

Original: English

**Contribution to call for contributions on Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition.**

This contribution is prepared and co-written by Henry Thomas Simarmata, Heba Albukhari, Georgia Henderson, and Dicky Lopulalan[[1]](#footnote-1)

**Question**

1. This response is to contribute to the call as the Expert Mechanism seek to develop to “assess the extent to which article 37 of the UN Declaration has been and is being implemented or considered nationally”

**Scope and Limit: Sea Nomads**

1. This contribution will analyse the various agreements, between the State of the Republic of Indonesia and “Suku Laut”, also known as sea nomads. This document will present the extent of recognition of “suku laut” in Indonesia, and how those develop an in-stages application both to domestic and to regional context -both are pursuant to distinguished international instruments. This contribution will also bring attention to the suku laut and/or sea nomads as far as recognition solved statelessness, in the context of local and national recognition.
2. The whole scope and definition of UNDRIP shall apply, and, especially, wherein article 37 applies. In support and together with those, article 1 and references to rural and indigenous communities of UNDROP shall also apply.

**The existence of Sea Nomads**

1. Sea nomads are used to refer to indigenous groups who are always moving in their lives and in their livelihoods as dwellers in marine spaces. They fall into the categories of “nomadic” or “semi nomadic” communities, as some groups do partially have sedentary lifestyles. Sea nomads are spread across three major communities being the ‘Orang Laut’, ‘Bajo and/or Bajau’ and ‘Moken’. For the purpose of this contribution, the primary focus will be on the Bajau. The Bajo and/or Bajau are the largest remaining sea nomad group, they live as communities across the coastal areas of Southeast Asia mainland and adjacent archipelagos. They ‘dwell’ across the coasts of various territories of state, mainly Indonesia, Malaysia, the Philippines, Thailand, Myanmar, and the Pacific.
2. Through traditional knowledge, Suku laut and sea nomads rely on biodiversity and nature as the basis of their livelihood. The principal economic activities of suku laut includes spearing of sea animals, collecting of marine and forest products, and hunting of coastal animals for both sustenance and small-scale trading. They also partake in the regional monetary and trade systems by selling their products and buying items for their daily needs, in addition to traditional exchanges. Over time, various stereotypes have become associated with sea nomads, inclusive of being isolated, underdeveloped, pirates and robbers. This has contributed to the issue of their fundamental rights being recognised under agreements and the Constitution.

**Recognition**

1. ***recognition by the ruling of Indonesian Constitutional Law*** The existence of indigenous people in Indonesia is contained in Article 18 of the 1945 Constitution, with a second amendment to Article 18B to further strengthen the existence of indigenous law communities which “respects the unity of indigenous peoples and their traditional rights as long as they live in accordance… by the law”. The “ruling” of Indonesian Constitutional Court on Law No. 27/2007 regarding the Management of Coastal Areas and Small Islands both prevent an exclusive dwelling and/or ownershop marine area, including coastal and small islands. )The ruling states “…greatest welfare of the people” which is consistent with other rulings which is intended and in application of protection and management of tenure). The constitutional court ruling did not specifically recognise the existence sea nomads, but they introducte regulation and management on the marine tenure.

The Court ruling is addressing the right of citizen, especially those of Bajau and/or sea nomads, in the face of privatisation. Coastal communities, especially sea nomads, but also fisherfolk and coastal communities had to compete with corporations for rights over their tenure and existence. They were disproportionality impacted by competition with the potential to become merely spectators, due to disparities in capital, access to information, technology and knowledge. This meant that little or no space would remain for marine communities, including sea nomads, exacerbating issues including social exclusion, economic difficulties and the loss of traditional areas to conduct cultural activities. The court ruled that any type of “exclusive tenure” on marine areas will discriminate marine communities, including sea nomads. Further, the existence of marine communities, including sea nomads, are recognised as “citizen”

