

**SURUHANJAYA HAK ASASI MANUSIA MALAYSIA
(SUHAKAM)**

**LAPORAN ADUAN DAN SIASATAN
HAK MASYARAKAT ASLI SARAWAK**

JUN 2002



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LAPORAN ADUAN DAN SIASATAN
HAK MASYARAKAT ASLI SARAWAK

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BAB 1

PENGENALAN

1. Sarawak

SARAWAK¹ yang terletak di utara ekuator di antara latitud 0° 50' dan 5° U dan longitud 109° 36' dan 115° 40' T terbentang sepanjang 800 km di pinggir barat laut Pulau Borneo. Sarawak yang dipisahkan sejauh 600km dari Semenanjung Malaysia oleh Laut China Selatan di sebelah barat terletak bersebelahan dengan negeri Sabah di sebelah timur laut. Dari segi ukuran, Sarawak merupakan negeri terbesar di Malaysia dengan keluasan 124,449 km persegi. Ini meliputi hampir 37.5% keluasan Malaysia. Negeri Sarawak dibahagikan kepada 11 buah bahagian pentadbiran, iaitu, Kuching, Sri Aman, Sibu, Miri, Limbang, Sarikei, Kapit, Samarahan, Bintulu, Betong dan Mukah. Setiap bahagian diwakili oleh seorang residen.

2. Masyarakat asli negeri Sarawak

Menurut Seksyen 3 *Sarawak Interpretation Ordinance (Cap. 1 1958 Ed.)*, masyarakat asli (*native*) di Sarawak ditafsirkan sebagai:-

“a citizen of Malaysia of any race which is now considered to be indigenous to Sarawak as set out in the Schedule;”

Jadual kepada *Interpretation Ordinance* tersebut menyatakan bahawa kaum-kaum berikut serta sebarang campuran di antara satu sama lain (*“any admixture of them with one another”*) merupakan masyarakat asli: Bukitan, Bisayah, Dusun, Dayak (Laut), Dayak (Darat), Kadayan, Kalabit, Kayan, Kenyah (termasuk Sabup dan Sipeng), Kajang (termasuk Sekapan, Kejaman, Lahanan, Punan, Tanjong, Kanowit), Lugat, Lisum, Melayu, Melanau, Murut, Penan, Sian, Tagal, Tabun dan Ukit.

Selain itu, walaupun istilah “Iban” serta “Bidayuh” tidak termasuk dalam tafsiran “masyarakat asli” di bawah *Sarawak Interpretation Ordinance*, “Bidayuh” dan “Iban” juga merupakan masyarakat asli Sarawak berdasarkan Perkara 2 *Adat Bidayuh Order 1994* yang menyatakan:-

¹ Sumber: http://www.sarawak.gov.my/sarawak_online/general/gen_info.html

“For the purpose of this Order , the term “Bidayuh” means the native of Sarawak referred to as Land Dayak in the Schedule to the Interpretation Ordinance”

dan Seksyen 1, Jadual Kedua *Adat Iban Order 1993* yang menyatakan:

“Iban” means Dayak (Sea) as defined in the Interpretation Ordinance, Cap. 1, Vol. I of the Laws of Sarawak, 1958”.

Suruhanjaya Hak Asasi Manusia Malaysia (**SUHAKAM**) sedar bahawa terdapatnya perbezaan pendapat tentang tafsiran “masyarakat asli” di Sarawak. Namun demikian untuk tujuan laporan ini, tafsiran “masyarakat asli Sarawak” adalah menurut tafsiran di bawah *Sarawak Interpretation Ordinance, Adat Bidayuh Order 1994* dan *Adat Iban Order 1993*.

3. Memorandum dan aduan kepada SUHAKAM

Sehingga Oktober 2001, SUHAKAM telah menerima 4 memorandum serta aduan mengenai pelanggaran hak asasi masyarakat asli Sarawak.

