Plan of Action (2014-2020).

Projects and 57 community outreach, tree-planting, and habitat restoration projects to date.⁴⁵ The majority of the identified projects are based in Sabah as an ICCA review which analysed the connection between the ICCA concepts and the community governance of biodiversity was first carried out in Sabah in 2011.⁴⁶ For instance, Sabah has paved the way for ICCA recognition, with 3,384 hectares which includes the Bundu Tuhan Native Reserve (884 hectares) and Sg. Pin Conservation Area (2,500 Hectares).

Under the ICCA-GSI Initiative, there are currently eight ongoing projects in Malaysia which have been identified as potential ICCAs, and they are⁴⁷: -

- i) Alutok, Tambatuon, Monggis, Rumantai, Sg. Eloi and Alab Lanas in Sabah;
- ii) Long Beluk in Baram, Sarawak; and
- iii) Kg. Peta in Johor, Peninsular Malaysia.

CCAs in Malaysia also include Community Use Zones (CUZ) which was a management option initially introduced under the Crocker Range Park Management Plan in 2006, to deal with issues relating to communities living and utilising resources within protected areas. In Sabah, the legal framework for the establishment of CUZs was approved after an amendment to the Parks Enactment 1984 which gave Sabah Parks the mandate to zone sections of the park as CUZs for co-management. CUZs in Sabah were intended to be collaboratively managed by Sabah Parks and the relevant local communities, and a recognised example of CUZs are areas within the Crocker Range Park in Sabah (CRP). Local community representatives are recruited by Sabah Parks and the Sabah Wildlife Department (SWD) to act as 'Honorary Park/Wildlife Rangers' to monitor and patrol these areas.⁴⁸

In Peninsular Malaysia, there are a few community-driven CCAs, such as the Ara Damansara Ecopark and the Kota Damansara Community Forest in Selangor, and the Urban Community Forest (UCF) Network set up by the Malaysian Nature Society (MNS), the Perdana Botanical Gardens and the new Taman Tugu Park which collectively form the green lung of Kuala Lumpur.⁴⁹ However, these are not specifically ICCAs.

1.4.2 Governance and management of ICCAs

Many indigenous peoples in Malaysia continue to exercise traditional systems of governance and continue to observe traditional laws regarding the management of and interactions with the land, despite limitations imposed by Malaysian law. For most indigenous peoples, these traditional laws and systems of governance are based on the concept of interconnectedness. The governance and management of their territories and conserved areas vary across different ethnic groups and communities. Even though most of their resource management systems are developed and passed down through the generations and precede the existence of colonial powers and the modern state, there is a considerable difference among the various ethnic groups in the governance and management of their ecosystems and resources both in terrestrial areas as well as seascapes. The common thread between these communities is the continuous struggle to reconcile or merge traditional concepts of stewardship and customs on these resources with

⁴⁵ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 68.

⁴⁶ Majid-Cooke, F. & Vaz, J. 2011. *The Sabah ICCA Review: A Review of Indigenous Peoples and Community Conserved Areas in Sabah. Report submitted to the Japan International Cooperation Agency (JICA) as part of the project Traditional Ecological Knowledge in Sabah, under the Bornean Biodiversity and Ecosystems Conservation Phase II Programme. Global Diversity Foundation.*

⁴⁷ Under the Global Support Initiative to Indigenous Peoples and Community Conserved Territories and Areas (ICCA-GSI) in partnership with the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), Germany, the UNDP GEF-Small Grants Programme (SGP) has appointed PACOS to examine the ICCA situation and status in Malaysia. These sites were identified and selected due to their potential and willingness to take part in the process.

⁴⁸ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 68.

⁴⁹ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 68.

government objectives of resource commodification and economic development.⁵⁰ This is where traditional leadership plays an important role.

Sabah

The ICCA concept in Sabah emphasises active participation in decision making in matters relating to community life, in particular on natural resource conservation, traditional ecological knowledge (TEK) and local management systems. The objective is to promote equitable outcomes, such as access to shared benefits and resources within and for the community. In this context, community-based natural resource management refers to managing the fertility of the rainforest soils for short term farming and thereafter leaving the soils to fallow until they can be used again.⁵¹

Jannie Lasimbang and Colin Nicholas write about the practice of ensuring that wildlife thrives, by practising selective hunting and the concept of “use and protect” which ensures that the animals and plants with medicinal properties are not overharvested. Another example of local resource management is clearly illustrated in the *managal* system practised by the local community which is a system of marking a stretch of river as “no fishing” zone for a certain period of time (six months to a year) to allow declining fish numbers to multiply. The period of abstinence is marked by a communal ceremony where the period is proclaimed.⁵²

Sarawak

Community-based resource management in Sarawak differs based on the different ethnic groups. The main groupings are the Iban, Bidayuh, Orang Ulu from the Upper Baram, Rejang and Limbang (the Berawan, Kajang, Kayan, Kenyah, Kelabit, Bisaya, Lun Bawang) and the Melanau and the nomadic or semi-nomadic group the Penan and Punan.⁵³ Examples from each of these groups will be used to illustrate indigenous management and governance. Most communities in Sarawak continue to observe the customary land tenure of their ancestors where land is held communally, with individual members obtaining rights to land and resources either by being the first to clear and cultivate virgin jungle or by seeking permission from the community through the community head. Typically, native community territories are comprised of longhouse settlement areas, cultivated lands, grazing lands, old longhouse sites and burial sites, communal jungle land, hunting and fishing grounds. In many communities, tree tenure customs govern how communal and individual rights to trees are acquired and maintained.⁵⁴ The native customary tenure and areas conserved for communal use are illustrated in the specific examples from the Kelabit, Iban and Penan communities below:

The Kelabit of Sarawak

Traditionally, customary rights to lands were acquired through the first felling of virgin jungle for cultivation. This is done within a communal village territory, called the *tana' bawang*, which refers to land accessed by the community and under the recognised control of its longhouse settlement. Individual rights are carved out of communal rights for cultivation. Essentially meaning that the first household who clears, has first claim. The longhouse is surrounded by grazing grounds for buffaloes and cows which are called *laman*, which are deemed common property with rights of access based on residence in the *bawang*, and membership in the domestic household. The Kelabit recognise *tana' tu'en mulong* or, simply,

⁵⁰ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 12.

⁵¹ Majid-Cooke & Vaz, *The Sabah ICCA Review: A Review of Indigenous Peoples and Community Conserved Areas in Sabah*.

⁵² Lasimbang, J. & Nicholas, C. 2007. Malaysia: The Changing Status of Indigenous and Statutory Systems on Natural Resource Management. *BRIDGING THE GAP: Policies and Practices on Indigenous Peoples' Natural Resource Management in Asia*, pp. 175–233, p. 189.

⁵³ Indigenous groups in Sarawak is listed in Art 161(7) of the Federal Constitution and in the schedule to the Interpretation Ordinance 2005.

⁵⁴ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p. 9.

ulung, within the *tana' bawang* (village territory), which refers to land reserved for the general use of the village mostly for timber and firewood. It is a designated area outside the boundaries of established secondary jungle or *amug* and trees may be marked and owned individually, for fruit or timber, but no individual may claim an exclusive right to harvesting of honey from a *tapang* tree containing *bua tikan umung* (a collection of beehives) in one area or tree. A tree reserved for communal use is marked using four sticks entwined to form a square. Historically, hunting and fishing was done only within each village territory. Today, however, with better means of transport, hunting appears to have transcended village lines. The Kelabit (like the Lun Bawang) produce their own salt through a saltwater evaporation process obtained from the numerous salt springs found in the highlands. Although these salt springs may be accessed by anyone from the Kelabit community to produce salt, it remains the common property of the community, subject to the control of the village within whose village territory it is located.

The Iban of Sarawak

The geographical location of the longhouse community and the contiguous territory for the Iban is known as *pemakai menoa*, or "land to eat from". It contains resources for sustenance including land suitable for farming, water, fishing, hunting, and forest produce. The *pemakai menoa* includes *tanah umai* (cultivated land), *tembawai* (the old longhouse site), *pendam* (cemetery) and a forest area. The farming land within the *menoa* (territory) is called the *temuda*, which is acquired through the clearing and cultivation of the land. The Iban often maintain a forest area called the *galau* or *pulau galau*. The *pulau* is the primary forest preserved to supply forest products, for water catchment, and for hunting. It is also preserved to honour distinguished people. The boundary of the *pemakai menoa* is determined with reference to mountains, ridges, rivers, and other geographical features. The Iban allow *temuda* to fallow in order to allow the soil to regain fertility and for regrowth of trees and forest produce within the jungle, which is a process that could take up to 25 years. Land is identified within the forest-fallowing cycle in four stages: (1) *jerami* or *redas* - land one to two years following the harvest of a padi crop (2) *temuda* - land following a three to ten year fallow period, (3) *damun* - land following a ten to twenty year fallow period, and (4) *pengerang* - which resembles virgin forest, but is secondary growth or *temuda* laid to fallow for greater than 25 years. The practice of maintaining the *pulau* or jungle that supplies forest products is "important for the survival of the Iban".⁵⁵

The Penan of Sarawak

The Penan manage land within their territorial boundaries according to the practice of *molong*, which means to preserve or foster. *Molong* is a sustainable harvesting method which establishes community or individual rights to stewardship over resources cared for or managed by the Penan, and the person who first claims the resource establishes rights of tenure. However, these rights are lost when the person moves away from the community. The *molong* tradition provides a way for the community to keep an account of resources in sizeable areas and conserve those resources for future use. According to Dr. Ramy Bulan, the *molong* system informs the overall land tenure customs of the Western Penan based on their 'sense of belonging to a particular portion of landscape', a belief "validated economically and historically by the management of resources in an area".⁵⁶

The preceding paragraphs show elements of traditional conservation, use and local governance of territories and sustainable land use by local communities. These practices reveal potential for community conserved areas managed by local communities through their own traditional knowledge systems.

⁵⁵ Bulan, R. & Locklear, A. 2008b. *Legal Perspectives on Native Customary Land Rights in Sarawak*. SUHAKAM, Kuala Lumpur, p. 39.

⁵⁶ Brosius, P.J. 2006. Between Politics and Poetics: Narratives of Dispossession in Sarawak, East Malaysia. In Biersack, A. & Greenburg, J.B. (eds.), *Reimagining Political Ecology ('Between Politics')*, Duke University Press, Durham, pp. 281-322 cited in Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p 41.

1.4.3 Main threats to communities' local governance of territories, areas, and natural resources

As previously explained, the main threats to communities' local governance of territories, areas and natural resources are the deprivation of communal land due to encroachment and illegal logging, or land acquisition. The legislation will be dealt with later in the paper, but, at the outset, it is useful to note some factors surrounding the issues.

In Sabah, the threats to and infringement of the rights of indigenous communities are closely associated to the recognition of their claim to communal lands and resources by the government, loss of livelihood as a result of the acquisition of the land by the government and forced resettlement without requisite consultation and adequate compensation, 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.⁵⁷ In protest against a proposed mega-dam in Papar, indigenous peoples claim that the government has failed to understand that, because of its magnitude, the mega-dam will affect the environment and everyone living by the river regardless of the dam's location. They have emphasised that the rich green land and clean rivers are lifelines and central to their way of life, with sacred ancestral tradition attached to their identity saying, "we are indigenous people who live with and rely on nature. We are not urban settlers who live in lots and rely on modern amenities".⁵⁸

In Sarawak, the recognition of the native customary rights to land has, for many years, been protracted in litigation as a result of restrictive statutory recognition and the conflict between native notions of customary tenure and the leaning of the State towards pure documentary title under legislation. Issuance of licences and provisional leases to third parties that have encroached partly on land claimed by natives, which community leaders have opposed and which have led to conflicts. There have been reports of deaths of persons⁵⁹ either in protest or in the attempt to assist the affected communities.⁶⁰ The announcement by the Chief Minister and the present government to freeze the grant of any new licences and provisional leases granted to large plantations (including tree plantations) is a welcome relief for native landowners.⁶¹ The Chief Minister announced the government's emphasis on conserving the environment including the replanting of degraded forests.⁶²

In Peninsular Malaysia, the Orang Asli have, through long term formal and informal government policies and programs, been denied their rights to customary lands, the ensuing livelihoods, their identity as a people, and therefore have been denied self-determination. Many assimilation programs designed to include the Orang Asli into the majority group population are seen as a threat to their identity, by erasing traditional knowledge, culture and identity, and affinity to the land of their forefathers. In Gua Musang in Kelantan, Orang Asli have begun to take matters into their hands by erecting blockades against loggers who have been granted licences to log timber on lands that they claim as their customary lands.⁶³

⁵⁷ Majid-Cooke & Vaz, *The Sabah ICCA Review: A Review of Indigenous Peoples and Community Conserved Areas in Sabah*.

⁵⁸ <https://www.freemalaysiatoday.com/category/nation/2019/08/01/protesters-seek-divine-intervention-to-halt-papar-dam-project> and https://www.thestar.com.my/opinion/letters/2020/02/24/study-needs-before-building-dam?itm_source=parsely-api

⁵⁹ See Borneo Post on Bill Kayong murder at <https://www.theborneopost.com/2018/10/16/re-open-bill-kayong-murder-case-swak-pkrmps-urge-authorities/> and Amnesty International. 2018. The Forest is Our Heartbeat: The struggle to defend indigenous land in Malaysia. *Amnesty International*, No. ASA 28/9424/2018, pp. 1–58, p. 7.

⁶⁰ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*; Yong et al., *Deforestation drivers and human rights in Malaysia: A national overview and two sub-regional case studies*.

⁶¹ <https://www.theborneopost.com/2018/07/12/no-provisional-lease-issued-to-forest-plantations-len-talif/>

⁶² The Borneo Post online, 'No more new oil palm plantations, focus is on conserving environment' Posted on December 3, 2019.

⁶³ <https://www.freemalaysiatoday.com/category/nation/2018/09/19/gua-musang-orang-asli-blockades-cause-loggers-to-lose-millions/>

1.4.4 Main initiatives being undertaken to address the threats to ICCAs

Notwithstanding the recognition of community conserved areas (CCAs) in several policy documents, clearly, implementation is lacking, as a deeper understanding of what ICCAs encompass and how they can be incorporated into the Malaysian context is necessary. There have been various attempts to gather stakeholders comprising government agencies, academicians, non-governmental organisations (NGOs) and indigenous peoples to participate in discussions to exchange viewpoints and share expertise, in order to analyse the current status of ICCAs and to work towards creating a national strategy. Between 2011-2012, the ICCA Consortium (www.iccaconsortium.org), SwedBio and Natural Justice conducted a larger study on an international level and 15 national-level legal reviews (including Malaysia) between 2011-2012 to analyse the interaction between international and national legal and institutional frameworks on the one hand, and the vitality and resilience of ICCAs on the other:

- (i) Legal Review: An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities (Report No.1: International Law and Jurisprudence)⁶⁴; and
- (ii) Legal Review: An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities (Report No.15: Malaysia)⁶⁵

The ICCA Legal Review 2012 focused predominantly on Sabah, as it was the only state that had undertaken a state-wide ICCA Review (2011) at that point.⁶⁶ While the international and national reviews clearly highlighted areas of advancement, significant gaps and weaknesses of various kinds continue to exist at all levels. The 2012 Legal Review Synthesis Report⁶⁷ set out the following four tendencies in the international and national legal systems (including Malaysia) as they relate to socio-ecological systems. Factors resulting in the continued marginalisation of indigenous peoples and local communities are:

- International law is exclusionary and fragmented.
- The development, implementation and enforcement of laws is discriminatory.
- Inappropriate legislation undermines indigenous peoples and local communities' and their territories, areas and natural resources.
- Non-legal recognition and support of indigenous peoples and local communities' and their territories, areas and natural resources remains absent, weak, or inappropriate.⁶⁸

Target 2 and indicator 2.1 of the National Policy on Biological Diversity 2016-2025 is that policy and legal provisions to empower indigenous peoples and local communities to be custodians of biodiversity have been developed by 2021. The Sixth National Report to the CBD confirmed that progress has been made to achieve this target but at an insufficient rate. Although the concept of CCAs has been recognised in several policy documents including the National Physical Plan, the National Policy of Biological Diversity, and the Sabah Biodiversity Strategy 2012-2022, a systematic approach and legal provisions to empower indigenous peoples as custodians for natural resources have yet to be developed at the national level.

⁶⁴ Jonas, H., Makagon, J.E., Booker, S. & Shrumm, H. 2012. *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*. No. Report No.1: International Law and Jurisprudence, Bangalore, Pune and Delhi.

⁶⁵ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*.

⁶⁶ Majid-Cooke & Vaz, *The Sabah ICCA Review: A Review of Indigenous Peoples and Community Conserved Areas in Sabah*.

⁶⁷ Jonas, H., Kothari, A. & Schrumm, H. 2012. *Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities. An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities. Synthesis Report*, Bangalore, Pune and Delhi.

⁶⁸ The following sections are drawn from Jonas et al. 2012. (Legal Review).

As mentioned earlier, one key initiative is the ICCA recognition of 3,384 ha in Sabah comprising the Bundu Tuhan Native Reserve (884 ha) (Case Study on Bundu Tuhan Native Reserve in Part 11) and Sg. Pin Conservation Area (2,500 Ha).⁶⁹ PACOS Trust has also undertaken a *Community Conservation Resilience Initiative* (CCRI) which aims to increase the resilience of indigenous peoples' customary institutions and natural resource stewardship systems through constructive engagements with the decision-making processes. This initiative is laudable. It has been proposed by some writers that "to qualify as conservation, any action or practice must not only prevent or mitigate resource over harvesting or environmental damage, it must also be designed to do so".⁷⁰ Interestingly, a report on the Gumantong Conserved Area of about 590 hectares highlights the distinction between the communities expressing an intention to conserve and conservation as an unintended outcome of cultural practices. It goes on to consider the implication of this distinction for the process of recognising and supporting community conserved areas.⁷¹

In Sarawak, the state government has recognised the participation of indigenous peoples and local communities in managing protected areas and wildlife. The Honorary Wildlife Ranger, under section 8 of the Wild Life Protection Ordinance 1998, is a volunteer-based programme aimed at involving locals as the eyes and ears of the government. The Special Wildlife Committee⁷² (for wildlife sanctuaries) and the Special Parks Committee (for national parks and nature reserves)⁷³ are formed with selected members of the communities as committee members to ensure the participation in managing these protected areas.

On an international level, there are international agencies that have been engaged to support the development of ICCAs, and to promote the right and role of indigenous peoples and local communities in conservation. For example, the *EU-REDD+ Tackling Climate Change through Sustainable Forest Management and Community Development Project*, which was launched to support the community-based restoration of degraded habitat and sustainable agriculture within CCAs in the Kinabalu ECOLINC region. The International ICCA Consortium has supported a three-year initiative to increase the resilience of indigenous local communities' customary institutions and natural resource stewardship systems through constructive engagement with decision-making processes since 2014. The project supports communities in five villages and is part of the global Community Conservation Resilience Initiative.

⁶⁹ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 31.

⁷⁰ Smith, E. & M, W. 2000. Conservation and Subsistence in Small-Scale Societies. *Annual Review of Anthropology*, Vol. 29, pp. 493–524, p. 493.

⁷¹ Massey, A., Bhagwat, S. & Porodong, P. 2011. Beware the animals that dance: Conservation as an unintended outcome of cultural practices. *Society, Biology and Human Affairs*, Vol. 76 No. 2, pp. 1–10.

⁷² Section 9 of the Wild Life Protection Ordinance 1998.

⁷³ Section 8 of the National Parks and Nature Reserves Ordinance 1998.

In December 2018, UNDP's GEF-Small Grants Programme (GEF-SGP) in collaboration with PACOS Trust, a local non-governmental organisation, held a multi-stakeholder consultation workshop aimed at engaging relevant stakeholders, forming an ICCA working group and working towards developing a national ICCA strategy. The discussions held in this workshop have informed some of the aspects of this Legal Review.



ICCA Strategy Development Consultation Workshop in December 2018, Kota Kinabalu, Sabah

PART 2: HUMAN RIGHTS AND THE LAW IN CONTEXT

2.1 International treaties and conventions

Malaysia practices dualism, as a result of its British colonial legal heritage, and this has posed challenges in the implementation of international law in Malaysia. The dualist approach means that the effect of ratification of treaties and its implications on Malaysia follows the “doctrine of transformation” which essentially means that international law only becomes binding and enforceable if it has been directly incorporated into domestic law by an act of Parliament by an enabling statute⁷⁴. Article 76 (1) (a) of the Federal Constitution gives power to Parliament to make laws for the purpose of implementing any treaty, agreement or convention including human rights treaties.⁷⁵ Although this has been the accepted position in Malaysia, the Constitution does not speak to the relationship between international and national law, nor does it expressly state that implementing legislation is strictly necessary to give effect to international treaties.⁷⁶ Article 160(2) of the Federal Constitution does not include “international law” in the definition of “law”.

The Malaysian Courts have traditionally taken a strict dualist approach towards international law, giving effect only to national legislation and statutes as enforceable in courts. However, this stance seems to be shifting with the increase in judicial activism and engagement with human rights law in the last decade. In order to measure Malaysia’s human rights practice, it is helpful to see what international instruments it has ratified.

To date, Malaysia has only signed three out of the nine core treaties on international human rights: the United Nations Human Rights Conventions, which deal with the Elimination of Discrimination against Women (CEDAW); United Nations Convention on the Rights of the Child (CRC) Children’s Rights (with reservations); and the Convention on the Rights of Persons with Disabilities (CRPD). Additionally, Malaysia has ratified six of the eight core conventions of the International Labour Organisation (ILO) including: the Forced Labour Convention 1930; the Equal Remuneration Convention 1951; Minimum Age Convention 1973 and the Worst Forms of Child Labour Convention 1999; and the Right to Organise and Collective Bargaining Convention 1949.

Malaysia is a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁷⁷ The UNDRIP contains a comprehensive list of rights, both individual and collective, of indigenous peoples.⁷⁸ The Declaration sets out a wide-ranging and comprehensive list of rights belonging to indigenous peoples including non-discrimination, indigenous customs, land rights and state obligations to obtain the “free, prior and informed consent” of the community prior to taking actions that threaten indigenous interests in traditional lands, rights to own use, develop and control the lands and territories that they possess by reason of their traditional occupation and governed according to their own customs, traditions and their own indigenous knowledge systems (Articles 24-32).

⁷⁴ Brownlie, I. 1998. *Principles of Public International Law*. 5th edn, Oxford University Press, pp. 42–43.

⁷⁵ Human Rights Council. 2009. *A/HRC/WG.6/4/MYS/1/Rev.1, National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, Malaysia*. Vol. 15 No. February, pp. 2–13, viewed, <http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/MY/A_HRC_WG6_4_MYS_1_E.PDF>, p. 3.

⁷⁶ Neo, J.L. 2012. Incorporating Human Rights: Mitigated Dualism and Interpretation in Malaysian Courts. *Asian Yearbook of International Law*, Vol. 832 No. 12, pp. 1–37.

⁷⁷ United Nations Working Group on the Universal Periodic Review, see https://lib.ohchr.org/HRBodies/UPR/Documents/Session4/MY/A_HRC_WG6_4_MYS_1_E.PDF

⁷⁸ United Nations, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Towards Human Rights for All, Says President, UN General Assembly Press Release GA/10612 (13 September 2007)’(‘Press Release’) <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> at 1 February 2008 (Remarks of Robert Hagen of U.S. and Jairo Montoya of Colombia).

Malaysia is also a signatory to the United Nations Convention on Biological Diversity (CBD) signed in June 1992 in Rio de Janeiro. The United Nations Convention on Biological Diversity 1992, Article 8(i) and the Cartagena Protocol both have relevance for indigenous peoples. The CBD is an international framework convention with three main goals: conservation of biodiversity, sustainable use of biodiversity resources and the equitable sharing of benefits from the use of genetic resources. In September 2016, Malaysia adopted the United Nations' Agenda 2030 for Sustainable Development and since then has made significant progress towards the realisation of the Sustainable Development Goals (SDGs), which are consistent with the CBD Strategic Plan for Biodiversity and other multilateral environmental agreements.⁷⁹ However, Malaysia has not ratified the International Convention on Civil and Political Rights (ICCPR) nor the ICESCR. This is significant as the applicability of the fundamental right of indigenous peoples to self-determination enshrined in Common Article 1 of the ICCPR and the ICESCR underlies the principle of Free, Prior and Informed Consent (FPIC), which is a fundamental principle in the UNDRIP. Therefore, even if it has ratified the UNDRIP, its application (at least theoretically) would have an implication on the respect of human rights of indigenous peoples' especially in forest and land-related businesses – one of the main areas of reported human rights violations in Malaysia. Malaysia's National Human Rights Commission, SUHAKAM has been pushing for the government to at least accede to the CAT, the ICCPR and the ECOSOC by 2020. Thus far, it would appear that no concrete steps have been taken to this end.⁸⁰ Malaysia's failure to ratify the ICCPR and the ICESCR could signify its overall attitude and commitment of the states' consent to be bound by international human rights standards as treaty law is: "indisputably the most significant source of international human rights law today".⁸¹ There has been a recent effort to come up with a National Human Rights Action Plan conducted by the legal department of the Prime Minister's Office. However, the emphasis on indigenous peoples is reportedly minimal,⁸² and the report has been disparaged as purely cosmetic by some NGOs.⁸³ This is relevant to the discussion at hand as it calls into question the general attitude of the Malaysian government towards protecting indigenous peoples and community conserved territories and areas.

The United Nations Protect, Respect, Remedy Framework and the Guiding Principles on Business and Human Rights

The United Nations Human Rights Council (UNHRC) unanimously adopted the Protect, Respect, Remedy (PRR) Framework in 2008 and the United Nations Guidelines on Business and Human Rights (UNGPs) were adopted on 6 July 2011 by the Human Rights Council. The UDHR and the ICESCR, which comprise the International Bill of Human Rights (IBHR), together with the ILO Declaration on Fundamental Principles and Rights at Work, were used as a benchmark by the SRSG in developing the PRR Framework.⁸⁴ The UNGPs are structured in the same way as the PRR Framework. The first pillar provides for the States' duty to protect against human rights abuses by third parties, including business enterprises, through relevant laws and regulations. The second pillar is the corporate responsibility to respect human rights, which provides that companies should act with due diligence to avoid infringing on the rights of others and to address adverse human rights impacts. The third pillar provides that victims should have greater access to both judicial and non-judicial grievance mechanisms. There are 31 UNGPs comprising foundational and operational principles, the former being the basis for the latter. This will be elaborated on in Part 5.

⁷⁹ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 9.

⁸⁰ <https://www.freemalaysiatoday.com/category/nation/2019/07/08/no-rush-govt-says-on-ratifying-un-treaty-against-torture/> and <https://scandasia.com/norwegian-embassy-supported-malaysia-to-ratify-un-treaty-against-torture/>

⁸¹ Megret, F. 2010. Nature of Obligations. In Moeckli, D., Shah, S. & Sivakumaran, S. (eds.), *International Human Rights Law*, Oxford University Press, Oxford, pp. 124–149, p. 7.

⁸² <http://www.bheuu.gov.my/index.php/en/publication/national-human-rights-action-plan-2018>

⁸³ <https://www.suaram.net/2018/03/05/national-human-rights-action-plan-is-purely-cosmetic/>

⁸⁴ Ruggie, J.G. 2013. *Just Business-Multinational Corporations and Human Rights*. W.W. Norton & Company, Inc, New York, p. 19.

The rights of indigenous peoples have been a main concern under the UNGPs since the Guiding Principles were endorsed by the UNHRC in 2011 and they were selected by the UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises as a focus area for the first thematic report to the UN General Assembly in 2012.

2.2 International human rights law, customary international law and Malaysian common law supporting indigenous peoples and local communities' rights

It is important to state that although Malaysia is not a party to the ICCPR and the ILO Convention No. 169, it is legally bound to follow customary international law. In section 2.2, the treaties are not cited because Malaysia is a party to them, but because they reflect principles that have become part of customary international law, which Malaysia is obliged to follow based on its membership in the international community. It is argued that although not all of the authoritative documents referred to here can be taken as a whole to articulate customary law, the documents represent fundamental principles that are widely accepted and, therefore to that degree, are indicative of international customary law.⁸⁵ For instance, the UN Declaration on the Rights of Indigenous Peoples has one of the highest number of signatories of any international document. The major countries that had initially not signed namely the USA, Australia, Canada and New Zealand have reversed their stand and have now signed the Declaration.

Similar to the UN Declaration and the Committee's interpretation of Article 27 of the ICCPR, the ILO Convention No. 169 contains protections for indigenous customs and land rights and sets out requirements for indigenous participation in decisions affecting those rights.⁸⁶ Article 4 of the ILO Convention No. 169 requires that States adopt measures to secure indigenous peoples' property, institutions, and cultures, consistent with the desires of the community concerned. Article 5 requires that indigenous social, cultural, religious and spiritual values and practices be recognised, protected, and respected in applying the Convention. Article 8(1) requires State parties to have 'due regard' for indigenous customs and customary laws in applying national laws and regulations, while Article 8(2) secures the right of indigenous peoples to their customs and institutions. Additionally, Article 23(1) requires that State parties recognise the importance of community-based, subsistence economies and traditional activities, such as hunting, fishing, trapping and gathering, in maintaining indigenous culture and economic self-sufficiency and development. State parties must "ensure that these activities are strengthened and promoted".

The Convention on Biological Diversity (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 8(j) requires States to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity", whereas Article 10(c) supports the "customary use of biological resources in accordance with traditional cultural practices" and is taken to encompass respect for indigenous tenure, management and governance of its resources., Therefore, Malaysia has an international obligation to enact these conventions at both national and state levels. However, these have limited effect unless the provisions are legislated into municipal laws. As part of Malaysia's response to the CBD strategic plans 2011- 2020, the National Policy on Biological Diversity (NPBD) 2016-2025 was formulated to provide the direction and framework to conserve biodiversity and sustainability. The Malaysian government issued its Sixth National Report setting out the progress of the NPBD 2016-2025 (NPBD) indicators and actions in achieving the national targets and Aichi Biodiversity Targets (ABTs) in December 2019.

⁸⁵ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*. P139.

⁸⁶ Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989 (entered into force 5 September 1991), International Labour Organisation, ILOLEX Database of International Labour Standards at 1 December 2019.

International human rights law has influenced the development of Malaysian common law on native title. Beyond native title law, Malaysian case law generally recognises that the international human rights principles expressed in the United Nations Universal Declaration of Human Rights are persuasive, although are not a binding authority. References to the UNDRIP have often stated clearly that the court is not bound by the Declaration. All principles therein are subjected to the Federal Constitution. However, some scholars have argued that protections for indigenous rights have already developed into international customary law.⁸⁷ Furthermore, section 3(1) of the Civil Law Act 1956 provides that Malaysian courts can apply English common law in the absence of written law and subject to local circumstances and local custom. Thus, the common law may serve as an instrument through which such human rights are incorporated into domestic law. Human rights are acknowledged as inherent to a democratic society. Specifically, indigenous rights must be accorded equal status under the law, and States are obligated to protect indigenous rights to traditional lands, to respect indigenous customs, including those associated with land tenure, and to consult with and obtain the consent of indigenous communities prior to taking actions that may affect their rights.⁸⁸

In the 2011 Federal Court (apex court) case of *Bato Bagi v Kerajaan Malaysia* [2011] 6 MLJ 297, the court showed its adherence to a strict interpretation of the dualist system when it dealt with a case of extinguishment of native customary rights by the Government of Sarawak without prior consultation. It was argued that the Government owes a fiduciary duty to protect the interest of the natives including the protection of their claims on the land and that international norms as embodied in the UNDRIP should be adhered to. The Federal Court opined that “international treaties do not form part of our law unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution” and that the UNDRIP must still be read in the context of the Constitution.

Despite some reluctance in the courts to apply international norms, it is encouraging to note that the High Court, just the year after in the landmark case of *Noorfadilla binti Ahmad Saikin v Chayed* [2012] 1 CLJ 769, recognised Malaysia’s obligations under CEDAW and acknowledged its duty to take into account the government’s commitment and obligation. Notwithstanding the fact that the CEDAW provisions had not been incorporated into domestic law as Malaysia is a party to the Convention, the international interpretation of the term “gender” in CEDAW is followed under the Federal Constitution. However, as it is currently pending appeal at the Federal Court, it remains to be seen if the landmark decision will remain precedent.

2.3 Constitutional protection for indigenous peoples under Malaysian law

Any study and analysis of laws on the rights of any people or community in Malaysia must begin with provisions of the supreme law of the land - the Federal Constitution (Article 4). The definition of law under the Federal Constitution includes written law, (including subsidiary laws) common law and customs having the force of law (Article 160). The Federal Constitution protects rights vital to maintaining the special relationship between native communities and their lands. This relationship underlies the spiritual, cultural, economic, and social existence of native communities. The right to property, livelihood, and equality before the law, safeguards for native interests with recognition of their custom and usage as law under Article 160, underpinned by the fiduciary obligation of government, all play a role in the recognition and protection of native customary title. This is because they embody and protect the special relationship and connection to their land, the recognition of custom and usage ensures the continuation of native communities. This is also consistent with the common law, which recognises native customs. The constitutional equality protection before the law under Article 8 must be taken to

⁸⁷ Prof James Anaya argues that UNDRIP has attained the status of international customary law.

