



“THE FOREST IS OUR HEARTBEAT”

**THE STRUGGLE TO DEFEND INDIGENOUS LAND IN
MALAYSIA**

**AMNESTY
INTERNATIONAL**



Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donation

© Amnesty International 2018

Except where otherwise noted, content in this document is licensed under a Creative Commons (attribution, non-commercial, no derivatives, international 4.0) licence.

<https://creativecommons.org/licenses/by-nc-nd/4.0/legalcode>

For more information please visit the permissions page on our website: www.amnesty.org

Where material is attributed to a copyright owner other than Amnesty International this material is not subject to the Creative Commons licence.

First published in 2018

by Amnesty International Ltd

Peter Benenson House, 1 Easton Street

London WC1X 0DW, UK

Index: ASA 28/9424/2018

Original language: English

amnesty.org



Cover photo: A pipe blocking access to a road on disputed land on the outskirts of Miri, Sarawak, July 2017 © Amnesty International

**AMNESTY
INTERNATIONAL**



CONTENTS

MAP

1. EXECUTIVE SUMMARY	6
2. METHODOLOGY	9
3. BACKGROUND	11
3.1 INDIGENOUS PEOPLES OF MALAYSIA	11
3.2 LAND OWNERSHIP	12
3.3 PARTICIPATION IN DECISION MAKING	14
3.4 MISSED OPPORTUNITIES	14
3.5 BREAKING FROM THE PAST	15
4. LEGAL FRAMEWORK	16
4.1 HUMAN RIGHTS DEFENDERS	16
4.2 RIGHTS OF INDIGENOUS PEOPLES	18
5. VIOLENCE AND HARRASSMENT	24
5.1 SARAWAK	24
5.2 PEOPLE DESCRIBED AS ‘GANGSTERS’	25
5.3 PHYSICAL ATTACK	25
5.4 KILLING	30
5.5 ACCOUNTABILITY	32
6. ARRESTS AND INVESTIGATIONS	34
6.1 ARRESTS	34
6.2 INVESTIGATIONS	40
7. THREATS AND INTIMIDATION	41
7.1 VILLAGE HEADS	41
7.2 ACTIVISTS AND LAWYERS	43
7.3 COMMUNITIES	45

8. BARRIERS TO JUSTICE	47
8.1 LEGAL OBSTACLES TO CLAIMING ANCESTRAL LANDS	47
8.2 NON EXISTENT OR INSUFFICIENT INVESTIGATIONS	50
8.3 FREE, PRIOR AND INFORMED CONSENT	51
8.4 RISK AND FEAR OF REPRISALS	52
9. CONCLUSION AND RECOMMENDATIONS	53
9.1 TO THE MALAYSIAN AUTHORITIES	53
9.2 TO THE NATIONAL HUMAN RIGHTS COMMISSION (SUHAKAM)	55
9.3 TO COMPANIES OPERATING IN MALAYSIA	55
9.4 TO THE UNITED NATIONS AND GOVERNMENTS ENGAGED IN BILATERAL COOPERATION WITH THE GOVERNMENT OF MALAYSIA	55



1. EXECUTIVE SUMMARY

In spite of incredible risks, Indigenous Peoples continue to speak out. They continue to defend their ways of life, their communities, and the lands and forests all humanity depends on.”

Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, August 2018

Across Malaysia, extensive land development is adversely affecting Indigenous peoples, posing a threat to ancestral lands, traditional ways of life and a wide spectrum of human rights. The Indigenous peoples of Malaysia comprise over 67 ethnic groups composing 14% of the country’s population. They reside in almost every state and territory within the Federation and are afforded special recognition in the country’s constitution. Despite this, they continue to suffer from disproportionate levels of poverty and ongoing social exclusion, in part due to an absence of formal recognition of their land as well as a lack of consultation and free, prior and informed consent on proposals to expropriate their land.

This report documents the extent of risk faced by Indigenous peoples in Malaysia who claim their rights to land and those that support them, in the context of development and the failures of the state to protect these human rights defenders from threats, intimidation and violence.

Indigenous peoples and defenders of Indigenous land remain on the frontline of forest conservation, preserving a precious ecosystem and vital asset to the country, which remains at risk of disappearing, together with their culture. In the absence of government protection, Indigenous land defenders have been at the forefront of an increasingly vocal struggle where their only options are to concede to the taking of their land or to protest, take legal action and once development is already underway attempt to block further expropriation of, and harm to, their land. In their attempt to defend, protect and promote the land rights of Indigenous peoples, these human rights defenders face harassment, intimidation, arrest, and even death. Fuelling this is the impunity and quasi-absolute lack of accountability for violations and criminal acts committed against them. This report documents how Indigenous land defenders are almost systematically denied justice and access to remedy when their rights were violated.

“Outside people want to change the way we live,” a community leader from Pos Piah, Perak told Amnesty International. “This is our culture and our religion, and how we heal the sick is according to our ways. The forest is our heartbeat.”

The report is based primarily on field research undertaken on visits to Malaysia by Amnesty International in July and August 2017 and January 2018, and further remote research undertaken in August and September 2018. During this time, Amnesty International interviewed 86 Indigenous community members, village heads, local activists, members of civil society organisations, lawyers, academics and journalists.

Amnesty International met with representatives of the National Human Rights Commission (SUHAKAM) and NGOs advocating Indigenous peoples’ rights. The report also draws on a review of academic and

other publications on this issue, as well as media reports related to Indigenous land in Malaysia. Research extended across Malaysia, encompassing Peninsular Malaysia, Sabah and Sarawak.

Amnesty International interviewed 17 land defenders in Sarawak who stated that, as in other parts of the country, Indigenous peoples faced intimidation and threats by private individuals described as gangsters. On 21 June 2016, in what has become an emblematic case, Bill Kayong, an activist working with a grassroots network that mobilised communities in the event of a dispute, was shot dead while waiting at a traffic light in Miri. Bill had been a vocal advocate for Indigenous land rights, in particular for a Dayak community in Bekelit, a two-hour drive from Miri, that has been claiming its rights to lands it considers to be ancestral. *“Bill was a really socially conscious person, so whenever people were in need he was ready to help them immediately. He was really brave, unconcerned for his own personal safety, he would prioritise the security of others,”* a relative of Bill’s told Amnesty International.

Bill’s death is the only case Amnesty International documented in which a person has been held accountable for the threats, intimidation and violence committed by individuals described as “gangsters” against members of Indigenous communities defending their right to land, or those helping them. In this case, however, only one person – the man believed to have pulled the trigger – has faced proper trial; those who gave the orders for the attack are believed to remain at large.

Amnesty International interviews reveal that village leaders, activists, and even journalists have faced the threat of arrest and investigation by police because of their peaceful activities to defend Indigenous land. Such arrests and investigations have taken place across the country and appear to be used to silence and intimidate communities and human rights defenders. While few people Amnesty International spoke to were formally charged, at least 20 spent time in police custody, some on multiple occasions, or had accompanied police to the station for questioning to discuss their role in protests.

State authorities have demolished blockades set up by Indigenous peoples in Gua Musang to protect their land, and activists and lawyers say that Indigenous peoples defending their rights to land have faced threats and acts of violence as a result of their work. The blockades have been demolished multiple times, and each time rebuilt by the communities. At the time of the publication of this report, the dispute continues. International human rights law requires that states engage with, and seek the consent of Indigenous peoples as collectives, through their chosen decision-making structures, for projects on their land.

Amnesty International documented cases of other challenges that defenders have faced, including dismissal from representative roles in the community, restrictions on their movement, and other reprisals for exercising their peaceful right to freedom of expression. Numerous individuals interviewed by Amnesty International that were not members of Indigenous communities described how they were intimidated for their work as an activist or lawyer and labelled as ‘instigators’.

In addition, the Malaysian government has failed to effectively investigate human rights violations against defenders. In instances of assault, attacks and threats, witnesses told Amnesty International that police routinely fail to investigate or respond to reports of Indigenous and other human rights defenders. The behaviour of non-state actors towards Indigenous peoples defending their land raises further challenges, highlighting the need for the government to hold accountable those who threaten defenders and urgently provide protection to those who have faced threats and intimidation.

Almost all the defenders that spoke to Amnesty International highlighted the lack of free, prior and informed consent for development projects which makes it difficult, if not impossible, for communities to oppose development once it has started. The numerous consequences of speaking out to defend Indigenous land has created a climate of fear amongst communities and activists. Many defenders who spoke to Amnesty International asked that their identities be concealed. Others feared filing police reports or raising issues with local officials. However, despite the risks and challenges, defenders of Indigenous land said they would continue to speak out, to ensure that the visibility of Indigenous communities and support for their efforts to defend their land grows. An Indigenous activist from Melikin, Sarawak told Amnesty International, *“I will never stop defending my rights on the land – because this land is the forest, we depend on the forest for future generations – no land, no life. I am not scared, I am willing to fight for the land for the rest of my life.”*

Amnesty International has concluded that since an official inquiry into Indigenous Land was published in 2013, there has been little progress on the improvement of the protection of Indigenous peoples in Malaysia and there remains a deep lack of recognition, respect, security and protection mechanisms for the work carried out by defenders of Indigenous land. In May 2018, the Pakatan Harapan coalition toppled former Prime Minister Najib Razak's ruling coalition Barisan Nasional from power. In its manifesto, Pakatan Harapan pledged to implement numerous human rights reforms, including to "recognise, uphold and protect the dignity and rights" of the Indigenous peoples of Malaysia.

In order to protect the work of Indigenous land defenders, the Malaysian government must ensure they are free from harassment, and the threat of criminalization through the use of repressive laws; and that they are able to conduct their important and legitimate work in a safe environment.

In addition, authorities must initiate prompt, thorough and impartial investigations into attacks, threats and assaults against defenders working to defend rights related to Indigenous land, and where there is sufficient evidence of criminal responsibility, bring those responsible to justice in fair trials, without recourse to the death penalty. Adequate legal aid and requisite financial assistance must be made available to Indigenous communities who are using the courts to defend their land rights and officials should refrain from using language that stigmatizes, abuses, disparages or discriminates against human rights defenders, including characterizing them as: "instigators," "anti-development," or "criminals."

More broadly, the government must implement the human rights of Indigenous peoples, including their right to land and to the protection of their cultural heritage. Mechanisms, including an independent National Commission on Indigenous Land Rights should be established to address the long term, systemic changes necessary to protect defenders working to defend Indigenous land and end the cycle of abuses against Indigenous Peoples.

Finally, the UN Special Rapporteur on the rights of human rights defenders must be allowed by the government to carry out a fact-finding visit to Malaysia. In addition, the government must consult with Indigenous peoples to determine the modalities for the visit of the Special Rapporteur on the rights of Indigenous Peoples in 2019.

At the dawn of a new government, an opportunity exists to address the systematic violations against Indigenous peoples and ensure the protection and respect of those that defend their land. This opportunity should not be missed. The future of the Indigenous peoples of Malaysia and the forest depends on it.

2. METHODOLOGY

This report is based primarily on field research undertaken on visits to Malaysia by Amnesty International in July and August 2017 and January 2018, and further research undertaken remotely in August and September 2018. It focuses on the challenges faced by Indigenous land defenders – people who work to promote, defend and protect the lands of Indigenous peoples on behalf of individuals or groups through non-violent means, including headmen, Indigenous community members, lawyers, journalists, local politicians – since an in-depth Inquiry by the National Human Rights Commission of Malaysia into the land rights of Indigenous Peoples that was conducted from 2010-2012, and published in 2013.¹

Amnesty International's research extended across Malaysia, encompassing the states of Selangor, Perak, Johor and Kelantan in Peninsular Malaysia, and interviews in Kota Kinabalu, Sabah and both Miri and Kuching in Sarawak. In total, Amnesty International delegates interviewed 86 Indigenous community members, village heads, local activists, members of civil society organisations- including those advocating Indigenous peoples' rights, lawyers, academics and journalists. Some interviews were conducted in English, while others, including the majority of interviews with Indigenous peoples, were undertaken in Malay or local languages, with English translation. Some people interviewed requested to have their names withheld, for fear of reprisals. Their names and any identifying information have been omitted from this report. When interviewing people from remote communities delegates travelled to villages or where that was not possible, interviewees travelled to central locations to meet with delegates.

Amnesty International also met with representatives of the National Human Rights Commission (SUHAKAM) and NGOs advocating on Indigenous peoples' rights. The report draws on a review of academic and other publications on this issue, as well as media reports related to Indigenous peoples' land in Malaysia.

Amnesty International focused its research on the actions and responsibilities of the state in Malaysia, whose duty it is to ensure rights. The report does not address the issue of responsibility on the part of specific companies. Amnesty International would like to thank all the individuals who spoke to the organisation, gave permission for their testimony to be used, and contributed time and their input towards the publishing of this report.

TERMINOLOGY

Generally, the name Orang Asli has been used to refer to the Indigenous peoples of Peninsular Malaysia, while those in Sabah and Sarawak, are referred to as the natives of Sabah and the natives of Sarawak. Amnesty International recognises however, the right of peoples to self identify, and the use of this terminology should not be taken in any way as an imposition of a name on a particular community. In this report, Amnesty International refers to the Indigenous peoples of Malaysia by their particular tribe or ethnic grouping, in order to accurately differentiate between the groups when necessary.

¹ Human Rights Commission of Malaysia (SUHAKAM), Report of the National Inquiry into the Land Rights of Indigenous Peoples, 2013

In this report we use terms such as Indigenous land defender and human rights defenders of Indigenous land to include both Indigenous people from the communities in question who are fighting for recognition of their own land, as well as others who are non-Indigenous and working alongside Indigenous peoples in their struggles to protect their land.

3. BACKGROUND

“Violations of Indigenous people’s rights continue to be wide-ranging, and the underlying reasons include the widespread, systematic discrimination against them, as well as exclusion from decision making and effective participation in matters that directly affect them.”

National Human Rights Commission of Malaysia (SUHAKAM)²

3.1 INDIGENOUS PEOPLES OF MALAYSIA

Spread across fourteen states, the Indigenous Peoples of Malaysia have been typically categorised into three groups – the Orang Asli of Peninsular Malaysia, the native peoples of Sabah, and the native peoples of Sarawak. In reality however they comprise over 100 different ethnic and sub-ethnic groups, many with characteristics different from those of their neighbours. While the Orang Asli comprise just 0.7% of the population of Peninsular Malaysia, the natives of Sabah and Sarawak form 60% and 70% of the populations of the two states respectively.³ Indigenous peoples make up 14% of the country’s population in total.⁴ The Indigenous peoples of Malaysia have distinctive cultural and historical characteristics, different from those of other segments of the population. As such, the state is required to ensure that the necessary conditions exist to allow their unique ways of life to flourish. While some Indigenous populations have migrated to urban areas, most remain in rural, and often remote parts of the country.⁵ Many communities continue to make a living from subsistence and commercial farming.⁶ However, beyond the use of the forest for practices such as agriculture, hunting, fishing, foraging and shifting cultivation, land also forms the basis of spiritual beliefs and contains historic sites, passed on from generation to generation.⁷ Hence the identity and culture of Indigenous peoples remains closely connected to the land.