1. ***Biodiversity recognition.*** In other ruling, the Indonesian Constitutional Court ruled the right of indigenous groups in forest area which essentially recognise indigenous community. The court recognise the tenure and existence of indigenous community. The ruling removed the term ‘state’ from the Forest Law; effectively indigenous community has the right to “customary forests…in the areas of custom-based communities”. By this ruling, sea nomads are also protected as they also exist as indigenou communities living both in coastal forests and forests in parcels of islands and marine biodiversity areas. This far, constitutional recognition is start yet insufficient to protect the customary rights of indigenous peoples, including those of sea nomads. There is greater need for increased regulatory protections to recognise sea nomads.
2. ***Regulation*.** At a national level, the regulation of Ministry of Maritime and Fisheries of the R.I. No. 8/Permen-Kp/2018 set a the procedures for Determining the Regional Area of Indigenous People in the use of Spaces within Coastal Areas and Small Islands. It “provides for the management of coastal areas and isles and in particular for their planning, utilization, conservation, disaster mitigation, coast reclamation, rehabilitation of coastal damage, rights and access of communities, settlement of conflicts and elaboration of related international conventions.” Article 30 sets out the main stakeholders as the users of resources with no consideration of sea nomads. The regulation prescribes the procedures for the control of coastal areas and obligations of society in which sea nomads is important part of it.
3. ***The application and the limit of “Marine Protected Areas” (MPA).*** The MPA has several forms of application -in Indonesia, one of prominent application of MPA is of “Wakatobi” national reserve. This application set a conservation pattern and co-management by communities living in it. The limit is on the term of “protected”. The Sea nomads, the Bajau of Indonesia, lives in nomadic and/or semi-nomadic way. In every other occasions, the Bajau is treated as “protected” in this MPA -meaning that they are treated not as a member of the MPA (since they are semi-nomadic). There is not intention by sea nomads to disrupt the MPA. They takes the MPA is one of many living spots. This is the limit of application of MPA they are indifferent to sea nomadic community dwelling in the MPA, across MPA, and in the outskirt of MPA.
4. ***Regulation in the govenrment of regency (kabupaten)*.** The government of Lingga Regency, a region located between a shared border of Malaysia and Singapore, set a local protections which distinctively recognising sea nomads of Bajau as member of marine area, and in which they dwells in the intersection part of Indonesia, Malaysia, Singapore as part of their customary life, not as commercial or expansive behaviour.

1. ***Statelessness*.** Suku laut and/or sea nomads is facing challenge due to their nomadic and semi-nomadic lifestyle, and movement between state borders. Bias identification of terrestrial homelands and the need to satisfy specific criteria to determine indigenous peoples self-determination and land rights, has consequently overlooked recognition of indigenous peoples livelihood in marine contexts.

Contemporary nation-state borders has meant that the suku laut are rarely granted recognition as citizens, giving rise to the issue of statelessness. Whilst, suku laut may have habitual residence on land during specific periods in a region, they have conventionally been categorised as ‘irregular migrants’. As they are unable to object to encroachment on their livelihoods or exercise their fundamental rights, the status of being stateless gives rise to further exclusion from social protections, resource management and economic development policies.

States, such as Malaysia, Thailand and Myanmar, are pondering on how to treat and deal with sea nomads communities, especially when it comes to nationality. In Sabah, the majority of the Bajau Laut population are facing the challenge of legal and cultural citizenship, effectuating a stateless status. As they receive no formal recognition, they have no access to representation, education, or health care or assistance afforded by state.

The lifestyle of sea nomads has for years not changed for a prolonged period of time, as they continue to live in a traditional way. Thus, it is common for sea nomads to not be in possession of valid identification, citizenships or birth registration documents. Statelessness is exacerbated with nation-states unwilling to provide sea nomads with identification to change their status to ‘refugee’ or ‘citizen’, making them vulnerable to detention, arrest or violence. With no formal recognition, this creates a domino effect as statelessness is passed down generations. There is also deep rooted fear amongst Bajau fisherman who travel between the Indonesia-Malaysia sea border. The maritime space is highly patrolled due to issues relating to Indonesian national security, international law and illegal activity. The lack of documentation and proper technology to detect when they have crossed the Indonesia-Malaysia border or Indonesia-Australia has occasionally resulted in the arrest of Bajau fisherman and the loss of fishing opportunities for their livelihood. This call for one or a combination of system on nationality.

A recognition of sea nomads could substantially facilitate the identity of sea nomads which to co-exist with conservation initiatives, which will be mutually beneficial due to their expansive traditional knowledge and management of biodiversity.

Further, written local arrangements have efficiently overcome the issue of recognising the rights and status of sea nomads. In the Lingga Regency, a region located between a shared border of Malaysia and Singapore, local protections apply. An example of a local arrangement is mangrove preservation. Suku laut engage in mangrove preservation in the region, in exchange for the mangrove to be a playing ground, a place of safety in times of strong winds and a natural fridge.

