THE LAND WE LOST
Native Customary Rights (NCR) and Monoculture Plantations in Sarawak
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Cover photograph: An Iban villager of Sungai Buri, Bakong, Miri, Sarawak looking over the oil palm plantation that has encroached upon his community’s customary territory.

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List of abbreviations and acronyms

BMP          Best management practices
BOD          Biochemical oxygen demand
CLJ          Current Law Journal (Malaysian law reporter)
EIA          Environmental impact assessment
ESA          Environmentally sensitive areas
ESIA         Environmental social impact assessment
FELCRA       Federal Land Consolidation and Rehabilitation Authority
FELDA        Federal Land Development Authority
FFB          Fresh fruit bunch
FOEI         Friends of the Earth International
FPIC         Free, prior and informed consent
HCS          High carbon stock
HCSA         High carbon stock area
HCV          High conservation value
HCVA         High conservation value area
HFCC         High forest cover country
HFCL         High forest cover landscape
HRD          Human rights defenders
ILO          International Labour Organisation
IUCN         The International Union on Conservation of Nature and Natural Resources
GTZ          Deutsche Gesellschaft für Technische Zusammenarbeit (The German Corporation for Technical Cooperation). In 2011, the GTZ was merged with two other German international development cooperation organisations to form the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) or the German Corporation for International Cooperation.
JAKOA        Jabatan Kemajuan Orang Asli / Department of Orang Asli Development, Peninsular Malaysia (formerly JHEOA)
JHEOA        Jabatan Hal Ehwal Orang Asli / Department of Orang Asli Affairs (currently JAKOA)
JVC          Joint venture company
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<th>Abbreviation</th>
<th>Full Form</th>
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<td>LCDA/PELITA</td>
<td>Land Custody and Development Authority / Lembaga Pembangunan dan Lindungan Tanah (Sarawak)</td>
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<tr>
<td>LPF</td>
<td>Licence for Planted Forest</td>
</tr>
<tr>
<td>LUCA</td>
<td>Land use change analysis</td>
</tr>
<tr>
<td>MITI</td>
<td>Ministry of International Trade and Industry</td>
</tr>
<tr>
<td>MLJ</td>
<td>Malayan Law Journal (law reporter, Malaysia)</td>
</tr>
<tr>
<td>MLRA</td>
<td>Malaysian Law Review Appellate Courts (law reporter, Malaysia)</td>
</tr>
<tr>
<td>MPI</td>
<td>Ministry of Primary Industries (formerly Ministry of Plantation Industries and Commodities)</td>
</tr>
<tr>
<td>MPOB</td>
<td>Malaysian Palm Oil Board</td>
</tr>
<tr>
<td>MPOCC</td>
<td>Malaysian Palm Oil Certification Council</td>
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<tr>
<td>MS</td>
<td>Malaysian Standards</td>
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<tr>
<td>MS 2530</td>
<td>Specific title for the MSPO standard set under the Malaysian Standards</td>
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<tr>
<td>MSPO</td>
<td>Malaysian Sustainable Palm Oil, general title of MS 2530</td>
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<td>NCL</td>
<td>Native customary land</td>
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<td>NCR</td>
<td>Native customary rights</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
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<tr>
<td>NPP</td>
<td>National Physical Plan</td>
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<tr>
<td>PMM</td>
<td>Proposal for Mitigation Measures, under the Sabah EIA legislation</td>
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<tr>
<td>PFE</td>
<td>Permanent Forest Estate</td>
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<tr>
<td>PRF</td>
<td>Permanent Reserved Forest</td>
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<tr>
<td>RaCP</td>
<td>Remediation and Compensation Procedure</td>
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<td>RISDA</td>
<td>Rubber Industry Smallholders’ Development Authority</td>
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<td>RSPO</td>
<td>Roundtable on Sustainable Palm Oil</td>
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<td>RSPO principles and criteria 2007</td>
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<td>RSPO P&amp;C 2013</td>
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<tr>
<td>RSPO P&amp;C 2018</td>
<td>RSPO principles and criteria 2018</td>
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<tr>
<td>RTE</td>
<td>Rare, threatened or endangered species</td>
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<td>SALCRA</td>
<td>Sarawak Land Consolidation and Rehabilitation Authority</td>
</tr>
<tr>
<td>SAM</td>
<td>Sahabat Alam Malaysia / Friends of the Earth Malaysia</td>
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<td>SEIA</td>
<td>Social and environmental impact assessment</td>
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<td>SFC</td>
<td>Sarawak Forestry Corporation</td>
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SLDB  Sarawak Land Development Board
SOP  Standard operating procedures
SPB  Sarawak Plantation Berhad
SUHAKAM  Suruhanjaya Hak-Hak Asasi Manusia Malaysia / Human Rights Commission of Malaysia
TPA  Totally protected area. The different classes of terrestrial and marine areas that have received significant legal protection. They may be conserved to serve purposes such as the protection of biodiversity, natural heritage; ecological functions or representation; education; research; and sustainable recreational and tourism activities. Resource extraction and large scale development activities are prohibited in a TPA, while other forms of human activity will be strictly regulated. A TPA may also be referred to as a protection or conservation forest, if it traverses forested areas, or more broadly, protection or conservation areas.
UNDRIP  United Nations’ Declaration on the Rights of Indigenous Peoples
### Glossary of non-English terms

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<tr>
<td>adat</td>
<td>customs</td>
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<tr>
<td>bilik</td>
<td>the individual family residential units within a longhouse. In common usage, a room</td>
</tr>
<tr>
<td>bukit</td>
<td>hill</td>
</tr>
<tr>
<td>kampung</td>
<td>village (abbrev. Kg)</td>
</tr>
<tr>
<td>konsep baru</td>
<td>new concept</td>
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<tr>
<td>kuala</td>
<td>estuary</td>
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<tr>
<td>ladang</td>
<td>plantation</td>
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<tr>
<td>Majlis Adat Istiadat Sarawak</td>
<td>State executive council</td>
</tr>
<tr>
<td>Majlis mesyuarat kerajaan negeri</td>
<td>State executive council</td>
</tr>
<tr>
<td>miring</td>
<td>sacred ceremony held during spiritually significant occasions by the Iban and a few other indigenous communities of Sarawak, involving prayers and offerings to the spiritual realm</td>
</tr>
<tr>
<td>ngampun antu penyakit</td>
<td>Iban healing ceremony to ask for divine forgiveness for any transgressions committed by community members</td>
</tr>
<tr>
<td>pengurip</td>
<td>The entire forested territory of a Penan community, who historically did not engage in agriculture or build any permanent housing facility and whose traditional way of life was based on hunting, fishing and gathering cycles</td>
</tr>
<tr>
<td>pulau galau</td>
<td>the communal forest reserve within an Iban customary territory, permanently protected for hunting, timber harvesting and resource gathering activities, which also functions as the village water catchment area</td>
</tr>
<tr>
<td>rarung</td>
<td>burial ground designated for Iban warriors and persons who have significantly contributed to the community</td>
</tr>
<tr>
<td>ruai</td>
<td>The communally shared contiguous veranda of a longhouse, a communal space for meetings, gatherings, ceremonies, the carrying out of daily domestic activities, rest and recreation</td>
</tr>
<tr>
<td>rumah panjang</td>
<td>Literally, longhouse. The traditional single, long wooden block of family residential units, or bilik, of most indigenous communities of Sarawak, which is built on stilts and fronted by a ruai</td>
</tr>
<tr>
<td>Term</td>
<td>Description</td>
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<tr>
<td>sungai</td>
<td>river (abbrev. Sg.)</td>
</tr>
<tr>
<td>tabak</td>
<td>ceremonial brass tray, utilised during sacred ceremonies of the Iban and a few other indigenous communities of Sarawak</td>
</tr>
<tr>
<td>tajau</td>
<td>urn, also used for the burial of important persons in the Iban and a few other indigenous communities of Sarawak</td>
</tr>
<tr>
<td>tanah</td>
<td>land</td>
</tr>
<tr>
<td>tanah pemakai menoa or pemakai menoa</td>
<td>the entire territory of an Iban community, with two broad types of land use i.e. the temuda and pulau galau</td>
</tr>
<tr>
<td>tanjuk</td>
<td>The protusion which extends out from an Iban longhouse ruai</td>
</tr>
<tr>
<td>tembawai</td>
<td>An abandoned longhouse</td>
</tr>
<tr>
<td>temuda</td>
<td>cultivation areas or sometimes, small plots of forested areas, under familial ownership within an Iban customary territory</td>
</tr>
<tr>
<td>umbut</td>
<td>edible pith from cultivated or wild plants consumed as a vegetable</td>
</tr>
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The oil palm plantation on the shared native customary territory of four single-origin Iban longhouses in Sungai Buri.

The oil palm plantation on the native customary territory of the Iban longhouse in Sungai Sebatuk.
1. Introduction

Background

The purpose of this publication is to look into how systemic poor governance on matters pertaining to indigenous peoples, land and forests in Sarawak has created adverse environmental and social impacts on indigenous communities affected by large scale oil palm plantations. The project seeks to document patterns of encroachment on indigenous customary territories in Sarawak and to subsequently demonstrate their linkages with systemic poor governance conditions. It is hoped that this effort is able to verify that violations of the indigenous customary land rights in Sarawak are indeed enabled by its governance system.

This governance system similarly also allows for logging and large scale pulp and paper plantations to encroach upon indigenous territories, apart from oil palm plantations. As a matter of fact, information on the impacts of logging operations on indigenous communities in Sarawak has been in the public domain since the 1980s, when industrial logging began to intensify, primarily for export to Japan. On the whole, the development of large scale monocultures that are predominantly cultivated with oil palm, as well as pulp and paper and timber trees, is largely a post-logging development, undertaken as a result of the overharvesting of natural timber since the 1980s which eventually, caused the depletion in natural timber resources in Sarawak today.

Two oil palm affected indigenous communities in the Miri Division have agreed to participate in this project. The collection of data was undertaken by way of a survey and interview sessions with affected village representatives, based on a series of questions that were prepared beforehand, as well as the collection of information on the relevant evidence from the respondents.

Main focus: Violations of native customary rights in Sarawak

This publication was initiated in order to propose a set of policy and legislative solutions to help end the violations of the indigenous customary land rights in Sarawak, based on the principles of law and universal natural justice. It is hoped that it will contribute towards the improvement of land and forestry governance and laws in Sarawak. At its core, the publication focuses on verifying that the violations of indigenous customary land rights have indeed been caused by systemic governance and legal conditions, as opposed to isolated incidents that may have
occurred as a result of the violations and breaches of legislative requirements or executive directives. Thus, the project must seek to evaluate the quality and effectiveness of the legal and governance framework on land, forestry and conservation areas in Sarawak in providing adequate protection towards indigenous customary land rights. The focus on oil palm plantations is important as it is a leading global agricultural commodity, although pulp and paper and timber tree plantations in Sarawak are also responsible for the same adverse impacts on indigenous communities and forests in the state.

The violations of the indigenous customary land rights are in fact a national issue that result from various basic weaknesses, limitations and flaws in the governance and legal framework concerning land, forestry and conservation areas, at both the federal and state levels. This view has been supported by the Report of the National Inquiry into the Land Rights of Indigenous Peoples published by the Human Rights Commission of Malaysia (SUHAKAM) in 2013. In fact, the first recommendation of the report focuses on the need to address the lack of tenure security of the indigenous customary land rights, which it describes as an outcome of flawed governance and legislative conditions that are systemic in nature. According to SUHAKAM, the violations of indigenous customary land rights go beyond the mere violations of statutory laws, as emphasised in one of the general conclusions of the report [emphasis added]:

Indigenous peoples are among the most marginalised and disadvantaged groups in Malaysia. Despite having provisions which recognise their land rights in the Federal Constitution, domestic and international laws, systemic issues have denied them the full enjoyment of their legal and human rights. These systemic issues evolved mainly from the successive amendments of land laws that do not recognise indigenous peoples’ perspectives of land ownership and management and therefore eroded customary rights to land. They also affected administrative decisions with respect to indigenous peoples’ land claims. The issues also evolved from the adoption of policies that give priority to approving lands for large-scale development projects over indigenous subsistence economy.¹

### Indigenous customary land rights

**Indigenous customary land rights or titles** are rights that have been obtained from the authority of traditional customs and customary laws, and are commonly acknowledged and enforced by members of an indigenous community. They are different from documentary land titles, which are rights obtained from documents issued by the state under legislative authority.

These root differences are subsequently intensified by at least two other broad factors. First, modern legislation around the world tends to fully recognise property

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¹ SUHAKAM (2013: 164).
and land rights only when such rights have been verified to fulfil all the required statutory conditions and administrative procedures, although judicial interventions in many countries have also begun to rule against the full applicability of such legislative requirements and administrative practices on the indigenous customary land rights. Second, while the modern documentary land title functions strictly to provide state recognition of property ownership, the customary land title is additionally informed by the cultural ethos of a community, including its spiritual beliefs and cosmology, the ecological ethics of sustainable use and communal sharing as well as other long-held customs. As such, customary land rights provide community members with more than just the right to own familial and communal land, they also form and maintain the cultural and spiritual bonds between the people and their land and the surrounding ecosystems.

Indigenous peoples are the earliest documented communities in a given territory. Their history of occupation on the land goes back to prehistory, prior to the arrival of other communities in the territory and the latters’ subsequent development of economic, political and cultural dominance, which in almost all cases resulted in the marginalisation of the former. The sources of livelihoods, culture, spirituality, traditions, customs and laws of indigenous communities are therefore decidedly distinct from the dominant communities in any given nation state.

The main reason for this difference lies in the fact that indigenous communities have continued to sustain their intimate relationship with the land, forests, rivers and other natural resources found on their traditional land. Further, they are also still in occupation of their ancestral territories that have been inherited in accordance with their customs since time immemorial and continue to depend directly on the natural resources found on the land. Even if some members of indigenous communities in Malaysia have started lives in urban areas, the land, forests and natural environment of their villages will always be remembered as part of their flesh and blood and as the very source of life, whose continued existence will always be defended.

Through Western European colonisation around the world, the modern statutory legal framework on matters relating to land, forests and natural resources has disseminated the documentary land titling system that is built upon legislation. From that point onwards, land without a state-issued written grant or document was

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2 Indigenous community-based organisations in Malaysia have advocated the use of the term orang asal in the Malay language to collectively represent the term ‘indigenous peoples’ in the country. However, legally, the indigenous peoples of Peninsular Malaysia are collectively known as the orang asli in Malay or aborigine in English. The legal system in Sarawak and Sabah meanwhile, utilises the term anak negeri in Malay or native in English, although the term dayak is also widely used to refer to indigenous communities in the state. Asal and asli are two closely related words, asli has a stronger connotative emphasis in respect of authenticity and a natural state of being, as opposed to artificiality or imitation, while asal carries a stronger stress on the process of originating and belonging, in particular in terms of geography or territoriality. The terms bumiputra and pribumi, which literally mean ‘child of the soil’ and would be inclusive of the Malay community, in actual fact are not mentioned by the Federal Constitution or any other statutory laws. Their usage only became more widespread in public administrative language and common parlance after the 1970s.
automatically claimed as property of the state. The land and forest reservation process, which is proclaimed in a government gazette, was also introduced, if the state wishes to reserve an area for any specific purpose which it defines to be consistent with public interest.

However, the status of the indigenous customary land that is typically located away from administrative centres, but rich in various natural resources that can be profitably exploited by outside parties, has simply been continuously neglected by state power. Such land may have never been bestowed with any document of title or a reservation status from any state authority to acknowledge its rightful status, although the communities may be allowed to remain within their original territories as land users, instead of landowners.

This is the cause of the ambiguities on the status of the indigenous customary land rights within the modern legal framework today. While indigenous peoples have continued to practise their customary land ownership rights based on their traditional laws within their customary territories, the ruling authorities from the colonial period up to the present day have claimed that such ancestral land as state property. They have then proceeded to marginalise such rights as merely a limited form of usufructuary rights or a right no better than that of a tenant at will. Consequently, this has resulted in the widespread violations of the indigenous customary land rights, especially after the large-scale development of the timber industry in Malaysia in the early 1970s.

However, many of the ambiguities in statutory law on the status of indigenous customary land rights have already been clarified by the Malaysian judiciary, after communities affected by territorial violations and encroachments began to undertake civil actions in the last two decades. Today, after indigenous customary land rights have been recognised as a right to property, which is protected under Article 13 of the Federal Constitution, there is no longer any legal justification for states to continue allowing such violations and encroachments.

The special position of Sarawak and Sabah

The Federation of Malaysia was formed in September 1963 consisting of Sarawak and Sabah in Borneo, the Federation of Malaya (Peninsular Malaysia) and Singapore, which eventually left the federation two years later. All four federation members were former colonies of Britain. Today, Malaysia comprises three federal territories and thirteen states, eleven of which are located in Peninsular Malaysia. As such, Sarawak and Sabah function simultaneously as members of the federation and states.
The land size of Malaysia is approximately 33 million hectares, with a population of 31.7 million in 2016. Peninsular Malaysia at 13.2 million hectares is the most densely populated, with a population of around 25 million. Sarawak, with a landmass of around 12.4 million hectares is the most sparsely populated, with a population of only 2.8 million. Sabah, with 7.2 million hectares, has a population of around 3.9 million.\(^3\)

As a result of this three-member governance structure of the federation, the Federal Constitution provides Sarawak and Sabah each with exclusive legislative power over matters related to land, forestry, conservation, agriculture, local government, physical planning and indigenous peoples. As a result, they are exempt from all ‘national’ land and forestry-related processes established at the federal level such as the National Land Policy and the National Forestry Policy.\(^4\) Both states therefore enforce their respective state forestry policies as well as laws on land, forests, conservation, environment and indigenous peoples.

While affairs of the indigenous peoples in Peninsular Malaysia fall under federal jurisdiction, Sarawak and Sabah exercise full jurisdiction on matters relating to their respective indigenous communities. Unlike Peninsular Malaysia, the indigenous communities in Sarawak and Sabah, collectively termed as native communities under the law, form the majority ethnic population in the two states. This difference in demography has also contributed towards the dissimilar manner in which indigenous customary land rights are legally addressed in the Bornean states and Peninsular Malaysia. Nevertheless, it must be stressed that the laws on indigenous customary land rights in the three regions still create a host of adverse impacts on the communities in a similar fashion.

In Sarawak and Sabah, indigenous customary land rights are defined and primarily addressed by their main land legislation regulated by their respective Department of Lands and Surveys, unlike in Peninsular Malaysia, where the main land legislation, the National Land Code 1965, is silent on such matters.\(^5\) In fact, the term native

\(^3\) For more information please see the website of the Department of Statistics, http://www.statistics.gov.my/.

\(^4\) Article 95C lays out the procedures for extending the legislative and executive powers of the two states. Article 95D excludes them from federal laws that have been passed to provide uniformity in land and local government governance. Article 95E further excludes the two states from national plans for land utilisation, local government, development and other related matters. Apart from these, Sarawak and Sabah also possess other constitutional privileges not granted to the states in Peninsular Malaysia. Part 4 of the Tenth Schedule of the Federal Constitution provides Sabah and Sarawak with special federal grants while its part 5 provides them with ten additional sources of revenue, including the export duty on timber and forest produce. For judicial matters, the High Court is granted with a special wing for Sabah and Sarawak, presided over by the its own chief judge, where law practitioners from Peninsular Malaysia can only appear with special permission. Further, there are also special provisions on employment, immigration, language and protection during emergency. Last but not least, concurrence of the Sabah and Sarawak heads of state is also needed before certain amendments to the Federal Constitution can take place on issues such as citizenship, the judiciary, federal-state relationship, religion, language, special rights of natives and quota allocations for Sabah and Sarawak lawmakers in the Parliament.

\(^5\) Although jurisdiction on all land matters fall under the jurisdiction of the states, affairs of indigenous peoples in Peninsular Malaysia, including their indigenous customary land rights, by executive convention, are interpreted to fully fall under the jurisdiction of the federal Aboriginal Peoples’ Act 1954, regulated by the Department of Orang Asli Development (Jabatan Kemajuan Orang Asli or JAKOA), previously Jabatan Hal Ehwal Orang Asli (JHEOA) or the
customary rights (NCR) is an official terminology utilised by the Sarawak and Sabah legal systems. Both the Land Code 1958 in Sarawak and the Land Ordinance 1930 in Sabah have provisions that stipulate the manner in which NCR can be acquired and of course, extinguished by the state, with some payment of compensation that however cannot be said to be adequate within the definition of Article 13 of the Federal Constitution.

Further, laws on forestry and conservation in Sarawak and Sabah also have specific provisions to address NCR claims. This also does not occur in the parallel laws in Peninsular Malaysia. Such forestry and conservation laws in Sarawak and Sabah also spell out the manner in which the extinguishment of NCR and the subsequent payment of compensation must be carried out, when a forested or a high conservation value area is gazetted by the state, either as a production forest or conservation area, respectively. Once again, these compensation processes cannot be said to be fully compliant with the demands on adequate compensation of the Federal Constitution.

In addition, the two states also possess their respective native courts which adjudicate over personal and family affairs as well as small scale land rights matters and disputes based on native laws, some of which have been individually coded based on the customs of individual tribes. The Federal Constitution also proclaims the special position of the native communities of the two states along with the Malay community, which authorises a host of affirmative actions to be undertaken in order to safeguard their interests, without neglecting the legitimate interests of other ethnic communities.

Last but not least, following a decision of the Court of Appeal in 1997, the two states have also been allowed to legislate and enforce their own environmental laws even as the states in Peninsular Malaysia continue to enforce the Environmental Quality Act 1974, which was passed through the federal legislature.\(^6\)

In all, Sarawak and Sabah run a more autonomous executive and legislature than the states in Peninsular Malaysia. As a matter of fact, their executive arms are termed as cabinets, which are headed by ministers, as they are termed at the federal level, instead of state executive councils that are headed by executive councillors, the parallel terms employed by all the states of Peninsular Malaysia. In short, the legal stature of Sarawak and Sabah within the federation is not the same as that of the other states in Peninsular Malaysia as they are also members of the federation.

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\(^6\) For the further information, please see *Kajing Tubek and Ors v. Ekran Bhd & Ors [1997] 4 CLJ 253; and Director-General, Department of Environment and Anor v. Kajing Tubek and Ors [1997] 3 MLJ 23.*

*Department of Orang Asli Affairs, a federal department under the Ministry of Rural and Regional Development. In fact, sub-section 4(2)(a) of the National Land Code 1965 enforced in Peninsular Malaysia clearly states that it does not have any effect on any legal provisions that are in force on customary land rights, which in this case is the Aboriginal Peoples Act 1954.*
Structure of the report

This introductory chapter describes the objectives and background to this publication project.

Chapter 2 provides more detailed descriptions of the governance and legislative framework in Sarawak pertaining to indigenous peoples, land, forestry and conservation areas, and how indigenous customary land rights have received only minimal protection from various statutes, which in turn permits the continued violations of such rights. Emphasis will also be made on the importance to look at the law in a comprehensive manner, encompassing statutes as well as the Federal Constitution, which is the highest law of the nation, and the legal interpretations of indigenous customary land rights by the judiciary.

Chapter 3 focuses on the debate surrounding the sustainable production of palm oil. In particular, it discusses whether the certification of palm oil, is able to adequately address the injustices frequently experienced by indigenous peoples as a result of the development of oil palm plantations which encroach upon their customary territories. The chapter will look at how a certification scheme functions within a governance and legal system that is weighed down by numerous systemic flaws and weaknesses. Equally important, this chapter also discusses the debate surrounding oil palm smallholdings, the livelihoods of many farmers in the country, including indigenous peoples in Sarawak and Sabah. This discussion is important for the purpose of understanding the structural differences between small-scale oil palm farming activities by communities and large-scale oil palm plantations that are developed by corporations which encroach upon the customary territories of indigenous peoples and cause massive deforestation. It argues that it is simply incorrect and misleading to presume that opposition against destructive large-scale corporate oil palm plantations which violate indigenous customary land rights and cause massive deforestation inevitably includes the opposition against the more sustainable form of oil palm smallholder agriculture.

Chapter 4 looks at the conclusions established from the results of the case study, covering two indigenous communities in the Miri Division. Here, the causes of the violations of indigenous customary land rights in relation to the governance and legal systems are discussed.

Based on the causes identified in chapter 4, chapter 5 presents recommendations to be implemented by the state and federal governments in order to halt the continued violations of indigenous customary land rights in Sarawak. The case study reports are placed in the Annex.
CHAPTER 2: Statutory laws, judicial decisions and native customary rights (NCR) in Sarawak
Protests and blockades by numerous native communities of Sarawak to protect their customary territories have continually been carried out since the 1980s. Between the 1980s and 2000s, the blockades were largely directed against logging operations. However, as a result of this over-harvesting of natural timber, large monoculture plantation licences began to be issued by the state between the 1990s and mid-2000s. Just like logging licences, plantation licences were also issued without consulting affected communities. These licences may traverse logged over forests and the native customary territories claimed over them, but they may also encroach upon community cultivation areas. From the 2000s onwards, more and more community protests and blockades have been staged against such large plantation operations, including those involved in the cultivation of oil palm.

Photographs courtesy of members of the following communities: Penan community in Batu Bungan, Mulu; Kenyah community of Uma Sambop in Belaga; Narum Malay and the Iban communities of Sungai Malikat and Tanjung Upar in Marudi.
2. Statutory laws, judicial decisions and native customary rights (NCR) in Sarawak

The natives of Sarawak and the NCR

Since indigenous communities in both Borneo and Peninsular Malaysia are made up by numerous distinct but often interrelated cultural and linguistic tribal groups, the definition of the indigenous identity is provided for by the law, although these may not be necessarily fully instructive. Under the law, the indigenous peoples of Sarawak and Sabah are termed as native in English or anak negeri in Malay, in contrast to the ‘Aborigine’ or Orang Asli in Peninsular Malaysia. For Sarawak, Article 161A(7) of the Federal Constitution provides the list of ethnicities recognised to be natives of the state:

**Article 161A**

(7) The races to be treated for the purposes of the definition of “native” in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

The Interpretation Ordinance 2005, a Sarawak state law, also provides a schedule where ethnicities recognised to be native in the state are listed.

An important concept of the indigenous customary rights is territoriality. An indigenous customary territory is where rights to land and the natural resources found on them, as well as the occupation rights associated with them, have been acquired by a group of pioneering ancestors, whose members are typically made up by several closely related kin groups. The rights would subsequently be passed down the inheritance line to succeeding generations in an unbroken and continuous fashion, right to the present-day descendants. Such a territory is often delineated based upon naturally occurring landmarks such as mountains, ridges, rivers, streams, confluences and other available geographical features of an area. The customs of the community would serve to regulate the rights and obligations involved in the access, claim, maintenance, inheritance and abandonment of the territory and its natural resources, including the management of land and natural resources that are communally shared as part of the village commons, and those
held under individual ownership, which tend to be largely made up of cultivation areas worked by individual families.

In Sarawak, the entire territory of an indigenous community is known as the *tanah pemakai menoa* in the Iban language, the largest indigenous ethnic group. The majority of the Sarawak indigenous tribes reside in homes called the *rumah panjang* or literally, the longhouse, situated within a walking distance from a navigable stretch of river. The traditional indigenous longhouse is built as a single, long wooden block of family residential units, built on stilts, made up of individual ‘rooms’ or *bilik*, although each room is in fact a complete family home. The front of the longhouse is the contiguous veranda or *ruai*, an important communal space for meetings, gatherings, ceremonies, the carrying out of daily domestic activities such as the making and repair of mats, craft, fishing gear and other tools, as well as for rest and recreation. The land which immediately surrounds the longhouse is often cultivated with vegetables, short-term crops and other edible or useful plants by individual families. Small scale breeding of animals such as pigs and chickens may also be undertaken in close proximity to the housing area. The continuous boundary of a village territory is typically sited at a distance of a day’s walk to the longhouse, to allow game to be hauled back to the longhouse in fresh conditions. The river meanwhile functions as the main transportation system, giving both men and women as well as young adults and the elderly, equal access to mobility and the freedom of movement.

Within the territory itself, there are two broad categories of land use activities. The first comprises family-owned cultivation areas, known as the *temuda*, often located by the riverbank for easier access. While hill rice cultivation, the main staple crop of sedentary indigenous communities will have to factor in fallow periods in its land management considerations, other parts of the family-owned farms may be reserved for mixed-crop cultivation that would typically involve fruit trees, tubers, vegetables, herbs and other food crops. In the past 100 years or so, most indigenous families have also been carrying out the cultivation of cash crops such as cocoa, coffee, rubber and pepper. For plots not devoted to rice cultivation and cash crops, there is often little need for the soil to be stripped bare, especially if within the land there already exist much sought after long-living fruit, medicinal and multi-purpose trees like rattan and bamboo. Meanwhile, rice fields and farms left in fallow may also over time gradually regenerate into secondary jungle, resembling virginal stands of forest

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7 The native terms used in this publication in respect of indigenous customary land rights and land use in Sarawak are from the Iban language, the largest native community in Sarawak. Such terms or their variations also exist in the languages of other tribes. For the Penan community who historically did not engage in agriculture or build any permanent housing facility and whose traditional way of life was based on hunting, fishing and gathering cycles, the forested customary territory of each clan is known as the *pengurip*. The movement of each Penan clan within their *pengurip* is methodically organised around the fruiting cycles that attract wild animals and the regeneration period of various wild sago palm species, harvested for their starch, the staple diet of the community. Major movements tend to take place only between three and four times a year based on such considerations.
to the untrained eye. Such practices often mislead outside parties to mistake such family-owned plots of land as forested areas without any claim of familial rights.

The second type of land is the virgin forest, also known as the pulau galau, which which lies beyond the temuda. The pulau galau is the village forest reserve, which can be accessed by all members of the community. This is where forest produce, medicinal plants and wood of superior quality are harvested, the latter usually for housing, boat and other construction materials, and where hunting and animal-trapping activities take place. This is essentially a totally protected area, which also functions as the village water catchment, where land clearing is permanently prohibited.

In Sarawak and Sabah, these rights are collectively termed as native customary rights (NCR) under the law. Land on which the NCR are conceded to exist by the state is therefore classed as the native customary land (NCL). The NCR is primarily addressed by the main land legislation, but are also mentioned in various forestry, conservation and a few natural resource-related statutes in the two states.

**How statutory laws affect the NCR**

There are several provisions of the Federal Constitution that guarantee protection to indigenous peoples in the country, including their customary land rights. However, the content of the various statutory laws, as well as the interpretation of the state and federal governments of the indigenous customary land rights, have essentially failed to fully understand the actual characteristics of indigenous customary land rights as how they have been developed by indigenous communities.

Therefore, even with constitutional protection, the violations of the indigenous customary land rights by logging, plantation, mining and other resource extractive operations are still prevalent in Sarawak, Sabah and Peninsular Malaysia. Additionally, indigenous customary territories are frequently confronted by the gazetting of forested areas, either for production or conservation purposes, which either extinguishes or severely reduces the indigenous customary land rights. Such territories are also often threatened by land acquisition actions undertaken by the state for purposes that are deemed to fall under the function of ‘public purpose’, which includes the construction of infrastructure such as dams and expressways.

In Peninsular Malaysia, the Aboriginal Peoples Act 1954 is interpreted by the state to be the sole legislation that addresses the affairs of indigenous peoples in the region, although this law is not primarily a law on indigenous customary land rights and is beset with many inadequacies. Sarawak and Sabah on the other hand do not possess such a legislation. Instead, the NCR is chiefly elaborated by their respective main
land legislation. In Sarawak, the Land Code 1958 is the main statutory reference for the regulation of the NCR, which elaborates on the methods in which the NCR can be created, exercised and extinguished. The forestry and conservation laws meanwhile only address how such rights can be extinguished or heavily reduced to make way for the gazetting of production forests or conservation areas, as well as to regulate the limits of community access to protected forest and other natural resources in such areas. However, despite the fact that the statutory framework in Sarawak (and Sabah) provides relatively more references to the exercise and regulation of the NCR than the Aboriginal Peoples Act 1954 or any other law being enforced in Peninsular Malaysia, it still contains many weaknesses, limitations and flaws, as summarised below:

(i) Although Section 2 of the Land Code 1958 provides for the definition of the native customary land and its Subsection 5(2) further describes the methods through which the NCR can be acquired by a native community, it does not give a comprehensive definition of native customary rights itself. The land law does not employ native words and terms in describing the concept of territoriality inherent in the exercise of the NCR as well as the land use and natural resource management strategies of native communities, which encompass the forested commons shared by a community and cultivated areas owned by individual families. Such descriptions are important in providing greater clarity to the nature and features of the NCR, in comparison to the modern documentary land title.

(ii) Land that is held under the NCR without any documentary title or reservation status, which tends to be the norm in the state, is merely perceived as being held under a tax-free land licence from the state. There is no recognition that the NCR is a form of a proprietary interest in the land itself, a form of land title that is legally equal in most aspects to the modern individual documentary land title.

(iii) Provisions in all existing statutes on compensation payments for the loss of the NCR do not guarantee adequate payment as demanded by Article 13 of the Federal Constitution. Instead, all such statutes allow for the assessment of compensation payments to be determined based upon the discretion of the different state authorities.

Currently, Subsection 5(6) of the Land Code 1958 merely authorises the state executive council to make rules for the assessment of compensation payable for the extinguishment of the NCR, without any further specifications, not even the mandatory publication of the said rules. Section 15 of the Forests Ordinance 2015, Section 16 of the National Parks and Nature Reserves Ordinance 1998 and Section 17 of the Wild Life Protection Ordinance 1998
meanwhile give the Sarawak Forests Department the same discretionary power to determine the amount of compensation payable based upon several criteria which by and large, allow considerable room for ambiguity. The criteria include the nature and extent of the rights being claimed and the degree of actual dependency of the affected persons on such rights, as a means of their livelihood.

(iv) The extinguishment or reduction of the NCR under the land, forestry and conservation laws fails to provide for an adequate, comprehensive and more community-centred notification process, which is able to take into account the linguistic, cultural and geographical circumstances of an affected community.

Any NCR extinguishment process initiated under Subsection 5(3) of the Land Code 1958, whether for land acquisition or land class status change purposes, only requires for the extinguishment notice to be published in the state gazette and a newspaper and displayed at the local district office. Affected communities are given 60 days to submit their claims for compensation and a further 21 days to appeal for arbitration if they are dissatisfied with the amount awarded to them. Section 8 of the Forests Ordinance 2015 meanwhile also stipulates the same minimal notification requirements for the gazetting of the production forests i.e. Forest Reserves and Protected Forests, in addition to other such medium as circumstances may permit, while the duration to appeal is extended to 30 days. Section 10 of the National Parks and Nature Reserves Ordinance 1998 and Section 11 of the Wild Life Protection Ordinance 1998, which provide for the gazetting of the National Parks, Nature Reserves and Wild Life Sanctuaries, respectively, also adhere to the same requirements stipulated in the forestry law, similarly giving the state the discretion to notify affected peoples through other suitable methods if necessary.

(v) There is not one statutory provision in Sarawak that has been enacted on the need to obtain the free, prior and informed consent from native communities for any processes pertaining to their customary land rights and other matters affecting their lives and well-being.

Table 1 lists a group of statutes in Sarawak which include those on land, forestry and conservation that may affect the NCR by way of several methods:

(i) The loss of the NCR as a result of a land acquisition or land gazetting action by the state for purposes that are deemed to fall under the function of public purpose under the Land Code 1958.
(ii) The gazetting of the Permanent Forest Estate (PFE) under the jurisdiction of the Forests Ordinance 2015. The PFE is largely classified as either a Forest Reserve or a Protected Forest, for timber production purposes.


(v) The issuance of logging and pulp and paper and timber tree plantation licences under the Forests Ordinance 2015. Some pulp and paper and timber tree plantations have also been allowed to devote a maximum of 20 per cent of their concession areas for the cultivation of oil palm for one cycle of 25 years.

(vi) The issuance of permits for land and agricultural development activities, in particular for oil palm plantations since the late 1990s, under the Land Code 1958. Apart from private companies, such oil palm plantation development activities may also be implemented by other statutory or body corporate authorities, such as the Land Custody and Development Authority (LCDA),\(^8\) the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA),\(^9\) the Sarawak Land Development Board (SLDB)\(^10\) and the Federal Land Consolidation and Rehabilitation Authority (FELCRA)\(^11\) with or without the

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\(^8\) LCDA is a state statutory agency established under the Land Custody and Development Authority Ordinance 1981. It is currently placed under the Chief Minister’s Department. LCDA’s function is to act as a land development catalyst in Sarawak. With several subsidiaries and associate companies, its business activities are focused on the development of oil palm and sago plantations, including on NCR land, salvage logging, property management and sand management. For more information, please see [http://www.pelita.gov.my/](http://www.pelita.gov.my/).

\(^9\) SALCRA is a state statutory agency established under the Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976. It is currently placed under the Sarawak Ministry of Land Development. SALCRA was modelled after its federal counterpart, FELCRA. For more information, please see [http://www.salcra.gov.my/](http://www.salcra.gov.my/).

\(^10\) SLDB is a state corporation established under the Sarawak Land Development Board Order 1972, enacted in pursuant to a federal statute, the Land Development Act 1956, as modified and extended by the Modification of Laws (Land Development) (Modifications and Extensions in Borneo States) Order 1967. It is currently placed under the Sarawak Ministry of Modernisation of Agriculture, Native Land and Regional Development. SLDB management was corporatised in 1993 and since 1997, its assets have been privatised to and managed by Sarawak Plantation Berhad (SPB). SLDB’s function is to promote and assist the investigation, formulation and implementation of projects for the development and settlement of land in the Sarawak, including through partnerships with other parties (individuals, companies or government agencies) or into arrangement for the sharing of profits, union of interest, co-operation and joint ventures, among others. Today, it is involved in the establishment of oil palm plantations and aquaculture projects for rural communities in Sarawak through federal funding from the Federal Ministry of Rural and Regional Development. For more information please see [http://www.manred.sarawak.gov.my/](http://www.manred.sarawak.gov.my/) and [http://www.spbgroup.com.my/](http://www.spbgroup.com.my/).

\(^11\) FELCRA was originally established as a federal statutory agency by the National Land Rehabilitation and Consolidation Authority (Incorporation) Act 1966, before being turned into a corporation owned by the Ministry of Finance through the Land Rehabilitation and Consolidation Authority (Succession and Dissolution) Act 1997. Its original function was to rehabilitate, consolidate and develop state land with the approval of state authorities, as well as other privately owned land as requested by their landowners, for the benefit of rural populations, chiefly through the cultivation of cash crops such as rubber and oil palm. Government assistance is rendered through the provision of finances for management and facility expenditures, soft loans, resettlement services and other forms of support, with clear profit sharing structures. In addition, FELCRA is duty bound to ensure that it fulfils a series of social obligations to further advance the interests of rural communities. Today, FELCRA’s activities have also diversified to include research and development and ownership of various subsidiaries to further its business interests, which among others include plantation management, livestock,
involvement of native landowners, depending on the mandate of the agencies concerned.

(vii) The issuance of permits for mineral mining operations with the exception of petroleum, sand, limestone, sandstone and other types of stones, under the Minerals Ordinance 2004.

(viii) Prohibition against native communities from freely undertaking activities to map their territories and even to tender such community-made maps as evidence of the existence of their NCR in a court of law, without permission from the Department of the Lands and Surveys, under the Land Surveyors Ordinance 2001.

(ix) Codification of individual living customs of different indigenous ethnic groups and proclamation authorised under the Native Customs (Declaration) Ordinance 1996, resulting in the codified customs to be declared by the executive as the most authoritative source of customary law for the concerned community.

Thus as can be seen from the above, despite constitutional protection, indigenous customary land rights in Sarawak continue to be undermined by actions authorised under the various laws on land, forests, conservation and mining, among others. It is for this reason, we argue that the violations of indigenous customary land rights is caused by systemic poor conditions in policy, legislation and governance.

Table 1: Laws that may affect the NCR in Sarawak

<table>
<thead>
<tr>
<th>Law</th>
<th>Authority</th>
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</thead>
<tbody>
<tr>
<td><strong>Laws with the power to extinguish the NCR</strong></td>
<td></td>
</tr>
<tr>
<td>1. Land Code 1958</td>
<td>Department of Lands and Surveys, Sarawak</td>
</tr>
<tr>
<td></td>
<td>• Land acquisition for public purposes.</td>
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<tr>
<td></td>
<td>• Gazetting of government reserves for public purposes.</td>
</tr>
<tr>
<td></td>
<td>• Issuance of permits for land and agricultural development activities, including for oil palm plantations.</td>
</tr>
<tr>
<td></td>
<td>• Declaration of development areas to be managed by the Land Custody and Development Authority (LCDA) and Sarawak Land Development Board (SLDB).</td>
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<tr>
<td></td>
<td>Law Title</td>
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<td>--------------------------------------------------------------------------</td>
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<tr>
<td>2</td>
<td><strong>Forests Ordinance 2015</strong></td>
</tr>
</tbody>
</table>
|   | • Gazetting of the Forest Reserves and Protected Forests as sub-classes of the Permanent Forest Estates (PFE).  
   |   • Issuance of logging licences.                                       |                                                                            |
|   | • Issuance of pulp and paper and timber tree plantation licences. Some of these plantations may also be allowed to utilise a maximum of 20 per cent of their concession areas to grow oil palm for one cycle of 25 years. |                                                                            |
| 3 | **Wild Life Protection Ordinance 1998**                                 | Department of Forests, Sarawak; Sarawak Forestry Corporation (SFC)          |
|   | • Gazetting of Wild Life Sanctuaries.                                   |                                                                            |
|   | • Listing of protected species and totally protected species.           |                                                                            |
| 4 | **National Parks and Nature Reserves Ordinance 1998**                  | Department of Forests, Sarawak; Sarawak Forestry Corporation (SFC)          |
|   | • Gazetting of National Parks and Nature Reserves.                     |                                                                            |

**Laws on oil palm plantation development with the involvement of NCR landowners**

<table>
<thead>
<tr>
<th></th>
<th>Law Title</th>
<th>Department</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><strong>Land Custody and Development Authority Ordinance 1981</strong></td>
<td>Land Custody and Development Authority, Sarawak (LCDA or PELITA)</td>
</tr>
<tr>
<td></td>
<td>• Declaration of development areas under the authority of PELITA.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Implementation of various land development activities, including for oil palm plantations on land with NCR claims.</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td><strong>Sarawak Land Development Board Order 1972</strong></td>
<td>Sarawak Land Development Board (SLDB)</td>
</tr>
</tbody>
</table>
- Declaration of land development areas under the authority of SLDB.
- Implementation of various land development activities, including for oil palm plantations on land with NCR claims.

### 3. Sarawak Land Consolidation and Rehabilitation Authority Ordinance 1976

<table>
<thead>
<tr>
<th>Sarawak Land Consolidation and Rehabilitation Authority (SALCRA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Implementation of oil palm plantation development on land with NCR claims and palm oil processing.</td>
</tr>
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</table>

### Other laws that may affect NCR landowners

#### 1. Minerals Ordinance 2004

<table>
<thead>
<tr>
<th>Department of Lands and Surveys, Sarawak; State Minerals Management Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Issuance of permits for mineral mining operations with the exception of petroleum, sand, limestone, sandstone and other types of stones.</td>
</tr>
</tbody>
</table>

#### 2. Land Surveyors Ordinance 2001

<table>
<thead>
<tr>
<th>Department of Lands and Surveys, Sarawak</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Prohibition against any party from accepting any cadastral land surveys or survey plans, unless those that have been approved by the Department of Lands and Surveys.</td>
</tr>
<tr>
<td>• Prohibition for any person who, not being a land surveyor or a government surveyor, certifies as to the accuracy of any cadastral land survey or signs or initials any survey plan, or not being a surveying assistant acting under the immediate personal direction and supervision of a land surveyor, carried out or undertakes to carry out any work, in connection with a cadastral land survey.</td>
</tr>
</tbody>
</table>

#### 3. Native Customs (Declaration) Ordinance 1996 and all codified native customs under its authority

<table>
<thead>
<tr>
<th>Majlis Adat Istiadat Sarawak (Council of Customs of Sarawak)</th>
</tr>
</thead>
</table>
• Publication of the codification of individual living customs of different indigenous ethnic groups and the proclamation that each code shall function as the most authoritative source of customary law for the concerned community:
  
  • The codified customary law for each ethnic community is to be regarded as conclusive and its correctness shall not be questioned in any court.
  
  • No code or any of its amendments shall be held invalid solely due to the failure of the Majlis Adat Istiadat Sarawak to conduct consultations with native community leaders prior to its publication.

Federal Constitution

The rights of the indigenous peoples in Malaysia, including their customary land rights, are among the rights protected under various provisions of the Federal Constitution. These principles of the Federal Constitution have allowed indigenous communities to win several landmark decisions at the courts.

Right to life

The court of appeal in 1997 recognised that indigenous customary land rights fall under the right to life protected by Article 5, based on the fact of the close relationship between the culture and spirituality of indigenous peoples and the heritage of their customary land and forests. The judiciary is of the view that the loss of the indigenous customary land rights will certainly adversely affect the sources of livelihoods and the economic, social and cultural well-being of indigenous peoples.

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12 Kajing Tubek and Ors v. Ekran Bhd & Ors [1997] 4 CLJ 253; and Director-General, Department of Environment and Anor v. Kajing Tubek and Ors [1997] 3 MLJ 23.
Article 5: Fundamental liberties

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Equality and the prohibition against ethnic discrimination

Meanwhile, Article 8 guarantees the equality of all citizens, thus prohibiting discrimination on the grounds of ethnicity.

Article 8: Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

Right to property

Article 13 guarantees the protection of a citizen's right to property. The judiciary has confirmed that indigenous customary land rights are a form of a proprietary interest in the land itself, even in cases where such rights do not possess any documentary title or reservation status.

Article 13: Right to property

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

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

Article 13 provided the legal principle utilised by the High Court in 2002 and the Court of Appeal in 2005 to rule on Sagong Tasi. This civil action was undertaken by six Temuan villagers who represented 26 families in Selangor. Their customary land had earlier been acquired by the state for the purpose of constructing an expressway to the Kuala Lumpur International Airport in 1996, without the payment of adequate compensation. In principle, the court’s decision ruled that the indigenous customary land rights do not only comprise usufructuary rights on the land, which include the rights to crops and built properties, but also encompass the proprietary interest in the land itself, even if such land does not possess any documentary title or a reservation status. As such, these rights fall under the protection of Article 13.
Subsequently, the judiciary went on to rule that the use of the Aboriginal Peoples Act 1954 to calculate the payment of compensation for the affected families, was in conflict with the demands of Article 13. Therefore the loss of the indigenous customary land rights must be compensated in the same manner established for the loss of the documentary land title. For Peninsular Malaysia, the law which must be used to process and calculate adequate compensation will be the Land Acquisition Act 1960.

In 2010, all the defendants in the case agreed to withdraw their appeal at the Federal Court. The Federal Court subsequently directed that RM6.5 million be paid to the affected villagers. This amount also included payment of damages for trespass that had occurred during the eviction process. With this decision, the judiciary has effectively given legal recognition that the status of indigenous customary land rights without any form of documentary title or reservation status is of the same legal value as a documentary land title, although the two different types of land ownership may still have particular differences. Therefore, any trespass into indigenous land is a wrongful act that can be subject to a legal action.

Special position of the natives of Sarawak and Sabah

Article 153 of the Federal Constitution bestows a special position on the natives of Sarawak and Sabah, along with the Malay community. Provisions under this article stipulate that it shall be the responsibility of the king to safeguard the special position of the Sarawak and Sabah natives, the Malay community as well as the legitimate interests of other communities. This provision permits for reasonable proportion of positions in the public service to be reserved for such communities. Likewise, similar reservations can also be made in relation to the provisions of scholarship, education, training privileges and other similar facilities, as well as in the issuance of trade or business permits and licences.

Customs and usage having the force of law must be respected as law

Article 160(2) elaborates that the definition of law encompasses written law, common law (i.e. case law or judicial decisions) and communally recognised customs:

“Law” includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

**Land Code 1958**

The Sarawak Land Code 1958 is the main land legislation which contains the most extensive provisions on native customary rights in the state, although not all of such provisions may necessarily be favourable to the interests of the communities.

Before we proceed to discuss this land law however, clarifications on the status of two series of controversial amendments that have been introduced in the year 2000 and 2018 must first be made. In principle, these amendments, which have grave implications on the NCR, have indeed been passed by the Sarawak state legislature. However, following the tabling and approval of a bill by the state legislature, a separate gazette notification is required to proclaim the date for the new law or series of amendments to come into force. In the absence of such a gazette notification, newly approved statutes or amendments, cannot be enforced. Currently, the commencement of the enforcement date for a large part of the amendments made in the year 2000 and the entire amendments of 2018 have yet to be announced and gazetted.

In May 2000, the Sarawak state legislature passed the Land Code (Amendments) Ordinance 2000, itemised as Chapter A78. However, since the passing of Chapter A78, only parts of the amendments have been gazetted to come into force. Through a notification in the Sarawak Government Gazette dated March 31, 2002 (Vol. LVII, No. 7, Legal Notification (L.N.) 17. April 1, 2002), Sections 7, 9, 14, 15, 22, 25 and 26 of Chapter A78 were finally gazetted to come into force, beginning from April 1, 2002. Transformed into the Sarawak Land Code 1958, these sections refer to the amendments made to its Sections 18, 46, 53(2), 54, 65, 73(1) and 77, respectively, which are not directly related to the NCR. The coming into force of the remaining sections of the amendment bill however, was never gazetted. The reason for this has remained unknown.