One Murut leader from Sabah told Amnesty International: *“The reason why they took our land was to plant palm oil. The land they are taking is the land where we collect our medicine, where we hunt, where the salt spring is and where the fruit trees are as well. We depend on hunting for our meat, we catch fish*

² Human Rights Commission of Malaysia (SUHAKAM) (herein SUHAKAM), Annual Report 2016, 2017 p.10

³ SUHAKAM, Report of the National Inquiry into the Land Rights of Indigenous Peoples (herein Report of the National Inquiry), 2013, p.10

⁴ SUHAKAM, Report of the National Inquiry, 2013, p.5

⁵ SUHAKAM, Report of the National Inquiry, 2013 p.10

⁶ See for example, Central Intelligence Agency Library, World Factbook, Malaysia, www.cia.gov/library/publications/the-world-factbook/geos/my.html; SUHAKAM, Report of the National Inquiry into the Land Rights of Indigenous Peoples, 2013; p.10; R Aiken, C Leigh, “Indigenous Land-Rights Issues in Malaysia”, The Geographical Review, October 2011, p. 475

⁷ See for example, R Aiken, C Leigh, “Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia,” Modern Asian Studies, Vol 45, No 4, July 2011, p. 826; SUHAKAM, Report of the National Inquiry, 2013, p. 173

there. We don't rear buffalo. That is why we will never let our land go. That is what our ancestors left for us, our inheritance. We are the caretakers now.”⁸

Research has shown that globally, Indigenous peoples make a vital contribution to forest conservation and climate change mitigation, preserving precious ecosystems which remain at risk of disappearing, together with their culture.⁹ While many Indigenous peoples have integrated aspects of contemporary life, many also retain traditional practices and customs that continue to be observed, some on a daily basis. Members of Indigenous peoples told Amnesty International about their own written and unwritten laws and customs, known as ‘adat’ which regulates use of the land, its resources and community governance,¹⁰ while others referred to land as sacred, governed by a creator or watched over by divine beings. One example is the Temiar community in Perak, who referred to the Princess of the Mountain as a guardian of their ancestral forest.¹¹ Hunting practices are often based on traditional techniques and require community members to observe certain rules to ensure the sustainability of the forest and its resources.

“We live in a traditional way, and practice our traditional knowledge, carry out agriculture, hunt through traditional knowledge and catch our fish through traditional knowledge. Our ancestors passed their forest to us, including the knowledge of medicinal herbs, all the trees, and also most of the forest produce we gather. Our livelihoods depend on resources,”¹² an Indigenous leader from Sabah explained.

3.2 LAND OWNERSHIP

Since Malaysia’s independence in 1957, the Indigenous peoples of Malaysia have often been adversely affected by, rather than the beneficiaries of the model of development pursued by the government.¹³ The country’s rapid economic growth over the past two decades has benefited in part from the extensive exploitation of Malaysia’s natural resources, including logging, land development, palm oil and rubber plantations, as well as the construction of dams.¹⁴ While development has brought gains for many Malaysians, Indigenous peoples have often faced encroachment on their land because of development projects, preventing them from benefiting from their traditional sources of livelihood and leaving them at risk of poverty and further marginalisation.¹⁵ In the worst cases, they have been summarily dispossessed of their lands, forced from their homes, and made to witness the depletion and degradation of natural resources they lay claim to.

The main reason for this is the lack of recognition and implementation of Indigenous peoples’ rights to land in law, policy and practice. While the Malaysian Federal Constitution provides for the right to property and some recognition of Indigenous land, in reality, there is a lack of realisation of these provisions. Article 161(A) permits for the provision of state law for the ‘reservation of land...or for alienation’ to natives of Sabah and Sarawak, or ‘for giving them preferential treatment as regards the alienation of land by the state.’ The land rights of the Orang Asli of Peninsular Malaysia are afforded less protection, though Article 8 (5)(c) of the Constitution provides for laws to be enacted by the Federal government for the “protection, wellbeing or advancement” of Orang Asli, “including the reservation of land.”

The struggle for the protection of Indigenous land has also been hampered because land and forest matters fall under the State List in Schedule 9 in the Federal Constitution, giving state governments jurisdiction over such matters. As such, state executives and lawmakers have wide powers to determine

⁸ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

⁹ See for example, WCS Newsroom, “New Analysis Says Indigenous Peoples Living in Intact Forests Are Key to Climate Fight”, 11 September 2018; The Guardian, “Indigenous rights are key to preserving forests, climate change study finds”, 2 November 2016

¹⁰ Interviews with Amnesty International, Sabah, 26 July 2017. See also for example, SUHAKAM, Report of the National Inquiry, 2013, p.11; R Aiken, C Leigh, “Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia,” *Modern Asian Studies*, Vol 45, No 4, July 2011, p. 872

¹¹ Interview with Amnesty International, Perak, 4 January 2018. See also for example, SUHAKAM, Report of the National Inquiry, 2013 p. 30

¹² Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹³ See for example, SUHAKAM, Report of the National Inquiry, 2013, p.vi-vii, 168

¹⁴ See for example, “Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia,” *Modern Asian Studies*, Vol 45, No 4, July 2011, p. 839, SUHAKAM, Report of the National Inquiry, 2013, p.5

¹⁵ Report to the Commission on Human Rights, Special Rapporteur of the Right to Food, UN Doc. A/HRC/25/57/Add.2, para. 64- 67

the extent to which Indigenous land is recognised and protected. Rarely is it that states, many of which consider natural resources an important source of revenue, act in favour of Indigenous claims.¹⁶ Rather, in most cases, Indigenous peoples are susceptible to the decisions of the state authorities that often favour development. Despite this, Malaysian courts have held that the federal and state governments have a duty to protect Indigenous land rights and to not take actions that are inconsistent with those rights. In its National Inquiry report, the National Human Rights Commission (SUHAKAM) also declared that Indigenous peoples' land rights cannot be ignored stressing that, "Where the rights are provided by statute, any inadequacy must be compensated by reference to the constitutional provisions to give full recognition of the customary rights to land."¹⁷ In other words, the Federal government still has the obligation to respect, protect and fulfil the right of Indigenous peoples to their ancestral lands, and cannot disregard this duty.

In the meantime, in order to prove their claim and challenge development on land, Indigenous communities have had to turn to the courts, a lengthy process that often takes years to resolve.¹⁸ During this time in at least some cases, states have continued to issue licenses to companies, or gazette land as Forest reserve, that can then be developed, without consulting Indigenous peoples. Without a title deed to demonstrate their ownership of the land, when a dispute arises, the company with a licence has been favoured by the police and local authorities, and Indigenous communities' claims are deemed illegitimate in the eyes of the law – increasing the risks against those who seek to protect and defend them.



Cleared land in Johor, Peninsular Malaysia, July 2017 © Amnesty International

¹⁶ See for example, "Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia," *Modern Asian Studies*, Vol 45, No 4, July 2011, p. 839

¹⁷ SUHAKAM, Report of the National Inquiry, 2013, p.65

¹⁸ See for example, Yogeswaran Subramaniam and Colin Nicholas. 'The courts and the restitution of indigenous territories in Malaysia' (2018) 18(1) *Erasmus Law Review* p.72

3.3 PARTICIPATION IN DECISION MAKING

A lack of participation in decision making in relation to Indigenous land by Indigenous communities has also been noted by SUHAKAM and experts including the UN Special Rapporteur on the Right to Food as a major barrier to the realisation of land rights.¹⁹ Following his visit to Malaysia in 2013, UN Special Rapporteur Olivier de Schutter called for free, prior and informed consent to be afforded to Indigenous peoples in Malaysia, an internationally recognised principle considered fundamental to the rights of Indigenous peoples that has also been emphasised repeatedly by the UN Special Rapporteur on the rights of Indigenous peoples.²⁰

Free, prior and informed consent is a principle that requires states to consult with Indigenous peoples regarding any development on their ancestral lands. In most cases where a significant impact on the community's rights to land or cultural heritage can be expected, the state has the obligation to obtain the free, prior and informed consent of the community for the proposed development.

Together with lack of title, the failure to obtain free, prior and informed consent is one of the principal challenges facing Indigenous communities in Malaysia. In some cases, licences are issued by government to companies without first consulting the affected Indigenous peoples. This was noted in the SUHAKAM National Inquiry, which included examples where this process was bypassed.²¹ In Peninsular Malaysia, the Department of Orang Asli Development (JAKOA), often engages with government agencies and companies and provides consent, considering itself the representative of the Indigenous people.²² In some cases, companies are permitted to begin operations before consultations have taken their course.²³ This is despite policy of the government that expressly requires such consent, for example The Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia which states that: "The special position of aborigines in respect of land usage and land rights shall be recognized.... Aborigines will not be moved from their traditional areas without their full consent."²⁴

This lack of consultation has contributed to an atmosphere of division and distrust between the government and the Indigenous peoples of Malaysia, spurring more action on the part of individuals and communities to make their voices heard.

3.4 MISSED OPPORTUNITIES

In 2013, there were signs that the government recognised the need to reform its policies on land issues facing Indigenous Peoples. An 18-month Inquiry by SUHAKAM, provided an in-depth examination of the land issues affecting Indigenous peoples. The Report of the National Inquiry into the Land Rights of Indigenous Peoples, exposed a wide-ranging pattern of abuses including the ongoing systemic issues centred around land laws that fail to recognise Indigenous peoples' land ownership and management, as well as the prioritisation of land development projects over the need to ensure the survival of Indigenous cultural practices and livelihoods.²⁵

Following the release of the SUHAKAM report, a government Taskforce on Indigenous Land Rights was formed to study the Commission's recommendations. Subsequently, the government adopted 17 out of 18

¹⁹ SUHAKAM, Report of the National Inquiry, 2013 p.32; Report to the Commission on Human Rights, Special Rapporteur on food, UN Doc. A/HRC/25/57/Add.2, para. 72-73

²⁰ Report to the Commission on Human Rights, Special Rapporteur on food, UN Doc. A/HRC/25/57/Add.2, para. 72-73; Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, UN Doc. A/HRC/12/34 (2009), para 36-57

²¹ See for example the encroachment of commercial plantations on land claimed as native customary rights in Sabah p.89

²² SUHAKAM, Report of the National Inquiry, 2013, p.135

²³ See for example SUHAKAM, Report of the National Inquiry. p 33; R Aiken, C Leigh, "Indigenous Land-Rights Issues in Malaysia", The Geographical Review, October 2011 p.481

²⁴ Section 1(d) Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia 1951

²⁵ SUHAKAM, Report of the National Inquiry, 2013, p.164

recommendations including those relating to recognition, demarcation and titling of Indigenous land, right to remedy for past abuses, and participation in decisions around land development.

The acceptance of these recommendations was hailed by observers, including the UN, as a step towards resolving the problems faced by Indigenous peoples and reducing human rights violations.²⁶ In April 2017, however, SUHAKAM declared that none of the recommendations had been implemented and that the government's inaction has led to an increase in confrontation and incidents between Indigenous peoples and the authorities. It called on the government to issue a temporary moratorium on all development involving Indigenous land rights.²⁷ This has not happened to date.

3.5 BREAKING FROM THE PAST

In May 2018, the Pakatan Harapan coalition toppled former Prime Minister Najib Razak's ruling coalition Barisan Nasional from power. The first change of government since independence has raised hopes amongst Malaysians and the international community that progress on human rights, including the rights of Indigenous peoples may be possible.

In its election manifesto, Pakatan Harapan pledged to implement numerous human rights reforms, including to "recognise, uphold and protect the dignity and rights" of the Indigenous peoples of Peninsular Malaysia²⁸, stating also that it will "work to implement the proposals of the National Inquiry into the Land Rights of Indigenous Peoples report...that has been ignored by (former ruling party and coalition) UMNO (United Malays National Organisation) and BN (Barisan Nasional)."²⁹ The manifesto promises it will bring this report "for debate within the first year of the Pakatan Harapan administration." The manifesto further pledges to recognize Indigenous lands of the Indigenous peoples of Peninsular Malaysia³⁰ Sabah and Sarawak, and in cases where land has been unfairly appropriated, to "establish a redress mechanism to ensure the affected party is adequately compensated."³¹

In addition, in its Voluntary National Review of the Sustainable Development Goals in 2017, Malaysia made several commitments to improve the livelihoods of Indigenous and local communities in the management of natural resources. The Review pledged that it would empower these communities to report illegal activities, and significantly, have the right to give or withhold consent to proposed projects that may affect their lands.³²

The new government has also promised to ratify six remaining human rights conventions to which Malaysia is not yet a state party.³³ These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on the Elimination of all Forms of Racial Discrimination, all of which have provisions on the rights of Indigenous peoples.

Amnesty International views the above commitments as an opportunity for progress that should not be missed and calls on the government to address the concerns highlighted in this report to fully realise Indigenous peoples' rights in Malaysia. Amnesty International likewise calls on the new government to also ensure respect for and the protection of the rights of human rights defenders defending Indigenous peoples' lands.

²⁶ See for example, UN News, "Malaysia must protect environment, Indigenous peoples as it reduces poverty – UN expert", 18 December 2013

²⁷ See for example, SUHAKAM, SUHAKAM Annual Report 2016 <https://drive.google.com/file/d/0B6FQ7SONa3PRLVFYOHoyODc0eDg/view>; Free Malaysia Today, "You have failed the Orang Asli Suhakam tells the government", 4 April 2017 <http://www.freemalaysiatoday.com/category/nation/2017/04/04/you-have-failed-the-orang-asli-suhakam-tells-the-government/>

²⁸ Pakatan Harapan, Buku Manifesto: Rebuilding our Nation (herein, PH Manifesto), Fulfilling our Hopes, March 2018, p. 83

²⁹ PH Manifesto p.83

³⁰ PH Manifesto p.83

³¹ PH Manifesto p. 100-101

³² Government of Malaysia, Economic Planning Unit, Malaysia Sustainable Development Goals - Voluntary National Review, June 2017 <https://sustainabledevelopment.un.org/content/documents/15881Malaysia.pdf>

³³ See for example Amnesty International Malaysia, New Ministers Statement an Opportunity for Human Rights Reforms, 3 July 2018 <http://www.amnesty.my/malaysia-new-ministers-statement-opens-opportunity-for-human-rights-reforms/>

4. LEGAL FRAMEWORK

“Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”

Article 1, UN Declaration on Human Rights Defenders³⁴

Malaysian authorities are bound by a number of international and domestic obligations that require them to protect both the rights of human rights defenders and the lands of the Indigenous Peoples of Malaysia.

4.1 HUMAN RIGHTS DEFENDERS

4.1.1 INTERNATIONAL LAW

UN DECLARATION ON HUMAN RIGHTS DEFENDERS

Under international human rights law and standards, every person who acts to defend or promote human rights, individually or in association with others, at the national, regional or international level is entitled to effective protections under national and international law to allow them to carry out their work in a safe and enabling environment. This right is set forth in the UN Declaration on the Rights of Human Rights Defenders and has been consistently recognized by several resolutions of the UN General Assembly and the Human Rights Council.

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, commonly known as the Declaration on Human Rights Defenders, was adopted by the UN General Assembly by consensus in 1998.³⁵ The Declaration, while not a legally binding document, articulates several rights protected under international law and applies them to the particular role and situation of human rights defenders, including

³⁴ Declaration on the role of human rights defenders and the need for their protection (also known as the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms) A/RES/53/144, 8 March 1999 (Herein, Declaration on the Rights of Human Rights Defenders)

³⁵ Declaration on the Rights of Human Rights Defenders

the duty of States to grant effective protections to those who face risks and attacks for their work in defending human rights.

Specifically, the UN Declaration on Human Rights Defenders requires states to protect human rights defenders against threats, harassment, intimidation and attacks, including the use of criminal laws to target and silence them.³⁶ Article 12 (2) for example, states that “The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.” It also requires states to combat impunity by ensuring that those responsible for violations and abuses against human rights defenders are promptly brought to justice.³⁷

While states bear the ultimate responsibility to protect human rights defenders, non-state actors, including companies, have a responsibility to respect human rights and should refrain from undermining the capacity of human rights defenders to do their work freely and safely.³⁸ Companies must pay particular attention to the risks their operations entail for human rights defenders and put in place enhanced due diligence procedures to identify, assess and adequately address risks to, and impacts on human rights, including on the rights of human rights defenders.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Human rights defenders are also entitled to the protection and fulfilment of their fundamental rights as enshrined in the Universal Declaration of Human Rights (UDHR).

