

Human Rights Situation of the Indigenous Peoples (Orang Asal) in Malaysia

Submission on the 3rd Cycle Universal Periodic Review of Malaysia 2018

Submitting Organisations

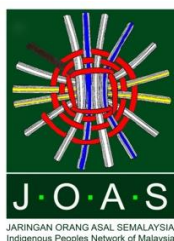
Jaringan Orang Asal SeMalaysia (JOAS)

The Indigenous Peoples Network of Malaysia (or Jaringan Orang Asal SeMalaysia, JOAS) is the umbrella network of 100 organisations¹ throughout Malaysia that represents different Indigenous Peoples' organisations and communities. As the focal point for indigenous rights and advocacy in Malaysia, JOAS provides the indigenous communities with representation nationally, regionally and internationally.

Contact details of Reference Person

Mr. Yusri Ahon, President, JOAS or Mr. Thomas Jalong, Secretary General, JOAS at

Tel: +6088726413, Email: joasmalaysia@gmail.com



Asia Indigenous Peoples Pact (AIPP)

AIPP is a regional organization founded in 1988 by indigenous peoples' movements. It is committed to the cause of promoting and defending indigenous peoples' rights and human rights and articulating issues of relevance to indigenous peoples. Based in Chiang Mai, Thailand, AIPP currently has 48 member organizations from 14 countries in Asia including Japan. It has Special Consultative status with the UN Economic and Social Council (ECOSOC).

Website: www.aippnet.org

Contact: aippmail@aippnet.org Address: 112 Moo 1, T. Sanpranate, A. Sansai, Chiang Mai, 50210, THAILAND



¹ Please see Appendix 1: List of organisations of the Indigenous Peoples Network of Malaysia (JOAS)

Context: Basic information about the Indigenous Peoples of Malaysia

The Orang Asal or Indigenous Peoples of Malaysia consist of more than 80b ethno-linguistic groups, each with its own culture, language and territory. Together we number about 4 million, or about 15 per cent of the national population. Collectively, our peoples count as among the most poor in Malaysia, due to marginalisation from the mainstream society on account of the non-recognition of our rights as contained in both national and international customary law.

Basic and Focus of the Review (UPR)

This review focuses on the current human rights situation of the Indigenous Peoples (Orang Asal) in Malaysia based on the recommendations accepted by Government of Malaysia (GoM) during the 2nd cycle of the UPR in 2013. This review will also look into Malaysia's commitment to the implementation of the UNDRIP of which the GoM have endorsed twice (30 June 2007 & 13 September 2007), through the Party-driven and intergovernmental negotiation process.

During the 2nd cycle of the UPR, Malaysia have accepted 150 recommendations in full, in part and in principle, noting 82 of them. However, only 64 of these could be described as somewhat measurable, with only 17 calling for specific actions to be taken by the GoM.² On the issue of the rights of Indigenous Peoples, 10 recommendations were put forward by 9 countries in which only 4 were accepted in full while the rest were rejected.

1. Violations with Regards to Right to Land

1.1 Violations with regards to land rights continue to be the main issue affecting the Orang Asal in Malaysia. The recommendations on the rights of Indigenous Peoples that were rejected during the last cycle of the UPR touched on the issue of indigenous land rights and their rights in law and practice as in accordance to the UNDRIP. Two of the rejected recommendations call on the establishment of an independent body to look into the Indigenous Peoples' issues.³ hile another rejected recommendation call for the visit of the Special Rapporteur on the rights of Indigenous Peoples to Malaysia. However, Malaysia did invite the Special Rapporteur on the rights of Indigenous Peoples to visit Malaysia but was rejected by the GoM in March 2014.⁴

1.2 The GoM have given the excuse that a Task Force had been set up to investigate the issues brought up in the Human Rights Commission of Malaysia's (SUHAKAM) National Inquiry on Land report.⁵ After the taskforce have deliberated, the GoM only accepted 17 of the 18 recommendations made by SUHAKAM in its report.⁶

1.3 Since then, the report was presented to the cabinet and a cabinet committee was formed which was then chaired by the former Deputy Prime Minister of Malaysia, Tan Sri Muhyiddin Yassin. However, he was sacked from the cabinet and Task Force report was sent to the Administrative & Integrity Division (BITU) in the Prime Minister's Department and since then, there is no effective involvement, explanation, and information on the Cabinet Committee's outcomes regarding the 17 accepted recommendations made by SUHAKAM.