Then in 2018, the Land Code (Amendments) Ordinance 2018, itemised as Chapter A81, was passed by the Sarawak state legislature. These amendments were also similarly protested by civil society groups and native communities, for they introduce more limitations to the exercise of the NCR. However, Section 9 of this ordinance also instructs for the aforementioned Land Code (Amendment) Ordinance 2000 to be repealed, except for the sections that have already been enforced in 2002. Compounding the problem further, the enforcement date for Chapter A81 to come into force has also yet to be gazetted.

Therefore, in view of the continued absence of the gazette notification to proclaim the commencement of the enforcement date for the remaining provisions of Chapter A78 and Chapter A81, this publication will adhere to the pre-amended version of the law.
Land classification

Under this land law, the definition of ‘state land’ puts indigenous customary territories that are without any documentary title, which tends to form the bulk of such territories, under direct state control:

**State land**

All land for which no document of title has been issued and all land which subsequent to the issue of a document of title may have been or may be forfeited or surrendered to or resumed by the Government, and includes –

(a) the bed of any river, stream, lake or watercourse; and

(b) the foreshore and beds of the sea within the boundaries of Sarawak as extended by the Sarawak (Alternation of Boundaries) Order in Council, 1954.

The legal constitution of all land classes in Sarawak is defined under Section 2 of the code, which deals with interpretation.\(^{14}\)

(i) **Mixed Zone Land**

Land that can be held under private titles and occupied by both native and non-native persons or permanent residents in Malaysia without any restrictions. The Mixed Zone Land cannot be occupied by any persons without a valid document of title.

(ii) **Native Area Land**

Land which can be held only by native persons but under a document of title. Non-native persons are only allowed to hold rights to such land under specific circumstances, including for mineral prospecting and forest produce harvesting. Much of such land is located within native customary territories that are in close proximity to areas that have become relatively urbanised.

(iii) **Native Customary Land (NCL)**

(a) Land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the January 1, 1958, and still subsist as such.

(b) Land from time to time comprised in a reserve to which Section 6 applies.\(^{15}\)

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\(^{14}\) The provisions on the different land classes originated from the former Sarawak Land Classification Ordinance 1948 [Ordinance 19/1948] under its Subsections 3(1)(a) to (c).

\(^{15}\) Section 6 provides for the establishment of Native Communal Reserves.
(c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit issued under Section 10.

In principle, the NCL encompasses land that are held by natives under customary tenure without any private documentary land title, which technically still renders the land as a form of state land, as well as land that has been gazetted as a Native Communal Reserve, which in this instance renders it as a form of government reserved land. Native persons in lawful occupation of the NCL that has not been gazetted as a Native Communal Reserve are deemed to be holding a land licence from the government that is however exempted from any form of land rent. The NCL may not be alienated unless the subsisting NCR have first been successfully extinguished.

(iv) Government Reserved Land

This is land reserved for various purposes including but not limited to, for the direct use of the state and federal governments, the establishment of the three categories of the Permanent Forest Estate (PFE) currently regulated under the Forests Ordinance 2015, the establishment of conservation areas currently regulated under two state laws, the establishment of Native Communal Reserves under the code itself. A reserve creation can be notified without stating its purpose, or its purpose can be specified on a later date. Change of existing purpose is also allowed.

(v) Interior Area Land

Land which does not fall within any of the definitions of the four other categories. The bulk of such land is located in the interior.

Although this land class is distinguished from the NCL, legally speaking, it may still be subject to customary land rights of native communities. Since Interior Area Land is a form of state land which is without any holder of documentary title, the absence of executive recognition on the existence of NCR over such land cannot be simply used to invalidate any NCR claims, as such rights owe their existence to pre-existing indigenous laws and not to any modern legislation. Modern legislation in this case will be relevant only for the purpose of ascertaining if such rights had been terminated by any executive, legislative or judiciary action at some point of time. In the absence of any rights termination exercise, despite its categorisation, such rights may well subsist on the Interior Area Land to this very day.
Creation of the NCR

Description on the NCR in the state is provided for under Subsections 5((1) and (2) of the law.

Section 5

(1) As from the 1st day of January, 1958, native customary rights may be acquired in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are:

(a) the felling of virgin jungle and the occupation of the land thereby created;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method.

In the year 2000, Chapter A78 instructed for the deletion of Subsection 5(2)(f). However, as mentioned above, the commencement date for this amendment to come into force, was never gazetted. If Subsection 5(2)(f) is ever removed, this will certainly dilute the statutory clarity which recognises the legitimacy of NCR that had been acquired through methods other than those that have been specified by Subsections 5(2)(a) to (e). These include the acquisition of shared common rights by an entire community on the higher forests through hunting, harvesting and gathering activities and the recognition of territorial boundaries through mutual agreements with adjacent communities.

Meanwhile, the lack of documentary title for the NCR does not jeopardise their legitimacy, as the people are still regarded as government land licensees under the law. The first of the two provisos following Subsection 5(2) reads:

Until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him.
The second proviso of the same Subsection however, has an important legal implication:

the question whether any such right (NCR) has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January 1958.

 Increasing the strength of executive recognition of the NCR

The land law also provides for ways in which indigenous customary land rights can be further strengthened and explicitly recognised through executive actions. First, its Section 6 allows for the creation of the Native Communal Reserve, which is still explicitly admitted to be part of state land.

Section 6

(1) The Minister may by order signified in the Gazette declare any area of State land to be a Native Communal Reserve for the use of any community having a native system of personal law and may, by such order or by subsequent order, declare that the customary law of such community in relation to the acquisition, transfer and transmission of rights and privileges in or over land, and in any building or other structure erected therein, shall apply with such modifications as may be specified or provided for in any such order.

(2) Save in so far as the contrary may be specified or provided for in any such order or by this section, rights in any land declared to be a Native Communal Reserve under subsection (1) shall be regulated by the customary law of the community for whose use it was declared to be reserved.

(3) Notwithstanding subsection (2), but without prejudice to subsections (4) to (7) inclusive, at any such land shall continue to be State land, and the native community for whose use it was reserved or any member thereof acquiring any rights therein shall hold the same as a licensee from the Government, and if, by virtue of the provisions of this section (including the provisions of any order made under subsection (1)), any individual native customary rights become established, the issue of any document of title in respect thereof shall be in the absolute discretion of the Director:

Provided that the Minister may of his own motion or upon petition review and confirm or amend any exercise of such discretion.

Like its counterparts in the Peninsular Malaysia and Sabah, the status of the Native Communal Reserve in Sarawak may also be revoked, as provided for by Subsection 6(4).

(4) If the Minister is satisfied that any part of any area comprised in any declaration under subsection (1) is no longer required as a Native Communal Reserve and that this subsection may be applied without causing injustice or oppression, he may by order signified in the Gazette declare that such part shall cease to form part of such Native Communal Reserve, and as from such date, if any, as from which such declaration is expressed to come into effect, or, if no such date is expressed, then as from the date of publication in the Gazette of any such order, such part shall be at the disposition of the Government as free and unencumbered
by any right, privilege or equity in respect thereof as if it has never been declared to be a Native Communal Reserve.

Second, the state may also allow for the acquisition of new rights after 1958 by issuing a special permit under Section 10 of the code although admittedly, its tone is more focused on prohibiting the occupation of areas within Mixed Zone Land without a valid document of title:

Section 10

(1) Without prejudice to section 5(2)(e) or to section 29 or to the provisions of any written law, no person may occupy or exercise any rights or privileges over any Mixed Zone Land save under a valid and subsisting document of title and, if the land in question is unalienated, any occupier thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

Third, in addressing the reality that most subsisting NCR in Sarawak are held without any form of documentary title on state land, Section 18 of the law specifies that if the state finds such claims of rights legitimate, it can in fact issue the rights holders with a grant in perpetuity, free of any land rental charges. Section 18 comes under Part III of the law which addresses issues related to the alienation of state land. This process therefore can be deemed as a form of land alienation for native persons who hold customary tenure over their traditional land.

Section 18

(1) Where the Director, subject to any direction from the Minister, is satisfied that a native has occupied and used any area of unalienated State land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes, he may, subject to section 18A, issue to the native a grant in perpetuity of that area of land free of premium rent and other charges.

(2) A grant in perpetuity under this section shall be made for residential or agricultural purposes, as the case may be, subject to such conditions, obligations and restrictions, as the Director on the direction of the Minister, may impose.

NCR extinguishment and land acquisition

Subsections 5(3) to 5(7) of the Land Code 1958 also provide for the extinguishment of the NCR. The notification process provided by the law is severely inadequate, requiring that it is only published in the Sarawak Government Gazette and in one newspaper, in addition to being displayed at the local district office. There is no provision whatsoever which compels the state to inform affected peoples in a more personal fashion, or to do so in an appropriate language or dialect. However, as some NCR extinguishments undertaken through this law had involved forced
relocation for the purpose of the construction of large dams, in such cases the state had no choice but to also conduct personal notifications for affected communities.

From the date of the announcement and regardless of whether affected communities have been fully informed of the decision to extinguish their land rights or otherwise, the people will have a maximum period of 60 days to submit their claims to the Department of Lands and Surveys. Upon receiving the decision on the compensation claims from the department, dissatisfied claimants will have a maximum of 21 days to write to the department to request for an arbitration process.

Subsection 5(3)

(a) Any native customary rights may be extinguished by direction issued by the Minister which shall be –

(i) published in the Gazette and one newspaper circulating in Sarawak; and

(ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate, and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:

Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him without payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

(b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

(c) No claim for compensation for extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

Subsection 5(4)

(a) Any person who is dissatisfied with any decision made by the Superintendent under subsection (3) on the ground that his claim to native customary rights has been rejected or not recognised by the Superintendent;

(i) the allocation of land over which such rights are to be exercised, is inadequate or inequitable; or

(ii) the amount or apportionment of compensation is inadequate, unfair or unreasonable, may within 21 days from the date of receipt of the decision of the Superintendent, by notice in writing addressed to the Superintendent require the matter to be referred to arbitration in accordance with Section 212.
(b) Upon receipt of the notice of arbitration, the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be deposited in the High Court, pending the outcome of such arbitration proceedings.

Subsection 5(5)

Subsection (3) shall apply whether the land over which the customary rights are exercised is required for a public purpose or the extinction of such rights is expedient for the purpose of facilitating alienation, but shall have no application to cases in which the Forests Ordinance, the National Parks and Nature Reserves Ordinance, 1998 and or any written law, including Part V, makes other provision for the extinguishment thereof.

Subsection 5(6)

The Majlis Mesyuarat Kerajaan Negeri may make rules for the assessment of compensation payable for extinguishment of native customary rights under this section and section 15.

Subsection 5(7)

Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights.

Meanwhile, Subsection 15(1) stipulates that land with subsisting NCR, cannot be alienated unless all such subsisting rights have first either been surrendered or extinguished and compensation payments have been made to affected persons.\textsuperscript{16}

Section 15

(1) Without prejudice to section 18 and 18A, where native customary rights have been lawfully created over State land, such land shall not be alienated or be used for a public purpose until all native customary rights have been surrendered or extinguished or provisions for compensating the persons entitled thereto have been made.

The resumption of land by the state is fully addressed under part 4 of this law, although its section 82 stipulates that the extinguishment of the NCR will not be dealt with by provisions under this part. Its section 46 nevertheless, does provide for a wide range of purposes for which land may be resumed by the state. While Subsections 46(a) until 46(f) describe a list of more specific contexts of such purposes, the same cannot be necessarily said on the subsequent Subsections:

\textsuperscript{16} The subsequent Subsections 15(2)(a) - (f) provide for the processes related to the surrendering of the affected rights once the land is required by the state. This land resumption process is undertaken mostly at the level of the Department of Lands and Surveys, avoiding the more elaborate process of issuing a direct ministerial NCR extinguishment order, as provided for by Subsection 5(3). However, since it is in unlikely that native communities are willing to part with their land voluntarily, even with compensation payments, certainly it is more expedient for the state to simply directly invoke Subsection 5(3).
Section 46

(g) any work or undertaking by any person, corporation or statutory body, which in the opinion of the Minister is beneficial to the economic or social development of the State or any part thereof or to the public generally or any class of the public;

(h) any purpose declared to be a public purpose by or under any written law either for the purpose of this Code or for the purpose of any written law repealed by this Code;

(i) any purpose which the Majlis Mesyuarat Kerajaan Negeri by order signified in the Gazette may declare to be a public purpose, whether in addition, in lieu or by way of modification of any of the foregoing; and

(j) any combination of the above purposes.

Subsequently, Section 47 deals with the power of authorised persons to enter and survey “land in any locality” that is required to be resumed by the state, after “a public notice of the substance of such decision” to be given at convenient places in the concerned locality. Section 48 then addresses the declaration and notification process for the resumption of such land that is required for a public purpose. Sections 49 to 51 all deal with the procedures linked to the claims of affected persons.

Development Areas and large-scale plantations on NCR land

Section 18A of the law empowers two statutory agencies i.e. the Sarawak Land Custody and Development Authority (LCDA, or its Malay abbreviation, PELITA) and the Sarawak Land Development Board (SLDB), to use their respective ordinances to declare an area as a Development Area. A lease over such land may then be issued for not more than 60 years to any approved corporate or statutory body. On the expiry of the lease, if they so wish, natives whose lands have been included in a Development Area must submit the application for the reinstatement of their rights over the land to the Department of the Lands and Surveys, which may then issue such a grant to the applicants, with terms and conditions that is deemed fit to be imposed.

Clearly, Section 18A was introduced in order to facilitate access to native customary land for the purpose of developing them into plantation projects. These may include joint-venture projects undertaken between the private sector and native landowners in the controversial Konsep Baru land development policy, which will be further discussed below. Apart from questions of consent and other issues associated with the transparency and fairness of the profit-sharing ventures under the Konsep Baru, in reality, this amendment has the possible effect of permanently terminating the peoples’ rights.
Section 18A

(1) Where unalienated State land, over which a native who has acquired ownership thereof by the exercise of native customary rights under section 5, is within –

(a) a Development Area declared under section 11(1) of the Land Custody and Development Authority Ordinance, 1981 [Ord. No. 4/81]; or

(b) an area designated as a Sarawak Land Development Area under the Schedule of the Lembaga Kemajuan Tanah Sarawak (Sarawak Land Development Board ) Order, 1972 [Swk. L.N. 17/72]

the Superintendent may issue a lease over such land for a term of not more than sixty years, on such terms and conditions as he may impose, to a body corporate approved by the Minister.

(2) The Superintendent may amalgamate all land, within a Development Area referred to in subsection (1), over which natives have acquired ownership, or over such land and any adjoining State land, into one parcel of land, for the purpose of granting a single document of title to the body corporate approved by the Minister.

(3) On the expiry of a lease issued to the body corporate under subsection (1), any native whose land has been included in such a lease may apply to the Superintendent for the issue to him [sic] of a grant over his land or any part thereof. The Superintendent may, subject to the direction of the Director, issue such grant to the native upon such terms and conditions as he deems fit to impose.

(4) For the purposes of this section, "body corporate" shall mean a body corporate established under State law or a company incorporated under the Companies Act 1965 [Act 125], and which has been deemed, pursuant to section 9(1)(d) to be a native for the purpose of or relating to a dealing under this Code, in or over Native Area Land.

Forests Ordinance 2015

The Forests Ordinance 2015 was passed by the Sarawak state legislature in April 2015, to replace its predecessor, the Forests Ordinance 1954. First and foremost, the forestry law declares that all forest produce in the state as property of the state:

Section 39

All forest produce situated, lying, growing or having its origin within a permanent forest or State land shall be the property of the State except where the rights to such forest produce have been specifically disposed of in accordance with the provisions of this Ordinance or any other written law.

The forestry legislation provides for the creation of three classes of the Permanent Forest Estate (PFE), namely the Forest Reserve, Protected Forest and Communal Forest Reserve. The gazetting of the Forest Reserves and Protected Forests under the Forests Ordinance 2015 tends to largely extinguish any NCR claims to such forests, as the case is in Sabah and Peninsular Malaysia. Although the state may concede
certain ‘subsisting rights’ to affected native communities in such forests, such rights will be subject to new conditions, set at the discretion of the state.

Section 21

Where any right or privilege has been admitted but was not extinguished at the time of the constitution of the forest reserve or protected forest (referred to in this Part as “subsisting rights or privileges”), the exercise thereof shall be subject to the control of the Director and to such order or direction as he may make to regulate the limits or area within a forest reserve or protected forest whereby the subsisting rights or privileges may be exercised, including the mode of exercising thereof and having regard to the natural capacity of the natives to enjoy such rights or privileges.

While such conditions may allow affected communities to continue residing in such forests and to carry on with their cultivation activities on existing farms, they may also make it an offence the planting of new trees or unauthorised utilisation of the forests and the felling of trees within such forests. Further, the amount of jungle produce that can be harvested by communities may also be heavily controlled.17

Apart from Section 39, Section 20 of the law also asserts that all forest produce found within Forest Reserves and Protected Forests specifically, as belonging “absolutely to the government.” In addition, the section has strict clauses prohibiting not only the unauthorised staying and occupation of Forest Reserves and Protected Forests, but unauthorised entrance as well, by persons whose rights have been extinguished for the purpose of establishing such production forests.

Section 26 of the law provides for a list of activities that are prohibited to be carried out without authorisation within the Forest Reserves and Protected Forests. They include the felling, cutting and injuring of any tree or timber, including by fire, the erection of buildings, the clearing of land for cultivation or for any other purpose, animal pasturing and even trespass of the forests themselves. Section 27 however does prevent activities associated with the exercise of any subsisting rights within Forest Reserves and Protected Forests, from being punishable under the law.

In 1995, Sarawak corporatised the functions of its Forests Department, including its enforcement tasks to the Sarawak Forestry Corporation (SFC) by virtue of the Sarawak Forestry Corporation Ordinance 1995. The department remains a policy making body.

NCR extinguishment and the gazetted production forest

The forestry legislation does provide for a notification and compensation claims process for the extinguishment of the NCR prior to the establishment of the Forest

17 For more information, please see Sarawak State Attorney-General's Chambers (2007).
Reserve and Protected Forest. However this process is highly unfavourable to affected communities. It does not incorporate any free, prior and informed consent procedures. It does not compel the NCR extinguishment notification to be served in a more personal fashion to affected communities, demand for local languages to be used for the notification or direct the precise manner in which compensation payments are to be calculated.

The law only stipulates that the notification must first be initiated by an announcement in the Sarawak Government Gazette and followed by its publication in at least one newspaper, or in such medium as circumstances may permit, and displayed at the local district office. Affected communities are given a maximum of 60 days from the date of the notice to submit their claims and evidence to support their claims. Affected persons who fail to submit such claims within the stipulated period shall simply be deemed to have abandoned or waived their rights and no longer be entitled to any compensation payment.

Following the submission, an enquiry process will take place. Affected persons who are not satisfied with the decision of the department will have another 21 days to appeal at the sessions court. The rights that can be claimed are those that can be demonstrated to exist prior to January 1, 1954, the date the predecessor to the current forestry legislation came into force and are continuously held until the date of the extinguishment notice.

Due to the absence of a mandatory personal notification and information dissemination process, historically, many affected indigenous communities have affirmed that they were not even aware of the extinguishment of their NCR for the purpose of establishing such production forests, not until the process had reached its final stages or even completed.

Certainly, it is simply illogical for us to expect that rural communities to discover extinguishment notifications displayed in a district office located in the nearest town centre or published within the advertisement section of a newspaper, which in the first place may not even be accessible to them on a daily basis. Further in the past, a high percentage of the older generation were not even fluent in the national or English languages and lived in a highly oral culture with a modest literacy rate.

Section 8:

(1) Where it is proposed to constitute a forest reserve or a protected forest over any State land, the Minister shall publish in the Gazette, a notification –

(a) specifying as accurately as possible the description and limits of the land intended to be constituted a forest reserve or a protected forest;

(b) directing any person claiming any right or privilege in or over such land to submit, within sixty days from the date of publication of such notification, to
the Regional Forests Officer for the area in which the land is situated, his
claim with evidence in support thereof; and

(c) stating that upon the expiry of a period of sixty days from the date of
publication of the notification, all rights and privileges in or over the area
intended to be constituted a forest reserve or a protected forest shall, unless
admitted under section 14, be deemed extinguished, and that compensation
shall be paid to any person whose rights or privileges have been so
extinguished in accordance with this Part.

(2) A copy of the notification shall be published in at least one newspaper circulating
in Sarawak, or in such medium as circumstances may permit, and displayed at the
District Office for the area to be constituted a forest reserve or protected forest.

Section 12: Enquiry into claim

(1) The Regional Forests Officer shall, within sixty days upon the expiry date of the
notification published under section 8(1)(b), conduct an enquiry into any claim or
privilege in or over any land proposed to be constituted a forest reserve or
protected forest.

(2) In any such enquiry, the onus of proving the existence of any right or privilege
claimed shall be on the claimant.

(3) The Regional Forests Officer may call for and receive any evidence to verify,
confirm or support any claim from any claimant or any public officer or any other
person having knowledge of such claim. In the conduct of such enquiry, the
Regional Forests Officer shall have the same powers to summon and examine
witnesses as a Magistrate.

(4) Where it is considered necessary and expedient, any enquiry conducted pursuant
to this section may be held in public at such time and on such date as may be
specified in a notice to be issued by the Regional Forests Officer.

Section 13: Report

(1) The Regional Forests Officer shall, upon conclusion of the enquiry, furnish a report
thereof to the Director.

(2) The report shall the contain notes of proceedings and evidence recorded at the
enquiry together with such findings and recommendations as the Regional Forests
Officer may deem fit or proper to make.

Section 14: Rights or privileges admitted, etc.

(1) Upon receipt of the report furnished under section 13, the Director shall make a
decision as to –

(a) the right or privilege that is to be admitted and subjected to section 21; or

(b) the right or privilege that is to be extinguished.

(2) Where any right or privilege is to be extinguished under subsection (1)(b), the
Director shall forthwith proceed to assess the compensation payable to the
claimant in accordance with section 15.
Section 15: Assessment of compensation

In assessing compensation payable under this Part for the extinguishment of any right or privilege under section 14, the Director shall take into account the following –

(a) the nature and extent of the right or privilege claimed;

(b) whether such right or privilege is still exercised or enjoyed by the claimant at the date of the notification published under section 8;

(c) the degree of actual dependency, if any, of the claimant on such right or privilege, as a means of his livelihood;

(d) if the right or privilege relates to the planting of any crop, whether an alternative site or area has been provided by the Government for the person or the community to which he belongs, for farming; and

(e) any other relevant factors or circumstances pertaining to the enjoyment or exercise of such right or privilege.

Section 17: Appeal

(1) Any person aggrieved by the decision of the Director may, within thirty days from the date of service of the decision on him, appeal to a Sessions Court.

(2) An appeal to a Sessions Court shall be by way of an application as provided in the Rules of Court 2012.

(3) Subject to the Rules of Court 2012, a Judge of the Sessions Court may give such direction as he may deem fit or necessary for the disposal or hearing of any appeal before him under this section.

Communal Forest Reserve

Sections 30 to 38 of the forestry legislation also provide for the creation of the Communal Forest Reserve, the only category which can be gazetted for the sole domestic use of local native communities. The native community concerned is to maintain the communal forest in a condition of sustained yield under the direction of the Forests Department.

However, the size of the Communal Forest Reserve has been in sharp decline since the 1960s. In fact, data on this is not readily made available in the public but the percentage of its size in relation to the overall size of the forested area or even the PFE in the state, is believed to be less than one per cent today. In practice, the gazetting of such forests has long been halted by the state. In the last three decades, countless native villages had applied for such legal recognition to no avail. In 1992, a report published by the then German international technical cooperation agency, formerly known as the GTZ, seemed to have confirmed that this inaction is indeed a result of deliberate state policy [emphasis added]:
According to the Forests Department it is the present policy not to gazette new Communal Forests and the distinction of the PFE into Forest Reserves, Protected Forests and Communal Forests has lost its importance, because the right of the local people to collect forest produce for their own use is no longer restricted to Protected Forests and Communal Forests today.\textsuperscript{18}

Further, it must also be noted that in 2001, a confounding amendment was also made to the predecessor forestry legislation on the Communal Forest Reserve. This was the insertion of Subsection 47(3), which perversely posited that if members of a community proceeded to harvest forest produce within their Communal Forest Reserve, they would then be presumed to be taking it for sale, exchange or direct profit, unless they could prove otherwise. This insertion effectively rendered the function of the Communal Forest Reserve meaningless. The content of Subsection 47(3) is now retained through Subsection 37(3) in the new 2015 law, with specific penalties being stipulated in the succeeding Subsections 37(4) and 37(5).

**Section 37: Removal of forest produce**

1. Subject to any conditions imposed in writing by the Director or any forest officer authorized by him under section 36, any member of the native community may remove, free of royalty or fee, any forest produce for his own use and not for sale, barter or profit.

2. No other person shall remove any forest produce from a communal reserve for any purpose whatsoever.

3. A member of the native community shall be presumed to be taking forest produce for sale, barter or profit unless he can prove to the satisfaction of the court or the Director or any officer authorized by him to investigate an offence under section 81, that he requires the forest produce as firewood or for the construction, repair or extension of his dwelling house or for the making of any boat, furniture or any other household goods or utensils for the use of himself or his immediate family, and that the forest produce was taken by himself or a member of his family.

4. Any person who contravenes subsection (1) or (2) shall, upon conviction, be punished with a fine of not less than five thousand ringgit and not exceeding fifty thousand ringgit or imprisonment for a term not exceeding two years or both, and for a subsequent offence, shall be punished with a fine of not less than ten thousand ringgit and not exceeding one hundred thousand ringgit or imprisonment for a term not exceeding five years or to both.

\textsuperscript{18} GTZ. (1992: 23).
National Parks and Nature Reserves Ordinance 1998 and the Wild Life Protection Ordinance 1998

Apart from the forestry legislation, the Sarawak Forests Department also oversees the implementation of two other pieces of legislation regulating totally protected areas i.e. the National Parks and Nature Reserves Ordinance 1998, which regulates the creation of National Parks and Nature Reserves, as well as the Wild Life Protection Ordinance 1998, which regulates the establishment of Wild Life Sanctuaries and protected animal and plant species. Like the forestry legislation, these conservation laws also pose similar threats to the NCR. For the purpose of the establishment of these conservation forests or areas, these rights will also be either extinguished in full or severely reduced and regulated.

For the National Parks and Nature Reserves Ordinance 1998, although its Subsection 8(3) allows for the designation of any part of its conservation areas for the exercise of subsisting rights or privileges, its Section 21 also spells out the effects of the notification of the establishment of its conservation areas, which bars unauthorised entrance, residence and stay within its conservation areas.

Section 21

(1) From the date referred to in the notification gazetted under section 19(1) or 20(1), no person shall –

(a) enter, reside or remain in a national park or a nature reserve without the permission of the Controller;

(b) exercise and enjoy any right or privilege in the national park or the nature reserve, whether such right or privilege were awarded under licence, permit, or accrued or recognized under any written law, except in accordance with the written directive or guidelines issued by the Controller; and

(c) undertake any activities, studies or research in the national park or the nature reserve without the prior written permission of the Controller, who shall, if such permission is to be given to a person who is not a member of the public service of the State, consult the Chief Executive Officer of the Sarawak Biodiversity Council before granting such permission.

(2) Any person who fails to comply with any of the provisions of subsection (1) may be removed or evicted from the national park or the nature reserve by the Park Warden or a police officer not below the rank of Inspector.
Meanwhile, Section 23 declares that National Parks and Nature Reserves to be the property of the state:

**Section 23**

(1) From the date of constitution of a national park or a nature reserve, the place so constituted shall be the property of the Government of Sarawak and shall, subject to this Ordinance, be managed and controlled by the Controller.

(2) Nothing in this Part shall authorize the Controller to grant any permit or licence to any person who is not a member of the public service of the State to take away, remove any wild life for research purposes without the prior approval of the Chief Executive Officer the Sarawak Biodiversity Council.

Section 26 provides for the list of acts prohibited within National Parks and Nature Reserves, which include, among others, the unauthorised entrance, residence or stay within the areas; the possession of any weapons, explosives, poison or any contrivance of any kind used for the taking, capturing, shooting, killing or disturbing of any animals; the killing, injuring, capturing or disturbing of any animal or the destruction of any plant, egg or nest; the setting of fire to any plant; the destruction and removal of objects of special interest; the removal of any animal or plant; the erection of buildings; and the clearing of land.

Last but not least, Subsection 37(1) of the law provides a long list of matters on which further regulations may be made by the state in respect of such conservation areas. These include the exclusion of members of the public from the areas; the capturing and killing of animals; the burning and cutting of vegetation; the taking, hunting, killing, snaring, trapping or capturing of any kind of wildlife by people with subsisting rights and privileges; the control of the type of weapons, instruments, contrivances and methods that they are able to use in the taking, shooting or killing of wild life; the conditions subject to which permission to enter the areas may be granted; and the periods of times during which they shall be open to the public.

Likewise, the Wild Life Protection Ordinance 1998 also contains similar provisions. Its Section 25 allows for some exemption to be given for the exercise of any right or the enjoyment of any privilege. Its Section 22 spells out the effects of the notification of the establishment of the Wild Life Sanctuary, which among others also bars unauthorised entrance, residence and stay in the gazetted area.

**Section 22**

(1) From the date referred to in the notification gazetted under section 20(1) or 21(1), no person shall –

(a) enter and remain in the Wild Life Sanctuary without the written permission of the Warden in charge thereof;
exercise and enjoy any right or privilege in the Wild Life Sanctuary, whether such right or privilege has been awarded under any licence, permit, or accrued or recognized under any written law, except in accordance with the written directive or guidelines issued by the Controller; and

undertake any activities, studies or research in the Wild Life Sanctuary without the prior written permission of the Controller.

Any person who fails to comply with any of the provisions of subsection (1) may be removed or evicted from the Wild Life Sanctuary by a Warden or a police officer not below the rank of Inspector.

Its Section 24 provides for the list of acts prohibited within Wild Life Sanctuaries, which include, among others, the unauthorised entrance, residence or stay within a Wild Life Sanctuary; the hunt or capture of any animal; the possession of any weapon, contrivance or material for the taking, shooting or killing of any animal; the possession or use of any trap, snare, net or any similar contrivances (with the exception of fishing nets for people with subsisting rights or privileges); the cutting, collection, removal or possession of any wild plant; the possession of any wild animal or its parts and derivates; the erection of buildings; and the breaking of land for cultivation or for any other purpose.

Finally, its Subsection 55(1) also provides for the list of matters on which further regulations may be made by the state in respect of the Wild Life Sanctuary. These include the control on the taking, hunting, killing, snaring, trapping or capturing of any kind of wildlife; and the type of weapons, instruments, contrivances and methods to be used in the taking, shooting or killing of wildlife.

**NCR extinguishment and conservation areas**

Like the forestry legislation, the two conservation laws also provide for a notification and compensation claims process for the extinguishment of the NCR prior to the establishment of National Parks, Nature Reserves and Wild Life Sanctuaries. Similarly, the process under both laws is also highly unfavourable to affected communities. They do not incorporate any free, prior and informed consent procedures. They do not compel the rights extinguishment notification to be served on a personal fashion to affected communities, only stipulating that this however may be done based on ministerial discretion, if necessary. They also do not direct for local languages to be used or spell out a more precise manner in which compensation payments are to be calculated.

Both laws only stipulate that the notification must first be initiated by an announcement in the Sarawak Government Gazette and followed by its publication in at least one newspaper and displayed at the local district office. Additionally, the state may also apply its own discretion in deciding whether it is necessary for other
Notification methods to be carried out for affected native communities. Affected communities are given a maximum of 60 days from the date of the notice to submit their claims and evidence to support their claims. Affected persons who fail to submit such claims within the stipulated period shall simply be deemed to have abandoned or waived their rights and no longer be entitled to any compensation payment.

Following such submissions, an enquiry process will take place. Affected persons who are not satisfied with the decision of the department will have another 21 days to appeal at the sessions court. For the National Parks and Nature Reserves Ordinance 1998, the rights that can be claimed are those that can be demonstrated to exist prior to February 16, 1956 and are continuously held until the date of the extinguishment notice. For the Wild Life Protection Ordinance 1998, the cut off date is set on January 1, 1958.

For the lack of a mandatory personal notification and information dissemination process, again, many affected indigenous communities will attest that they were not even aware of the extinguishment of their NCR for the purpose of establishing such conservation forests and areas, not until the process had reached its final stages or even completed, although admittedly this issue is more prevalent for the reservation of production forests. Once again, both laws have the effect of presuming that native communities are able to learn of the NCR extinguishment process without any mandatory personal notification being implemented by the state.

The following are part of the provisions concerning the extinguishment of the NCR under the National Parks and Nature Reserves Ordinance 1998.

**Section 10: Procedure for constituting a national park or a nature reserve**

1. Where it is proposed to constitute a national park or a nature reserve over State land which is not within a forest reserve or a Wild Life Sanctuary, the Minister shall publish in the **Gazette** a notification –
   
   a. specifying as accurately as possible the description and limits of the land intended to be constituted as a national park or a nature reserve;
   
   b. directing any person claiming any rights or privileges in or over such land to submit, within sixty days from the date of publication of such notification, to the Chief Park Warden for the area in which the land is situated, his claim with evidence in support thereof; and
   
   c. stating that upon the expiry of a period of sixty days from the date of publication of the notification, no claim to any rights or privileges in or over the area intended to be constituted a national park or a nature reserve shall be entertained and such rights or privileges, if any, shall be deemed to have been abandoned or the exercise thereof has been waived, by any person entitled thereto.

2. A copy of the notification shall be published in at least one newspaper circulating in Sarawak, and displayed at the District Office for the area to be constituted a
national park or a nature reserve or be brought to the notice of the persons affected thereby in such a manner as the Minister thinks necessary.

Section 13: Inquiry into claim

(1) The Chief Park Warden shall, within sixty days from the date of receipt of any claim submitted under section 12 or such extended period as the Controller may allow, conduct an inquiry into such claim.

(2) In any such inquiry, the onus of proving the existence of any right or privilege claimed shall be on the claimant.

(3) The Chief Park Warden may call for and receive any evidence to verify, confirm or support any claim from any claimant or any public officer or any other person having knowledge of such claim. In the conduct of such inquiry, the Chief Park Warden shall have the same powers to summon and examine witnesses as a Magistrate.

(4) Where it is considered necessary and expedient, any inquiry conducted pursuant to this section may be held in public at such time, on such date and at such location as may be specified in a notice to be issued by the Chief Park Warden.

Section 14: Report

(1) The Chief Park Warden shall, upon conclusion of the inquiry, furnish a report thereof to the Controller.

(2) The report shall contain the notes of proceedings and evidence recorded at the inquiry together with such findings and recommendations as the Chief Park Warden may deem it fit or proper to make.

Section 15: Rights or privileges admitted

Where any right or privilege is admitted or found to have subsisted at the time of the notification published under section 10, the Controller shall –

(a) regulate the exercise or enjoyment of such rights or privileges including directing the areas or places within a national park or a nature reserve where the rights or privileges may be exercised or enjoyed and the manner of exercising or enjoyment thereof; or

(b) with the approval of the Minister, proceed to extinguish such rights or privileges and pay adequate compensation to the lawful claimant thereof.

Section 16: Assessment of compensation

In assessing the compensation payable under this Part for the extinguishment of any right or privilege in or over the area constituted or to be constituted a national park or a nature reserve, the Controller shall take into account the following:

(a) the nature and extent of the right or privilege claimed;

(b) whether such right or privilege is still being exercised or enjoyed by the claimant at the date of notification published under section 10;

(c) the degree of actual dependency, if any, of the claimant on such right or privilege, as a means of his livelihood;
(d) if the right or privilege relates to the planting of any crop, whether alternative site or area has been provided by the Government for the person or the community to which he belongs, for farming; and

(e) any other relevant factors or circumstances pertaining to the enjoyment or exercise of such right or privilege.

Section 18: Appeal

(1) Any person aggrieved by the decision of the Controller may, within thirty days from the date of service of the decision on him, appeal to a Sessions Court.

(2) An appeal to a Sessions Court shall be by way of originating application and shall follow the procedures prescribed by the Subordinate Courts Rules 1980.

(3) Subject to the Subordinate Courts Rules 1980, a Judge of the Sessions Court may give such direction as he may deem fit or necessary for the disposal or hearing of any appeal before him under this section.

Meanwhile, the following are part of the provisions concerning the extinguishment of the NCR under the Wild Life Protection Ordinance 1998.

Section 11: Procedure for constituting a Wild Life Sanctuary

(1) Where it is proposed to constitute a Wild Life Sanctuary over State land which is not within a forest reserve, the Minister shall publish in the Gazette, a notification –

(a) specifying as accurately as possible the description and limits of the land intended to be constituted a Wild Life Sanctuary;

(b) directing any person claiming any right or privilege in or over such land to submit, within sixty days from the date of publication of such notification, to the Chief Wild Life Warden for the area in which the land is situated, his claim with evidence in support thereof; and

(c) stating that upon the expiry of a period of sixty days from the date of publication of the notification, no claim to any rights or privileges in or over the area intended to be constituted a Wild Life Sanctuary shall be entertained and such rights or privileges, if any, shall be deemed to have been abandoned or the exercise thereof has been waived, by any person entitled thereto.

(2) A copy of the notification shall be published in at least one newspaper circulating in Sarawak, and displayed at the District Office for the area to be constituted a Wild Life Sanctuary or be brought to the notice of the persons affected thereby in such manner as the Minister thinks necessary.

Section 14: Inquiry into claim

(1) The Chief Wild Life Warden shall, within sixty days from the date of receipt of any claim submitted under section 13, or such extended period as may be approved by the Controller, conduct an inquiry into such claim.

(2) In any such inquiry, the onus of proving the existence of any right or privilege claimed shall be on the claimant.
(3) The Chief Wild Life Warden may call for and receive any evidence to verify, confirm or support any claim from any claimant or any public officer or any other person having knowledge of such claim. In the conduct of such inquiry, the Chief Wild Life Warden shall have the same powers to summon and examine witnesses as a Magistrate.

(4) Where it is considered necessary and expedient, any inquiry conducted pursuant to this section may be held in public at such time and on such date as may be specified in a notice to be issued by the Chief Wild Life Warden.

Section 15: Report

(1) The Chief Wild Life Warden shall, upon conclusion of the inquiry, furnish a report thereof to the Controller.

(2) The report shall contain the notes of proceedings and evidence recorded at the inquiry together with such findings and recommendations as the Chief Wild Life Warden may deem it fit or proper to make.

Section 16: Rights or privileges admitted, etc.

Where any right or privilege is admitted or found to have subsisted at the time of the publication of the notification under section 11, the Controller shall –

(a) regulate the exercise or enjoyment of such rights or privileges including directing the areas or places within a Wild Life Sanctuary where the rights or privileges may be exercised or enjoyed and the manner of exercising or enjoyment thereof; or

(b) with the approval of the Minister, proceed to extinguish such rights or privileges and pay compensation to the lawful claimant thereof or permit in consultation with the Director of Lands and Surveys, the exercise of such rights and privileges in any other area outside the Wild Life Sanctuary.

Section 17: Assessment of compensation

In assessing the compensation payable under this Part for the extinguishment of any right or privilege in or over the area constituted or to be constituted a Wild Life Sanctuary, the Controller shall take into account the following:

(a) the nature and extent of the right or privilege claimed;

(b) whether such right or privilege is still exercised or enjoyed by the claimant at the date of notification published under section 11;

(c) the degree of actual dependency, if any, of the claimant on such right or privilege as a means of his livelihood;

(d) if the right or privilege relates to the planting of any crop, whether alternative site or area has been provided by the Government for the person or the community to which he belongs, for farming; and

(e) any other relevant factors or circumstances pertaining to the exercise or enjoyment of such right or privilege.

Section 19: Appeal

(1) Any person aggrieved by the decision of the Controller may, within thirty days from the date of service of the decision on him, appeal to a Sessions Court.
(2) An appeal to a Sessions Court shall be by way of originating application and shall follow the procedures prescribed by the Subordinate Courts Rules 1980.

(3) Subject to the Subordinate Courts Rules 1980, a Judge of the Sessions Court may give such direction as he may deem fit or necessary for the disposal or hearing of any appeal before him under this section.

Apart from the above, Section 28 of the Wild Life Protection Ordinance 1998 also provides for the protection of land deemed to be of ‘special interest’, for its important wildlife population or interesting geological or physiographical features. The conservation measures undertaken to protect such wildlife habitats or natural features may include similar prohibitions enforced in other conservation areas. These may include the hunt or capture of any animal or fishing activities and the destruction, cutting, burning or removal of wild plants and timber trees, soils, rocks and minerals, among others. In fact the exercise of the NCR may also be similarly curtailed if the state deems it necessary for this to be enforced. However, such regulatory measures can also be achieved through the establishment of special arrangements and agreements with the owners or occupiers of the land:

...with a view to compensation and to carry out all such works in respect of the land as may be necessary for the protection or conservation of its wild life or geological or physiographical features; the agreement may impose restrictions or obligations as respects the method of cultivating the land, its use for agriculture or forestry purposes or any other usage or the exercise of rights over the land;

However, where the state finds that it is not possible for such an arrangement or agreement to be reached with affected persons, it can also unilaterally serve them with a written notice which sets out the conservation measures it wishes to undertake in the concerned area in no less than a month's time. In this case, affected persons may still forward their concerns and objections to the state, whose decision however will be final and cannot be challenged or appealed against in any way, including in a court of law. Affected persons who fail or neglect to carry out the order or act in breach of the provisions of the arrangement or agreement made, shall be guilty of an offence punishable by both imprisonment and fines.

The environmental impact assessment (EIA) process in Sarawak

Sarawak, like Sabah, has been allowed the right to enforce its own environmental law and environmental impact assessment (EIA) legislation through a controversial decision of the Court of Appeal in 1997 in a civil legal action initiated by the indigenous communities in Belaga, Sarawak, affected by the construction of the Bakun hydroelectric project in 1995. Prior to this event, the EIA process for the entire country fell under the jurisdiction of a federal law on the environment, the Environmental Quality Act 1974 and its subsidiary legislation, the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987,
On April 1, 1995, SAM along with other civil society groups, concerned legal practitioners and affected communities were shocked upon discovering that the first EIA report for the Bakun dam had already been approved by the Sarawak Natural Resources and Environment Board (NREB) at the end of March 1995. Days later, it was learnt that the NREB had in fact just been established in February 1994, under the authority of a long dormant colonial legislation, the Sarawak Natural Resources and Environment Ordinance 1949.

Evidently, it was only in November 1993 that an amendment to the colonial law, the Natural Resources and Environment (Amendment) Ordinance 1993, was passed by the state legislature, which among others, provided for the establishment of the NREB. Subsequently, the NREB enacted a new subsidiary legislation, the Natural Resources and Environment (Prescribed Activities) Order 1994, which came into force in September 1994. The order provides for the implementation of the EIA process for a host of prescribed activities in Sarawak, including the construction of dams, artificial lakes and reservoirs, which fell under NREB authority. Most tellingly, unlike its federal counterpart, the Sarawak EIA legislation does not require mandatory public participation in its review process.

However, it was only on the same day that the first EIA report for the Bakun dam was approved by the NREB at the end of March 1995, that the federal government through a ministerial order managed to promulgate an order to the federal Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, to exclude the prescribed activities listed in the Sarawak order from federal jurisdiction. This order was finally gazetted on April 20, 1995, the same day the affected communities filed their civil legal action at the High Court, but it would come into force retrospectively, beginning from September 1, 1994. It is thus still widely held today that the primary motive in transferring the jurisdiction on environmental matters from the federal level to Sarawak was in fact directly linked to the intention of facilitating the construction of Bakun, in the midst of fierce local, national and international criticisms.

Subsequently, a civil legal action was filed by the Bakun affected communities at the High Court to challenge the series of federal and state executive actions above. At the High Court, the executive amendment to the federal order was treated as the focal point of the case. The High Court then declared that the approval of the first EIA report for the Bakun dam, issued pursuant to the Sarawak legislation, as invalid.

19 Kajing Tubek and Ors v. Ekran Bhd and Ors.
The High Court ruled that the federal government did not have the right to transfer its jurisdiction for the EIA process to Sarawak in a retrospective manner.

At the Court of Appeal however, the focus of the case was shifted to a much narrower question of interpretation of the Federal Constitution in relation to the applicability of the federal law to Sarawak.\(^\text{20}\) Subsequently, in 1997, the Court of Appeal finally quashed the High Court decision, ruling that since under the Federal Constitution land is listed to be under state jurisdiction and since the construction of the dam involves the elements of land use, water, rivers, soil and forests, the ‘environment’ in relation to the project legally lies within state authority.

In the meantime, earlier in January 1995, the NREB proceeded to publish a set of guidelines for its EIA process, the Handbook of the Policy and Basic Procedure of Environmental Impact Assessment (EIA) in Sarawak. Among others, the document argues that the Natural Resources and Environment (Amendment) Ordinance 1993 was introduced pursuant to Article 77 of the Federal Constitution, in supposed recognition that matters on the ‘environment’ is neither listed under the federal nor state jurisdiction. Consequently, the state then concludes that it has residual powers to pass laws on environmental governance.\(^\text{21}\)

Unfortunately, the guidelines do not compel mandatory public participation in its EIA review process. For the preliminary EIA process, no mention of public participation is mentioned. For the detailed EIA process, the following procedures are laid down, which leave involvement of members of the public to the discretion of the project proponents or developers.\(^\text{22}\)

Public participation, on the initiative of the project proponent and where it affects public interest, ought to be included in the Detailed EIA process if it is likely to benefit the planning of the project in any of the following ways:

- Clarify the nature of impacts or provide a better estimate of the magnitude of impacts;
- Provide project planners with a better understanding of community aspirations and needs;
- Allay fears in the community or improve the social acceptability of the project;
- Provide additional environmental information to project planners.

The need for public participation should be discussed during the formulation of the technical proposal of the Detailed EIA.

\(^{20}\) Director General of the Department of Environment and Anor v. Kajing Tubek and Ors and Another Appeal.

\(^{21}\) The Ninth Schedule of the Federal Constitution defines the division of jurisdiction between the federal and the state governments, where no direct mention of ‘environment’ is listed. Article 77 of the Federal Constitution however describes the residual power of a state legislature to enact laws which are not set in the Ninth Schedule, “not being a matter in respect of which the Parliament has power to make laws.”

\(^{22}\) p. 19.
The following mechanisms ought to be considered in respect of public participation:

- **Public Meetings and Workshops**

  These can be used to obtain public opinions on a wide range of issues arising from the proposed project. People are willing to attend public meetings or workshops if they have a genuine interest in a project, although some may not like to express their opinion in the public.

- **Public Opinion Sampling**

  Public opinion sampling can be useful in the Detailed EIA process if the environmental issues arising from the project are simple and clear-cut. This mechanism can be used to reach a large number of or diverse people, but it must be carefully planned and managed so as to obtain a valid and meaningful result.

Meanwhile, the second principle outlined in the guidelines in respect of the involvement of different persons and parties in the EIA process is decidedly weak.²³

**Principle 2:**

**Involve the appropriate persons and groups**

It is important to be selective when involving people in the EIA process. Generally, three categories of participants are required to carry out an EIA:-

- Those appointed to manage and undertake the EIA process (usually the team leader and a staff of experts);
- Those who can contribute facts, ideas or concerns to the study;
- Those who have direct authority to permit, control or alter the project, i.e. project proponent/developer, aid agency/investors, competent authorities, regulators, etc.

The above principle appears to have been adapted from a United Nations Environment Programme (UNEP) document on the proposed framework for an EIA process. However, while the EIA process in Sarawak limits external participants to those who can contribute facts, ideas or concerns, the UNEP document actually continues to specify them as “including scientists, economists, engineers, policymakers and representatives of interested of affected groups.”²⁴

Today in Sarawak, the EIA process for many development activities, including those related to oil palm and pulp and paper and timber tree plantation development, as well as those on forestry activities such as logging, fall under the jurisdiction of the Natural Resources and Environment (Prescribed Activities) Order 1994. Meanwhile, the federal environmental law and the Department of Environment still have some authority in Sarawak, but only for a limited number of activities.²⁵

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²³ p. 25,
²⁴ For more information, please see Rajeswari (2000).
²⁵ Construction of aerodromes, industrial development involving chemicals, cement, lime, petrochemicals, shipyards, non-ferrous metals, iron and steel, various operations of the petroleum industry, development of ports, development of fossil fuel and nuclear power generation plants and power transmission lines, waste treatment and disposal, development of housing areas and development of industrial estates.
Table 2 provides the list of forestry and agricultural development activities that are mandatorily required to obtain an EIA approval in Sarawak, all without a mandatory public review process.

**Table 2: Plantation and forestry activities requiring an EIA process in Sarawak**

**PUBLIC REVIEW IS NOT MANDATORY**

**Agricultural development**

- Development of agricultural estates or plantations of an area exceeding 500 hectares from land under secondary or primary forests or which would involve the resettlement of more than 100 families or which would involve modification in the use of the land.

- Conversion of mangrove swamps into agricultural estates having an area exceeding 50 hectares.

**Logging**

- Extraction or felling of timber from any area exceeding 500 hectares which have previously been logged or in coupes that have previously been closed.

- Extraction or felling of any timber within any area declared to be a water catchment area under the Water Ordinance 1994.