⁸⁸ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*.

recognise native customs and property rights embedded therein on an equal basis with non-native property rights and thus be afforded the same protections. Recognition and protection for native title is also part of the constitutional right to livelihood, which guarantees native title based on the essential role of land in the economies and cultural identity of native communities. As a proprietary right under the Constitution, there can be no deprivation or termination except in accordance with law and upon payment of fair compensation as provided by Article 13. Adequacy of compensation must factor in the role of land in the livelihood of native communities. Remedies other than monetary compensation may be necessary where the deprivation of property constitutes a deprivation of livelihood, and right to life under Article 5 of the Constitution. A related point with regards to recognition of custom and usage is the importance of the traditional leadership that are the custodian of the customs and their application.

2.4 Traditional leadership hierarchy and decision making, native courts and local government

Since traditional indigenous decision-making processes are embedded in native customary practices, the constitutional provisions that protect customs and usage also protect those mechanisms. Traditionally, indigenous peoples have primarily made their decisions through consensus and settled their disputes through a participatory process of consultation, negotiation and mediation.⁸⁹ This process has worked well in: a cohesive community where the customary practices are alive; traditional leadership well-versed with the *adat* or customs; and respect for the leadership is deeply ingrained. Administratively, in Sabah and Sarawak this traditional process has been integrated with formal court systems as a supporting and complementary process,⁹⁰ as native courts deal with breaches of native law and customs. The personnel at the lower courts preserved the traditional dispute resolution structure administered by the traditional leadership comprising the headman, the Penghulu, Pemancha and Temenggong in Sarawak, and the headman and the *Orang Kaya-Kaya* (the nobility) in Sabah. The adjudicators in higher (appellate) courts are drawn from the government administrators, the District Officer, the Resident (Sarawak) and a High Court judge may sit in the Native Court of Appeal.⁹¹ As the traditional leadership in these courts apply native laws and customs, they also use customary rules with regards to the allocation and management of resources. There is no equivalent aboriginal court system for the Orang Asli in Peninsular Malaysia; however, a traditional system exists where the *batin* (headman) and the *Balai Adat* (Council of Customs) resolve issues in the community according to their own customs.

The government instituted village committee in all rural communities is called the JKKK (*Jawatan Kuasa Kemajuan dan Keselamatan*) (Committee for Development and Security) which functions as an intermediary between the community and the local government to act as a conduit for government funding for development and ideally to decide on policies for the villages.⁹² An understanding of the traditional leadership and their roles in the local governance of resources is essential in this context.

On the whole, while matters like national security, international treaties, education and federal courts fall under Federal jurisdiction, Sabah and Sarawak have their own legislation on specific areas that fall under the State list, including matters of lands, forests, local government, and customs and religion. These matters pertain to indigenous communities living in their own territories, where traditional and contemporary systems of stewardship which are embedded within their cultural practices.

⁸⁹ See for instance, R Bulan, "Resolution of Conflict and Disputes under Kelabit Customary laws in Sarawak", in Zawawi Ibrahim, *Representation, identity and Multiculturalism in Sarawak*, 2008, at 155.

⁹⁰ See Peter R Phelan, *The Traditional Legal System of Sabah*, Pusat Kajian Borneo, Yayasan Sabah, 2003. See also Wan Arfah Hamzah and Ramy Bulan, *Introduction to the Malaysian Legal System*, Oxford Fajar, 2002.

⁹¹ The Sarawak Native Court Ordinance 1992 and Rules, and the Sabah Native Court Enactment 1992 and Native Court Rules 1993.

⁹² These policies range from security issue, to social, educational, welfare and women's affairs.

This divided jurisdiction means that Sabah and Sarawak have their own state laws to protect, regulate or conserve their natural resources, customary land tenure and related cultural practices, in addition to their own as state courts; the rest of the states in Peninsular Malaysia are regulated by another set of conservation, environmental, land and forestry laws. Therefore, there is a spectrum of laws applicable in each of the three regions which, though uniform in substance, are very different in implementation and governance suited to the demography of each region.

2.5 Recommendations: Legislative and institutional reforms required to better protect the human rights of indigenous peoples and local communities

The failure of the state to effectively discharge its duty to protect indigenous peoples and local communities and enforce the existing legal protections have many far-reaching consequences, including human rights violations, such as:

- (i) the weakening or removal of the recognition of the rights of communities to native land tenure (NCR lands);
- (ii) lack of consultation sought for free, prior and informed consent (FPIC) of indigenous peoples and local communities;
- (iii) inadequacy of compensation for acquisition of and deprivation of local communities' and indigenous peoples' lands; and
- (iv) threat to life owing to the use of violence in land conflicts by the authorities.

The National Human Rights Council of Malaysia (SUHAKAM) received numerous complaints between 2002 to 2010 relating to indigenous people's customary rights to land, allegations of encroachment and dispossession of land, and violations of human rights. After conducting investigations into the complaints, the commission acted on the SUHAKAM Act 1999 which requires that human rights issues be addressed within the scope of existing relevant laws. Thus, SUHAKAM commissioned Dr. Ramy Bulan to conduct the study *Legal Perspectives on Native Customary Land Rights in Sarawak*,⁹³ to examine the basis of recognition, content and proof of native title and its protection, as well as to explore Malaysia's responsibilities under international customary law protecting indigenous land rights. SUHAKAM endorsed this report through its Economic, Social and Cultural Rights Working Group (ECOSOC) in 2008.

Despite the 2013 inquiry and repeated promises that the government would review the recommendations made by the Commission in its 2013 Report there appears to be minimal progress on the recommendations set out and no tangible improvement in the protection of the rights of indigenous peoples in Malaysia. The documented findings, which included 18 recommendations to resolve the indigenous communities' land problems, was never debated in parliament.⁹⁴ The Pakatan Harapan Government promised to bring this report "for parliamentary debate within the first year of the Pakatan Harapan administration" and its pledge to incorporate the proposals of the National Inquiry into the Land Rights of Indigenous Peoples⁹⁵ did not materialise as the government unexpectedly collapsed.

⁹³ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*.

⁹⁴ SUHAKAM. 2013. *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*. Kuala Lumpur.

⁹⁵ <https://www.iwgia.org/en/malaysia/3429-iw2019-malaysia>

SUHAKAM's recommendations for legislative and institutional reforms remain relevant and are reiterated here and include:

(i) Recommendations for overall legislative reform at the international level:

- Ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and International Labour Organisation Convention 169 on Indigenous and Tribal Peoples.
- Accept, without further delay, the visit request by the UN Special Rapporteur on the rights of indigenous peoples and guarantee free and unimpeded access to all parts of the country, allowing private meetings with a wide range of stakeholders, including indigenous peoples.
- Prioritise security for peoples and communities in land tenure, food and basic human needs (adequate housing, clean water, transportation, etc.), complying with international laws and standards like the Universal Declaration on Human Rights, UN Declarations on the Rights of Indigenous Peoples.
- Review and amend existing international macroeconomic and trade policies and laws that contribute to escalating human rights abuses and land-grabbing.

(ii) Recommendations for overall legislative reform at the national level:

- Respect and uphold human (including collective or community) rights.
- Adopt a human rights-based approach to land and forest tenure that takes into account: human rights as enshrined in domestic and international law and policy; recognition of indigenous peoples' adat; NCRs to land and other rights, practices and knowledge; the rights of indigenous peoples and forest-dependent local communities to represent themselves through their own institutions and community-elected representative leaders, taking into account gender, age, ethnicity/minority status; and other socio-economic factors that marginalise one or more groups of people and favour the other.
- Improve the implementation of legislation by harmonising laws and undertaking institutional reform.
- Improve access to justice and uphold the rule of law.
- Ensure that the constitutional protection on native title rights is not taken away, except in accordance to the law and upon payment of just compensation.
- Emphasis must be made on the fiduciary obligation of the government officials to consult and obtain consent from the native communities prior to taking action that may infringe their native title rights.
- Review and amend existing national macroeconomic and trade policies and laws that contribute to escalating human rights abuses and land-grabbing.
- Support legal empowerment and capacity building initiatives.
- Allow the National Human Rights Council to operate independently and effectively, free from reprisals for the free expression of its views.

(iii) Recommendations for legislating for integrated socio-ecological systems and implementing laws in conformity with human rights standards:

- Recognise and respect customary and collective land rights.
- Ensure protected areas comply with international rights, principles and standards.

PART 3: LAND, FRESHWATER AND MARINE

In Malaysia, the law relating to land differs based on the region. The National Land Code 1965 (NLC), which came into effect on 1st January 1965, is the primary law governing land ownership and tenure in Peninsular Malaysia. The other legislation that impacts indigenous peoples or Orang Asli of Peninsular Malaysia is the Aboriginal Peoples Act 1954, whereas Sabah and Sarawak have their own sets of land laws: the Sabah Land Ordinance 1930 and Sarawak Land Code (Cap.81) respectively. They will be dealt with in turn.

Marine fisheries and aquaculture in Malaysia are a federal concern, whereas inland fisheries and aquaculture regulations are issued by state authorities. The Fisheries Act No.317 (1985) and its regulations govern Malaysian fisheries. The Ministry of Agriculture and Agro-based Industry (MOA) is the state-mandated authority to oversee it, whereas the Director-General of Fisheries, who is the head of the Department of Fisheries Malaysia (DOFM) under the MOA, is responsible for overall aquatic natural resources management including marine parks, rehabilitation, conservation, and resource utilisation, and has the authority to develop marine and inland farming, in consultation with the relevant state authority.

The Department of Fisheries Malaysia is supported by its own Fisheries Research Institute (FRI) and the Southeast Asia Marine Resources Institute (ISMAT). The Ministry of Primary Industries (MPI) focuses on the management of the commodities industry, which includes palm oil, rubber, cocoa, and forestry sectors. The Maritime Institute of Malaysia (MIMA) deals with research issues involving national, regional and global maritime issues while the Freshwater Fisheries Research Centre within the Fisheries Department of the Ministry of Agriculture deals with the development of freshwater aquaculture, and the conservation and management of aquatic resources.

3.1 Land, freshwater and marine legislation in Sabah

The Sabah Forestry Department (SFD) is the state agency that is mandated to develop and implement land, freshwater and marine laws and policies in Sabah that relate to territorial and tenure rights. The SFD oversees forest reserves and the Department of Lands and Surveys (DLS) and manages all issues pertaining to land. Both agencies report to the Natural Resources Office (NRO) within the Sabah Chief Minister's (the Sabah Head of Government) Department. The SFD also plays a role in safeguarding the protection of forest reserves and ensuring that all commercial forest reserves parcelled within Forest Management Units (FMUs) are managed according to Sustainable Forest Management (SFM) guidelines. Sabah Parks and the Sabah Wildlife Department both report to the Ministry of Tourism, Culture and Environment who oversee conservation.

The Sabah Land Ordinance 1930

The legislation relevant to the recognition of Sabah native title is the Sabah Land Ordinance No.10 of 1930.⁹⁶ The Ordinance was a system of legal pluralism designed by the North Borneo Chartered Company that was established in Sabah (formerly known as North Borneo) in 1881 to support several native customary laws on the one hand, but suppress and replace those that hampered economic development with western legal concepts on the other.⁹⁷ The common thread that runs through this piece of legislation is the underlying principle of the protection and recognition of natives' rights to their lands and the practice of their own customs and laws.

⁹⁶ The Ordinance was updated by provisions taken from the Land Code 1926 of the Federated Malay States and made applicable to Labuan and the whole of Sabah by the Land (Unification and Amendment) Ordinance passed in 1953.

⁹⁷ Doolittle, A. 2005. *Native Struggles over Land Rights: Property and Politics in Sabah, Malaysia*. University of Washington Press, p. 82. In SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 21.

The administrators from the British colonial period were obliged to give regard to those customs as well as emphasising that the uncultivated or unoccupied lands reverted to the government after a certain period.⁹⁸ This Ordinance is the operational legislation for the Sabah Department of Lands giving recognition to customary tenure.

Establishing customary tenure

Lands that have no documentary title but have been occupied by natives under their own customs are lands subject to native customary rights (NCR). These native customary rights, to which only natives are entitled, are defined by section 15 of the Ordinance to be:

- (a) land possessed by customary tenure;
- (b) land planted with fruit trees, when the number of fruit trees amounts to 50 and upwards to each hectare;
- (c) isolated fruit trees, and sago, *rotan*, or other plants of economic value, that the claimant can prove to the satisfaction of the collector were planted or upkept and regularly enjoyed by him as his personal property;
- (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
- (e) land that has been cultivated or built on within three years;
- (f) burial grounds or shrines; and
- (g) the usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

The conflicting concepts that persist until today are captured in section 15 of the NCR criteria, which was adopted from British colonial law. It does not reflect the actual meaning of customary land rights in Sabah. In particular, the prescription for the number of trees per hectare of land (section 15 (b)) and isolated fruit trees, sago, *rotan*, or other plants of economic value (section 15 (c)) that must be found when ascertaining NCR, is a limiting provision as traditional native agriculture usually involves planting a diversified number of crops using inter-cropping techniques in a particular area to ensure a steady supply of food for the family and for other purposes. Fruit trees may traditionally be interspersed with trees for firewood, medicines, crafts, or as building materials, and therefore confining NCR to cover only fruit trees and plants of economic value will not capture the actual customary land use.

However, one of the most common ways to establish native customary rights is through “customary tenure”⁹⁹ under section 65 of the Ordinance: “the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years under the Ordinance or under the Poll Tax Ordinance¹⁰⁰ or Part IV of the Land Ordinance 1913”. This essentially means that when an individual enters into occupation of a particular land, that individual is granted not only possession but a “title by occupancy” as well; therefore, occupation is, on the face of it, proof of possession.¹⁰¹ Customary tenure, in this regard, gives a native a permanent interest in the land, without a documentary title, as long as he submits his claim through the headman or to the collector, and he is able to establish one of the rights under section 65 above.¹⁰²

“Customary tenure” in section 66 of the Sabah Land Ordinance, which is linked to section 15(a), is only deemed lawful if there has been continuous occupation or cultivation for three or more consecutive years.

⁹⁸ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 45.

⁹⁹ Section 65 and 66 of the Sabah Land Ordinance 1930

¹⁰⁰ Repealed by Ordinance No.14 of 1962

¹⁰¹ Kent McNeil, *Common Law Aboriginal Title*, Clarendon Press, 1989, 73, cited in SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 43.

¹⁰² Section 66 of the Sabah Land Ordinance 1930.

This raises the issue of restrictive provision with regards to the fallow period of 3-10 years which is used to restore soil fertility and whether it would fulfil the requirement of the three or more consecutive years of continuous cultivation. Customary tenure grants a native a permanent heritable and transferable right of use and occupancy in his land even if he does not hold a documentary title; although the collector may require him to do so.¹⁰³

Does a native need prior approval in order to occupy state land? In 2007, in a judicial review of *Rambilin binti Ambit's v Assistant Collector for Land Revenue s Pitas*¹⁰⁴ Ian Chin J held that native customary rights included the right to enter state land for the purpose of establishing customary rights. That right still subsists under the law and that has not been abolished. Does that mean that a native might freely enter upon state land and not be guilty of trespass under section 164 of the Land Ordinance? The Court answered this question in the affirmative. See full details of this case in Part 7 on Judicial Decisions.

Native title

Natives of Sabah may also apply for native title by applying for alienation of state land under section 70 of the Sabah Land Ordinance; although land under this section may not exceed 20 hectares and may only be used for agricultural purposes which include the cultivation of any crop (including trees cultivated for the purpose of their produce), herbs, the breeding and keeping of honey bees, livestock and reptiles, market gardening, and aquaculture or any combination thereof. There is a requirement that, upon approval of the application, legitimate cultivation of the land must begin within six months and the whole area has to be cultivated within three years.

Communal title

The Ordinance also provides for the conferment of collective native customary rights, or communal title, where customary tenure has been established.¹⁰⁵ A communal title is often given for land held for common use, particularly in areas where villages are without demarcated individual boundaries, grazing land for cattle and other domesticated animals, for burial grounds or shrines. The communal land is held in the name of the collector as trustee without power of sale.¹⁰⁶ And such communal land may, with the authorization of the collector, be sub-divided and wholly or in part, assigned to individual owners who shall receive native titles in their own name.¹⁰⁷ The collector or the native chief or the village headman may in the interest of prudent management, and communal interests, require an owner or members of the community to render free labour¹⁰⁸ to conserve and manage the communal land.¹⁰⁹

This communal title was a formal recognition of a tradition of collective rights that has been practised by the natives on their territories since time immemorial. It is intended to ensure the retention of lands in native hands and facilitates the management of their collective resources, agricultural areas, water catchment and communal forests. While the communal title provision has rarely been used, indigenous and community-based organisations have long held that the sustainable long-term management of community territories is better supported when land is managed as a collective. For example, PACOS Trust, a major Sabah non-governmental organisation, has advocated for lands to be held communally as

¹⁰³ Sabah Land Ordinance s 67 (2)

¹⁰⁴ In the High Court in Sabah and Sarawak at Kota Kinabalu, Judicial Review K25-02-2002

¹⁰⁵ SLO s 76

¹⁰⁶ SLO s 76

¹⁰⁷ SLO s 77

¹⁰⁸ SLO s 66 (b)

¹⁰⁹ This traditional form of voluntary community work is called *mogitabang* in Kadazandusun and its equivalent in Malay is *gotong-royong*. Certain days are set aside for the whole community to do specific work on the land.

this would empower more reciprocity, collective decision making and resource management.¹¹⁰ For example, PACOS Trust, a major Sabah non-governmental organisation, has advocated for lands to be held communally as this would empower more reciprocity, collective decision making and resource management.¹¹¹

Although section 76 may seem to be a useful provision to secure ICCAs on customary lands under communal management, it would appear that communal titling combined with compulsory land development may yield minimal conservation benefits and could deprive communities of forest resources. In 2009, the DLS announced that it would hasten the process for awarding recognition of customary claims to land through communal title and amendments were made to section 76¹¹² to expedite the issuance of the communal title, a solution that seemed promising on the face of it. However, the following year, the DLS reported that 350,000 hectares of idle and 'non-development' land had been identified to be put into productive use through joint venture (JV) agricultural development schemes under the guise of helping local people "to develop the land for agriculture and reap lucrative income to boost their social and economic standards". The agricultural development, in this case, was in fact oil palm plantation expansion. It would appear that the original intent of the communal title to provide a way for communities to manage their resources for conservation and sustainable use has been compromised to give way to economic development. The amendment to section 76 deviates from the traditional territories concept and basically relegates Sabah natives to being beneficiaries of communal native title and not owners in accordance with their native customary rights. Further, it brings in outsiders onto the land, which might displace many natives living in the area. PACOS Trust and many other NGOs have called for the government to repeal the amendment to communal titles if it is genuine about preserving native rights over their traditional territories.¹¹³

Native reserves

section 78 of the Sabah Land Ordinance gives power to the Sabah governor, the Yang diPertua Negeri (YDP) to create native reserves, upon surveying the boundaries, to protect the existing and future interests and well-being of the natives of Sabah upon certain conditions and for specific purposes. At the outset, it seems to provide a clear demarcation of what constitutes a native reserve. Section 78 requires these reserves to be held by trustees who are appointed to control and manage the reserves subject to the directions of the Secretary of Natural Resources or the District Officer. Native reserves may at any time be revoked or cancelled or the terms varied, and any wilful and unreasonable non-compliance by the community for whom the reserve is created may be a ground for revocation.¹¹⁴ This has created much dissatisfaction among local communities, as such decisions could take place arbitrarily and without the consultation of the local community by parties which may have a vested interest in the natural resources of the land.¹¹⁵ This provision has hardly been utilised by the DLS as there have not been native reserves gazetted in many years, despite applications that have been filed dating back to 1999.¹¹⁶

¹¹⁰ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 20.

¹¹¹ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 20.

¹¹² Land (Amendment) Enactment 2009.

¹¹³ See article: <https://www.thestar.com.my/news/nation/2016/08/10/sabah-natives-wary-over-communal-land-titles>

¹¹⁴ SLO s 78 (4) (b)

¹¹⁵ View expressed by community leaders responsible for the management of the Bundu Tuhan Native Reserve in the ICCA Review Stakeholder Workshops in 2010, 2011 cited in Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 22.

¹¹⁶ Application for Native Reserve Gazette of the Lundayeh Community of Long Pasia cited in Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 22.

Establishing claims to and determination of NCR

Section 69 of the Sabah Land Ordinance sets out the procedure for making an NCR claim, which is a claim to land based upon customary tenure. It is to be heard and decided by the collector “being guided by the conditions laid down in the definitions of customary tenure and native customary rights”, and any appeal from the collector’s decision would go to the Director of Lands and Surveys (sections 41 and 84). The collector will register all claims submitted within the requisite period and record his decision on the ownership of the land and the claims to other native customary rights (section 82). In order to determine whether NCR exists on the land, under section 13 of the Sabah Land Ordinance, when an application for State land is made to the director or the collector. The collector for Land Revenue has to then publish a notice calling upon any claimants to NCR who do not hold a documentary title, to make or send a statement of claim (under sections 15 and 65) within a date specified in the notice, and the collector would then register the claim and the claims made by other natives, if any.

One of the primary issues has to do with proof of native identity at the point of application for native title. The collector has to be satisfied that a claimant is a native before he is entitled to certain lands. He may exercise his discretion based on a certificate of native status issued by the Native Court. There are reports of questionable issue of native certificates where non-natives are in possession of such certificate in order to take advantage of the benefits granted to natives. The Malaysian Human Rights Commission (SUHAKAM) for instance, have reported 407 complaints relating to NCR in between 2002-2010 alone.¹¹⁷ Claims to NCR are to be heard and decided on by the collector, and until he decides, there is no recourse by the claimants to the court. Many cases are not heard or settled at the collector’s level, sometimes for years. It is in this context that a case for judicial review was brought to the High Court in 2007. It typifies the common situations and issues that exist on the ground.

The Sabah Land Use Policy 2010

The Sabah Land Use Policy (SLUP), adopted in 2010, was intended to provide a land use orientation that balances social, environmental and economic functions. The Policy has been seen as a step forward as although it is conventional in the sense of adopting the ‘administrative view’ in considering all lands that are untitled as State land, it advocates for the formalisation of the concept of native community domain which essentially refers to more sensitivity towards “the traditions and needs of native communities”. With regard to the security of tenure, the Policy supports the formation of more native reserves (under the existing Section 78 of the SLO 1930) so that traditional farming of hill rice may continue. Echoing the views set out in the SUHAKAM Report 2013, the SLUP “leaves open the invitation to operationalise in finer form, the concept of native community domain, beyond what it has done, which is the formation of more native reserves and the allowing for rights to remain in forest reserves and state parks”.¹¹⁸

The Sabah Forest Enactment 1968

The Forest Enactment deals with the removal of forest produce on State land, given that alienated land is subjected to the Forest Enactment. Natives are allowed, under section 41, to take certain forest resources for their own use from any State land. The Sabah Forest Enactment also provides for the creation (and abolition) of forest reserves and protected forests which may affect indigenous inhabitants, and as such, under section 12 of the Enactment, a reservation notice setting forth the rights and privileges to any person or group of persons (subject to the YDP’s discretion).

¹¹⁷ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 5.

¹¹⁸ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 48.

The Sabah Land Acquisition Ordinance (1950)

This Ordinance sets out the grounds on which any land may be compulsorily acquired by the state. “Public purpose” is defined in section 2 to include for the “exclusive use of the Government or of the Federal Government or for general public use”, development, townships, railway, roads, resettlement, or conservation and exploitation of natural resources. In 2009, section 2(e) of the Ordinance was amended to include corporations:

(e) for or in connection with any public utility undertaking or the provision of any public service, undertaken or provided or about to be undertaken or provided, by the Government, the Federal Government, a local authority or any corporation incorporated directly by written law.

The Sabah Parks Enactment 1984

This Enactment deals with the administration and gazettment of park areas in Sabah and gives power to the YDP to declare any land as a park and nature reserve. The land cannot be alienated, built upon, cultivated and hunted upon between the period of the YDPs declaration and gazetting of the park (section 5). The YDP has the power to:

- (i) compulsorily acquire land for a public purpose and include it within the limit of the park or nature reserve (section 10);
- (ii) convert any reserve or sanctuary area into a park or nature reserve (section 12);
- (iii) hold the land on a leasehold for a period of 999 years free from all liabilities (section 13); and
- (iv) only declare that the area ceases to be park or nature reserve after a scientific research or investigation is conducted to justify the degazettment of a portion or the whole of the park or nature reserve or part of it (section 18).

Various activities regarding cultivation and development are prohibited in a park or nature reserve according to section 48.

The Sabah Land Development Board Enactment 1981

The Sabah Land Development Board is granted the authority under section 24 of this Enactment, to carry out development and settlement projects of land in the State, and may request the YDP to compulsorily acquire non-State land if the Board deems it fit under section 41. Such lands, that are acquired by the board, can then be, subject to written law and Ministerial approval, transferred or disposed of to any corporation, body or person under section 50.

The Sabah Water Resources Enactment 1998

The Water Resources Enactment 1998 enables the Department of Irrigation and Drainage to manage water catchments in Sabah. The State Water Resources Council facilitates cross-agency coordination and advises the Chief Minister on the management and use of water resources. The main purpose of the Water Resources Enactment is to protect “environmentally sensitive” zones which include (a) water protection areas, where land-use change is not permitted and can include both state land and forest reserves; and (b) water conservation areas, which are areas where certain activities, such as housing and limited agriculture may be allowed. The Enactment recognises private water rights, which include the water rights of indigenous peoples. It takes into consideration the economic and social impact on the owner or occupier of the land when making a water resources management decision, implying the necessity to examine land ownership and occupation rights of indigenous peoples. A requirement for consultation also means that the Government is obliged to involve indigenous peoples in the management of catchment areas and water bodies.

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

The Sabah Inland Fisheries and Aquaculture Enactment 2003

This statute governs the Sabah Forestry Development Authority (SAFODA) which is tasked with carrying out activities aimed to develop lands which have had timber extracted from it. The statute confers upon SAFODA the same legal rights as a native (section 47) and as such SAFODA may request the YDP to compulsorily acquire any land which is not State land (section 39), and the YDP may also transfer any State land to SAFODA (section 40).

The Sabah Drainage and Irrigation Ordinance 1956

The Act allows the YDP to declare any land to be a drainage and irrigation area, for paddy cultivation, and may also prohibit the planting of trees and plants in the area. It also prevents the use of any water vessels and any placement of fishing traps in an area that has been declared a drainage and irrigation area.

3.2 Land, freshwater and marine legislation in Sarawak

During the Brooke rule in Sarawak, there was an implicit recognition of customary rights where the Dayaks and the Malays were allowed a form of self-governance in relation to their customary lands.¹¹⁹ The Brooke Government introduced the Land Order 1931 which redefined State land as “all lands for which no document of title has been issued but includes all lands which may become forfeited or may be surrendered ... by the lawful owner”. The Torrens system, essentially a system of registration of titles, was thereafter introduced by way of the Land Settlement Ordinance 1933 and required the Land Administrator to, among others, record and determine boundary lines in order to preserve customary land. When the Brooke Government ceded Sarawak to the British Monarch after the Japanese Occupation in 1941-1945, the rights in all lands “but subject to existing private rights and native customary rights” were transferred to the Crown, and in effect, English common law and doctrines of equity were received afresh through the Application of Laws Ordinance 1949 on the condition that they are applied to the extent permitted by local circumstances and customs.¹²⁰ This is reflected in the Civil Law Act 1956. The Land (Classification) Ordinance 1948 was passed to “regulate land use in a multiracial society and to define and protect the land rights of the indigenous people”. This Ordinance created the present-day land classification system under the Sarawak Land Code 1958. The State authority mandated to develop, administer and implement land laws and policies in Sarawak, including native customary land is the Land and Survey Department.

The Sarawak Land Code (Cap.81)

The Sarawak Land Code 1958, a consolidation of the existing land laws into one piece of legislation, is the main legislation governing land issues in Sarawak. One of its objectives was to clarify NCR law issues¹²¹. Section 2 of the Sarawak Land Code classifies all land in Sarawak into one of six categories:

- (a) Mixed Zone Land (MZL), which may be held by any citizen without restriction;
- (b) Native Area Land (NAL), which is land held under registered title but only by natives;

¹¹⁹ Bulan, R. 2007. Statutory Recognition of native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place. *Journal of Malaysian and Comparative Law*, pp. 21–84.

¹²⁰ Order No C-24, Sarawak Government Gazette, XXXV (7) Notification No 111, dated 25 May 1946, Laws of Sarawak, id at p 34. And Notification No 113, Laws of Sarawak, id at p 35. Ordinance No 27 of 1949. The ordinance came into force in 1949. English law was originally received under the Sarawak Application Ordinance 1928.

¹²¹ Hansard, The Land Code Bill Reading, Council Negri Sitting, Wednesday, 22 May 1957 cited in SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 54.

- (c) Native Communal Reserve (NR), which is State land declared by the Minister for use by a native community under a native system of personal law under section 6 of the Land Code 1958¹²²;
- (d) Reserved land (RL), which is land that is: -
 - (1) reserved by the Government under section 38 of the Land Code 1958 or prior law,
 - (2) located within a national park, forest reserve, protected forest, or communal forest,
 - (3) occupied by the federal or state government without a document of title, or
 - (4) “otherwise lawfully constituted or declared to be reserved land”;
- (e) Native Customary Land, which is land on which native customary rights whether communal or otherwise have been exercised, and
- (f) Interior Area Land, which is land that does not fall under any of the other land categories. These classifications continue in the Land Code 1958.

The most important land categories with respect to NCR in Sarawak are Native Customary Land (NCL) and Interior Area Land (IAL).

NCL includes land:

- (1) over which NCR “have lawfully been created prior to the 1st day of January 1958, and still subsist as such”,
- (2) within a reserve under section 6 of the Land Code 1958, or
- (3) IAL over which NCR “have lawfully been created pursuant to a permit under section 10” of the Land Code 1958.

Interior Area Land (IAL) is the residuary category and includes lands not within the definition of RL, NCL, NAL, or MZL. IAL is distinct from the others, as it is the only category of land that allows natives to create new NCR pursuant to section 5 of the Land Code 1958. The Minister is authorised to convert one category of land to another. For example, land currently categorised as NAL or IAL can be declared MZL, unalienated MZL declared NAL, and IAL can be declared NAL.¹²³

The Sarawak Land Code 1958 sets out the methods for creating NCR over Interior Area Lands in Sarawak after 1957. In general, the customs of the majority of the natives of Sarawak dictate that land is held communally, with individual members acquiring rights to use land and resources by being the first to clear and cultivate virgin jungle or by seeking permission from the community. NCR created before 1 January 1958 are recognised under the laws in force before that date.

Pre-existing NCR

NCR created prior to 1 January 1958 is recognised by the Land Code 1958. The question as to whether a native or native community has acquired or lost NCR prior to 1 January 1958 is determined by the Land (Classification) (Amendment) Ordinance 1955 (1955 Ordinance) which was the law in effect on 31 December 1957. Under the 1955 Ordinance, NCR can be created in IAL after 16 April 1955 if a permit is obtained from the district officer. The 1955 Ordinance was the first prohibition on the creation of new NCR, but it did not affect existing NCR and any pre-existing rights of the natives prior to that date because it had no retrospective application. Prior to 16 April 1955, statutory law did not limit, but consistently reaffirmed native title. Therefore, NCR based in native law and custom and in existence prior to 16 April 1955 are recognised under the common law.¹²⁴

¹²² Section 6(1). A native system of personal law is defined as the customary law of a native community. Land Code 1958

¹²³ Land Code 1958, s 4(1)-(3)Bulan, R. & Locklear, A. 2008b. *Legal Perspectives on Native Customary Land Rights in Sarawak* in SUHAKAM, Kuala Lumpur, p. 54.

¹²⁴ For a full discussion on the law relating to native title, see Chapter VI of Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*.

Under section 5(1) of the Land Code, NCR can be created in IAL only if occupation is established based on the clearing and occupation of virgin jungle, planting fruit trees on land, occupying cultivated land, using land for burial grounds or shrines, and using lands for rights of way. The recognition of NCR on land in principle is based on occupation, and therefore where occupation is recognised, the occupiers should be given rights of way over the territory that is occupied by the individual or community

Creation of NCR after 1957

Section 5(1) of the Land Code prohibits the creation of NCR after 1 January 1958 except in accordance with the requirements of the statute unless a permit is acquired from the superintendent under section 10. The occupation of NCL or RL outside of this scope would constitute unlawful occupation under section 10(2) of the Sarawak Land Code. This means that until the Government issues a title, natives in lawful occupation of State land are deemed licensees. A residual category, which allowed for the creation of NCR “by any lawful method”, was deleted from the law in 2000, but was not gazetted¹²⁵ but has since been restored by the Land Code (Amendment) Ordinance 2008.

Challenges

The Sarawak Land Code raises challenges and limits native communities from securing their native customary rights over lands as it imposes on natives an onerous burden of establishing ownership of lands over which they exercise NCR. It fails to recognise traditional forms of occupation according to native customary laws and gives the State the broad power to use native lands or extinguish NCR by merely giving notice and compensation. The Sarawak government’s expansive statutory authority to extinguish NCR rights exposes natives to additional risks, as the loss of NCR through extinguishment has the potential to destroy irreplaceable features of their cultural, spiritual, and community life.¹²⁶ The crux of the issue lies in the narrow definition of “occupation” under section 5 of the Sarawak Land Code which requires evidence—primarily of cultivation and settlement and disregards the central traditional feature of the customary land laws of some natives where forest areas are kept uncultivated and preserved within their territories for hunting, gathering, recording their history and commemorating significant events and people. The definition in section 5 primarily disregards the full meaning of customary tenure as practised by the natives’ part of which is encapsulated by the traditional feature, such as *pemakai menoa*¹²⁷ and *pulau galau*,¹²⁸ which are essentially part of NCR.