² COMANGO (2016). *Malaysia's 2016 UPR Mid-Term Review*. https://www.upr-info.org/sites/default/files/document/malaysia/session_17_-_october_2013/comango-malaysia-mid-term.pdf

³ A/HRC/22/14/Add.1, para 147.85 (Norway)

⁴ <https://iva.aippnet.org/malaysia-msia-disallows-un-special-rapporteur-to-visit-assess-treatment-of-indigenous-people/>

⁵ <https://drive.google.com/file/d/0B6FQ7SONa3PRbUInUGcxdzdEWU0/preview>

⁶ <https://www.bharian.com.my/node/17603>

- 1.4** The Orang Asal in Malaysia have been seeking redress at the Malaysian Courts and the Courts have endorsed that the Orang Asal have rights to their lands, territories and resources through the judgments of cases of Adong Kuwau⁷, Nor Nyawai⁸, Sagong Tasi⁹, Rambilin¹⁰ and Madeli Salleh¹¹. However, of late the Apex Court in Malaysia, i.e. the Federal Court have delivered damaging judgments in the Sandah Tabau's¹² case on Indigenous Peoples rights to land in the state of Sarawak by not recognising their ancestral territories or *Pemakai Menoa* and communal forest or *pulau galau* as having a 'force of law'¹³.
- 1.5** Since the Federal Court judgment in the Sandah Tabau's case, many more cases that were brought to the Federal Court by the Sarawak State Government for appeal are lost by the Orang Asal. In the case of Nyutan Jami¹⁴ the Federal Court ruled that once a lease is issued over the customary land of the natives, the success of proving the existence of native customary rights (NCR) does not entitle the NCR land owners to that part of the land¹⁵. These cases will set precedence to all the other land cases that are pending in the Malaysian Courts and the outcome does not look good.
- 1.6** In JOAS submission on the 2013 UPR review, there has been no change in the issuance of communal titles to develop native customary lands under a joint venture scheme with the government agencies or private sector in the state of Sabah. The Orang Asal in Sabah are concerned that the merging of NCR lands into large plantations under this scheme is deemed dangerous to the status of rights claim of indigenous communities to their traditional lands, territories and resources.¹⁶
- 1.7** In Peninsular Malaysia, the State Government of Kelantan has been implementing the Peoples' Estate Programme (Program Ladang Rakyat) which is also known as forest estates. A total of 199,352 hectares of forest in Kelantan¹⁷ is set aside for this program whereby 13 Orang Asli villages¹⁸ are located within this said area.
- 1.8** Since 2012, the Orang Asli in Kelantan have protested the establishment of these forest estates. A total of 12 blockades were erected since and in November 2016, 47 Orang Asli were arrested and 17 were remanded for erecting blockades at 3 areas in the forest reserve.

⁷ Adong bin Kuwau & ors v Kerajaan Negeri Johor & Anor, No. 24-828-1994 (High Court of Malaya, Johor Bahru, November 21, 1996)

⁸ Nor Anak Nyawai & ors v Borneo Pulp Plantation Sdn. Bhd. & ors, No. 22-28-99-I (High Court of Sabah & Sarawak, Kuching, May 12, 2001)

⁹ Sagong Tasi & ors v Kerajaan Negeri Selangor & ors, No. MTI-21-314-1996 (High Court of Malaya, Shah Alam, April 12, 2002)

¹⁰ Rambilin binti Ambit v Assistant Collector for Land Revenue, Pitas, No. K 25-02-2002 (High Court of Sabah & Sarawak, Kota Kinabalu, July 9, 2007)

¹¹ Superintendent of Land & Surveys Miri Division & Anor v Madeli Salleh, No. 01-1-2006 (Q) (Federal Court, Putrajaya, October 8, 2007)

¹² TR Sandah Anak Tabau & ors v Director of Forest, Sarawak & Anor, No. 01-27-04/2015 (0) (Federal Court, Kuching, December 20, 2016)

¹³ <http://www.theborneopost.com/2016/12/21/federal-court-rules-no-ncr-over-pemakai-menoa-pulau-galau/>

¹⁴ TR Nyutan Anak Jami & ors v TH Pelita Sadong Sdn. Bhd. & Anor, No. 01-26-12/2014(Q) (Federal Court, Kuching, October 13, 2017)

¹⁵ <http://www.theborneopost.com/2017/10/13/no-title-rectification-for-ncr-land-once-lease-given-federal-court/>

¹⁶ https://www.cifor.org/publications/pdf_files/WPapers/WP-78Andriani.pdf, pg 9

¹⁷ http://jpnk.kelantan.gov.my/index.php?option=com_content&view=article&id=44:ladang-getah-klon-balak-tlc&catid=23:maklumat-perhutanan&Itemid=321&lang=my/

¹⁸ Villages affected are Kampung Kuala Wook, Kampung Kuala Wias and Pos Pasik at Gunung Stong Selatan Forest Reserve, Pos Pulat, Kampung Kuala Bering, Pos Gob and Pos Simpoh at Balah Forest Reserve, Depak, Angkek, Pos Bihai, Pos Belatim, Pos Balar and Pos Blau at Perias Forest Reserve.