In principle, the state law on the EIA process in Sarawak perfectly permits for the EIA process for all prescribed activities, including for the development of large-scale oil palm plantations, to be approved by the NREB, without having to seek inputs from affected communities and members of the public. It is thus categorically weaker than its federal counterpart.

Without a mandatory public notification and participation in the EIA process, public access to information and other important information dissemination exercises generally do not form as an integral part of such large-scale plantation developments. As a result of this non-transparency and the speed in which new oil palm and pulp and paper and timber tree plantations are developed annually, affected communities and other stakeholders have had to face many challenges in expressing their concerns or outright protests. The EIA reports themselves are not necessarily easily accessible, especially for affected communities, as they can be obtained only at the relevant government offices. Civil society groups also face great
difficulty in monitoring the planning and establishment of new plantations, as information on them is not readily made available through the internet. In contrast, the federal EIA process for various development projects can easily be monitored through the website of the federal Department of Environment.

Landmark judicial decisions: Adong Kuwau, Sagong Tasi, Nor Nyawai and Madeli Salleh

The failure of the executive and legislation to fully understand and protect the indigenous customary land rights in Malaysia has led numerous indigenous communities to seek judicial interventions in an effort to restore their violated rights, in particular since the 1990s. Consequently, between 1997 and 2007, the Malaysian judiciary has produced several legal descriptions to better define the nature, features and scope of the indigenous customary land rights, through at least four landmark decisions, namely, Adong Kuwau from the state of Johor, Sagong Tasi from the state of Selangor and Nor Nyawai and Madeli Salleh from Sarawak. These decisions serve to clarify and describe many key aspects of the indigenous customary land rights in greater detail. Basically, there are two fundamental legal principles that form the basis of the four decisions.

The first, as captured by table 3, is the legal principle that the common law respects the pre-existence of such rights under native laws or customs, which has been confirmed by the Federal Court through Madeli Salleh in 2007.26 The acceptance of the principle of the pre-existence of indigenous customary law, relative to statutory law, in turn has other legal impacts on other aspects of the indigenous customary land rights.

An important legal implication of the pre-existence principle is the fact that it inevitably requires the acceptance that the lawfulness of such rights does not depend on any executive, legislative or judicial declaration. Therefore in order to determine the lawfulness of an indigenous customary land rights claim, one then has to refer to the customary laws of the concerned community themselves, instead of statutory laws. Consequently, modern legislation will only be relevant for the purpose of determining if any notice in clear and unambiguous language, issued under its authority, has actually successfully extinguished such rights at any given time.

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26 Superintendent of Land and Surveys, Miri Division and Anor v. Madeli Salleh [2007] 6 CLJ 509. The decision of the Federal Court ruled in favour of Madeli Salleh in 2007. The appeal of the Sarawak state government for a review of this decision was rejected by the Federal Court in 2009.
Table 3: Judicial recognition on the pre-existing nature of indigenous customary land rights

<table>
<thead>
<tr>
<th>Indigenous customary land rights are pre-existing rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Common law respects the principle that the indigenous customary land rights are pre-existing rights. The indigenous customary land rights derive their authority from customary laws that are recognised and enforced by members of an indigenous community, as opposed to documentary land rights, which are rights derived from documents issued under the authority of a legislation. Indigenous customary land rights include:</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>- The lawfulness of such rights does not depend on any executive, legislative or judicial declaration.</td>
</tr>
<tr>
<td>- In order to determine its lawfulness, that which must be referred to is the customary law of the community, and not modern legislation. Legislation is only relevant to determine if any notice issued under its authority had successfully extinguished the rights at any point of time.</td>
</tr>
<tr>
<td>- If an indigenous customary territory is without a gazetting status or a documentary title, its existence is still lawful.</td>
</tr>
<tr>
<td>- The government owes a fiduciary duty to indigenous peoples i.e. a duty based on the trust between a trustee (government) and a beneficiary (indigenous peoples). These include the duty to protect the customary land rights and welfare of indigenous peoples and to not act in a manner that is inconsistent with those rights and that which may affect their well-being.</td>
</tr>
</tbody>
</table>
Table 4: Judicial recognition of indigenous customary land rights as a form of property right protected under Article 13 of the Federal Constitution

<table>
<thead>
<tr>
<th>Indigenous customary land rights are property rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Indigenous customary land rights go beyond usufructuary rights, i.e. the rights to benefit from the use of properties and resources found on the land. Instead, it is a form of proprietary interest in the land itself, protected by Article 13 of the Federal Constitution, which guarantees the right to property.</td>
</tr>
</tbody>
</table>

| • Indigenous customary land rights may only be extinguished through clear and unambiguous written notification, in accordance with the law and with the payment of adequate compensation. |

| • Without the issuance of a clearly worded notification to extinguish the indigenous customary land rights, and the payment of adequate compensation, any denial of subsisting rights can still be legally challenged. |

<table>
<thead>
<tr>
<th>• The payment of adequate compensation for the loss of the indigenous customary land rights must include the payment for the loss of the land itself, apart from crops, properties and other interests:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The loss of heritage land</td>
</tr>
<tr>
<td>• The loss of the freedom of inhabitation and movement</td>
</tr>
<tr>
<td>• The loss of forest resources</td>
</tr>
<tr>
<td>• The loss of future living for oneself and other family members</td>
</tr>
<tr>
<td>• The loss of future living for one’s descendants</td>
</tr>
</tbody>
</table>

| • Adequate compensation for the loss of the indigenous customary land rights in Peninsular Malaysia must be based on the Land Acquisition Act 1960 and not the Aboriginal Peoples Act 1954. Likewise, in Sarawak and Sabah, the applicable laws for this are the same laws applicable for the loss of documentary land rights. |

| • Entry into the indigenous customary territory without the permission of its inhabitants and the action of causing destruction in the area, in an unlawful manner, is considered as a trespass that can be subjected to civil action. |
All of the above were ruled by the High Court in 2002 and the Court of Appeal in 2005 in *Sagong Tasi*, which also served to affirm *Adong Kuwau*, ruled by the High Court in 1997 and the Court of Appeal in 1998. The High Court decision in 2001 in *Nor Nyawai* was also heavily referenced by the *Sagong Tasi* decision. Finally, in 2007, the Federal Court in *Madeli Salleh* affirmed the respect that the common law accords to this pre-existence principle and its associated legal consequences.

The second, as captured by table 4, is the legal principle that the indigenous customary land rights indeed fall under the protection of Article 13 of the Federal Constitution, which guarantees the right to property and the need to provide adequate compensation for its loss. This question was first resolved by the Court of Appeal in *Sagong Tasi* and later referenced by the Federal Court in *Madeli Salleh* and affirmed more directly in *Bato Bagi* in 2011, another case involving indigenous communities impacted by the Bakun hydroelectric project.

In *Adong Kuwau*, for the first time, the nature of the losses resulting from the deprivation of the indigenous customary land rights was described in detail by the judiciary. In *Sagong Tasi*, the appropriate legislation to address adequate compensation in Peninsular Malaysia was ruled to be the Land Acquisition Act 1960, instead of the Aboriginal Peoples Act 1954. This puts the status of indigenous customary land rights on an equal footing with the documentary land title, as far as the payment of adequate compensation is concerned. Further, the need for consent to enter an indigenous territory was also confirmed by the decision, as damages were awarded against the act of trespassing and demolition of the communities’ homes and public hall.

Similarly, following this recognition of the right to property, the enactment of any statutes or issuance of any written directives by different executive powers, even during the colonial era, may not in any way automatically extinguish subsisting indigenous customary land rights. Instead, any intention to extinguish such rights

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27 *Sagong Tasi and Ors v. Selangor State Government and Ors* [2002] 2 CLJ 543; and *Selangor State Government and Ors v. Sagong Tasi and Ors* [2005] 4 CLJ 169. The High Court in 2002 and the court of appeal in 2005 both ruled in favour of the indigenous community. Between 2009 and 2010, all defendants named by the suit withdrew their appeal at the Federal Court. The Federal Court subsequently directed that RM6.5 million be paid to the affected villagers. This payment also included the payment of damages for the trespass that had occurred during the eviction process against the people.

28 *Adong Kuwau and Ors v. Johor State Government and Anor* [1997] 1 MLJ 418; and *Johor State Government and Anor v. Adong Kuwau and Ors* [1998] 2 CLJ 665. The decision of the High Court ruled in favour of the Orang Asli community in 1997. This decision was confirmed by the court of appeal in 1998. The leave to appeal of the Johor state government at the Federal Court was dismissed without any reasoned judgment.

29 *Nor Anak Nyawai and Ors v. Borneo Pulp Plantation Sdn. Bhd. and Ors* [2001] 2 CLJ 769; and *Superintendent of Lands and Surveys, Bintulu v. Nor Anak Nyawai and Ors and Another Appeal* [2005] 3 CLJ 555. The High Court in 2001 ruled in favour of the native community. In 2005, the court of appeal overturned the decision made by the High Court. Although the native community suffered a loss in this case, the court of appeal also emphasised the fact that this was strictly due to the presentation of non-credible evidence by the plaintiffs. All the principles on the indigenous customary land rights as ruled by the High Court were fully accepted by the court of appeal, including the use of the terms of the *temuda, pulau galau* and *pemakai menoa*. The leave to appeal by the community was dismissed by the Federal Court in 2008.

may only be carried out successfully and lawfully through clear and unambiguous written language and words. This was the decision of the Federal Court in 2007 in Madeli Salleh, which affirmed the legal principles adopted by Adong Kuwau, Sagong Tasi and Nor Nyawai.

The above is a summary of four landmark judicial decisions that have strengthened the legal status of the indigenous customary land rights in the country from the late 1990s up to 2007. Unfortunately, reforms and amendments have yet to be undertaken by our federal and state authorities to ensure that all federal and state policies and legislation are aligned to the legal principles espoused by the judiciary. In this regard, the legality of various executive actions undertaken the authority of outdated legislation and the outcomes and products yielded as a result of such actions cannot be said to be legally impeccable and can still be questioned in a court of law.

**The Federal Court decision in Sandah Tabau, 2016**

**The pulau galau and pemakai menoa of Sarawak and the force of law**

The Federal Court decision in *Director of Forests, Sarawak and Anor v. Sandah Tabau and Ors* is primarily concerned with the rights of indigenous communities in Sarawak to their communal forest reserves i.e. the pulau galau and the entirety of their territorial rights, i.e. the tanah pemakai menoa. Despite the existence of precedent decisions, in 2016, the Federal Court ruled that the pulau galau and pemakai menoa, unlike the cultivated areas i.e. temuda, whose existence the state tends to concede, are customs that are without any force of law, within the meaning of Article 160(2) of the Federal Constitution.

This decision appears to hinge on two arguments. First, are the absence of the terms pulau galau and pemakai menoa in the Tusun Tunggu Orders and the Adat Iban Order 1993, and supposedly, other executive and legislative documents. This was then used to justify that the two types of customary land rights, although indeed exist and practised in accordance with customary law, are nonetheless not part of the law which the state recognises, unlike the customary law on temuda, a term that is indeed

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31 *Director of Forests, Sarawak & Anor v. TR Sandah Tabau & Ors and Other Appeals* [2017] 2 MLRA 91.

32 The Tusun Tunggu Orders were a series of attempts to codify the Iban family and personal law between the 1930s and 1950s. They were developed at several conferences of Iban community leaders, organised by the colonial government, in order to clarify and even limit certain aspects of the Iban customary law, in particular the indigenous relocation and migration practices. The first version, applicable to the Iban communities in the third division, was known in English as the Sea Dayak (Iban) Fines 1936. It was later revised at another conference in 1952. Three Tusun Tunggu Orders were established pursuant to the introduction of the Native Customary Laws Ordinance 1955 (revised in 1958), one of which was a revision of the 1952 order. All three orders i.e. The Tusun Tunggu (Third Division) Order 1955, The Tusun Tunggu (Fifth Division) Order 1956 and The Tusun Tunggu (Fourth Division) Order 1957, were eventually replaced by the Adat Iban Order 1993, which is now governed under the Native Courts Ordinance 1992 and later, Native Customs (Declaration) Ordinance 1996, the successor to the 1955 ordinance.
mentioned by the two documents. Second, is the assumption that such rights are incidental and non-integral to the structure of indigenous customs.

We view this ruling as highly incompatible with the spirit of the legal principles of other precedent-setting decisions. Such landmark cases have already confirmed that indigenous customary land rights owe their existence to customary law itself, and not to executive, legislative or judicial declarations. It is therefore incongruous to suddenly rule that the rights to communally shared forests and their concept on territoriality are incidental and non-integral to indigenous customs, and hence, are without any force of law. Fortunately, the only dissenting judgement in this case shares many of our concerns. The review of Sandah Tabau is currently pending in the Federal Court.

**Codified customs are not an exhaustive source of living customs**

The only dissenting judgement in the case stresses on the unwritten nature of native customary law and its evolution from communal oral acceptance on the ground, instead from a coercive authority. Therefore, the absence of the terms pulau galau and pemakai menoa in any executive and legislative documents cannot be equated as conclusive evidence of their inconsequentiality within indigenous customs.

Executive and legislative documents on the indigenous customary land rights are only outcomes of the unilateral attempts of the state to regulate oral indigenous customs. Such outcomes could well succeed or fail, in parts or whole, in capturing accurately oral customary law. The failure of the authorities to refer to such customs in their documents must not be perversely burdened on the communities. Therefore attempts to declare them as being exhaustive in nature is at best, premature.

The dissenting judgement also correctly points out that both the Tusun Tunggu and the Adat Iban Order 1993 are not in actual fact land rights laws. In principle, the two documents are primarily codified personal and family laws of the Iban community. Nonetheless, they also do contain provisions on the effects of deaths and divorces on land ownership. Here, provisions which touch on the temuda have to be made for very specific contextual objectives that cannot be avoided i.e. the status of the temuda owned by a family after a death or divorce. In this context, the rights to pulau galau and pemakai menoa are virtually irrelevant since the two are communal rights shared by all members of the territory. Therefore, it is simply illogical for us to conclude that the absence of the terms pulau galau and pemakai menoa in the two documents qualifies as credible evidence to demonstrate their incidental nature.
Gathering of evidence on lawful customs through comprehensive factual inquiry

Despite the purported absence of their description in previous and present executive and legislative documents, the evidence on the existence and crucial status of the *pulau galau* and *pemakai menoa* can easily be obtained by way of other methods of factual inquiry, including through the testimonies of expert opinions and references in public, historical and anthropological documents. Executive and legislative documents are not the only sources of evidence for their existence. This fact was also emphasised by the dissenting judgement. Furthermore, the court was also submitted with evidence of credible publications published in the 1960s that had referred to the importance of the two practices. The dissenting judgement has also rightly pointed out that even the government’s Secretariat Circular No. 12/1939, had also referred to the customs of reserving forested areas and the integrity of an indigenous territory, although the actual indigenous terms were not used by the document.

The principle of the pre-existence of indigenous customary land rights

The Federal Court in *Madeli Salleh* in 2007, although in principle only discussed on the rights to the *temuda*, has affirmed that the common law respects the pre-existence of indigenous customary land rights. This ruling conceptually requires the acceptance of another legal principle first ruled in *Sagong Tasi* in 2002 and was also affirmed by the Court of Appeal in *Nor Nyawai* in 2005. This principle clarifies that the lawful existence of the indigenous customary land rights are not dependent on any executive, legislative or judicial declarations. Therefore it is rather incongruous for the same court to now suddenly insist on the primacy of executive and legislative documents in determining if a particular custom is bestowed with the force of law.

All types of land rights are integral to indigenous customs

In principle, the ruling admitted that the *temuda, pulau galau* and *pemakai menoa* have indeed existed since time immemorial. However it insisted to accord only the *temuda* with the force of law, but not on the other two. This insistence was based upon the conclusion that the last two practices are incidental and non-integral to indigenous customs. However, in reality, agriculture, fishing, hunting and the harvesting of timber and other forest produce are all integral parts of the sustainable livelihood strategy of sedentary indigenous peoples in Malaysia, governed with the force of law under the respective communal customs. Communities would not have survived to modern times if this was not the case. If a group of an intertwined body of rights is to be accorded different sets of legal status, there must be a factual justification to conclude on how one particular right is fundamentally different from another, and hence, deserving of a higher status than the other. In reality, it is simply
not possible to prove such a compartmentalisation within indigenous customs, for they have never existed in the first place.

Qualifiers for customs to possess the force of law

The dissenting judgement of the case discusses with precision, the conditions which can be imposed by the state to deny any custom from having the force of law. To be permitted to possess the force of law, the customs must be able to demonstrate their longevity, consistency, reasonableness, acceptability and compatibility with humanity, morality and public policy. The pulau galau and pemakai menoa are more than able to satisfy these requirements.

Size of an indigenous customary territory is a question of fact

This ruling discussed the limits of the indigenous customary territorial rights by relying on the decision first held by the High Court in Sagong Tasi, and later affirmed by the Court of Appeal, including in Nor Nyawai. This decision opined that such rights are limited only to the area that forms a community settlement, but not to the jungles at large, where the people used to roam to forage for their livelihood in accordance with their tradition. However, in full, Sagong Tasi actually continued to clarify that the area of the settlement and its size is a question of fact in each case. Even the rejection of the Court of Appeal in Nor Nyawai pertaining to the communal rights to the pulau galau was ruled on the basis of the lack of credible evidence. The decision even cautioned that its ruling must not be used as a precedent for potential claims in the future, when more credible evidence is submitted. Nowhere in Nor Nyawai that the lawfulness of the rights to the pulau galau and pemakai menoa was denied. In fact, both the High Court and Court of Appeal explicitly accepted the terms. Similarly, rights to forested areas were also affirmed in Adong Kuwau.

Evidence of indigenous territorial occupation must be contextualised

The Federal Court in Madeli Salleh has ruled that land occupation may be qualified on the basis of the measures of control undertaken by landowners in their physical absence. The dissenting judgement discusses at length on the need to understand the full nature of the particular rights being claimed, so as not to go overboard in demanding evidence of occupation. Hence, the evidence to prove the existence of settlement and cultivation areas is naturally different from that to be used to prove the utilisation of forest resources.
Natural limits to the boundaries of indigenous customary territory

In reality, the cautionary tone adopted by the judiciary that there is risk that claims of rights being made by mere assertion is unnecessary. The indigenous customary territorial claim is naturally limited by practical constraints. First, there is the centrality of the concept of territoriality and boundaries pertaining to such rights. Second, the High Court in *Nor Nyawai* has also described that an indigenous customary territory is often claimed only to the extent of a half-day journey on foot from the housing site, in order to allow the hauling of game and forest produce that would still be fit for consumption back to the village. This description was never disputed by the Court of Appeal. Obviously, indigenous customary territories and boundaries are established precisely as a strategy to ensure the sustainable utilisation of natural resources and minimise the possibility of conflicts. Even in the past, communities were not able to simply ‘forage and roam’ freely. They have always been farmers, fishers, hunters and gatherers with a plan, strategy and human limitations. The dissenting judgement has also correctly reflected on this.

Conclusion

From this discussion, we can conclude that there are numerous weaknesses, limitations and flaws in the content of the various laws on land, forestry, conservation, the NCR and the EIA process in Sarawak. It is clear that such laws have failed to provide adequate protection on the NCR and native communities affected by the development of oil palm plantations in Sarawak, as demanded by the Federal Constitution and a set of landmark judicial decisions. These statutory failures have therefore led to the numerous problems reported by our case study.

Equally important, we must also note that the impacts of the various weaknesses in the existing statutory framework are not only experienced by native communities affected by oil palm or pulp and paper and timber tree plantations. For more than three decades, the same challenges have long troubled native communities affected by logging operations and the construction of large dams. It is for this reason that we view the governance issues discussed in this publication as being systemic in nature. It is unlikely for any certification scheme to be able to prevent oil palm or pulp and paper and timber tree plantations and logging companies from violating the customary land rights of native communities and from causing further deforestation, as the statutory and policy contents and governance conditions in the state are simply unable to provide optimal support to the protection of the NCR and forests. In this context, a certification scheme at best, can only function as a highly limited technical solution, if it can even termed as that, to problems that are essentially structural in nature, which have their origins in our existing economic, political and legal systems.
Large monoculture plantations: NCR, deforestation, certification and oil palm smallholdings
Since the 1990s, deforestation caused by large monoculture plantations of mostly pulp and paper and timber trees and oil palm is an undeniable reality in Sarawak. These pictures were taken on the native customary territories of the Iban community of Rumah Mas in Merurong, Tubau in 2010; the Iban community of Rumah Chabok in Lubok Amam, Marudi in 2010; the Penan community of Long Lunyim in Sungai Pelutan, Long Lama in 2011; and the Penan community of Batu Bungan, Mulu in 2019.

Photographs of the territories of Rumah Mas, Merurong, Tubau and the Penan community in Batu Bungan, Mulu are courtesy of the community members.
3. Large monoculture plantations: NCR, deforestation, certification and oil palm smallholdings

The size of native customary territories unilaterally determined by the government

Prior to 2009, the Sarawak Lands and Surveys Department used to display statistical data which showed that the size of NCL in Sarawak to be around 1.6 million hectares, or approximately 13 per cent of Sarawak’s total land area, as reproduced in table 5. Prior to 2009, the Sarawak Lands and Surveys Department used to display statistical data which showed that the size of NCL in Sarawak to be around 1.6 million hectares, or approximately 13 per cent of Sarawak’s total land area, as reproduced in table 5. This information presumably represented the situation up to 1994. Although this data is more than 25 years old, new NCR territories can no longer be easily claimed by native communities since the introduction of the Land Code 1958. Therefore, the areas conceded by the Sarawak state government to be under legitimate NCR claims could not have changed significantly since the 1990s.

This information shows the total size of areas generally categorised by the state to be under NCR claims, the size of areas that the state has verified to be under legitimate claims, most probably through its land surveying activities, and the size of the remaining areas that have yet to be surveyed, as of 1994. Unfortunately, this data appears to no longer be available on the department’s website. Although this information appears to no longer be available on the department’s website, in November 2012, the Sarawak state legislature was reportedly told by the Sarawak assistant resource planning minister that “around 1.5 million hectares of land in Sarawak may be subject to native customary rights.” However, it was also clarified that these did not include the pemakai menoa or pulau galau, unless there was proof of NCR claims over such land.33 We thus believe that areas held under the NCR as defined by the peoples’ customs, which include the entire pemakai menoa, would be much higher than the figures furnished in table 5.

33 The Star. Naroden: 1.5 million ha subject to NCR. November 24, 2012.
Table 5: Size of NCL in Sarawak according to the Sarawak Department of Lands and Surveys prior to 2009 (hectares)

<table>
<thead>
<tr>
<th>Division</th>
<th>Areas under NCR</th>
<th>Areas already adjudicated</th>
<th>Balance as of 1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Kuching</td>
<td>102,450</td>
<td>24,003</td>
<td>78,447</td>
</tr>
<tr>
<td>2 Sri Aman</td>
<td>174,192</td>
<td>35,723</td>
<td>138,469</td>
</tr>
<tr>
<td>3 Sibu</td>
<td>269,998</td>
<td>24,023</td>
<td>245,975</td>
</tr>
<tr>
<td>4 Miri</td>
<td>201,063</td>
<td>19,703</td>
<td>18,136</td>
</tr>
<tr>
<td>5 Limbang</td>
<td>55,161</td>
<td>17,745</td>
<td>37,416</td>
</tr>
<tr>
<td>6 Sarikei</td>
<td>162,580</td>
<td>15,035</td>
<td>147,545</td>
</tr>
<tr>
<td>7 Kapit</td>
<td>457,255</td>
<td>11,098</td>
<td>446,157</td>
</tr>
<tr>
<td>8 Samarahan</td>
<td>124,000</td>
<td>16,291</td>
<td>107,709</td>
</tr>
<tr>
<td>9 Bintulu</td>
<td>82,000</td>
<td>5,224</td>
<td>76,776</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1,628,699</td>
<td>168,845</td>
<td>1,459,854</td>
</tr>
</tbody>
</table>

Table 6: Forested areas in Sarawak 1990-2013 (million hectares)

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>* Production forest</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>6.00</td>
<td>6.00</td>
<td>6.00</td>
</tr>
<tr>
<td>* Protection forest</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>1.00</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>** State land forest</td>
<td>n.a</td>
<td>n.a</td>
<td>n.a</td>
<td>1.07</td>
<td>1.83</td>
<td>1.81</td>
</tr>
<tr>
<td>TOTAL</td>
<td>8.71</td>
<td>8.50</td>
<td>8.20</td>
<td>8.07</td>
<td>7.83</td>
<td>7.81</td>
</tr>
</tbody>
</table>

Sources: For the years 1990-1995, Statistics of Commodities 2007; for the years 2005 -2013, Statistics of Commodities 2013, both published by the Ministry of Plantation Industries and Commodities (now the Ministry of Primary Industries). Data on production and protection forest were sourced from table 7-2 (Malaysia: Permanent reserve forest by region), while their total is derived from table 7-1 (Malaysia: Forested area by region). * In Sarawak, the reserved permanent production forest is termed as the Permanent Forest Estate, which is sub-classed into Forest Reserves, Protected Forests and Communal Forest Reserves, while protection forest includes National Parks, Nature Reserves and Wild Life Sanctuaries. ** Data on state land forest in Sarawak was not provided by any of the sources cited. They were calculated by subtracting the total size of production and protection forest from the total size of forested areas.
How much forest is left in Sarawak?

Determining the accuracy of statistical information on forested areas in Sarawak tends to be a confusing endeavour. Often, most of these issues are caused by the manner in which our forestry data are managed and tabulated by different federal and state agencies. First, data obtained from the website of the Sarawak Forests Department, including its annual reports, and other federal sources can be inconsistent or poorly tabulated. In fact, the website of the Sarawak Forests Department only provides its annual report up until the year 2013. Then, in recent years, the quality of federal forestry data available on the website of the Ministry of Primary Industries (previously Ministry of Plantation Industries and Commodities) also appears to have gradually deteriorated. Likewise, currently, the Ministry of Water, Land and Natural Resources also does not provide high quality forestry data.

Particular federal forestry data publication may furnish only national information, neglecting the importance of providing the regional breakdowns between Sarawak, Sabah and Peninsular Malaysia for different sets of data. Then, their website information may also be limited in range, prioritising the publication of the current annual data instead of a body of data which covers a longer period of years, which may make visible certain important trends. Equally important, there may also be various inconsistencies between different sets of data. Data discrepancies may occur between information published by federal and state sources, or even within the same agency. In fact, the annual publication of the Ministry of Primary Industries, the Statistics of Commodities, may themselves give different statistical information pertaining to the same unit of information for a particular year, during different years.\textsuperscript{34} Then there are also outright confounding data, as shown in table 6. As can be seen, the Statistics of Commodities curiously reported that Sarawak did not harbour any protection forest in 2010 and 2013. However, the annual report of 2013 of the Sarawak Forests Department, which did not provide statistical information on the size of its Permanent Forest Estate and its subclasses, actually revealed the following:

\begin{quote}
The State Government has set aside 6 million hectares under Permanent Forest Estates for sustainable timber production while another 1.0 million designated for Totally Protected Areas (TPAs). As at 2013, a total of 809,900.70 hectares of area have been gazetted as TPAs. In addition, the establishment of 1.0 million hectares of planted forests as a long-term strategy of the State towards providing an alternative and reliable source of wood materials for wood-based industries in Sarawak is actively being pursued.\textsuperscript{35}
\end{quote}

Out of the 809,900 hectares of protection or conservation areas, the size of National Parks stood at 601,673 hectares, of which terrestrial area comprised only 393,079

\textsuperscript{34} For an example, please see the data for Sarawak in table 7-1 published in \textit{Statistics of Commodities} for the years 2006 and the following years up to 2013.

\textsuperscript{35} p. 4, Sarawak Forests Department, Annual Report 2013.
hectares and the remaining 208,594 hectares were actually established on Sarawak territorial waters. Meanwhile, the size of Nature Reserves was recorded to be at 1,767 hectares. The remaining 206,460 hectares were made up of Wild Life Sanctuaries.

**Oil palm plantation development in Malaysia**

Table 7 displays the size of oil palm plantations in Malaysia from 2007 to 2017, sourced from the Malaysian Oil Palm Board (MPOB), a federal statutory agency under the Ministry of Primary Industries that is tasked to regulate the oil palm industry. From 4.24 million hectares in 2007, the size of oil palm plantations in the country grew to 5.81 million hectares in 2017, an increase of 1.57 million hectares, over a span of one decade. This means that by 2017, approximately 18 per cent of the country’s land area is under oil palm cultivation.

During this ten-year period, Peninsular Malaysia registered an expansion of 340,018 hectares. Although we were unable to find data which describes further the focal points of this growth, it is very possible that they took place mostly on existing agricultural estates and smallholding farms. There are at least two reasons behind this assumption. First, while Peninsular Malaysia, like Sarawak and Sabah, also has a policy of allowing the conversion of forests into monoculture plantations, which certainly brings with it similar forest and ecological destruction and violations of the indigenous customary land rights, this policy is largely focused on the development of pulp and paper and timber tree plantations on reserved production forests. Second, Peninsular Malaysia is also a highly urbanised and heavily populated region with large areas of existing private agricultural estates and smallholdings, which in theory could also absorb a considerable expanse of new oil palm cultivation.

However, the same conditions cannot be said to exist for Sabah and Sarawak. From the 1990s onwards, Sarawak and Sabah have both permitted the development of pulp and paper and timber tree and oil palm plantations on reserved production forests and the non-reserved state land forests. Between 2007 and 2017, oil palm cultivated areas in Sabah registered a growth of 291,251 hectares, reaching some 1.5 million hectares in total. In 2017, the annual report of the Sabah Forestry Department reported that 77,134 hectares of land under its authority have been planted with oil palm. Apart from this, as of 2017, Sabah has also designated another 451,239 hectares for tree plantations in its gazetted production forests, of which 149,263 hectares have already been developed. Undoubtedly, the largest expansion of oil palm cultivation areas between 2007 and 2017 in Malaysia was contributed by

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36 Table 18.11, p. 244. Sabah Forestry Department, Annual Report 2017.
Sarawak, which registered a growth of 941,513 hectares, despite the fact that 2.8 million hectares of largely forested areas in the state have also been licensed out to pulp and paper and timber tree plantations, of which 285,520 hectares have been permitted to be grown with oil palm. In short, from the late 1990s onwards, the conversion of forests into oil palm plantations in Sarawak is an indisputable reality that cannot in any way be denied. In addition, the development of such plantations also often involves the violations of the NCR.

As illustrated by table 8, during the period from 2013 to 2017, the bulk of Malaysia’s oil palm plantations was held under private estates, which annually contributed between 61 and 62 per cent of the total size of the cultivation area. The size of oil palm cultivation held under smallholder farming, which can be undertaken independently or organised under state-sponsored agricultural schemes overseen by statutory agencies such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and the Rubber Industry Smallholders Development Authority (RISDA) contributed between 32 and 33 per cent. The plantations developed by various state schemes and government agencies meanwhile consistently contributed around 6 per cent of the national size during the same period. Meanwhile, table 9 illustrates the increase in the size of plantations by planter category from 2013 to 2017. During the four year period, the largest expansion in size was first contributed by private estates, at 300,991 hectares, and second by independent smallholders, at 247,594 hectares.

**Large scale oil palm plantations in Sarawak v. community smallholdings**

In order to properly understand the debate on the environmental and social impacts of oil palm plantations in Malaysia, we must first take into account several important factors that have long been neglected. For a very long time, it has been insinuated that any opposition to the development of oil palm cultivation in the country is akin to hurting the interests of the countless smallholders whose modest livelihoods heavily depend on the crop. However, this is a highly simplistic, unfair and misleading claim.

In actual fact, SAM and many concerned NGOs are particularly critical of the expansion of oil palm plantations that involve two destructive factors. The first are oil palm plantations which require the rampant destruction of the environment, such as the new conversions of forests. The second are oil palm plantations that are responsible for producing adverse social impacts, such as the violations of the indigenous customary land rights. Often these two destructive factors are inextricably intertwined. **Such large destructive oil palm plantations are typically**
developed by large corporations, including those which operate transnationally, and are neither owned nor run by smallholders.

As a matter of fact, our concern is also extended to all types of destructive large corporate monoculture plantations, be they cultivated with oil palm, or pulp and paper or timber trees, as long as they involve new conversions of forests and the violations of human rights. Our critical position also extends to oil palm plantations developed as joint venture projects between state and private actors and indigenous customary landowners that are undertaken without full community consent, where indigenous communities are exposed to coercion, resulting in the loss of community access to and control over their own land, and lacking in the safeguards to guarantee meaningful financial returns for the communities involved. **In short, we do not distinguish between the different crops of choice for such environmentally and socially destructive large corporate monoculture plantations. What we are most concerned about are the specific manner and contexts in which the monoculture plantations are developed.** Therefore it is extremely important for us to first be able to distinguish how the development of large oil palm plantations in Sarawak (and Sabah) has a vastly different socio-economic and political context from the one that had long existed in Peninsular Malaysia.

In Peninsular Malaysia, the bulk of oil palm plantations were established on existing, old agricultural estates which used to be cultivated with other cash crops such as rubber, some of which had been developed since the colonial era. Although environmental and social issues associated with the abuse of pesticides as well as the violations of labour and migrant rights in the plantation industry are not unknown, such plantations generally do not involve any further forest conversions. Then, there is also a significant size of cultivation areas in Peninsular Malaysia that are being worked on by smallholders, be they independent farmers or those operating under various state sponsored schemes. The organised state sponsored schemes in particular, were designed to distribute and develop land for families who were originally landless, in order to create a viable livelihood for them.

On the other hand, in Sarawak, most of the rights to develop large plantations of mostly oil palm or pulp and paper and timber trees were issued only in the late 1990s, at a time when deforestation and ecological concerns have already received ample acknowledgement internationally. They encompass large tracts of logged over forests, be they state land or those that have been reserved as production forests. They are largely a post-logging development, as the overharvesting of timber between the 1970s and the 1990s had resulted in the depletion of natural timber resources.

Additionally, in Sarawak (and Sabah), a significant size of forested and cultivated land is held under the NCR. The various weaknesses, flaws and limitations of the
statutory and policy framework in respect of land and forestry governance in Sarawak have long given rise to the lack of harmonisation between the NCR claims of native communities and those conceded by the state. The state has further consistently put severe limitations to community claims of their NCR, especially on forested areas. It has also purportedly extinguished a significant amount of such rights during the gazetting of production forests (and conservation areas), although the legality of such policy interpretations and executive actions can still be questioned in the court of law.

Consequently, many large scale plantation permits in Sarawak, be they for the cultivation of oil palm or pulp and paper and timber trees, have in fact been issued on land where native communities lawfully claim as their customary territories, leading to numerous land conflicts. As can be seen from the two case studies documented in this publication, oil palm plantation encroachments on the territories of native communities also entail the destruction of communally shared forests and productive farmlands and the pollution of rivers that rural communities depend on for their source of potable water and other domestic needs. It must also be noted that unlike many oil palm smallholders in Peninsular Malaysia, native communities are not at all landless, and neither can their farmlands be described as idle or unproductive. On the contrary, such plantations may well turn landowning native communities into mere labourers on their own land. While native communities will almost certainly benefit from state supported smallholder schemes as well as assistance in the distribution and marketing of their agricultural and agroforestry products, the joint venture plantation scheme most advocated by the state is instead more focused on wrestling away community access to and control over their land for a maximum period of 60 years, or quite possibly, permanently, so they could be captured by private and state actors. Compounding the matter, weak governance conditions also entail that there are inadequate safeguards to ensure transparency, participatory decision making, full community consent and even meaningful profitability for the native landowners.

In short, opposition to such large scale oil palm plantations in Sarawak, which destroy forests, farmlands and rivers of native communities is in fact spurred by the deep concern for their well-being and livelihoods, as well as the alarm caused by the irreversible destruction of forested ecosystems and wildlife. The quality of life, income and livelihoods of such affected native communities have in fact been gravely affected by such large, corporate and in some cases, transnational plantations.

As a matter of fact, many native communities affected by large oil palm or pulp and paper and timber tree plantations in Sarawak are themselves highly receptive to the development of their own family-owned oil palm smallholdings, as they have been to the cultivation of other cash crops such as rubber, pepper and cocoa in the last 80
years or so. However, with their land grabbed by oil palm or pulp and paper and timber tree plantation corporations that have been issued with development permits by the state, how could they even profitably embark on their own independent oil palm smallholdings? In fact, many of their other existing sources of livelihoods and income would have also been destroyed during the land clearing of such large plantations. These include both subsistence crops such as vegetables and herbs or cash crops such as rubber, cocoa and pepper, as well as multi-purpose wild trees found in forested areas such as rattan, bamboo and medicinal plants, and not to be forgotten, freshwater fishery resources, a source of good and stable income for many families.

Therefore it is inaccurate and deceptive to equate that opposition to such large scale oil palm plantations in Sarawak, which destroy forests and the livelihoods and income of native communities, with the action of hurting the livelihoods and income of other smallholders in the country. Large scale monoculture plantations and smallholding farms are very different modes of agriculture. There is an urgent need to distinguish between destructive large oil palm plantations and oil palm cultivation undertaken by smallholder communities of modest means. These two types of oil palm cultivation are not the same in nature, structure and scale. They each represent vastly different economic interests, seek vastly different gradations of profitability and are situated on vastly different planes within the existing national and global political and economic hierarchy.

**Oil palm plantations in Sarawak**

From 2007 to 2017, the highest expansion of oil palm cultivation areas in Malaysia was contributed by Sarawak, whose increase jumped from 0.61 million hectares in 2007 to 1.56 million hectares in 2017, a growth of some 0.95 million hectares. This expansion formed 61 per cent of the total size expansion of oil palm plantations in the country during the ten-year period. Table 10 tabulates the latest available statistical data on the areas most likely designated for oil palm plantations in Sarawak in 2018, collected from the website of different state and federal agencies. They include the entirety of the land designated for the development of monoculture plantations where oil palm is most likely the commodity of choice, where planting may or may not have commenced. Therefore the total figure of table 10 cannot be equated with total cultivation areas as illustrated in table 7.

Unlike in Peninsular Malaysia, we believe that the bulk of large scale oil palm monoculture plantations in Sarawak developed since the late 1990s would have highly likely involved the conversions of logged over forests and the violations of the NCR. There are at least three reasons for this view.
First, table 10 shows that out of the total 1.2 million hectares of land documented, at least 0.28 million hectares are under the authority of the Forests Department, be they the gazetted Forest Reserves and Protected Forests or the non-gazetted state land forests. This is a strong indication that not only such areas used to be forested, in all probability, they had also been logged before. If such areas have been gazetted as production forests, the state would have deemed that all NCR within them had either been successfully extinguished or heavily restricted. However as we have already explained, the extinguishment of the NCR in the state is beset with many weaknesses, including its inherent inability to ensure the payment of adequate compensation, in direct conflict with the demands of Article 13 of the Federal Constitution, to mention only one.

Second, for the remaining areas designated for oil palm cultivation that are still classed as state land, they too may still contain both forested areas and legitimate NCR territories, whether they are under the jurisdiction of the Forests Department or the Lands and Surveys Department. The judiciary has ruled that as long as no NCR extinguishment notice has been ordered in clear and unambiguous words on any class of land, such rights shall continue to exist. Further, state land areas claimed as part of an indigenous customary territory would have certainly contained forested areas that have been reserved, utilised and cared for by its community members in accordance with their customs.

Third, for organised joint venture schemes involving indigenous communities, they too are not necessarily free from land rights conflicts, in particular if the joint development rights have been obtained by state or private actors through some form of coercion and entail the loss of community access to and control over their land. Many affected communities have protested against the establishment of such schemes on their territories, for a variety of reasons which typically revolve around issues such as the lack of consent and the loss of access to and control of their land.

In principle, there are two broad types of oil palm plantation development permits in Sarawak, i.e. those which originate from the Forests Department and those that originate from the Department of Lands and Surveys. The following section provides further details on the different governance frameworks which oversee the development of oil palm plantations in Sarawak, apart from independent oil palm smallholdings that are mostly owned by indigenous families.

(i) Department of Forests: Licence for Planted Forests (LPF)

The first type of oil palm plantation development permit takes place under the Licence for Planted Forests (LPF) system, issued by the Forests Department and regulated under the Forests Ordinance 2015 and its subsidiary legislation, the
Forests (Planted Forests) Rules 1997. Currently 43 LPFs have been issued in Sarawak since the mid-1990s, covering a total area of 2.8 million hectares. Although the LPFs are principally permits to develop plantations of various kinds of pulp and paper and timber trees, at least 15 of these have also been given the permission to devote a maximum of 20 per cent of their licensed areas to cultivate oil palm trees for one cycle of 25 years. The LPF projects only take place in the gazetted production forests and the non-gazetted state land forests, where the Forests Department is able to exercise its authority and where logging operations had most likely been carried out. The smallest LPF plantation is believed to be around 5,000 hectares while the largest, the LPF 1, is close to 490,000 hectares, with the Forests Department itself functioning as the project proponent, and a timber consortium contracted to carry out the actual plantation activities.

The LPFs do not involve any participation from native landowners. From the perspective of the state, the NCR would have already been largely extinguished in the gazetted Forest Reserves and Protected Forests. At the same, it is the policy of the state government to also deny that the NCR may exist on forested areas that have not been reserved, even if such forested areas have never been served with any NCR extinguishment notice. Nevertheless, the legality of both views is not without contestations. In the gazetted production forests, numerous affected native communities were never even informed and compensated for the loss of their land rights in the first place, as a result of the poor notification process under the forestry law. This practice is in clear breach of the exacting demand stipulated by Article 13 of the Federal Constitution which addresses the right to property and instructs that adequate compensation must be paid for the loss of such rights. Meanwhile, in the non-gazetted state land forests, the denial of the existence of the NCR contradicts the traditional laws of indigenous communities. Further, the requirement to notify affected communities when a state land forest is to be gazetted either as a Forest Reserve or Protected Forest, no matter how poorly spelt out, is in and of itself an explicit admission by the law that such rights can indeed subsist on forested areas.

Further, as such areas fall under the jurisdiction of the Forests Department, it is safe to presume that these are largely made up of formerly logged over forests which in theory could still be allowed to regenerate, but only with due care and proper conservation measures being put in place. More importantly, a significant portion of the forested areas still remain gazetted as either Forest Reserves or Protected Forests. This leads us to question the integrity of the forestry statistics in Sarawak. In paper, such areas will remain categorised as forested areas and even permanently reserved as production forests, although on the ground they have in fact been turned into oil palm monocultures.

38 For more information on the list of LPF projects, please see Friends of the Earth International and Member Groups (2008).
Currently, the Forests Department website shows that around 285,520 hectares have been designated for oil palm cultivation under the LPF system, of which 146,578 hectares have already been developed.

(ii) Department of Lands and Surveys: Agricultural development

The second type of oil palm plantation development permit is under the authority of the Department of Lands and Surveys, where the land use activity is specified for the purpose of agriculture. These licences are much smaller in size in comparison to the LPF permits, typically ranging from a few hundred to a few thousand hectares. However there are possibly hundreds of such licences in existence today. These licences in turn utilise different development approaches under different development authorities.

(a) Without the involvement of native landowners

The first type of licence permits the development of oil palm plantations without any involvement of native landowners, implemented either by the private sector or state government agencies such as the LCDA and SLDB, or through some form of partnership between these private and public actors.

This development approach appears to rely on the premature and often misleading assumption that such areas are largely not encumbered by any legitimate NCR claims. We believe the oil palm plantations documented in the two case studies fall under this category of licence, fully developed by the private sector. A significant portion of such land would have almost certainly contained forested areas which are part of the community commons, utilised for hunting activities as well as the harvesting of a diversity of forest resources. According to the LCDA website, 238,885 hectares of such state land have been put under its development authority. Meanwhile, the website of the Sarawak Plantation Berhad (SPB), the company which owns and manages the principal assets of SLDB, showed that 46,150 hectares of such land are currently under its development authority, under 19 projects.

(b) With the involvement of native landowners

Another development approach for oil palm plantation projects are those which require the supposed partnership between state or federal government agencies and native landowners, with or without the support of private investors. The justification for this partnership model would typically involve claims that vast plots of native customary land are fragmented and not under optimal utilisation. Therefore the
commercial development of native customary land is argued to be highly beneficial for native landowners. However, many of such projects have also been widely protested against by affected communities, as a result of a combination of factors. These include the manner in which such schemes reportedly compel the participation of community members without adequate consultation, transparency and information disclosure as well as a proper consent process, the project managerial structures that prevent communities from being actively involved in the operational and financial decision-making process of the plantations and the long-term or even possibly, permanent loss of community control over their land. Further, apart from creating legal uncertainties over the continuation of their rights in the future, community members may also remain unconvinced on the financial profitability of such plantation projects.

Generally, there are two models of partnerships in such plantation development projects with native communities, namely:

(i) Development by government agencies such as the SALCRA and FELCRA, with government funding in the form of grants and soft loans.

The capital and other expertise and management resources needed by the projects will be channeled through SALCRA or FELCRA. SALCRA and FELCRA projects typically involve a 30-year and 25-year contracts, respectively. While native landowners will hold 90 per cent of the project equity, the remaining 10 per cent will be held by the LCDA, which will also act as the project managing agent.

In 2018, the size of SALCRA joint-venture projects stood at around 51,072 hectares while FELCRA projects covered a more modest 11,017 hectares.

(ii) Development by the private sector without government funding through the New Concept of Development on Native Customary Rights Land, typically referred to as the Konsep Baru in Malay. The bulk of such projects are under the development authority of the LCDA, with only one project under the development authority of SLDB through its company, SPB.

In 2018, the LCDA website showed that 554,523 hectares of land with NCR claims have been approved for such a development, while the SPB website showed that only one such project, at 2,128 hectares, has been developed under its authority.
**Konsep Baru**


The *Konsep Baru* seeks to unite adjacent NCL into a collective ‘NCR land bank’ of 5,000 hectares and above, to be handed to a private company which will utilise its own capital to develop the land into plantations of mostly oil palm and rubber. No government funding is involved in this undertaking. The justification for introducing the initiative is the same, based on the argument that native customary land is mostly fragmented and therefore has remained underdeveloped. This joint-venture model requires the state government to appoint agencies such as the LCDA or SLDB to facilitate the process and to act as trustees on behalf of the native landowners in order to safeguard the interests of the communities.

Consequently, the *Konsep Baru* plantations require that a joint venture company (JVC) to be set up, with 60 per cent of its equity owned by the private company, while the government agency will be holding in trust another 30 per cent of the shares on behalf of the native landowners and entitled to the remaining 10 per cent of the shares. The JVC will then be issued with one land title for a period of 60 years for an agreed value.

Subsequently, the land will be gazetted as a Development Area, as provided for by Section 18A of the Land Code 1958, which was introduced in 1997. The land involved will also be re-classed as Native Area Land, where private titling to native persons is permitted, although in this case, the landowners themselves will not be issued with any individual land titles. Further, the land use activity of the area will also be restricted for agricultural development, with further implementation of any land development activities requiring ministerial authorisation.

The monetary value generated by the use of the land will be used for two types of investments. While 60 per cent of the generated value will be used to fund the landowners’ 30 per cent equity in the JVC, which is to be regarded as their long-term investment, the remaining 30 per cent of the value will be invested in unit trusts for swifter profit-making for the community members. The remaining 10 per cent of the land value will be paid directly to the landowners in cash.
The JVC will have to issue out the landowners’ shares to the trustee, which will be credited in full payment, equivalent to 60 per cent of their land value. Representing 30 per cent of the capital issued out by the JVC, landowners will then be entitled to 30 per cent of the profits generated by the project. Meanwhile the remaining 40 per cent of the land value will be paid by the JVC as deposit to the trustee, with 30 per cent of it to be used for investment in the above said state-sponsored unit trusts, while the remaining 10 per cent to be directly paid in cash to the landowners.

However, involvement in the Konsep Baru entails that the communities’ access to and control of their land will effectively be restricted. Further, it will also distance landowners from important decision-making that may have impacts on their land. In all, despite the assurances of the state, the Konsep Baru may highly likely compromise on the communities’ land rights through a number of ways.

First, although all such shares ownership and profit-sharing rates have already been pre-determined, in the end, the eventual value of the land and dividends due to individual landowners will be subject to various factors such as the size and value of their land, the ratio of debt and equity involved and the costs associated with the development of the plantation. In cases where their land value is assessed to be less than the issued price of the shares allocated to the landowners for their 30 per cent equity ownership in the JVC, the trustee and the JVC may then seek for loans or other financial arrangements in order to resolve the financial gap, putting the people in debt that would not be acquired had they not participated in the scheme. The repayment of such loans will be undertaken by the trustee on behalf of the native landowners, sourced out from the dividends due to them.

Second, on the question why landowners are not issued out with individual titles, the Konsep Baru booklet has this to say [sic]:

Any development initiative will not succeed without systematic planning and implementation... The proposed method will give to the company implementing the project absolute rights to manage it WITHOUT the interference (disturbance) of the native customary rights landowners for a period of 60 years. Nevertheless, all the rights and interests of the native customary rights landowners will be safeguarded (protected) by the agency appointed by the government as the Trustee. This is therefore only to guarantee systematic and simultaneous commercial development which will produce benefits to native customary rights landowners in the form of dividends and job opportunities.