In *Superintendent of Lands v Nor anak Nyawai* [2006] 1 MLJ 256 the Court of Appeal affirmed the High Court decision¹²⁹ that the Iban customary tenure included the concept of *pemakai menoa*, literally “land to eat from”. The *pemakai menoa* encompasses, their *tanah umai* (gardens), *temuda* (previously cultivated lands that are now left to fallow), *tembawai* (old longhouse settlements), *pendam* (burial sites) and *pulau galau* (uncultivated areas reserved for community use). However, in *Director of Forest v TR Sandah* [2017] 2 MLJ 281, the majority agreed that such a customary practice was in existence, but held that it did not have the force of law and could not be a basis for a claim. The lack of evidence or record of the practice in writing in the codified Adat Orders was a reason to dismiss it as a “force of law”. The state’s quick political response was to amend the Land Code (Cap. 81) to give effect to that right.

This will be explained in greater detail in Part 7 on Judicial Decisions.

¹²⁵ Ramy Bulan, *Native Title in Malaysia: Kelabit Land Rights in Transition* (PhD thesis, Australian National University, 2005) 36. (‘PhD thesis’)

¹²⁶ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p. 8.

¹²⁷ Term used to refer to a particular area as communal or territorial domain of an indigenous village.

¹²⁸ Term used to refer to a preserved protected virgin forest by the indigenous community.

¹²⁹ *Nor anak Nyawai & Ors v Superintendent of Lands & Surveys* [2001] 6 MLJ 241

The Land Code (Amendment) Ordinance 2018

The Land Code (Amendment) Ordinance 2018 came into effect on 1 August 2019, after being passed by the Sarawak State Legislative Assembly (DUN) on 12 July 2018. The Ordinance introduced a new term called “native territorial domain (NTD)” which provided for the issuance of native communal title in perpetuity to a native community based on areas proved to have been used as the community’s usufruct. This will confer proprietary rights to the NTD. This amendment was intended to resolve the problems arising from the Federal Court decisions in the *Director of Forests v TR Sandah & Ors* [2017] 2 MLJ 281 (“TR Sandah”) case. With respect, it is contended that the Federal Court decided incorrectly that the Iban *adat* (customs) of *Pemakai menoa* (communal territory) and *Pulau galau* (forest reserves) did not have the force of law and could not be enforced.

The amendment introduced a new section 6(A) to the Land Code to create native communal title which is issued in perpetuity over a native territorial domain (NTD) in the name of a person or body of persons as trustee for the exclusive use of the native community concerned. The term native territorial domain encompasses areas “within or conjoining or immediately adjacent to an area where NCR have been created in accordance with s 5” and areas where the community had previously exercised their usufructuary rights, which includes for foraging for food, hunting and fishing. The term NTD was intended to be a catch-all phrase to encompass areas which various communities considered their communal territories, described using various terms including *pemakai menoa* (communal domain), *Pulau galau* (forest reserves) for the Ibans, *pulau ramu* for the Kedayans, *pimung* for the Bidayuh, and *kawasan cari makan* (areas of livelihood) for the Malays, *tana’ bawang*, for Kelabits and Lun Bawang, *tana’ daleh* for Kenyah and Kayan. NTD excludes area already constituted as communal forest under the Forests Ordinance 2015 and limited to claims up to 500 hectares for each village or community or additionally up to 1,000 hectares subject to Cabinet approval. This communal title cannot be transferred or sold. It is for the community to decide how they would utilise the land.

Another important aim of the amendment was to resolve the issue in relation to provisional leases (PL). Every PL must specify the area, the period or term of the PL. The new section 28 of the Land Code now provides that any NCR or NTD must first be excluded from the PLs, effectively introducing a deferred indefeasibility to any lease that may be granted¹³⁰. The 2008 amendment also repealed many provisions in the Land Code Amendment Ordinance 2000 which had not come into force. Notably section 5(2) (f) which allowed for creation of NCR “through any lawful means” which was deleted in 2000, was never put into force. The 2008 amendment reinstated section 5(2)(f).

The 2008 amendment marked the Sarawak government’s commitment to ensure that the proprietary interests over communal areas are protected, ostensibly, recognising that these communities have an existing practice of keeping traditional communal areas for community resources and sustenance. Despite the good intentions of recognition and protection, the creation of NTD has altered the character of such communal areas whose geographical location, area and boundaries had in the past been determined by the customary practices of the communities but now transformed into a statutory title which is limited by area and subject to proof and cabinet determination. A number of challenges arise with this change. Since the NTD is held by trustees from within the respective community, the use of the land should be for the common good. Would this facilitate the growth of community conserved areas? In addition, with the restoration of section 5(f) subject to proof of any additional traditionally used territory, it might well allow communities to claim beyond the stipulated 500 hectares as communal reserves or conserved community areas?

¹³⁰ This tempers the effect, although does not overturn the judicial decision in *TH Pelita Sadong Sdn Bhd & Ors v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77.

Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976

With large areas of land, the State pushed for large scale agricultural development of lands. Thus, the Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976 established the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA), with a view to rehabilitate land and provide advice and training on farming and land management. Under this scheme, the natives contribute their lands while SALCRA provides the expertise and funding. The rights to land are recognised through the issuance of land titles to individual owners. They retained ownership of the land but management was handed over to SALCRA who paid bonus and dividends to workers and the farmers out of the profits. Eventually, the land would be given back for farmers to self-manage. At present, SALCRA's core business encompasses the management of NCR land for oil palm plantations and tea estate. Since the establishment of the first oil palm estate in Lubok Antu in 1976, 17 more estates have sprung up, including one tea estate, covering more than 51,000 hectares of land area stretching from Lundu to Bau, Serian, Sri Aman, Betong and Saratok regions.¹³¹

Sarawak Land Consolidation and Development Authority Ordinance 1981

An analogous scheme to SALCRA was set up under the Land Consolidation and Development Authority (PELITA) in 1981 to promote the development of both agricultural and non-agricultural projects under the Land Consolidation and Development Authority Ordinance 1981.¹³² The LCDA has the power to acquire land for private estate development on both State-controlled land, as well as NCR land. This provides the basis for a joint venture (JVC) between land owners and LCDA under a new joint venture entity. A key aspect of the JVC is that native NCR 'owners' who assign all rights to the land to the JVC become partners in these ventures without having to provide financial capital.¹³³

Sarawak Forestry Corporation Ordinance 1995

The Sarawak Forestry Corporation acts as a government agent to provide services to administer, assess and enforce forestry and forestry-related legislation. It also manages the protected and totally protected areas, and conducts scientific research on Sarawak's rainforest and its products and provides training and education to employees, stakeholders and the public.

Forests Ordinance 1953 amended by Forests Ordinance 2015

The Forests Ordinance 2015, which repealed the earlier Forest Ordinance 1953, deals with forest reserves in Part II, Protected Forests in Part III and Communal Forests in Part IV. A forest reserve or protected forest may be constituted over any State land in the manner provided in Part III of the Forests Ordinance. Under section 8, the Minister shall publish a notification in the Gazette where there is a proposal to constitute a forest reserve or protected forest over any State land. Under section 10, rights or privileges may be claimed in an area to be constituted a forest reserve or protected forest, but these shall only be those rights or privileges which have been enjoyed or exercised by or accrued to a native or his forefathers or a native community for an uninterrupted period beginning from a date prior to 1st January 1954 to the date of the notification referred to in section 8. Where such rights have been infringed and compensation is payable, the assessment of compensation payable, shall take into account the nature and extent of the right or privilege claimed (section 15); whether such right or privilege is still exercised or enjoyed by the claimant at the date of the notification published under section 8; the degree of actual dependency, if any, of the claimant on such right or privilege as a means of his livelihood; and if the right or privilege relates to the planting of any crop, whether an alternative site or area has been provided by the Government for the person or the community to which he belongs, for farming. Where there are "subsisting rights or privileges" over the land, the director may regulate the limits or area within a forest

¹³¹ See <http://www.salcra.gov.my/en/about-us.html> accessed 24 March 2020

¹³² SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 57.

¹³³ Jitab, Kris with James Ritchie, *Sarawak Awakens*, Taib Mahmud's Politics of Development, Pelanduk Publications (1991) cited in SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 58.

reserve or protected forest, whereby the subsisting rights or privileges may be exercised, including the mode of exercising thereof and having regard to the natural capacity of the natives to enjoy such rights or privilege (section 21). Under s 65 (3) of the Ordinance, where native customary rights have been lawfully claimed by the natives, no licence for planted forests shall be granted over unless such rights have been extinguished pursuant to section 5(3) of the Land Code.

The Ordinance makes provision for communal forests for the use of a native community and places a duty on the native community to undertake to maintain the communal forest in a condition of sustained yield in such a manner as the director or any forest officer authorized by him may direct. The director or any forest officer authorized by him may regulate the method and extent of any felling or other operations. Removal of forest produce from a communal reserve may be done by any member of the native community, and no other person, as long as it is for his own use and not for sale (section 37). A person found to contravene this section must be able to prove that he requires the forest produce as firewood or for the construction, repair or extension of his dwelling house or for the making of any boat, furniture or any other household goods or utensils for the use of himself or his immediate family, and that the forest produce was taken by himself or a member of his family. The punishment for a contravention of this section is a fine or imprisonment or both.¹³⁴

Forest Policy 1954

It must be noted that the execution of the Ordinance is done according to the Forest Policy of 1954, which is a government Forest Policy statement on forest management and conservation, and land use.

Wild Life Protection Ordinance 1998 (Cap.26)

The Wild Life Protection Ordinance is enforceable in areas known as wildlife sanctuaries. A wildlife sanctuary may be constituted over any State land which is not part of a national park or a nature reserve (section 10), and the rights and privileges over land constituted as a wildlife sanctuary are only afforded to a native or his forefathers or a native community who have had the land for an uninterrupted period beginning from a date prior to 1st January 1958, to the date of the notification referred to in section 11(1). Section 24 states that no person may enter a wildlife sanctuary without written permission from the warden in charge. A native residing within a native area land or native customary land may have a wild animal in his possession, for his own consumption or use; and any other person (who is not a native) may have, for his own consumption, not more than five kilograms of a wild animal (section 37).

National Parks and Nature Reserves Ordinance 1998

This Ordinance was created for the constitution and management of national parks and nature reserves and all related matters. The Minister may appoint a Controller of National Parks and Nature Reserves, a Deputy Controller of National Parks and Nature Reserves, chief park wardens, park wardens, and park rangers to perform the functions and duties assigned to him under this Ordinance. The Controller is responsible for the administration and enforcement of this Ordinance; the protection and development of schemes and policies for the protection of wildlife and their habitats within the park and reserve and for the demarcation of a park and reserve into various zones or areas to facilitate effective and proper management and control (section 4). A national park or a nature reserve may be constituted over any area of land, including land within a forest reserve or a wildlife sanctuary and land within a historical site or a historical monument; any inland water area; or any area within the territorial waters of the State (section 9(1)). Where a historical site or a historical monument is within a national park or a nature reserve, that historical site and monument shall be preserved and managed in accordance with the Sarawak Cultural Heritage Ordinance, 1993 (section 9(2)). Section 26 sets out the prohibitions over national parks and nature reserves, unless with the permit of the controller, including the entry into,

¹³⁴ The Ordinance was amended in 2015 with the view to increase the penalty to curb illegal exporting of logs and promote sustainable forest management.

removal of animals or plants, the introduction of any animal or plant and clearing or breaking up any land in a national park or nature reserve. The penalty imposed for contravention of any of the provisions of the Ordinance is a fine of RM5000, imprisonment for a year or both (section 32).

Sarawak State Fisheries Ordinance 2003

This Ordinance deals with both aquaculture and inland fisheries and uses the term “inland waters” to describe its area of jurisdiction, although this term is not found in the Fisheries Act 1985 (Amended 1993). The Inland Fisheries Branch of the Sarawak Agriculture Department has endeavoured to gazette wildlife sanctuaries of importance for indigenous fish, alongside the Sarawak National Parks and Wildlife Department.¹³⁵ However, the Ordinance does not cover issues, such as the *tagal* (known as *tagang* in Sarawak).¹³⁶

In all the legislation set out above, whether it is on forest management and conservation, land use, the constitution of forest reserves, protected forests and communal forests, national parks and nature reserves, or of wildlife sanctuaries, it is clear that considerations have been taken to safeguard the rights of the communities. However, in practice, it is doubtful if many communities really do reap those benefits. It appears that to date, law enforcement by the government is still ‘stipulations of dos and don’ts’, with little consideration for their active community participation in conservation management.¹³⁷

3.3 Land, freshwater and marine legislation in Peninsular Malaysia

National Land Code 1965

Section 4(2) of the National Land Code (NLC) provides for recognition of customary tenure. Nothing in the NLC shall affect the provisions of (a) any law for the time being in force relating to customary tenure; and (b) any law for the time being in force relating to Malay reservation or Malay holdings; and, in the absence of an express provision to the contrary, if any provision of this Act is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall to the extent of the inconsistency, be void.

The term “customary tenure” has also been used to refer to Malay customary tenure under the National Land (Penang & Malacca) Titles Act, as well as to *adat perpateh* or *tribal adat* in Negeri Sembilan. Judith Sihombing and other legal scholars are of the view that since Malay customary tenure is dealt with by enrolment in the Mukim Register, it would follow that customary tenure, which is given importance by section 4(2) of the NLC, refers to tribal adat.¹³⁸ When one looks at section 4 (2), the lack of reference to the Orang Asli or their status on the land in the NLC may be indicative of the invisible status of the Orang Asli in Peninsular Malaysia. However, this does not detract from the fact that Orang Asli have pre-existing customary rights to the lands that they have traditionally occupied that could be recognised under the general provision of section 4(2) on “customary tenure” and also under “custom and usages” under the Federal Constitution, and that right is held and regulated by the aboriginal customs of the different Orang Asli communities.¹³⁹ Indeed, in *Kerajaan Negeri Selangor v Sagong Tasi and Ors* [2005] 6 MLJ 289, Gopal Sri Ram JCA said that section 4(2) does not strike at the customary title of the Orang Asli.

¹³⁵ Mokhtar, H. 2013. *Review of Malaysian Laws and Policies In Relation to the Implementation of Ecosystem Approach to Fisheries Management In Malaysia* CTI-CFF National Coordinating Committee. p. 21.

¹³⁶ Mokhtar, *Review of Malaysian Laws and Policies In Relation to the Implementation of Ecosystem Approach to Fisheries Management In Malaysia* CTI-CFF National Coordinating Committee, p. 19.

¹³⁷ Personal interview with a senior Forest Officer, Forestry Department, Sarawak.

¹³⁸ Sihombing, J. 1992. *National Land Code: A Commentary*. 2nd edn, Malayan Law Journal, Kuala Lumpur, p. 81.

¹³⁹ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 61.

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

The Aboriginal Peoples Act 1954 is the only law that specifically refers to the Orang Asli and was enacted to “provide for the protection, well-being and advancement of the aboriginal peoples of Peninsular Malaysia”. The Act reflects the attitude of the State towards the Orang Asli, viewing them as a “homogenous people, subject to the control and administration by the State, rather than treating them as autonomous social units”.¹⁴⁰ The Act recognises that Orang Asli may reside in Orang Asli reserves, aboriginal areas and aboriginal inhabited areas. These are defined as:

(a) *an aboriginal reserve*

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

(b) *an aboriginal area*

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

(c) *an aboriginal inhabited area*

which refers to any place that is inhabited by Orang Asli which has not been declared to be an aboriginal area or reserve is called an aboriginal inhabited area. The relevant state authority may grant rights of occupancy, free of rent or subject to conditions in a grant, within any aboriginal area or reserve to Orang Asli individually, to members of any family of aborigines, or to members of the community but such rights would not confer on any person “any better right than that of a tenant at will”.

In each case, the state authority may revoke wholly or in part or vary any declaration of an aboriginal area or aboriginal reserve. There appears to be no provision of any obligation imposed on the state authority to replace any land taken or de-gazetted as such. An Orang Asli reserve is gazetted by the state, but even this right is not a permanent right but a right given as a “tenancy at will” of the State (section 8(2)(c)). Should the State decide to acquire or alienate the land, it is required to make compensation for the loss of crops on Orang Asli lands, but it is not required to pay any compensation for the land or to provide an alternative replacement (section 11(2)). The approach taken by the State towards the Orang Asli has been to treat them as wards of the State. This has been argued to constitute the tacit acceptance of a fiduciary relationship to the Orang Asli.¹⁴¹ All matters pertaining to land, under the APA, including the gazetting and de-gazetting of aboriginal reserves, come under the purview of the State, who may by notification in the Gazette, declare any area exclusively inhabited by aborigines to be Orang Asli reserves.

¹⁴⁰ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 32.

¹⁴¹ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p. 155.

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

The Government via the Department of Aboriginal Affairs issued a “Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia Department of Orang Asli Affairs (JHEOA)” in 1961,¹⁴² promising that the Orang Asli shall be allowed to retain their own customs, political system, laws and institutions when they are not incompatible with the national legal system¹⁴³; the special position of aborigines in respect of land usage and land rights shall be recognised,¹⁴⁴ and the Orang Asli will not be moved from their traditional areas without their full consent. The huge gap and contradiction between the recognition of Orang Asli rights at the policy level and in the application of the Aboriginal Peoples Act at the practical level is made blatantly evident in the present-day treatment of the Orang Asli as they have in practice been excluded from the government’s development schemes, such as the Federal Land Development Authority (FELDA) schemes for the development of oil palm under the Land (Group Settlement Areas) Act 1960.¹⁴⁵

National Forestry Act 1984

Under this Act, the entire property of all forests produce, within a permanent reserved forest or State land, is vested in the state authority, and no person can take forest produce from State land or permanent reserved forest (section 14 and section 15). However, this provision is a vesting provision and not an extinguishing provision, and therefore it makes an exception where rights have already been disposed of by any written law which could involve the grant of licenses. The state authority may grant privileges to Orang Asli in respect of removal of forest produce (section 40(3)), and the Director of Forestry may use his discretion to waive or exempt Orang Asli from any payment of royalty for forest produce that is taken for the maintenance of fishing stakes and landing places, fuelwood for domestic purposes, or construction or maintenance of any work for common benefit of Orang Asli (section 62(2)). These provisions would only give use rights to Orang Asli in the forests, which is ironic, as they are often employed as gatherers or harvesters of forest produce for traders who possess the licences to harvest forest produce, whereas for themselves, provision is made only for their domestic use.¹⁴⁶

National Land (Group Settlement Areas) Act 1960

Under the National Land (Group Settlement Areas) Act 1960, land agencies, such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies, such as the Pahang Tenggara Development Authority (DARA), may take over State land to develop it for the purpose of land settlement, which culminates in the issue of land titles to the settlers. Although many of these early programmes and plantations have been established in areas traditionally settled by Orang Asli, the Orang Asli as a community have not enjoyed the benefits or been participants in these programmes.¹⁴⁷ Instead, the Orang Asli been resettled under Regroupment Schemes (Rancangan Pengumpulan Semula) or RPS, which are targeted at the socio-economic rehabilitation of the Orang Asli, and to reorganise them in suitable centres in their traditional areas. This involves relocating them to new areas in order to transform them into self-sufficient and productive farmers resulting in relocation and a loss of ownership and control over their traditional lands and territories.¹⁴⁸

¹⁴² This department has been renamed as Jabatan Kemajuan Orang Asli (JAKOA) (Department for the Development of Orang Asli).

¹⁴³ Section 1(c) of the Aboriginal Peoples Act 1954.

¹⁴⁴ Section 1(d) of the Aboriginal Peoples Act 1954.

¹⁴⁵ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 63.

¹⁴⁶ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 64.

¹⁴⁷ Endicott, K. 1979. The Impact of Economic Modernisation on the Orang Asli (Aborigines) of Northern Peninsula Malaysia. In Jackson, J. & Rudner, M. (eds.), *Issues in Malaysian Development*, Heinemann, Singapore, pp. 167–204, p. 192 referred to in SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 64.

¹⁴⁸ Nicholas, C. 2010. *Orang Asli Rights, Problems, Solution*. Kuala Lumpur, p. 26.

Waters Act No.418 (1920, as amended)

Waters Act is the basic law on water resources at the federal level and applies to the States of Negeri Sembilan, Pahang, Perak, Selangor, Malacca, Penang and Federal Territory. Under this Act, a licence is required for water abstraction and use, but no specific reference is made to aquaculture.

3.4 Recommendations: Legislative and institutional reforms required to better protect the rights of indigenous peoples and local communities over land, freshwater and marine territories and areas

- Review of existing Malaysian laws and policies should be done to ensure that legal language and implementation explicitly recognise human rights.
- Recognition and protection of indigenous peoples' NCRs to lands and resources, in line with statutory provisions, common law and *adat* (customs) including making amendments to NCR discriminating laws.
- Review and ratify laws and policies passed by state and federal parliament, including policies for forest management and large-scale agricultural expansion that have not taken NCR and FPIC into consideration.
- The Constitutional protection on native title rights cannot be taken away except according to the law and upon payment of just compensation and as such, there must be express acknowledgement of fiduciary obligation by the government to consult and obtain consent from the native communities prior to taking action that may infringe on their native title rights.
- The Sabah and Sarawak State Governments should take steps to review the current Sabah Land Ordinance 1930 and the Sarawak Land Code 1958 to ensure that it serves to promote and continually protect the rights of the indigenous groups to their customary land, and include:
 - (a) The recognition of customary rights to land as part of law and the right of the natives to land by virtue of customary law is consistent with those rights.
 - (b) The recognition of the methods of native occupation that arise out of native customs and traditions is proof of ownership to land, and therefore not to be dictated by the Sarawak Land Code 1958 which imposes a burden to establish ownership of lands via documentary evidence.

PART 4: NATURAL RESOURCES, ENVIRONMENT AND CULTURE

4.1 Natural resources and environment

The Ministry of Water, Land and Natural Resources (KATS) formerly known as the Ministry of Natural Resources (NRE) is the federal ministry responsible for sustainable natural resource management including water, land, forestry, biodiversity, minerals, geoscience, and geospatial matters. The departments and agencies under KATS include the:

- (i) Forestry Department Peninsular Malaysia
- (ii) Department of Wildlife and National Parks
- (iii) Department of Irrigation and Drainage
- (iv) Department of Biosafety
- (v) Department of Director General of Lands and Mines
- (vi) Department of Mineral and Geoscience
- (vii) Department of Survey and Mapping Malaysia
- (viii) Department of Water Supply
- (ix) Department of Sewerage Service
- (x) National Institute of Land and Survey
- (xi) National Hydraulic Research Institute Malaysia Statutory bodies:
- (xii) Forest Research Institute Malaysia
- (xiii) The Land Surveyors Board
- (xiv) Tin Industry (Research and Development) Board
- (xv) Board of Geologist Malaysia
- (xvi) National Water Services Commission

Besides KATS, the Ministry of Energy, Science, Technology, Environment and Climate Change (MESTECC), formed in 2018, spearheads the green and efficient energy sector, wealth creation through science and technology, as well as environmental pollution and climate change. The Sabah and Sarawak State Governments possess respective governing structures for forest and biodiversity. The other relevant ministries involved in biodiversity matters include the Ministry of Federal Territories (MFT), the Ministry of Rural Development (KPLB) and the Ministry of Tourism, Arts and Culture (MOTAC) which work together with the Ministry of Economic Affairs and the Ministry of Finance which monitor the economic and financial progress of biodiversity programmes and initiatives at the federal level. As enshrined in the Federal Constitution, the states of Sabah and Sarawak have greater autonomy over land and natural resources.

At the federal level, the National Forestry Act 1994 and the Environmental Quality Act 1974 are the main pieces of legislation governing natural resources and the environment in Malaysia. The national policies are the: -

National Policy on Biological Diversity 1998

The National Policy on Biological Diversity is a federal policy intended to “conserve Malaysia’s biological diversity and to ensure that its components are utilised in a sustainable manner for the continued progress and socio-economic development of the nation”. The Biodiversity and Forestry Management Division of KATS is the principal overseer of the NPBD as well as the focal point of the Convention on Biological Diversity (CBD), and serves as the national coordinator.

National Policy on Environment 2002

This Policy aims at achieving continued economic, social and cultural progress in Malaysia, and focuses on environmental development through research and development, economic efficiency, social equity, responsibility and accountability.

Mineral Development Act, 1994 and the State Mineral Enactment

KATS is responsible for the mining and quarrying sector in Malaysia. The National Mineral Council (NMC) was established in 1998 to integrate and oversee the mineral industry and coordinating the relationship between the Federal and State Governments on matters relating to the sector. The National Mineral Policy (NMP) was introduced in 2009. The main legal instruments governing the NMP are the Mineral Development Act 1994 and the State Mineral Enactment. The Mineral Development Act 1994 vests power in the Federal Government to inspect and regulate mineral exploration and mining and other related issues. However, as of 2000, only the States of Sabah and Selangor had adopted the State Mineral Enactment, which gives States the powers and rights to issue mining leases and mineral prospecting and exploration licenses.

The Malaysian Maritime Enforcement Agency (MMEA) Act 2004

The Malaysian Maritime Enforcement Agency (MMEA) is the principal government agency tasked to provide a “platform and support services” to any relevant agencies enforcing marine-related laws. It is, in effect, a coast guard. The agency is not part of the Malaysian Armed Forces. The agency and its members are part of the Malaysian Civil Service and report directly to the Prime Minister’s department. The MMEA was formally established with the enactment of the Malaysian Maritime Enforcement Agency Act 2004 (Act 633) in May 2004. It came into force on 15th February 2005 and commenced operation on 30th November 2005. The MMEA Act lists the functions and powers of the MMEA (or ‘the Agency’ as referred to in the act), which includes enforcement of any federal law within the Malaysian Maritime Zone. Though its operational scope covers all waters up to the EEZ boundary, at present, it still does not cover marine parks. The MMEA is empowered under section 7 to inspect any fisheries vessel suspected of committing an offence against the provisions of the Fisheries Act. The MMEA may also demand the production of any license, permit, record, certificate, or any other document and to inspect such license, permit, record, certificate, or other document, or make copies of or take extracts from such license, permit, record, certificate, or other document (e.g. on behalf of the Fisheries Department for activities related to fishing or for polluting offences in any Malaysian Maritime Zone). Whilst the MMEA Act recognises the MMEA’s responsibility for maritime enforcement throughout the maritime estate, other legislation remains unamended, thus continuing to give enforcement responsibilities to other agencies (PR, 2011).

Exclusive Economic Zone Act 1984

The Exclusive Economic Zone Act, 1984 (EEZ Act) provides the Director-General of the Environment the responsibility for the management of the marine environment in the EEZ area⁴ (PR, 2011). Part IV of the act refers to the sovereign right of Malaysia to exploit her natural resources under the national environmental policies and its duty to protect and preserve the marine environment. The EEZ Act permits the exploitation of economic resources and the dumping of old and disused aquaculture cages so long as the activity is regulated by the act. Article 5 prohibits activities in the EEZ or on the continental shelf except where authorized, as in Part III for fisheries activities and in Part IV for the protection and preservation of marine resources.

4.1.1 Sabah

Legal and policy framework on natural resource management & environment in Sabah

The primary ministry responsible for environmental policies in Sabah is the Ministry of Tourism, Culture and Environment (KePKAS). The Sabah Forestry Department (SFD) works under KePKAS to plan and implements the management of the state’s forest resources in accordance with the principles of sustainable forest management and carries out forestry research; whereas the Environment Protection Department (EPD) and Sabah Parks (SP) were established to protect the environment and enforce environmental laws, to manage terrestrial and marine protected areas respectively. The Sabah Wildlife Department (SWD) however is entrusted to regulate, protect and conserve wildlife and its habitats in

Sabah. The Sabah Biodiversity Centre (SaBC) established in 2008 oversees the conservation and utilisation of Sabah's biodiversity. The Yayasan Sabah Group is also responsible for Sabah's biodiversity and manages three major protected areas in Sabah namely Imbak Canyon, Danum Valley, and Maliau Basin.

There is no overarching statute or policy that governs natural resource management in Sabah as natural resources are generally administered according to broad categories, such as land, forests, wildlife, plantations, biodiversity, water and fisheries. There is also overlap in the jurisdiction and management of natural resources inter-ministerial and inter-departmental collaboration and coordination. Among the federal natural resource management laws that are applicable to Sabah and Sarawak include the Environmental Quality Act, 1974; Continental Shelf Act 1966; Fisheries Act 1985; Pesticides Act 1974 and the Petroleum Development Act 1974.¹⁴⁹

Land Ordinance, 1930

The Sabah Land Ordinance deals with native lands in Part IV (section 64 to 86) of the Ordinance. Sub-surface and surface resources, as well as seas and coastal areas are also dealt with in the Ordinance. As set out in Part 3, section 15 which sets out the criteria for NCR, was an attempt to incorporate indigenous peoples' customary law on land ownership into the land law. However, there are limitations in the process of land demarcation, and this is attributed to the lack understanding of indigenous peoples' concept of land and natural resource management. For example, failing to take into consideration the practicalities of native natural resource management when it comes to the rotational agriculture cycle (non-continuous cultivation) and fallow periods.

However, in 2018, the Sabah State Legislative Assembly passed a bill to amend the Land Ordinance with a view to refining the definition of "land" to include the bed of any river, stream, lake or watercourse, and the area of Sabah's continental shelf, and would extend to the seabed and its subsoil which lies beneath the high seas contiguous to the territorial waters of Sabah, as stated in the North Borneo (Alteration of Boundaries) Order in Council 1954. The amendment would allow the state to collect sales tax on natural resources extracted from its waters.¹⁵⁰ This has a bearing on indigenous communities as it reinforces Sabah's power under the initial Malaysia Agreement 1963.

Land Acquisition Ordinance

The Land Acquisition Ordinance lists the "conservation and exploitation of natural resources" under the definition "public purpose" under section 2(h), and does not explicitly set out a procedure for the determination of compensation upon such acquisitions. However, in practice, NCR lands have been acquired on such grounds without compensation.

Inland Fisheries and Aquaculture Enactment 2003

Section 35 deals with Riverine Fishing and Fisheries and allows for the declaration and recognition of indigenous system of resource management, while sections 36 and 37 provide for a new procedure for the creation of a committee to administer such zones, and punishment related to the Community Fisheries Zone. These provisions are considered progressive as it recognises community management of riverine sources. However, it has weakened the traditional authority and practice of the Tagal system, as the Tagal system was to a certain extent taken over by the Department.

¹⁴⁹ These provisions were referred to in detail, and the provisions here extracted from the UNDP study conducted in 2006 on natural resources in Sabah in Lasimbang, J. & Nicholas, C. 2006. *Natural Resource Management Country Studies: Malaysia Report*. UNDP-Regional Indigenous Peoples' Programme, Bangkok, p. 17.

¹⁵⁰ <https://www.thestar.com.my/news/nation/2018/11/15/sabah-passes-bill-to-amend-land-law-to-enable-tax-collection>.

Although the law itself is very progressive in recognizing community systems of managing riverine resources (by creating committees under sections 36 and 37), it has in a sense contributed to the weakening of the traditional authority for the Tagal system.¹⁵¹

Forest Enactment, 1968 and Forest Rules, 1969

Although indigenous land rights are not expressly recognised in the Forest Enactment, in section 41, it allows indigenous peoples to use forest resources for livelihood, including for the benefit of the individual and the community and their traditional way of life. Sections 8 and 9 stipulate that there must be an enquiry to ensure that “local inhabitants” are aware of the government’s intention to declare a particular area a forest reserve, and to allow the settlement of any claims. However, there have many complaints that these enquiries were rarely made, and in cases where they were, they were not recorded. As such, a large section of the forest (estimated to be around 50%) has already been gazetted as forest reserves with no recourse for an appeal or settlement.

Parks Enactment, 1984

The Parks Enactment gives power to the Department of Sabah Parks to control and manage areas legislated under the Enactment including inland and marine ecosystems. There are no provisions made for collaborative indigenous people’s participation and management of the Parks, although section 20 of the Parks (Amendment) Enactment 2002 also empowers the Parks Board of Trustees to carry out “bio-prospecting and tree plantations as well as developing commercial and industrial enterprises”.

Conservation of the Environment Enactment 1996 and the Environment Protection Enactment 2002

The Conservation of the Environment Enactment came into force in August 1998. It was amended to strengthen punitive provisions relating to environmental degradation caused by large companies. The Environment Protection Enactment 2002 was enacted to make provisions relating to the protection of the environment. However, there are no specific provisions on indigenous peoples’ rights and instead imposes restrictions on the use of land (section 28) and activities affecting vegetation (section 33).

Wildlife Conservation Enactment 1997 and the Wildlife Regulation 1998

The Wildlife Conservation Enactment 1997 is a state legislation enacted to protect the endangered flora and fauna in the region as well as control international trade of these species. The Enactment recognises community hunting areas (section 32) and honorary community wildlife wardens (section 7) trained by the Wildlife Department with an emphasis on indigenous knowledge and wildlife management and conservation. The requirement for a notice and an explanation of “native or traditional rights that will continue to be exercisable after the coming into effect of the declaration of the proposed sanctuary” are set out in section 9(2) together with a summary of representations made by affected communities. The downside is the short 90-day period for publishing in the government gazette.