The right to life, liberty and security of person is enshrined in Article 3 of the UDHR while Article 8 sets out the right to an effective remedy for violations of rights under the Constitution or by law.

In the context of attacks, intimidation and threats faced by human rights defenders, the right to freedom of opinion and expression is set out in Article 19 of the UDHR. This right includes the “freedom to hold opinions without interference” and to “seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 20 meanwhile, sets out the right to peaceful assembly and association.

Although international human rights law does permit certain restrictions on freedom of expression and peaceful assembly, these restrictions must meet a strict three-part test: they must be provided by law; be limited to specified purposes such as national security, public order or respect for the rights or reputation of others; and be necessary and proportionate to the achievement of one of those permissible purposes. Any restrictions imposed that do not meet all elements of this “three-part test” constitute violations of these rights.

4.1.2 NATIONAL LEGAL FRAMEWORK

While the role and work of human rights defenders is not explicitly mentioned in Malaysian law, the Malaysian Federal Constitution and a range of other laws - including the Sedition Act, Peaceful Assembly Act, the Legal Aid Act are relevant to the protection of and respect for human rights defenders and the work that they carry out.

The Malaysian Constitution affirms the rights to life, liberty, and due process.³⁹ It further guarantees all persons equal protection of the law (Article 8). The Constitution also affirms other rights set out in the Declaration of Human Rights Defenders, including the rights to freedom of expression, assembly and association.⁴⁰

³⁶ Article 12, Declaration on the Rights of Human Rights Defenders

³⁷ Article 9 e.g. “Everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.” Declaration on the Rights of Human Rights Defenders

³⁸ Article 11, Declaration on the Rights of Human Rights Defenders

³⁹ Article 5, Federal Constitution of Malaysia 1963

⁴⁰ Article 10, Federal Constitution of Malaysia 1963

While freedom of expression and the right to peaceful assembly are protected in the Constitution, they are subject to restrictions in practice. Legislation that sets out the limits of these rights in Malaysia includes the Sedition Act 1948 and the Peaceful Assembly Act 2012.

Malaysia's colonial-era Sedition Act criminalises a wide array of activities, which should be considered to be a legitimate exercise of the freedom of expression, including those 'with a tendency to excite disaffection against any Ruler or government' or that 'question any matter' protected by the Constitution. The restrictions imposed in the Act are phrased in an excessively broad and vague manner, potentially resulting in both an overreach and abusive application of the law. The Act does not comply with international human rights law and standards, and additionally, violates the rights to freedom of expression as guaranteed in Malaysia's Constitution. Those found guilty can face three years in prison and large fines. Opposition politicians, lawyers, journalists and others have all been investigated under the Sedition Act over recent years. As such, civil society and human rights organisations, including Amnesty International, have called for the law to be repealed.

Although the Peaceful Assembly Act aims to ensure all citizens have the right to organise or participate in peaceful assemblies without arms, this Act has also been misused since its inception to target human rights defenders and government critics and to criminalise the act of organising or participating in public peaceful assemblies.

Other legislation includes the Legal Aid Act 1971, which is intended to grant those in need of legal defence the right to a lawyer. In practice, the Act only provides for representation of accused persons who plead guilty to a criminal charge, or those charged under the Minor Offences Act 1955. As such, there continues to be a significant lack of access to legal aid, and consequently, access to justice in Malaysia, including for human rights defenders.

4.2 RIGHTS OF INDIGENOUS PEOPLES

4.2.1 INTERNATIONAL LAW

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴¹ is the most substantive international document that sets out the rights of Indigenous peoples. It outlines rights integral for the work of Indigenous human rights defenders, as well as to Indigenous peoples' lands and natural resources.

The Declaration confers obligations on all states; including to respect the right of Indigenous peoples to self-determination; the right to self-government and free, prior and informed consent; recognition and preservation of cultural identity; the right to reparation and redress for wrongs suffered; and the right for treaties and agreements that they have negotiated with a State to be honoured and fully implemented.⁴² The Declaration affirms Indigenous Peoples' rights to equality and non-discrimination, and the right to freedom of expression which is necessary to defend other rights. In Article 4, the Declaration states "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

While Malaysia voted in favour of the UNDRIP in 2007, there is a huge gap between the principles that Malaysia supported in the Declaration and the protection provided to Indigenous peoples under Malaysian laws, policies and state practice on Indigenous peoples' rights. This gap includes the failure to respect rights relating to Indigenous peoples' lands and natural resources and free, prior and informed consent,

⁴¹ United Nations General Assembly, Declaration on the Rights of Indigenous Peoples, A/61/295, 13 December 2007

⁴² International Law Association, "Report of The Hague Conference - Rights of Indigenous Peoples" (2010)

and numerous barriers to justice for Indigenous communities and defenders. Moreover, few principles of UNDRIP have adequately been translated into Malaysian law.

Malaysia is not a party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights or the International Convention on the Elimination of all Forms of Racial Discrimination, which also contain protections for Indigenous human rights defenders and Indigenous peoples, and prohibitions of racial discrimination.

Malaysia is, however, party to the Convention on the Rights of the Child (CRC), and the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). Under the CRC, state parties must work towards the protection and care necessary for the well-being of a child (defined as being below the age of 18), including ensuring that a child of Indigenous origin shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, and to profess and practise his or her religion or language. The UN Committee on the Rights of the Child, which oversees the convention, has stated that “the use of traditional land is of significant importance to [Indigenous children’s] development and enjoyment of culture”, and that states who have ratified the convention should “closely consider the cultural significance of traditional land and the quality of the natural environment.”⁴³

4.2.2 NATIONAL LEGAL FRAMEWORK

“Indigenous peoples” for the purpose of this chapter refers to three constitutionally identified ethnic groups: the Aborigines (Orang Asli) of the Malay peninsula, the natives of Sabah and the natives of Sarawak. The Malaysian Constitution provides for equality under the law for all citizens (Article 8). It also provides for the ‘right to property’ of Malaysian citizens, including Indigenous peoples and guarantees the right to ‘adequate compensation’ in the event of the state’s compulsory acquisition or use of property (Article 13).⁴⁴ Article 83 provides the Federal Government (in consultation with the State Government) with the power to acquire, for public purposes, land that has been designated for large-scale development projects, such as for the creation of dams, highways and national parks.

A set of varying state laws, outlined below, further govern land. Despite some differences in law, the main challenge Indigenous peoples face across the country remains the same. A lack of formal recognition of native land title, leaves communities without title deeds meaning they must resort to the courts to demonstrate and prove their formal ownership of the land. This is exacerbated by the state authorities’ persistent designation of land use in favour of commercial development, rather than protection of forest reserves, a slow and inefficient land registration system, and a lack of effective participation, consultation and free, prior and informed consent of Indigenous peoples in land decisions that affect them.⁴⁵

PENINSULAR MALAYSIA

Article 8(5)(c) of the Federal Constitution provides for the protection of the Orang Asli, including the ‘reservations’ (allocation) of land. Despite this provision, the National Land Code 1965 (‘NLC’), the principal statute governing land registration and interests in Peninsular Malaysia does not contain explicit provisions recognising or regulating Orang Asli customary land.

Instead, the Aboriginal Peoples Act 1954 (‘APA’), the main statute governing Indigenous peoples in the Peninsula, empowers the individual state authority, amongst other things, to designate Indigenous land as ‘aboriginal reserves’ or ‘aboriginal areas’. However, only a small percentage of the villages and land on which Orang Asli live has been officially designated as such. Even if such lands are formally protected by reservation, these land reservations can be revoked by the state under the APA or the NLC to make way for other land use priorities, including land development. Moreover, the existing statutory scheme does not

⁴³ Committee on the Rights of the Child, General Comment no. 11 (2009), para 35

⁴⁴ Article 13, Federal Constitution of Malaysia 1963

⁴⁵ SUHAKAM, National Inquiry Report, 2013, p.6

recognise communal proprietorship of Orang Asli land. These limitations severely curtail the security of tenure enjoyed by the Orang Asli in respect of their customary lands.

The National Forestry Act 1984 vests property in forest produce on reserve or state land in the State Authority and provides Orang Asli limited access to forest produce for domestic and subsistence use. In recent years, disputes and clashes between Orang Asli and the Forestry Department have occurred particularly where Orang Asli forage and cultivate land on forest reserves that they claim as ancestral or customary land.

SABAH

Article 153 (1) of Malaysia's Federal Constitution obliges the government to safeguard the special position of the Malays, natives of Sabah and Sarawak and the legitimate interests of other communities. Article 161A (5) of the Constitution provides for the reservation of land to natives of Sabah and Sarawak.

The Sabah Land Ordinance 1930 provides for the protection of land rights of the natives of Sabah, referred to as Native Customary Rights (NCR). A person Indigenous to Sabah may prove these rights through continuous occupation by making an application for 'native title'.⁴⁶ Under the written laws of Sabah, a native title can also be granted for land in common use, for example for collective resources, water catchment and communal forests. The Yang diPertua Negeri (YDP - Head of State) may also declare land as native reserves under these laws.

Claims for 'native title' can be made to the headman, or directly to the Collector, any District Land Administrator, Land Officer, District Officer or other officer appointed under the State land law; who hears claims and determines them. In reality, relatively few native titles have been granted, leaving many Indigenous communities residing on state land, and faced with the challenge of going through a long and arduous registration or court process, in order to claim land titles.

COMMUNAL LAND TITLES

Under the terms of the Sabah Land Ordinance, Indigenous people are deemed to be beneficiaries of communal native title and not owners.⁴⁷ Communal titles are land held in trust by the district office or the assistant collector of land revenue, who have power over what crops are cultivated and whether or not land can be given to the next of kin.

Communal titles have, for example, also included outsiders while many of the natives living in the area are not named. The government has also used communal land for joint ventures with private companies or developers, often without the free, prior and informed consent of native communities.

In August 2018, the Chief Minister of Sabah announced that communal land titles were to be scrapped, in order for native land rights to be better protected.⁴⁸

He noted the issues that had meant that communal land title had resulted in the loss of rights over land by Indigenous communities, including joint ventures, and the sale of land title to outside individuals and suggested these would be rectified. This promise was reiterated in November 2018, when he stated that communal titles would begin to be cancelled by December 2018. However, the Chief Minister also stated that individual titles would be issued, which would fail to comply with the obligation of the state to recognise the collective land rights of Indigenous peoples.⁴⁹

⁴⁶ Section 15, Sabah Land Ordinance 1930

⁴⁷ Section 76, Sabah Land Ordinance 1930. See also for example: Malaysia Star, "Sabah Natives Wary of Communal Land Titles", 10 August 2016, <https://www.thestar.com.my/news/nation/2016/08/10/sabah-natives-wary-over-communal-land-titles/#BRcsGsOoDzClFpdD.99>

⁴⁸ Malaysia Star, "Shafie: Communal Land Titles to be Scrapped", 8 August 2018, <https://www.thestar.com.my/news/nation/2018/08/08/shafie-communal-land-titles-to-be-scrapped/>

⁴⁹ *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs) (Series C No. 172) Inter-American Court of Human Rights, (2007); Art. 26, United Nations Declaration on the Rights of Indigenous Peoples

SARAWAK

Like Sabah, the state of Sarawak has historically recognized the customary rights to land of Indigenous peoples by statute with the Sarawak Land Code 1958 being the primary legislation in Sarawak governing land matters.

Customary land rights may be created by demonstrating land use, for example, the felling of virgin forests, or planting of fruit trees, or use of the land for burial grounds. According to Section 5(2) of the Code, until a document of title has been issued, the land shall be State Land and any Indigenous person in occupation of this land will be deemed as a 'licence holder from the Government'. As so few native titles have been issued, many communities remain mere licence holders.

The Sarawak Forests Ordinance 2015 criminalises the construction of blockades or the prevention of their dismantling, a crime punishable by up to two years in jail or a fine of 10,000 ringgit (\$2387 USD).⁵⁰ Despite this, Indigenous communities in Sarawak have continued to use blockades to protest the loss of their land, often as a last resort.

In July 2018, amendments to the Land Code were passed to counter the effects of the majority Federal Court ruling in the *TR Sandah* decision (discussed below). The amendments provide for the issuance of a title in perpetuity (permanent title) in respect of communal native customary lands beyond cleared, settled and cultivated areas but places a statutory limit of 1000 hectares per title. The Land Code has been criticised for short-changing natives of their NCR. Advocates, including the current Works Minister Baru Bian stated that Indigenous communities had established communal customary claims to over 10,000 hectares through the courts in the past.⁵¹ Indigenous rights activists expressed concern that the amendments in the law would merely grant Indigenous communities the right to use, but not own, the land, taking to the streets of cities within the state to express their dissatisfaction.⁵²

DEVELOPMENT OF CASE LAW AND JUDICIAL TRENDS

From the 1990s, Indigenous communities and their defenders have increasingly resorted to Malaysian courts to seek formal recognition and protection of their customary lands and resources, to some degree of success. Among their successes is the Malaysian courts' recognition of pre-existing Indigenous rights to lands and resources without the need for formal legislative and executive endorsement.⁵³

These rights to lands and resources are enforceable through the courts where Indigenous claimants establish prior and continuous occupation of the land claimed.⁵⁴ The recognition of Indigenous customary land rights by the Courts has seen significant gains particularly in Peninsular Malaysia, arguably attributable to the fact that there are no written laws expressly recognising, limiting or extinguishing Orang Asli customary rights. Orang Asli have successfully claimed adequate monetary compensation⁵⁵ for the deprivation and restitution of their lands⁵⁶ where they have proven customary land rights in the Courts. Malaysian courts have also held that the federal and state governments have a fiduciary duty to protect Indigenous land rights and to not take actions that are inconsistent with such land rights.⁵⁷

⁵⁰ Section 102, Sarawak Forests Ordinance 2015

⁵¹ See for example: Borneo Post, "PH Against Land Code Amendment Bill", 11 July 2018 <http://www.theborneopost.com/2018/07/11/ph-against-land-code-amendment-bill/>

⁵² Reuters, "Indigenous Malaysians fight new land law with maps of burial grounds", 16 July 2018 <https://www.reuters.com/article/us-malaysia-landrights-lawmaking/Indigenous-malaysians-fight-new-land-law-with-maps-of-burial-grounds-idUSKBN1K61EF>

⁵³ See for example, the cases of *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 and *Nor anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241. The legal correctness of these cases was affirmed by the apex court of Malaysia in *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677.

⁵⁴ *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677.

⁵⁵ See eg. *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 527 (Court of Appeal).

⁵⁶ *Ketua Pengarah Jabatan Hal Ehwal Orang Asli v Mohamad bin Nohing* (Batin Kampung Bukit Rok) [2015] 6 MLJ 527 (Court of Appeal).

⁵⁷ *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 527 (Court of Appeal).

Unfortunately, more recent superior court decisions from Sarawak suggest regressive judicial trends. In 2017, the majority Federal Court decision in *Director of Forest, Sarawak v TR Sandah ak Tabau* (2017) 3 CLJ 1 limited common law recognition of native Iban customary lands to settled, cleared and cultivated lands '*temuda*' and held that the broader territorial domain '*pemakai menoa*' and communal forest *pulau galau* had not been given the force of law by the written laws of Sarawak.