The intention to give the company implementing the project absolute rights over the land puts into question whether landowners, upon participating in such a project, may still hold the rights to transfer their ownership rights to their descendants. More

39 Sebarang usaha pembangunan tidak akan berjaya tanpa perancangan dan pelaksanaan yang sistematis... Kaedah yang dirangka ini akan memberikan hak mutlak kepada syarikat yang mengendalikan projek bagi menguruskannya TANPA campur tangan (gangguan) para pemilik tanah HAB dalam masa 60 tahun. Walau bagaimanapun, segala hak dan kepentingan para pemilik tanah HAB akan dipelihara (dilindungi) oleh agensi yang dilantik kerajaan sebagai Pemegah Amanah. Ini senata-mata untuk menjamin pembangunan komersil yang teratur dan serentak dengan itu memberikan faedah kepada para pemilik tanah HAB dalam bentuk dividen dan peluang pekerjaan.
importantly, this statement is also akin to an admission that instead of being allowed to make collective decisions on matters that may affect their land and the project, participating landowners will be holding no such rights, despite their involvement as legitimate business partners in a collaborative commercial undertaking.

Third, although the company in principle is not allowed to use the land title issued to the JVC to mortgage the land for the purpose of obtaining loans, this can still be done with the written permission of the minister. However the possible repercussions of this permission are not further explained by the handbook.\textsuperscript{40}

Fourth, landowners are also permitted to sell off their shares under the supervision of the trustee, despite the legal fact that the sale and purchase of the NCL may only be mutually undertaken between consenting native persons. This legal prohibition serves to protect the NCL from being sold to non-natives and to private corporations and from it being utilised as mortgages, which could increase the risk of its permanent loss amongst native persons. As such, a native landowner may only lose his land to another native landowner. However, this possible permission renders that the \textit{Konsep Baru} may after all increase the risk of the permanent land loss amongst native landowners, instead of increasing the degree of protection that is afforded to such land. Short of directly stating that such an action will cause the landowners concerned to lose all their rights to the land and certainly profits generated by the project for good, the handbook instead has this to say:\textsuperscript{41}

> Any person who has purchased your shares in the company will then acquire an interest in the company. The share purchasers will have the rights to all the dividends and the exercise of other rights and privileges associated to the ownership of the shares.

Last but not least, the paragraph above then jumps to assure readers that although at the end of the 60-year contract, the company will cease to be a registered developer to the land, the lease over the land may be renewed with the consent of the affected landowners. This simply indicates that after six decades of effectively losing the control and rights to their land, subject to the conditions contained in the project agreement, the land rights of participating landowners will at last be returned to them, but only if they or more likely their descendants, who may have formed a weaker relationship to the concerned land as a result of the absence of experience in working on the land directly, collectively do not wish for the renewal of the lease.

\textsuperscript{40} p. 29.
\textsuperscript{41} Sesiapa sahaja yang membeli saham tuan/puan dalam syarikat akan mempunyai kepentingan dalam syarikat. Pembeli saham tuan/puan itu akan berhak ke atas semua dividen dan menikmati hak dan keistimewaan lain berkait dengan pemegangan saham tersebut. (p. 31).
Overall analysis on the estimated size of large monoculture plantations in Sarawak from various sources

From the above information, the following estimations can be done.

First, around 570,555 hectares of land in Sarawak have been designated to be developed into monoculture plantations of mostly oil palm, without the involvement of native communities. This development can be undertaken either by the private or public sector, or through some form of private and public partnership. However, due to the unilateral manner in which native customary territories are determined by the state, such areas may still well be held under legitimate NCR claims, containing forested areas, productive farmlands and land left in fallow.

There are at least three broad categories of such oil palm plantation permits. The first is under the development authority of the Forests Department’s LPF system, where 285,520 hectares of gazetted production forests and non-gazetted state land forests have been designated, constituting 50 per cent of such areas. The second is under the development authority of the LCDA, where another 238,885 hectares of state land have been designated, which may still be largely forested, constituting another 42 per cent. The third is under the development authority of the SLDB, whose principal assets are now owned and managed by the SPB business group, where 46,150 hectares of state land have been designated, which may also still be largely forested, constituting the remaining 8 per cent from this category.

Second, another 618,740 hectares of land, where the NCR are conceded to exist by the state, have also been targeted to be jointly developed by state or private actors, or through varying modes of public and private partnerships, with the participation of native landowners. The LCDA is currently responsible for the development of some 554,523 hectares or 90 per cent of such designated land under the Konsep Baru. However, in 2015, in a reply to a question raised by a state lawmaker in the Sarawak state legislature, the government stated that only 79,565 hectares of such NCR land have in fact been developed, for which concerns were also raised on the reportedly low financial returns received by the communities involved. Meanwhile, for the remaining 10 per cent of such designated land, some 2,128 hectares, 51,072 hectares and 11,017 hectares of land are currently under the development authority of SPB, SALCRA and FELCRA, respectively.

In summary, out of the 1.2 million hectares of land designated for oil palm plantations in Sarawak which we have managed to trace, 285,520 hectares are under the development authority of the Forests Department; 793,408 hectares are under the

42 Borneo Post. Written reply on NCR land JVs irks Chong. 29 December 2015.
development authority of LCDA; 48,278 hectares are held by SPB, under the development authority of SLDB; 51,072 hectares are under the development authority of SALCRA; and 11,859 hectares are under the development authority of FELCRA. Meanwhile, according to MPOB data, 1.5 million hectares of oil palm cultivation areas have already been developed in Sarawak by 2017.

Last but not least, some 2.8 million hectares have also been designated for large monoculture plantation development in Sarawak under 43 LPF licences, regulated by its Forests Department. As mentioned above, the LPFs in principle are permits to develop pulp and paper or timber trees. However, 15 LPFs have also been permitted to devote no more than 20 per cent of their concession areas to grow oil palm for one cycle of 25 years.

Therefore this estimation shows that since the 1990s, more than 3 million hectares of land, or more than a quarter of the Sarawak land area, or an area approximately the size of the state of Pahang, have been designated for large monoculture plantations in Sarawak, where the size of areas designated for pulp and paper and timber trees is larger than that designated for oil palm. A significant size of these areas may fall within native customary territories and contain productive native farmlands as well as forested areas that have been mostly logged over in the previous decades, including forests that have been gazetted as production forests i.e. the Forest Reserves and Protected Forests. Therefore, we need to be clear that oil palm per se is not the only problem here. The real two principal problems are the violations of the indigenous customary land rights and deforestation. Essentially, the advent of such large monoculture plantations of pulp and paper or timber trees or oil palm in Malaysia is a post-logging development which commenced in the 1990s, after unsustainable logging practices in the previous decades had significantly depleted the country’s natural timber resources.

Certainly, not all of these areas are plantable. Some plantations in fact have yet to be fully developed. Therefore there is still time for the federal and state authorities to take the correct course of action to protect the remaining NCR territories and forested areas where land clearing activities have yet to commence. There is an urgent need to review or revoke large monoculture licences which affect indigenous customary territories as well as forested areas, whether they are gazetted production forests or non-reserved stateland forests, regardless of the kind of commodity involved. This call in fact extends to the entire country, as both Peninsular Malaysia and Sabah are also engaged in the development of large monoculture plantations that affect indigenous customary territories and forested areas.

Map 1 shows the map of large monoculture plantation licences in Sarawak, both under the authority of the Sarawak Forests Department and the Sarawak Department of Lands and Surveys, which we had managed to document. It was first
published in 2008 in our joint publication with other members of Friends of the Earth International (FOEI), Malaysian Palm Oil – Green Gold or Green Wash?. This publication also provided information of the licence holders of the LPF system.43

43 Friends of the Earth International and Member Groups. (2008).
### Table 7: Size of oil palm plantations in Malaysia 2008 - 2017 (hectares)

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<td>744,372</td>
<td>839,748</td>
<td>919,418</td>
<td>1,012,587</td>
<td>1,160,898</td>
<td>1,263,391</td>
<td>1,439,359</td>
<td>1,506,769</td>
<td>1,555,828</td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>4,238,363</strong></td>
<td><strong>4,487,957</strong></td>
<td><strong>4,691,160</strong></td>
<td><strong>4,853,766</strong></td>
<td><strong>5,076,929</strong></td>
<td><strong>5,229,739</strong></td>
<td><strong>5,392,235</strong></td>
<td><strong>5,642,943</strong></td>
<td><strong>5,737,985</strong></td>
<td><strong>5,811,145</strong></td>
<td></td>
</tr>
</tbody>
</table>


### Table 8: Size and percentage of oil palm plantations in Malaysia by planter category 2013 - 2017 (hectares)

<table>
<thead>
<tr>
<th></th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private estates</td>
<td>3,242,438</td>
<td>3,343,186</td>
<td>3,442,195</td>
<td>3,508,554</td>
<td>3,543,429</td>
</tr>
<tr>
<td>Independent smallholders</td>
<td>732,164</td>
<td>808,835</td>
<td>902,871</td>
<td>933,948</td>
<td>979,758</td>
</tr>
<tr>
<td>FELDA</td>
<td>679,866</td>
<td>700,991</td>
<td>733,583</td>
<td>706,588</td>
<td>704,811</td>
</tr>
<tr>
<td>State schemes, government agencies</td>
<td>313,784</td>
<td>323,534</td>
<td>388,577</td>
<td>344,314</td>
<td>347,632</td>
</tr>
<tr>
<td>FELCRA</td>
<td>156,892</td>
<td>161,767</td>
<td>169,288</td>
<td>173,032</td>
<td>169,158</td>
</tr>
<tr>
<td>Planter Category</td>
<td>2013</td>
<td>2017</td>
<td>Area increase 2013 - 2017</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
<td>----------</td>
<td>----------</td>
<td>---------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Private estates</td>
<td>3,242,438</td>
<td>3,543,429</td>
<td>300,991</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Independent smallholders</td>
<td>732,164</td>
<td>979,758</td>
<td>247,594</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FELDA</td>
<td>679,866</td>
<td>704,811</td>
<td>24,945</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State schemes, government agencies</td>
<td>313,784</td>
<td>347,632</td>
<td>33,848</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FELCRA</td>
<td>156,892</td>
<td>169,158</td>
<td>12,266</td>
<td></td>
<td></td>
</tr>
<tr>
<td>RISDA</td>
<td>104,595</td>
<td>66,357</td>
<td>-38,238</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>5,229,739</strong></td>
<td><strong>5,811,145</strong></td>
<td><strong>581,406</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Plantation development description</th>
<th>Size of designated areas (hectares)</th>
<th>Land status</th>
<th>Number of projects</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> Land under the authority of the Forests Department</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Licence for Planted Forest (LPF)</td>
<td>285,520 (However, based on individual EIA reports, the total size of areas calculated stood at 161,736 hectares.)</td>
<td>Permanent Forest Estate and state land forests considered to be free from NCR claims by the state.</td>
<td>15</td>
<td>Sarawak Forests Department website (December 2018)</td>
</tr>
<tr>
<td>Planted forest development undertaken by private companies without the involvement of native communities</td>
<td></td>
<td></td>
<td></td>
<td>Project EIA reports</td>
</tr>
<tr>
<td>All licences are principally for the cultivation of pulp and paper or timber trees. However several licence holders have been permitted to plant oil palm on no more than 20 per cent of their concession areas, for one cycle of 25 years.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. LPF 004: Kuala Baram Forest Plantation, Miri</td>
<td>18,000</td>
<td>75 % out of 24,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. LPF 006: Lana Forest Plantation, Nanga Merit - Punan Bah Area, Bintulu – Kapit</td>
<td>15,000</td>
<td>30 % out of 50,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>iii. LPF 009: Samling Plantation at Kuala Tatau, Bintulu</td>
<td>1,766</td>
<td>* 20 % out of 8,830</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*maximum percentage used as actual ratio not provided in the EIA report.*
| iv. | LPF 010: Pasin & Tekalit Forest Plantation, Sibu – Kapit | 15,042 | * 20 % out of 75,210 |
| v. | LPF 011: Tutoh Forest Plantation, Miri | 22,027 | Actual figure provided |
| vi. | LPF 013: Belaga Forest Plantation, Bintulu – Kapit | 24,220 | Actual figure provided |
| vii. | LPF 018: Penyuan & Plieran Forest Plantation, Bintulu – Kapit | 30,436 | Actual figure provided |
| viii. | LPF 027: Medamit Forest Plantation, Limbang | 6,329 | Actual figure provided |
| ix. | LPF 029: Loba Kabang Oil Palm Plantation, at Batang Lassa, Sibu – Mukah | 4,240 | * 20 % out of 21,200 |
| x. | LPF 032: Oya - Kanowit - Katibas Forest Plantation, Sibu | 5,240 | Actual figure provided |
| xi. | LPF 033: Pandan Belaga Forest Plantation, Kapit | 2,532 | * 20 % out of 12,661 |
| xii. | LPF 034: Saribas Oil Palm Plantation in Pusa, | 1,207 | * 20 % out of 6,034 |
### Seratok, Betong

<table>
<thead>
<tr>
<th>No.</th>
<th>Plantation Name and Location</th>
<th>Development Authority</th>
<th>Land under Authority of the Lands and Surveys Department</th>
</tr>
</thead>
<tbody>
<tr>
<td>xiii.</td>
<td>LPF 035: Rumah Simunjan Oil Palm Plantation, Samarahan – Sri Aman</td>
<td>Land Custody and Development Authority (LCDA/PELITA)</td>
<td>Agricultural development undertaken by private companies without the involvement of native communities</td>
</tr>
<tr>
<td>xiv.</td>
<td>LPF 037: Baram Tinjar Forest Plantation in Batang Tinjar and Sg. Apoh Areas, Miri</td>
<td>LCDA website (March 2018)</td>
<td>State land considered to be free from NCR claims by the state.</td>
</tr>
<tr>
<td>xv.</td>
<td>LPF 038: Limba Jaya Forest Plantation, Limbang</td>
<td>LCDA website (March 2018)</td>
<td>State land considered to be held under NCR by the state.</td>
</tr>
</tbody>
</table>

### II

#### Land under the authority of the Lands and Surveys Department

<table>
<thead>
<tr>
<th>Development Authority</th>
<th>Agricultural development undertaken by private companies without the involvement of native communities</th>
<th>Agricultural development undertaken by private companies on native customary land with the involvement of native communities</th>
<th>Joint venture with native landowners with 10 per cent equity held by LCDA, 30 per</th>
</tr>
</thead>
<tbody>
<tr>
<td>LCDA website (March 2018)</td>
<td>238,885 State land considered to be free from NCR claims by the state.</td>
<td>554,523 State land considered to be held under NCR by the state.</td>
<td>47 13,952 registered participants</td>
</tr>
</tbody>
</table>
cent equity held by native landowners and 60 per cent equity held by the private investor.

Capital provided by private investors while the LCDA functions as the project managing agent. Typically under a 60-year contract.

<table>
<thead>
<tr>
<th>Subtotal</th>
<th>793,408</th>
</tr>
</thead>
</table>

2. Development authority: Sarawak Land Development Board (SLDB)
The principal assets of SLDB are owned and managed by the Sarawak Plantation Berhad Group (SPB)

(i) Agricultural development undertaken by SPB without the involvement of native communities

<table>
<thead>
<tr>
<th>Area</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Melugu</td>
<td>3,007</td>
</tr>
<tr>
<td>Tulai</td>
<td>2,079</td>
</tr>
<tr>
<td>Mukah 1</td>
<td>3,877</td>
</tr>
<tr>
<td>Matadeng</td>
<td>1,848</td>
</tr>
<tr>
<td>Bakau</td>
<td>3,993</td>
</tr>
<tr>
<td>Bukut</td>
<td>1,561</td>
</tr>
<tr>
<td>Mukah 3</td>
<td>3,014</td>
</tr>
</tbody>
</table>

State land considered to be free from NCR claims by the state.
<table>
<thead>
<tr>
<th>Location</th>
<th>Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sri Duan</td>
<td>2,651</td>
</tr>
<tr>
<td>Sawai</td>
<td>2,726</td>
</tr>
<tr>
<td>Subis 3</td>
<td>2,559</td>
</tr>
<tr>
<td>Subis 2</td>
<td>2,736</td>
</tr>
<tr>
<td>Ladang Surea</td>
<td>1,838</td>
</tr>
<tr>
<td>Bukit Peninjau</td>
<td>2,139</td>
</tr>
<tr>
<td>Sungai Tangit</td>
<td>1,698</td>
</tr>
<tr>
<td>Ladang 3</td>
<td>2,251</td>
</tr>
<tr>
<td>Ladang Kosa</td>
<td>2,845</td>
</tr>
<tr>
<td>Tugau</td>
<td>3,050</td>
</tr>
<tr>
<td>Pinji Mewah</td>
<td>1,908</td>
</tr>
<tr>
<td>Karabungan</td>
<td>370</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>48,278</strong></td>
</tr>
</tbody>
</table>

(ii) Agricultural development undertaken by SPB on native customary land with the involvement of native communities **2,128** State land considered to be held under NCR by the state.

<table>
<thead>
<tr>
<th>Location</th>
<th>Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPB Pelita Suai</td>
<td>2,128</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>48,278</strong></td>
</tr>
</tbody>
</table>

3. **Development authority: Land Consolidation and Rehabilitation Authority (SALCRA)**

Agricultural development undertaken by SALCRA on native customary land with **51,072** State land considered to be held under NCR by the state. **19** SALCRA website
the involvement of native communities

Joint venture with 10 per cent equity held by the LCDA and 90 per cent equity held by native landowners.

Capital provided by SALCRA while the LCDA functions as the project managing agent. Typically under a 30-year contract.

<table>
<thead>
<tr>
<th>Bau -Lundu</th>
<th>11,859</th>
<th>53 villages, 6,590 landowners</th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Jagoi</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Bratak</td>
<td></td>
<td></td>
</tr>
<tr>
<td>iii. Undan</td>
<td></td>
<td></td>
</tr>
<tr>
<td>iv. Stenggang</td>
<td></td>
<td></td>
</tr>
<tr>
<td>v. Sebako</td>
<td>Serian</td>
<td>11,869</td>
</tr>
<tr>
<td>i. Kedup 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ii. Kedup 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>iii. Melikin</td>
<td></td>
<td></td>
</tr>
<tr>
<td>iv. Mongkos</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(December 2017)
| Development authority: Federal Land Consolidation and Rehabilitation Authority (FELCRA) |
|---|---|---|---|
| Agricultural development undertaken by FELCRA on native customary land with the involvement of native communities | 11,017 | State land considered to be held under NCR by the state. | 5 | FELCRA website (January 2015) |

### Sri Aman

<table>
<thead>
<tr>
<th>Village</th>
<th>Population</th>
<th>Number of Villages</th>
<th>Number of Landowners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sri Aman</td>
<td>12,518</td>
<td>133</td>
<td>5,096</td>
</tr>
</tbody>
</table>

#### Saratok – Saribas

<table>
<thead>
<tr>
<th>Village</th>
<th>Population</th>
<th>Number of Villages</th>
<th>Number of Landowners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saratok</td>
<td>14,621</td>
<td>241</td>
<td>7,314</td>
</tr>
</tbody>
</table>

### Sarakek

<table>
<thead>
<tr>
<th>Village</th>
<th>Population</th>
<th>Number of Villages</th>
<th>Number of Landowners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pakit</td>
<td>11,017</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Joint venture with 10 per cent equity held by LCDA and 90 per cent equity held by native landowners.

Capital provided by FELCRA (although management charges and marketing fees will be imposed) while the LCDA functions as the project managing agent. Typically under a 25-year contract.

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i.</td>
<td>Balingian Plantation</td>
<td>2,000</td>
<td></td>
</tr>
<tr>
<td>ii.</td>
<td>Sundar Awat-Awat Plantation</td>
<td>517</td>
<td></td>
</tr>
<tr>
<td>iii.</td>
<td>Sedong Plantation, Simunjan</td>
<td>1,500</td>
<td></td>
</tr>
<tr>
<td>iv.</td>
<td>Melugu Plantation, Sri Aman</td>
<td>5,000</td>
<td></td>
</tr>
<tr>
<td>v.</td>
<td>Jemoreng Plantation</td>
<td>2,000</td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL** | **1,189,295** |   |   |

Note: As the data in this table have been sourced from different federal and state government agencies, they may comprise both plantable areas and non-plantable areas, as well as areas that have been developed and areas that have yet to be developed.
Map 1: Licensed areas for large monoculture plantations in Sarawak
Certified oil palm is not necessarily respectful towards indigenous customary land rights

Since the 1990s, various international and national processes have been developed to ensure that logging operations and the production of timber and its products can be conducted sustainably, without involving irreversible forest destruction, or legally, without involving activities that are in contravention of the law, or both. In the following decades, similar attempts were also made on the production of other global commodities, especially those that have been widely reported to cause numerous social and environmental problems, such as community land rights violations and deforestation. Palm oil is one of these commodities. For palm oil, the most prominent certification scheme is the Roundtable on Sustainable Palm Oil (RSPO), which began operating in 2007. In 2013, Malaysia too launched its own national certification scheme, the Malaysian Sustainable Palm Oil (MSPO), which is planned to be made compulsory nationwide by the end of 2019.

However, civil society organisations such as SAM, have continued to take the position that the certification of commodities is a false solution to environmental destruction and human rights violations that are fundamentally caused by poor governance conditions and the unsustainable production and consumption patterns of the global free market. Our view is based on the fact that the violations of the NCR and massive deforestation caused by oil palm plantations in Sarawak are in fact the direct outcomes of systemic weaknesses, flaws and limitations of the policy and legislative framework pertaining to land, forest, conservation areas and the NCR in the state. In short, the environmentally and socially destructive large-scale oil palm plantations are part of this governance system instead of its exception.

This is the same system that had permitted unsustainable rates of timber harvesting, especially in the 1980s and 1990s, which eventually led to the depletion of natural timber resources in the state. This depletion in turn fuelled the advent of large scale monoculture plantations in the state by the late 1990s, mostly developed on logged over forests, which many native communities still claim as part of their customary territories. This is also the same system that denies NCR recognition to the communal forest. Further, this system also permits the extinguishment of the NCR without a comprehensive notification process and the payment of adequate compensation. It also fails to institute the free, prior and informed consent process for native communities affected by NCR extinguishment and the issuance of resource-extractive and land development permits, including for oil palm plantations.

Therefore, the certification of any commodity produced in such governance conditions, may only at best, offer highly limited technical solutions to what is
essentially a structural issue. At its worst, it can actually function as a greenwashing tool, certifying commodities that are far from sustainable and whose legal impeccability may even be questionable in certain cases, misleading consumers as its market continues to expand comfortably around the world.

**Roundtable on Sustainable Palm Oil (RSPO)**

The first set of RSPO principles, criteria and indicators (RSPO P&C 2007) came into application in November 2007, after a trial period that commenced in 2005. In a number of countries, the RSPO P&C 2007 was also subjected to a subsequent process of national interpretation. Between 2012 and 2013, these standards underwent a review process, leading to the RSPO P&C 2013. After another five years of application, the second standard was also similarly reviewed, resulting in the RSPO P&C 2018, which came into application in November 2018. Subsequently, the respective national interpretations are expected to be revised to be fully compliant with the new standard within 12 months of its adoption. If this is not completed, the P&C 2018 will continue to be effective until the national interpretation has been updated.

The definitions of the technical terms used in the standard are clarified in its annex one. Annex two provides further guidance to support the implementation of the standard, based on each principle. Key international laws and conventions applicable to the production of palm oil under the standard are set out in its annex three. Annex four provides the necessary details for the implementation procedure for its indicator 2.3.2. Annex five provides guidance on the transition from the sole assessment on high conservation value (HCV) areas of the previous standard to one which additionally includes high carbon stock (HCS) areas. Further, the standard is also supported by other normative documents such as the ‘Free, Prior and Informed Consent: Guide for RSPO members’, published in 2013. The FPIC document contains ten guides, eight of which are listed in table 9, with the corresponding selected texts.

RSPO defines sustainable palm oil production as one which comprises legal, economically viable, environmentally appropriate and socially beneficial management and operations. The RSPO and its members recognise, support and commit to the United Nations Universal Declaration of Human Rights, the International Labour Organisation’s (ILO) Declaration on Fundamental Principles and Rights at Work. Apart from these, annex three of the standard also lists other key international laws and conventions applicable to the production of palm oil, including the United Nations’ Declaration on the Rights of Indigenous Peoples (UNDRIP), the United Nations Guiding Principles on Business and Human Rights and the International Covenant on Economic, Social and Cultural Rights.
Table 11 shows selected principles, criteria and indicators for the RSPO P&C 2018 that are related to indigenous customary land rights, forests and the environment.

**Malaysian Sustainable Palm Oil (MSPO)**

The Malaysian Sustainable Palm Oil (MSPO), otherwise known as MS 2530, is a national certification standard for the Malaysian palm oil industry. It was published in 2013 by the Department of Standards Malaysia, which regulates the approval of a standard as a Malaysian Standard under the Standards of Malaysia Act 1996. As stated in MSPO documents, the Malaysian Standards (MS) are developed through consensus by committees which comprise balanced representation of producers, users, consumers and other appropriate parties with relevant interests and must be reviewed periodically. Their use is voluntary except when they are made mandatory by regulatory authorities by means of regulations, local by-laws or any other similar ways. The development, distribution and sale of MS has been tasked to SIRIM Berhad, (formerly, the Standard and Industrial Research Institute of Malaysia) which today is a body corporate wholly owned by the Malaysian government under the Ministry of International Trade and Industry (MITI) that focuses on industrial research and technology.

The MSPO was developed by the Technical Committee on Fats and Oils under the Industry Standards Committee on Food, Food Products and Food Safety. Its development was carried out by the Malaysian Palm Oil Board (MPOB), which has been appointed by SIRIM Berhad to develop standards for palm oil products, oil-based food products, palm kernel products and oil palm-based products. The scheme owner meanwhile is the Malaysian Palm Oil Certification Council (MPOCC), which works closely with the Ministry of Primary Industries (MPI).

Launched in January 2015, Malaysia aims to make the MSPO 2013 mandatory for all oil palm producers by the end of 2019. The MSPO 2013 comprises four parts. Part one contains its general principles; part two covers the general principles for independent smallholders; part three covers the general principles for palm oil plantations and organised smallholders; and its part four covers the general principles for palm oil mills. The standard operates based upon seven principles which cover the themes of management, social equity, environmental protection and economic progress. Currently, the MPOCC has begun the process of reviewing the 2013 standard, set to be completed by 2020.

Table 12 shows selected principles, criteria and indicators for part 3 of the MSPO, for oil palm plantations and organised smallholders that are related to indigenous customary land rights, forests and the environment.
Table 11: RSPO P&C 2018 – Selected principles, criteria and indicators on indigenous peoples, deforestation and environmental protection

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Principle 1:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Behave ethically and transparently</strong></td>
<td></td>
</tr>
<tr>
<td>1.1 The unit of certification provides adequate information to relevant stakeholders on environmental, social and legal issues relevant to RSPO Criteria, in appropriate languages and forms to allow for effective participation in decision-making.</td>
<td>1.1.1 (C) Management documents that are specified in the RSPO P&amp;C are made publicly available.</td>
</tr>
<tr>
<td></td>
<td>1.1.2 Information is provided in appropriate languages and accessible to relevant stakeholders.</td>
</tr>
<tr>
<td></td>
<td>1.1.3 (C) Records of requests for information and responses are maintained.</td>
</tr>
<tr>
<td></td>
<td>1.1.4 (C) Consultation and communication procedures are documented, disclosed, implemented, made available, and explained to all relevant stakeholders by a nominated management official.</td>
</tr>
<tr>
<td>1.2 The unit of certification commits to ethical conduct in all business operations and transactions.</td>
<td>1.2.1 A policy for ethical conduct is in place and implemented in all business operations and transactions, including recruitment and contracts.</td>
</tr>
<tr>
<td></td>
<td>1.2.2 A system is in place to monitor compliance and the implementation of the policy and overall ethical business practice.</td>
</tr>
<tr>
<td><strong>Principle 2:</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Operate legally and respect rights</strong></td>
<td></td>
</tr>
<tr>
<td>2.1 There is compliance with all applicable</td>
<td>2.1.1 (C) The unit of certification complies with applicable legal</td>
</tr>
<tr>
<td><strong>local, national, and ratified international laws and regulations.</strong></td>
<td>requirements.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>2.1.2</strong></td>
<td>A documented system for ensuring legal compliance is in place. This system has a means to track changes to the law and also includes listing and evidence of legal due diligence of all contracted third parties, recruitment agencies, service providers and labour contractors.</td>
</tr>
<tr>
<td><strong>2.1.3</strong></td>
<td>Legal or authorised boundaries are clearly demarcated and visibly maintained, and there is no planting beyond these legal or authorised boundaries.</td>
</tr>
</tbody>
</table>

**Principle 3:**

**Optimise productivity, efficiency, positive impacts and resilience**

<table>
<thead>
<tr>
<th><strong>3.2</strong></th>
<th><strong>3.2.1</strong></th>
<th><strong>3.2.2</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>The unit of certification regularly monitors and reviews their economic, social and environmental performance and develops and implements action plans that allow demonstrable continuous improvement in key operations.</td>
<td>(C) The action plan for continuous improvement is implemented, based on consideration of the main social and environmental impacts and opportunities of the unit of certification.</td>
<td>As part of the monitoring and continuous improvement process, annual reports are submitted to the RSPO Secretariat using the RSPO metrics template.</td>
</tr>
<tr>
<td><strong>3.3</strong></td>
<td><strong>3.3.1</strong></td>
<td><strong>3.3.2</strong></td>
</tr>
<tr>
<td>Operating procedures are appropriately documented, consistently implemented and</td>
<td>(C) Standard Operating Procedures (SOPs) for the unit of certification are in place.</td>
<td>A mechanism to check consistent implementation of procedures is</td>
</tr>
<tr>
<td>Principle 4:</td>
<td>Respect community and human rights and deliver benefits</td>
<td></td>
</tr>
<tr>
<td>-------------</td>
<td>--------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>4.1</strong></td>
<td>The unit of certification respects human rights, which includes respecting the rights of Human Rights Defenders.</td>
<td></td>
</tr>
<tr>
<td><strong>4.1.1</strong></td>
<td>(C) A policy to respect human rights, including prohibiting retaliation against Human Rights Defenders (HRDs), is documented and communicated to all levels of the workforce, operations, supply chain and local communities and prohibits intimidation and harassment by the unit of certification and</td>
<td></td>
</tr>
</tbody>
</table>

| 3.3.3        | Records of monitoring and any actions taken are maintained and available. |

<p>| 3.4          | A comprehensive Social and Environmental Impact Assessment (SEIA) is undertaken prior to new plantings or operations, and a social and environmental management and monitoring plan is implemented and regularly updated in ongoing operations. |
| <strong>3.4.1</strong>    | (C) In new plantings or operations including mills, an independent SEIA, undertaken through a participatory methodology involving the affected stakeholders, and including the impacts of any smallholder/outgrower scheme is documented. |
| <strong>3.4.2</strong>    | For the unit of certification, a SEIA is available and social and environmental management and monitoring plans have been developed with participation of affected stakeholders. |
| <strong>3.4.3</strong>    | (C) The social and environmental management and monitoring plan is implemented, reviewed and updated regularly in a participatory way. |</p>
<table>
<thead>
<tr>
<th>4.1.2</th>
<th>The unit of certification does not instigate violence or use any form of harassment, including the use of mercenaries and paramilitaries in their operations.</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.2</td>
<td>There is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all affected parties.</td>
</tr>
<tr>
<td>4.2.1</td>
<td>(C) The mutually agreed system, open to all affected parties, resolves disputes in an effective, timely and appropriate manner, ensuring anonymity of complainants, HRDs, community spokespersons and whistleblowers, where requested, without risk of reprisal or intimidation and follows the RSPO policy on respect for HRDs.</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Procedures are in place to ensure that the system is understood by the affected parties, including by illiterate parties.</td>
</tr>
<tr>
<td>4.2.3</td>
<td>The unit of certification keeps parties to a grievance informed of its progress, including against agreed timeframe and the outcome is available and communicated to relevant stakeholders.</td>
</tr>
<tr>
<td>4.2.4</td>
<td>The conflict resolution mechanism includes the option of access to independent legal and technical advice, the ability for complainants to choose individuals or groups to support</td>
</tr>
<tr>
<td></td>
<td>The unit of certification contributes to local sustainable development as agreed by local communities.</td>
</tr>
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</tr>
<tr>
<td>4.3</td>
<td>Use of the land for oil palm does not diminish the legal, customary or user rights of other users without their Free, Prior and Informed Consent.</td>
</tr>
<tr>
<td>4.4.2</td>
<td>Copies of documents evidencing agreement-making processes and negotiated agreements detailing the FPIC process are available and include:</td>
</tr>
<tr>
<td></td>
<td>a) Evidence that a plan has been developed through consultation and discussion in good faith with all affected groups in the communities, with particular assurance that vulnerable, minorities’ and gender groups are consulted, and that information has been provided to all affected groups, including information on the steps that are taken to involve them in decision-making.</td>
</tr>
</tbody>
</table>
b) Evidence that the unit of certification has respected communities’ decisions to give or withhold their consent to the operation at the time that these decisions were taken.

c) Evidence that the legal, economic, environmental and social implications of permitting operations on their land have been understood and accepted by affected communities, including the implications for the legal status of their land at the expiry of the unit of certification’s title, concession or lease on the land.

<table>
<thead>
<tr>
<th>4.4.3</th>
<th>(C) Maps of an appropriate scale showing the extent of recognised legal, customary or user rights are developed through participatory mapping involving affected parties (including neighbouring communities where applicable, and relevant authorities).</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.4.4</td>
<td>All relevant information is available in appropriate forms and languages, including assessments of impacts, proposed benefit sharing, and legal arrangements.</td>
</tr>
<tr>
<td>4.4.5</td>
<td>(C) Evidence is available to show that communities are represented</td>
</tr>
</tbody>
</table>
through institutions or representatives of their own choosing, including by legal counsel if they so choose.

4.4.6 There is evidence that implementation of agreements negotiated through FPIC is annually reviewed in consultation with affected parties.

| 4.5 | No new plantings are established on local peoples’ land where it can be demonstrated that there are legal, customary or user rights, without their FPIC. This is dealt with through a documented system that enables these and other stakeholders to express their views through their own representative institutions. |
| 4.5.1 | (C) Documents showing identification and assessment of demonstrable legal, customary and user rights are available. |
| 4.5.2 | (C) FPIC is obtained for all oil palm development through a comprehensive process, including in particular, full respect for their legal and customary rights to the territories, lands and resources via local communities’ own representative institutions, with all the relevant information and documents made available, with option of resourced access to independent advice through a documented, long-term and two-way process of consultation and negotiation. |
| 4.5.3 | Evidence is available that affected local peoples understand they have the right to say ‘no’ to operations planned on their lands before and during initial discussions, during the stage of information gathering and |
associated consultations, during negotiations, and up until an agreement with the unit of certification is signed and ratified by these local peoples. Negotiated agreements are non-coercive and entered into voluntarily and carried out prior to new operations.

4.5.4 To ensure local food and water security, as part of the FPIC process, participatory SEIA and participatory land-use planning with local peoples, the full range of food and water provisioning options are considered. There is transparency of the land allocation process.

4.5.5 Evidence is available that the affected communities and rights holders have had the option to access information and advice, that is independent of the project proponent, concerning the legal, economic, environmental and social implications of the proposed operations on their lands.

4.5.6 Evidence is available that the communities (or their representatives) gave consent to the initial planning phases of the operations prior to the issuance of a new concession or land title to the operator.

4.5.7 New lands will not be acquired for plantations and mills after 15
November 2018 as a result of recent (2005 or later) expropriations in the national interest without consent (eminent domain), except in cases of smallholders benefitting from agrarian reform or anti-drug programmes.

<p>| 4.5.8 | (C) New lands are not acquired in areas inhabited by communities in voluntary isolation. |
| 4.6 | Any negotiations concerning compensation for loss of legal, customary or user rights are dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions. |
| 4.6.1 | (C) A mutually agreed procedure for identifying legal, customary or user rights, and a procedure for identifying people entitled to compensation, is in place. |
| 4.6.2 | (C) A mutually agreed procedure for calculating and distributing fair and gender-equal compensation (monetary or otherwise) is established and implemented, monitored and evaluated in a participatory way, and corrective actions taken as a result of this evaluation. |
| 4.6.3 | Evidence is available that equal opportunities are provided to both men and women to hold land titles for smallholdings. |
| 4.6.4 | The process and outcomes of any negotiated agreements, compensation and payments are documented, with evidence of the participation of affected parties, and made publicly |</p>
<table>
<thead>
<tr>
<th><strong>4.7</strong></th>
<th>Where it can be demonstrated that local peoples have legal, customary or user rights, they are compensated for any agreed land acquisitions and relinquishment of rights, subject to their FPIC and negotiated agreements.</th>
<th><strong>4.7.1</strong></th>
<th>(C) A mutually agreed procedure for identifying people entitled to compensation is in place.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>4.7.2</strong></td>
<td>(C) A mutually agreed procedure for calculating and distributing fair compensation (monetary or otherwise) is in place and documented and made available to affected parties.</td>
<td><strong>4.7.3</strong></td>
<td>Communities that have lost access and rights to land for plantation expansion are given opportunities to benefit from plantation development.</td>
</tr>
<tr>
<td><strong>4.8</strong></td>
<td>The right to use the land is demonstrated and is not legitimately contested by local people who can demonstrate that they have legal, customary, or user rights.</td>
<td><strong>4.8.1</strong></td>
<td>Where there are or have been disputes, proof of legal acquisition of title and evidence that mutually agree compensation has been made to all people who held legal, customary, or user rights at the time of acquisition is available and provided to parties to a dispute, and that any compensation was accepted following a documented proces of FPIC.</td>
</tr>
<tr>
<td><strong>4.8.2</strong></td>
<td>(C) Land conflict is not present in the area of the unit of certification. Where land conflict exists, acceptable conflict resolution processes (see Criteria 4.2 and 4.6) are implemented and accepted by the parties involved. In the case of newly acquired</td>
<td></td>
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</tr>
</tbody>
</table>
plantations, the unit of certification addresses an unresolved conflict through appropriate conflict resolution mechanisms.

| 4.8.3 | Where there is evidence of acquisition through dispossession or forced abandonment of customary and user rights prior to the current operations and there remain parties with demonstrable customary and land use rights, these claims will be settled using the relevant requirements (Indicators 4.4.2, 4.4.3 and 4.4.4) |

| 4.8.4 | For any conflict or dispute over the land, the extent of the disputed area is mapped out in a participatory way with involvement of affected parties (including neighbouring communities where applicable). |

**Principle 7:**
**Protect, conserve and enhance ecosystems and the environment**

| 7.7 | No new planting on peat, regardless of depth after 15 November 2018 and all peatlands are managed responsibly. |
| 7.7.1 | (C) There is no new planting on peat regardless of depth after 15 November 2018 in existing and new development areas. |
| 7.7.2 | Areas of peat within the managed areas are inventoried, documented and reported (effective from 15 November 2018) to RSPO Secretariat. |

*(Procedural note provided.*)
| 7.7.3 | (C) Subsidence of peat is monitored, documented and minimised. |
| 7.7.4 | (C) A documented water and ground cover management programme is in place. |
| 7.7.5 | (C) For plantations planted on peat, drainability assessments are conducted following the RSPO Drainability Assessment Procedure, or other RSPO recognised methods, at least five years prior to replanting. The assessment result is used to set the timeframe for future replanting, as well as for phasing out of oil palm cultivation at least 40 years, or two cycles, whichever is greater, before reaching the natural gravity drainability limit for peat. When oil palm is phased out, it is replaced with crops suitable for a higher water table (paludiculture) or rehabilitated with natural vegetation.  

*(Procedural note provided.)* |
| 7.7.6 | (C) All existing plantings on peat are managed according to the ‘RSPO Manual on Best Management Practices (BMPs) for existing oil palm cultivation on peat’, version 2 (2018) and associated audit guidance. |
| 7.7.7 | (C) All areas of unplanted and set-aside peatlands in the |
managed area (regardless of depth) are protected as “peatland conservation areas”; new drainage, road building and power lines by the unit of certification on peat soils is prohibited; peatlands are managed in accordance with the ‘RSPO BMPs for Management and Rehabilitation of Natural Vegetation Associated with Oil Palm Cultivation on Peat’, version 2 (2018) and associated audit guidance.

| 7.8 | Practices maintain the quality and availability of surface and groundwater. | 7.8.1 | A water management plan is in place and implemented to promote more efficient use and continued availability of water sources and to avoid negative impacts on other users in the catchment. The plan addresses the following:

a) The unit of certification does not restrict access to clean water or contribute to pollution of water used by communities.

b) Workers have adequate access to clean water.

7.8.2 | (C) Water courses and wetlands are protected, including maintaining and restoring appropriate riparian and other buffer zones in line with ‘RSPO Manual on BMPs for the management and rehabilitation of riparian reserves’ (April 2017). |
7.8.3 Mill effluent is treated to be in compliance with national regulations. Discharge quality of mill effluent, especially Biochemical Oxygen Demand (BOD), is regularly monitored.

7.8.4 Mill water use per tonne of FFB is monitored and recorded.

<table>
<thead>
<tr>
<th>7.12</th>
<th>Land clearing does not cause deforestation or damage any area required to protect or enhance High Conservation Values (HCVs) or High Carbon Stock (HCS) forest. HCVs and HCS forests in the managed area are identified and protected or enhanced.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>7.12.1</strong></td>
<td>(C) Land clearing since November 2005 has not damaged primary forest or any area required to protect or enhance HCVs. Land clearing since 15 November 2018 has not damaged HCVs or HCS forests. A historic Land Use Change Analysis (LUCA) is conducted prior to any new land clearing, in accordance with the RSPO LUCA guidance document.</td>
</tr>
</tbody>
</table>
| **7.12.2** | (C) HCVs, HCS forests and other conservation areas are identified as follows:  
  a) For existing plantations with an HCV assessment conducted by an RSPO-approved assessor and no new land clearing after 15 November 2018, the current HCV assessment of those plantations remains valid.  
  b) Any new land clearing (in existing plantations or new plantings) after 15 November 2018 is preceded by an HCV-HCS assessment, using the HCSA Toolkit and the HCV- |
HCSA Assessment Manual. This will include stakeholder consultation and take into account wider landscape-level considerations.

*(Procedural note provided.)*

(C) In High Forest Cover Landscapes (HFCLs) within HFCCs, a specific procedure will apply for legacy cases and development by indigenous peoples and local communities with legal or customary rights, taking into consideration regional and national multi-stakeholder processes. Until this procedure is developed and endorsed, 7.12.2 applies.

*(Procedural note provided.)*

(C) Where HCVs, HCS forests after 15 November 2018, peatland and other conservation areas have been identified, they are protected and/or enhanced. An integrated management plan to protect and/or enhance HCVs, HCS forests, peatland and other conservation areas is developed, implemented and adapted where necessary, and contains monitoring requirements. The integrated management plan is reviewed at least once every five years. The integrated management plan is developed in consultation with relevant stakeholders and includes the directly managed area and any
relevant wider landscape level considerations (where these are identified).

Where rights of local communities have been identified in HCV areas, HCS forest after 15 November 2018, peatland and other conservation areas, there is no reduction of these rights without evidence of a negotiated agreement, obtained through FPIC, encouraging their involvement in the maintenance and management of these conservation areas.

All rare, threatened or endangered (RTE) species are protected, whether or not they are identified in an HCV assessment. A programme to regularly educate the workforce about the status of RTE species is in place. Appropriate disciplinary measures are taken and documented in accordance with company rules and national law if any individual working for the company is found to capture, harm, collect, trade, possess or kill these species.

The status of HCVs, HCS forests after 15 November 2018, other natural ecosystems, peatland conservation areas and RTE species is monitored. Outcomes of this monitoring are fed back into the management plan.
(C) Where there has been land clearing without prior HCV assessment since November 2005, or without prior HCV-HCSA assessment since 15 November 2018, the Remediation and Compensation Procedure (RaCP) applies.

*(C) Critical indicators

Table 12: MSPO 2013, Part 3 – Selected principles, criteria and indicators on indigenous peoples, deforestation and environmental protection

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Indicators</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Principle 1: Management commitment and responsibilities</strong></td>
<td></td>
</tr>
<tr>
<td>1  Malaysian Sustainable Palm Oil (MSPO) Policy</td>
<td>1  A policy for the implementation of the MSPO shall be established.</td>
</tr>
<tr>
<td></td>
<td>2  The policy shall also emphasise commitment to continual improvement.</td>
</tr>
<tr>
<td>2  Internal audit</td>
<td>1  Internal audit shall be planned and conducted regularly to determine the strong and weak points and potential area for further improvement.</td>
</tr>
<tr>
<td></td>
<td>2  The internal audit procedures and audit results shall be documented and evaluated, followed by the identification of strengths and root causes of nonconformities, in order to implement the necessary corrective action.</td>
</tr>
<tr>
<td></td>
<td>3  Report shall be made available to the management for their review.</td>
</tr>
<tr>
<td><strong>Principle 2: Transparency</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Transparency of information and documents relevant to MPSO requirements</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Transparent method of communication and consultation</td>
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<tr>
<td>3</td>
<td>Traceability</td>
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<tr>
<td>3</td>
<td>The management should identify and assign suitable employees to implement and maintain the traceability system.</td>
</tr>
<tr>
<td>4</td>
<td>Records of sales, delivery or transportation of FFB shall be maintained.</td>
</tr>
</tbody>
</table>

### Principle 3: Compliance to legal requirements

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<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Regulatory requirements</td>
<td>1</td>
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<tr>
<td>2</td>
<td>The management shall list all laws applicable to their operations in a legal requirements register.</td>
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</tr>
<tr>
<td>3</td>
<td>The legal requirements register shall be updated as and when there are any new amendments or any new regulations coming into force.</td>
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<tr>
<td>4</td>
<td>The management should assign a person responsible to monitor compliance and to track and update the changes in regulatory requirements.</td>
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</thead>
<tbody>
<tr>
<td>2</td>
<td>Land use rights</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>The management shall provide documents showing legal ownership or lease, history of land tenure and the actual use of the land.</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Legal perimeter boundary markers should be clearly demarcated and visibly maintained on the ground where practicable.</td>
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</tr>
</tbody>
</table>
4 Where there are, or have been, disputes, documented proof of legal acquisition of land title and fair compensation that have been or are being made to previous owners and occupants, shall be made available and that these should have been accepted with free, prior and informed consent (FPIC).

<table>
<thead>
<tr>
<th></th>
<th>Customary rights</th>
<th>1</th>
<th>Where lands are encumbered by customary rights, the company shall demonstrate that these rights are understood and are not being threatened or reduced.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>2</td>
<td>Maps of an appropriate scale showing extent of recognised customary rights shall be made available.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3</td>
<td>Negotiation and FPIC shall be recorded and copies of negotiated agreements should be made available.</td>
</tr>
</tbody>
</table>

**Principle 4: Social responsibility, health, safety and employment condition**

<table>
<thead>
<tr>
<th></th>
<th>Social impact assessment (SIA)</th>
<th>1</th>
<th>Social impacts should be identified and plans are implemented to mitigate the negative impacts and promote the positive ones.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Complaints and grievances</td>
<td>1</td>
<td>A system for dealing with complaints and grievances shall be established and documented.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2</td>
<td>The system shall be able to resolve disputes in an effective, timely and appropriate manner that is accepted by all parties.</td>
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</tr>
<tr>
<td><strong>3</strong></td>
<td><strong>Commitment to contribute to local sustainable development</strong></td>
<td></td>
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<tr>
<td></td>
<td>Growers should contribute to local development in consultation with local communities.</td>
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**Principle 5: Environment, natural resources, biodiversity and ecosystem services**

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<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td><strong>1</strong></td>
<td><strong>Environmental management plan</strong></td>
</tr>
<tr>
<td></td>
<td>An environmental policy and management plan in compliance with the relevant country and state environmental laws shall be developed, effectively communicated and implemented.</td>
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</tbody>
</table>

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<thead>
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</thead>
<tbody>
<tr>
<td></td>
<td>The environmental management plan shall cover the following:</td>
</tr>
<tr>
<td>a)</td>
<td>An environmental policy and objectives.</td>
</tr>
<tr>
<td>b)</td>
<td>The aspects and impacts analysis of all operations.</td>
</tr>
</tbody>
</table>

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</thead>
<tbody>
<tr>
<td><strong>3</strong></td>
<td><strong>An environmental improvement plan to mitigate the negative impacts and to promote the positive ones, shall be developed, effectively implemented and monitored.</strong></td>
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<tr>
<td>4</td>
<td>A programme to promote the positive impacts should be included in the continual improvement plan.</td>
</tr>
<tr>
<td>5</td>
<td>An awareness and training programme shall be established and implemented to ensure that all employees understand the policy and objectives of the environmental management and improvement plans and are working towards achieving the objectives.</td>
</tr>
<tr>
<td>6</td>
<td>Management shall organise regular meetings with employees where their concerns about environmental quality are discussed.</td>
</tr>
</tbody>
</table>

|6 | Status of rare, threatened, or endangered species an high biodiversity value area |   |

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<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Information shall be collated that includes both the planted area itself and relevant wider landscape-level considerations (such as wildlife corridors). This information should cover:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>a) Identification of high biodiversity value habitats, such as rare and threatened ecosystems, that could be significantly affected by the grower(s) activities.</td>
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<tr>
<td></td>
<td>b) Conservation status (e.g. The International Union on Conservation of Nature and Natural Resources (IUCN) status on legal protection, population status and habitat requirements of rare, threatened or endangered species), that could be significantly affected by the grower(s) activities.</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>If rare, threatened or endangered species, or high biodiversity value, are present, appropriate measures for management planning and operations should include:</td>
<td></td>
</tr>
</tbody>
</table>
a) Ensuring that any legal requirements relating to the protection of the species are met.

b) Discouraging any illegal or inappropriate hunting, fishing or collecting activities and developing responsible measures to resolve human-wildlife conflicts.