Water Resources Enactment, 1998

The Water Resources Enactment recognises private water rights, including the water rights of indigenous peoples. When making a water resources decision, the Enactment requires that the authorities take into consideration the economic and social impact on the owner or occupier of the land. This would imply that there is also a necessity to examine land ownership and occupation rights of indigenous peoples. Further, the government is obliged to involve indigenous peoples in the management of catchment areas and water bodies in the course of the consultation. The gaps in this Enactment relate to provisions which state that the interest to protect areas precedes the rights of indigenous peoples to land and does not recognise the fact that indigenous peoples may have been traditionally protecting the area adequately (section 36). An example is a case in Bundu, Sabah where communities have managed to stop large-scale loggers from entering their watershed area upstream.

¹⁵¹ Lasimbang & Nicholas, *Natural Resource Management Country Studies: Malaysia Report*, p. 19.

The area remained pristine, but the declaration of the area as a water protection area did not stop logging companies from attempting to enter and devastate the entire area, creating havoc to peoples' lives in the process. See Case Study in Part 11.

Sabah Forestry Development Authority (SAFODA) Enactment, 1981

There are a number of state agencies in Sabah that deal with the use of natural resources. These agencies include Sabah Forest Industries (SFI) and the Sabah Land Development Board (SLDB), both of which are privatised state agencies resulting in the alienated lands converting into private property. The full government agencies to dates are the Rural Development Corporation (KPD), the Sabah Rubber Industry Board and the Sabah Forestry Development Authority (SAFODA).

Sabah Biodiversity Enactment, 2000

The Sabah Biodiversity Enactment gives power to the YDP, after consulting with the Council which consists of the Chairman who is the Minister of Natural Resources, and the Directors of the Forestry Department, Sabah Parks, Wildlife Department, Environmental Conservation Department and Water Resources, by order published in the *Gazette* make rules and regulations providing for various things including the management and control of the Biodiversity Centre; and prescribing incentives to persons for carrying out measures which are necessary to protect and conserve natural resources for the protection and enhancement of the biodiversity. The SBE2000 signifies a potential coordinating body for natural resource management in the state and recognizing this, indigenous peoples have asked that they be part of the decision-making body, i.e. the Sabah Biodiversity Council.

Other Laws

The other relevant laws on natural resource management include:

- The Birds Nest Ordinance 1914
- Cattle, Grazing and Pounds Ordinance 1952
- Country Land Utilisation Ordinance 1962
- Drainage and Irrigation Ordinance 1956
- Fauna Conservation Ordinance 1963
- Town and Country Planning Ordinance 1950
- Water Supply Ordinance 1961
- Cultural Heritage (Conservation) Enactment 1997

Sabah Forest Policy 1954

The Sabah Forest Policy 1954 sets out the need for sustainable forest management, forest legislation, community forestry, use of non-wood forest products, conservation of biodiversity and recreation and tourism. The Policy allows community cultivation and free movement and collection of forest produce within forest reserves, residence within the forest reserves and participation in joint forest management approaches. The Sabah Forestry Department legally recognises cultivation within forest reserves by approving occupation permits and areas may be set aside for community forest areas under the Sustainable Forest Management System. License agreements between Forest Management Unit holders and the Sabah Forestry Department also recognise customary use of resources by indigenous communities.¹⁵²

¹⁵² Lasimbang & Nicholas, 'Malaysia: The Changing Status of Indigenous and Statutory Systems on Natural Resource Management', p. 199.

Sabah Conservation Strategy 1992

The Sabah Conservation Strategy 1992 was introduced to create a variety of protected areas and to improve the management of resources on a regional basis through a range of actions including land-use, land revenue, community forests, illegal logging, mining, and water catchments areas.

Local community stewardship and community governance

In Sabah, traditionally the Council of Elders, which is composed of the village head, elders, and the *bobohizan* (priests/priestesses) govern the management of natural resources, which involves both the spiritual and physical realms. Although the Council of Elders no longer exists in most native communities in Sabah, the *bobohizan* and knowledgeable elders are still called upon for ceremonial purposes¹⁵³. In Sabah, most communities are represented by a *Ketua Kampung* (Headman), who is typically a respected individual appointed by the community to represent and oversee community matters, including the adherence to *adat* laws. Broadly, 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. There is also a Village Security and Development Committee (JKKK) presided by a *Pengerusi* (chairman), a political appointee, who is responsible for representing the village at government meetings and liaising with relevant agencies on resource management and development initiatives. This may sometimes be problematic when there are conflicts between the government plans and the interests of the community. The village head and elders instruct and enforce the *adat* to ensure that the whole community not only manages resources in a responsible manner but also passes on the knowledge to the next generation. However, their role as instructors and enforcers of the *adat* has decreased to a large extent, and the management of natural resources is often neglected, as many village heads are confined to settling interpersonal conflicts within village.¹⁵⁴

4.1.2 Sarawak

Legal and policy framework on natural resource management & environment in Sarawak

The Ministry of Urban Development and Natural Resources (MUDeNR) is the primary ministry for environmental policies, and it works through its agencies the Natural Resources and Environment Board (NREB), Forest Department Sarawak (FDS) and Sarawak Forestry Corporation (SFC). The management of forests, including protected areas and biodiversity, is under the jurisdiction of FDS and SFC. Additionally, the Sarawak Biodiversity Centre (SBC) established in 1998 regulates research and development on biological resources for Sarawak.

Sarawak Natural Resources and Environment Ordinance 1993

The Natural Resources and Environment Ordinance (NREO) was created to establish the Natural Resources and Environment Board (NREB) which deals with the conservation and management of natural resources and the protection of the environment related to native land rights, and must be read together with the Environment Quality Act 1974 (EQA). The Ordinance provides for the enactment of subsidiary legislation which are related to the Environmental Impact Assessment report, which require any person undertaking certain 'prescribed activities' (under sections 11 and 18), which include the clearing of forest areas for plantations, logging, natural resource extraction and any other activity that may cause pollution or damage to the environment or natural forests.

¹⁵³ Lasimbang & Nicholas, 'Malaysia: The Changing Status of Indigenous and Statutory Systems on Natural Resource Management', p. 187.

¹⁵⁴ Lasimbang & Nicholas, 'Malaysia: The Changing Status of Indigenous and Statutory Systems on Natural Resource Management', p. 188.

This is important as many of these activities are carried out on ancestral lands occupied by native communities. Other relevant policies include:

- Sarawak Diversity Regulations 2004
- A Master Plan for Wildlife in Sarawak 1996

Local community stewardship and community governance in Sarawak

In Sarawak, community chiefs consist of the headman, the *Penghulu*, *Pemancha* and *Temenggong* who make up the traditional governing system of the village and community. Today the appointment of these community leaders is provided for under the Community Chiefs and Headmen Ordinance 2004 which came into force on 1 January 2020.¹⁵⁵ In the past, leaders were appointed through traditional family hierarchy, where the baton was passed through ancestral lineage, but in the present day, political alliances determine the selection of leaders who are appointed for a specific tenure of three years. To preserve their independence, they may be members of a political party, but they cannot hold any positions in the party, neither are they allowed to hold any position of profit or business. Leadership in their communities involves settling conflicts in the community, but also to act as an intermediary between their people and the government.

4.1.3 Peninsular Malaysia

Legal and policy framework on natural resource management & environment in Peninsular Malaysia

National Land Code 1965 (Act No. 56)

The National Land Code applies only to the Peninsula and deals with matters of tenure, title, and land transfer. The National Land Code established a uniform system of tenure where title to land depends on registration, while the authority over all land, mineral, and rock material is given to the respective states. In Peninsular Malaysia, the Quarry Rules under section 14 of the National Land Code regulate quarrying activities. As at the end of 2008 the states of Perak, Kelantan, Sabah, Selangor, Pahang and Terengganu had adopted and implemented the Quarry Rules.

Land Conservation Act 1960 (Act No. 385), revised 1989

The Land Conservation Act 1960 amalgamates the law relating to the conservation of hill lands and the protection of soil from erosion and the inroad of silt. Section 5 provides that no person shall plant any hill land with short term crops¹⁵⁶ without an annual permit from the Collector of Land Revenue and section 6 prohibits the clearing of hill land. These provisions are disadvantageous to Orang Asli communities who live in forest and forest fringe areas and who still depend on the traditional swiddens for their subsistence.

Land (Group Settlement Areas) Act 1960 (Act No. 530), revised 1994

The Land (Group Settlement Areas) Act 1960 enables land agencies, such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies, such as the Pahang Tenggara Development Authority (DARA) to take over State land and to develop them for the purpose of land settlement which leads to the issue of titles to the settlers.

¹⁵⁵ Part II, Sarawak Government Gazette Notification, Swk, LN 572 of 2019.

¹⁵⁶ (i.e. crops that normally complete their life cycle 42 within two years after planting)

Protection of Wildlife Act 1972 (Act No. 76), revised 1976, 1991

The Protection of Wildlife Act 1972 (Act 76) expressly mentions the Orang Asli (or 'aboriginal community'), and under this legislation, the wildlife reserves and sanctuaries may be declared by the state. In these areas, an Orang Asli may shoot, kill or take certain wildlife for the purpose of providing food for himself or his family.

National Forestry Act 1984

The National Forestry Act 1984 provides for the administration, management and conservation of forests and forestry development. It also states that forest produce is the property of the state and stipulates that harvesting requires a license. Essentially, the Orang Asli are viewed as the harvesters of forest produce (e.g. *petai* and rattan) who work for the traders who hold the necessary licences from the Forest Department.

National Parks Act 1980

The National Parks Act (Act 226) 1980 provides for the establishment and control of national parks and related matters. Although the usufructuary rights of the Orang Asli may not be curtailed in such parks, their right to own and control their traditional territories are not secure.

Aboriginal Peoples Act 1954 (Act No. 134), revised 1974

The Aboriginal Peoples Act is the only law that specifically refers to the Orang Asli. The Act provides for the establishment of Orang Asli Areas and Orang Asli Reserves, but it also grants the state authority the right to order any Orang Asli community to leave and stay out of an area. This essentially means that the Orang Asli is permitted to remain in a particular area at the pleasure of the state authority, giving the Orang Asli, at best, the legal position of a 'tenant-at-will'. The state can revoke this status if it decides to reacquire the land, with no obligation to pay any compensation or to allocate an alternative site. The Aboriginal Peoples Act effectively gives the Minister, or his representative, the Director-General of the Department of Orang Asli Affairs (JHEOA) the power in all matters concerning the administration of the Orang Asli, and to the state authority for all matters concerning land. These laws give the Federal and State Governments a tremendous amount of leverage against the Orang Asli.¹⁵⁷

Local community stewardship and community governance – Orang Asli in Peninsular Malaysia

The traditional leader in the Orang Asli community is the *batin* (headman), and the *Balai Adat* (Council of Customs) which resolves issues in the community according to their own customs. The village committee instituted in all rural communities is called the JKKK (*Jawatan Kuasa Kemajuan dan Keselamatan*) (Committee for Development and Security) which acts as an intermediary between the community and the local government, to decide on policies for the villages¹⁵⁸ and as a conduit for government funding for development. The headman is ex-officio in the JKKK. However, one of the most significant challenges with this system is the clash between the traditional approach of consensus-based decision making, coupled with the general non-confrontational approaches taken by most indigenous communities in problem-solving. It is a slow process, compounded by the fact that the village heads and the community leaders are political appointees who would not go against their political masters.¹⁵⁹

¹⁵⁷ Lasimbang & Nicholas, *Natural Resource Management Country Studies: Malaysia Report*, p. 42.

¹⁵⁸ These policies range from security issue, to social, educational, welfare and women's affairs.

¹⁵⁹ Bulan, 'Indigenous Peoples and the Right to Participate in Decision Making in Malaysia'.

4.2 Traditional knowledge, intangible heritage and culture

4.2.1 Laws and policies

Under NPBD target 14: By 2025, Malaysia is supposed to have an operational access to benefit sharing (ABS) framework that is consistent with the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation. Action 14.3 aims to “protect and document the traditional knowledge, innovations and practices of indigenous people and local communities”.¹⁶⁰ Article 8 (In-Situ Conservation) of the CBD stipulates that: “Each Contracting Party shall, as far as possible and as appropriate: (j) subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.”

Protection of New Plant Varieties Act 2004

The Protection of New Plant Varieties Act 2004 entered into force in 2007, to provide for “the protection of the rights of breeders of new plant varieties, and the recognition and protection of contribution made by farmers, local communities and indigenous people towards the creation of new plant varieties; to encourage investment in and development of the breeding of new plant varieties in both public and private sectors; and to provide for related matters”. “Local community” is defined in section 2 of the Act as “a group of individuals who have settled together and continuously inherit production processes and culture or a group of individuals settled together in a village or area and under an eco-cultural system.”

The three regulations that implemented the Act were the:

- (i) Protection of New Plant Varieties Regulation 2008;
- (ii) Protection of New Plant Varieties (Size of Holdings) Regulations Act 2008; and the
- (iii) Administrative Guidelines on Application and Registration of New Varieties of Plants 2008.

The Department of Agriculture is the agency mandated to administer plant variety protection (PVP) under the Plant Variety Protection Office. This Act, unlike the UPOV model, creates a form of intellectual property for breeders’ plant varieties as well as farmers and communities’ varieties. According to Adhikari and Jefferson, the breeder plant varieties are “assessed on criteria, such as distinctness, uniformity and stability, whereas the farmers and community plant varieties are assessed on a more flexible standard, based on whether they are distinct, new and identifiable”. They are of the view that the condition of “identifiability” under section 14 of the Malaysian PVP Act is “significant as it provides a more flexible standard for claiming the specific characteristics that make a variety special” and state that “identifiability” is a concept that is “sui generis and unique to the PVP Act” and is achieved when a person skilled in the art is able to identify a claimed plant variety by the specific characteristics that it exhibits.”¹⁶¹

The Sabah Biodiversity Enactment 2000

This Enactment has eight important sections that are relevant to indigenous peoples. The Enactment recognises rights to biological resources in land claimed under NCR¹⁶² and has specified that activities related to the collection of biological resources should not negatively impact the livelihood, quality of life

¹⁶⁰ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 113.

¹⁶¹ Adhikari, K. & Jefferson, D.J. 2020. Intellectual Property Law for Plant Varieties: Challenges and Developments in Asia. In Adhikari, K. & Jefferson, D.J. (eds.), *Intellectual Property Law and Plant Protection: Challenges and Developments in Asia*, Routledge, Oxford.

¹⁶² Section 16(b) of the Sabah Biodiversity Enactment 2000.

and the way of life of indigenous peoples.¹⁶³ Section 9(1)(j) sets out that the indigenous peoples and other local communities are, at all times, the legitimate creators, users and custodians of traditional knowledge, and collectively benefit from the use of such knowledge.

Sabah Biodiversity Strategy 2012-2025

The draft of the new Sabah Biodiversity Strategy 2012-2022 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 Sabah government has taken several initiatives in the last few years to work closely with the local organisations on grassroots concerns. It would appear that this has been the result of the international initiatives, such as the Bornean Biodiversity Ecosystem Project (Phases 1 and 2) funded by JICA which has for more than a decade provided technical support and impetus to the state government to enhance its Protected Area network in order to fulfil its commitment to the Convention on Biological Diversity.¹⁶⁴

Sabah Wildlife Conservation Enactment 1997 and the Wildlife Regulation 1998

There are no specific provisions with regards to indigenous knowledge under the Wildlife Conservation Enactment, although the Enactment provides, under section 68, for the right of traditional owners of caves to collect edible bird's nest under the Birds Nest Ordinance 1914. The issue is that most of the plant species used in traditional medicines require a licence (whether by indigenous communities or otherwise) to be collected as they are protected.

4.2.2 Traditional knowledge and culture

The *tagal* and *tagang* system in Sabah and Sarawak respectively are good examples of how traditional knowledge is used effectively to manage fishery resources. In addition to food and medicine from plant and animal species, biodiversity forms an essential part of the cultural life of Malaysia's indigenous people. Carving and traditional weaving have been influenced by both the availability of trees, rattans and aquatic plants as well as other natural motifs. For example, traditional carvings of the Dayak and Orang Asli incorporate designs of leaves, seed pods, tendrils, buds and flowers. The Mahmeri Orang Asli are known for their intricate wood carvings and weaving.¹⁶⁵ Indigenous communities' houses use materials that are available in their environment and incorporate their traditional artwork in their designs. This is very well exemplified in the living museum at Sarawak Cultural Village.¹⁶⁶ Other cultural villages exist in Kota Kinabalu in Sabah, which includes the Monsopiad Heritage Village, Mari Mari Cultural Village, KDCA cultural village and Borneo Cultural village.¹⁶⁷ Throughout the country, towns and villages are named after important and useful plants, animals and characteristics found in nature, such that modern-day built-up environments persist in echoing the cultural consciousness of the value of biodiversity to their people. There are efforts by indigenous peoples themselves to preserve their culture and traditional knowledge through practical educational programs. One such effort is the jungle school program called Jungleschool Gombak run in the state of Selangor. The programs include survival skills of the Orang Asli,

¹⁶³ Section 20(3) and Section 25(1)(b) of the Sabah Biodiversity Enactment 2000.

¹⁶⁴ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 15.

¹⁶⁵ Kunasekaran, P., Gill, S.S., Talib, A.T. & Redzuan, M. 2013. Culture as an indigenous tourism product of Mah Meri community in Malaysia. *Life Science Journal*, Vol. 10 No. 3, pp. 1600–1604.

¹⁶⁶ <https://scv.com.my/>

¹⁶⁷ See Sabah Tourism at <https://sabahtourism.com>

learning about the use of flora and fauna, the basic skills of food searching and the traditional ways of Orang Asli hut making, camping, awareness of the rainforest sustainability, laws of the jungle, Orang Asli food preparation, and a tree-planting program.¹⁶⁸

4.2.3 *Traditional knowledge documentation*

According to the 6th National Report to the CBD, Malaysia is on track to achieve its target of establishing a registry of traditional ecological knowledge by 2025 (indicator 14.3 of the NPBD). The Malaysia Traditional Knowledge Digital Library (MyTKDL) was set up in 2009, under the purview of the Malaysia Intellectual Property Corporation (MyIPO), to serve as a digital database on traditional knowledge, traditional cultural expression and genetic resources from Malaysia and is used to process traditional knowledge and patent application. There is a total of 50 patents that are registered under the MyTKDL flagship at present.¹⁶⁹

Traditional knowledge documentation has been undertaken among the indigenous communities and the Malay people in Peninsular Malaysia. This includes “rapid rural appraisals, awareness workshops, socio-economic household surveys, capacity building on documentation among the Orang Asli communities, database development and lab analysis of selected potential medicinal plants”.¹⁷⁰ The Forest Research Institute of Malaysia (FRIM) has been working on a new approach to traditional knowledge documentation among the indigenous communities by involving the local communities in understanding the issues, with prior informed consent and knowledge sharing. Several prototypes from various sub-ethnic groups derived from traditional knowledge on the medicinal plants of the Jahai, Temiar, Semoq Beri, Mendriq, Lanoh, Semelai and Temuan communities in Peninsular Malaysia have also been identified and developed.

In Sabah, PACOS Trust has conducted several empowerment programs to support and prepare ILCs in the development of a community protocol for Access to Benefit Sharing. In Sarawak, traditional knowledge workshops and documentation programmes have been conducted resulting in, as at December 2019, 6,156 plants being recorded. Of this, 1,328 species have been classified and identification efforts are ongoing.¹⁷¹

4.2.4 *Traditional knowledge and customary decision-making and governance systems*

Traditional knowledge is learned orally through reference and repetition and is the responsibility of every individual in the community. However, the elders and parents are given a significant role to pass down traditional knowledge of natural resource management to their children. Unfortunately, there has been corrosion in the understanding of native resource management systems and natural resources are now viewed as an individual property right instead of collectively owned by the community. The challenge, therefore, lies in reinstating and instilling a sense of communal responsibility towards the utilisation of resources in the interest of the community as a whole.¹⁷²

¹⁶⁸ See Jungleschool Gombak at <https://www.jungleschoolgombak.com/>

¹⁶⁹ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 115.

¹⁷⁰ Fui, L.H., Haron, N., Yusof, N., Baharuddin, I.N. & Mustapha, N.M. 2015. Documenting traditional forest-related knowledge of medicinal plants in Malaysia: a comprehensive approach. *Journal of Tropical Resources and Sustainable Science*, Vol. 3 No. 1, pp. 77–85.

¹⁷¹ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 115.

¹⁷² Lasimbang & Nicholas, 'Malaysia: The Changing Status of Indigenous and Statutory Systems on Natural Resource Management', p. 219.

4.3 Access and benefit sharing

4.3.1 Laws and policies with respect to access and benefit-sharing

Convention on Biological Diversity (CBD)

The Convention on Biological Diversity entered into force in Malaysia on 22 September 1994 in accordance with Article 36 of the CBD, and the CBD enjoins Parties to the Convention to “take legislative, administrative or policy measures, as appropriate, to implement the provisions relating to access to genetic resources and the fair and equitable sharing of benefits arising from their commercial and other utilization”.

Access to Biological Resources and Benefit Sharing Act 2017

Following from the Convention on Biological Diversity, in 2010 the government of Malaysia and the UNDP Malaysia Country Office approved a project on capacity development for the formulation of a policy and regulatory framework for access and benefit sharing of biological resources in Malaysia. The overall objective of the project was to support the establishment of a regulatory framework for access and benefit-sharing in Malaysia and the relevant capacity building in this area.

In 2017, the Access to Biological Resources and Benefit Sharing Act 2017 was enacted.¹⁷³ This is an Act “to implement the Convention on Biological Diversity and any protocol to the Convention dealing with access to biological resources and traditional knowledge associated with biological resources and the sharing of benefits arising from their utilization and for matters connected therewith”. This Act was designed to work in tandem with the PVP Act and in conjunction with the national framework for access and benefit-sharing. This Act is significant as was the first time there was a uniform legal framework for the local biodiversity and traditional knowledge of indigenous peoples and local communities across all three regions in Malaysia. State Competent Authorities representing each state have the power to enforce the ABS Act 2017, including granting access permits and engage in benefit-sharing terms. This piece of legislation also enabled Malaysia to accede to the Nagoya Protocol in November 2018.¹⁷⁴

A “resource provider” under this Act includes the Federal Government, or state authority, possessing biological resources in in-situ conditions; in respect of ex-situ biological resource, where the resource originates; a government department, agency or public higher education institution holding a biological resource in ex-situ conditions (e) the indigenous community and local community, where the resource is on land to which they have a right as established by law; (f) the indigenous community and local community, where they are the holders of the traditional knowledge associated with a biological resource including members of the community who are traditional healers; or (g) an individual, where the biological resource is taken from the body of that individual.

Access to a biological resource is defined in section 5(1) of the Act to mean: “the taking of a biological resource from its natural habitat or place where it is kept, grown or found including in the market for the purpose of research and development; or there is a reasonable prospect as determined by the Competent Authority that a biological resource taken by the person will be subject to research and development”. Section 5(2) of the Act sets out that access to a biological resource does not include the taking of biological resources (g) in relation to the indigenous community and local community, for the use and exchange of the biological resource among themselves in the exercise of their traditional and customary practices. It also does not include fishing for commerce, recreation or game; taking animals or plants for food; taking a biological resource that has been cultivated or tended for any purpose other than the purpose of research and development; taking natural produce including oils and honey for any purpose other than

¹⁷³ Prior to this Act, the Sabah Biodiversity Enactment (SBE) 2000 and Sarawak Biodiversity Ordinance 1997 were in force.

¹⁷⁴ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 8.

the purpose of research and development; collecting plant reproductive material for propagation; or carrying out commercial forestry.

Under this Act, access to biological resources and associated traditional knowledge can only be obtained pursuant to the successful grant of an access permit under section 13 and 16, regardless of whether it is for commercial or non-commercial use, by a competent authority. There are a few conditions attached to the approval of these permits; the most important of which are benefit sharing and prior informed consent.

The National Competent Authority consists of the Secretary-General of the Ministry of Natural Resources and Environment who shall be the Chairman; and such number of persons to be appointed by the Minister. Under section 8 of the Act, one of the functions of the National Competent Authority is to: "(h) to support customary laws and practices of the indigenous community and local community, and the development of community protocols and procedures by the indigenous community and local community, as the case may be". The Competent Authorities shall, under section 9, establish an advisory body to deal with matters relating to the indigenous community and local community and traditional knowledge associated with the biological resource comprising representatives of the indigenous community and local community whose advice shall be sought and taken into account, and may if it thinks necessary, establish such committee to facilitate the carrying out of its functions under this Act.

Under section 12, an application for a permit for commercial or potential commercial purpose may be approved under certain criteria among others, in cases where: (a) a benefit-sharing agreement has been established in accordance with section 22; (b) in the case of access to a biological resource or traditional knowledge associated with a biological resource; (c) the application is not for any threatened tax; and (e) the access is not likely to result in adverse effects on the livelihood or cultural practices including religious, ceremonial or other traditional or customary practices of the indigenous community and local community.

Prior and informed consent

A permit is not required in the circumstances set out under section 18, where a person employed or studying and carrying out research for non-commercial purposes under the authority of a public high education institution or government agency within Malaysia, and subject to the fact that prior informed consent of the relevant indigenous community and local community has been obtained for any access to a biological resource and traditional knowledge associated with a biological resource referred to in subsection 23(1).

The Minister has the power to make exemptions under section 60(4) of the Act to revoke an order made where the interest of the indigenous community and local community may be affected. Under section 62(m), the Minister also has the power to make regulations to "provide the essential elements for obtaining the prior informed consent of the indigenous community and local community".

The Access to Biological Resources and Benefit Sharing Act 2017 has been a significant breakthrough in Malaysia's legislative reforms.

4.3.2 State-implemented policies, frameworks or measures

According to the 6th National Report to the CBD¹⁷⁵:

“...it would appear that Malaysia is on track to achieve its public awareness target to establish a baseline understanding of ABS, as according to the 6NR, more than 80% of the institutional/government stakeholders are aware of elements of ABS (principles of Prior Informed Consent (PIC), mutually-agreed terms; traditional knowledge and benefit-sharing agreement between resource users and providers). Additionally, more than 80% of the government stakeholders indicated that there are no existing measures by the respective organisation when dealing with ABS issues. The similar level of awareness was echoed by the indigenous and local communities (ILCs) surveyed in terms of their understanding of PIC, and the benefit-sharing agreement from the use of traditional knowledge. Almost half of the indigenous and local communities perceived that implementation of ABS law in Malaysia may restrict their use of biological resources to exercise their community’s traditional and customary practices and is unsure that implementation of ABS law is beneficial to them”.

KATs has actively engaged and conducted many awareness-raising programmes, including¹⁷⁶:

- (i) Awareness workshop with the Competent Authorities and Enforcement Officers (March 2016)
- (ii) National Conference on ABS (September 2016)
- (iii) ABS Awareness Materials Contest (16 December 2016 - 31 January 2017)
- (iv) ABS Booth during 10th Kuala Lumpur Eco Film Festival Exhibition (26-29 October 2017)
- (v) Asia Pacific Conference on Food Security 2018 (30-31 October 2018)

The Sarawak Government has amended the Biodiversity Centre (Amendment) Ordinance 2014 and its Regulations 2016 to incorporate, among other, provisions of free, prior, and informed consent (FPIC) in regulating access and benefit sharing, recognising the importance of community governance in order to align with target 2 of the NPBD, which is that “by 2025, the contributions of indigenous peoples and local communities, civil society and the private sector to the conservation and sustainable utilisation of biodiversity have increased significantly”. Some examples set out in the 6th Report to the CBD, of the working models in community-based resource management are the FORMADAT (Alliance of Indigenous Peoples of The Highlands of Borneo) and community representative committees in Kubaan Puak, Ba’Kelalan, and Long Semadoh.¹⁷⁷ The Sarawak Biodiversity Centre (SBC) piloted a project on ABS and developed a line of natural personal care products with on the ground community empowerment to produce essential oil derived from the traditional plant *Litsea cubeba*. Thereafter, leading to the development of an ABS framework based on community input and an ABS agreement signed with the SBC.

According to KATS, the ABS users’ guide, guidelines on National Competent Authority and Competent Authorities roles and responsibilities, and ABS training modules have been made available to ensure implementation of ABS and a clearing-house mechanism to facilitate information sharing is underway.¹⁷⁸

In Sabah, documentation training on customary laws, traditions and community resource areas have been given to communities in Melangkap to develop their respective biocultural community protocol and to increase community awareness on the principles of ABS and biodiversity resources. In Peninsular

¹⁷⁵ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 114.

¹⁷⁶ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 114.

¹⁷⁷ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 26.

¹⁷⁸ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 113.

Malaysia, in addition to documenting traditional knowledge of indigenous and local communities, the Forest Research Institute Malaysia (FRIM) has been working on the development and piloting of prototypes based on traditional medicinal plants of several Orang Asli communities.

4.4 Recommendations: Legislative and institutional reforms required to better protect the rights of indigenous peoples and local communities over their natural resources, environment and culture

- Consult with representatives of indigenous peoples to put in place legislation – such as on the free, prior and informed consent of indigenous peoples – and other mechanisms that ensure that these human rights defenders are free from harassment, discrimination, and the threat of criminalization, thereby enabling them to conduct their work in a safe environment.
- Reform laws and policies to effectively protect and promote traditional knowledge, cultural heritage and customary practices.
- Work with indigenous communities to develop, with their free, prior and informed consent, a public awareness campaign about the work of indigenous rights defenders and implement it throughout the country.
- Continue to conduct awareness-raising workshops with the competent authorities and enforcement officers on ABS and traditional knowledge.
- Ensure that the implementation of ABS is executed effectively.

PART 5: NATURAL RESOURCE EXPLORATION AND EXTRACTION, LARGE-SCALE INFRASTRUCTURE/DEVELOPMENT PROJECTS AND AGRICULTURE

5.1 Natural resource extraction and large-scale infrastructure and development projects

Despite the legislative frameworks in Malaysia governing the provisions and processes regarding natural resource exploration and extraction, the use of lands for large-scale agriculture and infrastructure and/or development projects (large-scale development projects) hinder and infringe on the rights of indigenous peoples and local communities over their territories, areas and natural resources. The systemic issues that cause the denial of indigenous peoples' full enjoyment of their legal and human rights evolve mainly from the continuous amendments of land laws (which have British colonial origins) that do not recognise indigenous peoples' perspectives of land ownership and management. Therefore, native customary rights to land have been eroded in favour of land acquisition and concession allocations to commercial enterprises in the name of large-scale development and agriculture. In addition, they have affected administrative decisions with respect to indigenous peoples' land claims¹⁷⁹ and have affected indigenous peoples' human rights to life, land, resources and property, cultural rights, rights to a clean environment, clean water, health, food and subsistence.

Natural resource extraction in Malaysia is predominantly timber related, with industrial logging causing degradation of forest resources, pollution and environmental damage. Large-scale infrastructure and development projects, such as commercial agriculture plantations, in particular oil palm plantations, extractive industries and mining activities, the construction of roads, highways, hydroelectric dams have been prioritised at the expense of the environment and human rights. Major hydropower projects have been undertaken for the SCORE project ("Sarawak Corridor of Renewable Energy") in Sarawak despite numerous protests over the years on the grounds that these projects cause displacement and dispossession of lands of tens of thousands of indigenous peoples and irreversible devastation to the biodiversity of Sarawak's ecosystems.¹⁸⁰

Although historically human rights has been the responsibility of the State, given the rapid growth of and size of multinational corporations and the impact of business on the lives of people, corporations are now held to a higher standard as regards human rights under the United Nations Guiding Principles on Business and Human Rights (UNGPs), in particular in the extractive industries sector. The foundational principles as regards the second pillar of the UNGP, namely, The Corporate Responsibility to Respect, is set out at UNGPs 11-15. Foundational UNGP (FGP) 11 provides that businesses should avoid the infringement of human rights and elaborates in FGP12 to include, amongst others the rights of indigenous peoples, women, children and migrant workers). FGP12 refers to "internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work"¹⁸¹, and the commentary of FGP12, sets out that the International Bill of Human Rights "consists of the UDHR and the main instruments through which it has been codified: the ICCPR and the ICESOC), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work". This is significant, as set out in Part 2, as Malaysia has not ratified these Conventions. FGP13 requires businesses to seek to prevent or mitigate adverse human rights impacts and address them where they occur and these "business relationships" are set out in the commentary, to include "relationships with business partners, entities in

¹⁷⁹ SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 164.

¹⁸⁰ See: <https://www.business-humanrights.org/en/business-human-rights-in-malaysia-a-report-from-kuala-lumpur>

¹⁸¹ SRSG. 2011. *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protec. No. March, p. A/HRC/17/31, viewed, <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>*, p. 13.

its value chain, and any other non-State or State entity directly linked to its business operations, products or services” whereas FGP14 provides that human rights apply to all enterprises regardless of their size, operational context, ownership or structure. FGP15 sets out that business enterprises should have in place policies and processes to meet their responsibility to respect human rights, including:

- (a) policy commitment to meet their responsibilities (this is elaborated in Operational UNGP (OGP) 16);
- (b) human rights due-diligence (HRDD) process to identify, prevent, mitigate and account for how they address their impacts on human rights (set out at OGP 17 – 21); and
- (c) a process to enable the remediation of any adverse human rights impacts they cause or contribute to (OGP 22, 29 and 31).