While Malaysian courts remain a potential option for Indigenous communities seeking redress for their land problems, Indigenous litigants face significant challenges in navigating this route due to limited financial resources, incongruous evidentiary requirements, protracted litigation, judicial uncertainty and non-compliant state governments.⁵⁸

CHALLENGES OF LAND RECOGNITION IN PENINSULAR MALAYSIA, SABAH & SARAWAK

The National Inquiry into Indigenous Land Rights by SUHAKAM in 2013⁵⁹, identified the following challenges faced by Indigenous peoples in relation to land rights in the country:

Peninsular Malaysia

- Where an Orang Asli (OA) reserve is created there is still no security of tenure as the state government can revoke the status of reserve at any time
- Maps used by local government do not include land occupied by OA that is not gazetted as OA reserves, making them effectively invisible
- A lack of uniformity in land policy across states
- Significant delays in the processing of reserve applications, meaning that there has been only a 0.02% increase in 20 years of gazetting of OA land according to JAKOA (the Department of Orang Asli Development) figures, with some applications pending for over 10 years
- Land previously recognised as OA land has, in some cases, been transferred to the state or another entity
- JAKOA informed the Inquiry that the main reason for their inability to gazette OA reserves is that JAKOA is a Federal Agency while land is a State matter
- OA have been led to believe, in some cases by JAKOA officials, politicians, government servants and those having authority over land matters in the State, that their customary lands were theirs to own and occupy, leading them not to submit land applications
- Where OA are on state land or forest reserve, the land continues to be treated as such and a lack of recognition creates the risk of land being alienated to parties other than OA

Sabah

- Individual land applications for land tenure rights are encouraged by authorities, although communal land rights are recognized in the form of native reserves and communal titles under the Sabah Land Ordinance (SLO)
- There are significant delays in approving applications and surveying land, with delays in some cases exceeding 10 years
- Indigenous land claims overlap with those of private individuals, companies, Government Linked Companies (GLCs) and state development agencies, despite pending applications for land claims by natives. Often, private individuals sell their land to a company
- When Indigenous communities complain about others on their land, they have been told that their application was rejected or the application of another individual/company was accepted before theirs
- There has been fraud and abuse of power, with village heads putting names of outsiders on land title

See for example . Yogeswaran Subramaniam and Colin Nicholas. 'The courts and the restitution of indigenous territories in Malaysia' (2018) 18(1) Erasmus Law Review pp. 67-79

⁵⁹ SUHAKAM, National Inquiry Report, 2013, pp.81-153

- Notices are merely posted on the notice boards at the Land Surveys Department without efforts to identify those who had made prior applications with respect to the same land and to proactively communicate the notices to them so that they might challenge a claim
- Communal title allows the government to develop land in a joint venture with the community, often without their full free, prior and informed consent.
- Many affected native communities are not aware that their lands were within forest reserve until the arrival of logging companies or the posting of notices by the authorities to warn against trespassing

Sarawak

- The definition of customary land does not include roaming land
- Courts have failed to acknowledge and build on progressive interpretations of customary land in previous court decisions, instead strictly following the much narrower definition of customary land as provided under Section 5(2) of the Sarawak Land Code (SLC)
- There have been significant delays to land rights claims, with some applications being lost in the bureaucratic process
- Provisional leases by Government authorities have been given to third parties or forest reserves have been gazetted, over-ruling land that was the subject of native applications
- No reply to applications to survey the land
- Notices to develop land posted in offices in provincial capitals are not practical for remote communities to hear about and challenge
- Provisional licenses provided to companies to develop the land include an obligation to excise and protect NCR land but this often does not happen. This requirement is not specified in the licence agreement itself

5. VIOLENCE AND HARRASSMENT

“...We are marked by the gangsters. The gangsters know us ... we are criminals to them – the activist is criminal to them...”

Dennis Along, Tring activist from Sarawak⁶⁰

5.1 SARAWAK

To date, the most violent attacks on Indigenous land defenders have occurred overwhelmingly in Sarawak, a state rich in natural resources. International organisations, including Global Witness, currently estimate that less than 10% of the State's primary rainforests are left, the rest having been subject to selective logging, or development into plantations, predominantly palm oil, since the forestry industry began in the 1950s. From an original forest coverage of approximately 10 million hectares, less than 1 million hectares of virgin forest are estimated to remain.⁶¹

From 1963 up until 2014, the Chief Minister of Sarawak was Abdul Taib Mahmud. A representative of the Barisan Nasional coalition, which was Malaysia's ruling government until recently, Mr Taib stepped down in 2014 at the age of 77 after ruling the state for over 50 years. However, he then took office as Yang di-Pertua Negeri (Head of State). The former Chief Minister and his family have been accused of allegedly amassing a large majority of their substantial wealth through the plunder of Sarawak's vast natural resources. According to the investigative organisations Global Witness and Bruno Manser Fund, the Chief Minister personally had control of forest and plantation licenses, which have been granted in a way that has violated the rights of Indigenous peoples.⁶²

Sarawak is home to a large number of Indigenous peoples, the largest group being the Dayak who make up approximately 40% of the state's population. However, there are over 37 groups and subgroups in the state, including the Iban, Murut, Melanau, and the Penan. Rich in forest and natural resources, and within this context of autocratic rule, Sarawak continues to see Indigenous land defenders experience some of the greatest threats and challenges within the country.

⁶⁰ Interview with Amnesty International, Miri, 29 July 2017

⁶¹ See for example, Global Witness, "Sarawak's Forests: Myths and Reality", 2011 p.1
<https://www.globalwitness.org/sites/default/files/library/Sarawak%20myths%20and%20reality.doc.pdf>

⁶² See for example, Al Jazeera, "Undercover Sting Exposes Malaysia Land-Grab", 19 March 2018, <https://www.aljazeera.com/indepth/features/2013/03/2013318131755948174.html>; The Economist, "Rumbles in the Jungle", 5 May 2016, www.economist.com/asia/2016/05/05/rumbles-in-the-jungle; Bruno Manser Fund, "Malaysian anti-corruption urged to reopen Sarawak corruption probe", 5 May 2018; Global Witness, "Inside Malaysia's Shadow State", 19 March 2013

5.2 PEOPLE DESCRIBED AS ‘GANGSTERS’

Amnesty International interviewed 17 land defenders in Sarawak who stated that Indigenous peoples faced intimidation at the hands of individuals that confronted and harassed villagers seeking to defend their land.⁶³ This confrontation and harassment of members of Indigenous communities by such people has led to activists, lawyers and Indigenous land defenders referring to them as ‘gangsters’ due to their often violent and intimidating approach.

The descriptions of the presentation and activities of individuals described as gangsters by Amnesty interviewees bear similarities from case to case. These individuals were described as wearing plain clothes with their faces covered at times, appearing unannounced on Indigenous land or in their vicinity to confront Indigenous community members and threaten them with swords, machetes or guns, sometimes violently attacking the Indigenous community members.

In six instances, Amnesty International heard that individuals described as gangsters have issued verbal threats towards Indigenous communities who are opposed to a project or are present at blockades. In five cases, Amnesty International collected witness testimony alleging that such individuals targeted village heads or activists through physical violence, leading to physical harm, and even death.

5.3 PHYSICAL ATTACK

““I dropped down to my knees, they attacked me with the handle of a hoe, and used a samurai [sword]. They hit me many times. Then they ran away.”

Surik anak Muntai, Indigenous activist from Sarawak⁶⁴

Human rights defenders to whom Amnesty International spoke, told of how people described as gangsters appeared when disputes turned bitter. In Serian, Sarawak, 16 communities of the Iban Indigenous people have been fighting for their rights on land where they reside and which they hold claim to.



**SURIK ANAK MUNTAI
MELIKIN**

In March 2013, Surik anak Muntai a 71-year-old Iban activist from Melikin, Serian, was making his way to a bus stop to wait for his grandchildren to finish school after sending his palm oil fruit to the mill. He described how four men stopped him and began attacking him with weapons.

He told Amnesty International:

“I dropped down to my knees, they attacked me with the handle of a hoe, and used a samurai [sword]. They hit me many times. Then they ran away.”⁶⁵

Muntai told an Amnesty researcher that he suffered wounds on his face, arms, and torso, showing the scars left from the attack and documents that confirmed he was admitted to hospital for 3 months. Despite filing a police report about the attack, and claiming that he saw his main attacker's face, the individual he

⁶³ Interviews with Amnesty International, Sarawak, 28-30 July 2017. See also for example, Free Malaysia Today, “Clashes between gangsters and natives”, 20 July 2011, <http://www.freemalaysiatoday.com/category/nation/2011/02/20/near-clashes-between-gangsters-and-natives/>; SUARAM, Malaysia Human Rights Report 2016: Civil and Political Rights, 2017 p. 190

⁶⁴ Interview with Amnesty International, Miri, 29 July 2017

⁶⁵ Interview with Amnesty International, Kuching, 28 July 2017

identified to police was released and was not charged, three days after the incident.⁶⁶ No further action was taken.

"The police didn't do anything. They tried to sabotage (the case). They wouldn't explore it," said Muntai.

"The police used the excuse that they lost the file three times."

Media reports state that the police were unable to identify any of the assailants.⁶⁷

Nevertheless, despite this experience, and his age, Muntai vowed he would continue fighting for his land.

"I will never stop defending my rights on the land – because this land is the forest, we depend on the forest for future generations – no land no life. I am not scared, I am willing to fight for the land for the rest of my life."



↑ A palm oil fruit lies on disputed land, Bekelit, Sarawak, July 2017 © Amnesty International

Michael Luang, another community leader from Melikin, provided some more background on the dispute.

"We found out in November 2011 that a provisional lease had been granted when we saw masonry arriving. When they came we spoke to the person, perhaps a contractor with the company to develop or destroy our land. From then on, we were told the company that was responsible had been given a provisional licence."

Michael Luang explained that at one point, his car was set on fire. He also explained that a decision on the land claim that he and his community had fought in court came on 10 July 2017. The Miri High Court ruled that two companies have a provisional licence and rights to develop the land. The ruling came following the Federal court judgement TR Sandah in 2017, that has had a wide-ranging impact on long running land claims in Sarawak. The 16 communities attempted to claim rights over 12,500 hectares of land, but the judge, referring to the TR Sandah judgement, ruled that the communities had failed to

⁶⁶ Interview with Amnesty International, Kuching, 28 July 2017. See also Malaysia Today, "Sarawak NCR Defender's Attacker Walks Free", 26 March 2013; Malaysiakini, "Attacker of Sarawak NCR defender walks free", 25 March 2013

⁶⁷ See for example: Borneo Post, "Villagers Living in Fear of Gangsters", 5 November 2013

provide enough evidence to claim land rights.⁶⁸ Despite this, Luang also promised he and his community would continue to defend their land.

“The trees, land, rivers belong to us. I was born there searching for food there. That land is our market and our bank – we cannot depart from our land.”⁶⁹

In a separate case, the ongoing land dispute concerning the community of Sungai Bekelit, has made national headlines.



JAMBAI ANAK JALI SUNGAI BEELIT



Jambai anak Jali stands outside a blockade that was patrolled 24 hours a day to protect ancestral land, Bekelit, July 2017 © Amnesty International

“We became unable to retrieve the palm oil fruit on our plantation and we experienced commercial loss.”⁷⁰

Tuai Rumah (Village head) Jambai Jali,⁷¹ an Iban Indigenous leader in Sungai Bekelit, told Amnesty International.

Tuai Rumah Jambai and other community members explained how they found out that authorities issued a provisional lease to a palm oil plantation on an area that the community considers their ancestral land. In 2008, the community took their complaint to the High Court. After they lost their case in 2013, intimidation started to escalate. During this time the community erected a series of blockades to prevent the company from entering the land.

⁶⁸ Luang Anak Entiyang & Ors v United Teamtrade Sdn Bhd & Ors. [2017] MLJU 1631.

⁶⁹ Interview with Amnesty International, Kuching, 28 July 2017

⁷⁰ Interview with Amnesty International, Bekelit, Sarawak, 30 July 2017

⁷¹ According to Tuai Rumah Jambai, despite not being an official headman since 2014, at least 30 families in Sungai Bekelit consider Jambai their headman, as opposed to the headman officially recognized by the authorities

In December 2014, when negotiations broke down, at least 80 police came to the community, to dismantle the blockade. They arrested community members, and destroyed the blockade and a piring – religious rites of protection, that had been set up.⁷²

Community members Amnesty International spoke to, seemed particularly disturbed by the destruction of the piring –

“That is a red line, this is one of the traditions that applies in Dayak culture– when a piring is set up, you have to show respect – you cannot go beyond (or destroy it).”⁷³

Two weeks later, people described by interviewees as gangsters arrived at the blockades in police cars, explained another village leader. When the villagers realised who they were, they continued to block the roads. In subsequent weeks, they built more permanent blockades, with up to 30 people present at all times. During this period, people described as gangsters continued to visit, armed with guns and swords on at least one occasion, but were outnumbered by the community. After further negotiations were unsuccessful, the three head chiefs of the longhouses were harassed with phone calls, according to village leaders.⁷⁴

Bibi anak Unding described how events escalated:

“On 22 December 2014, the first incident took place – Jambai’s car was burned.

“On 22 March 2015, our house was set on fire. It is near the airport. The house was empty, and the neighbours were able to extinguish the blaze.

“On 26 November 2015, we were followed by two gangsters , after visiting the bank. When we reached the flyover, a car was blocking us, they stopped our car, and another was behind us. They pinned us in the middle. We continued to drive, turned back next to the police headquarters, that was when we were hit in the rear, and our car overturned. After the car overturned, all the gangsters started damaging our car. We were attacked and injured.”⁷⁵

Tuai Rumah Jambai was punched, kicked and slashed with a samurai sword. Strangers passing by stopped and called medical services.



Longhouse of the Bekelit community, Bekelit, Sarawak, July 2017 © Amnesty International

⁷² Interview with Amnesty International, Bekelit, Sarawak, 30 July 2017. See also: Sarawak Report, “Miri Police Chief disregards Iban adat and demolishes ‘piring’ and blockade”, 3 February 2015 <http://www.sarawakreport.org/campaign/miri-police-chief-disregards-iban-adat-and-proceeded-to-demolish-piring-and-blockade/>

⁷³ Interview with Amnesty International, Bekelit, Sarawak, 30 July 2017

⁷⁴ Interview with Amnesty International, Bekelit, Sarawak, 30 July 2017

⁷⁵ Interview with Amnesty International, Bekelit, Sarawak, 30 July 2017

Their ordeal was not over, however. According to Bibi anak Unding, three days after Jambai was released from hospital, people described as gangsters came to the house at night. Three came out of the car, wearing masks and surrounded the house. When the villagers saw this, they gathered together, and called Bill Kayong, leader of PEDAS, a community response initiative working on land rights issues, as well as the police. The people left, but the community remained there at the house until 4 or 5am.

According to Bibi anak Unding, the police asked if they recognised those that visited and recommended that they log a police report in the morning. The community referred all the incidents that took place to the police. Following the dismantling of their miring, they filed eight police reports, none of which resulted in the arrest of any individuals.

Seven months later, their compatriot Bill Kayong was gunned down in Miri town centre. The Bekelit community continue to fight for their customary land claim.



 ↑ A “Piring” – food offerings part of an Indigenous rite of protection hang by a blockade set up by the Bekelit community to protect their land. Pirings have been previously destroyed by police at other locations, Bekelit, Sarawak, July 2017 © Amnesty International

MIRING

A miring, a Dayak rite of protection is a ceremony to spirits and gods in order to receive blessings, or protection from threats. A miring may be carried out as part of a festival, such as the Gawai Dayak, but also following a disaster, or when ill fate befalls a community.

During the research for this report, several Dayak communities Amnesty International interviewed had carried out mirings, and left out pirings (food offerings, part of a miring) at their blockades defending their land. Destruction of piring is considered taboo.

