SUHAKAM's INPUT FOR STUDY OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES – PROMOTION AND PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES WITH RESPECT TO THEIR CULTURAL HERITAGE

1. Introduction[1]

1.1. Based on the United Nations' working definition of Indigenous Peoples (IPs), the common characteristics of IPs include historical continuity since before pre-colonial societies, their non-dominant or marginalised situation, self-identification and distinctiveness from the dominant society, determination to preserve their rights and identity, intricate relationship with land, territories and region, and the presence of customary, social and political institutions.

1.2. In the context of Malaysia, IPs would include the aborigines of Peninsular Malaysia and the natives of Sabah and Sarawak, whose positions are recognised by the Federal Constitution of Malaysia and relevant State laws.

1.3. Most of the IPs in Malaysia still live in rural and remote areas, although there have been increasing number of IPs living in the periphery of urban areas.

1.4. The IPs in Malaysia have a close relationship to their lands, territories and resources as these are significant not only as means of livelihood but also part of their spiritual, ancestral worship and cultural life. The IPs have their own *adat* / custom in relation to the use and protection of the lands, territories and resources.

2. SUHAKAM's National Inquiry on the Land Rights of Indigenous Peoples in Malaysia[2]

2.1. In 2010, SUHAKAM conducted its first ever National Inquiry to look into the issues of land rights faced by IPs in Malaysia. The National Inquiry process was completed in 2012 and the report on its findings was subsequently published in 2013.

2.2. The Inquiry adopted a cooperative and responsive approach, involving a wide range of stakeholders, including government departments and agencies, non-governmental organisations, indigenous communities, private companies, media as well as other interested groups and individuals. The Inquiry also sought to identify and develop practical solutions to improve the status of land ownership of the IPs in Malaysia.

2.3. The scope of the National Inquiry focused on the IPs of Peninsular Malaysia and the natives in the states of Sabah and Sarawak.

[1] SUHAKAM, Report on the National Inquiry on Land Rights of Indigenous Peoples in Malaysia (2013).
[2] Ibid.

2.4. As a result of the National Inquiry, SUHAKAM's findings, among others, included the following:

i. Political impacts of non-recognition of indigenous peoples' lands are the denial of their participation in consultation processes on land issues or in decision-making pertaining to land development within their traditional territories. Although there seems to be tacit recognition of indigenous peoples' claims on the land, consultations were mainly done and controlled by related government agencies.

ii. Most indigenous peoples consider their lands to be their own properties either individually or collectively by virtue of continuous occupation, and do not see the need for registration of ownership. This is a serious constraint to their rights because the State only recognises ownership of land which has been registered or issued with documentary titles or gazetted as a reserve.

iii. The inquiry also heard of cases where village chiefs acted as an intermediary to sell native customary rights (NCR) land without the community's consent. This often involved the use of Power of Attorney authorising the sale or lease of land belonging to IPs in Sabah to individuals and developers without their knowledge and consent.

iv. Acquisition of NCR land involving large-scale development projects that involve politicians and influential people have impacted indigenous peoples negatively. Community witnesses informed the Inquiry that they face constraints in obtaining support from political leaders for the application of the NCR land. It was also claimed that they were denied their rights vis-à-vis any development because many decisions regarding these development projects were made without their free, prior and informed consent.

v. The Inquiry also found that the current land conflicts involving logging, development projects and oil palm plantations stem from the non-recognition of the native customary rights of indigenous peoples. These activities have resulted in the collapse of the ecologies which caused environmental degradation. Another possible negative impact on the environment, if indigenous peoples are deprived of their land, is the over-exploitation by the affected people of the resources around them. For the sustainability of survival, this would have an immense effect on them, particularly if they do not have other livelihood options or their low level of education prevents them from finding alternative employment.

vi. Slow process of redress mechanism available through judicial process also posed as one of the constraints which impedes the full enjoyment of the IPs' rights to land. For instance, an increasing number of natives in Sarawak have resorted to filing cases in court to determine the validity of their NCR claims. However, court cases take a long time to be heard and during the waiting period, ground

evidences could be destroyed especially if a company or a development agency is not ordered to stop work through a court injunction.

2.5. SUHAKAM's report on the NI was completed in April 2013. Given the importance of the findings and recommendations of the NI to the well-being of Indigenous Peoples (IP), SUHAKAM felt it necessary to first submit the NI Report to the Parliament, State Legislative Assemblies, the Federal Government and relevant State Governments, so as to allow elected representatives and policy makers to deliberate on the issues and recommendations.