SUHAKAM, the Malaysian NHRI has initiated several awareness programmes for the business sector, such as the SUHAKAM-RWI Research Project which is a partnership with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) which was a grant for the NHRI to research ‘The Role of SUHAKAM in Addressing Corporate Human Rights Violations: A Study on Logging and Plantation Industries in Malaysia’ pursuant to the National Inquiry into the Land Rights of Indigenous Peoples in Malaysia.

5.2 **Recommendations: Legislative and institutional reforms are required to better protect the rights of indigenous peoples and local communities against the negative impacts of large-scale development projects**

SUHAKAM’s recommendations for legislative and institutional reforms remain relevant and are reiterated here and include: -

- Recommendation 7: Adopt HRBA to development and FPIC law
 - The Federal Constitution in Article 5 guarantees the right to life, which the courts have elaborated to include a right to livelihood and quality of life. The Declaration on Right to Development, the UNDRIP, ILO C169, CRC, CEDAW and ICESCR all contain provisions and legal measures that promote the right of participation in various forms.
 - The report of the UN Expert Mechanism on the Rights of Indigenous Peoples on “indigenous peoples and the right to participate in decision-making” stressed the importance of State parties in ensuring that corporations respect the rights of indigenous peoples to give or withhold their free, prior and informed consent to operations that may affect their rights.
 - The UNDP recommended that States adopt a human rights-based approach (HRBA) to development so as to ensure such development will benefit both the State and its citizens. The UNDRIP and ILO C169 also recommend the adoption of an FPIC law in order to obtain consent from indigenous peoples and ensure that they would also benefit from development programmes.
 - In line with international standards, the State and Federal Governments must adopt such a human rights-based approach to development and adopt an FPIC law outlining consent making processes that ensure effective participation of affected indigenous communities.
- Recommendation 8: Ensure land development does not adversely impact indigenous peoples prevailing development in Malaysia leans towards the development of large-scale projects (mainly plantations) by private sector investment or Government-linked companies.
 - Studies (Cramb 2007, Majid Cooke 2012, and Li 2011) have shown that implementing large-scale

282 These aspirations are clearly articulated under articles 193 to 196 of the UN Conference - Rio+20 outcome document. Malaysia participated at two UN Conferences on Sustainable Development better known as “Rio gatherings” and endorsed the Agenda 21 document emerging

from the first gathering and The Future We Want document in June 2012 Rio+20 gathering. In both there are clear global commitments towards sustainable development.

- Report of the National Inquiry into the Land Rights of Indigenous Peoples development projects has compounded land conflicts rather than improving land matters, and poverty among indigenous peoples has not been reduced significantly.

Recommendations for consideration on business and human rights in the extractive industries:

- Promote the development of a governance framework for the extractive sector and support further discussion on the UNGPs to identify practical implementation action steps of the principle of free, prior and informed consent as a sector-wide norm for oil, gas and mining enterprises.
- Conduct a multi-stakeholder dialogue on indigenous peoples, extractive industries and human rights-focused on the regulation of the extractive industry in accordance with the Declaration on the Rights of Indigenous Peoples and as a means of ensuring a level playing field for all companies operating on indigenous peoples' lands.
- Establish a national forum for dialogue with indigenous peoples' representatives to consider measures that might be proposed to improve relations between their communities and extractive industries.
- Conduct an extensive review of all ongoing projects that create inequitable gaps between NCR landowners, rural local farmers and non-industry landowners on one side and political and economic elites on the other side.
- Extractive corporations should commit to voluntary regulations in the industry, such as certification and a due diligence code of conduct that fully respect and recognise NCRs to lands of indigenous communities.
- Corporations must obtain FPIC for all activities planned on the customary lands and territories of indigenous peoples and conduct stakeholders' participation in decision-making before the start of any project pursuant to FPIC.
- The banking sector should make changes to banking regulations to include the precondition of recognition and protection of indigenous peoples' rights to their lands, territories and resources.

PART 6: PROTECTED AREAS, ICCAs AND SACRED NATURAL SITES

6.1 Protected Areas

6.1.1 Laws and policies that constitute the protected area framework

In Malaysia, sites with significant terrestrial, coastal and marine biodiversity and ecosystem are gazetted as protected areas in the form of national and state parks, permanent reserved forests (PRFs), nature reserves and wildlife sanctuaries, and fisheries prohibited areas. Chior Wildlife Reserve in Perak (former British Malaya) was the first protected area gazetted in 1903 and regazetted in 1910. As of 2016, there are 527 protected areas in Malaysia: 275 in Peninsular Malaysia, 195 in Sabah (including 3 in the federal territory of Labuan) and 57 in Sarawak. This constitutes approximately 4.35 million ha of land area and 1.51 million ha of marine and coastal areas. Therefore, the terrestrial protected area coverage for Malaysia is 13.2%, whereas the marine protected area coverage is 3.3%.¹⁸² Although not officially published, based on the 2018 list, there are 467 terrestrial protected areas constituting 4.35 million ha of land areas (13.2 per cent of the terrestrial area of Malaysia). As at February 2020, the World Database on Protected Areas states that 6,341,900 ha of land, or 19.12% of the country, is protected.¹⁸³

The various types of protected areas in Malaysia that can be broadly grouped based on the laws used in their creation are:

- (i) Marine protected areas under the marine laws
- (ii) Areas reserved for a public purpose under the land laws
- (iii) Protection forests under the forestry laws
- (iv) National parks, state parks and nature reserve under the relevant park/forestry laws
- (v) Wildlife sanctuaries or wildlife reserves under the wildlife laws

(i) **Marine protected areas**

Marine protected areas are described as “fisheries prohibited areas” in the Fisheries Act 1985. There are five “fisheries prohibited areas” in Peninsular Malaysia (e.g. the Fisheries (Prohibited Areas) Rantau Abang Regulations 1991) and three areas in Sarawak. The Marine Parks Malaysia Order 1994, which was created under section 41(1) of the Fisheries Act 1985 provides for Marine Parks in line with the definition of IUCN protected areas. It has been used to describe 42 islands in four states of Peninsular Malaysia and Labuan. According to the 2019 Master List, the protected marine area within marine parks stretches two nautical miles seaward from the outer points of the islands as measured at low watermark for all of the islands with the exception of Pulau Kapas in Terengganu; and Pulau Kuraman, Pulau Rusukan Besar and Pulau Rusukan Kecil in FT Labuan for which the MPA only covers up to one nautical mile seaward. The Division of Marine Park and Resource Management (DMPRM) was established to be the management authority of these MPAs). The National Parks Act 1980 has been used to gazette marine protected areas, such as the marine component of the Penang National Park. Other legislation that provide for the protection of both terrestrial and marine protected areas include the Sabah Parks Enactment 1984 (e.g. Tunku Abdul Rahman Park) and Wildlife Conservation Enactment 1997 (e.g. Sugud Islands Marine Conservation Area. In Sarawak, the National Parks and Nature Reserves Ordinance 1998 are also used to gazette marine protected area (e.g. Talang Satang National Park and Miri-Sibuti National Park) or part of PAs (both land and water body).

¹⁸² Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*.

¹⁸³ UNEP-WCMC. 2018. “Protected Area Profile for Malaysia from the World Database of Protected Areas.” Accessed February 2020. <https://www.protectedplanet.net/country/MYS>. (Differences between statistics may be due to differences in methodologies or out of date reporting).

(ii) Areas reserved for a public purpose

The National Land Code 1965 in Peninsular Malaysia and the Sabah Land Ordinance provides for areas reserved for a specific public purpose, and these include bird sanctuaries and wildlife reserves. However, most areas reserved for a public purpose (such as recreation or tourism) are usually not considered to be IUCN protected areas because biodiversity conservation has not been specified as an objective of the reserves. Some of the notable examples of a protected area gazetted under the National Land Code 1965 under the 2019 Master List are the Pahang side of the Endau Rompin National Park, the Melaka City Bird Sanctuary, the Padang Kemunting Turtle Sanctuary, the Segari Turtle Sanctuary and the Paya Indah Wetlands. The 240ha Kuala Selangor Nature Park, designated using the National Land Code 1965, is an important wetland area managed by the Kuala Selangor District Council and the MNS. It is reserved as a “Taman Alam” or Nature Park. In Sabah, the Sabah Land Ordinance has made provisions for the Kota Kinabalu Wetlands (managed by the NGO Sabah Wetlands Conservation Society) to preserve the mangrove for waterbirds.

(iii) Forest reserves

As set out in Part 3, in Peninsular Malaysia, most of the forest reserves fall under the category of Permanent Reserve Forests (PRF) under the National Forestry Act 1984 and forest enactments. According to the 2019 Master List, although the majority of these areas are not considered as IUCN protected areas as they are timber production forests, the National Forestry Policy 1978 states that the “Permanent Forest Estate” will be managed and classified under four types of forests for the purposes of protection, production, amenity and research and education. The management practices of these areas do not allow harvesting activity to be carried out, as is evidenced by the National Forestry Policy. KATS is of the view that the recognition of protection PRFs in Peninsular Malaysia as protected areas within the Master List is in line with the recommendation of the Common Vision on Biodiversity.

In Sabah, the Sabah Forest Enactment 1968 provides for forest reserves (section 12) which are divided into one or more of the seven classes according to their management objective. Class I, Class VI and Class VII are considered to be applicable for protected areas and areas designated under any of these classes are included in the Master List. According to the 2019 Master List, the three major protected areas within the Yayasan Sabah concession area (Danum Valley Conservation Area, Imbak Canyon Conservation Area and Maliau Basin Conservation Area) are all gazetted as Class I (Protection) Forest Reserves, and the three areas established under Class VII (Wildlife) Forest Reserve include the Balat Damit Wildlife Reserve, Kulamba Wildlife Reserve and Tabin Wildlife Reserve.

In Sarawak, Chapter 71 of the Forests Ordinance 2015 provides for the creation of three categories of permanent forests, namely forest reserves, protected forests and communal forests. Forest reserves are production forests established to supply timber and other forest produce while communal forests are meant to supply forest produce to a settled community for their domestic need. Both of these categories are not considered as protected areas. The third category, protected forests, are normally established for the protection of soil and water, but local communities may be permitted to hunt, fish and take forest produce for domestic use, as well as to pasture cattle. Protected forests in Sarawak were not included in the 2019 Master List as they have not been confirmed as protected areas.

(iv) National parks, state parks and nature reserves

The IUCN guidelines state that all areas that fit into category II are considered to be national parks, regardless of what they are called locally and which legal instrument was used. In Malaysia, the only protected area created under the National Parks Act 1980 is the Penang National Park. The Taman Negara National Park (renamed Taman Negara) was created under three state-level

national park enactments. Four protected areas managed by the Johor State Government through the Johor National Parks Corporation (JNPC) are referred to as national parks, although they were constituted using state enactments. This state parks model has since been emulated (with some modifications) by Perak through the Perak State Parks Corporation (PSPC) with the gazette of Royal Belum State Park and Pulau Sembilan State Park. Two other states with a state park enactment are Selangor (Selangor State Parks Corporation Enactment 2005) and Terengganu (Terengganu State Park Enactment 1986). However, to date, both enactments have not been used to establish any state park. The only state park in Selangor has been gazetted under the state-adopted National Forestry Act rather than the state parks enactment.

In Sabah, the Sabah Parks Enactment 1984, repealed the National Parks Enactment in 1977 and the earlier National Parks Ordinance 1962 which established Kinabalu Park in 1964 and Tunku Abdul Rahman Park in 1974. According to the 2019 Master List, there are nine areas established under the Sabah Parks Enactment under the management of Sabah Parks, and consist of both terrestrial (e.g. Crocker Range Park) and marine parks (e.g. Tun Mustapha Park).

In Sarawak, the Nature Reserves Ordinance 1998 (repealed the National Parks Ordinance 1956) is the legislation administered by the Forest Department Sarawak. The national parks or nature reserves established using the National Parks and Nature Reserves Ordinance 1998 may include land and/or sea areas. The first protected area established in Sarawak was Bako National Park (gazetted in 1957). According to the 2019 Master List, there are 36 national parks in Sarawak as at June 2016.

(v) **Wildlife reserves**

In Peninsular Malaysia, the Department of Wildlife and National Parks, Peninsular Malaysia (DWNP) is responsible for wildlife reserves. The Wildlife Conservation Act 2010 (which replaced the Protection of Wild Life Act 1972 deals with bird sanctuaries, wildlife sanctuaries, wildlife reserves and game reserves. It should be noted that there are a number of PRFs that have been designated as “non-hunting areas” under the Protection of Wild Life Act 1972, but these areas are not included in the Master List (see, “Areas Not Currently Included”, below). In addition to the more general wildlife enactments, two states in Peninsular Malaysia have enactments specific to the protection of chelonians. In Kedah, two riparian stretches have been gazetted as sanctuaries under the state River Terrapin Enactment 1972. In Terengganu, the state Turtles Enactment 1951 has been used to gazette sanctuaries under one riparian stretch (Bukit Paloh Tuntung Reserve) and one coastal stretch (the Rantau Abang Turtle Sanctuary). In addition, the National Land Code 1965 has also been used to gazette sanctuaries on Pulau Redang (Pasir Cagar Hutang, Pasir Mak Kepit, Pasir Bujang, Pasir Mak Simpan and Pasir Cik Keling) and Pulau Perhentian (Tiga Ruang, Tanjung Guntung, Pinang Seribu and Tanjung Tukah).

In Sabah, wildlife sanctuaries are managed by the Sabah Wildlife Department and are established under section 9 of the Wildlife Conservation Enactment 1997. According to the 2019 Master List, the Lower Kinabatangan Wildlife Sanctuary gazetted in 2005, has been the only area established as a wildlife sanctuary thus far. The Wildlife Conservation Enactment 1997 can also establish another type of protected area which are conservation areas which can also include the protection of both land and sea area (unlike the Wildlife Conservation Act 2010 applied in Peninsular Malaysia). Additionally, the Sabah Forest Enactment 1968 can be used to classify any of the established forest reserves into Class VII, i.e. Wildlife Reserve. Examples of wildlife reserves gazetted using this mechanism are Balat Damit Wildlife Reserve, Kulamba Wildlife Reserve and Tabin Wildlife Reserve. Kulamba Wildlife Reserve and Tabin Wildlife Reserve are managed by Sabah Wildlife Department while Balat Damit Wildlife Reserve is managed by the Sabah Forestry Department.

In Sarawak, Wild Life Sanctuaries are governed by the Wild Life Protection Ordinance 1998 (which repealed the Wild Life Protection Ordinance 1958). Wild Life Sanctuaries can be constituted over any State Land (which is not part of a national park or a nature reserve) (section 10) or over a forest reserve (section 21). The Wild Life Sanctuaries gazetted under this legislation include the Samunsam Wild Life Sanctuary (1979), Lanjak Entimau Wild Life Sanctuary (1983), Pulau Tukong Ara-Banun Wild Life Sanctuary (1985), Sibuti Wild Life Sanctuary (2000) and Sungai Jelangai Wild Life Sanctuary (2016).

The National Policy on Biological Diversity (NPBD) 2016-2025

The National Policy on Biological Diversity (NPBD) 2016-2025 was formulated to provide the direction and framework to conserve biodiversity and meet the targets set out under the CBD, one of which is to increase protected areas coverage (Aichi 2020 Target 11).¹⁸⁴ The Malaysian Government, through the Ministry of Land, Water and Natural Resources (KATS) issued its Sixth National Report setting out the progress of the NPBD 2016-2025 (NPBD) indicators and actions in achieving national and Aichi Biodiversity Targets (ABTs) in December 2019. Target 6 of the NPBD is that by 2025, at least 20% of terrestrial areas and inland waters, and 10% of coastal and marine areas, are conserved through a representative system of protected areas and other effective area-based conservation measures.

The National Framework for Protected Areas

Malaysia has met indicator 6.4 of target 6 of the NPBD, as the National Framework for Protected Areas for Malaysia has been developed to provide a standard definition for PAs, a uniform classification for PAs and the coordination structure for PAs in Malaysia. The NFPA was developed through extensive consultations with over 45 sessions with related PA stakeholders, which included all the 13 State Governments who have the jurisdiction over most of the natural resources, federal government agencies, NGOs and private sector. Three distinct PA working groups were suggested to undertake the action plans for the regions of Peninsular Malaysia, Sabah and Sarawak, respectively. In addition, five national-level stakeholder consultations were held to prioritise and refine the actions to be taken under the NFPA. The NFPA prioritised strategies and actions to achieve six objectives:

- (i) strengthen and streamline PA governance;
- (ii) ensure ecological representativeness of the PA network;
- (iii) ensure effective PA coverage;
- (iv) enhance conservation of biodiversity resources and PA management;
- (v) empower stakeholders' participation; and
- (vi) diversify funding sources.

The Master List of Protected Areas in Malaysia 2019

The Master List of Protected Areas in Malaysia 2019 was designed as a tool for national biodiversity conservation management and planning.¹⁸⁵ The Master List was the first attempt to compile and consolidate all categories of terrestrial and marine protected areas in Malaysia into a comprehensive official national list and is the result of a collaboration between the Ministry of Land, Water and Natural Resources (KATS), formerly known as the Ministry of Natural Resources and Environment Malaysia (NRE), the Malaysian–Danish Environmental Cooperation Programme and WWF-Malaysia.

¹⁸⁴ The Convention of Biological Diversity (CBD) Aichi 2020 targets include increasing protected areas coverage (target 11); safeguarding essential ecosystem services (target 14); and protection of traditional knowledge (target 18).

¹⁸⁵ Ministry of Water, Land and Natural Resources. 2019. A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning. Ministry of Water, Land and Natural Resources, Putrajaya, Malaysia. ISBN: 978-967-0250-30-4

The Master List was necessary and timely, as it ruled out data and reporting inconsistencies by various governmental and non-governmental agencies which had resulted in the wrong inclusion of areas, figures and measurements of protected areas nationally and in global databases, such as the United Nations List of Protected Areas (UN, 2003), the UNEPWCMC IUCN-WCPA World Database of Protected Areas (WDPA) and the Protected Planet online database which is a global platform on the status and trends of protected areas run by IUCN, IUCN-WCPA and UNEP-WCMC.¹⁸⁶

6.1.2 Definition of a protected area

IUCN and CBD definition of a protected area

The International Union for the Conservation of Nature's Global Programme on Protected Areas (IUCN) defines a protected area as a "clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values". Article 2 of the Convention on Biological Diversity (CBD) defines a "protected area" as "a geographically defined area, which is designated or regulated and managed to achieve specific conservation objectives".

There are six categories of protected areas under the IUCN are classified according to their management objectives and include strict nature reserve, wilderness area, national park, natural monument of feature, habitat or species management, protected landscape or seascape and protected areas with sustainable use of natural resources. The category should be based on the primary management objective(s), in which the 75 per cent rule applies (i.e. should apply to at least three-quarters of the protected area). The IUCN categories are set out in the table below¹⁸⁷:

Protected Area Category and International Name	Management Objectives
Ia - Strict Nature Reserve	Strictly protected areas set aside to conserve biodiversity and, possibly, geological/geomorphological features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values. They serve as indispensable reference areas for scientific research and monitoring.
Ib - Wilderness Area	Large unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition.
II - National Park (ecosystem protection; protection of cultural values)	Large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities.
III - Natural Monument	Areas are set aside to protect a specific natural monument, such as a landform, sea mount, a cave or even a living feature such as an ancient grove. They are generally quite small areas and often have high visitor, historical or cultural value.
IV - Habitat/ Species Management	Areas dedicated to the conservation of particular species or habitats. Many Category IV protected areas need regular, active management interventions to meet their objective.
V - Protected Landscape/ Seascape	An area where the interaction of people and nature over time has produced a distinct character and significant ecological, biological, cultural and scenic values, and where safeguarding the integrity of this interaction is vital to conserving nature and sustaining other values.
VI - Protected Area with Sustainable Use of Natural Resources	Protected areas that conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition and part under sustainable natural resource management. Low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of this type of protected areas.

¹⁸⁶ Ministry of Water, L. and N.R. 2019. *A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning*. Putrajaya, p. 1 and see www.protectedplanet.net.

¹⁸⁷ Borrini-Feyerabend, G., Dudley, N., Jaeger, T., Lassen, B., Broome, N.P., Phillips, A. & Sandwith, T. 2013. *Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines No. 20*. No. 20, Gland, p. 8.

Definition of a protected area in Malaysia

Previously, the only definition for “protected areas” found in Malaysian legislation was the definition found in the Protected Areas and Protected Places Act 1959 (Act 298) - an act unrelated to the conservation of biological diversity. The National Policy on Biological Diversity 2016-2025 (NRE, 2016) mentions protected areas (see goal 3, target 6), but does not explicitly define “protected area”. However, at the first national workshop on “A Master List of Protected Areas in Malaysia” held on 7-8 April 2008, stakeholders comprising representatives of protected area management authorities and other relevant agencies discussed the Malaysian definition for protected areas. In order to streamline the management of protected areas (PAs), KATS adapted the IUCN and CBD definitions into the local context and adopted the National Framework for Protected Areas (NFPA) with the aim to provide a national definition for PA in Malaysia; expand PAs beyond legal gazettes to include alternative regulatory mechanisms like OECM, and to provide a uniform classification of PAs in Malaysia.

The Federal Government adopted the IUCN definition of “protected areas”, which includes protection forests within the permanent reserve forest and separates gazetted from non-gazetted areas¹⁸⁸. According to the NFPA, a “protected area” in Malaysia is defined as:

“A geographical area dedicated for the long-term protection and conservation of natural and associated cultural resources and managed through legal and/or other effective means.”

This national PA definition goes beyond the past practice of viewing PAs only from a legal perspective and implies that there are several major components involved in PA designation in Malaysia. The PA has to be¹⁸⁹:

- (i) *Dedicated*: The PA has to be designated and recognised by a government decision-making authority (i.e. the respective state governments who are the ultimate decision-making authorities. The Federal Government is the ultimate decision-making authority for the federal territories. While some IPLCs and private sector can designate their own PAs, the recognition has to come from the federal or state decision-making authorities.
- (ii) *Geographical area*: Land or marine area with clearly demarcated boundary.
- (iii) *Legal means*: PA designated under a federal or state legislation.
- (iv) *Other effective means*: PA designated under regulatory mechanism recognised by the respective federal or state decision-making authorities.
- (v) *Long-term protection*: PA designated for the benefit of the present and future generations.
- (vi) *Managed*: There is a competent agency/body assigned to manage the PA.
- (vii) *Conservation of natural and associated cultural resources*: The primary objective of the designated PA is for conservation of natural resources and can include the associated cultural resources of the site.

Therefore, in Malaysia, as set out in the IUCN guidelines, in determining whether or not a particular site is a protected area, the first criterion is the dedication or designation of an area for biodiversity conservation as indicated by explicit management objectives. In the Malaysian context, most protected areas are state-owned, with their management objectives prescribed by a notification in the relevant government gazette. In addition, further indications of the management objective of the protected area in question were obtained from relevant supporting official policy documents (e.g. the National Forestry Policy in the case of protection permanent reserved forests in Peninsular Malaysia), and as such only

¹⁸⁸ Gloss, L., Myron, E., and Ahmed, H. International Outlook for Privately Protected Areas: Malaysia Country Profile. International Land Conservation Network (a project of the Lincoln Institute of Land Policy) - United Nations Development Programme, 2019.

¹⁸⁹ Department of Wildlife and National Parks, M. 2017. *NATIONAL FRAMEWORK FOR PROTECTED AREAS (NFPA) SYSTEM IN MALAYSIA Final Draft of the National Framework for Protected Area (NFPA)*. Kuala Lumpur, p. 29.

legally constituted (gazetted) areas were considered in the Master List. Proposed areas and areas set aside administratively but without legal provisions (e.g. most virgin jungle reserves (VJRs) in Peninsular Malaysia) are considered to be “areas not currently included” in the 2019 Master List.

The agreed criteria for deciding and listing of areas that can be included in the Master List of Protected Areas in Malaysia 2019 in order to ensure consistency are: -

- (i) *“The area concerned has been gazetted under the agreed list of laws. Areas established under “administrative orders” alone will not be included. The complete list of laws is available in annex III. The list may change accordingly/as agreed by the relevant stakeholders to take into account any changes made to the existing laws or if new laws are created.*
- (ii) *The gazette notification has been published in the relevant government gazette.*
- (iii) *The geographical location of the area is clearly defined, either in descriptive format contained within the gazette notification or is available as a gazette plan (map) which can be obtained from the relevant survey and mapping department.*
- (iv) *Biodiversity conservation is mentioned explicitly as the objective of the establishment of the area. For example, Tasik Chini is not included in the list as its gazette notification only listed recreation as its objective, even though the area contains significant biodiversity values.*
- (v) *The condition of the area or its management effectiveness is not considered as a factor in the inclusion of the areas in the Master List as it this would be the subject for further assessment under a separate initiative. A given area will be included in the Master List as long as it fulfills criteria 1-4 above.*
- (vi) *Areas with national/international designations are not included in the Master List if they not gazetted with any of the nationally accepted protected areas laws listed as per the first criterion. For example, the Sungai Pulai Ramsar site in Johor is not included in the Master List whereas Tanjung Piai (also a Ramsar site) is included – the former is a production forest gazetted under the state-adopted National Forestry Act while the latter is gazetted under the Johor National Parks Enactment.*

Note: there are minor exceptions to the above criteria based on careful analysis of the situation pertaining to the particular protected area and inputs provided by the relevant managing authorities. These anomalies have been documented in official correspondence and noted as footnotes in annexe 1. In some cases, recommendations have been made to ensure these areas progress towards fulfilling these criteria in future.¹⁹⁰

Alternative mechanism to designate PAs

Based on the national PA definition adopted by the stakeholders, PAs in Malaysia are designated through two major mechanisms which are through legal gazettelement under specific PA legislation or through the recognised regulatory mechanism. While the legal gazettelement of PAs can be done under the federal and state legislation, stakeholders involved in the NFPA agreed that the PAs approved by state government decision-making authorities can be considered as part of the regulatory mechanism to designate PAs).¹⁹¹ There were also further recommendations that the legal gazettelement of PAs should not be confined to the traditional legislation and that natural sites gazetted under non-traditional legislation related to water resources and native customary land could also be considered as PAs. Additionally, stakeholders also recommended that natural sites that have been gazetted under this non-traditional PA legislation should be evaluated and considered as PAs since such sites also conserve the natural resources, habitats and/or associated cultural resources. Therefore, in addition to the 17 traditional PA legislation, there are many other non-traditional legislations that can be included for the gazettelement and management of new PAs. The regulatory mechanism is used to by-pass delay in the gazettelement of PAs in Malaysia as it

¹⁹⁰ Extracted from the Ministry of Water, *A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning*, p. 11.

¹⁹¹ Chart 3: Alternative Designation Mechanism of PAs under the NFPA Designated PAs Gazetted Federal Legislation (Peninsular Malaysia) State Legislation Regulated State EXCO/Cabinet Plans/Programmes /Policies EIA, FSC, RSPO.

immediately intervenes to protect and manage the site before the finalisation of the legal gazette-ment-an initiative that is in step with the IUCN global initiative to recognise such conservation sites as other effective area-based conservation measure (OECM) sites, which will be elaborated on in Part 6.1.7.

6.1.3 State agencies mandated to develop and implement protected area laws and policies

In Peninsular Malaysia, the administration of the protected area falls under the purview of the Forestry Department Peninsular Malaysia (FDPM). The FDPM consists of the forestry department headquarters Peninsular Malaysia, 11 state forestry departments and 33 district forest offices located throughout the peninsular. The FDPM comes under the Ministry of Water, Land and Natural Resources, Malaysia (KATS). There are at least four major protected areas networks, managed by different government agencies. Each network is governed by different laws with varying requirements and degrees of protection. The terrestrial protected areas fall into two broad categories: wildlife protection areas and protection forests under permanent reserved forests. Wildlife protection areas include national parks, state parks, wildlife reserves, wildlife sanctuaries and nature reserves and are established by the National Parks Act 1980, the Wildlife Conservation Act 2010, and the National Land Code 1965 at the federal level. The National Forestry Act of 1984 (section 10) defines permanent reserve forest and provides forest classifications for production and protection forests.¹⁹²

In Sabah, the Sabah Forestry Department (SFD) under the Ministry of Tourism, Culture and Environment (KePKAS) is mandated to develop and implement protected area laws and policies, The Sabah Biodiversity Centre (SaBC) was established in 2008 to govern the conservation and utilization of Sabah's biodiversity. Yayasan Sabah Group is the other key state entity that manages three major protected areas in Sabah including Danum Valley, Imbak Canyon and Maliau Basin. In Sarawak, the management of forests, including protected areas and biodiversity is under the jurisdiction of the Forest Department Sarawak (FDS) and Sarawak Forestry Corporation (SFC). Both these departments are under the purview of the Ministry of Urban Development and Natural Resources (MUDeNR) which is responsible for environmental policies in the State as a whole. A detailed strategic action plan (SAP) to be undertaken between 2017 and 2025 has been developed together with the stakeholders in order to fulfil the obligations under the NFPA. The stakeholders in the SAP are categorised as:

- (i) Decision-makers
- (ii) Planning & monitoring
- (iii) Management
- (iv) Civil society
- (v) Funding

¹⁹² Gloss, L., Myron, E., and Ahmed, H. 2019. *International Outlook for Privately Protected Areas: Malaysia Country Profile. International Land Conservation Network (a project of the Lincoln Institute of Land Policy) - United Nations Development Programme, 2019.*, No. September, p. 5.

A table setting out the different stakeholders responsible in each region is set out below: -

	Sabah	Sarawak	Peninsular Malaysia
Decision-makers	State Cabinet, Natural Resource Office (NRO), KePKAS, Protected Areas Working Group (PAWG)-Sabah, Sabah PSC, Sabah (Ministry of Finance) MoF	State Cabinet, MUDNR, PAWG-Sarawak, Sarawak PSC, Sarawak MoF	(Natural Resource and Environment (NRE), PAWG-Peninsular Malaysia, MoF
Planning & monitoring	Sabah Wildlife Department (SWD), Sabah Forestry Department (SFD), Sabah Parks (SP), World Wide Fund for Nature (WWF)	Forest Department Sarawak (FDS), (Similajau National Park Wildlife Department (SNPWD), Sarawak Forestry Corporation (SFC), WWF	Department of Wildlife and National Parks (DWNP), Forest Department Peninsular Malaysia (FDPM), Department of Marine Parks Malaysia (DMPM), Forest Research Institute Malaysia (FRIM), WWF
Management	SWD, SFD, SP, Sabah Foundation, WWF, Reefcheck	FDS, SNPWD, SFC, WWF, Reefcheck, WCS	DWNP, FDPM, DMPM, WWF, MNS, WCS
Civil society	NGOs, corporate and IPLCs	NGOs, corporate, IPLCs	NGOs, corporate and IPLCs
Funding	Sabah MoF, NRE, EPU, corporate	MoF,NRE,EPU, corporate	MoF, NRE, EPU, corporate

6.1.4 Recognition of different types of protected areas (i.e. Governance ‘Type D’)

The IUCN protected area matrix is a classification system for protected areas based on their governance type to describe who holds authority and responsibility, and who makes the key decisions for the particular protected area. The four governance types are:

- (i) governance by government;
- (ii) shared governance;
- (iii) private governance; and
- (iv) governance by indigenous peoples and local communities.

Under the IUCN protected area matrix, ICCAs are recognised as a type of governance and referred to as Type D governance, declared and run by local communities. IUCN defines Type D governance as: “protected areas where the management authority and responsibility rest with indigenous peoples and/or local communities through various forms of customary or legal, formal or informal, institutions and rules”.¹⁹³ An effective governance regime under this type infers that the indigenous peoples or local communities possess an “institutional arrangement” that takes decisions and develops rules for the land, water and natural resources.

¹⁹³ BorriniFeyerabend, G., Kothari, A., Oviedo, G., Phillips, A., Miller, K. & Farvar, T. 2004. Indigenous and Local Communities and Protected Areas Series Editor Towards Equity and Enhanced Conservation Guidance on policy and practice for Comanaged Protected Areas and Community Conserved Areas. *IUCN*.

The Malaysian PA Framework does not recognise ICCAs to a sufficient degree, as all forests are state-owned. Although the concept of community conserved areas (CCAs) has been recognised in several policy documents including the National Physical Plan, the Sabah Biodiversity Strategy 2012-2022, and the NPBD, a systematic approach and specific legal provisions to empower indigenous peoples as custodians for natural resources have not been developed at the national level.¹⁹⁴ For example, in Sarawak, the government establishes communal forests to meet the needs of communities for forest products and the communal forests are looked after by the communities themselves to ensure sustainable use of resources. This may be considered devolution of governance or co-governance. It is unfortunate to note, however, that many communal forests have been given up for logging.¹⁹⁵ In the Sixth National Report to the CBD, Malaysia plans to have developed policy and legal provisions to empower indigenous peoples and local communities to be custodians of biodiversity by 2021. Thus far, Sabah has paved the way for ICCA recognition, with 3,384 ha which includes the Bundu Tuhan Native Reserve (884 ha) and Sg. Pin Conservation Area (2,500 Ha). The Bundu Tuhan Native Reserve will be examined as a Case Study in Part 11.