5.4 KILLING

“Bill was a really socially conscious person, so whenever people were in need he was ready to help them immediately. He was really brave, unconcerned for his own safety; he would prioritise the security of others.”

Relative of Bill Kayong, was shot dead in Miri city centre in June 2016⁷⁶



BILL KAYONG
MIRI



Members of Bill's family hold up a banner with a photo of Bill Kayong on it, Miri, Sarawak, July 2017 © Amnesty International

On the morning of 21 June 2016, in Miri, Sarawak 43-year-old Bill Kayong set out for work on his regular morning commute. Around 8am, while Bill's pickup truck was waiting at a junction, a gunman pulled up on a motorcycle and fired two gunshots through his window, killing Bill instantly.

⁷⁶ Interview with Amnesty International, Miri, 29 July 2017

*"It was a normal day, he left the house on the way to work. It was only when his wife got the call that we heard he had been shot at the traffic light not very far from the house. When I first heard I couldn't believe it,"*⁷⁷ recalled his youngest brother Davy Kayong.

Bill was the political secretary of Miri MP Dr Michael Teo, as well as the secretary of PEDAS, a grassroots initiative for Dayaks that worked as a network and mobilised communities in the event of a dispute. Bill had become known to native communities who looked to him for advice on how to proceed when they were engaged in land disputes.

In particular, Bill had been a vocal advocate for a Dayak community in Bekelit, a two-hour drive from Miri.

"Of all the issues he dealt with, one of the hottest was the Bekelit issue – when he was doing his work, he faced a lot of threats ... Even though we all advised him not to get involved, he continued to be firm in his belief and all he said was 'the fight must go on,'" said Davy Kayong.

Another family member described Bill as follows:

*"Bill was a really socially conscious person, so whenever people were in need he was ready to help them immediately. He was really brave, unconcerned for his own safety; he would prioritise the security of others."*⁷⁸

Davy Kayong, together with other members of Bill's family, told Amnesty International that the threats to Bill – on which Bill had filed multiple police reports – had been increasing in the lead up to his death.

"He was given different types of threats: he would be killed, his family would be in grave danger. He would hang up, but the guy would keep calling back..." said Davy. *"...Bill had filed lots of police reports. I am really not satisfied with how the police handled the case and I believe if the police did their job effectively and on time my brother would still be alive. The way the police handled the case was that they would take the report, [but] nothing was done, no action was taken."*

In November 2016, three men were arrested and charged with Bill's murder. In January 2017, the main suspect in the case, was arrested in Fujian Province, China, after a manhunt that had spanned several countries.⁷⁹ They were accused of masterminding the killing, with police at the time clearly stating that they thought they had found the culprits.⁸⁰

Six months later, the Miri High Court acquitted three of the four accused leaving only the alleged gunman, known as Fitri, on trial. According to the High Court judge, there was insufficient evidence linking the others to the crime. The three were immediately released.

Davy Kayong told Amnesty International:

*"At first I was actually confident (in the way that the investigation had taken place). Initially 40 witnesses were called, but then only half were [actually] called. The people they failed to call were the closest witnesses for the case with vital information. My family and my life and personal security are at risk."*⁸¹

On 10 August 2018, Fitri was found guilty of fatally shooting Bill Kayong and sentenced to death by the High Court. The offence of murder under Section 302 of the Penal Code carries the mandatory death penalty, however the government of Malaysia has recently announced they intend to abolish this punishment. Amnesty International opposes the use of the death penalty in all circumstances, no matter the crime.

Bill's family is currently trying to get the Federal Attorney General to re-open the case.⁸²

⁷⁷ Interview with Amnesty International, 29 July 2017.

⁷⁸ Interview with Amnesty International, Miri, 29 July 2017

⁷⁹ Interview with Amnesty International, Miri, 29 July 2017, See also The Star, "Bill Kayong Murder Mastermind Arrested", 13 December 2016, <https://www.thestar.com.my/news/nation/2016/12/13/bill-kayong-murder-mastermind-arrested/>; Adit, Gary, "Principal Suspect Caught", Borneo Post <http://www.theborneopost.com/2016/12/14/principal-suspect-caught/>;

⁸⁰ See for example, Borneo Today, "Alleged Mastermind Nabbed Hiding in China", 14 December 2016, <https://www.borneotoday.net/alleged-mastermind-behind-bill-kayong-murder-nabbed-hiding-in-china/>;

⁸¹ Interview with Amnesty International, Miri, 29 July 2017

⁸² Mahadi, Nora, "PKR Trying to get Bill Kayong Murder Case Re-examined", Borneo Post, 24 June 2018 <http://www.theborneopost.com/2018/06/24/pkr-trying-to-get-bill-kayong-murder-case-re-examined/>

Almost all defenders in Miri that Amnesty International spoke to said they were more concerned about safety after the murder of Bill Kayong. This fear has also led to a climate where defenders are more hesitant to speak out. A number of defenders in Sarawak who spoke to Amnesty International asked that their identities be concealed. Others expressed concern about retaliation, and had little faith that police would protect them.

*“People get scared, become quieter. Fewer people go to the ground [to investigate abuses], fewer people make a statement, fewer professional people want to come out [to support those who are being threatened]— for example lawyers. We are worried for the future,”*⁸³ Dennis Along, an activist for the Tring community told Amnesty International.

Elsewhere in the country, Amnesty International heard other testimonies about attacks by people described by interviewees as ‘gangsters’, albeit not to the same degree as in Sarawak.

*“200 gangsters [tried] to scare us,”*⁸⁴ said one Indigenous community leader from Sabah, seeking to protect their land from logging concessions.

Mustafa Along, a Temiar activist leader of the Gua Musang community in Kelantan, stated that people armed with machetes that appeared at blockades and acted in a threatening manner were a challenge for his community. In July 2018, the community lodged police reports, alleging threats from people described as gangsters following a re-escalation of the dispute.⁸⁵

5.5 ACCOUNTABILITY

In only one case Amnesty International has documented, the killing of Bill Kayong, has any person been held accountable for threats, intimidation and violence against members of Indigenous communities defending their land, or those helping them. Since the murder of Bill Kayong, local human rights organisation SUARAM has documented further incidents of intimidation and reported that communities refrain from reporting these incidents to police, for fear of reprisal.⁸⁶

Ten human rights defenders interviewed by Amnesty International said they believed that the actions of people described as gangsters were either ignored by police, or carried out with their knowledge or acquiescence. Tuai Rumah Jambai shared that people described as gangsters had turned up in vehicles that looked like police cars, making villagers initially believe that they were indeed police.⁸⁷

Impunity for attacks on human rights defenders sends a message that there will be no consequences for those who attack defenders.

Sarawak authorities have acknowledged concerns that alleged acts of violence have been carried out by people described as gangsters, though they pin the blame solely on companies.

“Sarawak must be very serious and strict about [people described as gangsters] and stop them once and for all. Or the problem of gangsterism in plantations will never end. It will go on and on,”⁸⁸ James Masing, Deputy Chief Minister of Sarawak, said in October 2016. He further stated that the licenses of companies found to employ people described as gangsters would be revoked.⁸⁹ Over two years after this statement, lawyers working on harassment cases relating to defenders of Indigenous land rights alleged that there had not been a single case of a company that has been investigated, let alone had their license removed for this reason.

⁸³ Interview with Amnesty International, Miri, 29 July 2017

⁸⁴ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

⁸⁵ See for example, MalayMail online, “Temiar people up in arms again, this time against Musang King, rubber planters”, 30 July 2018 <https://www.malaymail.com/s/1657509/temiar-people-up-in-arms-again-this-time-against-musang-king-rubber-planter>

⁸⁶ SUARAM, Human Rights Report 2016: Civil and Political Rights, 2017p. 195; Human Rights Report 2017: p.107-112

⁸⁷ Interview with Amnesty International, Bekelit, 30 July 2017

⁸⁸ See for example, Borneo Post, “Suspend Firms that Hire Thugs”, 27 October 2016

<http://www.theborneopost.com/2016/10/27/suspend-firms-that-hire-thugs/> ;

Borneo Today, “Companies hiring gangsters a police matter,” 25 November 2016 <https://www.borneotoday.net/companies-hiring-gangsters-a-police-matter-sarawak-state-assembly-told/>



MALAYSIA'S OBLIGATIONS REGARDING THIRD PARTIES AND COMPANIES

According to the United Nations Guiding Principles on Business and Human Rights, "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts"⁹⁰

In situations in which companies consult directly with Indigenous peoples to seek their consent for projects, this does not absolve the state of its duty to ensure that such processes comply with international human rights law. "The State remains ultimately responsible for any inadequacy in the consultation or negotiation procedures and therefore should employ measures to oversee and evaluate the procedures and their outcomes, and especially to mitigate against power imbalances between the companies and the Indigenous peoples with which they negotiate."⁹¹

⁹⁰ A/HRC/5 Protect, Respect and Remedy: a Framework for Business and Human Rights, Human Rights Council, 7 April 2008, <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>

⁹¹ United Nations Human Rights Council: Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya: Extractive industries and Indigenous peoples (1 July 2013), A/HRC/24/41, Para. 62.

6. ARRESTS AND INVESTIGATIONS

“When we asked what they were charging us for, they couldn’t give us an answer.”

Mustafa Along, Gua Musang activist⁹²

While the risk of physical violence is highest in Sarawak, Amnesty International interviews reveal that village leaders, activists, and even journalists have faced the threat of arrest and investigation by police because of their peaceful activities to defend Indigenous land.

Such arrests and investigations have taken place across the country. While few people Amnesty International spoke to were formally charged, at least 20 had spent time in police custody, some on multiple occasions, or had accompanied police to the station for questioning to discuss their role in peaceful protests.

International human rights law requires Malaysia to ensure Indigenous peoples provide their free, prior and informed consent before actions are taken that affect their ancestral lands. It also requires the Malaysian authorities to protect rather than arrest or detain those peacefully exercising their rights to freedom of expression and assembly.

6.1 ARRESTS

“We were not wrong, all we were doing was defending our land rights,”

Najib, Community leader, Pos Piah, Perak ⁹³

Fifteen human rights defenders interviewed by Amnesty International said they had been arrested at least once in the course of their work to defend their claim to Indigenous land.

Many of these arrests have occurred at blockades, a popular means of direct action to stop logging companies or machinery from entering disputed land. Communities have set up physical barriers to prevent companies gaining access by road, often constructing temporary shelters and working in shifts to ensure that a ‘blockade’ is defended twenty-four hours a day. Blockades have become one of the last alternatives Indigenous communities have to make their voices heard, particularly in circumstances where they face mounting obstacles to the recognition of their rights to ancestral lands through the courts, including cost,

⁹² Interview with Amnesty International, Gua Musang, Kelantan, 1 August 2017

⁹³ Interview with Amnesty International, Perak, 4 January 2018

length of legal process, limited availability of lawyers, and, at times, inadequate recognition of ancestral lands.

Since 2011, the Gua Musang community (who are part of the Temiar Indigenous people) in Kelantan has built blockades on multiple occasions, rebuilding them each time after companies, the Forestry Department or police tear them down. Despite being promised a resolution numerous times,⁹⁴ their struggle continues. The escalation of their struggle and the state government's heavy-handed response over the past two years, including the mass arrest of community members, has generated national attention.



MUSTAFA ALONG
GUA MUSANG, KELANTAN



↑ Community leader Mustafa Along, was detained with over 50 others following blockades in 2016 and 2017. Gua Musang, Kelantan, August 2017
© Amnesty International

"In late 2011 we set up blockades, the reason was to block logging, mining, individual trespassing and deforestation," explained Mustafa Along, Secretary of the Kelantan Network of Orang Asli Villages (JKOAK) and a Temiar activist.

*"We made blockades as a message to the Kelantan government that that is our forest and land."*⁹⁵

In 2011, seven villages of Pos Belatim, Gua Musang learned that a 99-year lease had been granted on lands they claim as ancestral to a palm oil company. This was done after the Kelantan state government changed the status of the land from forest reserve – land which should be preserved as forest – to 'forest farm' allowing forests to be totally cleared. In order to challenge the license, the seven villages filed a judicial review against the Kelantan State Government and its Land Administrator.

The legal dispute was protracted, and in the years that followed, logging continued extending into areas claimed and used by the Temiar to forage, and collect traditional medicines. In 2012, 13 Temiar

⁹⁴ See for example, Malaysian Bar, Press Release, January 2012, http://www.malaysianbar.org.my/press_statements/press_release_malaysian_bar_deplores_arrest_of_orang_asli_and_lawyer_and_abuse_of_police_powers_in_gua_musang.html

⁹⁵ Interview with Amnesty International, Gua Musang, Kelantan, 1 August 2017

Indigenous peoples were arrested for attempting to stop loggers from entering the land. Also arrested was their lawyer, Siti Kasim, who was kept separate from the group during her detention.⁹⁶

In 2016, tensions escalated again when the government granted farming and logging rights to another 10,000 hectares of land, in places where the Temiar roam and live. The communities responded by setting up further blockades.

On 29 November 2016, 47 members of the Gua Musang community at one of the blockades were arrested and detained in an operation conducted by the Forestry Department, with the assistance of the police, to dismantle their blockade and disperse the peaceful protests. They were remanded in custody for two days, under the National Forest Enactment Code for 'trespassing on permanent forest reserve' and then released without charge.

*"It's not that there was no evidence, we did not commit any crime, actually," said Mustafa. "In the two days we were in prison, all our friends assembled at the police station. The other inmates all asked if we had carried out a riot as there were a lot of people."*⁹⁷

After the arrests, the State police chief warned that they would take stern action against those who would attempted to 'tarnish the image of the police', by posting on social media.⁹⁸

On 17 January 2017, one group at Pos Balar managed to secure a court ruling against a logging company operating on Forest Reserve at Gua Musang. Despite this, reports at the time said that a Deputy Minister of Kelantan state then gave permission for logging to continue.⁹⁹

On 23 January 2017, five defenders were detained at a blockade. The following day, 16 more Orang Asli human rights activists and two journalists, who were at the blockade to document the community's protests in defence of their land, were detained. All were released without charge two days later. Mustafa Along told Amnesty International:

"They (the police and the Forestry department) used force and the police used the chainsaw to cut the blockade. After that a lorry was still going forward, so the community had no choice but to disperse."

*"They (the police) thought I was in charge, so they separated me from the group. On what crime will you arrest me, I asked, but they had nothing. I was separated, I was put inside a vehicle, the car was guarded by the police, the doors were locked, and they didn't put on any air-conditioning. When I asked what they were charging me for they couldn't give us an answer."*¹⁰⁰

Apart from the arrest of community members, the arrest and detention of the two journalists- a reporter, Jules Ong- and cameraman- Too Chee Kung, who were producing a documentary on deforestation and were filming the blockades-sparked additional outcry within the country. Too Chee Kung told Amnesty International:

*"We were just carrying out our duties as journalists. In my head I assumed that they (the authorities) didn't want to deal with journalists... They handcuffed me and the handcuffs were too tight. The next day the Forestry Department came, they were trying to ask a lot of questions that would implicate me, and trying to discount the context about who I am."*¹⁰¹

Like the villagers, Too Chee Kung and Jules Ong were arrested on 24 January 2017 and remanded for two days and subsequently released without charge. Both men were arrested under Section 47(1) of the

⁹⁶ See for example, Global Voices, "Malaysia Temiar Blockade and Indigenous Rights", 29 January 2012, <https://globalvoices.org/2012/01/29/malaysia-temiar-blockade-and-indigenous-rights/>

⁹⁷ Interview with Amnesty International, Gua Musang, Kelantan, 1 August 2017

⁹⁸ See for example, Free Malaysia Today, "Cops warn those who Post Orang Asli Arrests Online", 1 December 2016, <http://www.freemalaysiatoday.com/category/nation/2016/12/01/cops-warn-those-who-post-orang-asli-arrests-online/>

⁹⁹ SUARAM, Malaysia Human Rights Report 2016: Civil and Political Rights, 2017

¹⁰⁰ Interview with Amnesty International, Gua Musang, Kelantan, 1 August 2017

¹⁰¹ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

National Forestry Act which prohibits those without an entry permit for permanent forest reserves from entering a closed forest, with the maximum penalty of RM10,000 fine or three years' jail or both.