3 A management plan to comply with indicator 1 shall be established and effectively implemented, if required.

**Principle 7: Development of new plantings**

<table>
<thead>
<tr>
<th>1</th>
<th>High biodiversity value</th>
<th>1</th>
<th>Oil palm shall not be planted on land with high biodiversity value unless it is carried out in compliance with the National and/or State Biodiversity Legislation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Peat land</td>
<td>1</td>
<td>New planting and replanting may be developed and implemented on peat land as per MPOB guidelines on peat land development or industry best practice.</td>
</tr>
<tr>
<td>3</td>
<td>Social and Environmental</td>
<td>1</td>
<td>A comprehensive and participatory social and environmental impact assessment shall be</td>
</tr>
<tr>
<td>Impact Assessment (SEIA)</td>
<td>conducted prior to establishing new plantings or operations.</td>
<td></td>
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<td>2</td>
<td>SEIAs shall include previous land use or history and involve independent consultation as per national and state regulations, via participatory methodology which includes stakeholders.</td>
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<td>3</td>
<td>The results of the SEIA shall be incorporated into an appropriate management plan and operational procedures developed, implemented, monitored and reviewed.</td>
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<td>4</td>
<td>Where the development includes smallholder schemes of above 500 ha in total or small estates, the impacts and implications of how each scheme or small estate is to be managed should be documented and a plan to manage the impacts developed, implemented, monitored and reviewed.</td>
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<td>6</td>
<td>Customary land</td>
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<td>1</td>
<td>No new plantings are established on recognised customary land without the owners’ free, prior and informed consent, dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions.</td>
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<td>2</td>
<td>When new plantings on recognised customary lands are acceptable, management plans and operations should maintain sacred sites.</td>
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<td>3</td>
<td>Where recognised customary or legally owned lands have been taken over, the documentary proof of the transfer of rights and of payment or provision of agreed compensation shall be</td>
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Certification v. reality on the ground in Sarawak

As can be seen from above, a certification standard may look very comprehensive on paper. However, in reality, their successful implementation is largely dependent on the robustness and efficiency of the existing governance framework, which includes its policy and legal structures and contents. While certification may work in areas where the governance framework is vigorous, for Sarawak, it remains unclear how certification for palm oil will be able to effectively tackle two important areas covered by this publication i.e. the violations of the indigenous customary land rights and deforestation, and all of their associated issues, such as the lack of

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<tr>
<td>4</td>
<td>The owner of recognised customary land shall be compensated for any agreed land acquisitions and relinquishment of rights, subject to their free prior informed consent and negotiated agreement.</td>
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<td>5</td>
<td>Identification and assessment of legal and recognised customary rights shall be documented.</td>
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<td>6</td>
<td>A system for identifying people entitled to compensation and for calculating and distributing fair compensation shall be established.</td>
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<tr>
<td>7</td>
<td>The process and outcome of any compensation claims shall be documented and made publicly available.</td>
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<tr>
<td>8</td>
<td>Communities that have lost access and rights to land for plantation expansion should be given opportunities to benefit from the plantation development.</td>
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Certification v. reality on the ground in Sarawak

As can be seen from above, a certification standard may look very comprehensive on paper. However, in reality, their successful implementation is largely dependent on the robustness and efficiency of the existing governance framework, which includes its policy and legal structures and contents. While certification may work in areas where the governance framework is vigorous, for Sarawak, it remains unclear how certification for palm oil will be able to effectively tackle two important areas covered by this publication i.e. the violations of the indigenous customary land rights and deforestation, and all of their associated issues, such as the lack of...
transparency, consultative practices and the free, prior and informed consent process. In fact for Sarawak, even the robustness of its EIA process is questionable, as it lacks a mandatory public participation component.

Therefore, when the very source of the numerous land rights conflicts involving native communities and deforestation affected by oil palm plantations has its origins in the existing governance framework, how can a mere certification system be expected to ensure that the indigenous customary land rights are respected and forests are protected from conversions? Although a certification system, on paper, can demand a standard that appears to be higher than that required by existing policies and laws, the fact remains that they are merely technical instructions that may not be able to fully overcome the limitations of structural governance conditions. Although such governance limitations may still have to be addressed by the unit being certified, this is done without the guidance and authority of legislation and regulations, which either do not exist or in many cases, operate to enforce the limitations themselves.

Another fact that also needs to be noted is that oil palm plantations are not the only cause of the violations of the indigenous customary land rights and deforestation in Sarawak, and Malaysia. Pulp and paper and timber tree plantations, logging and large dam construction have all caused the same impacts on indigenous peoples and forests. We cannot ignore the fact that such destructive large monoculture plantations in Sarawak only arrived in the late 1990s, as a result of the depletion in natural timber resources, caused by the overharvesting of natural timber in the 1980s and 1990s. Therefore, palm oil is only one of the commodities of choice. The governance system has hardly changed since the 1990s, if not worsened by the introduction of various statutory amendments designed to further limit the NCR and allow forest conversions.

The first root problem surrounding the land and forestry policy and regulatory system in Sarawak is the fact that it perfectly permits for oil palm and pulp and paper and timber tree plantations, logging operations as well as other land development and resource-extractive operations, to be issued by the state under the authority of the relevant legislation, without the consent and knowledge of affected indigenous communities. This is the current standard practice of the state for the simple reason that the governance system actually allows for the state to unilaterally determine areas held under such rights, without consultations with and consent from communities, information dissemination and ground demarcation, and to regard the rights as merely a form of user rights, mostly limited to cultivation areas. These are not only undemocratic but they are also in conflict with judicial decision on the matter of determining the legitimacy of indigenous customary land rights claims. Numerous pulp and paper and timber tree and oil palm plantations licensed out from the mid-1990s onwards in Sarawak have in fact encroached upon NCR
territories, destroying farms and forests, polluting and drying up rivers, diminishing communities’ natural resources, including their sources of food, livelihoods and income. Divisive tactics have been employed by companies to restrain and placate affected communities, resulting in long lasting intra-community conflicts, which set to distress them further. Land disputes and internal conflicts have even occurred in joint venture projects that did not receive full community support. To put it simply, Sarawak currently does not have robust governance conditions and the institutional mechanisms, to adequately address NCR issues, which can abide by the most minimum requirements of certification on matters such as consultations and consent. On the contrary, many of its institutional processes have in fact been designed to exert state control over such processes.

The second root problem of the governance system is that it also perfectly permits for forests, whether gazetted production forests or state land forests, to be converted into monoculture plantations, be they for pulp and paper and timber trees or oil palm.

Consequently, the bulk of existing monoculture plantation licences in Sarawak today, which had already received their preliminary provisional leases approval probably sometime between the late 1990s and 2005, would have affected the NCR of communities or involved forest conversions, or both. We also believe that at the very least, the preliminary process for the issuance of such licences have already been mostly completed in Sarawak, with many projects having already gone through the finalisation stage of their licensing process while many others have in fact long begun their development activities. This implies that despite the pledge of the new federal government not to expand the size of oil palm cultivation areas in the country and its commitment to certification, there is simply not much land left in Sarawak for the fresh issuance of monoculture plantation licences that can be made to abide by a higher governance standard. How then could a certification system deal with this reality and reverse all such past injustices?

Certification and failures in governance

Although a certification system such as the RSPO and MSPO will incorporate a review process over a period of years to introduce improvements to its system, the question remains, exactly how can they be effectively be implemented in Sarawak, across at least two areas of concern i.e. protection of the rights of indigenous communities and the prevention of deforestation? These two concerns in turn can be linked to at least seven issues of governance, which no matter how vigourous a certification standard is, are unlikely to be effectively addressed and resolved by it, as far as Sarawak and in many circumstances, even Malaysia, are concerned.
First is the failure of the governance system to fully recognise the full extent of the indigenous customary land rights; second is the absence of any law which directs a mandatory free, prior and informed consent for native communities affected by the development of monoculture plantations; third is the challenge to overcome state-controlled community representation which tends to permeate consultative spaces for indigenous peoples in the country; fourth is the lack of governance transparency on land, forests and other matters that affect indigenous peoples; fifth is the prohibition against the making of maps without state authorisation and the acceptance of any maps that are without state approval by any party, which affects the tendering of such maps as evidence in a court of law; sixth is the lack of mandatory public participation in the EIA process in Sarawak; and seventh is the national and state forestry policies which allow for the issuance of monoculture plantation licences on gazetted production forests and state land forests, including for the purpose of oil palm cultivation.

In the country’s rush to implement the MSPO, questions on these seven matters have remained unresolved, at least as far as Sarawak is concerned. It is unclear to us how the implementation of this certification scheme can indeed go forward successfully in the state, when its basic governance framework is still severely flawed on several levels.

Table 13 provides the illustration on the challenges that the RSPO certification may face in Sarawak pertaining to the consent of affected native communities. Based on selected texts from the document Free, Prior and Informed Consent Guide for RSPO Members (2015), it recaptures the Sarawak governance reality and its impacts on native communities in the state. Certainly, to be able to adhere to the guidance provided by the document would require significant institutional reforms of the governance and legal system pertaining to forests, land and indigenous peoples in the state, including the institutionalisation of new mechanisms and processes. The possibility such legal reforms may in fact even be necessary in certain national contexts in the pursuit of compliance to certain certification standard is also commented on by the document:

Last but not least, experiences on the ground demonstrate that where national laws and regulations fail to provide adequate recognition and protection to the rights of indigenous peoples and local communities, where international human rights instruments are poorly enforced, and where national and international legal frameworks are not harmonised, the ability of companies to abide by certification standards such as the RSPO is hindered, and their efforts towards sustainability requirements at times penalised rather than encouraged as a result. As such, the effective implementation of certification standards that require respect for both national and international systems of law requires legal harmonisation and effective and independently monitored implementation and enforcement of such laws. It is our view that the RSPO and its member companies, individually and in concert with other RSPO members can play a pivotal role in pushing for legal reform by engaging with national governments to revise...
The following section provides further information on the aforementioned seven issues of governance, which are unlikely to be resolved by any certification effort. More importantly, they also apply to the development of pulp and paper and timber tree plantations, logging and other resource extractive and land development operations taking place on land and forests where the NCR are claimed in Sarawak. In short, the only effective way to resolve them is through the pathway of policy and legal reforms.

Failure 1: Absence of the full recognition on native customary territories in accordance with customary law and judicial decisions

The root cause of the NCR violations by oil palm plantations is the same with those caused by pulp and paper and timber tree plantations, logging and other resource extractive and land development operations. They stem from the fact that the Sarawak state government fails to accord full executive recognition on the nature of the NCR as how native communities have developed them and the territories of the NCR as how native communities have established them. Furthermore, some of these positions are also contrary to landmark judicial decisions. Together, they produce the structural governance conditions that cannot be avoided, circumvented or mitigated by certification schemes. In brief, these include the following:

(i) NCR territories that are without any document of title or a reservation status are interpreted as a form of usufructuary rights or a land licence free of any rental charges. However, the judiciary has ruled that the indigenous customary land rights are a form of proprietary interest in the land itself, protected under Article 13 of the Federal Constitution. They are not merely limited to usufructuary rights, or the rights to use the land. This implies that the issuance of any resource-extractive and land development permits on indigenous customary territories must be subject to the consent of the landowners. Further, entry into such territories without the permission of its inhabitants and in an unlawful manner (including causing destruction to the area) is considered as a trespass that can be subjected to legal action.

(ii) The Sarawak state government tends to concede the existence of the NCR only on cultivation areas and consistently disputes the lawfulness of its existence on forested areas. However, the judiciary has affirmed that the pre-existence principle of indigenous customary land rights renders that without any clear

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and unambiguous extinguishment notice from the state, such rights will continue to subsist. It also further affirms that to determine the lawfulness of indigenous customary territory, that which must be referred to are the customary laws of the community, and not any modern legislation. Legislation is only relevant to determine if such rights have ever been successfully extinguished successfully at any point of time.

(iii) NCR territories on gazetted production forests i.e. Forest Reserves and Protected Forests are deemed to have largely been extinguished by the state, even if the communities had never been never notified properly during their establishment and as such, no adequate compensation had ever been paid to them, breaching the demands of Article 13 of the Federal Constitution which protects the right to property. Such forests may fall under the Licence for Planted Forest (LPF) system regulated by the Forests Department, which permit some concessions to devote no more than 20 per cent of their concession areas to grow oil palm for one cycle of 25 years.

(iv) Native customary territories also tend to be unilaterally determined by the state largely by utilising colonial aerial photographs. These official maps and the aerial photographs themselves are not made widely accessible to the communities.

(v) Boundary demarcation of native customary territories is not actively being carried out in their entirety.

(vi) The process to determine adequate compensation as demanded by Article 13 of the Federal Constitution for the loss of the indigenous customary land rights is the same for the documentary land title. In Peninsular Malaysia, the law that must be used to compensate the loss of indigenous territories is the same law that is used to compensate the loss of the documentary land title i.e. Land Acquisition Act 1960. However in Sarawak, its Land Code 1958 continues to apply different compensation procedures for customary and documentary titles. The rules for the compensation of customary land are still not well publicised, often giving rise to criticisms of unclear procedures and other ambiguities, which inevitably lead to inadequate compensation.

In all, what constitute the legitimate areas and boundaries of a native customary territory are still largely unilaterally determined, no matter how vaguely, ambiguously and erroneously, by the state, and often contested by native communities. It is unclear how any certification system can then overcome the authority and governance position of the state. The very fact that a licence has been issued over any indigenous customary territory has already suggested that the state
does not recognise the full extent of the rights associated with the territories concerned.

**Failure 2: Absence of the free, prior and informed consent process**

As a result of the governance positions on the NCR of the state, the issuance of the permits for oil palm plantations do not incorporate any free, prior and informed consent. In fact, there is not one federal or state law which addresses the issue of consent of indigenous communities affected by land development or resource extractive operations. Therefore the decision on permit issuance in Sarawak is made by the state authorities without consulting or informing affected communities since NCR that are without any document of title or a reservation status are deemed as a mere users’ rights. Communities typically discover the arrival of such activities either during preparatory activities of a licensed operation or sometimes when the initial activities such as land clearing have already commenced on the ground. Unequal bargaining power is the norm rather than the exception in land disputes involving any resource extractive, land development or dam-building activities in Sarawak. The authority of the state is often emphasised against the legal duty of citizens to abide by the decisions of the state.

**Failure 3: Absence of meaningful community representation and effective consultation spaces**

For several decades, leadership of native communities in Sarawak has been determined by the state. Official state appointments of village chiefs have long replaced the traditional system of election by way of a community consensus. In fact, consultation spaces for indigenous peoples in Malaysia are often troubled by the issue of meaningful representation. Community representation is tightly controlled by the state, making it difficult for ordinary members of the village to articulate their concerns and even protests. This is also the cost of the numerous internal conflicts within indigenous communities affected by logging and plantations. Reports of gifts, inducements and incentives are not unknown, including the offer to purchase NCR land, which by law, cannot be sold to non-natives.

**Failure 4: Lack of governance transparency and information dissemination**

In Sarawak, information on the issuance of permits for oil palm and pulp and paper and timber tree plantation development, as the case is with logging operations, is not made publicly available by its state government. Likewise, the maps for such project
areas are also not made publicly available. In fact, even the details of the Permanent Forest Estate in Sarawak, in particular of the boundaries and names of individual Forest Reserves and Protected Forests are also not made easily accessible through the internet.

**Failure 5: Prohibition against mapping activities and acceptance of maps that have not received state approval**

The prohibition against any party from accepting any maps that have not been approved by the Sarawak Department of Lands and Surveys and from undertaking map making activities without state authorisation, may render that community-made maps may not be tendered in as evidence in a court of law, and the attempt to make such maps itself as a criminal offence. Community-made maps have been recognised as a valuable tool for communities to assert their territorial boundaries and land use activities, be they to companies or in a civil legal action. However, the Sarawak Land Surveyors Ordinance 2001 has effectively attempted to curb the making and utilisation of this tool. Therefore, even if a certification scheme encourages or even requests for community-made maps, in Sarawak, the state can freely reject them and subject them to a state approval process.

**Failure 6: Absence of mandatory public participation in the Sarawak EIA process**

It remains to be seen how any certification process in Sarawak can ensure that an oil palm plantation development incorporates public participation. The bulk of existing oil palm plantations in Sarawak would have undergone a weak EIA process without such a component. The absence of a mandatory of public participation in the EIA process also means that the authorities do not have a vigourous practice of public announcements as implemented by the federal Department of Environment for Peninsular Malaysian states. Likewise, while at the federal level many EIA reports may even be freely downloadable from the DOE website, in Sarawak, members of the public may have to travel to the local offices of the NREB or even its headquarters in Kuching in order to access an EIA report. In principle, the Sarawak state law perfectly permits for the development of large-scale oil palm plantations, to be approved by the NREB, without having sought inputs from affected communities and members of the public. It is thus categorically weaker than its federal counterpart.

**Failure 7: Issuance of oil palm plantation licences on forested areas**
It is an undeniable fact that oil palm and pulp and paper and timber tree plantation licences in Sarawak issued since the mid-1990s do involve deforestation. In fact, there are even oil palm plantations under the Licence for Planted Forests (LPF) overseen by its Forests Department itself, encompassing both the Permanent Forest Estates and state land forests. While the federal government has announced that no more new oil palm plantation licences will be issued, more than 3 million hectares of land in Sarawak have already been licensed out to monoculture plantations since the late 1990s. The reality is that, there is simply not much land left for the issuance of more monoculture licences in the state. Therefore today, there are two questions that need to be urgently answered. First, whether certification can actually prevent deforestation on licensed areas that have yet to be developed? Second, whether the federal and state authorities themselves are able to put into effect, a partial revocation of the permit or a moratorium on the progress of existing oil palm plantation licences on forested areas, which have yet to be fully developed?

Table 13: Selected guidance from Free, Prior and Informed Consent Guide for RSPO members and systemic challenges in Sarawak

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<th>Selected texts</th>
<th>Systemic challenges in Sarawak</th>
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<tr>
<td><strong>Guidance 2:</strong> Engaging with representative organisations</td>
<td>Failure 3: Absence of meaningful community representation and effective consultation spaces</td>
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<td>A pre-condition to this process is to proactively inform the community that they have the right to choose their own representatives and institutions, should they wish to pursue interactions with the project proponent, and that they have the right to choose more than one such representative, depending on the issue at hand. The communities’ self-chosen representatives may include one or a combination of bodies… all of which need to be taken into consideration and engaged with directly, where communities so wish.</td>
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<td><strong>Guidance 3:</strong> Identifying prior rights to land</td>
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One of the first steps in a process assuring FPIC is identifying whether a planned oil palm development area, and wider areas that it will impact, are encumbered with prior rights and uses. This may include a very wide range of uses and rights including formal and statutory rights, customary rights, and more informal land uses... The RSPO P&C require that companies planning to develop oil palm in such areas respect communities’ prior rights and negotiate for use of the land for oil palm by accepting that they have the right to give or withhold consent to the proposed operations... The P&C require companies to apply two main means to ascertain these prior land uses: first by carrying out a study of land tenure and second through participatory mapping.

...Agreeing to the use and distribution of the maps is particularly important: some communities may fear negative repercussions on the part of the local government if the participatory maps challenge existing government maps, or that the government may seek to intervene or oppose the mapping process if they are not directly involved, or that the maps produced will be used against them rather than as a tool to assert their rights.

...For an effective mapping process and outcome to take place, it is imperative that the communities have access to maps of the boundaries of the planned operation itself.

**Failure 1:** Absence of the full recognition on native customary territories as how the communities have acquired them based on customary law

**Failure 2:** Absence of the free, prior and informed consent process

**Failure 3:** Absence of meaningful community representation and effective consultation spaces

**Failure 4:** Lack of governance transparency and information dissemination

**Failure 5:** Prohibition against mapping activities and acceptance of maps that have not received state approval

**Guidance 4:**
Ensuring consent is informed
Ensuring that rights-holders are adequately informed prior to any negotiated agreements is a crucial part of FPIC… These requirements include in particular the need for transparency and information sharing and for participatory social and HCV assessments. Both these assessments and environmental impact assessments need to be completed prior to land acquisition and land clearance and the information shared with those likely to be affected to ensure that any relinquishment of rights is fully informed. As noted above, participatory mapping, ESIAs and HCVAs taken together should provide much of the contextual information that communities need to make informed decisions about whether or not to accept oil palm developments on their lands.

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<th>Guidance 5: Ensuring consent is freely given</th>
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<td>A vital part of consent for it to be meaningful is that in the process towards reaching any decisions the members of the community feel that they are free from any external pressure or coercion, intimidation, duress and manipulation, and also free from internal pressures from co-opted leaders. Typical examples of manipulation occur if companies or other agencies offer bribes, gifts, inducements, incentives or other unregulated or questionable patronage to community leaders or individuals to accede to relinquish land without the wider communities’ knowledge or agreement… As such it is critical to actively refrain from actions</td>
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<th>Failure 2: Absence of the free, prior and informed consent process</th>
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<td>Failure 3: Absence of meaningful community representation and effective consultation spaces</td>
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<td>Failure 4: Lack of governance transparency and information dissemination</td>
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<td>Failure 5: Prohibition against mapping activities and acceptance of maps that have not received state approval</td>
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<tr>
<td>Failure 6: Absence of mandatory public participation in the Sarawak EIA process</td>
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taken in the FPIC process that may exploit the absence of equal bargaining power, compromise the exercise of the communities’ collective, self-determined and autonomous control and decision-making, or increase inter/intra-community divisions. At each stage in the process, the project proponent should reflect on whether anything is happening that may undermine communities’ collective, self-determined and autonomous control and decision-making, how the project proponent might be unfairly benefiting from an unequal bargaining position, and what can be done to prevent this.

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<th>Failure 1: Absence of the full recognition on native customary territories as how the communities have acquired them based on customary law</th>
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<td>Guidance 6: Ensuring consent is prior</td>
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Where consultation is pro forma and outcomes are predetermined, such participation only generates a sense of powerlessness. Where consent is required it is even more imperative that this is done prior to any decision to invest and take over land. In some countries where national laws or administrative practice classify much land as State land or Crown land and consider communities to have few if any rights to such lands, the legal process for the issuance of permits or concessions may itself preclude the involvement of the communities in decision-making.

…The field studies show that communities often feel outmaneuvered and undermined when they discover in their very first meetings with investors that companies already have permits over the lands the communities use and to which they have customary rights. Less scrupulous
companies use such permits to pressurize communities into acceding to their planned operations, but even where companies don’t exert such pressure, the very fact that the government has issued permits prior to community involvement creates a very unlevel playing field for communities.

One way to address this issue is to clarify the legal permit acquisition process in detail with the communities, along with the legal requirements on the part of the government and the project proponent, and what stage of the permit acquisition should coincide with which stages in the FPIC process. As noted earlier, explaining the requirement to seek FPIC to the government should also help ensure that FPIC can be accommodated in the permit acquisition process in ways that give sufficient leverage to communities in the negotiation process.

**Guidance 7:**
**Ensuring there is consent**

However, if a community makes clear that it cannot accept the plantation on the terms being offered (even after negotiation), the company must accept that ‘No’ mean no. Repeated returns to communities, without following mutually agreed procedures, to pressure individuals or sub-groups to relinquish lands constitute coercion and violate the RSPO standard.

Where an agreement is reached, then it should be legalised (e.g. by a notary) and officially endorsed by local government. Many communities will also want to see the agreement publicly affirmed through a

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Failure 6: Absence of mandatory public participation in the Sarawak EIA process

Failure 1: Absence of the full recognition on native customary territories as how the communities have acquired them based on customary law

Failure 2: Absence of the free, prior and informed consent process

Failure 3: Absence of meaningful community representation and effective consultation spaces
ceremony or other culturally appropriate event. This is important to ensure the full community is aware not only that the company is binding itself to uphold the agreement but so also are all the community members.

**Guidance 8:**
**Ensuring agreements are upheld**

The extent to which agreements are upheld in practice will be found to depend a lot on the extent to which FPIC has been properly implemented in the first place (i.e. whether and how far the communities signed agreements in an informed and free way prior to implementation of the project, hence the long-term importance of doing FPIC properly). Where agreements have been pre-written by the project proponent and simply signed by communities, or where these have been signed in the presence of unwanted actors (e.g. military, police), or where agreements have not been physically given to communities but simply read out, or where a ‘take it or leave it’ approach to the agreement has been adopted, it is very unlikely that communities will want to uphold it or cooperate in its implementation.

Failure 1: Absence of the full recognition on native customary territories as how the communities have acquired them based on customary law

Failure 2: Absence of the free, prior and informed consent process

Failure 3: Absence of meaningful community representation and effective consultation spaces

Failure 4: Lack of governance transparency and information dissemination

Failure 5: Prohibition against mapping activities and acceptance of maps that have not received state approval

Failure 6: Absence of mandatory public participation in the Sarawak EIA process

**Guidance 9:**
**Resolving conflicts and providing remedy**
The establishment of a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all affected parties, and implemented in a timely and effective manner, is critical to ensuring that parties involved can raise concerns that may arise through the project’s lifetime, and that the project maintains its transparency, accountability and legitimacy. Providing access to conflict resolution mechanisms is essential to fulfill the right to remedy of actors who feel their rights have been violated by other parties.

| Failure 1: Absence of the full recognition on native customary territories as how the communities have acquired them based on customary law |
| Failure 2: Absence of the free, prior and informed consent process |
| Failure 3: Absence of meaningful community representation and effective consultation spaces |
| Failure 4: Lack of governance transparency and information dissemination |
| Failure 5: Prohibition against mapping activities and acceptance of maps that have not received state approval |

**Conclusion**

As far as preventing deforestation and the violations of the NCR is concerned, policy and legal reforms are still the best pathways to ensure a higher possibility of success. It is in fact the responsibility of the state to ensure human rights are respected and our forests and environment are protected. Certification is only a technical process that cannot be equated with meaningful governance reforms or law enforcement. It is a response that has been attempted worldwide across different commodity production systems when they are faced with criticisms on similar issues which range from deforestation, environmental destruction, the violations of human rights – be they indigenous or local communities or workers’ rights, and the capture of natural resources and the commons by corporate and state actors, at the expense of the public and communities. With the advent of climate change, our insistence on business as usual will only be looked back with disbelief and disdain by the future generation.
CHAPTER 4: Case study: Causes of encroachment of native customary territories in Sarawak
Affected native communities in Sarawak often do not have any knowledge of the issuance of plantation licences in their territories until the arrival of heavy machinery in their village. Confrontations with the workers involved in the clear felling for the plantations are often unpleasant events. The workers would typically suggest that clarifications on the licences must be sought from their superiors. These pictures were taken on the native customary territories of the Iban community of Rumah Chabok in Lubok Amam and the Narum Malay community in Marudi in 2007 and 2011; and the Penan community of Batu Bungan, Mulu in 2019.

Photographs of the territories of the Iban community of Rumah Chabok, Lubok Aman and the Narum Malay community, both in Marudi and the Penan community in Batu Bungan, Mulu are courtesy of the community members.
4. Case study: Causes of the encroachment on native customary territories in Sarawak

Focus of the case study

Briefly, the case study was designed to verify whether the violations of native customary territories in Sarawak by oil palm plantation operations are a result of isolated incidents triggered by the failure of a few parties to uphold the respect for the customary land rights of the affected villages, or if they involve something larger or systemic, and can be linked to the weaknesses, flaws and limitations of the existing governance and legal framework.

Two Iban communities in the Miri Division were involved in the study. The first were members of the Sungai Buri Residents’ Association in Sungai Buri, Bakong. The second were members of the Rumah Lachi Residents’ Association in Sungai Sebatuk in Batu Niah. The rivers cutting through these two territories are all part of the Baram river basin, the second longest river in Sarawak and in Malaysia.

The data collection for the case study was focused on several issues:

(i) The chronology of the encroachment from the moment information on the concerned plantation operations within customary territories was discovered by the affected villages up to the time of the interview. This includes information on the actions that have been taken by the villagers and the effectiveness of such actions.

(ii) The status of free, prior and informed consent of the affected villagers in each encroachment case, including the quality of the consultations that may have been undertaken by the companies involved and/or the authorities with them.

(iii) The impacts of the encroachment on the welfare and lives of the villagers, including issues pertaining to the destruction of forest and riverine resources and environmental pollution, and their effects on the livelihood, safety and well-being of the villagers.
(iv) The types of harassment and pressure from any parties, if any, that may have been faced by the villagers in the defence of their customary land rights against the encroachments.

(v) The manner in which the companies and the state authorities address customary land rights claims of the affected villagers within the licensed oil palm plantation areas, including either their acceptance or denial of the existence of such rights.

(vi) The level of forestry and land governance transparency and information access available for the affected villagers on matters pertaining to logging and plantation licences as well as the gazetting of forests.

**Case study methodology**

(i) In February 2017, we held the first briefing for villagers from native customary territories that had been identified earlier as having been affected by oil palm plantations, for the purpose of inviting them to participate in the case study.

(ii) In June 2017, visits were conducted to the two selected communities, in Sungai Buri and Sungai Sebatuk in Miri, Sarawak, spanning a period of four days for each affected community. The first round of interviews were conducted with the community representatives, and evaluation was done as to whether the documents and the collected information in their possession were in acceptable order. Interviews were conducted based on two sets of survey questions, a main survey to determine the chronology of the events and a subsidiary survey to investigate on the socio-economic and environmental impacts of the plantations on individual families.

Mapping and photograph taking activities were also conducted by another team during this visit.

(iii) A week later in the same month, the same communities were requested to meet at our office for the second round of interviews to ensure that all information that had been organised in the first draft was factually accurate. The collection of other evidentiary documents also continued during and after the meeting.

(iv) In August 2017, another round of field visit was conducted to gather mapping data that could not be collected during the June visit.
(v) At the end of September 2017, the community representatives were requested to conduct another review of their interviews at our office. Further corrections were made.

(vi) In February 2018, the final review of the case study draft was done with the communities, to seek their final and written approval.

Each admission on the encroachment on customary territories collected in this case study must be supported by evidence of protest from local communities in the form of written correspondence, police reports or other actions that are able to demonstrate that consent from affected communities was not obtained by the concerned plantation operation.

**Main findings**

The following are the main findings gathered from the interviews conducted with the native community representatives involved in the case study.

1. **The absence of consultation and early information dissemination to affected native communities prior to the issuance of oil palm plantation licences and prior to the commencement of the operations is a result of the fact that their consent is not mandatorily required in law.**

Representatives of both communities stated that their villages were neither informed nor consulted prior to the issuance of the oil palm plantation licences within their customary territories. The representatives further affirmed that although for a number of reasons they did become apprehensive at some point of time on the possibility of the encroachment by the two plantations on their respective territories, they did not have the capacity to conduct their own inquiries to verify the matter. Even after the licences had been issued but prior to the commencement of the land clearing operations, according to the respondents, neither the state authorities nor the company disseminated clear and comprehensive information to the villages.

In the end, both communities only discovered the plan to develop oil palm plantations on their territories after the land clearing operations had commenced. However, upon the discovery of the plan, more time was needed to verify that permits had indeed been issued by the state. During the land clearing operations, the villagers were only able to confront the labourers encountered on-site, who in turn were most likely working directly under a contractor hired by the actual licence holders. The labourers would typically disclose their inability to confirm on any matter related to the licensing process and suggested that the villagers must instead meet with their superiors in order to seek further clarifications.
For the Sungai Buri community, the people first became concerned with the rumours on the possible expansion of the plantation which finally encroached on their territory, after the project had begun operations within the territory of a neighbouring community. However the people did not have the capacity to find any confirmation on this matter themselves and neither the authorities nor the company representatives had approached them with official information. Meanwhile, for the Sungai Sebatuk community, they were indeed visited by a consultant three years before the commencement of the land clearing activities. However, no further information was imparted to them until the land clearing operations actually began.

Although the representatives of licence holder companies or their contractors did eventually conduct consultations with the affected villages, with or without the presence of the state authorities, all these took place only after the licences had been obtained. Further, despite the fact that these consultations had an appearance of a process to obtain consent, they fundamentally functioned only as an information dissemination process. During such consultations, the companies often emphasised the fact they had been issued with a lawful licence.

In short, the question of obtaining the free, prior and informed consent of the affected indigenous communities did not even emerge in the projects. This was made possible by the existing failure of statutory law in clearly recognising that the indigenous customary land rights is a proprietary interest in the land itself, despite the fact that judicial law has interpreted it as such. In the absence of robust statutory provisions, the issue of FPIC does not arise in the issuance of permit for any resource-extractive and land development process in Sarawak, or for that matter, in Malaysia.

All representatives also testified that during the land felling activities prior to the cultivation of the oil palm crops, substantial amount of logging would have taken place. For Sungai Buri, a logging licence was issued up until 2014 in areas that are now under the oil palm cultivation.

2. Native communities are frequently confronted by various difficulties and challenges in highlighting their protests to the encroaching companies

Representatives of both communities reported on the difficulties to assert the legitimate existence of their customary land rights to companies that were operating in their respective villages. Their complaints often fell on deaf ears or were responded to with the argument that the people did not have any rights to halt their operations as the licences had already been legally obtained from the state.

The community of Sungai Sebatuk also alleged that they suffer the intimidation of
unknown persons who brought up the murder of a land rights activist and lawyer in their informal discussion. This caused the people to feel highly threatened.

3. Absence of a process that mandatorily compels the direct dissemination of notification letters as well as official documents and information pertaining to the issuance of oil palm plantation licences to affected indigenous communities.

There is no process within the statutory framework which compels state authorities to inform affected indigenous villages on the issuance of such oil palm plantation licences within their territories, in a formal manner and through the provision of official notification letters and documents and the establishment of open consultation spaces, which could provide important information about the operations, prior to or even after the issuance of the plantation licences within native customary territories.

Both communities had to spend a lot of resources and time to obtain key information on their own.

4. Information on the boundaries of non-gazetted indigenous customary territories as interpreted by the state is not communicated to native communities, whether through maps or ground demarcation.

Representatives of both communities affirmed that they were not at all clear on the interpretation of the state regarding the extent and size of their customary territories, or how such decisions were arrived at by the state in the first place. To the best of our knowledge, the majority of indigenous customary territories in Sarawak have never obtained any official maps of their territories from the state and such territorial boundaries have also not been demarcated on the ground.

5. Oil palm plantations have caused deep internal crisis and fractions within affected communities.

Both communities suffer from deep internal conflicts as a result of the arrival of the oil palm plantations. Representatives spoke of their psychological distress and deep hurt that their communities are today deeply divided to the extent that some residents are no longer speaking to each other.

6. Oil palm companies resorted to questionable tactics in obtaining ‘consent’ of affected communities, including the persuasion for affected families to sell their land.

Representatives of both communities reported that their communities did receive modest amounts of gifts and assistance from the oil palm plantation companies, in
particular during festive seasons. However members of the Sungai Buri community also claimed that they were continually persuaded to sell their land at a rate of RM500 per hectare. This is a legally questionable action since native customary land cannot be sold to non-native persons. Many anxious landowners reportedly caved in under pressure, for fear of not receiving anything at all for eventual loss of their farms and crops.

7. Protest letters from native communities frequently did not receive any response from government agencies.

Representatives of both communities had written to various authorities and the respective companies several times since the commencement of the encroachments on their land. However, only on one occasion the community of Sungai Sebatuk received a response from the company.

9. The police have generally failed to take effective actions in investigating the complaints about encroachment on native customary territories.

Representatives of both communities did not report any effective follow-up actions undertaken by the police as a result of police reports made by communities.

10. On the whole, native communities are not satisfied with the services provided by government agencies.

Representatives of both communities reported that they are not satisfied with the quality of services of the various government agencies. The common view voiced by the representatives was that government agencies were biased and more inclined to side with the oil palm plantation companies.

11. Oil palm plantation operations definitely produced damaging impacts on forests, rivers and land as well as adversely affecting potable water sources, food, medicines, natural resources used in cultural and spiritual ceremonies, income and the health of affected native communities.

Representatives from both communities affirmed the adverse impacts of oil palm plantation operations on the natural resources and ecosystems within their territories, which in turn negatively impacted on the well-being, quality of life, income and livelihoods of the villagers.
Environmental and socio-economic impacts

All the respondents verified that both oil palm project have deforested large parts of their communal forest, destroyed numerous family farms and polluted the rivers, affecting their sources of food and income derived from agricultural, forest and fishery resources and materials used in construction, craft and tool making, traditional healing practices and cultural and spiritual ceremonies.

The destruction of the farms in the two communities is a source of great suffering for them. Their farms recorded a staggering variety of crops. The losses included cash crops like rubber, cocoa, pepper and banana, multipurpose plants like rattan and bamboo, a variety of plants with edible piths consumed as vegetables, generically termed as *umbut*, as well as common and rare fruit trees. The species of common and rare fruit trees mentioned by the respondents included durian, rambutan, jackfruit, stinky beans, areca nut, cempedak, langsat, rambai, isu, embawang, engkabang, engkala, dabai, puak, cekak, pakan, lembak, cuit, tekalong, tuba and tarap.

In Sungai Buri, only a few families are still engaged in rice cultivation today. Many of the respondents reported that the output of their rice harvest began to decline with the arrival of logging operations three decades ago. Over the years, the soil fertility of their rice fields and farms began to decline as attacks from insects, birds and monkeys increased. Consequently, most families halted rice cultivation altogether. In Sungai Sebatuk, no one we interviewed was still cultivating rice. The destruction in Sungai Sebatuk appears to be more severe than in Sungai Sebatuk, as a larger part of their land has been encroached upon.

All of the respondents described how easy it was to hunt or trap wild animals, fish and harvest other forest resources in the past. Their territories were frequented by plenty of wild animals and were rich in forest resources. Among the wild animals that could be found easily included various species of wild boar, deer, foxes, monkeys, porcupines and birds. In Sungai Buri today, only monkeys can still be found easily. The forest also provided a significant amount of wild vegetables from leafy greens such as sabung and kesindu, ferns like midin, mushrooms to *umbut*. The sharp decline of edible piths, a common form of vegetable for the communities, which also used to provide an easy and popular income source is greatly felt. Amongst the most popular wild *umbut* are rebung, pantu, nibung, gereneh, rua, lalis, sibau, kubal, keranji, kemayau, juit and asam paya. Wild fruit trees were also harvested during their fruiting season, but the destruction of the forest also means many of such trees have been lost permanently. Generally, such plants are only readily available for individual families if the species happen to still grow on their family farms that have not been destroyed.
There is also now scarcity of timber trees, traditionally utilised for housing, farming hut and boat construction. As a result, the people today have no other choice but to purchase wood for construction or renovation works. In Sungai Sebatuk, a new concrete longhouse has been constructed. For the making of mats, baskets and other handcraft, the bemban plant reportedly can be found more easily, in comparison to rattan, tanggi and sengang. In Sungai Buri, medicinal plants like selukai and kayu hujan panas can still be found on individual farms that have not been destroyed.

The respondents affirmed that most of the rivers in the two territories have been polluted by chemicals used by the plantations, as well as by siltation, causing the sharp depletion in river resources. The rivers in both territories used to have an abundance of various species of fish and prawns, which used to be a stable source of income for many of the respondents, especially in Sungai Buri. The fish for sale could be sold live, frozen, smoked or fermented. Depending on their domestic financial planning, most respondents in Sungai Buri did not have to fish or collect forest produce on a daily basis. The respondents, including the women, described how they were generally able to end their fishing activities nearby their farms by noontime. It was possible to obtain plenty of fish just within an hour of starting. However today, it may not even be possible for them to find anything much even after a few hours. Fishing has to be done in areas located further away, increasing the costs of petrol for their boats, but bringing home only smaller amounts of catch. The villagers in Sungai Buri recounted a variety of fish species which used to be in abundance, such as biawan, baung, puyu, toman, tapah, padi, kaloi, kenadak, palau, lipai, jeruai, udun, haruan and keli. Today, they stated that only the cheaper biawan can be found more easily.

In Sungai Buri, the main potable water supply is from a gravity-fed system, sourced from a smaller stream in a nearby hill. However, during the land clearing operations, the water turned muddy for three months. During this period, many community members suffered from stomachaches after drinking the polluted water. Even today, the water would still turn muddy with an unpleasant odour during the rainy season, although it would be clear within a shorter period of time. When the water supply is muddy, the alternative would be the rainwater collected in individual family water tanks, which have been provided with a filter by the government.

In Sungai Sebatuk, for cleaning, many of the families interviewed are also now relying on rainwater collected in their family tanks, although bathing is still commonly done in a stream nearby. Potable water would either be sourced from public taps in the township of Batu Niah or from bottled water that has to be purchased in large quantities. This community also owns a communal filtered water tank, but as a result of internal conflicts, the respondents stated that they no longer
felt comfortable accessing water from the village tank. The respondents also reported the death of fish and prawns when the oil palm mill nearby releases its effluents.

In the past, most families in Sungai Buri derived their main income from the sale of produce at the Miri weekend market, although it is also common to sell within the community itself on a daily basis. Today, some families may have to wait for two weeks before being able to obtain a decent volume of fish and other produce. All would have to spend longer hours to fish or to collect forest produce. Further, most families are also forced to develop alternative agricultural income sources such as through the cultivation of bananas, pumpkins and other squashes, beans, maize, chillies, cassava, cucumber, eggplant, and other common vegetables or the development of oil palm smallholdings, or by working on other families' smallholdings. A few younger male and female adults have also sought employment in Miri, while others have sought new sources of income from small business ventures or by providing private vehicle charter and driving services.

In Sungai Sebatuk, some respondents have attempted to harvest and sell the oil palm fruits on their farms, as an act of protest. A few residents have been arrested, although not charged, as a result of this. A few women still attempt to sell cultivated vegetables in the market in Batu Niah. Many adult male members of the smaller number of respondents have also sought employment in Miri, usually on a contractual basis, or have sought new sources of income by providing private vehicle charter and driving services, sometimes driving passengers all the way to Indonesia.

**Specific impacts on women**

In the past, fishing was a reliable source of income for many women, apart from forest resources like umbut. Women were able to fish nearby their farms, sometimes alone. Today, many have reduced or abstained altogether from fishing. Unless during the rainy season, fishing almost has to be conducted in areas located further away and for longer hours, in order to ensure a modest amount of catch, which in any case tends to be lower than that which they could bring home in the past.

In Sungai Buri, the women also expressed their fear on the recent increase in crocodile sightings as the animal's food sources have also been affected by forest destruction and river pollution. A few women also expressed their discomfort that the project has brought male outsiders to work on their land. Many women in Sungai Buri today have had to turn to vegetable farming to generate their income independently from their husbands, which brings in a much smaller amount of income for them. At the same time, they are also no longer able to engage in the making and sale of handcraft, chiefly from bemban, tanggi, rattan and bamboo.
Today, a few have started to utilise plastics to replace the natural materials. In Sungai Sebatuk, vegetable farming by women are now mostly done only for domestic consumption, although a few women are still able to derive some income from it.

In all, the female respondents expressed their frustration of having to be more financially dependent on their husbands today, or for single mothers, the compassion of other family and community members. They also greatly missed the sense of safety in their freedom of movement in the past.

**Systemic causes of the violations of the NCR**

Apart from weaknesses found in existing statutes, the governance conditions in respect of land, forests and indigenous peoples in the state themselves are mired in several systemic problems. Some of these conditions are unique to Sarawak, while others are also present in Sabah and Peninsular Malaysia. Based on the findings of the case study as well as the analysis on the legal and governance framework for land, forestry, conservation areas and affairs of indigenous peoples in the state, it is fair for us to agree with SUHAKAM that the causes of these violations are indeed systemic in nature. The following section provides detailed elaborations on these systemic causes of the violations of the NCR.

1. **The absence of land tenure security and the unilateral interpretation of customary territory areas by the state.**

   Generally, the different authorities from the colonisation era to present time, took particular administrative steps to demonstrate that they were aware of the existence of the NCR that had been acquired based on native customary laws. However, as a result of various economic, political and geographical factors, most of such customary territories, which were (and still are) located far from administrative centres, have never received any document of title, recognition in the form of a communal reservation or other forms of written recognition from any authority.

   This is the root cause of the land rights violation and encroachment conflicts on indigenous customary territories, i.e. **the absence of land tenure security** of indigenous customary territories all over Malaysia, including in Sarawak. This problem has been allowed to continue from pre-independence times until today.

   From a legal point of view, this predicament resulted, first, from various weaknesses contained within various statutes that regulate the governance of land, forestry and conservation areas. Second, there have also been a host of erroneous interpretations
by the state regarding the features of the NCR. Such interpretations may not only be in conflict with the actual characteristics of the NCR as how they have been developed by the various native communities, but some are also no longer aligned to landmark judicial decisions.

As a result, the determination of the size of NCR territories has been conducted unilaterally and without the free, prior and informed consent of the people. Compounding the matter, this state interpretation of the extent of customary territories has not been informed to native communities themselves, whether through the issuance of official maps or boundary demarcation on the ground. As such, the people are not even certain how the state had arrived at their interpretation of the size and boundaries of their customary territories.

The state also tends not to actively utilise any existing statutory provisions that in fact can be used to improve land tenure security for indigenous territories. Currently, there are at least four methods through which increased statutory protection can be given to NCR territories by the state. Under the Land Code 1958, its Section 6, 10 and 18 provide for the establishment of the Native Communal Reserves, a special permit limited on the Interior Area Land and a grant in perpetuity free of any land rent, respectively. Amongst these, there is a legal consensus that Section 18 offers the highest form of protection. Meanwhile under the Forests Ordinance 2015, the Communal Forest Reserves can also be established.

However, such processes have yet to be actively and systematically utilised by the state. In fact, the state appears to have an implicit policy of abstaining further from establishing the Communal Forest Reserve under the forestry legislation, any such existing forest today would have been established at least some four or five decades ago. Data on the size of such community forests today are not easily accessible, but we can safely state that it must be negligible in respect of the total size of forested areas in Sarawak. Throughout the years, the size of land with NCR claims are often quoted by the media to be between one and 1.5 million hectares. However further details on this are not made freely available to the public.

2. Limiting NCR claims only to active cultivation areas and the refusal to recognise NCR on forested areas.

The Sarawak state government has openly stated its policy of limiting its recognition of the NCR to active cultivation areas, consistently disputing the existence of communal rights to forested areas. As most indigenous family farms are located nearby navigable rivers for their easy accessibility, according to many maps produced by the state government, areas identified as NCL tend to be largely situated along riverbanks.
This policy position however is inconsistent with the customs and customary laws of native communities, as well as the decision of the Court of Appeal in *Sagong Tasi* in 2002, which was eventually affirmed by the Federal Court. This concerns the judicial ruling that in any attempt to determine the lawfulness of any customary land rights claim, the ultimate legal reference would be the customary law of the concerned community itself, instead of statutory law. This principle is established as a result of the pre-existing status of customary laws. In 2016, the Federal Court in *Sandah Tabau* did rule that the customary law on communal rights to forested areas does not have the force of law. However, this highly criticised decision is not without a dissenting judgement. The review of *Sandah Tabau* is currently pending in the Federal Court.

3. **The use of colonial aerial photographs to determine cultivation areas under NCR.**

In order to distinguish forests from cultivated areas in their unilateral mapping of NCR areas, where rights tend to be conceded only on the latter but largely curtailed on the former, the Sarawak state government relies primarily on aerial photographs taken during the colonial period. This technique however is woefully inadequate and puts the people at a great disadvantage.

First, what appear to be forested areas from an aerial view may in fact still be land belonging to individual families. Indigenous communities do not conduct total land clearing for all agricultural activities. Land-clearing for the purpose of agriculture is only necessary in particular for rice and some cash crop cultivation. Meanwhile, some family farms or orchards may well still be left largely forested, if the land already contains abundant valuable and long-living wood, fruit, medicinal and other multi-purpose trees like rattan and bamboo. Though they may appear as forests, especially from an aerial view, such land can in fact be under the ownership of families who have the sole rights to harvest the resources found on them.

Second, such photographs are also unable to show the subtle differences between virgin forests and partially disturbed forests that have regenerated extensively, as the people are able to tell with much ease. This is an important fact as indigenous agriculture, especially for rice cultivation, also involves the practice of fallowing for the purpose of restoring soil fertility. Further, an entire community may also relocate their housing facility and farms within the same territory over the course of decades for various reasons.

Third, aerial photographs alone are clearly insufficient to determine the extent of the territories without corroboration from joint ground surveys, adjacent villages and historical, administrative and anthropological records.
Finally, as a matter of administrative policy, the aerial photographs themselves are not made accessible to the villages and the public. The state does not appear to have a policy to encourage the voluntary dissemination of information on its version of the peoples’ territorial boundaries outside of a land rights termination process, perhaps out of fear of inviting disputes.

4. The unilateral interpretation of native customary rights as a mere usufructuary right

To date, the state continues to interpret the NCRs as a limited form of usufructuary rights or as a rent-free land licence, instead of a citizen's proprietary interest in the land itself. Such rights may encompass the ownership rights to crops, housing and other built structures, but not the rights to the land itself. Such an interpretation again is in contradiction to the judicial decision that has ruled that the indigenous customary land rights are a form of a proprietary right in the land, which is protected under Article 13 of the Federal Constitution.