After the arrests, no solution was put forward by the State Government to resolve the issue, and the Orang Asli continued their protest by erecting another 3 blockades in February 2018 and is currently on-going¹⁹.

1.9 The rights of Indigenous Peoples' to our traditional lands, territories and resources continues to not be recognised by decision-makers, government agencies and now the highest court in Malaysia.

2. Measures to Eradicate Poverty not to the Aspirations of Indigenous Peoples

2.1 Malaysia have accepted two (2) recommendations^{20 21} regarding poverty eradication and one (1) recommendation²² on enhancing the economic and social welfare particularly among the Indigenous Peoples. However, we have yet to see progress being made.

2.2 The development model put forward by the government through its Government Transformation Programme (GTP) does not meet the aspiration of the Orang Asal. The poverty rate throughout Malaysia among the Orang Asal community is still very high as the budget of the GTP did not reach the intended recipients fully. The GoM, through JAKOA, have failed to address and put an end to the problems faced by the Orang Asal community²³.

2.3 The development programmes initiated both the Federal and State governments have failed to properly consult the Orang Asal using the principle of free, prior and informed consent (FPIC). This can be seen by the dam building projects planned by the government in Peninsular Malaysia, Sabah and Sarawak.

2.4 The resettlement schemes that were established as a result of indigenous communities being displaced by the dams do not guarantee a better quality of life for the Orang Asal to break out of the poverty circle. Promises made by the government in order to entice the indigenous communities to accept the government's terms, normally do not materialised. One such example is the Penans who were displaced by the Murum hydroelectric dam in Sarawak. The Penans that were resettled at the Tagulang and Metalun are struggling to survive since they were resettled in 2013²⁴.

2.5 Joint venture (JV) schemes that are implemented by the government to get the indigenous communities to partner with corporations, usually plantation companies, often reduced the indigenous communities from being a landowner to a shareholder. For example, the government would put on paper the size of the land area to be developed as an oil palm plantation. The indigenous communities would be told they will have a percentage share in the JV and that they will receive dividends based on the shares they have. However, the dealings are not always transparent and the indigenous communities were often left out in

¹⁹ <https://www.hmetro.com.my/mutakhir/2018/02/313669/tambah-lagi-tiga-sekatan/>

²⁰ A/HRC/22/14/Add.1, para 146.215 (Bolivia (Plurinational State of))

²¹ A/HRC/22/14/Add.1, para 146.216 (Venezuela (Bolivarian Republic of))

²² A/HRC/22/14/Add.1, para 146.214 (Bolivia (Plurinational State of))

²³ <http://www.freemalaysiatoday.com/category/nation/2017/04/04/you-have-failed-the-orang-asli-suhakam-tells-the-government/>

²⁴ www.freemalaysiatoday.com/category/nation/2016/07/10/resettled-penan-community-struggles-to-survive/

the management and decision making process of the JV company. These JV schemes can be seen in the issuances of communal title in Sabah to private companies and government agencies, the JV concept of NCR land development in Sarawak and the people's estate in Peninsular Malaysia.

3. Malaysia's non-compliance with the UNDRIP

3.1 The GoM have endorsed the UNDRIP twice (30 June 2007 & 13 September 2007), through the Party-driven and intergovernmental negotiation process. It has also endorsed the UN Outcome Document²⁵ which reiterates the government's commitment to implement the UNDRIP.

3.2 However, during the last UPR cycle review in 2013, Malaysia rejected the recommendations pertaining to compliance with the UNDRIP²⁶. The government sees the UNDRIP as a 'soft-law' and it is non-binding, therefore compliance is not necessary.²⁷

3.3 The GoM paints a different image when it portrays itself internationally, by making statements that it is committed to uphold Indigenous Peoples rights, however this is all a façade and rhetorical act.

4. Continued Violations, Intimidation and Harassment by authorities

4.1 Indigenous communities are still suffering from intimidation and harassment by the authorities and law enforcement personnel when trying to protect their lands, territories and resources.