A month following their release, online news website Malay Mail reported that Jules Ong was told that if he and Too Chee Kung pleaded guilty and paid a RM1,000 fine, the Kelantan Forestry Department would drop the case against them. Both journalists refused, telling reporters in an interview that accepting this offer would set a bad precedent regarding the right of journalists to cover Indigenous peoples' rights and land disputes.¹⁰²



 ↑ A vehicle carrying logs waits along a roadside. Gua Musang, Kelantan, July 2017, © Amnesty International

The arrest of Indigenous peoples for erecting blockades on their ancestral land being developed without their free, prior and informed consent, as well as journalists carrying out their work, is an illegitimate use of the criminal justice system to harass Indigenous communities into ceasing their protests and journalists into ceasing to report on these breaches of international law. It violates the rights of both Indigenous peoples and journalists to freedom of expression and peaceful assembly.

Malaysia is obligated under international law to respect, protect, and fulfil the human rights of Indigenous people, including the rights to free, prior and informed consent before actions are taken that will affect their lands and the rights freedom of expression and assembly. During peaceful assemblies, such as blockades, the law enforcement officials' task is to facilitate and not to restrict a peaceful public assembly. A decision to disperse an assembly must satisfy both domestic law and international human rights obligations; if these requirements are met, the order to disperse must be clearly communicated and explained, to obtain, as far as possible, the understanding and compliance of the demonstrators. International law enforcement standards require that force of any kind may be used only when there are no other means available, it is proportionate and appropriate, and it is the maximum level of force required to achieve the legitimate objective.

Amnesty International is concerned that the arrest and detention of the Gua Musang protestors was disproportionate and unlawful, and at the time called for their immediate release. The organization is also concerned about the lack of progress to date towards a meaningful resolution of the Gua Musang land

¹⁰² Malay Mail Online, "Documentary maker: Kelantan Forestry offered to settle case with RM1k fine", 27 February 2017, <https://www.malaymail.com/s/1324265/documentary-maker-kelantan-forestry-offered-to-settle-case-with-rm1k-fine>

dispute, which may result in further clashes between the community and the local authorities, as well as arrests, in the future.

In April 2017, the community of Pos Belatim won a High Court decision ordering the gazettelement of land to the Orang Asli, following a land claim that had been ongoing since 2011. However, areas surrounding this land, contested by the Temiar community, remain subject to logging, mining and other activities.

As a result, in early 2018, the Gua Musang community set up blockades once again, only for them to be torn down, and rebuilt several times over the subsequent months. According to media reports, in August 2018, the authorities attempted to remove the blockades with people described as gangsters who brought firearms to the site and issued threats of physical violence to those stationed at the blockade.


Following several days of uproar surrounding the dispute, including intense media coverage, on 10 August 2018, representatives of the community presented a memorandum to Prime Minister Mahathir Mohamed, who agreed to meet with them. During the meeting, the Prime Minister pledged to find a solution to the ongoing issue, by assisting with negotiations with Kelantan state authorities, while stressing that the issue of land is a state government responsibility.

Unfortunately, arrests have not been limited to blockades. In Perak, human rights defenders have been arrested for entering the forest, and questioning loggers operating on areas that they claim as their ancestral lands.



NAJIB
POS PIAH, PERAK



↑  Najib, (L) and eight members of his community who were arrested. Pos Piah, Perak, January 2018 © Amnesty International

"We're the Temiar people, we are the Orang Asli and we have been keeping the same lifestyle – although things have changed, we still like the same way. We have not been living in this forest for one year, two years, but for many generations. For us the main thing is the land. We don't want their version of development. We are not comfortable with change. We are most comfortable with the forest," explained Najib, a community leader from Pos Piah, Perak.

"Outside people want to change the way we live. This is our culture and our religion, and how we heal the sick is according to our ways. The forest is our heartbeat".

*"We only understand the village when it is undivided. We are familiar with everything in our area, old grave sites, orchard sites, the places we are used to hunting. We take care of the princess of the mountain - the guardian of this place. The trespassers are not respecting our land. The fishes used to be really big but now they are becoming really small...conditions of living have deteriorated. The government is not respecting our village and way of life."*¹⁰³

In August 2017, in Sungai Siput, Perak, police arrested 11 villagers, including Najib, for allegedly obstructing forest rangers in a forest reserve, under Section 186 of the Penal Code which states:

"Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment for a term which may extend to two years or a fine which may extend to ten thousand ringgit or with both."

According to Najib, they were arrested after asking a group of rangers tagging trees in the forest what they were doing there.

"It started on 8 August 2017. I saw a Hilux car coming towards our village. I saw inside camping materials, and food. We were hoping we could find out where they were going to as they were in the forest in the evening.

We left at 6pm to go into the interior of the forest – we didn't know where they were going to set up camp, we just were observing the area as they did not ask permission of the locals...When we reached them we asked honestly, openly, why are you entering the forest really late? I wanted to know their intention.

The ranger said, you are disturbing our work and that they saw the Tok Batin [community leaders, appointed by the Department for Orang Asli Development]. We said it is not enough to see the Tok Batin, and they have to meet the others too. There are two Tok Batins that have gone the way of the developers."

Abas anak Lewin, a member of the network of villagers defending their land, explained what happened next:

"On the 11th they carried out our arrest. There were 9 policemen. The police did not introduce themselves as police, they refused to show us ID."

*"After they took down our names, they told 11 of us to get into the Hilux."*¹⁰⁴

The community members were arrested and remanded for three days, after which they were released.

The community continue to call for their land to be gazetted as customary land and to stop logging activities there.¹⁰⁵

*"We were not wrong, all we were doing was defending our land rights,"*¹⁰⁶ said Najib.

¹⁰³ Interview with Amnesty International, Perak, 4 January 2018

¹⁰⁴ Interview with Amnesty International, Perak, 4 January 2018

¹⁰⁵ The Star, "13562 hectares of land for Orang Asli Gazetted", 12 April 2018, www.thestar.com.my/news/nation/2018/04/12/13562ha-of-land-for-orang-asli-gazetted/

¹⁰⁶ Interview with Amnesty International, Perak, 4 January 2018

6.2 INVESTIGATIONS

Other human rights defenders involved in land disputes told Amnesty International that they have been arrested or investigated by the police while working to defend land claims.

In one case, the head of a group set up by 10 villages to represent them in a land dispute in Sabah, explained how the members of the group were called to a police station for questioning.

“We were called by the police. We had to go to the police headquarters, it took us about 3 hours to get there and have a word with them. The police asked why we were opposing the development project, and also accused the community of planning to perform a demonstration when the Chief Minister was going to be at a ceremony.”¹⁰⁷

HRDs from NGOs working on Indigenous peoples’ land rights have also been arrested and investigated. The use of repressive laws such as the Sedition Act and the Communications and Multimedia Act to silence human rights defenders has been an ongoing issue of concern for Amnesty International.¹⁰⁸

In December 2016, Sabrina Sayed Akil, the President of Malaysian environmental NGO Peka, that also campaigns on the rights of Indigenous peoples, was arrested over statements on social media platform Facebook, where she questioned the rate of deforestation and degazettement of land owned by the Sultan of Johor (a change to the legal status of the land in order to allow logging). Her aide, Norhayati Shahrom, was also arrested, and both were investigated under Section 223 (1)(a) of the Communications and Multimedia Act 1998.¹⁰⁹ If found guilty, they would have faced a fine of up to RM 50,000 (USD 12,000), one year in prison, or both. After being remanded for three days, they were released, and the case was eventually dropped without going to court. Sayed Akil told Amnesty International:

“Is it a crime to defend the rainforest? As President of an NGO I have the right to question certain quarters about the permanent forest reserve being degazetted – just because I questioned that I was thrown in, locked up, and treated like a criminal.”¹¹⁰

According to Suresh Kumar, Secretary of NGO Jeringan Rakyat Tertindas (Oppressed Peoples Network, JERIT), arrests and investigation of human rights defenders can have different effects on communities.

“In Kelantan, arrests motivate other Orang Asli to stand up. In Pahang, the arrests make the Orang Asli slow down. It’s a clever tactic of the government to bring down the issue.”¹¹¹

Mustafa Along, from Gua Musang insisted that despite the setbacks, the crackdown of the forestry department on his community has not deterred him.

“I believe that my cause is good. Because there are millions [of Ringgit] at stake I could get arrested, beaten, even killed anytime, I will still do what I need to do... Threats are not really scary to us. The threat of losing our identity is scarier.”¹¹²

¹⁰⁷ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹⁰⁸ See for example: Amnesty International, “Critical Crackdown: Freedom of Expression Under Attack in Malaysia”, January 2017 <https://www.amnesty.org/en/documents/asa28/3166/2016/en/>

¹⁰⁹ Interview with Amnesty International, Kuala Lumpur, 3 August 2017; See also for example, The Star, “PEKA Chief and Aide remanded over rude Facebook remarks against Johor Sultan”, 23 December 2016, www.thestar.com.my/news/nation/2016/12/23/peka-chief-and-aide-remanded-over-rude-fb-remarks-against-johor-sultan/

¹¹⁰ Interview with Amnesty International, Gua Musang, Kelantan, 2 August 2017

¹¹¹ Interview with Amnesty International, Gua Musang, Kelantan, 2 August 2017

¹¹² Interview with Amnesty International, Gua Musang, Kelantan, 1 August 2017

7. THREATS AND INTIMIDATION

“In Malaysia the term human right defender is not well known. Because of that, there are authorities that call them ‘trouble makers’.”

Suresh Kumar, Oppressed People's Network (JERIT)¹¹³

Aside from risk of violence, arrest or investigation, threats against land rights defenders have taken on various other forms throughout the country. Amnesty International documented numerous cases of challenges village heads, lawyers, and journalists have faced including dismissal from representative roles in the community, restrictions on their movement, and other reprisals for the peaceful exercise of their right to freedom of expression.

When it comes to representing communities, local leaders play a crucial role in ensuring that the voice of their village gets heard. In some communities, these leaders are co-opted by the state authorities, hampering the efforts of those who oppose projects on ancestral lands. In a country where Indigenous peoples lack political agency, activists, lawyers and the media have all played a role in raising Indigenous issues. When court orders are often the only way to prevent work on disputed land from continuing, lawyers have played a crucial role in advocating on behalf of communities in defence of their land, making some inroads in the development of common law jurisprudence in the country in relation to Indigenous land titles and helping communities seek justice when violations take place. Apart from lawyers, journalists have also played an important role in drawing attention to abuses of Indigenous peoples' rights, specifically the exploitation of native land. Threats and harassment can come not only from the state but also from others within a community who may hold different views or are willing to accept compensation for the expropriation of their land.

7.1 VILLAGE HEADS

In Peninsular Malaysia, village headmen are usually appointed by government without consulting the community;¹¹⁴ this violates the right of Indigenous peoples to have their own governance systems respected and promoted.¹¹⁵ The appointment of headmen, who receive a monthly salary from state authorities, is a key factor in hampering the defence of Indigenous land.

“They are appointing headmen, rather than traditionally making headmen. As far as the government is concerned, they only recognise a certain headman,”¹¹⁶ said human rights lawyer Siti Kasim.

¹¹³ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹¹⁴ SUHAKAM, National Inquiry Report, 2013, p.140

¹¹⁵ See Section 3.2

¹¹⁶ Roundtable with Amnesty International, Kuala Lumpur, 24 July 2017

According to many communities, these headmen often side with the government in order to receive benefits from a project or ensure their salary.

However, in others, village heads have become crucial in leading efforts to stop the encroachment and development of land.



MENGKEK BIN ACHAI
LEDANG, JOHOR



↑ Village Head Mengkek bin Achai stands by a sign that reads: “No entry or trespassing – the native land of Orang Asli” Ledang, Johor, August 2017 © Amnesty International

“There was nothing here yet - everything was forest. There was no town also. Only we were here.”¹¹⁷

This is how Tok Batin (village head) Mengkek bin Achai describes his village in Johor State, Kampung Sungai Air Tawas and the area of Ledang that surrounds it before Independence.

“We have grave sites here, we have our durian farm, and our customary lands.”

Problems started in November 2016, when machinery of a plantation company began to do excavation works to dig a ditch, install a drain, and fence an area of land claimed by the community.

“We called all the villagers, we started shouting this is our sacred land, this is not something new, it has been here for centuries. About 40 people arrived old and young. If they keep doing this to Indigenous peoples, where will our history go?”

The first police report was made in December 2016.

“When Ledang police arrived, they told us to get a lawyer and fight in court. So I did that, that’s why I filed a case.”¹¹⁸

Mengkek bin Achai and neighbouring village head Jengkeng Jani, representing Kampung Tanah Gembur filed legal suits regarding their claim to their ancestral land.

Less than three months later, Achai received a dismissal letter from JAKOA (the Department of Orang Asli Development), removing both him and another person from their posts as village heads. No details were provided of complaints submitted against him, nor a procedure for appeal.

¹¹⁷ Interview with Amnesty International, Ledang, Johor, 5 August 2017

¹¹⁸ Interview with Amnesty International, Ledang, Johor, 5 August 2017

“When I was fired I didn’t feel anything, the people really affected were my village...I wasn’t even shocked- I didn’t do anything wrong, I didn’t make any mistakes, other people made them”, said Achai.

Despite the letter, the village decided to carry on treating the two men as village heads and ignore the directive. They also sent a reply asking for an explanation of the dismissal, but did not receive a response.

According to Achai, “They (JAKOA) seem to be very hesitant to help us, what they should be doing is being on our side. JAKOA usually says they can’t do anything.”¹¹⁹

After an outcry in the following months, including in national media, and by SUHAKAM about the treatment of the village heads, both Mengkek bin Achai and Jengkeng Jani were reinstated to their posts two months later in May 2017.

In addition to being subjected to harassment, violence, arrest and investigation, village heads who oppose development on their land and the community members who support them, are often subjected to other reprisals or threats as a result of defending their land.

“If a group of people try and go against a project they [state authorities] cut down basic needs, and make things difficult for [the people],” Suresh Kumar, representative of NGO Oppressed People’s Movement (JERIT), told Amnesty International. “There have also been instances where poor children were threatened that the authorities will take away KWAPM (welfare) money.”¹²⁰

Representatives from SUHAKAM supported this claim, saying they had received complaints of this type of treatment.

“Allowances given to Tok Batin by the state are used to threaten them if they go against the programmes. If a group of people try and go against the leaders, they cut down basic needs and make things difficult for them.”¹²¹

Village head Achai described his first-hand experience of this, “They stopped the children’s allowance for four months until we got the Human Rights Commission to get it [back].” According to Achai, this was another punishment for speaking out.

Tuai Rumah Jambai from the Bekelit community in Sarawak, also spoke of the problems that headmen and community members face when they rebel:

“We have gotten trouble with welfare, when they [the state] know you are from my village, we get less response and assistance.”¹²²

7.2 ACTIVISTS AND LAWYERS

“We become the enemies, we become instigators,”

Siti Kasim, human rights lawyer¹²³

Others interviewed by Amnesty International described how they were intimidated for their work as an activist or lawyer supporting the campaigns of Indigenous peoples to protect their lands and labelled as ‘instigators’.