2.6. However, the dissolution of Parliament for the 13th General Election coincided with the completion of the NI report. This compelled SUHAKAM to postpone the launch of the report until the new session of Parliament was convened. Even then, the NI Report was not tabled. Instead, the Federal Cabinet decided to set up a National Task Force to consider the NI Report. SUHAKAM had accepted this decision, when it was announced on 5 August 2013, as a practical and hopefully expeditious way of following up on the many recommendations contained in the NI Report, and formally presented the Report to Senator Datuk Paul Low Seng Kuan, Minister in the Prime Minister's Department, for the attention of the National Task Force.

2.7 In 2014, SUHAKAM was informed that the Task Force had completed its study on SUHAKAM's recommendations in the NI report and had come up with its own report. The Minister had subsequently announced that the Task Force's report would be presented to the Cabinet following which it would be referred to the Cabinet Committee on Sabah and Sarawak *Bumiputera (Indigenous Peoples)* for its comments before final implementation of the various recommendations.

2.8. In February 2015, SUHAKAM decided to proceed with its follow-up plan of action in relation to the NI Report, which would include follow-up meetings with relevant Government agencies and civil society organisations (CSOs), as well as public presentations of the NI Report and its recommendations. Following the decision by the Commission, the Minister has agreed to update SUHAKAM on the status of the Task Force Report.

3. Representation of Indigenous Peoples in the Government[3]

3.1. The Expert Mechanism on the Rights of IPs stressed that the IPs' participatory and decision-making rights are essential in enabling them to protect their cultures and languages, as well as their lands, territories and resources.[4]

[3] SUHAKAM, Paper on Good Practices in Promoting and Protecting the Rights of Indigenous Peoples in Malaysia (2014).

[4] EMRIP, Expert Mechanism Advice No. 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making, http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf

3.2. In the context of Malaysia, the Federal Constitution guarantees the representation of the IPs and their interests in the Government. With regard to the IP's representation in the Senate, Article 45 (2) of the Federal Constitution which provides for the composition of the Malaysian Senate, states that:

> "*The members to be appointed by the Yang di-Pertuan Agong (the King) shall be persons who in his opinion have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interests of the aborigines*"

3.3. As for the IPs' representation in the public service, Article 8(5)(c) of the Federal Constitution allows for the reservation of a reasonable proportion of suitable positions in the public service especially for the IPs in the Peninsula. In addition, Article 153 (2) provides that the Yang di-Pertuan Agong[5] shall exercise his function under the Federal Constitution and federal law to reserve for, among others, the natives of Sabah and Sarawak, reasonable proportions of positions in public service. (other than the public service of a State).

Cabinet Committee on *Bumiputera* Minorities of Sabah and Sarawak

3.4. In 2009, the Malaysian Federal Cabinet had agreed to establish a Cabinet Committee and a Technical Committee on Sabah and Sarawak *Bumiputera*[6] which aims to discuss the implementation of policies as well as development progress of the *Bumiputera* communities in Sabah and Sarawak. It is also tasked to formulate new policies pertaining to the communities in Sabah and Sarawak.[7]

3.5. The Cabinet Committee is chaired by the Prime Minister of Malaysia, Dato' Sri Mohd. Najib bin Tun Haji Abdul Razak. Currently, the Technical Committee on Sabah and Sarawak *Bumiputera* is jointly chaired by Cabinet Ministers Datuk Seri Maximus J. Ongkili and Datuk Seri Douglas Uggah Embas and it reports to the Cabinet Committee.[8]

[5] Yang di-Pertuan Agong refers to the Supreme Head of State or the King of Malaysia.
[6] The term 'Bumiputera' refers to indigenous groups in Sabah and Sarawak.
[7] Sabah Today.com, 'Cabinet Panel for Bumis in Sabah, S'wak, 18 October 2009, http://www.sabahtoday.com/?p=2419
[8] Malay Mail Online, 'Decision on Sarawak's 'Lain-lain' replacement next month, 7 February 2015, http://www.themalaymailonline.com/malaysia/article/decision-on-sarawaks-lain-lain-replacement-next-month

4. **Preservation of Cultural Heritage of Indigenous Peoples in Malaysia**[9]

4.1. The Malaysian Representative to the United Nations (UN), in a statement before the 66th session of the UN General Assembly in New York in 2011, said that the Malaysian Government has made it a priority to assist the Indigenous Peoples in Malaysia to preserve their traditional cultural heritage.