4.2 In 2015, the Iban communities in five longhouses from Sungai Bekelit, Sungai Serunggut and Sungai Kelitang were harassed by security personnel and auxiliary police of an oil palm company for defending their NCR land against encroachment from an oil palm company²⁸. As a result of inaction by the authorities on the various complaints lodged by the communities, a local activist, Bill Kayong who was assisting the communities was brutally assassinated in Miri in June 21, 2016. While the swift action of the police in apprehending the suspects is lauded, the trial outcome, whereby the mastermind of the murder was set free, is disappointing²⁹.

4.3 Indigenous leaders within JOAS are still facing discrimination and harassment by the government. Their names are on the blacklist of the Immigration Department, resulting in questioning at various entry points between Sabah, Sarawak and Peninsular Malaysia. Sarawak in particular, still uses its right to deny entry to indigenous, human rights and

²⁵ https://www.un.int/malaysia/sites/www.un.int/files/Malaysia/69th_session/2014-10-20_-_3rd_comm_national_statement_on_agenda_item_65.pdf

²⁶ A/HRC/22/14/Add.1, para 146.209 (Switzerland)

²⁷

http://webcache.googleusercontent.com/search?q=cache:kl_z7q5tPYMJ:www.parlimen.gov.my/files/hindex/pdf/KKDR-24102017.gempro.pdf+&cd=4&hl=en&ct=clnk&gl=my, pg 9

²⁸ www.freemalaysiatoday.com/category/nation/2015/03/25/longhouse-dwellers-in-land-dispute-being-harassed/

²⁹ www.thestar.com.my/news/nation/2017/06/06/bill-kayong-murder-trial-and-two-others-go-free/

political activists into the state. Indigenous activists who are conducting activities in the community are often followed and monitored by the police Special Branch unit.

4.4 In rejecting the recommendation on ensuring that laws on indigenous peoples as well as their implementation comply with the UNDRIP³⁰, this has caused too many cases of forced conversion into Islam³¹ among the Orang Asal, and once ‘Islam’ is stated on the MyKad, an identification document for Malaysians, it is extremely difficult to change the status. The indigenous peoples have been told that the issuance of MyKad will only be done if the applicant converts to Islam. For the Orang Asal who refused to convert, they will not receive any identification documents, which only means that they will not have access to education, to health and other benefits of a Malaysian citizen.

Recommendations

We reiterate our recommendations we made during the 2nd cycle of the UPR review in 2013 that to ensure the rights of Indigenous Peoples in Malaysia are protected, UN assistance, particularly from the United Nations Commission on Human Rights, UN Malaysia and other relevant bodies, including bilateral governments, are needed in areas of advocacy, advisory and capacity building. We would also make additional recommendations that are relevant for the 3rd cycle of the UPR review in 2018.

- i. GoM must ensure that the Cabinet Committee’s outcomes on the Task Force report on the SUHAKAM National Inquiry on Land be tabled in the Parliament as soon as possible;
- ii. Any recommendations from the Cabinet Committee that go against SUHAKAM’s recommendations must be made public and a National Consultation be held with the Orang Asal;
- iii. Development models envisaged by the government must be sustainable, transparent, and specific and sensitive to the context of indigenous peoples. It must ensure it is free from corruption. Indigenous peoples rights to FPIC from planning to implementation of related social development programmes are respected and promoted. The government must also ensure that the budget allocated for Government Transformation Programme is used in the best possible manner;
- iv. Development approaches must be based on the international Human Rights standards not watered down to fit so called ‘local values’ and it is in line with Orang Asal’s aspirations. The principle of FPIC must be upheld in any stage of a particular project that would affect the Orang Asal’s livelihood, lands, territories and resources;
- v. Even though the UNDRIP is a non-binding agreement, the GoM has a moral obligation to comply with it through its own domestic laws and the government should respect the rights, policies and decisions made and formulated by the government itself. It should develop a national action plan on indigenous peoples, including in relation to their commitment to the 2030 Agenda, as a follow-up to the WCIP Outcome Document;
- vi. The GoM should seriously consider the establishment of an Orang Asal tribunal to look into Indigenous Peoples’ rights disputes with different parties. The

³⁰ A/HRC/22/14/Add.1, para 146.209 (Switzerland)

³¹ JOAS is in possession of some examples of Orang Asli individuals whose children had to be categorised as being Muslim in their IDs despite the parents not being so.

establishment of an Orang Asal tribunal with judges who are well verse in Orang Asal issues would minimise the costs for the Orang Asal to bring their case to the Courts;

- vii. The GoM should not dismiss the formation of a National Commission on Indigenous Peoples as this commission can address many issues faced by the Orang Asal;
- viii. JOAS strongly urge the GoM to ratify the ILO Convention 169 – Indigenous and Tribal Peoples Convention, 1989 and the Convention on the Elimination of All Forms of Racial Discrimination.