6.1.5 Implementation of element 2 of the programme of work on protected areas (PoWPA)¹⁹⁶

As clearly described in the PoWPA, while protected areas are an essential part of conservation strategies, in order for them to be successful in the long run, they must be incorporated into the broader landscape and seascape as well as societal setting.¹⁹⁷ At the Fourteenth Meeting of the CBD in 2018, in decision X/3,¹⁹⁸ the Conference of the Parties, among other things, identified element 2 on governance, participation, equity and benefit-sharing of the PoWPA as a priority issue in need of greater attention. This includes promoting equity and benefit-sharing through increasing the benefits of protected areas for indigenous and local communities and enhancing the involvement of indigenous and local communities and relevant stakeholders. Thus far, the engagement and implementation of this is at an early stage as the understanding of these elements and how they fit into the Malaysian context is still at an early stage.

6.1.6 Protected areas that overlap with ICCAs

ICCAs do not always fall under the classification of protected areas, as they do not always meet the IUCN definition. However, there are some ICCAs that meet the IUCN definition but do not want to be considered protected areas. This can be for various reasons, such as the avoidance of compulsory changes in governance structures as a result of national protected area frameworks. Such areas are in the ICCA Registry but not in the WDPA.¹⁹⁹ According to Borrini-Feyerabend *et al.*, while these overlaps are officially acknowledged and recognised, in most cases they “remain unacknowledged or ‘invisible’ realities” and explain that the data on protected areas and ICCAs overlap generally occur in two situations:

- (i) “Lands and waters where protected areas have been created – either with or without free, prior, and informed consent (FPIC) – on territories that are officially recognised and acknowledged as having indigenous peoples’ and local communities” collective tenure; and

¹⁹⁴ Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, p. 27.

¹⁹⁵ Interview with a Senior Advisor of the Sarawak State Forestry Department.

¹⁹⁶ The text of PoWPA can be viewed on the CBD website: <http://www.cbd.int/protected/pow/learnmore/intro/>

¹⁹⁷ Borrini-Feyerabend *et al.*, *Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines No. 20*, p. 5.

¹⁹⁸ Convention on Biological Diversity. 2018. Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity ‘14/8. Protected areas and other effective area-based conservation measures’. in *Conference of the Parties to the Convention on Biological Diversity, Fourteenth Meeting, Agenda item 24 CBD/COP/DEC/14/8 30 November 2018*, No. November, United Nations Environment Programme (UNEP), Sharm El-Sheikh, pp. 1-19.

¹⁹⁹ Borrini-Feyerabend *et al.*, *Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines No. 20*.

- (ii) “Lands and waters where protected areas have been created – either with or without FPIC – on territories that the state does not recognise as being under indigenous peoples’ and local communities’ collective tenure, regardless of whether indigenous peoples and local communities consider them to be customary territories or whether they continue to inhabit, use, or manage them.”²⁰⁰

In Malaysia, this has been seen in Sabah and Sarawak and also in some national parks in Peninsular Malaysia.

Establishment of wildlife sanctuaries and conservation areas

The Wildlife Conservation Enactment 1997 can be read to protect ICCAs which consist of grazing areas, migratory bird habitat, riverine wildlife corridors and areas adjacent to important protected areas. Provisions for the establishment of both wildlife sanctuaries and conservation areas if the areas are deemed important for the conservation of flora and fauna. The Enactment contains provisions that may 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. 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 (section 20). As previously noted by Vaz, such a framework could provide an excellent basis for the partnership between the Wildlife Department and local communities to control activities that are detrimental to community resources and environmental quality and biodiversity conservation and the conservation area provision could provide an expedient means to safeguard threatened community-conserved areas which are not securely held by local communities.²⁰¹

Communities within park boundaries

Another example of a possible overlap would be communities within national park boundaries, such as the Crocker Range Park in Sabah. 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 causing opposition by the communities within the park. After several years of conciliatory efforts, there was a relaxation of the park statutes to allow for community use zones (CUZ) within the park specifically for the communities concerned.²⁰²

6.1.7 Recognition of other effective area-based conservation measures (OECM) in Malaysia

As mentioned in the previous section, a national definition for PA was made available by way of the NFPA by adapting IUCN and CBD definitions into the Malaysian context, and this new definition has expanded the PA designation beyond legal gazettes to include alternative regulatory mechanisms like OECM. Recognition of OECMs provides a significant opportunity to acknowledge and recognise existing long term-conservation that is located outside a designated protected area, and under various governance and management regimes and implemented by different actors, including: indigenous peoples and local communities, the private sector and government agencies. ICCAs are also potential candidates for recognition as OECMs as long as the circumstances are appropriate and the communities provide their free, prior and informed consent (FPIC).²⁰³

²⁰⁰ Borrini-Feyerabend *et al.*, *Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines No. 20*, p. 5.

²⁰¹ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 37.

²⁰² Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 37.

²⁰³ Eghenter, C. 2018. Indigenous Effective Area-Based Conservation Measures: Conservation Practices Among the Dayak Kenyah of North Kalimantan. *PARKS. The International Journal of Protected Areas and Conservation*, Vol. 24 No. Special Issue, pp. 69–78, p. 70.

The term “other effective area-based conservation measure” (OECM) was first used in 2010 at the Tenth Conference of the Parties to the Convention on Biological Diversity (COP/CBD) under Aichi Target 11 which states that conservation will be achieved “through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures”.²⁰⁴ While there were already clear definitions and criteria for protected areas there was no definition for “other effective area-based conservation measures”. After several revisions to the definition, in November 2018 this situation was remedied when Parties to the CBD adopted at the Fourteenth Conference of the Parties a definition of an “other effective area-based conservation measure” (OECM) as well as guiding principles, common characteristics and criteria for identification of OECMs (CBD/ COP/DEC/14/8). Decision 14/8 defines an OECM as:

“A geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the insitu conservation of biodiversity with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values.”²⁰⁵

The distinguishing factor between a PA and an OECM is that while a PA must have a primary conservation objective, this is not required for an OECM. An OECM may be managed for many different objectives, but the requirement is that it *must* deliver effective conservation of biodiversity, and this is regardless of the management objectives.²⁰⁶ As such, an OECM may be managed with conservation as a primary or secondary objective, or it could also be that long-term conservation is the ancillary result of management activities.

There is a spectrum of OECM which spans from the least intention to conserve biodiversity to more, but they all achieve conservation of biodiversity:

- Ancillary (not intended but good for conservation) – No-disturbance areas, sacred natural sites.
- Secondary – Areas that are protected through very low-impact use, watershed protection areas, sustainable use areas.
- Primary – ICCAs or privately governed areas with a primary conservation objective but the governance authority is unable to secure PA designation or prefers not to be recognised as a PA.

Challenges/Opportunities:

- The development of related policies, laws, institutional arrangements should be done with the full and effective participation of IPLCs.
- Methodologies for assessing the values of areas should be based on TK for ICCAs.
- The decision is clear about the human rights standards that should be applied. There must be assurances that they are met.
- Capacity sharing will be important.

The IUCN WCPA 2019 Guidelines for Recognising and Reporting Other Effective Area-based Conservation Measures.²⁰⁷ IUCN, Switzerland sets out 4 screening tools to meet the requirements of an OECM:

Test 1. Ensure that the area is not already recognised and/or recorded as a protected area.

Test 2. Ensure that the area has the essential characteristics as defined for OECMs.

²⁰⁴ IUCN & WCPA. 2019. Guidelines For Recognising And Reporting Other Effective Area-Based Conservation. No. April, p. 44.

²⁰⁵ IUCN-WCPA Task Force on OECMs, (2019). Recognising and reporting other effective area-based conservation measures. Gland, Switzerland: IUCN.

²⁰⁶ Jonas, H.D., Lee, E., Jonas, H. C., Matallana-Tobon, C., Wright, K.S., Nelson, F. & Enns, E. 2017. Will 'other effective area-based conservation measures' increase recognition and support for ICCAs? *Parks*, p. 64.

²⁰⁷ IUCN & WCPA, 'Guidelines For Recognising And Reporting Other Effective Area-Based Conservation.'

Test 3. Ensure that the conservation outcome will endure over the long-term.

Test 4. Ensure that an in-situ area-based conservation target (e.g. Aichi Target 11), as opposed to a sustainable use target, is the right focus for reporting. The guidelines set out different situations which can be considered as potential OECMs. It could be a site that has a primary or secondary conservation objective. A site that has a primary conservation objective and delivers effective biodiversity conservation but is not reported as a protected area could be recognised as OECMs if the governance authority so wishes, and one example being some territories or areas (marine, freshwater or terrestrial) governed by indigenous peoples, local communities or private entities that have a primary and explicit conservation objective and deliver the in-situ conservation of biodiversity, but where the governing body wishes the territories or areas to be recognised and reported as OECMs, rather than as protected areas.

OECMs can be governed under the same range of governance types as protected areas, namely: governance by governments (at various levels); shared governance (i.e. governance by various rights holders and stakeholders together); governance by private individuals, organisations or companies; and governance by IUCN envisages four distinct types of governance: governance by governments (at various levels); shared governance (i.e. governance by various rights holders and stakeholders together); governance by private individuals and organisations; and governance by indigenous peoples and/or local communities. As with protected areas, the governance of OECMs should strive to be “equitable” and accord with human rights norms recognised in international and regional human rights instruments and in national legislation. Any recognition of OECMs should require the free, prior and informed consent of the relevant governing bodies.

Therefore, the application of OECM may include some of the areas currently listed in annex II of the 2019 Master List or additional areas that have not previously considered before. The guidelines provide step-by-step guidance in determining whether an area has merit to be considered as an OECM. This presents an opportunity for KATS and managing authorities to explore other areas for inclusion towards achieving a holistic approach for biodiversity conservation for Malaysia in the future. Now that the international definition and guidelines for OECMs have been finalised, there will be a need to be a Malaysian national interpretation of OECMs before such areas can be listed to complement the Master List of Protected Areas.²⁰⁸

Further, the ICCA Consortium may develop a guide of ICCAs and OECMs in Malaysia. Currently, this endeavour is being led by the UN Global Environmental Facility’s Small Grant Project and PACOS with the support of the IUCN expert group on ICCA. However, there has been little progress thus far as the funding is limited to case studies. In October 2019, the South East Asia Rainforest Research Partnership (SEARRP) began conducting a two-year project funded by the GEF-Small Grants Programme in Malaysia to develop a robust understanding of OECMs in Malaysia, investigate the potential of OECMs and develop an understanding of how the OECM approach could operate in Malaysia. The overall aim is to determine the policy and institutional pathways that would be needed for Malaysia’s OECMs to contribute towards area-based in-situ biodiversity conservation in a more formal manner. The project is at the initial stages at present, but the research is expected to add to the understanding of OECMs in Malaysia.²⁰⁹

WWF has been taking the lead in advancing the agenda on an ICCA framework for Malaysia for the CBD in Beijing 2020 in the form of a new global agenda called the ‘New Deal for People and Nature’. They are using this framing as a narrative to have people-centred around it, to have CCA as a new form of protected areas.

²⁰⁸ Ministry of Water, *A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning*, p. 7.

²⁰⁹ Recognising and Reporting OECMs in Malaysia October 2019 to September 2021, see www.searrp.org/pr/oecm-malaysia

After the International Guidelines and definition on OECMs came out, and KATS issued the 2019 Master List of Protected Areas in Malaysia there has been progress, although it has been slow. WWF has been using these documents as an instrument to fill the gap of 1.7 million hectares for the Permanent Forest Estates in Sarawak. The PFE goal is 6 million, and much of the remaining forest is claimed by local people.

6.2 Sacred and heritage natural sites as a specific type of ICCA

Sacred natural sites (SNSs) are areas of land or water that have special spiritual significance to peoples and communities and have great significance for the conservation of nature and cultural values. SNSs share similar characteristics with ICCAs as they are often conserved voluntarily by NGOs. A key feature of both SNSs and ICCAs is that people attach to them “unique value and significance, usually closely related to their cultures and views of the world”.²¹⁰ Sacred natural sites can be categorised under ancillary conservation of the OECM Guidelines which can include sacred natural sites with high biodiversity values that are “conserved long-term for their associations with one or more faith groups and coastal and marine areas protected for reasons other than conservation, but that nonetheless achieve the in-situ conservation of biodiversity”.²¹¹ Indigenous communities conserve areas because of their historical, cultural, and spiritual significance. The Sabah Museum, under the Ministry of Tourism, Culture and Environment have continued to work with local communities to document and protect some significant sacred and heritage natural sites.

The 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 a conservation area to be preserved or conserved as a cultural heritage”. Thus far 19 heritage sites have been gazetted under the Act.

Native Court Enactment 1992

The Native Court Enactment may be useful for the protection of conserved community areas, although it has not yet been used extensively for this purpose. Section 6(1), which deals with cases arising from breach of native law or custom, has been used to safeguard sacred sites, such as the caves at Batu Balas which are used by the Dusun Subpan community near Lahad Datu as a burial site. 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.

In Sabah, the Rungus community members of five local villages in Kudat collectively observe the hilltop of the region, which caps the highest hill known as Gumantong. Within the Rungus Spirit World, the animals in the area of Gumantong would dance when a person entered the hilltop area. Despite conversion to Christianity at a later stage, the community held the Gumantong hill in cultural regard and objected to the clearing of the Gumantong Forest by the Sabah Forest Department from planting mangium. The Rungus community had partnered with the United Nations Development Program on Climate Change to conserve the hilltop of Gumantong but thereafter discovered that the Sabah Forest Department had gazetted a 590-hectare area including Gumantong as a Forest Reserve Class 1 (Watershed) in 2007 without the knowledge or consent from the village elders. The villagers applied for

²¹⁰ Borrini-Feyerabend et al., *Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines No. 20*, p. 50.

²¹¹ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 38.

Gumantong to be recognised as an ICCA. Massey *et al.*,²¹² in conducting the case study, commented that “both conservation as an expressed intention and conservation as an unintended outcome of communities’ cultural practices fall within the scope of ICCAs. This distinction is raised to note the benefits and challenges inherent in recognising and supporting ICCAs where conservation is an unintended outcome of cultural practices”. Therefore, it is important to note that a tailored approach should be applied by governments in the classification of sacred and cultural sites as ICCAs where conservation is an unintended outcome of communities’ cultural practices.

6.3 Other protected area-related designations

The 2019 Master List for Protected Areas specifically sets out areas with national/international designations are not included in the Master List if they not gazetted with any of the nationally accepted protected areas laws (Criteria 6).²¹³ For example, the Sungai Pulai Ramsar site in Johor is not included in the Master List, whereas Tanjung Piai (also a Ramsar site) is included; the former is a production forest gazetted under the state-adopted National Forestry Act while the latter is gazetted under the Johor National Parks Enactment. In Peninsular Malaysia, Tasek Bera Ramsar Reserve in Pahang has been recognised as a Ramsar Site and has been included in the 2019 Master List. The area was gazetted under the National Forestry Act (section 7) as Conservation Area Tasek Bera under RAMSAR convention. However, under national law, the area is yet to be classified under a protected status.

In Sabah, the Lower Kinabatangan-Segama Wetlands has been recognised as a Ramsar site, and it is the largest Ramsar site in Malaysia measuring 78,803 hectares. The Kota Kinabalu Wetland Centre is a 24-hectare urban wetland important for water birds and a popular recreational area run by a consortium of NGOs which has also been 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 was 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.²¹⁴

6.4 Recommendations: legislative and institutional reforms required to ensure ICCAs are more appropriately recognised and supported under conservation frameworks

- (i) Recommendations for appropriately respecting and supporting ICCAs²¹⁵
- Respect the rights of indigenous peoples and local communities to self-determination.
 - Create an enabling environment for self-designation and self-definition of ICCAs.
 - Recognise the full diversity of indigenous peoples and local communities and respect the social, cultural and spiritual values of ICCAs.
 - Recognise customary laws and decision-making processes.

²¹² Massey *et al.*, ‘Beware the animals that dance: Conservation as an unintended outcome of cultural practices’.

²¹³ Ministry of Water, *A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning*.

²¹⁴ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 41.

²¹⁵ Jonas *et al.*, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*.

(ii) Recommendations for designation of PAs and OECMs:

- (a) Develop a Malaysian national interpretation of OECMs so that such areas can be listed to complement the Master List of Protected Areas.²¹⁶
- (b) Incorporate the “Voluntary guidance on governance diversity” issued by the CBD and IUCN in line with decisions VII/28 and X/31, suggests steps that can be followed in relation to the recognition, support, verification and coordination, tracking, monitoring and reporting of areas voluntarily conserved by indigenous peoples and local communities, private landowners and other actors. Particularly in the case of territories and areas under the governance of indigenous peoples and local communities, such steps should be taken with their free, prior and informed consent, consistent with national policies, regulations and circumstances, and applicable international obligations, and based on respect for their rights, knowledge and institutions. In addition, in the case of areas conserved by private landowners, such steps should be taken with their approval and on the basis of respect for the owners’ rights and knowledge.²¹⁷
- (c) Undertake steps under the strategic action plan under the NFPA between 2017-2025, such as: ²¹⁸
- Benchmark existing PA legislation, rules, regulations and guidelines across Malaysia against international best practices.
 - Establish and convene at least once a year the PA Legislative Sub-Working Group (PALSWG) to review and harmonise PA legislation, rules and regulations and to present inputs to relevant government agencies and stakeholders.
 - Review existing legislation and draft rules and regulations to empower indigenous people and local community (IPLC) members to be appointed as honorary rangers and manage community conserved areas (CCA) and corporate-managed PAs.

²¹⁶ Ministry of Water, *A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning*, p. 7.

²¹⁷ Useful guidance includes: CBD Technical Series No. 64, the United Nations Declaration on the Rights of Indigenous Peoples; Sue Stolton, Kent H. Redford and Nigel Dudley (2014). *The Futures of Privately Protected Areas*. Gland, Switzerland, IUCN.

²¹⁸ Department of Wildlife and National Parks, *NATIONAL FRAMEWORK FOR PROTECTED AREAS (NFPA) SYSTEM IN MALAYSIA Final Draft of the National Framework for Protected Area (NFPA)*, p. 68.

PART 7: JUDICIAL DECISIONS

Malaysian common law on native title

It is significant that the Malaysian courts have in the past two decades and until recently handed down decisions affirming native title or customary rights to land, following principles applied by courts in other common law jurisdictions. There has been a steady stream of judicial authorities reaffirming recognition of and protection for native customary land rights arising out of common law and traditional law and customs. Native title protects the rights of natives in and to the land and as such, represents full beneficial ownership of land. Where that property interest is extinguished, the government must pay adequate compensation according to Article 13 of the Federal Constitution. Article 5 of the Federal Constitution protects the interest on land subject to native title as a right to livelihood, as such land is an essential component of community life.

Native title represents a non-documentary title held by the community which means that natives may only transfer native title land to other natives or the government. It has been described as a *sui generis* right, which means a right that is unique, and of its own kind – essentially a form of legal protection that exists outside of typical legal protections. It is a right captured by the constitutional definition of law, based on statute, common law and native laws and customs. The courts must, therefore, determine the nature of the right with reference to all three bodies of law, to give substance to what the Court of Appeal in Malaysia called a “complementary” right.²¹⁹

In this section, the terms native title, native customary rights to land (NCR), aboriginal title and customary title are used interchangeably. The term “common law native title” is also used as these principles have developed based on common law principles. Malaysian law recognises native customary rights (NCR) claims by customary tenure. However, there are several problems that often arise in relation to NCR claims in the Malaysian courts. Broadly:

- (i) All lands are considered state land and the onus or burden of proof is on the natives to prove their claim to land.
- (ii) Most customary lands are not issued with documentary titles, though since 2010 there is a drive by the Federal Government to fund perimeter survey of lands for native communal reserves, out of which individuals may be given title. This is an on-going effort which requires proof of use and occupation.
- (iii) Legislative failure to recognise traditional forms of occupation according to native customary laws; and
- (iv) The government’s broad authority to extinguish NCR according to statute.

The following sections will examine the landmark judicial decisions in Peninsular Malaysia, Sarawak and Sabah.

²¹⁹ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p. 60.

7.1. Landmark judicial decisions in Peninsular Malaysia

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor at the High Court [1997] 1 MLJ 418 ('Adong I')

In the landmark case of *Adong I*, the plaintiffs were representatives and heads of Orang Asli families living around the Sungei Linggui catchment area in the state of Johor. The defendants, the State of Johor and its Director of Lands and Mines, had acquired a total of 53,273 acres of land to construct a dam to supply water to Johor and Singapore. The plaintiffs claimed rights to the lands both under common law and statute, as well as property rights under the Federal Constitution and sought the compensation that Singapore had paid to Johor on the grounds that the lands within the vicinity of Sungei Linggui were their traditional and ancestral lands upon which the plaintiffs depended on for their livelihood. The Court evaluated several historical and judicial documents as evidence of occupation of the land since time immemorial, and considered native title law in various common law jurisdictions including the Australian High Court's decision in *Mabo (No. 2)*²²⁰ and the Canadian High Court's decision in *Calder*²²¹. The learned High Court Judge, Mokhtar Sidin JCA (as he then was) found that the Orang Asli have a common law right to their ancestral land based on continuous and unbroken occupation and enjoyment of rights to the land since time immemorial. This decision was affirmed by the Court of Appeal and the Federal Court.

The Court noted that the lands were unclaimed land in the present sense but were *kawasan saka* to the aboriginal people before the introduction of the Torrens system which effectively declared all *kawasan saka* as state land but where the aboriginal people were free to roam about the lands and harvest the fruits of the forest. Mokhtar Sidin JCA was of the view that even though some of those lands had been gazetted as forest reserves, the plaintiffs had continued to live in and/or depend upon that particular unalienated land and that all of them still consider the jungle as their domain to hunt and extract the produce of the forest as their ancestors had done, and that it is a "common law right which the natives have" which the Canadian and Australian courts have described as native titles in particular in the judgment of Judson J in the *Calder* case at p 156 where His Lordship said the rights include "... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...". Mokhtar Sidin JCA agreed with this and ruled that in Malaysia the aborigines' common law rights include, among others, the right to live on their land as their forefathers had lived, and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers. He also concluded that native title does not consist of a document of title but a right acquired in law, even though in the general sense the title denotes a document of title. The High Court gave a wide interpretation to proprietary rights under Article 13 of the Federal Constitution and decided that the plaintiffs' rights were proprietary rights protected under the Constitution and said that their right was, however, a right to the produce of, but not a right to, the land. Therefore, the High Court held that notwithstanding that the holders of the title had no right to convey, lease out or rent the land, the deprivation of the plaintiffs' rights by the defendants without compensation was unlawful.

²²⁰ *Mabo (No.2) v Queensland* (1992) 175 Commonwealth Law Reports 1

²²¹ *Calder et al. v. Attorney-General of British Columbia* [1973] S.C.R. 313, 34 Dominion Law Report (3d) 145 In the Goods of Abdullah [1869] 1 Kyshe, 216

The Court of Appeal in *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158 (*'Adong II'*) agreed entirely with the views expressed by the High Court.²²² The principles set out in the landmark case of Adong were soon after reiterated and clarified in the case of *Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*.

***Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors In Sagong Bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, 597 (*'Sagong I'*)**

In the significant decision of *Sagong I*, the plaintiffs, Orang Asli families of the Temuan tribe were evicted from a strip of 38,477 acres of land in the area of Dengkil, Selangor, running through their gazetted aboriginal reserve, as well as other lands they customarily occupied when the land was acquired by the Selangor State Government (the first defendant) for the purpose of the construction of a portion of a highway to the Kuala Lumpur International Airport in March 1996. The land is classified as an aboriginal area or aboriginal inhabited place. The second defendant, third and fourth defendants were United Engineers (M) Bhd, Lembaga Lebuhraya Malaysia (Malaysian Highway Board) and the Federal Government, who were the construction company, supervisory and highway maintenance authority and decision-making authority respectively. The plaintiffs claimed that the land was customary and ancestral land occupied by them and their forefathers for generations and based their claims on the following rights and argued that:

- (i) At common law, they had native title and usufructuary rights over the land-based on customs, and they had customary and proprietary rights in and over the land.
- (ii) Under statutory law, they had a right to the land under the Aboriginal Peoples Act 1954 ('APA 1954').
- (iii) Under the Federal Constitution, they alleged that the Selangor State Government had breached its fiduciary duty as they proprietary rights in the land.

This case was significant because the High Court held that the lands were customary and ancestral land belonging to the Temuan based not only on present occupation, but also a traditional connection that had existed for generations, and that the lands had been continuously occupied and maintained by the plaintiffs to the exclusion of others and that the land was inherited by them from generation to generation in accordance with their customs and thus fell within the meaning of "land occupied under customary right" within the meaning of the Land Acquisition Act 1960. The Court held that the eviction of the plaintiffs from their lands was unlawful as the APA 1954 had not extinguished the common law rights. As such, the first and second defendants were thus liable for trespassing on the plaintiffs' land. In coming to its decision, the Court considered evidence which was submitted on a wide range of cultural practices which the Court held were essential practices on the land, such as the customs relating to land tenure, religion, burial practices, language, place names based on the Temuan spoken language and a system of inheritance.

Although the defendants had adduced evidence to suggest that the plaintiff's cultural life had been so altered by modernisation that they should no longer be considered traditional Temuan as they alleged that the plaintiffs no longer depended on the land forage for their livelihood in accordance with their tradition; spoke other languages, inter-married, changed religions and had cultivated the lands with non-traditional crops, such as palm oil; the High Court concluded that these facts "do not change their origin" or their aboriginal identity the plaintiffs belonged to an organised society, followed an aboriginal way of life, practised their own customs and beliefs, and possessed their own language, which they used to the present day.

²²² *Adong II* [1998] 2 MLJ 158, 162 (Gopal Sri Ram JCA). The Federal Court issued a decision awarding interest on the compensation awarded to the respondents.

Kerajaan Negri Selangor v Sagong Tasi and Ors [2005] 6 MLJ 289 (“Sagong II”)

On appeal, the Court of Appeal in *Kerajaan Negri Selangor v Sagong Tasi and Ors* (Sagong II), Gopal Sri Ram JCA held that under the common law doctrine of indigenous title, the plaintiffs had ownership of lands in question under a customary community title of a “permanent nature”, had proprietary rights and were therefore entitled to be compensated (including compensation for part of the land that was ungazetted land) under the Land Acquisition Act 1960 and that they were also entitled to damages for trespass and to exemplary damages. The following year, the Defendants were granted leave to appeal to the Federal Court on points of law. However, after settlement negotiations, the claim was settled amicably in May 2010, and the Federal Government and other defendants withdrew their appeal, and the highway authorities agreed to pay compensation in the sum of RM6.5 million to the plaintiffs.

Significance of Adong and Sagong Tasi decisions²²³

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

- The Temuan held a proprietary and full beneficial interest in and to the land, albeit only to areas of settlement and not to the areas used as foraging lands²²⁴;
- The Governments of Selangor and Malaysia owed fiduciary duties and had breached those duties when they failed to gazette lands for Orang Asli plaintiffs;
- The radical title of the State is subject to any pre-existing rights held by Orang Asli;
- The common law recognises and protects the pre-existing rights of the Orang Asli in respect of their rights and resources;
- The APA 1954 does not extinguish the rights enjoyed by the aboriginal peoples under the common law and in order to determine the extent of the full rights, the common law and the statute had to be looked at “conjunctively”, for both rights were “complementary”²²⁵;
- Where customary rights are extinguished, there must be adequate compensation;
- Oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land are admissible, within the confines of the Evidence Act²²⁶; and
- For customs to be admitted as evidence they must be of public or general interest, made by a competent person, and the statement must be made before the controversy as to the right customs has arisen.

Other cases in Peninsular Malaysia

Following the *Sagong Tasi* decision, several more cases have been brought to the courts considering different issues of relevance in relation to indigenous peoples including self-determination, land territory, governance of territories, areas or natural resources, freedom of culture and religion, and a wide range of procedural as well as substantive rights. Some of the cases are highlighted below.

- (i) In the case of ***Yang di Pertua Majlis Daerah Gua Musang v Pedik bin Busu (Pedik) [2010] 5 MLJ 849*** a church building at an Orang Asli village in Kelantan was demolished by the local authority on the grounds that the necessary approval under the Street, Drainage and Building Act 1974 had not been given for the erection of the building. The Orang Asli applied for, amongst other things, declaratory relief claiming confirmation of their customary title and damages for the demolition. The court held that Orang Asli were owners of the land in question, although the title had yet to be issued, and damages were awarded to the Orang Asli as the proper notice had not been given to them.

²²³ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p. 63. and SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, p. 79.

²²⁴ *Sagong I* [2002] 2 MLJ 591, 613; *Sagong II* [2005] 6 MLJ 289, 308.

²²⁵ *Sagong I* [2002] 2 MLJ 591, 616

²²⁶ *Sagong I* [2002] 2 MLJ 591, 623-24

(ii) ***Khalip Bachik & Satu Lagi v Pengarah Tanah dan Galian Johor & Yang Lain [2012] MLRHU 1709***²²⁷ was a case involving the Orang Laut (Seletar) who were resettled to Kuala Masai by the Johor Government in 2003 and promised that the new lands would be gazetted as aboriginal reserves. Although approved, the lands were not formally gazetted. The Seletar community were also assured that they could build a church on the land. However, the chapel they had then built was demolished on the grounds that no approval had been granted. They filed an action seeking a declaration that they were holders of customary title and that the demolition was unlawful. The Court declared that the demolition was unlawful, ordered damages for trespass and further ordered damages for delay and failure to gazette the Kuala Masai lands and the loss of their original lands in Kuala Stulang. The Court also declared that the State had breached its fiduciary duty in failing to gazette the new lands.

(iii) The Courts have further established the fiduciary obligation of the state towards the Orang Asli in the case of ***Mohamad bin Nohing IBatin Kampung Bukit Rok (and 6 others) v Pejabat Tanah Galian Negeri Pahang [2013] MLJU 291*** where the Semelai Applicants filed a Judicial Review Application over an area of land in Bera, Pahang which they claimed to be part of Aboriginal Inhabited Land which they had occupied and inhabited for generations, and upon which the State government had given approval for a project to be undertaken. The High Court declared that the land utilised by FELCRA that encroaches upon the land claimed was an illegal encroachment and, therefore, had to be vacated. The Respondent Land Office was also directed to take measures to identify and draw boundaries of the claimed land using natural boundaries of rivers and hills and that the gazetting exercise should take no more than a year. The Court also observed that the records of customary land had not been kept in proper manner and many documents including correspondence of the natives and native bodies with the authorities were missing.

Recent cases in Peninsular Malaysia

In Peninsular Malaysia, after the High Court granted the Temiar-Orang Asli of Pos Belatim native title rights to 9,360 hectares of their traditional territories in 2017, the Kelantan state government, agreed to seek an amicable settlement with the Orang Asli in this matter at the appeal stage. Given the decision in TR Sandah (which at that time pending the Federal Court Review), the Orang Asli were open to coming to a settlement. As such, the Kelantan state government agreed to grant title to the settled, cultivated and occupied areas, while the remaining forest and catchment areas will continue to be recognised as forest reserves or protective forests, but with logging prohibited. The Temiar inhabitants were allowed to use these forests for their traditional subsistence and cultural activities. The terms of the settlement were recorded in a consent judgment by the Court of Appeal on 13 April 2018.

Government of Malaysia v the State Government of Kelantan & Others [2019]

On 18 January 2019, the Attorney General of Malaysia, Tommy Thomas, announced in a statement that the Federal Government had for the first time in Malaysian history, initiated legal proceedings on behalf of the Temiar, an Orang Asli tribe, against the state government of Kelantan for failing to protect the Orang Asli indigenous peoples of Peninsular Malaysia.²²⁸ The federal government filed the case in the Kota Bahru High Court and named the Kelantan state director of Lands and Mines, the Kelantan state director of the Forestry Department, and five private entities, in addition to the state government of Kelantan seeking, among other things, the legal recognition of the Temiar Orang Asli's native land rights in Pos Simpor, and injunctions to restrain private parties from encroaching upon and destroying the native land for commercial profits.

²²⁷ Confirmed on appeal at [2013] 1 MLJ 799.

²²⁸ <https://www.thestar.com.my/news/nation/2019/01/18/federal-govt-sues-kelantan-to-protect-orang-asli-land-rights/>

The defendants applied to strike out the case, but failed and have appealed to the Court of Appeal. Meanwhile, the Federal Government applied for an injunction to restrain the companies (who are primarily engaged in durian and rubber plantations) who have been granted licences by the Kelantan government to exploit land in Gua Musang claimed by the Orang Asli community. The Kota Bahru High Court dismissed the injunction application but held that the defendant companies should confine their activities to 4,000 hectares of cultivated land instead of 30,000 hectares as set out in the initial license, pending a final decision of the matter.²²⁹ This unprecedented case could establish various legal precedents, in particular in relation to the fiduciary duty of the government to indigenous peoples in Malaysia.

7.2 Landmark judicial decisions in Sarawak

One of the main problems in the determination of NCR in Sarawak is the restrictive definition or understanding of what constitutes NCR by governmental authorities. The Government's definition of NCR seems to be restricted to a cultivated or farmed area referred to as "*temuda*" which must have been cultivated or farmed before 1st January 1958 according to section 5 of the NLC. On the other hand, the natives believe that their NCR claim goes beyond their "*temuda*" to include their communal lands or territorial domain locally referred to as "*pemakai menoa*" and the "reserved virgin forests" within their "*pemakai menoa*" locally referred to as "*pulau*". "*Pulau*" is preserved or reserved specifically to meet the domestic needs of the natives and is normally an area abundant with timber for boats, house, different kinds of fruit trees, jungle produce with medicinal value, a hunting ground, fishing ground etc. to cater to their daily needs. As a result of the difference in understanding of what constitutes NCL or NCR, logging licenses and provisional leases are issued covering "*pemakai menoa*" and "*pulau*" of the natives in Sarawak.

***Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 ("*Nor Nyawai I*")**

One of the landmark decisions on NCR in Malaysia is the case of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 ("*Nor Nyawai-HC*"). Nearly 20 years ago, several Iban plaintiffs, who were residents of two longhouses located along the Sekabai River in Bintulu, Sarawak filed a case in the High Court against a timber company and the contractor company (first and second defendants) who they claimed had wrongfully entered and damaged their ancestral land. The third defendant, the Bintulu Superintendent of Lands & Surveys had issued a provisional lease to the first defendant who had hired contractors to clear the land for tree plantation. The plaintiffs did not hold documentary title to land, and their claim rested on their exclusive use and occupation of the land under a customary system of territorial control. The plaintiffs' claimed that under Iban custom, they had acquired NCR to lands that they regarded as *pemakai menoa*, which literally means "land to eat from". This is a territorial area held by a distinct longhouse or village community, whose boundaries are marked by natural features, like rivers, hills etc., known as *garis menoa*. Part of the lands had been encroached upon by the first and second defendants. The plaintiffs argued that they had a right to the disputed lands under native law and customs and those rights had not been abolished by the Land Code or its predecessors. The High Court held that the disputed area fell within the boundaries of the longhouse. They had customary rights to the land, passed down to them through the generations, and preserved by Orders of the Brooke administration as well as the existing laws. Those rights were never terminated. Their present occupation was proof of past occupation of the land. Not only did they clear virgin jungle for cultivation, they had accessed the lands for hunting, fishing and collecting forest produce.

²²⁹ <https://www.malaysiakini.com/news/498449>

***Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another ('Nor Nyawai II')* [2006] 1 MLJ 256**

Unhappy with the decision, the third defendant appealed to the Court of Appeal. However, the Court of Appeal agreed with the findings of the High Court and said that native customary rights are pre-existing rights which do not depend on statute or executive directives to create the right and can only be extinguished or terminated through a plain and clear intention of the State. The Court of Appeal affirmed the fact that the Iban customary practice of *pemakai menoa* existed as an established custom relating to land, but it overturned the High Court's ruling that they had a right to the disputed area on the grounds that there was insufficient evidence to show continuous occupation of the area. It would seem that the Court of Appeal may have been hesitant to allow such a claim as that may then mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed and foraged in the areas. The Court of Appeal, however, appeared to have confused the application of the law to the facts. Referring to its own decision in *Sagong Tasi v Kerajaan Negeri Johor* and, based on that decision, said that the plaintiffs had rights to lands only where they had their "settlement", although they had not made a proper distinction between the factual situations in the two cases.²³⁰ The plaintiffs in the *Nor Nyawai* case then filed an application for leave to appeal to the Federal Court to seek a determination on the kind of evidence that could be adduced in NCR claims. Leave was refused in November 2008, which means that the applicable law is contained in the Court of Appeal decision.

The Federal Court in *Madeli* reaffirmed the principles established in *Nor Nyawai*.

Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak ("Madeli")

Madeli bin Salleh, a Malay, had claimed NCR over a piece of land in Miri and argued that he had established occupation through evidence that he visited the land once a month, had correspondence with the Government with regard to the land, and there was evidence of planted fruit trees. The High Court decided that he had not acquired NCR over the land prior to 1921, the year in which the land became subject to Rajah Order (Sarawak No XXIX) 1921 setting it aside for use by Sarawak Shell Oilfields Limited ('1921 Order') and rejected the appellant's claim that his father and grandfather had acquired NCR by cultivating the land with rubber and fruit trees in accordance with the requirements of s 22 of the Land Regulations—Order No VIII 1920 (1920 Regulations).

Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong) v Superintendent of Land & Surveys Miri Division and Government of Sarawak [2005] 5 MLJ 305 ('Madeli II')

The Court of Appeal, in a decision handed down by Clement Skinner J, the Court of Appeal reversed the High Court's dismissal of the plaintiff's claim seeking a declaration that he acquired NCR to certain land in Miri and claiming damages for the State of Sarawak's extinguishment of those rights and cited in support, the decision in *Adong I* that "the common law respects the pre-existing rights under native law or custom of the aboriginal people of Malaya"; the decision in *Calder*, recognising that tribal interests in land were legal interests predating European conquest; and the decision in *Nor Nyawai I*, which rejected the principle that conquest defeated the pre-existing rights of indigenous peoples and found that the 1921 Order could not have the effect of extinguishing the appellant's NCR.

²³⁰ See Bulan, 'Statutory Recognition of native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place'. For difference between *Sagong Tasi v Nor Anak Nyawai*.

Superintendent of Land & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh (Suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2007] 2 MLJ 390 ('Madeli III').

In October 2007, the Federal Court decided that Madeli's native customary rights over land were not extinguished as a result of the 1921 Order. The Federal Court also considered the issue of whether ss 3(1) and 6 of the CLA 1956 ('CLA') and Federal, Sarawak, and customary law precluded courts from relying on Adong I and Nor Nyawai I in light of the courts' reliance in those decisions on foreign judgments from the High Court of Australia and the Supreme Court of Canada.

The Federal Court acknowledged the rule that, upon acquiring sovereignty, courts assume the Crown intends to respect existing property rights and that that did not disturb indigenous land rights held pursuant to customs, although the Crown could extinguish such rights with clear and unambiguous legislation. The Federal Court referred to the holding in Nor Nyawai II that the common law respects NCR under native customs, although those rights can be extinguished by clear and unambiguous legislation. The Federal Court determined that an unduly strict interpretation of the term "occupation" would have the effect of unjustly and automatically depriving people of their rights as just because the appellant did not live on the disputed land, did not mean that he was no longer in control or did not occupy it. The Federal Court reaffirmed that native customary rights were not created by statute but were pre-existing rights under native law and customs, that proof of occupation need not necessarily be actual physical occupation and that what was needed to be shown was "sufficient measure of control to prevent strangers from interfering".

The Federal Court's decision is significant because it affirms critical holdings of the lower courts on native title. The decision reiterates that²³¹:

- (i) courts must consult native customs to determine the extent of native occupation;
- (ii) the theoretical foundation for Malaysia's recognition of native title is the English common law;
- (iii) there is a high threshold to meet for the government to affect an extinguishment of NCR;
- (iv) where there is no express language showing a clear intent to terminate the rights, natives continue to enjoy NCR; and
- (v) even in the absence of continuous physical presence, occupation over land may still be established through other evidence reflecting control over land.

The case of ***Agi Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd [2010] 4 MLJ 204*** subsequently confirmed judicial recognition of the customary practice of *pemakai menoa* when the High Court followed the Court of Appeal's decision in Nor Nyawai holding that *pemakai menoa* was an Iban custom and practice even though it was not codified in the Adat Iban as "native title requires an examination of the customs and practices of each individual community and this involves a factual inquiry and not whether the customs appear in the statute book" and that this was consistent with the intention of the Federal Constitution which defines law to include "custom and usage having the force of law in the federation or any part thereof".

Recent developments in the recognition of native customary rights in Sarawak

Whilst the decisions are encouraging developments in the law, the burden placed on the natives to establish ownership of lands remains an onerous one. Documentary proof of ownership is often unavailable as there are often no written records. Further, since NCR does not have a documentary title, with almost no funds provided for the survey of the lands, it is almost impossible for natives to secure indefeasible rights and title to their lands. In the absence of documentary title, it is difficult for NCR

²³¹ Bulan & Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, p. 72.

owners to be pitted against loggers and oil palm planters who have been given documentary title, albeit provisional lease.

Unfortunately, there have been recent regressive judicial trends from the courts pursuant to the 2017 Federal Court decision in *Director of Forest, Sarawak v TR Sandah ak Tabau*¹² (“TR Sandah case”) which in effect limited the recognition of native customary rights to lands that are settled, cleared and cultivated (*temuda* lands). Contradicting the reasoning in the preceding judicial decisions on NCR, the Federal Court was of the view that the written laws of Sarawak did not give the broader traditional territory (*pemakai menoa*) and communal forest (*pulau galau*) with the necessary “force of law” to allow the natives to stake a customary claim to them. This court ruling on the directly threatened more than a hundred native title cases in Sarawak and has broader consequences for indigenous lands and resources in Malaysia.

Director of Forest, Sarawak & Anor v Tuai Rumah Sandah ak Tabau & Ors [2014] 1 MLJ 161

At the High Court

Tuai Rumah Sandah and seven others, the Iban plaintiffs in the High Court, sued the Director of Forest, Sarawak for granting a provisional lease of state land to Kanowit Timber over lands at and around their longhouses in Kanowit-Ngemah, Sarawak covering an area of 11,822.26 hectares. They claimed that there was an infringement of their native customary rights acquired since the 1800s over a total area of 5639 hectares (2802 hectares comprising cleared and cultivated land, 2712 hectares under primary forest) as land over which they and their ancestors have acquired or inherited. On March 13, 2011, the High Court judge Datuk Yew Jen Kie found in favour of the plaintiffs against Kanowit Timber Company Sdn Bhd and the state government for encroachment into their NCR land, and granted a declaration that they had acquired native customary rights (NCR) and/or usufructuary rights from their ancestors over 2,712 hectares of primary forest in the Kanowit-Ngemah state forest area in Sarawak including their *pemakai menoa* via a timber licence issued by the state government to the timber company.

At the Court of Appeal

On June 13, 2013, the Court of Appeal agreed with the High Court’s decision and agreed that *pemakai menoa* and *pulau galau* were NCR lands. The subject of the appeal in the TR Sandah case was the concept of *Pemakai menoa*. The Director of Forests did not dispute the existence of such Iban customs of *pemakai menoa* and *pulau* but argued on appeal that there is no statutory recognition that appellants could acquire NCR to the primary forest, and that Sarawak only recognised the *temuda* as capable of giving rise to NCR. The Court of Appeal considered the following questions:

- (i) Whether the custom of *pemakai menoa* and *pulau* falls within (i) the definition of “law” under Article 160(2) of the Federal Constitution; or
- (ii) Whether the term “native customary law” as defined in the Land Code of Sarawak and the Native Courts Ordinance which came into force on 1 September 1955 recognises the customs of *pemakai menoa* and *pulau* in relation to the creation or acquisition of “rights over land” in Sarawak;
- (iii) Is native customary rights over land confined to *temuda* land?; and
- (iv) Has the custom of *pemakai menoa* been given the effect to by the law of Sarawak?

The appeal by the Director of Forests at the Court of Appeal was dismissed on the grounds that the claim to the *pulau* was a bona fide claim. The Court of Appeal held that in the absence of a clear and unambiguous word in legislation to repeal or reject pre-existing customary rights established under pre-existing native customs, the common law applicable in Sarawak recognised the NCR inherited by the respondents from their ancestors. Their rights were established in the early 1800s over the 2 721 hectares claimed as land set aside as *pemakai menoa* under the native customs of *pulau* and that right cannot be taken away without compensation. The Court further stated that the *pemakai menoa* was an

inherent right and that the sovereign right to title within the state was not absolute but subject to unextinguished pre-existing rights. The Appeal Court referred to the Federal Court decision in *Madeli III*²³² where the Federal Court categorically stated that common law which is part of Malaysian law has the same effect as written law. Therefore, it did not matter that the concept of *pemakai menoa* was not included in the codified Adat Iban. By implication, as common law recognised native law and customs, it is recognised by law. The Federal Court affirmed that such rights do not owe their existence to statutes. They are inherent rights that can only be extinguished through clear and unambiguous words of the legislation. The court also noted that the customs and practices evolve from and in response to changing circumstances and have gained general acceptance.

The Court of Appeal reaffirmed its recognition of *pulau galau* in *Superintendent of Lands and Surveys Department Sibiu Division & Anor v Usang ak Labit & Ors and another appeal (Usang Labit)* and cited the decision of Wahab Patail JCA where he said “It is true that not all produce or products in a *pulau galau* are derived directly from the land. But it stands to reason that produce and products derived directly from the land, be it its mineral or formation, such as caves or cliffs for birds' nests, necessarily means it is a right related to land for without the land the right to the produce and products could not be enjoyed, benefited from or accessed. Equally true and for the same reason, for produce or products derived indirectly, ... from the forest in the *pulau galau*. Without the land, the native customary right of the use of *pulau galau* can no longer be exercised. The custom of *pulau galau* is therefore a native custom so inextricably wrapped and tied up with the land it is upon that it is as much a native custom to land as the *tanah umai* and the fallow lands in the *temuda*. Hence, it has always been part of the native custom that the '*pulau galau*' is part of the *menoa* or *pemakai menoa*.”²³³

Director of Forest, Sarawak v Tuai Rumah Sandah ak Tabau & Ors (2017) 3 CLJ 1 (“the 2016 Federal Court decision”)

On appeal by the Director of Forest to the Federal Court, the same questions were brought up to be decided. The State appellants' contention was mainly that the customs of *pulau galau* and *pemakai menoa*, unlike the Iban custom of *temuda*, had never been sanctioned or recognised in any of the written laws or executive orders of Sarawak and as such were not considered “customs and usages having the force of law” within the meaning of the term “law” defined in Article 160 of the Federal Constitution. While the majority agreed with the fact of the existence of the custom of *pemakai menoa*, it was held that the customs did not have the force of law under Art 160 of the Constitution. Raus PCA (as he then was) opined that “as a matter of fact common law as developed in Malaysia further requires occupation and or maintenance of the land in question”. Thus, he felt that the custom did not satisfy common law requirements. What his Lordship failed to appreciate was that a right under customs does not require the same occupational content as common law. He also said that the custom did not have the force of law because it was not included in written records including the Iban Tusun Tunggu and the Iban Adat Order.

Dr Ramy Bulan, together with many other legal scholars, have argued that “such a decision lacks a full understanding of the place of adat as a source of law under the constitutional definition of law. It falls short of the “on the ground context and realities governing the life of the relevant community and others similar to it. The decision of the dissenting judge showed a better understanding of the jurisprudential basis of the customs and the proprietary rights that arose under it”.²³⁴ In her dissenting judgement Zainun Ali FCJ said: “Contextually, *temuda* exists BECAUSE it is part of *pemakai menoa*. To disembodify *pemakai menoa* and *pulau* from *temuda* makes little sense, because if the concept of Iban territorial

²³² *Superintendent of Lands & Surveys Miri v Madeli bin Salleh* [2007] 6 CLJ 509

²³³ [2014] 3 Malayan Law Journal 519 at 530.

²³⁴ Bulan, R. 2019. The Civil Courts and Determination of Native Customary Land Rights: Merely Declaring or Making Laws? *Borneo Research Journal*, Vol. 13 No. 1, pp. 1–23, p. 17.

domain is properly understood, one would at once acknowledge the relationship of various land rights in its context. Therefore, in the absence of a clear provision in statute which rejects the custom of *pulau*, the existence of *pulau* is recognised by common law.”²³⁵ With respect, the dissenting view ought to be an acceptable position.²³⁶

The 2019 Federal Court Review

The case was brought before the Federal Court to exercise its powers of review to correct any obvious error, injustice or ambiguity contained in its 2016 majority Federal Court decision. The Review Applications were jointly heard on 15 July 2019 at the Federal Court with the following panel of judges presiding over the hearing of the Review Applications: Azahar bin Mohamed FCJ, David Wong Dak Wah CJSS, Alizatul Khair binti Osman Khairuddin FCJ, Mohd Zawawi bin Salleh FCJ, and Idrus bin Harun FCJ. The issue at the heart of the Federal Court Review is the 2,712 hectares of communal forest called *pulau galau*, which they claimed as belonging to them since it is within their territorial domain or *pemakai menoa*.

A review of the decision by the Federal Court handed down on 14 September 2019 in Putrajaya did not disturb the earlier decision of the Federal Court. In arriving at a 4:1 decision not to exercise its review powers in the 2019 Federal Court review, the majority of the Federal Court decided not to exercise its review powers in the 2019 Federal Court review. They were of the view that the applicants had not demonstrated any exceptional circumstances to merit an intervention into the 2016 Federal Court decision and instead relied on the principle of finality of a Federal Court judgment, meaning that the merits of a case or any legal question, no matter how incorrect, should not be reopened once all avenues of appeal have been exhausted. Only one judge, YAA Tan Sri David Wong Dak Wah, Chief Judge of the High Court of Sabah and Sarawak, opposed this view and dissented bringing into sharp relief the importance of judicial contextualisation of native laws and customs. “The decision of the Federal Court in Tuai Rumah Sandah shows again that the application of customary laws in context requires an understanding of the community’s legal traditions. Like all legal traditions, they are permeable and subject to cross-cutting influences and must continually be reinterpreted to and reapplied in order to be relevant amidst changing conditions.”²³⁷ Justice David Wong opined that the 2016 Federal Court decision was split on the legal principles relating to the enforceability of *pemakai menoa* and *pulau galau* and that “there was in fact no majority and at best a superficial majority with no legal standing” and that “such a circumstance does not create any finality as there was no certainty” and was of the view that the case be reheard on the merits to conclusively determine the legal questions posed in the 2016 Federal Court decision.

Implications of the amendments to the Sarawak Land Code in July 2018

In an effort to placate the anger of the natives over the 2016 Federal Court Decision in TR Sandah, in July 2018, the Sarawak State Government amended the Sarawak Land Code through the Land Code (Amendment) 2018 to create Native Territorial Domain as a new category of land under section 6A to be utilised and held by a community under a communal grant. This amendment was made to balance out the impact of the TR Sandah ruling to provide for the issuance of a title in perpetuity for communal native customary lands that fell under the category of *pemakai menoa* and *pulau galau*. However, the amendment has been criticised to be limiting and “short-changing” the natives as it sets a statutory limit of 1,000 hectares per title. This is not ideal as communal customary claims in excess of 10,000 hectares have been accepted by the courts in the past. Further, there are also concerns that the amendments in the

²³⁵ Director of Forests v TR Sandah & ors [2017] 2 MLJ 281, p341 at para 210.

²³⁶ Bulan, ‘The Civil Courts and Determination of Native Customary Land Rights: Merely Declaring or Making Laws?’, p. 72.

²³⁷ Bulan, ‘The Civil Courts and Determination of Native Customary Land Rights: Merely Declaring or Making Laws?’

law would merely grant indigenous peoples and communities the right to use, but not own the land.²³⁸ The natives of Sarawak continue to protest this amendment and call for the concepts of *pemakai menoa* and *pulau galau* to be incorporated into the *Land Code*.

7.3 Landmark judicial decisions from Sabah

Naung Felix Sitom v Pendakwa Raya [2002] 7 MLJ 605

In Sabah, natives may enter State land for the purpose of creating customary rights through the methods stipulated under section 15 of the SLO and land that falls under NCR is “alienated” under the Sabah Forests Enactment 1968. This was one of the earliest cases on native customary land rights where it was established that persons holding native customary tenure as defined under section 15 of the Sabah Land Ordinance 1930 (SLO) can give rise to rights that are the same as landholders with title documents, notwithstanding the fact that there are no title documents. These generally comprise traditional occupation under customary tenure, use of land for cultivation, grazing lands.

Rambilin binti Ambit v Assistant Collector for Land Revenues Pitas²³⁹

The dispute in the landmark case of Rambilin involved a parcel of two plots of land in the District of Pitas. Rambilin’s father had purchased the two plots of land from two different parties in 1982 and gave the plots to his daughter, Rambilin, who had occupied those plots. Although she moved away to join her husband, who was transferred to another town, she came back periodically to see the land. She applied for the land to be alienated and registered in her name in 1989, but the Assistant Collector of Land Revenue (ACLR) did not make any decision on her application. However, the ACLR had apparently rejected her application in 1992, but she had no notice of this as the letter and notice of rejection were never served in accordance with rule 8 of the Land Rules. Meanwhile, the two plots of land were registered, and titles were issued in the name of one Ruddy Awah and another person in November 2001. Rambilin filed for Judicial Review to determine whether or not Rambilin had acquired rights by purchase of land, whether natives could enter State land without the approval of the State to create customary rights; and whether customary rights existed when there was a failure to register the customary right under the procedure prescribed by the Ordinance.

The High Court found that the land was indeed purchased by Rambilin’s father and transferred to her and since customary tenure is heritable, she had acquired customary tenure, and section 88 of the SLO expressly exempts land that is still held under customary tenure from registration. Even though she did not stay on the land for a continuous period, she had gone back to the land to cultivate it from time to time, and stay in the house that was erected on the land. The Court held that what was required were exclusive acts of dominance, and not necessarily physical possession, and therefore Rambilin’s occupation of the land was lawful, and she was entitled to possession and to recover possession of the land and that the defendant, Ruddy was trespassing.

Justice Ian Chin declared that there had not been any “plain and unambiguous” intention to extinguish the customary rights of native “to enter State land to create native customary rights” and that there was no need for a native to seek permission from the Government to enter State land for the purpose of establishing NCR since such rights were exercised from time immemorial without having to seek

²³⁸ Reuters, “Indigenous Malaysians fight new land law with maps of burial grounds”, 16 July 2018 and Borneo Post, “PH Against Land Code Amendment Bil”1, 11 July 2018 <http://www.theborneopost.com/2018/07/11/phagainst-land-code-amendment-bill/> 52 <https://www.reuters.com/article/usmalaysia-landrights-lawmaking/Indigenous-malaysians-fight-new-land-law-with-maps-of-burial-grounds-idUSKBN1K61EF>

²³⁹ Three cases were heard together in the High Court in Sabah and Sarawak at Kota Kinabalu: *Rambilin binti Ambit v Assistant Collector For Land Revenues Pitas* (Judicial Review K 25-02-2002); *Rambilin binti Ambit v Director of Lands and Surveys, Sabah, Assistant Collector For Land Revenues, Pitas Registrar of Titles* (Judicial Review K 240-2002); *Rambilin binti Ambit v Ruddy Awah* (Civil Suit K 22-71-2000 in open court, 9 July 2007).

permission from anyone. Under section 67(2) of the SLO, the collector may require a holder of a customary tenure to take out the title by entry in the Native Title register that is kept in each district. Any such entry requires payment of the prescribed fees and a copy of the entry, on a prescribed form signed by the collector, to be given to the owner. If immediate demarcation of the area is impracticable, the collector shall authorise entry into the Field Register, regarding the use and occupancy of such land. Like a provisional lease, such entry will specify the extent of the right and describe as nearly as may be the situation of the land, and after demarcation, an entry is then made in the Native Title Register. Prior to demarcation, the entry in the Field Register is as good as a Native Title.

The High Court in 2007 ruled that Rambilin was entitled to possession of the land, directed Ruddy to deliver vacant possession to her and awarded damages and mesne profits to Rambilin since 2006. The High Court ordered a proper inquiry to be held and at the inquiry, in the face of the High Court's determination of the facts, the ACLR accepted that the land was State land. However, the Director as an appellate tribunal determined otherwise, and therefore Rambilin could not establish NCR on that land. Rambilin again appealed to the High Court in *Rambilin v Magudar bin Ambit, Director of Lands and the ACLR* (OM No. BK1-25-1/1 of 2012). Dato' Abdul Rahman Sebli J held that Rambilin had acquired native customary rights to the subject land and was entitled to be issued with the appropriate and necessary document of title to the land. On appeal (File K41-128 of 2010), the Court of Appeal agreed with the High Court in that natives have a right to create NCR without permission from the State.

Andawan bin Ansapi & Ors v Public Prosecutor (File K41-128 of 2010)

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

Johnson bin Sipulou & 5 Ors v The State of Government of Sabah & Anor

In this case, it was held that the State cannot revoke an established native reserve without paying compensation. In this case, a revocation of a native reserve known as the Kampong Kayu Madang Native Reserve was challenged by native occupiers of the Reserve. They sought a declaration that the State's revocation of the reservation of 115 acres of land in the Reserve and the vesting of that portion of land in another was null and void. Furthermore, they sought the issuance of a title for the whole of the land in the Reserve to Penampang Grazing Cooperative Society Limited, who represented the natives in Penampang and Telipok. Having regard to the historical events leading to the publication of the gazette notification, the plaintiffs had customary tenure over Kampong Kayu Madang Native Reserve. Following *Naung Felix's* case the court declared that persons having native customary tenure as defined under the SLO should be accorded the same status as one who was in possession of a title deed. It was not within the State's right to disregard the plaintiffs' rights and interests or to degazette any part of the area that was gazetted as a native reserve. Since the plaintiffs had proven their customary tenure over the lands, it was wrong for the defendant, the State of Sabah, to ignore the proprietary rights and interests of the natives in the Kampong Kayu Madang Native Reserve which still subsisted.

***Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Berhad* [2011] 6 CLJ 733 [CA]**

This case made it clear that procedurally, the High Court does not have original jurisdiction to hear cases on native customary rights. A claimant would have to seek the Court's assistance through appellate jurisdiction from a decision of the Director of Lands and Surveys, which is appealed from the decision of the ACLR. This procedure has the potential to cause "bottlenecks" and have been a cause of complaints and distress as seen in Rambilin's case.

7.4 Recommendations: Legislative and institutional reforms required to better protect the rights of indigenous peoples and local communities within the judicial system

- The State Governments need to take further steps to review the current legislation to ensure that it serves to promote and continually protect the rights of the indigenous groups to their customary land. The review should include:
 - (i) Full recognition of customary rights to land based on the personal laws and customs of the relevant communities;
 - (ii) The recognition of the methods of traditional connection and occupation that arise out of native customs and traditions including oral narratives which may not be contained in written or documentary evidence;
 - (iii) Strengthening of the Constitutional protection on native rights through payment of just compensation upon any termination through direct or constructive extinguishment; and
 - (iv) Recognition of the fiduciary obligation of the government officials to consult and obtain consent from the native communities prior to taking action that may infringe their native title rights.
- For the removal of doubt, the panel of judges hearing customary land right cases ought to have judges with "on the ground" experience. Article 26(4) of Chapter 3 of the Report of the Inter-Governmental Committee, 1962 (IGC Report) read together with Article VIII of the Malaysia Agreement, the Federal Constitution, section 74 of Courts of Judicature Act 1964 should be re-examined to determine whether or not a legal obligation exists for the panel hearing appeals from Sabah and Sarawak to include a judge with sufficient Bornean experience.
- The Malaysian Bar has called upon the Federal legislature to honour its commitment under the Malaysia Agreement and Article 26(4) of the IGC Report by passing an amendment to the CJA 1964, providing for the mandatory inclusion of judges having sufficient Bornean experience for appeal cases from Sabah and Sarawak, especially in cases involving laws and customs peculiar to both those jurisdictions.
- A specialised NCR tribunal: The long-term solution may be to move resolution of these claims out of the civil court system and into a specialised native title tribunal as the current litigation system is too lengthy and expensive to provide adequate access to justice for the native community.
- Alternatively, strengthen and expand the jurisdiction of the Native Courts to deal with all matters relating to native customary law including native customary lands.
- Review policies passed by state and federal legislature, including policies for forest management and large-scale agricultural expansion that have not given room for FPIC and consultation with the local inhabitants and occupiers of the land.
- Legal provisions for the restitution of land needs to be put in place. Where the possibility of returning indigenous customary lands that have been acquired in the past is not feasible, alternative lands of similar value should be given or compensation granted.

PART 8: IMPLEMENTATION

8.1 Key factors that contribute to or undermine effective implementation of supportive provisions

There are several important potentially supportive provisions, such as the Federal Constitution and the common law which contain provisions that demand respect for the legal rights of indigenous peoples. There are also some provisions in federal, provincial and territorial legislation that support at least co-management of protected areas, examples of which have been described earlier. However, in general, Malaysia lacks the political will and vision to fully respect these rights, and denies indigenous peoples access to and use of resources or a fair share of the wealth. Malaysia has also reneged on its fiduciary responsibility to indigenous peoples.

The separation of jurisdiction between federal and state governments sometimes creates a conflict when it comes to the implementation of federal government measures at the state level. As explained in the previous sections, entrusting all powers related to “land” with the State has had a significant impact on the manner in which the implementation of many environmental and biodiversity programmes have been undertaken by the Federal Government.²⁴⁰ Further, it is evident that there is a clear variance between the recognition of Orang Asli or native rights at the policy level and in the application of the legislation (such as the Aboriginal Peoples Act, the Sarawak Land Code and the Sabah Land Ordinance) at the practical level.

The national and state policy environments which surround ICCAs have a great influence on their success and failure. There already exist spaces in the law for providing much needed security to the conserving communities. However, it would appear that indigenous communities have often faced challenges engaging with the relevant government officials when trying to use such laws, leading to inappropriate implementation despite the existing legislation and policies. It is the outlook and attitude of the implementing bodies that will help in the recognition and support of ICCAs or CCAs in the country.

8.2 Specific recommendations to the relevant agencies and other actors, such as indigenous peoples and local communities about how to improve implementation of supporting laws and policies

(i) *National Policy on Biological Diversity (NPBD)*

Although the first National Policy on Biological Diversity was formulated in 1998, Malaysia reaffirmed its commitment to biodiversity via the new National Policy on Biological Diversity 2016-2025 which represents the country’s commitment to deliver on the Conservation on Biological Diversity (CBD) Strategic Plan for Biodiversity (2011-2020) and Aichi Biodiversity Targets. The Implementation Framework of the NPBD sets out that the Federal government via KATS, will play a leading role in implementing the policy including to provide overall direction, coordinate stakeholder actions, establish the appropriate institutional platforms, facilitate resource mobilisation and initiate review of the Policy as necessary. State governments have jurisdiction over the management of inter alia land, water and forests and will play crucial roles in delivering the actions. This Policy will continue to guide Malaysia’s biodiversity aspirations until 2025. This is assuming that KATS and its policies will be retained under the new regime change.

²⁴⁰ Saad, J., Hiew, K. & Gopinath, N. 2012. *Review of Malaysian Laws and Policies in Relation to the Implementation of Ecosystem Approach to Fisheries Management in Malaysia*. No. May, The USAID Coral Triangle Support Partnership, Honolulu, Hawaii.

(ii) *Malaysia's implementation of the CBD*

The Malaysian government has been fairly proactive in demonstrating its commitment to implementing the Convention on Biological Diversity. Based on the Sixth National Report, it would appear that Malaysia is on track to achieving its targets by 2025. Although it is the Sixth National Report to the CBD, it is the first national report on the National Biodiversity Strategy and Action Plan (NBSAP) and the result of a collaboration between KATS and the United Nations Development Programme (UNDP) as its implementing partner. Given that the NPBD is aligned to the CBD Strategic Plan for Biodiversity, 6NR represents effort to review the status and progress of NPBD implementation. On the state level, Sabah has a strong foundation for CBD implementation as it has experienced individuals who work to advance the cause of biodiversity and biocultural diversity in the government and in the NGO sector, and 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. Sabah has also sought international recognition for its outstanding areas through the UNESCO World Heritage program, the UNESCO Man the Biosphere program and in identifying new Ramsar sites.

(iii) *Coordinating Platforms: National Steering Committee, State Steering Committee and the National Biodiversity Roundtable*

There are various coordinating platforms that are intended to be conducive to stakeholders, including civil society, indigenous peoples and local communities, and the private sector, to be active partners in the implementation of this Policy. In addition to the existing National Biodiversity Council which is the highest decision-making body, the National Steering Committee for the NPBD (NSC-NPBD) is the primary coordinating platform of the Policy. The State Steering Committee for the NPBD is the main coordinating platform at the state level for the implementation of this Policy. The Meeting of Ministers of the Environment (MEXCOE) coordinate the information-sharing platform for state ministers and state executive committee members responsible for environment and biodiversity. The National Biodiversity Roundtable is led by civil society and the private sector and provides technical advice and support to the NRE and the NSC-NPBD in the implementation and monitoring of this Policy.

(iv) *Bornean Biodiversity and Ecosystem Conservation (BBEC) Programme & Sabah Biodiversity Strategy 2012-2022*

The BBEC is a joint technical cooperation between the Federal Government, the Sabah State Government and the Japan International Cooperation Agency (JICA) under Japan's Official Development Assistance (ODA). BBEC has played a significant role in the development of an integrated and durable state-wide conservation system in Sabah. BBEC supported the participatory drafting of the Sabah Biodiversity Strategy 2012-2022 which features indigenous and CCAs.

Indigenous peoples will not be able to effectively govern their lands for conservation until such time indigenous peoples rights are prioritised by the Malaysian government. Indigenous peoples and other stakeholders must engage with the political process, either partisan or public policy advocacy, in order to create the will necessary for implementation. Reconciliation is the only way forward and there must be a move beyond token consultation with indigenous peoples merely as procedural step prior to the arbitrary execution of an intended acquisition. Consultation must be considered a mechanism for generating dialogue for reconciliation. Serious efforts to accommodate the rights of indigenous peoples must be pursued. This includes:

- Both the Federal and State Governments must work harder to ensure respect for and implementation of the various international instruments that exist to support respect for indigenous peoples.
- Ensuring the full integration of court decisions in a meaningful way in law and policy.