“In Malaysia the term human right defender is not well known. Because of that, there are authorities that call them ‘trouble makers’” said representatives from SUHAKAM. “Authorities must change the way and approach to people who fight for their rights.”¹²⁴

¹¹⁹ Interview with Amnesty International, Ledang, Johor, 5 August 2017

¹²⁰ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹²¹ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹²² Interview with Amnesty International, Bekelit, Sarawak 30 July 2017

¹²³ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹²⁴ Interview with Amnesty International, Kuala Lumpur, 4 August 2017

"We are considered agitators and the government, JAKOA and those who are pro-government all regard us as agitators," Tijah Yok Chopil - a prominent Orang Asli Activist, and a founder of JOAKSM (Jaringan Kampung Orang Asli Semenanjung Malaysia), a network in Peninsular Malaysia fighting for Indigenous rights - told Amnesty International. *"Our contact people in the community will be considered agitators and marginalized in government-provided economic programs."*¹²⁵

*"It is famous to tag you as an instigator – they think Indigenous people are so stupid that they cannot think for themselves. That shows the lack of respect towards them, as if they don't know what they are doing,"*¹²⁶ Suresh Kumar of JERIT described, as he shared the case of a community in Pos Lanai, Pahang, that had come together to challenge the construction of Telom dam. Suresh explained how, when he had accompanied community representatives to the police station to log police reports, officials would single him out at the station and tell him he was the one that had encouraged them to file complaints. Under Section 10 of the Malaysian Penal Code, instigation or abetment is criminalised.

Along with activists, lawyers face challenges in providing legal representation to Indigenous communities.

Human rights lawyer Siti Kasim, who has represented the Gua Musang community in Kelantan for over seven years, told Amnesty International, *"At the height of the blockade [in 2016] they claimed you need permits [to enter the Forest Reserve],"* in reference to restrictions she and her colleague were subjected to, preventing them from accessing their clients. *"For years we had been going in, now they say you needed a permit to go in. In this case it was the Forestry Department."*¹²⁷

Sections 45 and 47 of the National Forestry Act 1984 allows the state to declare a forest a closed forest, and to restrict access. However, when doing such, Section 46 of the Act requires the state to "give due consideration to the necessity of protecting the forest and the environment and to the recreational and other needs of the public." The restriction on Siti Kasim's movement was condemned by local human rights groups, including Lawyers for Liberty, who labelled the restriction as "arbitrary" and done "in bad faith." They said the move was an effort to "stop the Orang Asli from receiving 'outside' assistance in their struggle to protect their customary lands and traditional livelihoods," as well as to deter Siti Kasim from carrying out her work as a human rights lawyer.¹²⁸

Kasim spoke further about the smear campaigns against her work as a human rights lawyer.

*"Of course, we become the enemies, we become instigators. I was arrested in 2012. They arrested me and said I am encouraging this...they try to cut Orang Asli off from the outside."*¹²⁹

Attacks on lawyers have a wider effect on the defence of land rights.

"It undermines the credibility of lawyers because the government has its own interpretation of land rights without considering domestic jurisprudence in a balanced and equitable manner. They also appear to have little confidence that the Orang Asli can stand up for themselves so they believe there has to be somebody pushing them to 'rebellion'," said Yogeswaran Subramanian, Indigenous rights lawyer.¹³⁰

¹²⁵ Interview with Amnesty International, Kuala Lumpur, 24 July 2017

¹²⁶ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹²⁷ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹²⁸ See for example Malaysiakini, "NGO: Barring Siti Kasim from Orang Asli clients 'arbitrary', in 'bad faith'", 14 October 2016 <https://www.malaysiakini.com/news/358989>

¹²⁹ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹³⁰ Interview with Amnesty International, Kuala Lumpur, 2 August 2017



↑ Human rights lawyer Siti Kasim is involved in numerous cases to defend Indigenous land in Peninsular Malaysia, 2017 © Amnesty International

7.3 COMMUNITIES

In local constituencies where local officials stand to benefit from development projects, Indigenous peoples have been labelled as anti-government for defending land.

In Sabah, one village activist that travelled to meet with Amnesty International stated that they had been labelled as (political) ‘opposition’ in their struggle to oppose a communal land title that has taken away their ancestral lands.

“The communal title covers hunting ground, water catchment, ancestral borders, parts of jungle where we collect medicines, farming areas, including the village itself, and also graves and also salt water from the ground – we cook that and get salt. We have 5 generations living there. We are fighting to defend our ancestral land because it is our livelihood, it is our medicine and because it is where our generations have been living since the beginning of the 5th generation.

“We have been labelled as opposition by a prominent local assemblyman. The District Office said in his speech we are against the government and supporting the opposition – we are the opposition – because of the struggles for the land.”¹³¹

An activist from another community in Sabah described his experience of defending his claim to ancestral land, which overlaps with a Forest Reserve and for which a 100 year concession has been allocated by the government to a timber company: *“There’s a lot of threats from the Forestry Department [that insist the community is trespassing illegally on the land], the government, the community. When we claim our territory, we have been accused as opposition, black listed, and no more development given by the government until now.”¹³²*

While many Indigenous human rights defenders have experienced threats from outside their communities, others have faced intimidation from within, when some community members support the development of their land, and others oppose it.

¹³¹ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹³² Interview with Amnesty International, Kota Kinabalu, 26 July 2017

One described how they would receive warnings from village heads who were supportive of the projects, *“Usually from my experience, the head of the village will threaten us – (they say) if you are not going to stop, I will call the police to arrest you.”*¹³³

Amnesty International heard from many people that as communities grew divided over the issue of development on their land, communities that once lived together in long houses were sometimes separated and, people were threatened with violence from other community members for opposing industrial or agricultural projects.

In Sabah, members of Indigenous communities spoke to Amnesty International about how the threat of traditional beliefs and ‘black magic’ has been used to intimidate villagers defending their land.

A youth leader from Puput Pampanson, Sabah, and a member of group opposing the communal title, that has permitted logging on the land, described the strong belief in spirits and black magic that many villages retain.

*“Mondo is the biggest spirit. The second one takes care of the forest, Mantua. Akeu, brings all the animals. Sometimes Akeu will play with your eyes and you might wrongly shoot your friend and another human being. When you hunt there is a lot of taboo to follow.”*¹³⁴

A defender who is leading the fight for his land in a neighbouring village, explained to Amnesty International how these beliefs were being used to intimidate him and other members of his community.

“I have been threatened by those who are in favour of the company to stop protesting the communal title, to accept it, or to get out of the village. There have also been threats by this group of pro supporters that if we do not back down this hate/vengeance will continue with the next generation.”

“They are in my village, you can call them family even. I am not afraid of these people doing physical harm to me. In my village they still practice black magic. I am afraid of that because these people are capable of that. I worry most that they would harm my children through black magic. I am afraid because my children are still young they don’t understand all this but they are easy targets.”

*“We have reported it to the police but we don’t expect much from the police...I am the elected Vice Chairman it is my responsibility to ensure that the community, the culture, tradition do not go extinct. We believe that by losing this land our way of life will go extinct. I have to make sure that doesn’t happen.”*¹³⁵

¹³³ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹³⁴ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹³⁵ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

8. BARRIERS TO JUSTICE

“If the state doesn’t protect you in defence of your land – who do you complain to?”

Jerald Joseph, SUHAKAM Commissioner¹³⁶

In Malaysia, human rights defenders not only face the risk of attacks, arbitrary arrests, threats and intimidation, they also experience obstacles in seeking justice and accountability and accessing remedies for the violations against them.

Amnesty International researched cases where there was a lack of effective investigation into human rights violations against defenders. In instances of assault and threats, activists told Amnesty International that the police routinely fail to respond to the reports of Indigenous leaders and other human rights defenders.

8.1 LEGAL OBSTACLES TO CLAIMING ANCESTRAL LANDS

The lack of legal protection of Indigenous peoples’ rights to their lands remains a major barrier to effective realisation of their rights, and in turn, the protection of human rights defenders that advocate on their behalf.

Lawyers and activists that the organisation spoke to said they believed that the authorities are failing to act, because once a license has been issued to a company it has legal rights to the land which take precedence over community claims over ancestral areas. There is therefore little obligation for the authorities to respond to complaints.¹³⁷

“The companies, because their lease or licence is in a document form, are emboldened to enforce their rights themselves. Their approach is always that they would demand paper evidence from the locals. If they claim native rights they say ‘where’s your document to prove? We have our document, we have our licence, we have our lease ... where’s yours?’ So that’s how they argue,”¹³⁸ said Minister of Works and Indigenous rights lawyer Baru Bian.

Defenders reported that they face similar obstacles when they try to approach local representatives or government officials about their rights and their claims to their land. Given the political climate, there were

¹³⁶ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹³⁷ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹³⁸ Interview with Amnesty International, Kuching, 28 July 2017

also concerns about the independence of many institutions, especially when there are large claims at stake. One defender in Sabah told Amnesty International:

*“So far the government does not entertain us and does not want to listen to our claims. The District Officer runs away... We have been chasing after the District Officer since last year. I have never been face to face with the District Officer.”*¹³⁹

*“The government officials will meet me, will take the document but they won’t entertain me. Usually he will just say, OK, noted, he will take the letter but he will not talk,”*¹⁴⁰ explained another.

*“My worst experience was with the local Land Department because they have shares in the communal title, from the District Officer to the village head to the chairman of the JKKK (Village Development and Security Committee) all in this one boat.”*¹⁴¹

One defender described how they were ‘bounced’ between institutions, none of which wanted to deal with their claim.

“Usually, what we have is that the response from the Chief Minister is to write a letter to the Land and Survey Department, but at the same time the Land and Survey Department say it’s not in their jurisdiction because the land is with the government.”

*It’s like a ball to and fro, it will bounce back to you. This is one of the ways the government violates our rights.”*¹⁴²

In the National Inquiry on Indigenous Land Rights, SUHAKAM identified the Land and Survey Department as a key actor responsible for the delay in processing of registration of Indigenous land.¹⁴³

In all areas, there is a lack of response from the Federal government as land is viewed as a state issue.

*“The government doesn’t take notice of positive judgements on customary land claims, they only take note of statute law,”*¹⁴⁴ said human rights lawyer Siti Kasim.

*“The problem is our government is divided in two – forest land is under state jurisdiction. As a federal government they can do something about this. If there is a will, there is a way,”*¹⁴⁵ said Sabrina Syed Akil, of PEKA.

SUHAKAM representatives told Amnesty International, *“There is no national game plan, different states will treat you differently. The Federal government will go back to the state government. State government will say we have to go to the Federal government...state government and Federal government must ensure they collaborate to give Indigenous peoples the real rights they should enjoy. The government is hungry to capitalise on land. We are going to have more issues of land rights.”*¹⁴⁶

According to one expert commentary, the Federal government is shirking its responsibility towards Indigenous peoples’ rights since the government still has a considerable amount of control over states. This is, in part, due to the central allocation of many state funds, and the increasing powers granted by the executive.¹⁴⁷ Furthermore, the Federal government, as a party to international human rights obligations, is responsible for ensuring that such obligations are implemented across the territory.¹⁴⁸

In order to address land issues fully, as advocated by prominent land rights advocates in the country, including Minister of Works in Sarawak Baru Bian, there is an urgent need to develop an Independent National Commission on Indigenous Land Rights, that would comprise experts on native land to approve of applications for recognition of customary lands.

Communities are often forced to go to court to establish the status of customary land, when the state has issued a license to a company over an Indigenous people’s land without first obtaining the free, prior and informed consent of the Indigenous people in question. Communities have been creating community maps by demarcating land that they assert as native customary land. However, in many cases, companies

¹³⁹ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹⁴⁰ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹⁴¹ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹⁴² Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹⁴³ SUHAKAM, National Inquiry Report, 2013, p.115

¹⁴⁴ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁴⁵ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁴⁶ Interview with Amnesty International, Kuala Lumpur, 4 August 2017

¹⁴⁷ Aiken, Robert et al, “Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia”, *Modern Asian Studies*, Vol. 45, No. 4 (July 2011), p. 828

¹⁴⁸ Vienna Convention on the Law of Treaties, Article 29

contend that once they have purchased a licence, they then take action to remove the Indigenous community. The community must now contest ownership in court.

Effective legal representation has been key when Indigenous defenders have been arrested by authorities for claiming their rights to their land, or building blockades. In the case of the Gua Musang blockades, swift action by lawyers together with journalists, meant that defenders who were rounded up in mass arrests, were in most cases freed within three days, at most.

Siti Kasim told Amnesty International of the impact lawyers can have. *“Since the lawyers started doing cases, then they (Indigenous communities) start to feel braver, lawyers are behind them, they feel a bit more strength, feel a bit braver to rise.”*¹⁴⁹

However, one of the main challenges for communities is a lack of lawyers willing to take on cases, given that most communities are unable to afford private lawyers. Lawyers who do take up these cases end up doing it ‘pro bono’, as it does not fall into the purview of legal aid provided by the government or legal aid centres provided by the Bar.¹⁵⁰

“We are short of hands. We are doing this pro bono, it’s a long and protracted case, we have very few lawyers. We had one very dedicated lawyer and he passed away. So few lawyers want to do this,” Siti Kasim explained. *I don’t have the heart to say we don’t have lawyers to do it. Our stumbling block is cost...I am going in with my own money, most of the time I am going in out of pocket.”*¹⁵¹

The majority of the defenders that Amnesty International interviewed sought assistance from NGOs to obtain legal assistance, in the form of both funds for legal claims, or a referral to a lawyer who did this sort of work. However, there are also many communities that face greater obstacles in accessing such aid, because of their remoteness and the long distances to urban centres, as well as their awareness of their legal rights and entitlements.

Several human rights defenders expressed their concerns to Amnesty International about the legal costs of pursuing their claims in court.

*“Our problem is funding in terms of paying the court fees. We don’t have money to pay legal fees. We try to overcome this through collections, we also hope that we will get pro bono assistance,”*¹⁵² said one defender from Sabah whose community has been contesting his claim in court.



Cleared land in Johor, Peninsular Malaysia, July 2017 © Amnesty International

¹⁴⁹ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁵⁰ Government Legal Aid Bureaus are governed by the Legal Aid Act 1971, while the Bar Council provides legal aid under the Legal Profession Act 1976. The Legal Aid Act 1971, is intended to grant those in need of legal defense the right to a lawyer. In practice, the Act only provides for representation of accused persons who plead guilty to a criminal charge, or those charged under the Minor Offences Act 1955.

¹⁵¹ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁵² Interview with Amnesty International, Kota Kinabalu, 26 July 2017

8.2 NON EXISTENT OR INSUFFICIENT INVESTIGATIONS

“There is no faith that they will do anything, so far when making a report, they do not take action.”

Tijah Yok Chopil, Orang Asli activist¹⁵³

Several agencies have an obligation to investigate violations against Indigenous human rights defenders. The principle agent is the police. However, human rights defenders spoken to by Amnesty International stated that there was a lack of willingness by the police to act when defenders file complaints.

Bill Kayong had reported threats to the police regarding the intimidation against him in the days leading up to his death. *“The way that the police would handle the case is that they would take the report, and nothing was done, no action was taken,”*¹⁵⁴ Bill’s younger brother Davy Kayong said. In the community of Bekelit, which Bill was assisting, village head Tuai Rumah Jambai reported that he was not aware of any action taken by the police to investigate or otherwise offer protection in relation to these reports.

Tijah Yok Chopil of JOAKSM, described how when reporting a threat to a community defending their land, they did not expect a response. They continue using this recourse however, as a strategy.