When logging and plantation licences are issued on their territories, native villagers will be confronted by the difficulty of finding statutory support in protesting against the encroachments that ensue. For instance, plantation and logging companies can simply emphasise the fact that their licences have been acquired legally under the written law. When their land is to be acquired by the state for public purposes, the payment of compensation is never adequate and largely limited to the loss of crops and some properties, with the amount being determined based on the discretion of the state, unlike the process of land held under a documentary land title. When forested native territories are reserved for production or conservation purposes, the notification process is woefully inadequate that many affected communities may not even learn of the process until it has reached its final stages or even completed.

Equally important, there is also the judicial decision on the fiduciary duty of the state to protect the customary land rights and welfare of the indigenous communities. Fiduciary duty is a responsibility based on the trust built between a trustee, i.e. the state and the beneficiary, the native community. This responsibility includes the duty not to act in a manner that can adversely affect their rights and welfare. Therefore, the failure to provide the highest protection to native customary territories through the reservation of their territories and the issuance of logging, plantation and other resource extractive licences without their free, prior and informed consent, is a failure to fulfil a form of fiduciary duty by the state.

5. Failure to fully understand the principles and essence of the NCR.

Although the Land Code 1958 in Sarawak does stipulate the manner in which the NCR may have been acquired by a native community and provide for the
characteristics and features of the NCR and the legal definition of the NCL, they do not fully capture the principles and essence of the rights as developed and practised by the communities in their entirety. For example, the law does not employ native terms and concepts in elaborating such rights. The most important of these is the concept of territoriality in the exercise of the NCR and the two key land use patterns within such a territory. These terms include those such as the *tanah pemakai menoa*, which refers to the entire indigenous territorial domain, which contains the *temuda* or family-owned land made up of farms, orchards and at times, smaller plots of forested areas, and the *pulau galau*, the communally-owned forest reserve, the village commons where hunting and plant harvesting and gathering activities take place, which also doubles as the village water catchment area.

Equally important, without any documentary land title or a reservation status, native landowners are regarded as free land licence holders under statutory law, which has led the state to interpret the rights as a kind of usufructuary right at best, instead of a form of proprietary interest in the land itself.

6. Participatory mapping and boundary demarcation process for the purpose of the communal reservation of their land is not actively undertaken.

The state has also failed to take the appropriate action to map and demarcate the boundaries of native customary territories in their entirety with the participation of the communities and their free, prior and informed consent. Native communities in Sarawak have also not been given further information on the extent and size of their customary territories, whether through boundary demarcation or any cartographic documents. Statistical information on NCR areas that have been reserved for community use or issued with some form of documentary title or permit is also not in the public domain. Although native communities are fully aware of the boundaries of their customary territories and land use management within their villages, all community representatives interviewed affirmed that they did not have any knowledge of how the state interprets the boundaries of their customary territories.

The state clearly does possess some data on the size of land classed as native customary land. However it is the policy of the state to deny that the NCR may also extend to the forested areas, in contradiction to the customs of the various native communities. Therefore, any official statistical or cartographic data on the size of native customary territories that are without any reservation status or some form of documentary land title is highly unlikely to be accurate as it would have excluded large tracts of forested areas, especially those that have been gazetted as either production or conservation forests, where such rights have been deemed largely extinguished, with or without the prior knowledge of affected communities.
7. NCR recognition that is in conflict with community interest and neglects the concept of territoriality.

Another question associated with the recognition of native customary territories in Sarawak is the failure of the state to take into account the concept of the territoriality of customary land when and where any land title issuance or land gazetting effort is undertaken. Executive recognition of such land tends to bring with it the risk of causing the original size of such traditional territories to shrink.

In July 2010, the Sarawak state government revealed its plan to embark on an initiative to carry out en-bloc surveys of native customary land in the state, with the intention of gazetting such land into Native Communal Reserves as provided for under Section 6 of the Land Code 1958. This will also allow such land to be regulated by the customary laws of the community for whom it was declared to be reserved. Estimated to cost some RM20 million with the support of the federal government, it was reported that the effort would be carried out before the end of the year and would continue during the Tenth Malaysia Plan (2011 - 2015). Areas would be reportedly surveyed based upon the application by landowners with genuine land claims that are free from any court cases or disputes.

According to the Sarawak Department of Lands and Surveys, the process will be implemented in stages. First, a perimeter survey to delineate boundaries of NCR land within the state land is conducted. Then, areas that have been determined to be under legitimate rights will undergo a gazetting process. Subsequently, the landowners will be required to determine the boundaries of their individually-owned land within the gazetted reserve, in order to allow further survey works to be carried out for the eventual issuance of land titles over such plots of land, under Section 18 of the same law, which allows for the issuance of native grants that are free of rent charges. The department has stated that the declaration of such lands as Native Communal Reserves will serve as a guarantee for the people’s land ownership [emphasis added]:

- The declaration of NCR land as Native Communal Reserve under Section 6 of the Land Code is a confirmation and statutory recognition of native ownership over their land.
- The gazette will describe clearly the surveyed land within the declared Native Communal Reserve, allowing the community to detect and prevent any unlawful intrusion or encroachment upon their land.
- The rights were [sic] administered and regulated by the native system of personal law of the native communities concerned.

NCR land that had been surveyed can be put up for commercial development thus,

46 For more information on the matter, please see the website of the Sarawak Department of Lands and Surveys at http://www.landsurvey.sarawak.gov.my.
adding value to the land, and to help uplift the well being of landowners [sic].

However, critics of this initiative have questioned the underlying motives for this move, especially given the suggestion that such reserves can be put up for commercial development. Further, the process has also not revealed any strong safeguards which can ensure that it will be highly consultative and participatory in nature. For instance, how does the process collect and verify corroborative evidence that can be used to establish credence to support each land right claim? Will the process investigate such evidence from a wide range of sources – physical evidence on the ground, historical records and administrative references, and testimonies from neighbouring claimants and other knowledgeable persons? Will the state make it freely available, its interpretation on the extent of the peoples’ rights by disseminating colonial aerial maps and other forms of documents to them?

Equally important, the lack of transparency, consultative and participatory governance and information disclosure in the state as well as the policy of denying that the NCR may extent to forested areas, may render any native land registration initiative in Sarawak to be potentially detrimental to the peoples’ interests. Although executive recognition over some parts of their land may be obtained through the initiative, under current governance and policy conditions, it will not be surprising if the bulk of their land may be systematically excluded or rejected by the process.

7. The reservation of the Permanent Forest Estate and conservation areas and land acquisition process without the free, prior and informed consent of affected native communities and with poor notification process.

There is no statutory provision anywhere in any of the existing laws in Sarawak which requires a mandatory free, prior and informed consent process to be obtained from affected communities for any processes which may result in the extinguishment or heavy regulation of the NCR. The loss of the NCR can result from the forest reservation process either for production of conservation purposes as well as land acquisition or the change in land status. Further, the change in land class status from Native Area Land or Native Customary Land to Mixed Zone Land can also further complicate matters for native customary landowners.

All NCR extinguishment process undertaken through these different laws only requires for its notification to be published in the Sarawak state gazette and in one newspaper and displayed at the local district office. For land acquisition process requiring a forced relocation, the state does typically inform affected persons in a more personal fashion. For the reservation of the production forests and conservation areas, the state may also inform affected persons in a personal fashion, but this is a discretionary act. As a result, historically, many affected communities
were not even informed of their NCR extinguishment for these two purposes, in particular for the establishment of production forests.

For land acquisition process undertaken under the land law, affected persons are given 60 days to submit their compensation claims and a further 21 days to appeal if they are dissatisfied with any aspect of the decision. For the reservation of production forests and conservation areas, affected communities are also given 60 days to submit their claims and a further 30 days for the appeals process.

All such processes are clearly highly unfavourable to native communities who mostly reside in rural areas and rely largely on oral communications in their own native languages.

8. No guarantee of adequate compensation process for the loss of the NCR.

Provisions on compensation for the loss of the NCR be they in the land, forestry or conservation laws do not guarantee adequate payment as demanded by Article 13 of the Federal Constitution. Compensation on the loss of such land rights is entirely based on the discretion of the state government.

9. The issuance of resource-extractive and land development permits without the free, prior and informed consent of affected native communities.

Licences for logging and pulp and paper and timber tree plantation licences (the latter requiring the clear-felling of forests) are issued by the Sarawak Forests Department both over the gazetted Permanent Forest Estate, largely made up of two sub-classes of forests, namely, the Forest Reserves and the Protected Forests, as well the non-reserved state land forests. Some tree plantation licences however, mostly growing pulp and paper trees, are allowed to devote 20 per cent of their concession areas to grow oil palm for one cycle of 25 years. Further, land development permits for oil palm plantations are also issued by the Department of Lands and Surveys on land beyond the jurisdiction of the Forests Department, including on forested and cultivation areas where the NCR are claimed.

To the best of the knowledge of the respondents who were interviewed during the survey, they had never been consulted prior to the issuance of any logging or plantation licences. For both cases, the respondents stated that they only became aware of the arrival of oil palm plantation operations in their customary territories for the very first time, during the period when land-clearing activities had in fact already commenced.

Our survey further shows that if the people attempted to pursue further discussions with the companies, the latter’s responses tended to emphasise the fact that their
licences had been legally awarded by the state and that they had settled all the mandatory fees and payments required under the law. Therefore, from the perspective of the companies, they had indeed adhered to all statutory requirements. In short, these licences are seen as rights that have been legally obtained from state governments.

Licences are issued in such a way as a result of the interpretation of the state that all such areas, whether forested or otherwise, reserved and non-reserved, are the absolute property of the state, so long no documentary land title had been issued over them. The NCR meanwhile are understood as merely a limited form of usufructuary rights, limited to cultivation areas, although such farming areas have also not been spared from being included in the licences.

10. The lack of governance transparency and information access.

All of the above issues are in fact closely linked to the absence of transparency in the dissemination of important information to native communities. This information includes the boundaries of native customary territories as interpreted by the state, the gazetting of the Permanent Forest Estate and conservation areas, as well as the issuance of plantation and logging licences.

There is not one statutory provision in Sarawak that requires the mandatory dissemination of information to native communities in respect of matters that may have an impact on their NCR. As a result, conflicts over native customary territorial boundaries are the norm rather than the exception, wherein the assertions of affected communities are simply ignored and remain unrecognised by state authorities. Compounding the matter is the fact that the villages are not informed of territorial boundaries as interpreted by the state through official maps and boundary demarcation on the ground.

It is almost certain that the government’s interpretation of native customary territories is much lower than the original extent inherited by the communities since time immemorial. However, at the very least, the dissemination of information can be used to develop a dialogue to resolve any disputes that may arise between the state government and villages. Unfortunately, this is not the common practice of the Sarawak state government.

High-quality maps that are visually friendly and are able to illustrate the boundaries of the Permanent Forest Estate, native customary territories and licensed areas for logging and pulp and paper and timber tree and oil palm plantations are currently neither available on the websites of government agencies nor distributed amongst affected native communities. The same is true for other important information. Only on project sites are signboards erected to provide some details on such operations.
Information access on forestry matters can be extremely limited in Malaysia, with Sarawak being one of the most difficult states in this aspect. In Sarawak, our attempts to obtain detailed maps and information on all logging concessions have always failed, despite having written official requests for the purpose. Similarly, information on the licences for oil palm and tree plantations is not readily available in the public domain. As a matter of fact, we have not even been able to receive any favourable response in our request for detailed maps and descriptions of the state’s gazetted production forests over the years.
CHAPTER 5: Recommendations
SAM has consistently worked with numerous native communities in Sarawak on the ground for their empowerment, in defence of their customary territorial rights.
5. Recommendations

This final chapter discusses a set of recommendations to be undertaken by both the federal government and the Sarawak state government in order to ensure that violations of native customary territories in the state will be systematically halted. These recommendations are not necessarily new since there are other non-governmental organisations and community-based organisations that have shared the same position with us on issues relating to such violations and encroachments. Some of these recommendations are also not dissimilar to those proposed in the Report of the National Inquiry into the Land Rights of Indigenous Peoples published by SUHAKAM in 2013.

Two important objectives of the recommendations proposed here aim to achieve:

(i) The provision of land tenure security native communities by the state, based on the communities’ interpretation; and

(ii) Governance transparency for all matters relating to land and forestry management to allow the development of a genuinely sustainable forestry, land and natural resource management system.

Only when these objectives have been successfully fulfilled will the production system of timber, palm oil and other natural resources in Sarawak can be recognised as sustainable and possessing legal impeccability.

1. Protection of the remaining indigenous customary territories and forested areas that fall within monoculture plantations that have yet to be fully developed

There is still time for the federal and state authorities to take the correct course of action to protect the remaining NCR territories and forested areas where land clearing activities have yet to commence. There is an urgent need to review or revoke large monoculture licences which affect indigenous customary territories as well as forested areas, whether they are gazetted production forests or non-reserved stateland forests, regardless of the kind of commodity involved. This call in fact extends to the entire country, as both Peninsular Malaysia and Sabah are also engaged in the development of large monoculture plantations that affect indigenous customary territories and forested areas.

2. Legal reforms for the purpose of aligning statutes with landmark judicial decisions on native customary territories
Taking into account the landmark judicial decisions on indigenous customary land rights and the failure of the federal and state governments to introduce the appropriate amendments to the relevant statutes, there is now a lack of consistency between the two bodies of law.

As such, amendments to the relevant laws must be undertaken for the Land Code 1958, the Forests Ordinance 2015, the National Parks and Nature Reserves Ordinance 1998 and the Wild Life Protection Ordinance 1998 as well as other statutes that may have an impact on the native customary rights.

In view of these landmark judicial decisions, it is therefore **legally inappropriate** for the state authorities in Sarawak to continue the following practices:

(i) The unilateral determination of the size and territorial boundaries of native customary rights without the free, prior and informed consent of communities and through heavy reliance on aerial photographs.

(ii) The action of extinguishing or reducing native customary rights without an agreement that has been obtained through a free, prior and informed consent process and the payment of adequate compensation. This principle applies to both the land acquisition process and the gazetting of indigenous customary territories into the Permanent Forest Estate or other conservation areas.

(iii) The issuance of logging, plantation, mining or other resource-extractive licences, including for oil palm plantations, in the Permanent Forest Estate, with the presumption that any subsisting native customary rights have been successfully extinguished under the law, without actually taking the action to do so in clearly written language, if such forests still form part of a native customary territory through their continuous occupation.

(iv) The issuance of logging, plantation, mining or any resource-extractive licences on native customary territories, including for oil palm plantations, without an agreement that has been obtained through a free, prior and informed consent process, or at the very least to ensure that the extinguishment of the native customary rights and the payment of adequate compensation for the loss of such rights have been first conducted.

(v) The refusal to give stronger recognition to native territories either through the land or forestry law based on the size originally claimed by the communities.

### 3. The introduction of a definition of native customary rights in accordance with community perspective in the legal system
The Land Code 1958 must be amended to introduce a detailed definition of the features of native customary rights that are in accordance with community perspective on their customary territorial rights, the Federal Constitution and landmark judicial decisions on indigenous customary land rights.

4. The introduction of a participatory mapping and boundary demarcation process for native customary territories for the purpose of the gazetting and issuance of a communal grant for the land

Based on an accurate interpretation of the concept of territoriality in the exercise of indigenous customary land rights and supported by the Federal Constitution and landmark judicial decisions, a participatory mapping and boundary demarcation process must be introduced by the state for the purpose of the gazetting and issuance of a communal grant for native customary territories in Sarawak.

For this purpose, the legal provisions most favoured by native communities are those that provide for the issuance of a grant of perpetuity, free of any rental charges under Section 18 of the Land Code 1958 and those which provide for the establishment of the Communal Forest Reserves under the Forests Ordinance 2015.

5. The issuance of land recognition that is consistent with community interest and in accordance with the native concept of territoriality

The communal gazetting of native customary territories must be undertaken with the consent of the concerned communities and should not cause the size of such territories to decrease. Further, it must also take into account the diverse strategies of different tribes in managing the land use patterns of their customary territories.

6. The extinguishment of the NCR, the change in land status and the gazetting of the Permanent Forest Estate and conservation areas can only be undertaken with the free, prior and informed consent of affected communities and the payment of adequate compensation

The land, forestry and conservation laws must be amended to ensure that all processes which may cause NCR extinguishment cannot proceed without the free, prior and informed consent from and adequate compensation payment to affected communities. Further, other amendments must also take place, including, introducing provisions on an effective personalised notification process, which takes into account the language of the notice, the manner in which the notice is displayed and communicated orally to affected communities and a longer duration for affected communities to put forward objections and claims for adequate compensation.
7. The halting of the issuance of the licences for oil palm and pulp and paper and timber tree plantations and other land development and resource extractive operations on native customary territories without the free, prior and informed consent of affected communities

A host of the relevant laws must be amended to ensure that the process for the issuance of logging, plantation, mining and other land development and resource extractive operations can only be carried out after the free, prior and informed consent of affected native communities has been obtained. This means that any consultation with the affected communities must be undertaken prior to and not after such licences have been issued.

In order to permit such a process, the state administrative system must possess clarity on the location and territorial boundaries of native customary rights, in accordance with each community’s interpretation. Any unilateral interpretation by the state on the locations and boundaries of their territories will only cause an increase in land rights disputes in the future.

8. Ensuring transparency in the governance and legal structures relating to land, forestry, conservation areas and natural resource extraction activities

Transparency in the governance and legal structures relating to land, forestry, conservation areas and natural resource extraction activities must be improved through the introduction of the necessary amendments to all the relevant statutes. These laws include but are not limited to, the Land Code 1958, the Forests Ordinance 2015, the National Parks and Nature Reserves Ordinance 1998 and the Wild Life Protection Ordinance 1998.

Apart from this, the public administration system must also be empowered with official directives to ensure that information on land, forestry, conservation areas and strategies and the extraction of natural resources which may have an impact on the native communities and the public at large is publicised through the websites of the relevant government departments and agencies and their direct dissemination on the ground for affected communities.

In addition, information on the boundaries of the Permanent Forest Estate and other conservation areas must also be in the public domain. High-quality and visually friendly maps of such areas for the general public must be published on the websites of the relevant government departments or agencies, while clear boundary demarcation must also be carried out in the field.

Equally important, state governments must also provide the public with easy and free access to information on logging, oil palm and pulp and paper and timber tree
plantation, mining and other resource extractive licences on an annual basis. Such information must include at the very least maps of the licensed areas, duration for operations, licence numbers and the names of the licence holders and their contractors.

There has been much confusion on the ground for native communities as a result of the lack of such information, especially prior to the commencement of any licensed operations. This has complicated their efforts to articulate their opposition or even to make further inquiries on such licences. All such issues can be easily resolved if there is clear executive policy that compels such information to be placed freely in the public domain.
Findings of the case study on the encroachment on native customary territories in Sarawak

ANNEX
The land we lost – the oil palm plantation on the shared native customary territory of four Iban single-origin longhouses in Sungai Buri.

1. Sungai Buri Residents’ Association

The *rarung* or burial ground of warriors and important persons of the Sungai Buri Iban customary territory, evidence of their long occupation of the territory.
The river that has been made shallow by the siltation caused by the oil palm plantation in Sungai Buri.

A villager seeking shelter from the sun on the barren and heavily eroded land.

The river that has been made shallow by the siltation caused by the oil palm plantation in Sungai Buri.
The land we lost – the oil palm plantation on the native customary territory of the Iban longhouse in Sungai Sebatuk.

Two villagers from Sungai Sebatuk showing the remaining structure of their old longhouse, known as the *tembawai* in Iban, in the midst of the oil palm plantation, evidence of their long occupation of the territory.
A villager pointing out to the site where a heated argument once ensued with the company representatives.

The road that was allegedly dug out to prevent the people from harvesting the oil palm fruits, an action they undertook as a demonstration of their protest against the plantation.

A villager pointing out to the site where a heated argument once ensued with the company representatives.
Map 2: NCR territory of four single-origin longhouses of Sungai Buri, Bakong, Baram

Map 3: NCR territory of Rumah Ansang, Sungai Sebatuk, Suai, Niah, Miri
1. Sungai Buri, Bakong, Baram

**SECTION A:** BASIC INFORMATION ON AFFECTED VILLAGES

<table>
<thead>
<tr>
<th>Source</th>
<th>Sungai Buri Residents’ Association</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members of the association are residents of the Iban NCR territory shared by Rumah Gasah and three other longhouses, all four originating from a single ancestral longhouse.</td>
<td></td>
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</tbody>
</table>

**History**

Our customary territory is referred to as Sungai Buri, after the river which flows near our longhouses. The Sungai Buri is a tributary of the Sungai Bakong, all part of the Baram river basin.

In the beginning, Sungai Buri was known as Sungai Rangkie. The change of name from Rangkie to Buri was done because the old name was said to be unsuitable. When the former name was in use, there were too many adverse incidents taking place in the village, especially epidemics and deaths. In the Iban custom, such a condition is termed as ‘hot.

When Sungai Rangkie was ‘hot’, the village was confronted by a high rate of dangerous illnesses, such as epilepsy and elephantiasis, some of which also resulted in sudden deaths. According to our elders, at times, when a funeral was in service, there would still be another death taking place in the village.

Consequently, the villagers made the decision to temporarily move out of Sungai Rangkie to nearby areas such as Sungai Binyo, Selepin, Nakat, Entulang, Malang and Sungai Arang. Subsequently, after their return, they proceeded to conduct a ceremony known as *ngampun antu penyakit*. This rite was done to ask for divine forgiveness for any transgressions that may have been consciously or unconsciously committed by the people. Essentially, the ceremony was conducted to heal the ‘heat’ the village was suffering from.

This ceremony involved the selection of a new name from three available options. Each of the name was written on a separate piece of paper, each of which was then placed in a plate of rice. Subsequently, a chicken was used to select one of the three plates of rice to eat from. The chicken at last chose the rice from the plate with the paper which bore the name Sungai Buri. That is...
the origin of the name of the river in our village.

Our memory on the history of our ancestors goes back to the eighteenth century. Our ancestors had their roots in the Sungai Rajang basin, from which they migrated from. The group which relocated to Sungai Buri was led by a chief named Kuran Melebai. After Kuran passed away in the Sungai Buri longhouse, our village was led by his son, Manan Kuran. Manan was later replaced by his son-in-law, Mandi Beliang, around 1947, who in turn was replaced by his son, Dullah. In 1954, Aji Umpang took over the leadership of the village.

Due to the increase in population, another longhouse was built in 1988 within the territory. This second longhouse was led by Aji’s brother, Turan Umpang. Subsequently, this second longhouse broke up into three different longhouses between 2015 and 2017, one of which is currently being led by Gasah Tedong, who is the chair of the Sungai Buri Residents’ Association. Meanwhile, in the original longhouse, Aji was replaced by Ree Lindang in 2002. Today, this house is led by Ree’s daughter. All the four longhouses today continue to share the same territory.

The history of Sungai Buri is famed for its warriors. We own a special burial ground which is called rarung, set aside for those whom we deem as warriors and individuals who had made immense contribution to the community when they were alive. In this rarung, they were given special burial rites.

Our most well-known warrior was Jegalang Umot, who was killed in a battle in 1944 during the Japanese occupation in Sarawak. His body had decomposed for some time in the forest before it was found and cleaned by Jegalang’s own father, who had to dispose the remaining flesh still attached to his bones. His skeleton was then kept in an urn which we call tajau and concealed with a brass tray used during the miring ceremony which we call tabak. The Iban traditional costume known as the bird costume was also left in the tajau. After being brought home to the longhouse for the community to pay its last respects to Jegalang, the tajau was placed on a hill that is now known as rarung binyo.
SECTION B: 
VERIFICATION ON THE EXISTENCE OF CUSTOMARY 
LAND RIGHTS

The villagers verified that they are able to demonstrate the existence of their customary land rights through the following body of evidence.

<table>
<thead>
<tr>
<th>A.</th>
<th>Can the villagers provide oral evidence on the history of their customary territory?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>History on the origins of the customary territory and ancestry</td>
</tr>
<tr>
<td>2.</td>
<td>Site-specific history, folklores, legends</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th>B.</th>
<th>Do the villagers still practise the traditional customs and culture of their community?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Land clearing, agriculture</td>
</tr>
<tr>
<td>2.</td>
<td>Marriages</td>
</tr>
<tr>
<td>3.</td>
<td>Deaths, funerals</td>
</tr>
<tr>
<td>4.</td>
<td>Communal laws, code of conduct and ethics</td>
</tr>
<tr>
<td>5.</td>
<td>Possession of old items and heirlooms: traditional costumes, gongs, baskets, beads, personal ornaments, decorative objects, kitchen utensils, knives, machetes, weapons, household items etc.</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th>C.</th>
<th>Can the villagers provide evidence on their use of the land and its natural resources within the customary territory?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Tree felling or tree harvesting marks</td>
</tr>
<tr>
<td>2.</td>
<td>Hunting and fishing sites, saltlicks</td>
</tr>
<tr>
<td>3.</td>
<td>Burial grounds and sacred sites</td>
</tr>
<tr>
<td>4.</td>
<td>Trails and pathways within forested or cultivation areas</td>
</tr>
</tbody>
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<th>D.</th>
<th>Does the government acknowledge the existence of the villages?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Government built facilities</td>
</tr>
<tr>
<td>2.</td>
<td>Visits by ministries or governmental departments and agencies</td>
</tr>
</tbody>
</table>
SECTION C: LAND ENCROACHMENT REPORT

BACKGROUND

1. Background: Chronology of encroachment

History of logging encroachment

Logging operations first encroached upon our village way back since the 1960s. Since then, different companies began to continually enter our territory up until 2014. To the best of our knowledge, there were some complaints lodged in the early days against some of the operations, especially if our farms had been destroyed by the construction of access roads. However, these did not involve large scale protests or even blockades.

Even if the logging company representatives had conducted any consultations back then, these would have involved only the village leadership, without the complete involvement of other residents. We did receive some compensation from the companies, in the form of water tanks, zinc and sawnwood. We cannot recall ever receiving any monetary compensation. Regardless of these, there was never any free, prior and informed consent process involved in the past. More importantly, the occurrence of such logging encroachments in the past did not mean that we had let go of our NCR. We had valid reasons as to why we were unable to carry out any strong and systematic protests during this period.

In the past, the villagers did not have adequate knowledge on statutory law, although we were of course well-informed of our own customary law and the boundaries of our customary territory as well as our family-owned farms. Our land management practices were still administrated in accordance with our customs. Further, in the past, we also did not have the opportunity to attend the various programmes conducted by non-governmental organisations to learn more about such legal issues and how systematic protests can be carried out by communities.

Basically, in the past, it was extremely difficult for us to obtain technical assistance from outside parties, be they legal advice or the mapping of our territories, to enable us to defend our customary land rights in a more organised manner. However, this does not mean that we did not protect, develop or manage our customary territory based on our customs. We had never let go of our customary land rights to any logging, plantation or outside parties.
During this time, the logging operations of course did cause a lot of negative impacts on our lives. They did cause river pollution and affect the fertility of the farms in our village. However back then, we were still able to obtain the resources needed for our daily livelihoods. In the past, the size of our virgin forest was still large.

The last logging encroachment took place between 2012 and 2014. The timber harvested during this time was indeed from the area of the existing oil palm plantation today. This appears to be the usual practice, before the arrival of any plantation projects, the remaining timber would first be harvested. However during this time, some of us were already brave enough to conduct open protests to the point of erecting a blockade. As a result, there was a resident who ended up being arrested by the police and charged in court.

**The arrival of the oil palm plantation project**

In the early 2000s, we discovered that an oil palm plantation company had begun its operations in the neighbouring customary territory. Many of our own family farms used to be located near our boundary with this neighbouring community. This was how we knew of the existence of this plantation project. However, at this point of time, we did not suspect that its operations would soon encroach on our own territory.

Subsequently, somewhere in the year 2005, we began to witness land surveying activities conducted by a private company on our territory. They were demarcating the ground with wooden poles painted in red. As far as we know, no party had ever visited us to ask for our inclusive permission to conduct this activity. After the plantation project began to encroach upon our territory, then we could see that the poles had possibly been planted to demarcate the project boundary. However, during this period of time, we could not do anything much to stop the workers, as we ourselves were in the dark about the purpose of the land survey and demarcation activities.

In the early 2009, encroachment on several plots of farms belonging to our villagers located near our boundary with the neighbouring community began. This encroachment was carried out by the project contractor. It involved land clearing activities that were carried out in small stages without the knowledge of the landowners. However, at some point of time, the contractor did begin to inform some of the landowners whom he personally knew and confirmed to us that the project would indeed extend to our customary territory. Nevertheless during this time, we were given the impression that only a few plots of land would be affected, in particular those that were located nearby the boundary.
The affected families were then advised to arrange for a site visit together with the contractor to verify the boundaries of their farms so that no confusion would arise in the future. After agreeing on the date, the contractor then proceeded to show to the families the extent to which the project would encroach upon their farms. The families were however not given any maps or other official documents. We were also informed that we could not protest against this project as it had received a valid licence from the state government. Consequently, the affected villagers were suggested to ‘sell’ their land to the company.

Not long after this, a representative of the company finally came to meet the affected villagers to discuss about the ‘sale’ of their land, at a rate of RM500 per hectare. After being coaxed by this person, a few families who were worried that they might lose their land without any compensation payments, allegedly agreed to ‘sell’ their land at the rate that was being offered. Subsequently, we heard that they were then asked to visit the site office of the company, along with the presence of a specific third party from the community, to complete the sale of their land. The presence of this third party was thought to be necessary for the purpose of verifying that the plots of land being ‘sold’ were indeed owned by those ‘selling’ them. However, in our view, such a verification still did not satisfy the demands of our customs. This process would have been witnessed only by the company representatives, the affected villagers and the third party concerned. By right, all residents of the village must be involved in this process, in order to prevent any individuals from claiming ownership over plots of land that do not actually belong to them. For us, this is the correct way of ensuring that any transaction involving our land is genuinely valid.

Following this incident, before the Gawai day of 2009, which falls on June 1 every year, the company representatives came to pay us a visit with a lorry filled with hampers to be gifted to each family in the two longhouses. Each family was also given some cash. Subsequently, it became a practice for the company to shower us with gifts such as cash, fresh meats, hampers, foods and drinks from time to time in the coming years. Sometimes, parties were also held in conjunction with the handing out of such gifts. These events were also sometimes attended by representatives of government agencies in Sarawak. However at the same time, we still had no clear knowledge of the people who had sold off their land. We had only heard stories from other villagers about such things. It was very difficult for us to obtain any written documents as evidence of the ‘sale’ of land that had reportedly taken place.
On June 8, 2009 however, one of the village chiefs resorted to lodging a police report [BELURU/RPT/256/2009] to express his concern on the land encroachment:

...on 27 February 2009, we discovered that the land belonging to our longhouse was encroached upon by Bintulu Lumber Development Sdn. Bhd. They had begun clear felling and ground levelling activities within the territories of the longhouse owned by the villagers under my responsibility. This report is made for the reference of the Lands and Surveys Department and other relevant parties as well as for the police, for them to take any follow-up actions.

In the the following four years or so, the project operations were indeed limited to the farms nearby the village boundary. However, we were constantly warned by our neighbours that the licence for this oil palm plantation project in actual fact would involve a large part of our territory. Although we were of course anxious to listen to such claims, there was nothing much that we could do, as we were not given any detailed information about the matter. No representatives from the state ever came to provide us with such information.

**Villagers were forced to find information on the land status**

We did attempt to request for the complete map showing the actual extent of the project boundary and other relevant documents on the project licence from the company. However, our requests were simply rejected by them. As a result of this, around July 2012, Gasah Tedong finally decided to visit the Department of Lands and Surveys in Miri, with the intention of obtaining important information on the project. Through the regular counter service offered at this office for the public, he requested information which could verify whether the land around Sungai Buri, our customary territory, would be affected by any oil palm plantation project.

His request finally yielded information on the land status of Lot 192 and 193 within the Teraja Land District, which were located in the northern part of our territory. The official documents obtained show that the two lots have now been classed as Mixed Zone Land, where non-native and native persons are able to occupy with valid documents. A provisional lease had been issued over the land to a company for 60 years, beginning from the year 2000 to 2060. We of course had no knowledge whatsoever on the issuance of this lease within our territory. The state authorities had never conducted any consultation or obtained our consent before involving the territory of our village in this project.

When he returned to the village, Gasah began to let everyone know that he now had the evidence which verifies that the oil palm plantation licence for the company, does indeed affect a large part of our territory. The licence does not only affect the
territory of our neighbours and some farms of our fellow villagers located nearby the village boundary. Following this revelation, we conducted a large meeting to discuss over the matter. The majority of the villagers then decided to continue defending their customary land from being encroached upon by this project.

We then decided to visit the Department of Lands and Surveys in Miri once again to obtain further information on the document received by Gasah from any senior officers of the department. On the agreed upon day, four villagers went to visit the department in Miri for this purpose. After arriving, we inquired from the staff there on the most suitable officer who could further discuss the matter with us. At last we were led to a senior officer in the department.

During our discussion with him, we first requested for confirmation on the issuance of the oil palm plantation licence to the company. The officer of course verified the information contained in the two documents. We then requested for further explanation as to why the licence was issued over our land. For us, this is a gravely erroneous action. However, the officer responded by saying that the project was part of a state strategy to develop idle rural land. We were of course highly dissatisfied with such a reply. Nevertheless, there was nothing much that we could say during this encounter. We first must return to discuss further with other villagers on the appropriate actions that should be taken. At the very least on that day, we were certain that the information we received was accurate. We left the office immediately after the discussion.

Not long after the meeting, we began to hear stories from members of the neighbouring community who had received the contract to clear parts of the project area that we too would be able to have the same opportunity if we consented to the project. However, during this time, the project operations were still limited only to their territory and the farms located nearby the boundary. This area was located far from our longhouses and the majority of our farms.

Meanwhile, we began to make attempts to map our territory in order to understand the size of the area affected by this project. We did attempt to obtain land surveying and mapping services from a private company. However, we could not afford the high fees being charged for such services. This eventually resulted in our failure to undertake systematic and swift actions in halting the land encroachment.

**Commencement of large scale encroachments**

Somewhere in the middle of 2013, without the knowledge of the villagers, a large scale encroachment on our territory suddenly commenced. A group of villagers who were on their way to hunt witnessed the land clearing operations in the middle part of our customary territory. This area comprised both the communal forest shared by
all villagers as well as the farms owned by individual families. The hunters then rushed home to the longhouses to inform other villagers.

The villagers who sensed that their land might be affected immediately left for their farms in a large group. We walked together for at least two hours to the area. Upon our arrival, we could see with our own eyes the scale of the destruction nearby Sungai Terentang and Sungai Ensuai. The farms belonging to tens of families had been clear felled. The number of crops that had been destroyed was enormous, including rubber, jackfruit, durian, *isu*, *embawang*, *langsat*, *tarap*, areca nut and other crops and trees. The operation had apparently been carried out in such a swift speed. We believed numerous labourers had been contracted to conduct the land clearing activities simultaneously. We saw that they had also camped nearby.

Of course the people became extremely mad. When we demanded to know about the licence for the land clearing activities, they told us that they were mere labourers and could not answer anything on licensing matters. They suggested that the matter be brought directly to their leader. We believe that they were all foreign workers from Indonesia. We then ordered for the operations to be halted immediately and demanded for the owner of the contractor company to pay us a visit at our longhouses for a consultation. We emphasised to them that no further land clearing activities could proceed without any consultation. They then agreed to halt their activities on that day. We were there for about three hours. We arrived at our longhouses in the early evening.

Establishment of an action committee

Immediately after the incident above, the villagers once again conducted a large scale meeting. Gasah at this time openly questioned other villagers whether they wished to carry on ‘selling’ their land or instead struggle to defend their land rights. The majority of the people expressed their refusal to ‘sell’ any more of their land. At last we agreed to establish an action committee to monitor the development of the project and manage the protest against the land encroachment. During this meeting, we also agreed to undertake several actions.

First, a police report [BELURU/000410/13] was lodged by Gasah on August 20, 2013. At the Beluru police station, we explained to the police how the company had encroached on our customary territory and proceeded to fell our crops. Our wish was certainly for the police to conduct further investigation on the incident and to inform the company that they needed to pay compensation over the destruction that they had caused. Unfortunately, to the best of our knowledge, no meaningful action was undertaken by the police. Among others, the report stated the following:
In reference to the report Beluru/RPT/402/13 lodged by TR Ree anak Lindang on 16/08/2013 regarding the encroachment carried out by the company Bintulu Lumber Development (BLD) on our farms within Ensuai and Sungai Terentang Buri, Bakong, where they had felled fruit, rubber and other crops, belonging to the residents of TR Ree and TR Turan longhouses for the purpose of oil palm cultivation. I, acting as the chair of the action committee for residents of TR Ree anak Lindang and TR Turan anak Umpang, would like to express our strong protest against the project. Their action had caused us a great loss and income deprivation. We therefore would like to request for compensation to be paid for all the destruction and losses caused and for the destruction and felling activities to be halted immediately. Further action will ensue should BLD Plantation Sdn. Bhd. refuse to cooperate on this matter. This report is made for the reference of the Department of Lands and Surveys in Miri, the sub-district office of Beluru and BLD Plantation Sdn. Bhd.

Secondly, the action committee also planned to meet with the state authorities in the near future. We planned to write a protest letter to be handed directly to the state authorities. On November 18, 2013, the action committee called for another meeting to outline our position and other actions we wished to undertake. Among others, we decided on the following:

(i) To continue to strongly condemn the action of the company of encroaching on our customary territory. The encroachment had affected our temuda and pulau galau, inherited from our ancestors. All activities must be halted immediately and if this fails to be done, strong actions would be pursued.

(ii) To continue expressing our unanimous rejection of the company’s suggestion of purchasing our individual lands and any part of the customary territory of Sungai Buri.

(iii) To insist that our land must first be surveyed based on the provisions of Section 18 of the Sarawak Land Code 1954 and that documentary titles must also be issued before any consent may be given by the residents for the company to continue their operations, if any wishes to do so.

(iv) In cases where consent is subsequently given by any resident, it will be subject to a rental agreement that will be based upon a written agreement between the landowner and the company. Among others, the agreement will outline the following conditions:

(a) Duration of rent

(b) The liberty of the landowner to determine the plots of land to be rented out to the company.
(c) The company is still held responsible for the losses suffered by the residents as a result of their past land clearing activities that had destroyed our crops.

(d) The rate of rental is set at RM3.00 per oil palm crop.

(f) All agreements must be conducted with legal supervision from both parties.

Continuation of the pressure to ‘sell’ the land at RM500 per hectare

Soon, the company informed us that they wished to have a meeting with us to discuss over the land encroachment. This meeting was eventually held in an open field near the water treatment plant by the bank of Sungai Bakong. There was a large participation from the village.

During this discussion, the company stated that they wished to ‘purchase’ our land at the rate of RM500 per hectare. They attempted to persuade and promise us that if we were to agree in ‘selling’ our land to them, they would also provide us with other forms of assistance as well. These included repair works for the longhouses, access roads and the primary school nearby. They even promised to give financial support to our children who have the opportunity to continue their studies, help with the construction of a village clinic, provide various forms of support during festive celebrations such as Gawai and Christmas and offer the villagers job opportunities in the project.

The people of course still flatly refused to give their consent. Nevertheless, we did not openly show our displeasure over their attempts to persuade us. We did not wish to have any verbal matches or physical altercations with them. We did however inquire whether it was our communally shared forest or our farms that they were interested to purchase. They informed us that they were only interested to purchase our farms. We then informed the company representatives that we did not wish to sell “even an inch” of land to them, ever.

The discussion took place for around two hours. Never at any point of time did we give consent for the company to continue the encroachment on our territory.

Confusion over the ‘sale’ of customary land under the law

After this meeting, although the majority of us were still refusing to ‘sell’ our land, there was a small group of people who began to appear to be interested to do so. These few individuals then began to persuade others to do the same. Up to this day,
we are uncertain of the number of families who had ‘sold’ their land and if any village had unscrupulously sold off part of the communal forest reserve without the knowledge of others.

We had never been shown any sale and purchase document by any of the villagers who were said to have ‘sold off’ their land. We only heard stories from others without being able to access any of such documents ourselves. However, we believe that the profit from the land sale could have not been very high. In our estimation, those involved would probably receive between RM8,000 and RM13,000 only. To the best of our knowledge, this transaction was conducted between the family and the company, with the presence of a third party from our community.

We never had clarity over how the company could ‘purchase’ native customary land which under the law cannot be sold to non-native persons. Therefore, we did not make any police report on this matter. Until today, we really do not know what the company meant when they stated that they wished to ‘purchase’ our land.

**Continued attempts to obtain project maps**

A few weeks later, around September or October 2013, we headed for the Department of Lands and Surveys in Miri once again in two cars. Our intention this time around was to request for a copy of an official map showing the entire project area of the plantation, which we still had not received from the company or state authorities. All we had with us was the document showing that Lot 192 and 193, which spanned across our customary territory, were under the provisional lease held by the company. We had no knowledge on the actual size of the project or its boundary. At this stage, we only guessed the location of the project boundary based on the ground demarcation activities that had been undertaken.

During this visit, we once again met with the same senior officer. However this time around, his attitude and demeanour had changed. Our group was then twice larger than before. Perhaps, he was stressed by our questions which he found impossible to be answered in a manner that was satisfactory to us.

We began by handing him our protest letter. We requested to know why our land was given away to outside parties without any consultation with or consent from us. The officer then simply questioned the validity of our land rights within the project area. He informed us that our land was in fact state land. He stressed that our NCR are only limited to our farms. If a land is not a temuda, it is automatically considered as state land. Therefore, the company should not be blamed. According to him, they in fact were developing land that had long been idle.
The officer also emphasised that if the land concerned was really part of our territory, the state would naturally be aware of its status. In fact, he went on further to question how we were able to know that the land is ours. We simply replied that of course the land is ours, the crops were evidence that our NCR claims are not without any basis. He then questioned us back on the absence of any map to show that the project had indeed encroached upon our customary territory. When we attempted to show to him a copy of an old sketch map verified by the British colonial administration, he proceeded to belittle the map. He said that even his child could sketch such a map. We then requested for a copy of the oil palm plantation project map. He stated that the map was not in his keeping. We knew of course that this was nothing but an excuse.

For us, the attitude of the senior officer during this meeting was very impolite and disappointing. Our discussion did turn argumentative. However, he continued to claim that our territory was made up by idle land or forested areas. We were said not to have engaged in cultivation or obtained any profit from our customary territory. We found this encounter extremely regretful, the officer had brazenly stated his views without conducting any ground checks or visits to our village. Finally he informed us if we were still dissatisfied with the project, we were free to pursue the matter at the courts. Naturally, no resolution came out of this meeting.

**Project causing internal conflicts**

In actual fact, the attempts to ‘purchase’ our land have also led to another problem altogether. Generally, the native territory is made up by two types of land use. The first comprises plots of land owned by individual families. These include subsistence and cash crop farms, orchards and at times some small patches of jungle or secondary growths. The remaining part of the territory is made up by virgin forest communally shared by all villagers for the purpose of hunting, plant harvesting and water catchment protection. The boundary of our land had been determined since the time of our ancestors. This is why we were worried over the ‘sale’ of any plots of land that was not conducted openly without the verification of all families.

In November 2013, after the land clearing operations had nearly been completed, the company invited us to attend a dialogue at their site office. Representatives from both the company and its contractor were also present during this meeting. Around 20 of us attended this meeting, we came in several cars. However during this meeting, they ended up repeating the same intention, which was to ‘purchase’ our land at the same rate of RM500 per hectare.

We were still adamant in not wanting to ‘sell’ our land. At the most, we may agree to rent out our land, that was all. However, they were clearly uninterested in such an arrangement. Unfortunately however, one of us suddenly appeared to change his
Unexpectedly, he suddenly stated that he did not mind ‘selling’ his land. He then even began persuading the rest of us to do the same. He stated that if we chose to support the project, we would be able to receive many benefits, such as the provision of scholarships to our children and other job opportunities. His sudden turnabout caused severe tension to erupt during the discussion. Sarcasm and unpleasant verbal exchanges took place amongst us, right there in front of the company representatives.

Nevertheless, the rest of us continued to demand the company to halt their operations, a request which they chose to ignore. The contractor tried to persuade us further, explaining to us that after the completion of the land clearing operations, the failure to continue with land terracing activities may cause them a huge financial loss. According to them, the project was given a certain amount of time by the state to complete each stage of operations. If it fails to abide by this schedule, its licence can be revoked by the state. This meeting once again, failed to produce any resolution for us.

Subsequently, the land clearing and terracing activities continued to be undertaken. We could only monitor these activities from afar.

In December 2013, the company representatives called us once again to invite us to attend another meeting at their site office. However, during this meeting, we were astonished to find that they were offering us a large sum of money, an amount of cash which the representatives claimed to be RM196,000. They even showed to us the cash, which was arranged neatly in a bag. According to them, the money would be given to the residents of both longhouses, in return for our consent. Nevertheless, they did not explain to us how the amount was determined.

However, we still refused to receive the money. Their offer in fact did not make any sense at all. The amount and size of land owned by each family naturally differs from one another. How can their pre-determined amount of cash ever be distributed amongst all families in a fair manner?

Unfortunately however, upon seeing such a huge lump of cash, one of us once again began to have his turnabout act too. This person suddenly wanted to accept the cash. He began to call us who still refused to change our minds “stupid”. Once again, a quarrel took place right in front of the company representatives. The rest of us however remained steadfast. We were fully aware that any agreement to receive the said cash would only invite further repercussions and internal conflicts, as it would certainly anger those who could not be present at the meeting.

In January 2014, we again received another call from the company to request two community representatives to meet them, this time at their office in Miri. They gave
the excuse that only two persons could come as they did not want any untoward incident to take place. The action committee had a long discussion about the matter, whether to accept or refuse the invitation. At last, we agreed to send two representatives to meet them in Miri. These two persons however were requested to be cautious during this meeting and not to fall for any offers from the company.

During this meeting in Miri, they once again repeated their request for us to ‘sell’ our land to them. They even offered to provide us with some assistance for our agricultural activities, if we agreed to do so. This meeting took place over a short time, perhaps in less than two hours. They were extremely polite and well-mannered, as if trying to gently convince us.


On May 11, 2014... this is the second report after the Beluru RPT/000410/13 was made on Bintulu Lumber Development (BLD), which was still carrying out oil palm cultivation activities, although we had already told them to stop. Even our dialogues and discussions had been delayed for several times. This report is done for the attention of the company concerned.

On June 7, 2014, another villager also lodged another police report [LTBG MIRI/001012/14] to report on the land encroachment on his farm:

On June 6, 2014... on my farm in Terentang, Kampung Sungai Buri, Miri, I discovered that my farm had been encroached upon by the company BLD Sdn. Bhd... and all my fruit and rubber trees had been felled without my knowledge. I also saw that my farm hut had been destroyed by the falling trees felled by the company workers. This matter had already been brought to their attention a few times prior to this report, but no resolution has been achieved up until today. I would also like to inform the police that if the company continues to encroach upon my land, I intend to seize all of its equipment which I shall hand over to the police. I also forbid the company from cultivating any type of crop on my land without my consent.

On July 8, 2014, we decided to stage a demonstration for an hour at their site office. We also handed a memorandum to the company. However, only a few workers were present on that day. We then sent the photographs of our protest to the media in Miri. Unfortunately, no media was willing to report on the protest.

On July 14, 2014, we again attended another dialogue with the company over a very unpleasant incident that had transpired. This was a matter relating to the attempt of
one individual to ‘sell’ some land which was largely not his to the company, estimated to be 155 hectares in size.

Considering the size of the land, this time around the company wanted us to verify the claim. Some of us confirmed to them that while it was true that this person may own some land in the concerned location, it could never be as large as 155 hectares. This was simply not possible, we stressed. This individual then became enraged by our denial of his claim. He claimed that he had in his possession documents that had been verified by a certain senior community leader, although at last he failed to produce any of these. An intense argument ensued. His words, voice and body language became very aggressive. It was fortunate that there were a few people who managed to calm him down. At last, this particular ‘sale’ transaction was cancelled by the company after its failure to receive corroboration from the named community leader, who also disputed the claim that he had once verified the land ownership of 155 hectares of the said individual. On August 4, 2014, we wrote a letter bearing 140 signatures from the village to the company to forbid it from conducting any transaction with the concerned individual.

However, at the end of the same month, we received information from other villagers that another verification for the ‘sale and purchase’ of some land was going to take place in Miri. We however were not sure who would be involved in the transaction and verification. On the said day, we went to Miri in our attempt to obtain information on the matter. On September 10, 2014, Gasah lodged a police report [BELURU/000528/14] on the matter:

Two weeks ago in the office of BLD, Miri... upon my arrival at the location, I discovered that the staff of BLD had left the office in order to evade me and four (4) other villagers who had come to the office as a result of our dissatisfaction over our land whereby... had approved land owned by the villagers... most of the land is still owned by both longhouses and prior to this... had verified the sale of some plots of land without our knowledge and we have decided to do this because we do not agree with their actions...

Protest against the project continued

As a matter of fact, as early as November 2013, we had already begun writing to the state authorities to state our protest against the project. A letter dated November 7, 2013 was written to the Chief Minister of Sarawak and copied to other government agencies such as the Sarawak Ministry of Land Development, the Department of Lands and Surveys, the company itself and the Commission of Human Rights of Malaysia (SUHAKAM). Among others, the content of letter stated the following:
Regarding the matter, we feel great regret and extreme disappointment that the plantation company, Bintulu Lumber Development Sdn. Bhd. had encroached upon our customary territory since June last year without our prior knowledge and conducting prior consultation with us.