**Recommendations**

1. A localised arrangements can be advantageous as it will work alongside the laws of the region and suit the lifestyle of the community in the context of the regions natural environment. In reality, local and community-based arrangement on recognising sea nomads are increased. This should give a state, i.e. Indonesia and on the border of Indonesia with her neighbour, to develop an in-stages recognition, and protection therein.
2. The international framework, mainly article 37 of UNDRIP, and with support of all stipulations on indigenous group in UDROP is pivotal as it recognises the rights of indigenous peoples and subsequently the very existence of the Bajau and/or suku laut and/or sea nomads. Whilst, this framework provides states with a generalised guideline on the right to recognition, there are underlying issues that have hindered the observance of agreements and adequate constitutional recognition of suku laut rights. Thus, the framework on the fundamental and cultural rights of suku laut, has not been adequately established. The issues encountered by the suku laut and sea nomads as indigenous peoples in regards to their livelihoods and basic rights, is highly likely taking place where there is a lack of agreements and insufficient constitutional recognition.
3. This contribution urges the expert mechanism to conduct a specialised study on sea nomads, especially, but no limited to, their existence, their nomadic or semi-nomadic life (including the matter of freedom of movement and (co-)nationality), and their natural and legal position in the biodiversity of marine area. Given that the subject of “cross-border” entities or communities most likely attract heated debate, then, this contribution would persuaded the expert mechanism to promote a meaningful assessment against the complexity of the subject.

**Appendix**

Referred researches includes:

Papers of research of Dr. Dedi Adhuri and Dr. cand. Wengky Ariando

Narrative by Bajau Community as orally extended to Henry Thomas Simarmata, Dr. Dedi Adhuri, Dr. cand. Wengky Ariando.

Testimony (and its analysis) of Henry Thomas Simarmata in Indonesian Constitutional Court.

“Who is to blame? Logics of responsibility in the live reef food fish trade in Sulawesi, Indonesia” (2002, Celia Lowe), “Recent research on Southeast Asian sea nomads” (1995, Lioba Lenhart), “Dividing the Land: Legal Gaps in the Recognition of Customary Land in Indonesian Forest Areas” (2016, Myrna A. Safitri), “Indonesia: Indigenous Peoples Losing Their Forests, Lack of Government Oversight, Corporate Accountability Affects Culture, Livelihoods” (2019, Human Rights Watch), testimonty of Henry Thomas Simarmata in Indonesian Constitutional Court Ruling on the Annulment of the Provisions on Coastal Water Concessions (HP-3)”, “An Analysis of the Constitutional Court Ruling on the Annulment of the Provisions on Coastal Water Concessions (HP-3)” (2013, M. Riza Damanik), “Strengthening Indigenous Law to Make a Sustainable Development of the Coastal Area and Small Islands in Indonesia” (2018, Nurul Huda, A.H. Asy’ari T, Yusuf Saefudin, Muhammad Bahrus Syakirin); on the issue of statelessness, “Foreigners Everywhere, Nationals Nowhere: Exclusion, Irregularity, and Invisibility of Statelessness Bahau Laut in Eastern Sabah, Malaysia” (2017, Greg Acciaioli, Helen Brunt, Julian Clifton), “Statelessness and Conservation, Exploring the Implications of an International Governance Agenda” (2014, Julian Clifton, Greg Acciaioli, Helen Brunt, Wolfram Dressler, Michael Fabinyi, Sarinda Singh), “The Business Network of Bajau Tribe Sea Fisheries on the Indonesia-Malaysia Border” (2021, Tasrifin Tahara, Universitas Hasanuddin Dinna Dayana La Ode Malim, Universitas Dayanu Ikhsanuddin)

1. Henry Thomas Simarmata and Georgia Henderson are of Apintlaw; Heba Albukhari is of Law School of Western Sydney University (Ms. Albukhari participated in this research as part of ACICIS programme); and Dicky Lopulalan is of Terasmitra. The co-authors would extend sincere gratitude to Bajau Community of Indonesia, Dr. Dedi Adhuri of Indonesian Innovation and Research Body (BRIN), and Dr. cand. Wengky Ariando (researcher on Bajau, at present having doctorate program in Chulalongkorn University). Henry Thomas Simarmata serves as principal writer in this contribution; and he is responsible for (possible) mistakes in this report. Apintlaw is <https://apintlaw.info> [↑](#footnote-ref-1)