*“In the event of a threat, our first step is to lodge a police report and lodge a complaint with the Land Department and other agencies. There is no faith that they will do anything, but the process is still carried out, so that when we bring the case to court, it shows we took the necessary measures. So far when making a report, they do not take action. Sometimes, we feel pressure, following hours of interrogating us and not those we report causing us to be less willing to complain or our spirits to be weakened, but we still will.”*¹⁵⁵

Numerous defenders described how their work as human rights defenders was blocked or they were actively discouraged from pursuing their claims.

*“The authorities are supposed to be the defender of human rights defenders – it’s something we should instil inside their minds,”*¹⁵⁶ SUHAKAM Commissioner Jerald Joseph, told Amnesty International. *“If you make complaints you may be investigated for bringing up the issue or be accused. If the state doesn’t protect you in defence of your land – who do you complain to?”*

In addition to state officials, land rights defenders whom Amnesty International spoke to also singled out JAKOA, the Department of Orang Asli Development, responsible for Orang Asli affairs in Peninsular Malaysia.

“JAKOA should play a more aggressive role in protecting the rights of Indigenous Peoples,” a representative of SUHAKAM told Amnesty International. *“They need to be more proactive to ensure all complaints of Indigenous peoples are addressed.”*¹⁵⁷

“Legally we have problem with JAKOA because they don’t cooperate,” said lawyer Siti Kasim, *“Usually they are sitting on the other side of the fence while they should stand with Orang Asli.”*¹⁵⁸

¹⁵³ Interview with Amnesty International, Kuala Lumpur, 25 July 2017

¹⁵⁴ Interview with Amnesty International, Miri, 28 July 2017

¹⁵⁵ Roundtable with Amnesty International, Kuala Lumpur, 24 July 2017

¹⁵⁶ Meeting with Amnesty International, Kuala Lumpur, 3 August 2017

¹⁵⁷ Meeting with Amnesty International, Kuala Lumpur, 25 July 2017

¹⁵⁸ Interview with Amnesty International, Kuala Lumpur, 3 August 2017

8.3 LACK OF FREE, PRIOR AND INFORMED CONSENT

Almost all the defenders who spoke to Amnesty International highlighted the lack of free, prior and informed consent for development projects that makes it difficult, if not impossible for communities to oppose development once it has started.

The principle of free prior and informed consent is provided for in international law. The UN Declaration on the Rights of Indigenous Peoples, which Malaysia has voted in favour of, requires that such consent be obtained if the state proposes to relocate Indigenous peoples from their lands.

SUHAKAM told Amnesty International that many communities are only informed of a development project “when a notice board goes up” on their land, often when works have already begun. It stressed that JAKOA should seek to integrate the principle of free, prior and informed consent into its policy on Indigenous peoples.¹⁵⁹

This information was confirmed by Indigenous communities, as well as lawyers working with them.

*“In 2016, suddenly, there was a signboard that you can’t enter the area, that you can’t do hunting. The Forestry department set up a signboard saying no entry,”*¹⁶⁰ explained a defender in Sabah challenging logging on their land.

“At least give them a right to consultation and consent,” human rights lawyer Yogeswaran Subramaniam told Amnesty International. *“Even when consent is sought, it is obtained in such a way to divide and breakdown communities.”*

“Even if they do (consult) they manipulate it in some way. Orang Asli are powerful in a group. If you start to consult one person only, they start to crumble. They go house to house. That’s not the way they make decisions – consultation has to respect the (Indigenous peoples’) structures.”

Apart from dividing communities, *“(They) give no copy of the plan so we can advise,”* Subramaniam continued. *“Document access is difficult unless you get a court order.”*¹⁶¹

The free, prior and informed consent framework requires that complete information is provided, in a form that is accessible to the community, about the nature, extent, and social and environmental impacts of a proposed project, including possible alternatives that would not involve relocation. This information must be provided significantly in advance of consultations, so that the community can analyse and discuss it. Time must be factored in for an iterative process, whereby the community can make counter-proposals that are then considered by government, or be given further information or clarification, that can be taken back to the community and considered.

One land rights defender from an Indigenous community in Sabah, whose land has been developed as a palm oil plantation told Amnesty International, *“We found out that our leaders in our village, the Village Head, leader of the JKKK (Village Development and Security Committee¹⁶²) –all people who are appointed by the government held a meeting by themselves, an unofficial meeting about approving the communal title. There were a few of them from different villages who carried out the meeting, but the community was not involved. We were not even told about the meeting, so when we found out the communal title (which signed away rights to the land) had already come out.”*¹⁶³

Another land rights activist, also in Sabah shared: *“We feel that only the JKKK and village head were only involved in the communal title development. For me in this matter, the head village, head of district, don’t acknowledge the rights of the community to raise their voice.”*¹⁶⁴

¹⁵⁹ Meeting with Amnesty International, Kuala Lumpur, 25 July 2017

¹⁶⁰ Interview with Amnesty International, Kota Kinabalu 26 July 2017

¹⁶¹ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁶² The JKKK is a government approved entity that makes decisions for communities on the ‘development transformation plan of a village’. The executive of the committees receive monthly government allowances from the state. Source: Ministry of Rural Development <http://www.rurallink.gov.my/en/ikkkikkp-information-2/>

¹⁶³ Interview with Amnesty International, Kota Kinabalu, 26 July 2017; this was also a finding of the SUHAKAM National Inquiry. See for example p.120

¹⁶⁴ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

8.4 RISKS AND FEAR OF REPRISAL

The numerous consequences of speaking out to defend Indigenous land has created a climate of fear amongst communities and activists. At least 30 defenders who spoke to Amnesty International asked that their identities be concealed. Others feared filing police reports, or raising issues with local officials.

A number of defenders spoke of the burden of representing their community, experiencing limited progress, harassment and threats.

*"We have sacrificed a lot, money and time," said one community leader from Sabah. "Sometimes I leave the kids in the village with no money. We have to do this just to send a letter, to send a report. If we do not send these letters one of the effects is the Elders in the village become stressed out. This gives them hope. My grandmother told me "Son, you must continue this struggle. Never let it go." No matter how difficult I will travel, whatever meeting, I will come down."*¹⁶⁵

Despite the risks and challenges, defenders of Indigenous land said they would continue to speak out, to ensure that the visibility of Indigenous communities and support for their efforts to defend their land continue to grow.

*"There is an atmosphere of fear due to the extensive powers and control that the state can exercise over the Orang Asli, as such it is often difficult and sometimes unnerving to extract sufficient information and cooperation to build a case for rights violations,"*¹⁶⁶ said Indigenous rights lawyer Yogeswaran Subramaniam.

*"When Indigenous people lose their land, they lose everything. The land is the whole world to them,"*¹⁶⁷ Sarawak lawyer See Chee How told Amnesty International.

*"I have to continue to speak up," said Kuala Lumpur-based lawyer Siti Kasim, who has faced harassment and threats for her human rights work. "I am not going to change for anyone."*¹⁶⁸

Despite facing continuous obstacles and repeated attacks on their communities, village leaders have also vowed to keep up their struggle. *"I will defend my ancestral land, and the Indigenous rights of the Dayak. Wherever I will be I will always support the fight for native customary land,"*¹⁶⁹ said Village head Jambai from Bekelit, Sarawak.

Leaders remain key to ensuring that the struggle goes on, as explained by Dennis Along, Chairman of the Tring Association: *"We are doing the right thing for our community...my community has to have someone to lead them."*¹⁷⁰

As the new government of Malaysia takes power, it must ensure that the promises it has made to Indigenous peoples in the country are upheld, that Indigenous peoples' land rights are respected, and that human rights defenders are protected.

¹⁶⁵ Interview with Amnesty International, Kota Kinabalu, 26 July 2017

¹⁶⁶ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁶⁷ Interview with Amnesty International, Kuching, 27 July 2017

¹⁶⁸ Interview with Amnesty International, Kuala Lumpur, 2 August 2017

¹⁶⁹ Interview with Amnesty International, Bekelit, Sarawak, 30 July 2017

¹⁷⁰ Interview with Amnesty International, Miri, 28 July 2017

9. CONCLUSION & RECOMMENDATIONS

Since the publication of the National Inquiry on Indigenous Land Rights in 2013, the government of Malaysia has promised to take steps to improve the protection of Indigenous peoples. Despite the adoption of the recommendations of the Taskforce on Indigenous Land Rights, there has been little tangible progress to speak of, and clashes between the authorities and Indigenous communities continue.

The challenges of those defending Indigenous land in Malaysia, documented by Amnesty International in this report, reveal that human rights defenders face a broad range of obstacles and human rights violations when carrying out their work. The legitimate work of human rights defenders who are a part of these communities as well as those who advocate on their behalf is obstructed when they speak up. Indigenous leaders have been arrested, harassed, intimidated, and physically attacked, and have faced threats to their lives, amid limited recognition and protection of their communities.

The failure of the state in its obligation to protect those defending those claiming their rights to land, further undermines the work of human rights defenders and exposes them to greater danger. Almost every community member whom Amnesty International interviewed described the attacks against human rights defenders, and loss of their lands, as attacks against their culture and livelihood as Indigenous peoples.

Many people in Malaysia are concerned about the future of Indigenous peoples in the country. In the meantime, the heavy price that human rights defenders are paying – and the struggle that those claiming the right to ancestral land are facing shows that these challenges will continue until Indigenous peoples, and those who advocate on their behalf, are afforded full recognition and protection of their rights by the Malaysian government.

RECOMMENDATIONS

9.1 TO THE MALAYSIAN AUTHORITIES

- Ensure that Indigenous human rights defenders are free from harassment, discrimination, and the threat of criminalization through the application of repressive laws; and that they are able to conduct their important and legitimate work in a safe environment.
- Initiate prompt, thorough and impartial investigations into attacks, threats and assaults against defenders working to defend rights related to Indigenous land, and where there is sufficient evidence of criminal responsibility, bring those responsible to justice in fair trials without recourse to the death penalty.

- Refrain from using language that stigmatizes, abuses, disparages or discriminates against human rights defenders, including characterizing them as: “instigators”, “anti-development”, or “criminals”.
- Recognize, publicly and at the highest levels of both local and national authorities, the legitimate work of human rights defenders addressing issues related to Indigenous peoples’ land.
- 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.
- Implement the human rights of Indigenous peoples, including their right to land, the protection of their cultural heritage, and to a healthy environment.
- 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.
- Accept, without further delay, the visit request by the UN Special Rapporteur on the situation of human rights defenders to carry out a fact-finding visit to Malaysia. Confirm 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 including to meet with a wide range of stakeholders privately, including Indigenous peoples.
- 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 Organization Convention 169 on Indigenous and Tribal Peoples.
- Provide ongoing and continuous training for public officials, in particular to those responsible for Indigenous land rights, such as the Forestry Department and Department of Orang Asli Development on the international framework on the rights of human rights defenders, and of Indigenous peoples.
- Ensure that police act on and investigate complaints raised by members of Indigenous communities regarding land encroachment, violence and other ill-treatment by individuals connected to disputes over native customary land rights, and where there is sufficient evidence of criminal responsibility, bring those responsible to justice in fair trials without recourse to the death penalty.
- Ensure that human rights defenders and others facing criminal charges can have access to a lawyer of their choice from the outset of detention. If the person cannot afford to pay for a lawyer of their choice, the State should provide effective and qualified counsel free of charge.
- Ensure that Indigenous peoples are able to freely determine and organise their own self-governments; where specific positions are required for interacting with state, regional or national authorities, ensure that Indigenous peoples are able to freely select the persons taking up those positions.
- Ensure that Indigenous peoples and their leaders suffer no reprisals for legitimate activities to defend the rights of their communities.

To address the long term, systemic changes necessary to protect defenders working to defend Indigenous land and end the cycle of abuses against Indigenous peoples, immediately establish an Independent National Commission on Indigenous Land Rights, ensuring it has a mandate to:

- Review the cases of attacks, threats and assaults against human rights defenders working to defend rights to Indigenous land. Establish a database containing information on attacks, threats and assaults against human rights defenders. Conduct ongoing analyses of patterns of attacks on defenders to allow appropriate measures to be taken to mitigate the risks, and where appropriate, share information collected with police and/or prosecutors.
- Formulate and present recommendations to the relevant authorities aimed at ending attacks, threats and assaults against human rights defenders, and at ending violations of the land rights of Indigenous peoples.

- Carry out timely, independent, and impartial investigations into reports of violations of the land rights of Indigenous peoples, and refer evidence of criminal behaviour to a prosecutor.
- Where Indigenous peoples demonstrate customary land occupation and use, demarcate and provide title to native customary lands.

To ensure the Commission operates independently, effectively and transparently the Government of Malaysia should:

- Consult with Indigenous peoples, and develop with their free, prior and informed consent, the terms of reference, operational procedures, and modalities for appointments of commission members, and publish them, along with regular activity reports.
- Ensure the Commission is properly resourced, receives appropriate support and co-operation from government offices, and is given access and the authority to question relevant state officials and initiate civil and criminal investigations where appropriate.
- Ensure that members of the Commission are selected according to objective and relevant criteria, including their independence and expertise in human rights issues, and ensure overall adequate gender and ethnic representation, as well as expertise on Indigenous peoples' rights, the rights of human rights defenders, and gender issues.
- Guarantee that the Commission is functionally independent of government, and ensure that it is free from reprisals for the free expression of its views

9.2 TO THE NATIONAL HUMAN RIGHTS COMMISSION (SUHAKAM)

- Identify best practices for the engagement between state officials and Indigenous land defenders.
- Recommend, where appropriate, the pursuit of criminal investigations arising from reports of attacks against human rights defenders, and monitor the progress of such investigations.
- Include proposals for strategies for the protection and recognition of defenders working to defend rights related to land, territory and the environment in the work of the Commission, and in discussions between networks of human rights institutions.

9.3 TO COMPANIES OPERATING IN MALAYSIA

- Ensure due diligence, as set out in the UN Guiding Principles on Business and Human Rights, so that the human rights of individuals and communities are respected in the context of activities and projects related to the exploitation of natural resources.
- Collaborate with the state authorities in the investigation of the attacks against human rights defenders because of their work in the context of projects for the exploitation of natural resources.

9.4 TO THE UNITED NATIONS AND GOVERNMENTS ENGAGED IN BILATERAL COOPERATION WITH MALAYSIA

- Call on the Malaysian authorities to recognize, publicly and at the highest levels of both local and national authorities, the legitimate work of human rights defenders addressing issues related to Indigenous peoples' land and ensure that they receive protection in carrying out their work.
- Urge the government to establish an Independent National Commission on Indigenous Peoples, in line with the modalities described above.

- Give positive consideration to requests by Malaysian authorities for support and technical assistance in these endeavours.

**AMNESTY INTERNATIONAL
IS A GLOBAL MOVEMENT
FOR HUMAN RIGHTS.
WHEN INJUSTICE HAPPENS
TO ONE PERSON, IT
MATTERS TO US ALL.**

CONTACT US



info@amnesty.org



+44 (0)20 7413 5500

JOIN THE CONVERSATION



www.facebook.com/AmnestyGlobal



[@Amnesty](https://twitter.com/Amnesty)

“THE FOREST IS OUR HEARTBEAT”

THE STRUGGLE TO DEFEND INDIGENOUS LAND IN MALAYSIA

Defenders of the lands of Indigenous peoples in Malaysia are targeted, singled out and face opposition from state authorities and private individuals when they speak up. These abuses have further disenfranchised Indigenous communities in Malaysia, marginalising them socially and harming them economically. This report examines the struggles human rights defenders of Indigenous peoples have endured as they have sought to claim their right to Indigenous lands, and the steps that should be taken by the government to ensure that they are given the protection they deserve.