- Increase and improve means for indigenous peoples to participate in the governance by recognizing the governments of indigenous peoples as a legitimate third order of governance in Malaysia.
- Address issues between the Federal and State governments and the implementing stakeholders in an integrated manner to ensure coordination and meaningful implementation on the ground.
- Federal and territorial government departments and agencies must work better together to enhance cooperation and must stop passing responsibility for the inclusion of indigenous peoples and their values in government decision making.
- Address the Issue of State Revenue by allocating adequate financial resources to the state to fulfil their roles.
- Engage in negotiations for alternative revenue streams, such as the right to an increased share of oil and gas revenues from the territories of Sabah and Sarawak or a direct allocation from service taxes collected by businesses in the state.²⁴¹
- Reduce the dependency on federal funding for indigenous peoples by establishing own-source revenues streams for indigenous peoples and by establishing equalization payments to indigenous peoples.
- Reduce the degree of competition that often exists in federal or provincial funding processes which require indigenous peoples to compete with each other and which has the effect of restricting cooperation between indigenous peoples to address common concerns.
- Government research and policy must respect indigenous knowledge and greater efforts must be made to integrate indigenous knowledge in law and policy and include indigenous knowledge holders in its development.
- Indigenous peoples need to take advantage of opportunities that exist to promote their world views, share their perspectives, participate in protected areas management and governance, and take up rights of self-government despite opposition that may result from other levels of government.
- Capacity building efforts must be enhanced, including to support indigenous peoples' participation in protected areas management and governance, and to support greater awareness and respect for indigenous peoples and cultural values by non-indigenous Peoples.

²⁴¹ Presently, a five percent government tax is charged for services but is channelled to the Federal Governments as opposed to the State governments.

PART 9: RESISTANCE AND ENGAGEMENT

The main threats to communities' local governance of territories, areas and natural resources are the deprivation of communal land due to encroachment and illegal logging, or land acquisition. Indigenous peoples find themselves in disputes with developers, resource companies, government officials, environmental organisations, and private landowners. The broad movements and trends among indigenous peoples in response to key laws or policies that affect them revolve around asserting ownership over lands, areas and resources, extractive industries and industrial agriculture in the name of socio-economic development. Indigenous peoples in Malaysia are actively pursuing many different initiatives to achieve their rights through community-based action and through various community organisations which have gradually increased their reach over the past two decades or so. This has been done mostly through capacity building programs aimed at improving the socio-economic status of these communities. The main organisations in Malaysia focused on legal empowerment and advocacy initiatives are Partners of Community Organisations (PACOS) in Sabah, Jaringan Orang Asal SeMalaysia (JOAS), Centre for Orang Asli Concerns (COAC) and the Alliance of Indigenous Peoples of the Highlands of Borneo (FORMADAT). The natives of Sabah and Sarawak would appear to be better off compared to the Orang Asli of Peninsular Malaysia. This is probably due to the existing legislation on land issues that were passed down from British Colonial rule, and affirmative action policies allowing natives to gain access to higher education. As a result, a large percentage of native communities in Sabah and Sarawak have moved away from their rural villages and have settled in the neighbouring towns and cities. The Orang Asli, however, seem to have been neglected to a greater degree over the years as wards of the state.

PART 10: LEGAL AND POLICY REFORM

10.1 Institutional, legal and/or policy reforms required to better enable indigenous peoples and local communities to govern their lands, territories and natural resources

(i) *Reiterating the recommendations for overall legal reform at the national level as set out by the earlier ICCA International Legal Review:* ²⁴²

Malaysia needs to invest change in institutional, legal and policy reform to support indigenous peoples' governance of ICCAs. This includes among other things:

- Greater respect for the moral and legal obligations in international law including the United Nations Declaration on the Rights of Indigenous Peoples and respect and uphold human rights.
- Greater respect for the constitutional obligations owed by the government to indigenous peoples specifically.
- Negotiate agreements between the State Government and indigenous peoples to establish co-governing structures for protected areas where these do not already exist.
- Greater respect for cultural diversity while meeting the commitments to share the land.
- Provide greater financial and other capacity-building support to indigenous peoples to facilitate their effective involvement in governance of ICCAs.
- Improve implementation of legislation by harmonising laws and undertaking institutional reform.
- Uphold the rule of law and provide greater avenues for grievance mechanisms and improving access to justice respecting individual and collective rights.
- Support legal empowerment and capacity building initiatives.

(ii) *Recommendations for legislating for integrated socio-ecological systems and implementing laws in conformity with human rights standards*

- Recognise and respect native customary rights and collective land rights.
- Reform environmental and natural resource laws to improve rights and remove direct threats to ICCAs.
- Reform policies and laws to effectively protect and promote traditional knowledge, cultural heritage and customary practices.
- Ensure protected areas comply with international rights, principles and standards. ²⁴³

10.2 Specific changes that could be made to the existing legal or policy frameworks to ensure appropriate legal recognition and support of ICCAs

(i) *Priority strategies that should be addressed to secure ICCAs*

- Establish formal multi-stakeholder group comprising relevant NGOs and organisations dealing with IPLCs, organisations, such as IUCN, ICCA Consortium, WWF, that meets semi-regularly to provide a platform to advance the positive side of the law and to change the dynamics and have a more collaborative, constructive way to address issues.
- Create and Identify Common vision for ICCA Working Group Initiative.
- Develop and document community protocols.

²⁴² Jonas et al., *Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities. An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Con.*

²⁴³ Jonas et al., *Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities. An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Con.*

- Focus on preventing and deescalating conflict between communities and others whether it is industries or government because it gets to legal conflict stage.
- Engage with relevant government agencies that are central to addressing these issues.
- Network, particularly amongst communities.
- Address broader issues that are threats to ICCAs in addition to proactively securing ICCA territories.

(ii) *Key opportunities and priorities for strengthening existing provisions and existing supportive institutions*

- Analyse results of legal review and develop and advocate for a new framework and overarching law for ICCAs that covers the whole territory as cultural landscapes and seascapes (long term aim) to empower indigenous peoples and local communities to be custodians of biodiversity and increase their involvement in decision-making processes.²⁴⁴
- Engage with the Malaysian Bar Council, specifically the Environment and Climate Change Committee (ECC) and the Committee on Orang Asli Rights to push for the introduction of environmental legal doctrines into Malaysian courts.
- Make amendments to legislation, including:
 - (i) Adopt OECM principles to recognise conserved areas outside of the gazetted PAs.²⁴⁵
 - (ii) Amend the Federal Constitution to divert the mandatory financial allocations due to the state under the Tenth Schedule, Part IV which, in violation of procedural safeguards, have federalised critical state matters, such as environment, water, tourism and the appointment of judicial commissioners.
- Advocate and push for Native Courts to deal with native disputes.
- Engage with the judiciary through awareness-raising workshops and talks.
- Call for the free, prior and informed consent (FPIC) of indigenous peoples for the creation of new protected areas under the National Protected Area Framework.
- Awareness raising and capacity building of the government to align policies to realities on the ground to ensure streamlined implementation.
- Assist government agencies that are trying to support ICCAs, with technical support and provide support to KATS for the existing work undertaken.
- Develop maps and governance assessments that show the overlaps between forest cover, key biodiversity areas and ancestral domains (coordinate efforts among High Conservation Value and High Carbon Stock groups) and include new ways to work together, preferably by establishing co-governance and co-management arrangements.
- Assist and publish case studies and documentation to highlight what communities are doing to meet the current Aichi targets and actively engage in post-2020 biodiversity framework:
 - (i) Engage with current projects that are currently being developed to ensure a coordinated approach around conserved areas (such as around Heart of Borneo and the role of ICCAs)
 - (ii) Prepare for engagement and best-case practice sharing at the UN Biodiversity Conference hosted by the Convention on Biological Diversity (CBD) in Kunming, China, on 15-28 October 2020.
 - (iii) Showcase work done on ICCAs and mobilise government and NGOs ahead of the Asian Parks Congress in Kota Kinabalu in 2021.

²⁴⁴ In line with target 2, indicator 2.1 of the NPBD: By 2025, the contributions of indigenous peoples and local communities, civil society and the private sector to the conservation and sustainable utilisation of biodiversity have increased significantly.

²⁴⁵ In line with target 6 of the NPBD, Action 6.3 Develop community conserved areas as an integral part of the PA network.

PART 11: CASE STUDIES ON ESTABLISHED COMMUNITY CONSERVED AREAS

Case Study 1: Bundu Tuhan Native Reserve –Sabah

Bundu Tuhan Native Reserve is recognised as one of the best examples of an ICCA in Sabah. The Bundu Tuhan village leaders first applied to gazette the Kadazandusun settlement as a native reserve in 1966 under the provisions of the Sabah Land Ordinance 1930 and finally succeeded in 1983. Bundu Tuhan is located in Ranau, Kota Kinabalu in the foothills of Mount Kinabalu with a population of approximately 3,600 people and a substantial Native Reserve of around 1,263 hectares- 60% of which has been set aside by the community as a village forest reserve. The Bundu Tuhan Native Reserve is managed entirely by the community according to collectively recognised rules and regulations- an impressive feat considering the land area.²⁴⁶

A key factor in the success of this ICCA is the distinctive system of local governance, combining customary practices with modern systems of governance while seeking to give the community a voice. There are eight *Ketua Kampung* (Village Chiefs) and a *Ketua Anak Negeri* (Native Chief) and his representative, who are considered to be repositories of traditional knowledge and Adat of the Bundu Tuhan community. Bundu Tuhan is subdivided into three administrative units known as *Sokid*, *Siba* and *Gondohon* under the JKKKs (Village Safety and Development Committees). Collectively, the Native Chief, Village Chiefs, JKKK Chairmen and JKKK Executive Committee members are at the forefront of the Bundu Tuhan leadership who in turn report to a Community General Assembly that provides the mandate for the leaders to act. Bundu Tuhan community leaders have a significant role in managing communal lands and resources. Following the gazette, key aspects of the *adat*, customary rules and regulations governing the use of both the forested area and the village area, including public amenities, cultural and historical sites and raising livestock with zones demarcated for different land use, were codified through a participatory and community-driven process ensuring full cognisance and compliance among members of the community. Each household has a copy of the community management plan and the rules and guidelines.

However, notwithstanding the strong leadership and management capacity of the Bundu Tuhan community leadership, the provisions of the Ordinance require that government-appointed Trustees supervise the management of the Reserve. The Bundu Tuhan Native Reserve Board of Trustees (set out in the land title) is chaired by the District Officer and is composed of the *Ketua Anak Negeri* (Native Chief) and other village leaders, who are all government-appointed. This is the main complaint raised by the Bundu Tuhan community as although they have considerably secure tenure to community forest, the designation of the area as a Native Reserve means that management of the forest is not entirely under their control as they are treated as co-managers with the government. Fortunately, there have been no clashes or divergences in management viewpoints, largely because the existing leaders are all from Bundu Tuhan and share common goals. However, the Bundu Tuhan community leaders essentially want the government to recognise their management and community governance structures without having to co-manage as their forefathers have stewarded the forest since time immemorial.

²⁴⁶ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 86.

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 Park²⁴⁷

Another issue raised by the Bundu Tuhan community leaders is that a mistake was apparently made when the Sabah Forestry Department gazetted the neighbouring Tenompok Forest Reserve which was gazetted a year after the Bundu Tuhan Native Reserve was gazetted as there is a substantial overlap between the Tenompok Class I Forest Reserve and the Bundu Tuhan Native Reserve. The Bundu Tuhan community leaders have made a complaint with the Sabah Forestry Department on the grounds that their claim to the Reserve should be given primacy as the Native Reserve application was made earlier, in 1966. One of the concerns is the possibility of a change in the status of the Tenompok Forest Reserve from Class I to Class II which would permit logging and by extension potentially logging on the overlapping area.

Therefore, the Bundu Tuhan Community Leaders have pushed for:

- (i) A resurveying of the Tenompok Forest Reserve boundaries to reflect accurate boundary lines;
- (ii) Recognition that the Bundu Tuhan Native Reserve should be solely managed by the community; and
- (iii) International recognition of the Bundu Tuhan Native Reserve as an ICCA as this would provide due recognition for their conservation efforts.

²⁴⁷ Vaz, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, p. 88.

EU-REDD+ Tackling Climate Change through Sustainable Forest Management and Community Development Project was launched to support the community-based restoration of degraded habitat and sustainable agriculture within CCAs in the Kinabalu ECOLINC region. The Kinabalu-Ecolinc Zone focuses on providing support for indigenous communities to maintain forest resources on their traditional village lands through the establishment of community conserved areas (CCAs) and supports the establishment and strengthening of community organisations related to land and forest management and assist the community to obtain formal designation of the forest areas under Native Title to be held collectively by the village. The Bundu Tuhan community signed a Memorandum of Understanding with Kinabalu-Ecolinc Sabah Parks on 2 December 2014 to join the conservation activities under the four-year Sabah-EU REDD+ Project. Part of the agreement is to include the 884 hectares of their protected and regulated community forest called the Winokok Forest. The Bundu Tuhan Native Reserve has become the role model for other villages in the Kinabalu-Ecolinc Zone with a number of villages in the others

Kinabalu-Ecolinc EU REDD+ project areas, such as Kampung Kiau Nuluh-Bersatu (Kota Belud District), Kampung Wassai and Kampung Tiong Simpodon (Tuaran District) replicating the concept.²⁴⁸



Photo: Field Work: Village elders explaining layout of the Bundu Tuhan ICCA.

²⁴⁸ Martin, R.A. 2018. Community Conserved Areas (CCAs) under the EU Programme- Tackling Climate Change through Sustainable Forest Management and Community Development. in *APFNet Training Workshop on Forestry and Rural Livelihood Development*, Yunnan, China, pp. 68–84, p. 7.



Photo: Model to scale of Bundu Tuhan ICCA land area.

Case 2: Kampung Peta, Johor, Peninsular Malaysia

Kampung Peta (Peta Village) which is located in Johor in Peninsular Malaysia in and around the Endau Rompin National Park, is a state recognised area where Orang Asli Jakun community live and which can be turned into a conservation area. Kampung Peta is an example of a combination of a conservation area, an area recognised by the State as an area where the Orang Asli have rights to co-manage this area but given the current arrangement, there no plans to turn it into an ICCA. In this case, the laws and policies governing natural resources and environment support indigenous people's ways of life and local ownership, stewardship and management of their territories and natural resources. The leaders in the Orang Asli Jakun community are selected by way of traditional leadership within the community composing of systems including a Council of Elders (largely hereditary), the Batin System and the Village Security and Development Committee (JKKK).

Although the initial plan was to gazette a very big area as the Endau Rompin National Park, in the end, a smaller area was gazetted, which also included the Orang Asli customary areas. However, the only area that was recognised was an area about 250 acres as an Orang Asli Aboriginal Reserve compared to the 25,000 hectares of the Orang Asli land. There were 31 houses/buildings within the park area, as the Orang Asli were not considered when the boundary was initially drawn. The state government and the park authorities then evicted the Orang Asli, but there was resistance and retaliation in defence of their homes, and they filed an application for a judicial review against the government decision to evict them. After several rounds of legal proceedings and adducing evidence in support of their claim, approximately 6,000 hectares was recognised as customary land of the Orang Asli, half of which was located in the national park and half of which in the forest reserve and the State was supposed to vacate the area. The details of the case are set out below:

Sangka Chuka & Anor v. Pentadbir Tanah Daerah Mersing, Johor & Ors [2017] 2 MLRH 286

The applicants, from Kampung Peta filed an application for judicial review in the case of to quash a notice issued under s 425 of the National Land Code (NLC) by the 1st respondent, which required trespassers (which the applicants contended was directed at the Orang Asli Jakun of Kampung Peta) to vacate the Endau Rompin National Park by 19 January 2012 (the notice) and demanded the demolition of any

structures built within the park. The issues to be decided were, amongst others, whether the Orang Asli Jakun could prove evidence of continuous occupation of customary lands and whether those customary land rights had been extinguished or if they continued to subsist; whether the customary lands encompassed hunting and foraging areas; whether the State owed a fiduciary duty to the Orang Asli Jakun. The High Court, allowing the application with costs found that:

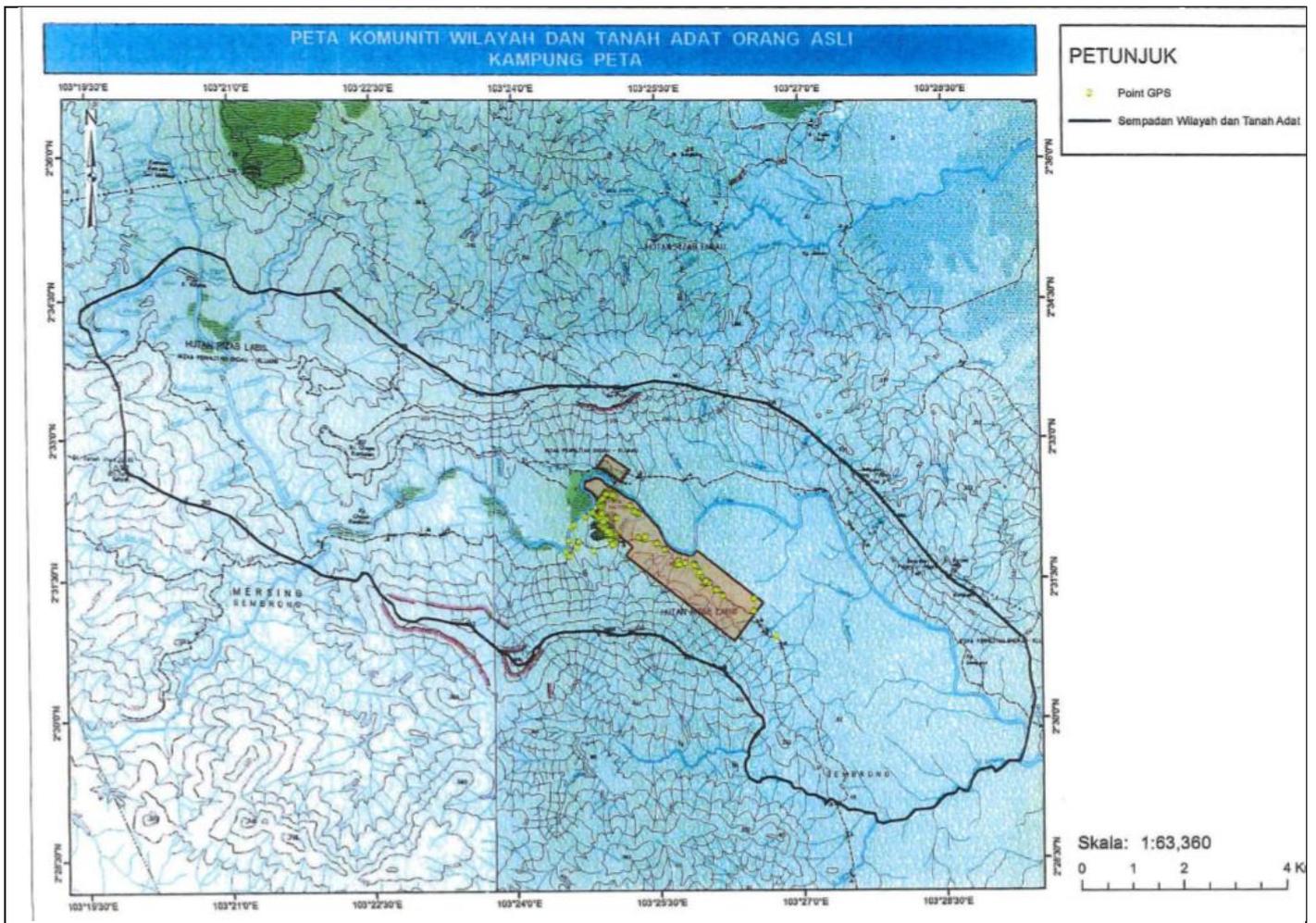
- (i) Actual physical presence in order to show occupation of the customary lands was not necessary as there could also be occupation under NCR if there was sufficient measure of control preventing strangers from intrusion or interference and that the presence of the Orang Asli Jakun of Kampung Peta in the said areas throughout the customary lands could, therefore, be said to be fairly established and long-standing.
- (ii) There was no subsequent legislation which clearly extinguished the prior common law customary land rights of the applicants.
- (iii) The activities of hunting, fishing and foraging to be integral elements to the custom and traditional activities of the Orang Asli Jakun of Kampung Peta, and that such practices were so closely intertwined with their use of and reliance on the lands they claimed to be ancestral and customary in nature, which had long been the primary source and essence of their existence and would continue to be essential to their future livelihood. Consequently, excluding foraging activities on lands beyond settlement sites when those sites, like the case of the applicants, clearly formed part of their custom and daily usage and activities, was not justified under the law.
- (iv) There was no justifiable or rational basis to reach any conclusion other than that the Orang Asli Jakun of Kampung Peta had the common law right to their customary lands. Therefore, the pre-existing customary land rights and prior ownership of native title over the areas of land claimed by the applicants were not impaired or in any way affected by subsequent legislative interventions including the NLC, and was thus protected by Article 13 of the Federal Constitution (FC).
- (v) The State had breached their fiduciary duty to the applicants and the Orang Asli Jakun of Kampung Peta, principally for failing to ensure that the entire customary lands were gazetted as Aboriginal Reserve or at least not included within the Endau Rompin National Park, and for their continued failure to take steps subsequently to exclude that part of the customary lands within the Endau Rompin National Park, despite having the knowledge of the fact of the continuous occupation of the said customary lands by the Orang Asli Jakun of Kampung Peta. More crucially, notwithstanding the recommendation by the fourth respondent or its predecessor as early as 1954 that the said lands should have been first gazetted, as well as more recently in 2010 that the lands should be returned to the rightful owner, which are the Orang Asli Jakun of Kampung Peta.

The State government filed an appeal against the decision (Civil Appeal No. J-01(A)-397-12/2015), but through several rounds of discussions, the Orang Asli agreed to a court-sanctioned consent agreement between the government and the Orang Asli on the following terms: that the Endau Rompin National Park would remain a national park, the forest reserve would remain a forest reserve, but the Orang Asli would have their customary areas intact with an undertaking that the State would never log in that particular area and further that they would have rights to use the forest according to the Jakun traditional practices and activities in accordance to the law. The full terms of the Consent Judgement recorded on 27 April 2018 are:

- (i) That the Orang Asli and their legal heirs are allowed to carry out traditional Jakun activities in the Endau Rompin National Park area and in the Labis Forest Reserve in the area marked in black in Attachment "A" and that the measurement process will be jointly conducted by the Third Appellant, Department Johor State Forestry together with the Orang Asli Jakun;
- (ii) The Orang Asli Jakun are allowed to work existing crops in the Endau-Rompin National Park area, and the Labis Forest reserve including rubber and orchard fruits but the Orang Asli Jakun are not allowed to open a new area within the Endau Rompin National Park and the Labis Forest Reserve for

cultivation nor are they allowed to dig or make fish ponds for the purpose of commercial fishing within the park and forest reserve area. As regards the existing cultivated rubber tree plantation areas, the Orang Asli Jakun are allowed to work to produce rubber tree yields for a period of 25 years from the date of this Consent Judgment after which the rubber tree area must be left so as to allow the regrowth of forest trees, although the Orang Asli Jakun may carry out traditional Jakun activities in the area including the existing fruit orchards;

- (iii) The Parties agree that the Johor State Forestry Department will not issue any logging permit in the marked area in Appendix A and the Orang Asli Jakun have also agreed not to conduct logging activities in the area;
- (iv) All 26 houses and residences, one storehouse, one multi-purpose hall and three homestay/chalets owned by 28 named persons are allowed to rebuild all 31 buildings in the future and to accordingly grant the rights to 31 buildings to the other residents of Kampung Peta accordingly. However, new homes and buildings in addition to the existing 31 are not allowed to be built in the Endau-Rompin National Park area;
- (v) Two burial grounds are to be allocated for the Orang Asli Jakun to be used within the boundaries of the Endau Rompin National Park and the Orang Asli are allowed to use these burial sites up until the boundary lines and their granted secure access rights to freely enter the burial area for the purposes of conducting traditional Jakun activities. When the burial site is fully utilised, the Orang Asli Jakun should then use the land within the existing Aboriginal Reserves for the purposes of burial;
- (vi) The Orang Asli Jakun are not allowed to move or destroy the boundary markers that surround the Aboriginal Reserve area, the Endau-Rompin National Park and the Labis Forest Reserve;
- (vii) The Orang Asli Jakun are granted the opportunity to participate in tourist and economic activities, such as tour guides or providing transportation in order to increase the income flow of the Orang Asli Jakun;
- (viii) Measurement activities as set out in the Consent Judgment is to be carried out collectively with the Orang Asli Jakun within a period of 12 months from the date of the Consent Judgment; and
- (ix) The Consent Judgment does not prohibit the Department of Aboriginal Affairs or the Orang Asli Jakun or any of its agents under the law from filing an application in the future concerning the changing the usage status of any of the areas marked in black in Appendix A contained in the Labis Forest Reserve.



Appendix A: Map of the Community District and Customary Land of the Kampung Peta Orang Asli.

CONCLUDING REMARKS

This analysis sought to assess the impact of laws, policies and institutional frameworks on ICCAs in Malaysia and how the existing legal framework and institutions support or undermine recognition and support for ICCAs. At present, it would appear that the existing laws do not sufficiently provide for and protect community conserved areas. Judicial decisions indicate some recognition that indigenous peoples and local communities do have customary practices that will augur well for protection and establishment of community conserved areas. These are augmented by case studies of local practices. However, this is not clearly reflected in legislation as well as state policies. It is hoped that this analysis will feed into and invigorate the work at the national level, particularly that it will add to the existing research and the local-to-global understanding of these dynamics and what legislative and institutional reforms can be made in the future to recognise and support ICCAs more effectively.

BIBLIOGRAPHY

- Adhikari, K. and D. J. Jefferson, Intellectual Property Law for Plant Varieties: Challenges and Developments in Asia. in K. Adhikari, D. J. Jefferson (eds.), *Intellectual Property Law and Plant Protection: Challenges and Developments in Asia*, Oxford: Routledge, 2020.
- Aiken, S. R. and C. H. Leigh, In the Way of Development: Indigenous Land-Rights Issues in Malaysia. *Geographical Review*, 2011.
- Amnesty International, The Forest is Our Heartbeat: The struggle to defend indigenous land in Malaysia. *Amnesty International*, 2018.
- Asada, H., K. Tan Kay, E. Ricardo, and V. Marieke, *OECD Economic Surveys Malaysia Overview*, 2019.
- Borrini-Feyerabend, G., N. Dudley, T. Jaeger, B. Lassen, N. P. Broome, A. Phillips, and T. Sandwith, *Governance of Protected Areas: From understanding to action. Best Practice Protected Area Guidelines No. 20.*, 2013.
- BorriniFeyerabend, G., A. Kothari, G. Oviedo, A. Phillips, K. Miller, and T. Farvar, Indigenous and Local Communities and Protected Areas Series Editor Towards Equity and Enhanced Conservation Guidance on policy and practice for Comanaged Protected Areas and Community Conserved Areas. *IUCN*, 2004.
- Brosius, P. J., Between Politics and Poetics: Narratives of Dispossession in Sarawak, East Malaysia. in A. Biersack, J. B. Greenburg (eds.), *Reimagining Political Ecology* ('Between Politics'), Durham: Duke University Press, 2006.
- Brownlie, I., *Principles of Public International Law*. 5th ed. Oxford University Press, 1998.
- Bulan, R., Native Title in Malaysia: A "Complementary" Sui Generis Proprietary Right under the Federal Constitution, 11 *Australian Indigenous Law Review*. 2007.
- Bulan, R., Statutory Recognition of native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place, *Journal of Malaysian and Comparative Law*, 2007.
- Bulan, R., *Indigenous Peoples and the Right to Participate in Decision Making in Malaysia*, 2010.
- Bulan, R., The Civil Courts and Determination of Native Customary Land Rights: Merely Declaring or Making Laws? 13 *Borneo Research Journal*, 2019.
- Bulan, R. and A. Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak*, SUHAKAM, 2008.
- Convention on Biological Diversity, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity "14/8. Protected areas and other effective area-based conservation measures *Conference of the Parties to the Convention on Biological Diversity*, Fourteenth Meeting, Agenda item 24 CBD/COP/DEC/14/8 30 November 2018, Sharm El-Sheikh: United Nations Environment Programme (UNEP), 2018.
- Current Law Journal, *Bato Bagi & Ors v Kerajaan Negeri Sarawak & Another Appeal*, 2011.
- Department of Wildlife and M. National Parks, National Framework for Protected Areas (NFPA) System in Malaysia. *Final Draft of the National Framework for Protected Area (NFPA)*, 2017.
- Doolittle, A., *Native Struggles over Land Rights: Property and Politics in Sabah, Malaysia*, 2005.
- Eghenter, C., Indigenous Effective Area-Based Conservation Measures: Conservation Practices Among the Dayak Kenyah of North Kalimantan 24 *PARKS. The International Journal of Protected Areas and Conservation*, 2018.
- Endicott, K., The Impact of Economic Modernisation on the Orang Asli (Aborigines) of Northern Peninsula Malaysia in J. Jackson, M. Rudner (eds.), *Issues in Malaysian Development*, Singapore: Heinemann, 1979.
- Fui, L. H., N. Haron, N. Yusof, I. N. Baharuddin, and N. M. Mustapha, Documenting traditional forest-related knowledge of medicinal plants in Malaysia: a comprehensive approach. *Journal of Tropical Resources and Sustainable Science*, 2015.
- Gloss, L., Myron, E., and Ahmed, H., *International Outlook for Privately Protected Areas: Malaysia Country Profile*

2019.

Human Rights Council, A/HRC/WG.6/4/MYS/1/Rev.1, National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, Malaysia, 2009.
http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/MY/A_HRC_WG6_4_MYS_1_E.PDF

IUCN and WCPA, *Guidelines For Recognising And Reporting Other Effective Area-Based Conservation*, 2019.

Jonas, H. D., E. Lee, H. C. Jonas, C. Matallana-Tobon, K. S. Wright, F. Nelson, and E. Enns, Will other effective area-based conservation measures increase recognition and support for ICCAs? *Parks*, 2017.

Jonas, H., A. Kothari, and H. Schrumm, *Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities. An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Con*, 2012.

Jonas, H., J. E. Makagon, S. Booker, and H. Shrumm, *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, 2012.

Journal, C. L., *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors*, 2012.

Kothari, A., Community conserved areas: towards ecological and livelihood Security 16 *Parks. The International Journal of Protected Areas and Conservation*, 2006.

Kunasekaran, P., S. S. Gill, A. T. Talib, and M. Redzuan, Culture as an indigenous tourism product of Mah Meri community in Malaysia. 10 *Life Science Journal*, 2013.

Lasimbang, J. and C. Nicholas, *Natural Resource Management Country Studies: Malaysia Report*, 2006.

Lasimbang, J. and C. Nicholas, Malaysia: The Changing Status of Indigenous and Statutory Systems on Natural Resource Management, *Bridging the Gap: Policies and Practices on Indigenous Peoples Natural Resource Management in Asia*, 2007.

Majid-Cooke, F. and J. Vaz, *The Sabah ICCA Review: A Review of Indigenous Peoples and Community Conserved Areas in Sabah*, 2011.

Martin, R. A., Community Conserved Areas (CCAs) under the EU Programme- Tackling Climate Change through Sustainable Forest Management and Community Development. *APFNet Training Workshop on Forestry and Rural Livelihood Development*, Yunnan, China, 2018.

Massey, A., S. Bhagwat, and P. Porodong, Beware the animals that dance: Conservation as an unintended outcome of cultural practices. 76 *Society, Biology and Human Affairs*, 2011.

Megret, F., Nature of Obligations in D. Moeckli, S. Shah, S. Sivakumaran (eds.), *International Human Rights Law*, Oxford: Oxford University Press, 2010.

Ministry of Natural Resources and Environment, *6th National Report of Malaysia to the Convention of Biological Diversity*, 2019.

Ministry of Water, L. and N. R., *A Master List of Protected Areas in Malaysia – A Tool for National Biodiversity Conservation Management and Planning*, 2019.

Mokhtar, H., *Review of Malaysian Laws and Policies In Relation to the Implementation of Ecosystem Approach to Fisheries Management In Malaysia CTI-CFF National Coordinating Committee*, 2013.

Neo, J. L., Incorporating Human Rights: Mitigated Dualism and Interpretation in Malaysian Courts. 832 *Asian Yearbook of International Law*, 2012.

Nicholas, C., *Orang Asli Rights, Problems, Solution*, 2010.

Payne, J., *This is Borneo: Sabah, Sarawak and Kalimantan*, New Holland, 2005.

Ruggie, J. G., *Just Business-Multinational Corporations and Human Rights*, W.W. Norton & Company, Inc, 2013.

Saad, J., K. Hiew, and N. Gopinath, *Review of Malaysian Laws and Policies in Relation to the Implementation of Ecosystem Approach to Fisheries Management in Malaysia* (The USAID Coral Triangle Support Partnership, 2012)

Sihombing, J., *National Land Code: A Commentary* 2nd ed. (Malayan Law Journal, 1992)

Smith, E. and W. M, Conservation and Subsistence in Small-Scale Societies, *29 Annual Review of Anthropology*, 2000.

SRSG, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations Protec,' 2011. <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

SUHAKAM, *Report of the National Inquiry Into the Land Rights of Indigenous Peoples*, 2013.

Vaz, J., *An Analysis of International Law, National Legislation, Judgements, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities*, 2012.

Warf, B., *Indigenous and Community Conserved Areas*, 2014.

Yong, C., S. A. SACCESS, and J. K. O. A. S. M. JKOASM, *Deforestation drivers and human rights in Malaysia: A national overview and two sub-regional case studies*, 2014.