4.2. The IPs' traditions and customs play a major part in enriching the Malaysian melting-pot of cultures, and the preservation of those traditions and customs have long been underscored. For instance, the Founding Father of Malaysia, the late Tunku Abdul Rahman, gave the assurance that the religion and culture of the natives of Sabah and Sarawak would not be lost by joining Malaysia. He pledged that the natives had the freedom to pursue their customs and to study their ancestral languages.

4.3. Various factors such as modern development, interference of the Government and the creation of new forms of institutions that do not respect the traditional customs and traditions of the IPs in Malaysia have contributed to the deterioration of those customs and traditions.

4.4. However, there are a few initiatives instituted in Malaysia that have supported the preservation of the Orang Asal traditions and customs:

i. Lenggong Archaeological Gallery

- The Lenggong Valley located in Perak is an important archaeological site in Malaysia. Excavations within the site not only revealed ancient human habitat, particularly from the Paleolithic, Neolithic and Metal Age, but also showed hereditary signs of native identity, culture and belief systems. This site also marks the oldest record of early man in the world – Perak Man.

- Perak Man is the oldest, most complete human skeleton found in Southeast Asia and was discovered within the Gunung Runtuh Cave situated in the Kepala Gajah Hill. Other prehistoric burial sites were also found in the Gunung Runtuh, Teluk Kelawar and Kajang Caves situated in the Lenggong Valley. These discoveries have increased the awareness among the public of the existence of obsolete cultural activities of the IPs. The revelations also instil a sense of appreciation amongst the IPs of their cultural heritage and the need to preserve them.

- The Lenggong Valley was inscripted as a UN Educational, Scientific and Cultural Organisation (UNESCO) World Heritage Site during the 36th World Heritage Committee Meeting in Saint Petersburg, Russia in 2012. This historical

[9] SUHAKAM, Paper on Good Practices in Promoting and Protecting the Rights of Indigenous Peoples in Malaysia (2014).

achievement has leveraged Malaysia to a strategic and good position to protect and promote the ancient identity and culture of the oldest mankind ever recorded in this area.

- The recognition of Lenggong Valley as the World Archaeological Heritage Site has successfully captured the interest of the community towards the discovery of ancient treasures, thus making Malaysia a popular destination for tourists as well as archaeologists. The National Heritage Department of Malaysia is fully responsible for the protection and conservation of the site. All development programs and promotions aimed at attracting visitors are conducted based on a set of guidelines to preserve the native heritage.

- The Lenggong Valley's listing as a world heritage site was commemorated on 10 November 2012. More importantly, the celebrations served as a platform to increase public knowledge and commitment towards protecting and conserving the Lenggong Valley. In order to ensure that only limited and necessary developments are carried out in the area, Malaysia had submitted to the UNESCO its management plan which includes a special area plan and a conservation plan that serves as a guide for the preservation and protection of the archaeological site.

ii. Sabah Parks

- Sabah Parks is a statutory body established by the Government with the purpose of preserving at all times, areas with significant geographical, biological or historical features as a national heritage for the benefit, education and enjoyment of the people of Sabah. It is also responsible to manage and promote the various protected reserves in Sabah, in particular those designated as national parks.

- There are currently 8 areas in Sabah that have been gazetted as national parks with a total land area of 317, 654 hectares traditionally owned by the IP. In many instances, the inclusion of IP areas into national park reserves have created many frictions between the authorities and the IPs. Affected IP landowners were restricted from practising their traditional way of life, including hunting, gathering and cultivation. In contrast, the authorities sought to preserve the rich biodiversity in the protected areas that happened to be inhabited or used by the IP.

- In order to overcome these frictions, the Sabah Parks adopted a good practice which is the introduction of the Community Use Zones (CUZ), which aims to strike a balance between conservation and usage of resources in the protected areas by the IPs.

- The CUZ is defined as “areas where existing cultivation and forest resource collection are found to occur inside the park and where traditional human activities will be allowed to continue under the supervision of Sabah Parks.

- Under the CUZ, if IPs are found to have legal ownership to lands located within a park reserve, they would be allowed to proceed to manage their properties as expressly provided in the land titles. On the other hand, any existing native land use within the Parks without ownership titles, while allowed to continue, will be regulated by the authorities.

- At the same time, the IPs are made partners to the authorities in order to manage and conserve the protected areas. Therefore, while the IPs are permitted to utilize the area, it should be done in a sustainable manner. The IPs are also required to assist in ensuring that the protected areas are not encroached by outsiders. This also shows that the CUZ has the potential to create a win-win situation for the IPs and the authorities.