…The reasons for our protest is as follows:

Prior to this, the bulk of our customary territory is made up by farms developed by each villager and thus filled with cultivated fruit and rubber trees. Most of our rubber trees that had been planted more than 40 years ago had been felled and destroyed, without any consideration to the losses, which we will have to endure, and our feelings. The action undertaken by Bintulu Lumber Sdn. Bhd. is indeed very cruel and inhuman.

…

(iii) We view that the development of large-scale oil palm plantation issued through the provisional leases within our NCR as simply unsuitable and unacceptable, since this company is an extremely obstinate and condescending company that looks down upon our lives, the ibans of Sungai Buri, Bakong.

The letter also stressed the fact that the residents had acquired their customary land rights since the times of the Brooke administration.

On May 12, 2014, we wrote another letter addressed to the Department of Lands and Surveys. Among others, the letter stated the following:

We the villagers of Rumah Ree and Rumah Turan unanimously would like to kindly request the relevant government offices to take actions to instruct Bintulu Lumber Development (BLD) to halt its oil palm cultivation activities on the NCR of Sungai Buri Bakong village.

…request that all the relevant parties to conduct a dialogue as soon as possible, including possibly to order the presence of BLD during the dialogue, so that this issue can be resolved fairly and peacefully.

On July 4, 2014, another letter was written to the company. First, the letter reiterated our position that our land must be surveyed based on Section 18 of the Sarawak Land Code 1954 which would result in a documentary title for our village. Apart from this, we also stated the following demands:

(i) The use of our land shall be charged at a monthly rental rate of RM2.00 per oil palm crop for 30 years. This rent would commence from the time the crops are planted.
(ii) If the company had purchased or intends to continue purchasing the land by disregarding the action committee of the two longhouses, it must bear the risks if any of such land in actual fact belongs to another family or is part of the communal forest reserve shared by all residents of the village.

(iii) All destruction and damage done to our crops as a result of the land clearing activities must be paid according to current market prices.

(iv) The company must build a good access road to connect the plantation areas and the longhouses so that the residents will have easier access to meet its staff.

(v) The company cannot stop the villagers from utilising any roads for the purpose of transporting their agricultural produce out of their farms.

This letter also stated that if the company does not agree to the conditions being set, they must leave our customary territory, without neglecting the payment of compensation for the destruction and losses already suffered by the villagers.

On December 1, 2014, we wrote again to the Miri Resident Office, other authorities as well as the company itself. This letter was intended to state our objections against the ‘sale and purchase’ of land between the villagers and the company. First, the letter stressed that our customary territory had been in existence since the colonial era and we were still protesting against the involvement of our land in the project. We repeated our position of disagreeing with the project as expressed during the dialogue in November 2013, and in our previous letter dated July 8, 2014. The letter emphasised the following:

Any individual or villager and community leader from Sungai Buri who intends to sell or reap personal profits would have breached and contravened the regulations and laws of the customary land rights since the NCR and its customary territory are communally owned.

We also do not permit for BLD to accept any verification from any community leader or any other party for the intended sale of the NCR and the customary territory by any individual to the company.

If such a process takes place, the transaction must be considered as illegal and the NCR and customary territory will continue to remain as our property. We will still retain rights to the land that had been in sold by individuals in complete disregard to the Sungai Buri Residents’ Association.

There are several reasons as to why we had been unable to conduct stronger protest actions such as by way of erecting blockades and other strategies. The blockade
action cannot be done due to geographical and topographical features of the land on which they first began their operations. In this vicinity, there is only one access road to the earliest areas that were felled. This road is very far from our longhouses. It is also crisscrossed by several rivers and connected via wooden bridges that can easily be damaged. Thus it was extremely difficult and dangerous for us to attempt erecting any blockade on this road. Had they commenced works in another site nearer to the longhouses with several options of access roads, perhaps it would have been easier to conduct a blockade.

Our residents’ association was registered in October 2014 to strengthen our land rights defence. We have also begun to meet other NGOs and lawyers to obtain legal and technical advice on this matter. Between 2015 and 2016, we did attempt to file a civil legal action. We began to collect and compile evidence of our NCR, including plates used to mark our rubber trees produced during the colonisation era and other land related documents. We also endeavoured to prepare more orderly documents on the history of our settlement and the migration of our ancestors. We began to learn some mapping techniques. Nevertheless, due to judicial developments surrounding the Sandah Tabau legal action, we decided to call off the action. This however does not mean that we are letting go of our rights.

2. Consent or opposition

(i) Describe whether the community members have given their consent or remained opposed to the plantation operations.

In the beginning, almost all members of the village did not agree to and protested against this plantation project. However, gradually, after having received gifts and being under persuasion, only half of us are still brave enough to continue protesting. There were also villagers who had ‘sold off’ their land because they had wanted a short cut to obtain cash, although the money received was not that much. There were also people who felt helpless after their land had been destroyed. Some no longer knew what could be done after they were forced to sell their land. Some sold their land simply because they did not want to lose everything, they were afraid that in the end their land may be destroyed anyway. Naturally, people who had ‘sold off’ their land are no longer protesting against the project.

(ii) Did any of the companies attempt to take the advantage of the consent given by any of the community member(s) to continue with their operations?

Yes.
(iii) Please explain how it was possible for this to take place without the approval of the entire community?

By way of enticement through a variety of gifts and cash as well as other sweet promises made by the company. These included the possibility of employment opportunities and the provision of materials such as plywood and paints, the construction of drainage and gravity-feed water supply systems and the use of heavy machinery such as bulldozers to construct a new longhouse.

3. Prior information, consent and transparency

(i) Were community members given prior information on the issuance of the plantation licences before the commencement of any operations? If no, has there been any other information disseminated before the operations started? Has the free, prior and informed consent process (FPIC) been adequately applied in the execution of the oil palm plantation project concerned?

No. We were not informed on the issuance of this plantation licence prior the commencement of the operations. Neither the state nor the company offered any further information on the project. This project has failed to utilise the FPIC process.

(ii) If some form of information dissemination on the oil palm plantation project was conducted, how and at what stage of the project was this first done? Who were the parties involved in the information dissemination process?

Irrelevant.

(iii) What was the content of the information given? Was it comprehensive and transparent? Did the community members receive satisfactory responses to the queries and concerns that they have raised?

Irrelevant.

(iv) Did the community obtain important information such as licence registration numbers, maps of the licensed areas and other important details?

No.
4. Community protests and consultations

(i) Did the community members meet with the company representatives at the encroachment site or their accommodation facility to voice their immediate protest? If yes, please describe these encounters further.

Yes. Please see above.

(ii) Did the community members meet with the authorities to voice their protest? If yes, please describe these encounters further.

Yes. Please see above.

(iii) Did the company or authorities themselves invite the community members to participate in any consultation process? If any, when did these take place – prior to/after the licence issuance, prior to/after the commencement of the project activities on the ground or prior to/after community protests? Please describe these consultations further.

Yes. We did participate in dialogues with them. However, all these took place only after the operations had commenced. We continued to protest. Many dialogues that were being held were in fact part of the attempt of the company to persuade us to ‘sell off’ our land to them. We have refused to do so until today.

(iv) What was the outcome of the protests and consultation process, if any? Did they manage to put an end to the encroachments?

No positive outcome was able to be obtained.

5. Compensation and damages

(i) Has compensation ever been promised and actually delivered to any of the community members? What was the form, amount and rates of the compensation received?

Yes. Please see above.

However, the people had also been pressured into ‘selling off’ their land. As such, the loss of their land occurred by way of ‘sale and purchase’. The terms compensation and damages were not used.
(ii) Generally, was this compensation deemed as adequate by the community members?

No. The purchase of land was conducted at a rate of RM500 per hectare. This is far from adequate.

6. Protest correspondence and documents

(i) Did the community members write any letters or other documents to any of the companies and/or the authorities to express their written protest?

<table>
<thead>
<tr>
<th>Date</th>
<th>Sender</th>
<th>Recipient</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 7 November 2013</td>
<td>Rumah Turan and Rumah Ree Action Committee</td>
<td>Sarawak chief minister</td>
<td>Protest letter on the opening of oil palm plantation PL Lot 192 and Lot 193 Teraja Land District or our customary territory by BLD Sdn. Bhd.</td>
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<tr>
<td>2. 18 November 2013</td>
<td>Rumah Turan and Rumah Ree Action Committee</td>
<td>Baram District Officer</td>
<td>Decisions from the meeting on the opening of oil palm plantation within the the native customary land (NCL) of Sungai Buri Bakong</td>
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<tr>
<td>3. 24 November 2013</td>
<td>Rumah Turan and Rumah Ree Action Committee</td>
<td>BLD</td>
<td>Request for the receipt for the payment of RM1800 for pemali menua or pelasi menua of Sg. Buri</td>
</tr>
<tr>
<td>4. 12 May 2014</td>
<td>Rumah Turan and Rumah Ree Action Committee</td>
<td>Sarawak Lands and Surveys Department</td>
<td>Protest / Encroachment on the native customary territory / NCR land</td>
</tr>
<tr>
<td>5. 8 July 2014</td>
<td>Rumah Turan and BLD</td>
<td>BLD</td>
<td>Motions submitted to BLD Plantation from residents</td>
</tr>
</tbody>
</table>
6. 4 August 2014  
Rumah Turan and Rumah Ree Action Committee  
Letter to express objection for any compensation payment for the Sungai Buri customary territory to be paid to the individual named...

7. 1 December 2014  
Sungai Buri Residents’ Association  
Miri Resident  
Prohibition against any party from verifying individual attempts to sell the NCR and customary territory of Sungai Buri to the company

(ii) Please describe the responses received from the companies and authorities, if any.

None.

7. Police

(i) Did any community member(s) lodge any police reports to express opposition to the oil palm plantation project or to complain on any matter related to the project, including concerns on their safety and that of their family members?

<table>
<thead>
<tr>
<th>Date</th>
<th>Report number</th>
<th>Complainant</th>
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<tbody>
<tr>
<td>1. 8 June 2009</td>
<td>BELURU/RPT/256/2009</td>
<td>Ree Lindang</td>
</tr>
<tr>
<td>2. 16 August 2013</td>
<td>BELURU/RPT/402/13</td>
<td>Ree Lindang</td>
</tr>
<tr>
<td>3. 20 August 2013</td>
<td>BELURU/000410/13</td>
<td>Gasah Tedong</td>
</tr>
<tr>
<td>4. 11 May 2014</td>
<td>BELURU/000271/14</td>
<td>Gasah Tedong</td>
</tr>
<tr>
<td>5. 7 June 2014</td>
<td>LTBG MIRI/001012/14</td>
<td>Gani Lindang</td>
</tr>
<tr>
<td>6. 10 September 2014</td>
<td>BELURU/000528/14</td>
<td>Gasah Tedong</td>
</tr>
</tbody>
</table>

(ii) Have any community members been detained by the police as a result of their protest actions or related activities against the oil palm plantation project? Were they eventually charged?
No. However, Gasah Tedong was once arrested as a result of his protest against logging encroachment in 2014.

8. Pressure, intimidation, threats, harassment

(i) Did any of the community members ever receive any pressure, intimidation, threat or harassment from any party, in relation to the protests against the encroachment on your customary territory?

No. However, we are stressed by community members who had chosen to side with the company. Our community has now been divided as a result of the oil palm plantation project.

(ii) If yes, please describe actions that were undertaken after such incidents.

We have been feeling distressed, disturbed and extremely sad. Some of us have experienced the break down of familial and friendship ties. Tension even occurred between siblings, parents and children. Many are going around the village with their sour faces. Many individuals no longer talk to each other. Our hearts are very much pained by all these.

(iii) Please describe the effects of the experience on the person(s) receiving this pressure, intimidation, threat or harassment as well as the community at large.

We have been feeling extremely stressed. Sometimes we would also hear unpleasant and untrue stories about our residents’ association, including rumours that its finances had not been managed correctly. Some of the villagers would begin to believe the gossips flying around and at last, chose to leave us.

9. Evaluation on the company representatives

(i) In your view, did the companies respond in a polite and respectful manner when confronted by the complaints and protests from the community members?

They were certainly polite. However they were consistent in their disregard of our protest.

(ii) Has any company ever broken any of their promises to the community? If yes, please describe these incidents further.
We have never consented to any oral or written agreements with the company. However, we believe there were villagers who actually believed in the company’s pledge to construct a new longhouse for them, which until today, has yet to be built.

10. Community evaluation on regulatory agencies and the police

Please describe the general views of the community members with regards to the manner in which the authorities respond to your protests and complaints.

(i) Are the community members satisfied with their responses and services?

No. We had lodged several police reports. Unfortunately, until today, no actions had been taken by them. When we attempted to consult the officer from the Department of Lands and Surveys in Miri, we were not being treated courteously. Even the information requested, such as maps, was not given to us.

(ii) Did the authorities show any bias in favour of the companies?

Yes. Some of them along with certain community leaders, even participated in the Gawai celebration that had been sponsored by the company. They seemed to encourage the people to abstain from protesting against the plantation project.

(iii) Has any authority taken any actions which to your view was excessive?

We believe there were government officers and community leaders who had been involved in the verification of the sale of our customary land. This was being conducted without the knowledge of other villagers. By right, any sale and purchase process must be informed on all members of the village, to prevent any individuals from selling land that does not belong to them or land that is part of the communal forest reserve which is shared by all. By right, these officials must function to protect our rights and not be involved in such secretive transactions. By right, they must also be organising programmes to increase the awareness of the people on their rights and not to let us lose the rights over our customary land.

(iv) In your view, have the authorities been transparent in their dissemination of information to the community members?

No.
11. Status of the indigenous customary land rights from the perspective of the company and authorities

(i) Please describe the views of the companies and authorities on the status of the customary land rights of the community. Did they recognise the existence of your rights?

The authorities frequently stressed that we do not have rights to our land because the land belongs to the state. The company meanwhile would maintain that they had obtained their rights legally from the state government.

(ii) If the community members are said to possess no such land rights, to which extent then do the authorities accept the existence of your rights, since your housing areas are also located in the same vicinity?

A portion of the southern part of our customary territory has been classed as Native Area Land.

(iii) Did any of the companies or state authorities make any legal references to support their view that the community do not possess any rights to the encroached land (state land, forest reserve etc.)?

Our rights now are said to be legitimate only within the Native Area Land in the south. In the northern part of our territory, our land has been classed as Mixed Zone Land, where the plantation project operates. If we remember it correctly, our entire customary territory used to be classed as Native Area Land.
SECTION D: CUSTOMARY TERRITORY AND GAZETTED FORESTS

Have any parts of your customary territory been gazetted as forest reserves, protected forests or any type of conservation areas?

Lambir National Park.

(i) If yes, please state the year the gazetting was undertaken. Do the community members possess any documents on the gazetting process?

We do not have this information.

(ii) If yes, please describe how the gazetting has adversely affected your rights?

The state claims that we have lost our rights to the land within the National Park. This area is indeed part of our customary territory.

(iii) If yes, did the authorities conduct any consultation with the community to obtain their consent on the gazetting process? Please state any important information on how the consultations were conducted.

We were informed that our elders in the past had failed to submit any objections or compensation claims within the stipulated period of three months from the time the notice for the extinguishment of our rights was displayed at the district office. Therefore, we never received any compensation payments.

(iv) If no consultations had ever been conducted, how did the people become aware of the existence of the gazetted forest?

By way of ground demarcation and signboards.
### Table A-1: Results of individual surveys amongst members of the Sungai Buri Residents’ Association on the impacts of the oil palm plantation on their livelihood, income and dietary sources

<table>
<thead>
<tr>
<th>Impacts on livelihood, income and dietary sources</th>
<th>General comments</th>
</tr>
</thead>
</table>
| **Respondent 1, male, b. 1960**  
Widower with three children  
All four plots of farms are still safe. | His main income is derived from the cultivation of oil palm, with state assistance, and bananas. Financial support is also received from his three children.  
He stated that his defence of the village territory would continue as an act of solidarity. He stressed that his quality of life has been greatly affected by the plantation and that the company must leave their territory. |

**Impacts on income sources:**  
His financial needs are relatively modest, as he no longer has any dependents.

**Impacts on food sources:**  
Rice, vegetables, fish and meats are mostly purchased as he lives alone. Rice cultivation halted after the death of his wife two years ago. They used to be able to obtain up to 15 sacks in one season. |

| **Respondent 2, male, 1956**  
Married with eight children  
Three out of ten plots of land destroyed. | His main income used to be derived from the sale of fish, edible piths and occasionally, meats. Financial support is also received from the salary of his |

He stated that he is very unhappy with the presence of the company on his land because |
children.

**Impacts on income sources:**
To generate additional income, the cultivation of vegetables, chillies and oil palm is undertaken. Fishing and edible pith harvesting must be conducted for longer hours and in areas located further away, almost on a daily basis.

**Impacts on food sources:**
Wild vegetables such as edible piths and ferns are still largely obtained from the land. Fish and meats sometimes have to be purchased. Rice cultivation is undertaken at a smaller scale today.

---

**Respondent 3, female, 1956**
**Single mother with one child**
**Farms were destroyed but not quantified.**

Her main income used to be derived from the sale of fish and vegetables. Fishing was undertaken in rivers near her farms and could be completed by noontime. Financial support is also received from her child who works as a labourer for hire.

**Impacts on income sources:**
The sale of fish can only be done once in every few weeks, sometimes supplemented with wild vegetables. Fishing has to be conducted in areas located further away. If there is only a small quantity of produce for sale, with a little contribution to their transportation costs, her neighbours would help sell them at the Miri weekend market. Income from her market sales has generally dropped by half.

---

She stated that today she no longer dares to go to the forest by herself due to the heavy presence of foreign labourers employed by the plantation. The loss of her land has deeply affected her. She stressed that she would never sell her remaining land to the company as it is her family's source of livelihood.
### Impacts on food sources:
Fish is still obtained from the rivers. Meats and wild vegetables such as piths and ferns sometimes have to be purchased. Rice cultivation halted six years ago due to poor health.

#### Respondent 4, male, 1941
Married and living with his daughter’s family
One out of six plots of land and a farm hut destroyed.

His main income is still derived from the sale of fish and vegetables. A son-in-law in a stable contractual employment is the main breadwinner of the family.

**Impacts on income sources:**
To generate additional income, fishing and the harvesting of edible piths and other forest produce have to be conducted for longer hours in areas located further away, almost on a daily basis.

**Impacts on food sources:**
Wild vegetables such as piths and ferns are still largely obtained from the land. Fish and meats sometimes have to be purchased. Rice cultivation halted five years ago. They used to be able to obtain up to 15 sacks in one season.

He stated that today his wife no longer dares to venture out to the forest alone without him. He affirmed that the loss of his land has greatly affected his family’s livelihood. He stressed that he would never sell his remaining land to the company for the sake of his grandchildren.

#### Respondent 5, female, 1934
Single mother living alone but weekly visited by her daughter and family
One out of six plots of land destroyed.

Her main income used to be derived from the sale of fish, prawns, meats and vegetables. Fishing was undertaken in rivers near to her farms. A son-in-law in

She stated that the plantation has made it difficult for her family to obtain their food
the civil service is the main breadwinner of the family.

Impacts on income sources:
To generate additional income, the cultivation of oil palm is undertaken with her daughter and son-in-law. She no longer fishes, hunts or collects forest produce for sale.

Impacts on food sources:
Wild vegetables such as piths and ferns are mostly purchased and only occasionally obtained from the land. Fish and meats are also largely purchased. Rice cultivation halted after the death of her husband. They used to be able to obtain up to 15 sacks in one season.

Respondent 6, female, 1951
Married and living with her son’s family
Two out of five plots of land destroyed.

Her main income used to be derived from the sale of oil palm and prior to this, rubber.

Impacts on income sources:
To generate additional income, she has recently begun the cultivation of vegetables, chillies and maize.

Impacts on food sources:
Wild vegetables such as piths and ferns are mostly obtained from the land. Fish and meats are largely purchased. Fishing tends to be carried out only during the rainy season. Rice cultivation halted many years ago. They used to be able to

She stated the plantation has made it difficult for them to obtain their food sources from the forest. She stressed that she would never sell her remaining land to the company for the sake of the family’s livelihood.
| Respondent 7, female, 1956  
| Single mother living with her daughter’s family  
| Five out of fifteen plots of land destroyed. |

Her main income used to be derived from the sale of fish, rice and rubber. A son-in-law in a blue-collar employment is the main breadwinner of the family.

**Impacts on income sources:**
To generate additional income, she has recently begun the cultivation of oil palm with state assistance. Occasionally, she would sell wild vegetables obtained from her farms.

**Impacts on food sources:**
Wild vegetables such as piths and ferns are mostly obtained from the land. Fish and meats are sometimes purchased. Fishing tends to be carried out only during the rainy season. Rice cultivation halted many years ago. They used to be able to obtain up to 50 sacks in one season.

She stated that she no longer dares to go to the forest alone due to the heavy presence of male foreign labourers employed by the plantation.

---

| Respondent 8, female, 1956  
| Single mother living with her child and sibling  
| Three out of thirteen plots of land and a farm hut destroyed. |

Her main income used to be derived from the sale of a variety of forest produce, fish, rice and rubber.

**Impacts on income sources:**
To generate additional income, she has begun the cultivation of vegetables and

She stated that the plantation has made it difficult for her family to obtain their food sources from the forest. She also has safety concerns when venturing out to the forest, due to the heavy presence of male foreign
pumpkins, although some of the plants had failed to grow well. She is also hired to carry out weeding in oil palm smallholdings of other villagers.

**Impacts on food sources:**
Wild vegetables such as piths and ferns are mostly obtained from the land. Cheaper species of fish and meats are purchased from her neighbours. Rice cultivation is undertaken at a smaller scale.

**Respondent 9, female, age unknown**
*Single mother living with her daughter’s family*
*Four out of ten plots of land destroyed.*

Her main income used to be derived from the sale of forest produce, wild vegetables, fish and rubber.

**Impacts on income sources:**
She has begun the cultivation of vegetables, chillies and maize. Due to her old age, she is unable to carry harvested forest produce out of areas located further away. She no longer fishes due to increased crocodile sightings.

**Impacts on food sources:**
Vegetables are mostly obtained from the land. Meats and fish are purchased when there is enough money. Some of her neighbours regularly share their food with her family. Rice cultivation has halted due to her old age. They used to be able to obtain rice in amounts which could last for up to two years.

She stated that the plantation has caused great suffering to her as her income has been greatly affected. Today, her family no longer has enough land for the cultivation of cash crops such as oil palm and rubber. Their remaining land could only be used for vegetable farming. She stressed that she would never sell her remaining land as the size of those plots of land is quite modest.

**Respondent 10, female, 1966**
*Single mother living with two children and her sister’s family*
<table>
<thead>
<tr>
<th>Two out of twelve plots of land destroyed.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Her main income used to be derived from the sale of fish and rubber.</td>
<td>She stated that she no longer dares to venture out to the forest by herself. She feels that the plantation has greatly affected her livelihood and sources of food.</td>
</tr>
<tr>
<td><strong>Impacts on income sources:</strong></td>
<td><strong>Impacts on food sources:</strong></td>
</tr>
<tr>
<td>She has recently begun the cultivation of oil palm, with state assistance, as well as vegetables, chillies and maize.</td>
<td>Wild vegetables such as piths and ferns are mostly obtained from the land. Fish and meats would sometimes be purchased. Rice cultivation halted after the death of her mother. They used to be able to obtain up to 15 sacks in one season.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Respondent 11, male, 1946</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Single father of 11, with five still living with him</td>
<td>Both plots of land destroyed.</td>
</tr>
<tr>
<td>Both plots of land destroyed.</td>
<td></td>
</tr>
<tr>
<td>His main income used to be derived from his employment with a logging company until his retirement ten years ago. He used to cultivate vegetables, fish and hunt for his family’s own consumption. He is financially supported by his children.</td>
<td>He stated that the loss of his land has totally left them without anything at all. Today, his daily activities have been reduced to only looking after his home and carrying out domestic duties. He described that he is left with the feeling as if he is now only waiting for death. He is also worried about his family who are now landless. He affirmed that he never consented for his land to be taken over by the company. He stressed that any payment of compensation must not be construed as the land having been sold. He said he feels</td>
</tr>
<tr>
<td><strong>Impacts on income sources:</strong></td>
<td><strong>Impacts on food sources:</strong></td>
</tr>
<tr>
<td>He expressed his regret on his inability to spend his retirement years freely farming, fishing, hunting and being financially independent.</td>
<td>Wild vegetables such as piths and ferns are mostly purchased or gifted by his neighbours. Fish and meats are also largely purchased. Rice cultivation halted</td>
</tr>
</tbody>
</table>

204
more than ten years ago. They used to be able to obtain up to 15 sacks in one season.

<table>
<thead>
<tr>
<th>Respondent 12, male, 1968</th>
<th>Extremely angered by the situation to the point where sometimes he felt like fighting.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with two children</td>
<td></td>
</tr>
<tr>
<td>One out of two plots of land destroyed</td>
<td></td>
</tr>
</tbody>
</table>

His main income is still derived from the sale of fish, wild vegetables and meats. He used to fish only once weekly.

**Impacts on income sources:**
To generate additional income, fishing must be conducted for longer hours, utilising a higher number of traps, at least twice weekly. His income has dropped by more than half.

**Impacts on food sources:**
Vegetables are mostly obtained from the land. Fish and meats are sometimes purchased. He was not engaged in rice cultivation.

<table>
<thead>
<tr>
<th>Respondent 13, male, 1966</th>
<th>He expressed his anger over how the plantation has caused disharmony in their community life and destroyed familial and personal relationships. Some community members have been influenced to support the project, creating frictions to the extent where</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with two children</td>
<td></td>
</tr>
<tr>
<td>One out of eight plots of land destroyed. Two plots of land destroyed by logging prior to this.</td>
<td></td>
</tr>
</tbody>
</table>

His main income is derived from the sale of rubber and oil palm. This used to be supported by the sale of fish, cultivated and wild vegetables and meats. He used to hunt and fish twice or thrice weekly.

**Impacts on income sources:**
He has recently set up a small business and begun the cultivation of vegetables,
pumpkins and tubers. Hunting and fishing are carried out only occasionally for domestic consumption today.

**Impacts on food sources:**
Vegetables are mostly obtained from the land. Fish and meats are largely purchased. Rice cultivation halted many years ago due to increased pest attacks, especially from birds and insects and decreased soil fertility. They used to be able to obtain up to 30 sacks in one season.

<table>
<thead>
<tr>
<th>Respondent 14, male, 1983</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with no children</td>
</tr>
<tr>
<td>Three out of nine plots of land destroyed.</td>
</tr>
</tbody>
</table>

His main income used to be derived from the sale of fish, edible piths and rattan.

**Impacts on income sources**
He has recently turned to contractual employment in Miri. His wife also found stable employment in the city as she did not wish to be financially dependent on him. If the encroachment did not take place, she would have been free to harvest forest produce or fish nearby their farms and to derive income from the sale of handcrafts. He said he himself does not encourage her to venture out too far from the longhouse.

**Impacts on food sources:**
He commented that logging had already caused long lasting impacts to the land. Soil compaction caused by heavy machinery had severely affected its fertility, wild trees tend to fruit less today while many wild animals had also fled the area. He lamented that the ecological impacts of the plantation would be much worse as it involves total forest clearing.
He estimated that today only about 30 per cent of his family’s dietary intake is sourced from the land, mainly limited to wild vegetables. The rest have to be purchased, especially fish and meats. Rice cultivation halted around seven years ago, due to increased pest attacks, especially from birds and insects, and decreased soil fertility.

<table>
<thead>
<tr>
<th>Respondent 15, male, 1972</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with three children</td>
</tr>
<tr>
<td>One out of eight plots land and a farm hut destroyed.</td>
</tr>
</tbody>
</table>

His main income used to be derived from the sale of fish, meats, rice and wild and cultivated vegetables.

**Impacts on income sources**
To generate additional income, he is more focused on the cultivation of vegetables, pumpkins and chillies. He continues to fish although the amount of catch has dropped considerably. He no longer hunts, remarking that the last time he set his trap was some few years ago. His income drop is described as acute.

**Impacts on food sources**
He estimated that only about 50 per cent of his family’s dietary intake is sourced from the land, mainly limited to vegetables. He has also recently begun cultivating some wild plants for their piths, for fear that they may soon disappear from the forest. More fish and meats have to be purchased than before. Rice cultivation halted around four years ago. After the development of the plantation, the crop simply failed, although he does not know the reason behind this.

He expressed his feelings of anger and sadness over the loss of land and pollution of the rivers, which have caused him financial difficulty. He also commented that women are having difficulty finding their own income independently. His wife is now focused more on vegetable farming.
**Respondent 16, female, 1976**  
Married with two adult children  
One out of seven plots of land destroyed.

Her main income is still derived from the sale of fish, forest produce and wild and cultivated vegetables. She used to harvest forest produce four times weekly and fish up to five times weekly. She is accustomed to fishing alone as she is a strong swimmer. She also used to make and sell handcrafts for additional income.

**Impacts on income sources**
She undertakes forest produce harvesting only thrice weekly and fishing even less regularly. She may need two weeks to obtain an adequate amount of produce for sale. She has also stopped making handcraft. Her income has dropped by more than half. Her husband who is more focused on hunting also faces a sharp drop in his income. Her family has recently begun the cultivation of oil palm.

**Impacts on food sources**
Vegetables are mainly obtained from the land. More fish and meats have to be purchased than before. Rice cultivation halted around many years ago. They were able to obtain up to 50 sacks a year in the past.

She stated that today women are having difficulty in maintaining their financial independence. She reported feelings of prolonged anxiety, stress and difficulty to sleep. She and her husband worry constantly about their family income and future. She lamented that her children would have to find stable employment instead of having the security of working on the land.

---

**Respondent 17, female, 1986**  
Married with four children, living with her father and sibling’s family  
All plots of land are still safe.

She is mostly financially dependent on her husband, who has a contractual employment in the city. However, she still fishes and harvests forest produce for her family’s consumption.

She stated the difficulty arising from the decline in river and forest resources. She remarked that since her family now has a car,
Impacts on income sources
Her husband’s employment has shielded her family from drastic financial difficulties. She is sometimes hired to help out in oil palm smallholdings of other villagers. She has also recently begun her own oil palm smallholding.

Impacts on food sources
Vegetables and fish are obtained from the land. Meats are mostly purchased. Rice cultivation halted many years ago as a result of increased pest attacks. They were able to obtain up to 50 sacks a year in the past.

Respondent 18, female, 1979
Single mother with three children
Two out of three plots of land a farm hut destroyed.

Her main income is derived from the sale of forest produce, fish and cultivated vegetables. She also receives welfare support from the state.

Impacts on income sources
She stresses that she has to be extremely frugal about her expenditures as she is a single mother with young children. She has begun a very small scale cultivation of oil palm but as a single mother, she worries about the costs to harvest and transport the fruits in the future.

Impacts on food sources
Vegetables are mostly obtained from the land. She would only purchase fish and meats if she has surplus money. Her neighbours would help her out frequently. Her family has gone without fish or meat before. Rice cultivation, she is able to continue forest produce harvesting. She stressed that she would never sell or lease out her remaining land to the company as they are an inheritance from her family.

She stated that it is very difficult for women to obtain an income today. The availability of natural resources has declined significantly. Further, she also has safety concerns during fishing trips due to the increase in crocodile sighting. She stressed that the land is priceless to the Iban community. She worries that her three children would have to share the one remaining plot of land.
led by her mother, halted around two years ago as a result of a decline in harvest.

<table>
<thead>
<tr>
<th>Respondent 19, male, 1985</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with two children</td>
</tr>
<tr>
<td>One out of three plots of land destroyed.</td>
</tr>
</tbody>
</table>

- His main income is derived from his contractual employment. He still farms and fishes for domestic consumption.

**Impacts on income sources**

Although he is not affected by the loss of land, he stresses that this is not the case with other families. He is not able to rely on his land for his livelihood anymore. His wife is financially dependent on him now as they have a toddler. She only focuses on vegetable cultivation.

**Impacts on food sources:**

- Vegetables are mostly obtained from the land. Fish and meats are mostly purchased. Rice cultivation, led by her wife’s parents, halted around three years ago as a result of pest attacks, especially birds.

- He stated that today one has no choice but to find stable employment since it is simply difficult to obtain sufficient income and food from the land. Further, having to fish or hunt in areas located further away also entails increased expenditures on petrol for the boat. His wife is no longer comfortable to venture out to the forest or fish alone with the presence of many foreign workers. He stated that he feels saddened watching the internal conflicts and slanders affecting the community today, with even siblings who have stopped talking to each other.

<table>
<thead>
<tr>
<th>Respondent 20, female, 1971</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with four children</td>
</tr>
<tr>
<td>All three plots of land are safe although one was previously damaged by logging.</td>
</tr>
</tbody>
</table>

- Her main income used to be derived from the sale of fish. She used to sell mats as for additional income.

**Impacts on income sources**

- She stated that today she is fully dependent on her husband as a result of the decline in the fish population. Increased crocodile sightings have also been frightening for her. She
She is now financially dependent on her husband, who has a contractual employment. She no longer fishes. Occasionally she would sell traditional chips to obtain some income.

**Impacts on food sources:**
Wild vegetables are mostly obtained from the land. She has recently begun the cultivation of commercial vegetables, chillies and maize to reduce her household expenditures. Fish and meats are purchased. Rice cultivation, led by her parents, halted around ten years ago as a result of decreased productivity.

stressed that the land is not for sale, even at increased prices, as it is an inheritance.
Table A-2: Summary of individual surveys amongst members of the Sungai Buri Residents’ Association on the economic, social, cultural and environmental impacts of oil palm plantation project

<table>
<thead>
<tr>
<th>R</th>
<th>Destruction of farm land</th>
<th>Decline in forest resources</th>
<th>Decline in river resources</th>
<th>Decline in income and livelihoods</th>
<th>Decline in sources of food, construction and craft materials</th>
<th>Decline in natural resources for healing and cultural activities</th>
<th>Destruction of burial grounds</th>
<th>Employment opportunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (M)</td>
<td>All plots still safe.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>2 (M)</td>
<td>3/10 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>3 (F)</td>
<td>Unquantified</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>4 (M)</td>
<td>1/7 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>5 (F)</td>
<td>1/6 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>6 (F)</td>
<td>2/5 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>7 (F)</td>
<td>5/15 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td></td>
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<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>8 (F)</td>
<td>3/13 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>9 (F)</td>
<td>4/10 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>10 (F)</td>
<td>2/12 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>11 (M)</td>
<td>2/2 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>12 (M)</td>
<td>1/2 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>13 (M)</td>
<td>1/8 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>14 (M)</td>
<td>3/9 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>15 (M)</td>
<td>1/8 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>16 (F)</td>
<td>1/7 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>17 (F)</td>
<td>All plots still safe.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>18 (F)</td>
<td>2/3 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Table A-3: Summary of individual surveys amongst members of the Sungai Buri Residents’ Association on the physical and psychological impacts of the oil palm plantation project

<table>
<thead>
<tr>
<th>R</th>
<th>Physiological issues</th>
<th>Psychological well-being</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (M)</td>
<td>None.</td>
<td>Feelings of anger over the loss of forest.</td>
</tr>
<tr>
<td>2 (M)</td>
<td>Eye irritation. Breathing difficulties requiring visits to clinic.</td>
<td>Feelings of anger over the loss of land.</td>
</tr>
<tr>
<td>3 (F)</td>
<td>Eye irritation and breathing difficulties possibly due to dusty air during land clearing operations. Vomiting possibly due to polluted water, requiring hospitalisation. Worrying has worsened her blood pressure.</td>
<td>Feelings of sadness over the loss of land.</td>
</tr>
<tr>
<td>4 (M)</td>
<td>Eye irritation and vomiting possibly due to polluted water, requiring visits to a clinic. Grandchild suffered from breathing difficulties and vomiting, requiring visits to the clinic and hospital.</td>
<td>Feelings of anger and anxiety over the loss of land and hopelessness over others who have allegedly sold their land.</td>
</tr>
<tr>
<td>5 (F)</td>
<td>Eye irritation possibly due to land clearing activities.</td>
<td>Feelings of fear and anxiety over the possibility of</td>
</tr>
<tr>
<td></td>
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<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>6 (F)</strong></td>
<td>None.</td>
<td>Feelings of anxiety over the loss of land.</td>
</tr>
<tr>
<td><strong>7 (F)</strong></td>
<td>Eye irritation and breathing difficulties, during land clearing activities. Her daughter suffered from vomiting, possibly due to polluted water.</td>
<td>Feelings of sadness over the loss of land.</td>
</tr>
<tr>
<td><strong>8 (F)</strong></td>
<td>Her eye, which had been injured before, suffered increased irritation, during the land clearing activities. Vomiting, possibly due to polluted water.</td>
<td>Feelings of sadness, fear and anxiety over the possibility of losing more land.</td>
</tr>
<tr>
<td><strong>9 (F)</strong></td>
<td>Vomiting, possibly due to polluted water. Incidents of breathing difficulties.</td>
<td>Feelings of sadness and anger over the loss of land and inability of seeking justice.</td>
</tr>
<tr>
<td><strong>10 (F)</strong></td>
<td>Her child has suffered from vomiting. The child of her sibling had also suffered from stomachache and diarrhoea, possibly due to polluted water.</td>
<td>Feelings of anxiety over the loss of land and the fear that they may be asked to leave.</td>
</tr>
<tr>
<td><strong>11 (M)</strong></td>
<td>Eye irritation during land clearing activities. Suffered from stomach pains, possibly due to polluted water.</td>
<td>Feelings of restlessness, worrying and anxiety over the loss of land and the challenges of supporting his children’s schooling costs. Finding himself staring emptily frequently.</td>
</tr>
<tr>
<td><strong>12 (M)</strong></td>
<td>Eye irritation, vomiting and breathing difficulties during land clearing activities.</td>
<td>Feelings of prolonged worrying about the family, especially over the decline in income.</td>
</tr>
<tr>
<td><strong>13 (M)</strong></td>
<td>Eye irritation, vomiting and breathing difficulties during land clearing activities.</td>
<td>Feelings of prolonged worrying about the family, especially over the decline in income and the children’s future. Sometimes he has difficulty to fall asleep.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>14 (M)</td>
<td>None.</td>
<td>Feelings of sadness and distress and prolonged worrying about his family, especially over the decline in income. Sometimes he has difficulty to sleep.</td>
</tr>
<tr>
<td>15 (M)</td>
<td>None.</td>
<td>Feelings of sadness and distress over the loss of land. Prolonged worrying over the future.</td>
</tr>
<tr>
<td>16 (F)</td>
<td>Coughing and breathing difficulties during land clearing activities, requiring hospitalisation.</td>
<td>Prolonged worrying.</td>
</tr>
<tr>
<td>17 (F)</td>
<td>None.</td>
<td>None.</td>
</tr>
<tr>
<td>18 (F)</td>
<td>None.</td>
<td>Feelings of sadness, anger and distress over the loss of land, income and the future.</td>
</tr>
<tr>
<td>19 (M)</td>
<td>His child suffered from eye irritation and breathing difficulties during land clearing activities.</td>
<td>Feelings of distress and prolonged worrying over the loss of land and income, the occurrence of internal communal conflicts and the need to ensure future employment.</td>
</tr>
<tr>
<td>20 (F)</td>
<td>Eye irritation during land clearing activities.</td>
<td></td>
</tr>
</tbody>
</table>

R: respondent; F: female; M: male
SECTION A: BASIC INFORMATION ON AFFECTED VILLAGES

Source
Rumah Lachi Residents’ Association
Members of the association are residents of the Iban NCR territory of Rumah Lachi

History
The residents of our village originated from the district of Semanggang in Sri Aman. We were relocated to our current customary territory under a programme planned by the British colonial administration around the 1940s. There are numerous old documents in our safekeeping which detail the administrative process of this relocation. Apart from us, there are also two other villages in the area whose members were also relocated from Semanggang.

According to our elders, amongst the reason the relocation scheme was planned was because the British did not wish for our current territory to remain uninhabited for fear that it would turn into a hideout for anti-colonial freedom fighters. Moreover, during this point of time, the Semanggang district was already facing a significant population pressure.

The villagers were arranged to move via ships by the British administration and disembarked at the port of Kuala Suai in Miri. From there, they used a smaller boat and travelled upstream to Suai. At first, they chose to settle and farm at Tapang Condong for a few years. Then, they moved to Rantau Panjai and lived there for a short while.

It was only in the 1950s that they at last moved to Sungai Sebatuk, which is still within the Suai river basin. In the beginning, there were only five pioneer families in the village. During this time, the area was indeed heavily forested and rather quiet. In the 1950s, we were led by our chief by the name of Adar Angking. He was later replaced by Tukok Adar in the 1970s before our current village leader took over in the 1990s.

Although we have been here only for seven decades, unlike other indigenous villages which may have a history that can stretch back for hundreds of
years, we still have several areas within the territory that bear their own myths. One of these is the **tanjuk** stone. *Tanjuk* is the protusion which extends out from the traditional communal veranda (*ruai*) of our longhouse. The stone is said to be guarded by a spirit by the name of Menying.

According to our elders, once upon a time, there was a group of hunters who had successfully shot a wild boar with a blowpipe. The wild boar however did not immediately die as expected. The hunters had to spend a few days tracking the injured animal by following its blood droplets. Finally instead of finding the wild boar, the men was met by Menying, who was standing on the *tanjuk* stone. Menying introduced himself as the guardian of the stone. A tributary of the Sebatuk is now named after Menying. The stone still exists today, amid the oil palm trees in the plantation.

In the 1960s, our village was populated by five principal families. In the 1980s, this number grew to more than 20 families. By the 1990s, there were more than 30 families in the longhouse.
SECTION B:  
VERIFICATION ON THE EXISTENCE OF CUSTOMARY LAND RIGHTS

The villagers verified that they are able to demonstrate the existence of their customary land rights through the following body of evidence.

<table>
<thead>
<tr>
<th>A. Can the villagers provide oral evidence on the history of their customary territory?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. History on the origins of the customary territory and ancestry</td>
</tr>
<tr>
<td>2. Site-specific history, folklores, legends</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>B. Do the villagers still practise the traditional customs and culture of their community?</td>
</tr>
<tr>
<td>1. Land clearing, agriculture</td>
</tr>
<tr>
<td>2. Marriages</td>
</tr>
<tr>
<td>3. Deaths, funerals</td>
</tr>
<tr>
<td>4. Communal laws, code of conduct and ethics</td>
</tr>
<tr>
<td>5. Possession of old items and heirlooms: traditional costumes, gongs, baskets, beads, personal ornaments, decorative objects, kitchen utensils, knives, machetes, weapons, household items etc.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>C. Can the villagers provide evidence on their use of the land and its natural resources within the customary territory?</td>
</tr>
<tr>
<td>1. Tree felling or tree harvesting marks</td>
</tr>
<tr>
<td>2. Hunting and fishing sites, saltlicks*</td>
</tr>
<tr>
<td>3. Burial grounds and sacred sites*</td>
</tr>
<tr>
<td>4. Trails and pathways within forested or cultivation areas*</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>D. Does the government acknowledge the existence of the villages?</td>
</tr>
<tr>
<td>1. Government built facilities</td>
</tr>
<tr>
<td>2. Visits by ministries or governmental departments and agencies</td>
</tr>
</tbody>
</table>

* Location for hunting and fishing activities, as well as sacred sites and trails and pathways within forested and cultivations areas have been destroyed by the oil palm plantation project. Burial grounds however are still protected.
SECTION C:  
LAND ENCROACHMENT REPORT 

BACKGROUND 

1. Background: Chronology of encroachment 

History of logging encroachment 

The encroachment on our customary territory began with logging operations as early as the 1960s. To the best of our memory, the operations halted for a while before the second cycle was resumed somewhere in the 1980s. During the second cycle, the loggers harvested even larger trees. The operations continued until they ran out of such trees. The last logging operation was carried out in the 1990s, slightly before the time the oil palm plantation development commenced. All such operations took place without the consent of our villagers. There was never a free, prior and informed consent process being put in place. 

Certainly the logging operations did cause a lot of difficulties for the villagers. Our drinking water which was sourced from the river was polluted. There were even people who suffered from skin infections and diarrhea back then. However, during this time, we were still able to continue obtaining natural resources and income from our land. If a particular area was affected by logging activities, we would simply look for forest resources at another site within our territory. If Sungai Sebatuk was polluted, we could still utilise other existing rivers. We still could farm. Unlike oil palm plantation operations which destroy almost all forest, river and agricultural resources, during this period, we still had other options, despite the fact that our lives had also been made more difficult by logging operations. The villagers were naturally unhappy with all such logging encroachments. However, never did we ever surrender our customary rights to the land. We had reasons as to why we had to remain silent about the encroachments. 

First, in the past, it was not easy for us to access government offices that were all located in the nearest town in order to express our objections. The road transport system in the 1980s was severely limited. In order to access the nearest town, Batu Niah, we first had to reach Kampung Iran via a two-hour boat ride. From Kampung Iran, we would have to continue the journey by chartered cars for another two hours to Batu Niah. In fact, even the nearest primary school was located far from our longhouse that the children had to board in the hostel provided there. Second, in the 1980s, we also used to hear stories about how members of other indigenous communities were detained by the police as a result of their protests against logging encroachments. This was also another concern of ours which had deterred us from
voicing our protest in an open and organised manner. Third, the number of families in our longhouse during this period was also small, in comparison to other indigenous villages in Sarawak which had resided in their territories for hundreds of years. In the 1960s, there were just five families here. In the 1980s, this number merely increased to only around 20 families. The people from our village and the neighbouring villages only moved here from the Semanggang in Sri Aman under a relocation exercise undertaken during the British administration in the 1940s. Therefore, the size of population of the village was not large during this time.

Commencement of the oil palm plantation project

In the early 1990s, after the final logging operations had ended, rumours on the plan to develop an oil palm plantation in our village began to circulate. It started with the arrival of an individual in his thirties from Peninsular Malaysia in our village. He introduced himself as a consultant for an oil palm plantation company that intended to develop an oil palm plantation project in our village. The purpose of his visit was to conduct site inspection and obtain the consent of the villagers. Although we may never know if there was any party who had given such a consent during this period of time, we ourselves as ordinary villagers, had never done so. During this visit, the consultant did witness for himself how the villagers had long developed their numerous family farms within the territory. He had been informed that all the land here belong to us. After he left, we did not hear anything again about the project for about three years.

Then one day in 1996, without any notice, our land was suddenly encroached upon by a group of labourers who proceeded to conduct land clearing operations on our farms. At first, the villagers heard the sounds of chainsaws and heavy machinery from a particular area. Subsequently, around 50 persons rushed to the concerned location. Upon our arrival at the encroachment site, we were shocked to find that the labourers had been freely felling our crops, including cash crops such as cocoa, rubber and pepper.

We immediately forbade them from continuing their activities. When asked about the permission that they had obtained to carry out the operations, they informed us that they had been hired by a contractor. All of them appeared to be foreign workers from Indonesia. Upon our insistence for them to stop, they finally obliged and left.

Not long after the incident, they began to be seen working in the territory of a neighbouring village. Similarly, the villagers there were also angered just like us. They too instantly forbade the workers from continuing with their felling activities and told them to leave. The workers then did as told.
Unfortunately however, the workers later returned to our village to continue with the felling operations. Once again, we stopped them and told them to leave. They then continued their activities in the neighbouring villages. This sequence of incidents then continued to be repeated back and forth between our village and two other neighbouring villages.

Apart from our farms, the contractor company was also clear felling our communal forest reserve which belongs to the village. In this forested area, the remaining timber was felled and taken out. As a result, soon, we also lost our hunting sites. The rivers began to be muddy from the soil erosion that ensued.

After a while, a villager began to hear from his friend that the licence for an oil palm plantation had indeed been issued by the state to a company. Only after requesting the help from several professional individuals to check on this information with the state authorities, did we receive the confirmation that this claim was indeed true. However, we had never given any consent for our customary territory to be used as part of this plantation.

**Establishment of an action committee**

Finally, our village and two of the neighbouring villages affected by the clear felling activities decided to unite and establish an action committee. During this initial stage, 33 families from our village agreed to mandate this committee to take further actions to defend our land rights. Due to the fact that the land clearing activities had continued, the committee finally decided to meet with the management of the contractor company at their site office. To the best of our memory, this meeting took place in 1998. By this time, a mobile office had secretly been built by the contractor, without the knowledge of most of us.

During this meeting which lasted for about an hour and attended by tens of villagers from the three villages, we told the company that their action of encroaching upon our farms was very wrong indeed. However, they insisted that their operations did possess a licence from the state. We in turn replied that even if their operations had been conducted with a licence, it would be more appropriate for them to develop forested land that was away from our villages. The manager whom we spoke to was not very polite. His tone of voice was rather aggressive. He repeatedly insisted that his company had obtained the rights to carry out land clearing activities.

Within this period, there was a lot of confusion that arose amongst the villagers as a result of the lack of information. For example, we did not have further information on the project itself, such as the duration of the licence, terms and conditions imposed by the state government on the licence as well as the size and boundary of the project. Until today, we have yet to receive any maps with complete geographical
coordinates of the project boundary. We are also still unclear about the relationship between the project proponent and its contractor as well as the actual business relationship of the project proponent with the individual who claimed he was the consultant to the project, whom first visited us. A lot of information which we had received was merely orally communicated to us.

Apart from this, the committee also began to write to the state authorities to express our protest against the project. However, we do not possess any copies of the documents written during this period of time. At this point of time, we began to realise that further discussions with the contractor would probably end in futility.

Civil action filed

Even at this early stage of the project development, the action committee was already attempting to obtain legal advice. We certainly had the intention to take legal action against the parties that were involved in this project. We believed that this was the best way to halt the encroachment from continuing. We invited a lawyer to visit the three villages in order to witness first hand how our customary territory was being encroached upon. However, the partnership with this particular lawyer failed to produce any results. Subsequently, we began to look for another legal advisor. In 1997, the residents from the three villages affected by this project were at last able to file their civil action at the High Court in Miri. This civil action however was only filed by families who still wished to defend our land rights. Not all families from the three villages participated in this legal action.

Internal conflicts in the village

In the beginning, when the project was still at its land clearing stage, we were informed that several residents from our village as well as the neighbouring villagers had been invited to fly to Kuching for the purpose of attending a dialogue with the company. We had never been quite certain on the exact purpose and content of this dialogue. However, upon returning from Kuching, it was rather obvious to us that quite a few of them began to act in a different manner.

After returing, some of the villagers began to appear reluctant to continue the struggle to defend our customary land rights. There were even some who began to express the view that it was no longer appropriate for the villagers to continue with the protest against the project proponent. Some of us were even advised by them to stop fighting against the company because the project would purportedly bring development which would provide the longhouse with many facilities. However, all such information only spread through the word of mouth. We did not have the chance to learn over what had exactly happened. Not long after this sudden turn of events, changes were made to the leadership of the action committee.
Perhaps by the year 2003, rumours began to spread about how certain individuals in the village had been approached by certain parties to agree receiving some compensation, in return of their consent to the project. Then, when the development of the nurseries and cultivation began, two very unpleasant events occurred.

First, a large group of villagers had been presented with various gifts such as sewing machines, television, refrigerators and water tanks. The rest of us, including our group, who did not know what exactly had transpired, did not receive anything at all. To the best of our memory, the gifts were received by half of the families here, or around 18 of them. The equipment was sent by a lorry to our doorstep. The rest of us could only watch the delivery and receipt of these gifts.

Second, a member of the action committee who had tirelessly attempted to find further information on the licence, had managed to obtain a list of names which showed that there were indeed villagers who had agreed to allow the plantation project to continue encroaching on our village and would soon receive some compensation cash for their consent. How this even occurred was beyond us. This committee member has also passed away, so we are not even certain how he had managed to obtain this document.

This document was only around two pages long. The names of our family members were certainly not there. This list was then pasted on the wall of the common veranda outside our houses, leading to a situation which was quite tense. We did not even know anything about this agreement. On average, we believe that each family received around RM4,000 each. The families concerned subsequently was handed this cash in a ceremony conducted in the Batu Niah town hall, in the presence of a state lawmaker. The rest of us whose names were not listed in the document were of course unable to attend this event.

Consequently, internal conflicts in the village began to worsen. At this point, only around half of the families in our village, or only around 17 families, were willing to continue with the defence of our customary land rights. It was very difficult indeed for us to conduct any open discussion with those who had decided to no longer do so, since we were very much angered by their action. Gradually, some of them also began to receive employment opportunities with the project, including small contracts. Of course our decision to continue defending our land rights, including our civil action efforts, has the potential to affect their newly found income.

By this time, the land clearing activities had almost been completed. In the next few years, another document detailing our out-of-court settlement with the project proponent which we would receive, finally revealed to us the size of this project, which stands at around 3,720 hectares. Altogether, the project comprises 29 blocks.
Without our knowledge, this project had freely incorporated a large part of our customary land into blocks 17, 18 and 19, while a smaller size of land was also included in blocks 20, 25, 26, 27 dan 28. The remaining blocks meanwhile appear to traverse the customary territories of the neighbouring villages.

Although in the end, we did receive a map showing the boundaries of the project and the location of all the 29 blocks, this map did not contain comprehensive geographical information on their coordinates, which could enable us to ascertain with accuracy, the location of the boundaries of these blocks within our territory. We only managed to deduce the location of the blocks on the ground based on the labelling plates nailed onto the oil palm trees and the project signboards.

Today, there are a few plots of our farms which still remain within blocks 17, 18 and 19, which are located nearer to our longhouse. However, their number and size are not very large. Most of such farms managed to be protected because their individual owners were able to act fast enough to halt land clearing activities from being conducted on their farms.

**Company’s offer to develop oil palm smallholding for the villagers**

By this time, the company had already acknowledged our group as one that was still strongly motivated to continue defending our customary land rights. It had thus identified us as ‘the Marudin Group’, named after our leader during this period of time, the late Marudin Bikang, who has now passed away.

Around 2007, an offer was made by the company to the families who were still keen to continue with the civil action and the defence of our customary land rights. The offer was in the form of the assistance to develop our own oil palm smallholding. We were informed that this family-owned smallholding would be able to generate an income for our families in the future. We would be able to reap its benefits without having to struggle very hard in sourcing out the capital needed for its development. Consequently, the people agreed to accept this offer, although our legal action had yet to be resolved at the court. We presumed that such an assistance was also akin to a kind of compensation payment for the loss of our land.

We were then requested to choose a suitable site to develop this community owned oil palm smallholding which would soon be developed with the assistance from the company. However, it was not easy for such an endeavour to be carried out by the people, as most of our plots are located away from each other and had long been put under cultivation. After discussing, five families, including the Marudin and Lachi brothers, who happened to possess adjacent plots of land which were located contiguously, initially agreed to let their family plots to be utilised for this community oil palm smallholding.
However in the end, only Lachi and Marudin remained committed in offering their plots of land of approximately 40 acres for the project. The two brothers had long cultivated the concerned plots of land with cash crops such as cocoa, rubber, pepper and a variety of fruit trees. They were naturally quite sad having to let the existing crops to be felled, but due to the encroachment by the plantation, they were left with not much choice.

According to the original plan, 17 families who were still intending to continue with our struggle to defend our customary land rights would participate in this 40-acre, community oil palm smallholding. The profits from its harvest in the future would be divided equally amongst all the families involved, with the exception of Lachi and Marudin, who stood to receive a slightly larger share, since the land being utilised belong to them. They would continue to be recognised as the rightful owners of the land.

Subsequently, the 40 acre land began to cleared by the company. Nevertheless, even today we are still uncertain about the actual size of land that had been cleared, since we did not participate in any of its survey activities. The land clearing activities were undertaken based on the boundaries of the plots of land involved, which we had earlier shown to them.

**Out of court settlement**

In March 2008, our civil legal action finally ended with an out of court settlement. We then received a document of agreement between the project proponent and the community, in English, which we were requested to sign. Amongst the conditions of this agreement were the following matters:

(i) The company was to pay RM 41,700.00 to the affected villagers in 14 days.

(ii) The company was to conduct land clearing activities on 122.92 acres of land, which was located outside of the 3,720 hectare project area, of which 40 acres had already been cleared prior to the signing of the agreement.

(iii) The company was to provide oil palm saplings for the 122.92 acres of land, at a rate of 53 saplings per acre as well as to provide advice on their cultivation up to the time when crops would be harvested.

(iv) The company was to purchase the fruits from the cultivated oil palm crops from the villagers at future market prices.
(v) The company was to provide 50 per cent of the fertiliser supply needed for the development of the said saplings, for a period of three years.

(vi) The company was to provide a loan for the affected villagers, which would be subject to the terms and conditions of a another new agreement, for the purpose of assisting the villagers in their purchase of the remaining 50 per cent of the fertiliser supply needed for the development of the saplings, in the next three years. This loan would be repaid by the villagers through the deductions made from the sale of the harvested oil palm fruits to the company, within a period of three years.

(vii) If any part of the 122.92 acres of land failed to be developed, the villagers would be responsible in finding new replacement plots, with the equivalent size.

(viii) The villagers were not permitted to encroach upon the project area or to harvest any oil palm fruits found within the project area.

(ix) The company and the people would continue to negotiate on the areas neighbouring blocks 18 and 19, located within the project area, which had yet to be developed.

(x) The affected villagers would not make any further claims on the company or take any further actions which could cause any hindrance or disturbance to the company, in their effort of continuing the development of the oil palm plantation within the project area.

(xi) Any payment or assistance rendered by the company to the villagers must not be construed as an acknowledgement from the company that the villagers indeed have legitimate claims, rights and privileges over the project area.

The compensation money was finally disbursed to the people during the same month in Miri.

However, in the beginning, there were some of us who did not clearly understand that the approximately 40 acres of land that had been cleared earlier, was to constitute as part of the overall 122.92 acres of land which the company had pledged to develop, in accordance with the agreement. Further, we were also worried about the demand for the company to develop the land at the pre-determined size. Although the concerned plots of land were shown in maps which formed as part of the agreement document, these maps did not contain comprehensive geographical information. We did not have information about their precise boundary locations on the ground. The only matter which was certain for us was the fact that all our plots
of land which had remained safe, had long been held and cultivated by individual families. Therefore, in effect, we did not know how we could ever find plots of land totalling up to 122.92 acres, to be developed by the company.

**Alleged failure of the company to fulfil their obligations**

After the land clearing of the 40 acres of land was completed, the company commenced the cultivation of the oil palm saplings, which nonetheless according to our views, was not carried out in a satisfactory and organised manner. Unfortunately for us, compounding the matter further was the failure of the company to fulfil its subsequent obligations as outlined by the agreement, in a manner which we could at least find as acceptable.

Therefore, in the years to come, we began to undertake various efforts to urge the company to fulfil their obligations in a more satisfactory manner. However, our endeavour was often met with various unacceptable excuses on their part. At times we could be informed that the site office was still waiting for approval for the necessary financial expenditures, at other times we could only meet with the company subordinates. We tried to be patient and continued to wait for them to fulfil their responsibilities. However, the company continued to fail in delivering their obligations at a level which we could find acceptable.

Therefore on January 11, 2011, we wrote two letters to the company to raise all such issues. The first letter put forward several demands from us, which were all linked to the various losses that we had been made to endure:

(i) 80 acres of land from blocks 17, 18 and 19 must be excised from the project area and returned to us. This demand is aligned with the out of court settlement which demanded the company to provide the support for us to develop our own smallholdings of approximately 122 acres.

(ii) Compensation payment of RM 150,000 for the families of each signatory.

(iii) Repair works to be conducted for the roads that are utilised by the villagers to access their farms.

(iv) The clearance for the villagers to pass through the security gates of the plantation without any disturbance from the company.

Apart from this, we also wrote another letter on the same date which provided the list of essentials and supplies needed for the continuation of the development of the 40 acre land already being cleared. These included necessities such as fertilisers and additional supplies of saplings, as well as materials needed for the construction of
decent access roads to our farms. We also further provided a list of works which we had undertaken on the said land, from July to September 2010, as instructed by them.

When we failed to receive any satisfactory response from the company, two years later, we once again wrote them two more letters, both dated July 4, 2013. Amongst others, the first letter emphasised the fact that the company had failed to satisfactorily fulfill its pledge to develop 122.92 acres of land for the villagers. As such, the letter demanded the company to replace the same equal amount of land from block 17 at Sungai Ensabang, block 18 at Sungai Menying and block 19 at Sungai Ensabang, all located within the project area:

Meanwhile, the second letter highlighted the following:

...Marudi Group Plantation would like you and the plantation to fulfill the responsibility as outlined under the agreement between the plantation (Sachiew Plantation Sdn. Bhd.) and us (Marudin Group Plantation.)

As pledged by the plantation, the company had cleared and cultivated the NCR land of Marudin anak Bikang with oil palm crops at Ensabang. However the company had failed to fulfill the further obligations in accordance with the said agreement.

To plant oil palm crops in a correct and organised manner.
To repair damaged roads.
To distribute fertilisers and pesticides.
To construct drainage and culverts.

As can be seen from the above, even the works that had been thus far implemented are also far from satisfactory for us. Today the cultivated plot of land has grown into secondary jungle.

I would like your company to fulfill the obligations as stipulated in the agreement.

However, all our efforts failed to produce any result. At last, we simply had to abandon the development of the 40 acres of land. Today the plot of land is filled with secondary jungle growths. The mature oil palm trees have also failed to fruit due to the lack of adequate care brought about by the failure of the company to supply us with the support promised. Further, we also could not select any further sites to ensure that the size of land to be developed would reach 122.92 acres.

On February 7, 2014, we once again wrote to the company. This letter repeated the same demands, including:
(i) The fulfillment of the pledge to develop the entirety of a land totalling 122.92 acres, in accordance with the out of court settlement.

(ii) The surrender of 80 acres of land from blocks 17, 18 and 19 to attain the totality of 122.92 acres of the land pledge.

(iii) Compensation payment of RM150,000 and a salary of RM3,000 for each family who is still a member of our group.

Finally, the company made an offer to resolve our claims of rights through a letter dated May 14, 2014. Apart from other matters, the letter also stated the following:

...after looking into your claims and taking into account the capacity of the company, we would like to offer you a consolation payment of RM77,000.00 in order to resolve any further claims from the residents of RH Anisang, who are represented by you, including the group led by Rody Ak Marudin and Ngang Ak Jalen, and the demands contained in the agreement signed by the late Marudin Ak Bikang and our company on 11-3-2008.

We would like to kindly request you and your group to accept this offer so that this issue of your long existing claims against us can be resolved peacefully.

If we were to agree to this offer, the company then further requested that we provide a list of names of the recipients and their details. A new agreement for this resolution must also be prepared to be signed by all the parties involved. However, the letter also stressed on the implications of our acceptance to the offer:

After the payment is made, members of your group must leave the areas which they are occupying.

Naturally, we rejected this offer. The amount of money being offered was for all the families involved when we in fact demanded a payment of RM150,000 for each family. The letter also did not provide any satisfactory response on the obligation of the company to develop an oil palm smallholding of 122.92 acres for the villagers, in accordance with the out of court settlement signed in March 2008.

Oil palm fruits harvested by the villagers

Finally, in early 2013, after discussions were held between us and the neighbouring villages, we who were involved in the development of the 40 acre land were determined to harvest the recently fruiting oil palm crops within our area, as an act
of protest. Some members of the neighbouring villages were also determined to do the same but within their territories.

Our group was interested in blocks 17, 18 and 19 because the concerned blocks are located in close proximity to our longhouse. Members of our group also possess many plots of land within these blocks. We were never focused on other blocks as there was concern that members of our own village who were not part of our group may also be interested to harvest the fruits within these other blocks. We thus carefully planned on how the harvesting could be collectively carried out. We intended to carry out the harvesting ourselves, along with other individuals who had agreed to be hired by us. The profits made from the sale of the fruits would be divided equally amongst the families involved. The costs for hiring workers, transport and other expenditures would also be sourced from the profits. We were also certainly mindful that our activities would not cause any dissatisfaction to arise amongst other villagers who did not wish to be part of our group.

When the harvesting activities were discovered by the company, they immediately warned us that they would definitely be taking further actions against us should we choose to continue doing so. We simply ignored their warnings. However, our actions were also preceded by several police reports to explain on the reasons behind our intention to harvest the oil palm fruits found within blocks 17, 18 and 19 of the plantation project.

The following is the police report [Batu Niah/000630/13] lodged by Unyat Tambat with five other villages on April 29, 2013:

...will defend our NCR land in Ensabang, Belinyok, Kurong and Menying from being encroached upon and seized by the Sachiew Plantation. Individuals who are not under my charge are not permitted in any way to harvest the oil palm fruits within these four areas. This report serves as a reminder for the plantation not to create any disturbance or obstruction for us while we are working to harvest the oil palm fruits on our NCR land.

I named as above is the son of Marudin anak Bikang... hereby inform that I will defend the NCR land belonging to my family in areas that have been cultivated with oil palm crops by Sachiew Plantation. As long as Sachiew continues to fail in fulfilling the obligations that had been agreed upon, my family would continue to harvest the oil palm fruits from the plantation in Ensebang, Belinyok, Kurong and Menying. This report serves as a reminder to the plantation not to create any disturbance or obstruction for me while I am working and harvesting the oil palm fruits on my family’s NCR land.

Bangga Kedit also lodged his own police report [Batu Niah/001039/13] on July 14, 2013 to provide explanation on the same matter:
On 14.07.2013 in Sachiew Plantation, for your reference, I will be using a vehicle... to harvest oil palm fruits. This report is made for the reference of the plantation and other relevant parties.

A year later, on pada November 5, 2014, Lachi Bikang also lodged his own police report [Batu Niah/001733/14]:

This report has been retyped from a piece of white paper given by the complainant. I Lachi anak Bikang... on behalf of myself and the residents of the Rumah Ansang Sungai Sebatuk Suai 98200 Niah Sarawak who are defending our native customary rights (NCR) feel that we have been deceived and dissatisfied with the company Sachiew Plantations Sdn. Bhd... as a result of their refusal to fulfill their pledge that they would be developing and cultivating oil palm for us the residents of the Rumah Ansang longhouse (previously Rumah Tukuk). The company had previously pledged to us that they would be cultivating oil palm for us on 122.92 acres of land outside of the provisional lease (PL) area which overlaps with our native customary territory.

Although we had repeatedly requested to them and given the company Sachiew Plantations Sdn. Bhd the chance to fulfill their obligations, to this very day, the company Sachiew Plantations Sdn. Bhd, had declined and refused and neglected and/or refused to fulfill their obligations in accordance with the deed dated 11th March 2008. As such, we view that Sachiew Plantations Sdn. Bhd had violated their agreement with us.

Therefore we are forced to reclaim our customary land and obtain all existing crops on our customary land which had been taken by the company Sachiew Plantations Sdn. Bhd.

This report is made for our own further actions and civil legal action.

**Roads in the village being dug**

Soon after we commenced the harvesting of the oil palm fruits, we began to face problems. First, we began to discover that the access roads to the blocks where the harvesting was taking place were being dug, as if to impede our travel to conduct the harvesting. When this incident first occurred in 2013, all of us decided to pay a visit to the company’s site office. We insisted that the company must proceed to cover the holes that had been dug on that very day itself. They finally gave in to our demands.

The following is the content of a police report made by Unyat Tambat [Batu Niah/000744/13] on May 24, 2013 on the matter:
On 24.05.2013... at Sachiew Plantation Niah while I was on my way from my house passing through Blocks 5, 6, 9, 13, 18 and 19 and the access road to Sachiew Plantation, I discovered that the access road had been dug and could not be passed. This has now affected the transport and travel between Rh. Ansang, Rh. Gangsur and Rh. Tarang. The residents of the 3 longhouses are angered by this act and together, they wish to visit the office of the Sachiew Plantation to inquire about the matter. This police report is lodged for fear of any untoward incident that may happen at the said office.

Not long after this, the same incident occurred again. During this second incident, we ourselves had to cover the dug up holes. Following the last of such an incident, we rushed to the site office of the company to demand that the holes be covered immediately. However, we failed to meet with any of the company’s staff. We then felled several of the oil palm trees within the vicinity and laid the trunk of a felled tree across the road as a sign of protest.

Further, we also lodged a police report through Lachi Bikang [Batu Niah/001796/15] on September 26, 2015 to record the following statement:

On 25/09/2015... at my farm in Menying, Sebatuk, when I went there to check on my chickens, I discovered that the road used by the longhouse residents to access their farms had been dug by the company Sachiew Plantation with the use of the JCV, and I later returned and immediately informed the villagers on the matter. This report is made for the reference of Sachiew Plantation, to request that they immediately conduct repair works on the dug up road. If the company refuses to do so, the residents of the longhouse will be taking the matter to court.

Consequently, such incidents no longer occurred.

**The entrance of outsiders to halt the harvest of oil palm fruits**

Apart from the damage done to the roads surrounding our village, the harvest of oil palm fruits by the villagers had also invited another new kind of trouble. Without any permission, our village began to be visited by outsiders who attempted to halt our actions.

Possibly, in late 2013, three vehicles carrying members of the General Operations Force and other unknown individuals, entered our customary territory. They were headed straight for the oil palm plantation area. As soon as the villagers discovered about the arrival of these outsiders, we rushed to see them. When we finally managed to intercept them, we inquired about the purpose of their travel to our village. They then informed us that they had come to our village to provide
assistance to the company. Their aim was to hold a discussion with us and put the request to us to halt our activities of harvesting of the oil palm fruits in the plantation. We told them that we did not wish to stop doing so, because the plantation was in fact developed on our land. We requested that they leave and inform the management staff of the plantation to come and see us instead. Before they left, we also told them that it would be best that they do not come to the village anymore.

During the same year, there was also an incident where two villagers, one of them being Umar Jalen, and their vehicle, had been stopped by unknown individuals, right after the villagers completed the task of harvesting the oil palm fruits. We were actually on our way out to send the fruits to our fruit collector agent. All of a sudden, we were being chased by a car with seven people in it. The car then intercepted our vehicle and prevented us from continuing our journey.

The seven individuals then got out of their car and began to threaten that they would beat us up if we retaliated. We became extremely nervous to be mistreated in this way. The men then took possession of our car and drove it away, leaving us stranded by the road side. We then walked for around one hour to the Batu Niah police station to report on the incident. However, we do not have a copy of this report with us.

After returning to the longhouse, the villagers attempted to find the car which had been driven away. At last, the police informed us that the car was in their possession at the Miri police station, along with the harvested oil palm fruits in it. The car then remained in police custody for a week. The police told us that the car was seized because the villagers were suspected of stealing the oil palm fruits. Fortunately, after the car was released to its owner, no charges were pressed on us.

Subsequently, another incident took place when the villagers were once again visited by unknown individuals. In April 2015, two villagers made a telephone call to us, urging us to immediately come to the site where they were harvesting the oil palm fruits since the unknown individuals were attempting to photograph them while they were working. When we rushed to the scene, a quarrel ensued between us and the outsiders. At last, the outsiders left the village.
A police report [Batu Niah/000656/15] was lodged by Lachi Bikang on the incident on April 7, 2015:

On 07.04.2015... in block 18, Sachiew Plantation, Batu Niah, when one of my people, Bangga anak Kedit... was driving a vehicle... had been loaded with oil palm fruits, was being chased by a four-wheel vehicle with the plate number... in gray colour with 4 men. They were chasing us until the people reached their family farms. The men also took photographs of the car of my son-in-law... which was parked at the boundary between block 18 and the family farm belonging to a villager. We do not know the purpose of them chasing after us and taking the pictures of our vehicles. We are only harvesting the oil palm fruits located in blocks 17, 18 and 19 of Sachiew Plantation because the company had failed to fulfill its obligations of an agreement with myself. We are not satisfied with the actions of the plantation. This report is made as a reference, for fear of any untoward incident happening to my family members, our vehicles and me.

Our action of harvesting the oil palm fruits was continuously being equated to theft, a criminal act, by the company. On July 31, 2015, we were accused of harvesting the oil palm fruits “without permission” by another unknown individual. Lachi Bikang lodged another police report [Batu Niah/001493/15] on this incident on July 31, 2015:

...I was told by my friend by the name of Umar anak Jalen that he had seen 5 unknown men (M) in a gray Hilux car... who had entered my farm. Subsequently, I went to meet one of them and was then accused of harvesting the oil palm fruits in my farm without any permission. I am not satisfied with the action of the man concerned, of accusing me as such, when the plantation land in fact is under my ownership. This police report serves only as a reminder, because I worry about any untoward incident that may occur and as a future reference, if necessary.

Later, in the afternoon of November 16, 2016, after completing the task of harvesting the fruits, two villagers were visited by three persons who were known to us, and two other individuals whom we did not know. These individuals claimed that the action of the villagers was wrong because we had stolen the harvest belonging to the plantation. The men also took photographs of the two villagers without their permission. They then demanded the two villagers discard the harvested oil palm fruits. If they refused to do so, according to one of them, we could “get into trouble”. In fact, he even raised the issue of the murder of Bill Kayong, a political activist and lawyer who was suspected to be murdered in June 2016, as a result of his fight in opposing an oil palm plantation project affecting a customary territory in Miri. We became very anxious as a result of his words.
The following was a police report [Batu Niah/001778/16], made by Smitheson Dackry Bangga dated November 17, 2016 on the frightening incident:

...one of the (M) Chinese had uttered to the two of us that “the both of you must throw away the oil palm fruits that you carry with you and if you do not do as such both of you will get into trouble and he also told me that he was a police officer from Miri and he also said that do not let until a case like Bill Kayong happen again and then they left the area. This report is made for further actions to be undertaken by the police.

Lastly, Lachi Bikang also made another police report [Batu Niah/000129/17] dated January 27, 2017 on the entrance of unknown persons to our village:

On 27.01.2017... at Block 19, Adar Area of Sachiew Plantation I became aware that 5 unknown Malay men were walking around the area and I do not know what was the purpose of them doing so. Soon after, they left through the main road. This police report is made in respect of the safety of the longhouse residents of Lachi Ak Bikang for fear of any untoward incident happening in the future.

Police arrest

Lastly, as a result of the harvesting of the oil palm fruits, several villagers ended up being arrested by the police. In the beginning, no charges were pressed on the individuals concerned. We heard that a few residents from other villages who had been harvesting the fruits on their customary territories had also been arrested.

In August 2015, a mass police arrest incident took place. Ten villagers were detained and eight vehicles that had been used to transport the oil palm fruits were seized and brought to the Batu Niah police station. The officer from the Malaysian Oil Palm Board (MPOB) was also called in. After their arrest and interrogation by the police, the individuals were released at around 2 pm on the same day. They were then escorted by the police to take the oil palm fruits to the processing mill. The fruits were then sold to the mill and the profit received was seized by the police. Other villagers also went to the police station during the incident, including women and young children. Fortunately, no charges were made against the people.
Lachi Bikang once again lodged a police report [Batu Niah/001642/15] on this incident on August 24, 2015:

> On 22/08/2015... at Rumah Lachi anak Bikang Sg. Sebatuk Batu Niah I received information that the MPOB had conducted checks and arrests on persons transporting the oil palm fruits... I as the chairperson of Rumah Lachi would like to make this report as a reminder for fear that the people under me may again be arrested by MPOB in the future.

Finally in August 2017, around 21 villagers were charged under Section 379 of the Penal Code, for theft. We also heard that residents from neighbouring villages were also similarly charged. On August 8, 2017, the police arrived at our longhouse to distribute individual written orders addressed to the residents involved. The individuals were instructed to present themselves at the police station to assist in the investigation launched as a result of two police reports that had been made against them. Bangga Kedit and Umar Jalen were also recipients of the police order. Therefore on August 11, the two presented themselves at the Miri Police Station as instructed, along with all the others who had been given the same order.

Each of us was then questioned by different police officers. The police also took our photographs and fingerprints. The investigation took around two hours for each individual. We were informed that police reports had been made against us concerning our action of ‘stealing’ the oil palm fruits belonging to the company. Bangga and Umar certainly explained to the police on the reasons behind their actions. We stressed that we were only harvesting oil palm fruits on blocks which fell under our customary territory. Umar also clarified that:

> I am only harvesting oil palm fruits on my land. Tomorrow and the day after I will still be on my farm. I will never sell off my land.

Subsequently, Bangga and Umar were charged under Section 379 of the Penal Code which deals with theft. Fortunately, the charge was eventually dropped.

**Dialogue**

Throughout the years, the company also attempted to conduct discussions with us from time to time. However all such discussions have thus far failed to resolve anything.

First, we were invited to attend a dialogue organised at the Department of Lands and Surveys in Miri in July 2013. This dialogue was also participated by other
villages affected by this project and attended by representatives from the Resident Office, the Department of Lands and Surveys, the police, the relevant community leaders, the project proponent and its contractor. During this dialogue, we demanded that the 80 acres from the blocks 17, 18 and 19 to be handed back to us, due to the failure of the company to implement the out of court settlement satisfactorily. The resident then apparently suggested that this case was in actual fact quite simple, as our demands were only a few. He said that he found this was not a complicated case that a civil legal action was necessary. The company did not say much during this dialogue. We agreed to write a letter to them to explain our demands further. A few days later, this letter, addressed to the company was handed to the Department of Lands and Surveys for verification.

Around April or May 2014, we were invited to participate in two dialogues with the company in Miri. This dialogue was conducted only for our village. Around ten people attended it. The company requested that we halt our intention to file another court action to resolve the dispute on the three blocks. They offered us RM77,000 for compensation through the drawing of a new agreement. As we refused to receive the compensation offered, no document was signed.

We also further informed them that the compensation money by right must be way higher than that being offered. In addition, it must also be paid to all affected families. We also continued to press that the three blocks must be returned to us, because originally, the out of court settlement had instructed them to develop 122.92 acres of land for us. They however refused to fulfil this demand. Therefore we informed them that we would continue to harvest the oil palm fruits in the concerned areas.

Apart from the above, we also participated in other discussions with the company at their site office from 2014 to 2016, along with other neighbouring villages.

In 2015, we were also invited by the sub-district office of Niah-Suai to attend a dialogue in relation to the “land claims and widespread loss/theft of oil palm fruits in the PL Sachiew Plantation Niah” on May 13. This dialogue was then postponed to June 6, 2015. At last, the event failed to take place.

The last dialogue which we attended was conducted at the Pujut police station which took place for a day at the end of 2015. This program on customary land rights was co-organised by the state authorities and the police. Many other villages affected by oil palm plantations also participated in the event. Perhaps around 200 persons from different villages were there. The company was also present to observe. The villagers were requested to bring forward questions on their customary land and oil palm plantation projects to be responded to by the police. However, there was no clear outcome from this event.
Life continues in distress

We continued to harvest the oil palm fruits in the three blocks concerned until the arrest of several villagers in 2017. Eventually, we also filed another civil action in 2017 in which we obtained a judgement in default from the High Court. This judgement made the following rulings:

(i) A declaration that the defendant was in breach of the deed dated 11th March 2008.

(ii) An order for specific performance on the part of the defendant of the said contract or deed dated 11th March 2008.

(iii) Further and/or in the alternative general damages against the defendant to be assessed by the Registrar of the High Court.

(iv) Interests to be charged on the said amount of damages at the rate 8% per annum from 11th March 2008 to date of judgement and realisation.

(v) Costs of RM1,500.

In 2015, we formed our own residents’ association and began to learn about our rights in a more systematic manner. We continue to feel distressed and sad over the conflict that had divided our community. Familial ties have been affected, tension plagues many families. Community members are no longer friendly with each other. Sometimes, sour faces are shown, neighbourly friendships have been disturbed and some of us, no longer speak to each other. Our hearts are very much pained by all these.

2. Consent or opposition

(i) Describe whether the community members have given their consent or remained opposed to the plantation operations.

In the beginning, during the land clearing operations, almost all families were opposed to the project. Two or three years later, their number gradually dwindled, after the people were being showered with many sweet promises and received small amounts of inducements and compensations. Now, only 12 families continue to oppose the project.
(ii) Did any of the companies attempt to take the advantage of the consent given by any of the community member(s) to continue with their operations?

Yes.

(iii) Please explain how it was possible for this to take place without the approval of the entire community?

By way of gifts from the company and the payment of compensation. We believe that some people had also been persuaded by certain parties behind our backs.

3. Prior information, consent and transparency

(i) Were community members given prior information on the issuance of the plantation licences before the commencement of any operations? If no, has there been any other information disseminated before the operations started? Has the free, prior and informed consent process (FPIC) been adequately applied in the execution of the oil palm plantation project concerned?

No. We were not informed on the issuance of this plantation licence prior the commencement of the operations. There was only a consultant who came to visit us a few years earlier. Although he had informed us on the proposal to develop the plantation, we were not given any further information on the matter. This project has failed to utilise the FPIC process.

(ii) If some form of information dissemination on the oil palm plantation project was conducted, how and at what stage of the project was this first done? Who were the parties involved in the information dissemination process?

Irrelevant.

(iii) What was the content of the information given? Was it comprehensive and transparent? Did the community members receive satisfactory responses to the queries and concerns that they have raised?

Irrelevant.

(iv) Did the community obtain important information such as licence registration numbers, maps of the licensed areas and other important details?

No.
4. Community protests and consultations

(i) Did the community members meet with the company representatives at the encroachment site or their accommodation facility to voice their immediate protest? If yes, please describe these encounters further.

Yes. Please see above.

(ii) Did the community members meet with the authorities to voice their protest? If yes, please describe these encounters further.

Yes. Please see above.

(iii) Did the company or authorities themselves invite the community members to participate in any consultation process? If any, when did these take place – prior to/after the licence issuance, prior to/after the commencement of the project activities on the ground, prior to/after community protests? Please describe these consultations further.

Yes. We did participate in dialogues with them. However, all these took place only after the operations had commenced. We continued to protest. We also continued to demand that adequate compensation is paid to us and for the obligations spelt out in the out of court settlement to be fulfilled by the company.

(iv) What was the outcome of the protests and consultation process, if any? Did they manage to put an end to the encroachments?

No positive outcome was able to be obtained.

5. Compensation and damages

(i) Has compensation ever been promised and actually delivered to any of the community members? What was the form, amount and rates of the compensation received?

Yes. Please see above.

(ii) Generally, was this compensation deemed as adequate by the community members?
No. We were not very interested in compensation. In fact, we would like our land back.

6. Protest correspondence and documents

(i) Did the community members write any letters or other documents to any of the companies and/or the authorities to express their written protest?

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<td>Marudin and Group Plantations</td>
<td>Plantation manager, Sachiew Plantations</td>
<td>Demanding our local native customary rights</td>
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<td>4. July 4, 2013</td>
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<td>6. February 10, 2014</td>
<td>Lachi Bikang and group</td>
<td>General manager, Sachiew Plantations</td>
<td>Demanding our local native customary rights</td>
</tr>
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(ii) Please describe the responses received from the companies and authorities, if any.

We received an offer letter dated May 14, 2014 to resolve our demands. However, we rejected the offer that was being made because it failed to fulfil our demands. Please see above.
7. Police

(i) Did any community member(s) lodge any police reports to express opposition to the oil palm plantation project or to complain on any matter related to the project, including concerns on their safety and that of their family members?

<table>
<thead>
<tr>
<th>Date</th>
<th>Report number</th>
<th>Complainant</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 29, 2013</td>
<td>Batu Niah/000630/13</td>
<td>Unyat Tambat</td>
</tr>
<tr>
<td>May 24, 2013</td>
<td>Batu Niah/000744/13</td>
<td>Unyat Tambat</td>
</tr>
<tr>
<td>July 14, 2013</td>
<td>Batu Niah/001039/13</td>
<td>Bangga Kedit</td>
</tr>
<tr>
<td>November 5, 2014</td>
<td>Batu Niah/001733/14</td>
<td>Lachi Bikang</td>
</tr>
<tr>
<td>April 7, 2015</td>
<td>Batu Niah/000656/15</td>
<td>Lachi Bikang</td>
</tr>
<tr>
<td>July 31, 2015</td>
<td>Batu Niah/001493/15</td>
<td>Lachi Bikang</td>
</tr>
<tr>
<td>August 24, 2015</td>
<td>Batu Niah/001642/15</td>
<td>Lachi Bikang</td>
</tr>
<tr>
<td>September 26, 2015</td>
<td>Batu Niah/001796/15</td>
<td>Lachi Bikang</td>
</tr>
<tr>
<td>November 17, 2016</td>
<td>Batu Niah/001778/16</td>
<td>Smitheson Dackry Bangga</td>
</tr>
<tr>
<td>January 27, 2017</td>
<td>Batu Niah/000129/17</td>
<td>Lachi Bikang</td>
</tr>
</tbody>
</table>

(ii) Have any community members been detained by the police as a result of their protest actions or related activities against the oil palm plantation project? Were they eventually charged?

Yes. After our arrest in August 2017, a number of villagers were charged under Section 379 of the Penal Code for theft. However, the charges were eventually dropped.

8. Pressure, intimidation, threats, harassment

(i) Did any of the community members ever receive any pressure, intimidation, threat or harassment from any party, in relation to the protests against the encroachment on your customary territory?

Yes. We have witnessed the arrival of unknown persons who demanded that we stop harvesting the oil palm fruits on our land. Some of these persons had also acted rather aggressively, such as intercepting our vehicle or raising the issue on the murder of the lawyer activist, Bill Kayong.

(ii) If yes, please describe actions that were undertaken after such incidents.

We felt angry and in fact even more infuriated by their words, especially the claim that we had no right to defend our own land.
(iii) Please describe the effects of the experience on the person(s) receiving this pressure, intimidation, threat or harassment as well as the community at large.

Naturally, we have been distressed. We are also a little concerned about our own safety.

9. Evaluation on the company representatives

(i) In your view, did the companies respond in a polite and respectful manner when confronted by the complaints and protests from the community members?

Sometimes they were impolite. Although in front of us they would behave rather normally most of the time, they have continued to fail in fulfilling our demands.

(ii) Has any company ever broken any of their promises to the community? If yes, please describe these incidents further.

Yes. In our view, the out of court settlement in 2008 had failed to be fulfilled. Please see above.

10. Community evaluation on regulatory agencies and the police

Please describe the general views of the community members with regards to the manner in which the authorities respond to your protests and complaints.

(i) Are the community members satisfied with their responses and services?

No.

(ii) Did the authorities show any bias in favour of the companies?

Yes.

(iii) Has any authority taken any actions which to your view was excessive?

No.
(iv) In your view, have the authorities been transparent in their dissemination of information to the community members?

No.

11. Status of the indigenous customary land rights from the perspective of the company and authorities

(i) Please describe the views of the companies and authorities on the status of the customary land rights of the community. Did they recognise the existence of your rights?

The authorities frequently stressed that we do not have rights to our land because the land belongs to the state. We of course do not agree with this view.

(ii) If the community members are said to possess no such land rights, to which extent then do the authorities accept the existence of your rights, since your housing areas are also located in the same vicinity?

The state government has never clarified their views on the boundaries of our customary territories and the extent of our territory. We have never been given any map of our NCR area. However, we are of course very aware of the boundaries of our customary territory and have always taken action to manage the land in accordance with our customs.

(iii) Did any of the companies or state authorities make any legal references to support their view that the community do not possess any rights to the encroached land (state land, forest reserve etc.)?

Yes. The Sarawak Land Code 1958 has been mentioned before. We were informed that land without any documentary land title is part of state land. However, according to our customs, this land still belongs to us. We were relocated here through a scheme that was managed by the British colonial authorities.
SECTION D: CUSTOMARY TERRITORY AND GAZETTED FORESTS

Have any parts of your customary territory been gazetted as forest reserves, protected forests or any type of conservation areas?

No.

(i) If yes, please state the year the gazetting was undertaken. Do the community members possess any documents on the gazetting process?

(ii) If yes, please describe how the gazetting has adversely affected your rights?

(iii) If yes, did the authorities conduct any consultation with the community to obtain their consent on the gazetting process? Please state any important information on how the consultations were conducted.

(iv) If no consultations had ever been conducted, how did the people become aware of the existence of the gazetted forest.
**SECTION E:**
**INDIVIDUAL SOCIO-ECONOMIC FAMILY SURVEY**

Table A-4: Results of individual surveys amongst members of the Rumah Lachi Residents’ Association on the impacts of oil palm plantation on their livelihood, income and dietary sources

<table>
<thead>
<tr>
<th>Impacts on livelihood, income and dietary sources</th>
<th>General comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Respondent 1, female, b. 1965</td>
<td></td>
</tr>
<tr>
<td>Married with children</td>
<td></td>
</tr>
<tr>
<td>All three plots of land and two farm huts destroyed</td>
<td></td>
</tr>
<tr>
<td>Her family has now relocated to the city but maintains their house in the village. She is a homemaker dependent on her husband financially. She used to fish and gather forest produce before all her land was destroyed.</td>
<td>She stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. She also observed that the soil fertility has also decreased sharply, making cultivation of other crops difficult. She stressed that the land is not for sale, even at increased prices, for the sake of their descendants.</td>
</tr>
</tbody>
</table>

**Impacts on income sources:**
They are forced to harvest the oil palm fruits on their land. She also cultivates vegetables for sale in her new home.

**Impacts on food sources:**
When in the village, nearly all food sources are purchased. Her family would also depend on bottled water since the communal conflicts make her uncomfortable obtaining water from the filtered tanks.

| Respondent 2, male, 1987                          |                  |
| Married with children                             |                  |
| Two out of three plots of land destroyed.         |                  |

Respondent 2, male, 1987
Married with children
Two out of three plots of land destroyed.
He used to fish and gather forest produce before all the land was destroyed.

**Impacts on income sources:**
They are forced to harvest the oil palm fruits on their land. His family also cultivates their own oil palm on the one remaining plot of land.

**Impacts on food sources:**
Nearly all food sources are purchased. Rice cultivation used to be carried out in the plots that had been destroyed. Today for drinking, bottled water is purchased since the on-going communal conflict has made them feeling uncomfortable obtaining water from the filtered communal tanks. For cleaning, cooking and other purposes, they utilise their own water tanks.

He stated that he is concerned of further backlash from parties who may be unhappy with their continued effort to defend their land rights.

<table>
<thead>
<tr>
<th>Respondent 3, female, 1990s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married with children</td>
</tr>
<tr>
<td>Three out of four plots of land destroyed</td>
</tr>
</tbody>
</table>

She is a homemaker dependent on her husband financially. Her husband used to have contractual employment which was not very stable. She used to join her parents to farm, fish and gather forest produce for domestic consumption before much of their land was destroyed.

**Impacts on income sources:**
They are forced to harvest oil palm fruits on their land. Her family continues cultivating vegetables in the one remaining plot of land. During the fruiting season, she would buy fruits in bulk from those who wish to sell to her, to be resold elsewhere. Together with her husband, they also provide a private car charter service.

She stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. She has concerns on her family’s safety as a result from their continued opposition to the plantation. She stressed that the land is not for sale, even at increased prices, for the sake of her ancestors and descendants.
### Impacts on food sources:

Nearly all food sources are purchased. Rice cultivation used to be carried out in the plots that had been destroyed. Drinking water is mostly purchased from bottled water since the on-going communal conflict has made them feeling uncomfortable obtaining water from the filtered communal tank. They also have a small family rainwater tank prioritised for washing, cleaning, cooking and at times, drinking. They used to source drinking water from the river, but today the river is only used for bathing.

**Respondent 4, female, 1973**  
**Married with children**  
**Farms destroyed unquantified as they belong to her husband’s family.**

Originally from another district, she moved into the community upon marriage when the clear felling for the plantation began in the 1990s. Her main income since then is derived from the sale of vegetables. Due to her husband’s employment, they used to stay in the city, before returning to the village.

### Impacts on income sources:

They are forced to harvest oil palm fruits on their land. She continues with the cultivation of vegetables. She also buys fish from others to be resold in the market. Fishing output is very little, only sufficient for her family consumption.

### Impacts on food sources:

Nearly all food sources are obtained from the land, with the exception of meat. Drinking water is mostly purchased from bottled water since the on-going communal conflict has made them feeling uncomfortable obtaining water from

She stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. She has concerns on her family’s safety as a result from their continued opposition to the plantation. She stressed that the land is not for sale, even at increased prices, for the sake of her descendants.
the filtered communal tank. They also have a small family rainwater tank prioritised for washing, cleaning, cooking and at times, drinking. They used to source drinking water from the river, but today the river is only used for bathing.

**Respondent 5, female, 1971**
**Married with children**
**Farms destroyed unquantified as they belong to her husband’s family.**

Originally from another district, she moved into the community upon marriage when the clear felling for the plantation began in the 1990s. She is a homemaker financially dependent on her husband. She gathers forest produce, cultivates vegetables and fishes whenever she can but only for family consumption, as the plantation has destroyed a lot of natural resources.

**Impacts on income sources:**
They are forced to harvest oil palm fruits on their land.

**Impacts on food sources:**
Most food sources are purchased. She is still able to harvest wild vegetables in her remaining land for family consumption. Drinking water is mostly purchased from bottled water since the on-going communal conflict has made them feeling uncomfortable obtaining water from the filtered communal tank. They also have a small family rainwater tank prioritised for washing, cleaning, cooking and at times, drinking. They used to source drinking water from the river, but today the river is only used for bathing.

She stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. She stressed that the land is not for sale, even at increased prices, for the sake of her descendants.

**Respondent 6, male, 1995**
<table>
<thead>
<tr>
<th>Married with children</th>
<th>Farms destroyed unquantified as the plots have been destroyed upon his birth</th>
</tr>
</thead>
<tbody>
<tr>
<td>By the time he was born, the clear felling for the plantation has already begun. His father had stable employment in the city and his mother is a homemaker.</td>
<td>He stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. He stressed that the land is not for sale, even at increased prices, for the sake of his descendants.</td>
</tr>
</tbody>
</table>

**Impacts on income sources:**
They are forced to harvest oil palm on their land. He also has stable employment in the city.

**Impacts on food sources:**
Most food sources are purchased. Drinking water is mostly purchased from bottled water since the on-going communal conflict has made them feeling uncomfortable obtaining water from the filtered communal tank. They also have a small family rainwater tank prioritised for washing, cleaning, cooking and at times, drinking. They used to source drinking water from the river, but today the river is only used for bathing.

<table>
<thead>
<tr>
<th>Respondent 7, female, 1950s</th>
<th>Single mother</th>
</tr>
</thead>
<tbody>
<tr>
<td>Five out of six plots of land destroyed</td>
<td></td>
</tr>
</tbody>
</table>

She is a homemaker who used to be financially dependent on her husband. She gathers forest produce, cultivates vegetables and fishes whenever she can but only for family consumption, as the plantation has destroyed a lot of natural resources.

**Impacts on income sources:**
They are forced to harvest oil palm fruits on their land.

She stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. She stressed that the land is not for sale, even at increased prices, for the sake
**Impacts on food sources:**
Most food sources are purchased except for vegetables. Drinking water is mostly purchased from bottled water since the on-going communal conflict has made them feeling uncomfortable obtaining water from the filtered communal tank. They also have a small family rainwater tank prioritised for washing, cleaning, cooking and at times, drinking. They used to source drinking water from the river, but today the river is only used for bathing.

---

**Respondent 8, female, 1950s**
**Single mother**
**Five out of six plots of land destroyed**

Her main income used to be derived from the sale of forest produce, vegetables, rice and fish.

**Impacts on income sources:**
The villagers are forced to harvest oil palm fruits on their land.

**Impacts on food sources:**
Most food sources are still obtained from the land with the exception of meat. Drinking water is mostly purchased from bottled water since the on-going communal conflict has made them feeling uncomfortable obtaining water from the filtered communal tank. They also have a small family rainwater tank prioritised for washing, cleaning, cooking and at times, drinking. They used to source drinking water from the river, but today the river is only used for bathing.

She stated that most forest and river resources have been destroyed as a result of the plantation. The villagers are no longer free to move about their territory which has largely been cultivated with oil palm. She stressed that the land is not for sale, even at increased prices, for the sake of her descendants.
Table A-5: Summary of individual surveys amongst members of the Rumah Lachi Residents’ Association on the economic, social, cultural and environmental impacts of oil palm plantation project

<table>
<thead>
<tr>
<th>R</th>
<th>Destruction of farm land</th>
<th>Decline in forest resources</th>
<th>Decline in river resources</th>
<th>Decline in income and livelihoods</th>
<th>Decline in sources of food, construction and craft materials</th>
<th>Decline in natural resources for healing and cultural activities</th>
<th>Destruction of burial grounds</th>
<th>Employment opportunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (F)</td>
<td>3/3 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
<tr>
<td>2 (F)</td>
<td>3/10 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
<tr>
<td>3 (M)</td>
<td>Unquantified</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
<tr>
<td>4 (F)</td>
<td>1/7 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
<tr>
<td>5 (F)</td>
<td>1/6 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
<tr>
<td>6 (F)</td>
<td>2/5 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
<tr>
<td>7 (F)</td>
<td>5/15 plots destroyed.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>❌</td>
<td>❌</td>
</tr>
</tbody>
</table>
8 (F) 3/13 plots destroyed. ✓ ✓ ✓ ✓ ✓ ✗ ✗

R: respondent; F: female; M: male

Table A-6: Summary of individual surveys amongst members of the Rumah Lachi Residents’ Association on the physical and psychological impacts of the oil palm plantation project

<table>
<thead>
<tr>
<th></th>
<th>Physiological issues</th>
<th>Psychological well-being</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (F)</td>
<td>Eye irritation during land clearing activities. Vomiting and skin irritation possibly due polluted water.</td>
<td>Feelings of anger and prolonged worrying over the loss of land.</td>
</tr>
<tr>
<td>2 (F)</td>
<td>Eye irritation during land clearing activities.</td>
<td>Feelings of anger over the loss of land.</td>
</tr>
<tr>
<td>3 (M)</td>
<td>None.</td>
<td>None.</td>
</tr>
<tr>
<td>4 (F)</td>
<td>Diarrhoea and skin irritation, possibly due to polluted water.</td>
<td>None.</td>
</tr>
<tr>
<td>5 (F)</td>
<td>None.</td>
<td>Feelings of anxiety over the loss of land.</td>
</tr>
<tr>
<td>6 (F)</td>
<td>Eye irritation and breathing difficulties during land clearing operations, which also affected the children. Skin irritation, possibly due to polluted water.</td>
<td>Feelings of fear over her family’s safety and intimidation from unknown outside parties. Feelings of anger and prolonged worrying over the loss of land.</td>
</tr>
<tr>
<td>7 (F)</td>
<td>None.</td>
<td>Feelings of fear over his family’s safety and</td>
</tr>
</tbody>
</table>
intimidation from unknown outside parties. There has been no adequate response from the police despite the community having made several reports.

| 8 (F) | Eye irritation during land clearing activities. Skin irritation possibly due polluted water. | Feelings of anger over the loss of land and fatigued by the struggle of their land rights defence. |

R: respondent; F: female; M: male
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