Senarai memorandum adalah seperti berikut:-

(a) Memorandum Tuai Rumah Ketip Anak Impang (bertarikh 22.8.2000)

Memorandum daripada Tuai Rumah Ketip Anak Impang yang mewakili penduduk di sembilan rumah panjang Iban di Sungai Basai, Balingian, Daerah Mukah, Bahagian Sibuan. Memorandum tersebut menyatakan bahawa Syarikat Novelpac Puncakdana Plantation Sdn. Bhd. telah mengugut untuk menggunakan kekerasan terhadap masyarakat Iban bagi menghalang mereka dari memasuki ke dalam Lot 11 Buloh Land District. Masyarakat Iban mendakwa bahawa Lot 11 Buloh Land District adalah tanah adat *Native Customary Rights (NCR)* mereka. Keputusan sama ada syarikat tersebut mempunyai hak sepenuhnya untuk bekerja di lot tersebut belum diputuskan secara muktamad oleh Mahkamah.

(b) Memorandum Tuai Rumah Rayong Anak Lapik (bertarikh 29.11.2000)

Memorandum daripada Tuai Rumah Rayong Anak Lapik adalah mewakili

masyarakat rumah panjang Iban di Sungai Bong, Sungai Apun, Sungai Pelajau, Sungai Buti dan Sungai Tirus, Tinjar, Baram. Isu yang dibangkitkan di dalam memorandum tersebut adalah berhubungan dengan pencerobohan tanah NCR mereka berikutan aktiviti pembalakan yang dijalankan oleh Syarikat Chung Chin Enterprise di dalam kawasan NCR masyarakat Iban. Aktiviti pembalakan tersebut dikatakan turut menyebabkan pencemaran dan kemusnahan alam sekitar.

(c) Memorandum Ronald Bete Lahang (bertarikh 3.7.2001)

Memorandum daripada Ronald Bete Lahang mewakili penduduk dari hilir Sungai Balui, Belaga yang melahirkan kebimbangan berikutan pembinaan Empangan Hidroelektrik Bakun. Isu-isu yang dibangkitkan dalam memorandum tersebut adalah seperti berikut:-

- (i) keselamatan empangan dan penduduk di hilir Sungai Balui;
- (ii) kualiti air dan kehidupan akuatik di hilir Sungai Balui; dan
- (iii) pencemaran di hilir Sungai Balui.

(d) Memorandum Jawatankuasa Bertindak Rakyat Kawasan Bakun (bertarikh 3.7.2001)

Memorandum daripada Jawatankuasa Bertindak Rakyat Kawasan Bakun yang mewakili penduduk-penduduk rumah panjang di Penempatan Semula Sungai Asap, penduduk di Sungai Balui yang telah berpindah ke hulu dan penduduk di sekitar Sungai Belaga.

Isu-isu yang dibangkitkan oleh penduduk di Penempatan Semula Sungai Asap adalah seperti berikut:-

- (i) pampasan yang belum diselesaikan;
- (ii) peruntukan kawasan tanaman yang tidak mencukupi dan tidak sesuai;
- (iii) harga rumah bernilai RM52,000 adalah terlalu mahal dan tidak wajar;
- (iv) pampasan rumah lama tidak pernah diterima; dan
- (v) kemudahan asas yang tidak lengkap.

Isu-isu yang dibangkitkan oleh penduduk di Sungai Balui yang telah berpindah ke hulu sungai adalah seperti berikut:-

- (i) bayaran pampasan yang belum dijelaskan;
- (ii) kelengkapan awam tidak dibina; dan
- (iii) hak untuk menentukan hala tuju masa depan mereka.

Isu-isu yang dibangkitkan oleh penduduk di sekitar Sungai Belaga adalah seperti berikut:-

- (i) pampasan ke atas tanah mereka yang telah diperolehi untuk pembinaan jalanraya Tubau – Bakun yang tidak diberi;
- (ii) penebangan pokok buah-buahan di tebing Sungai Belaga oleh pekerja-pekerja Jabatan Tanah dan Ukur;
- (iii) pencerobohan tanah NCR oleh syarikat ladang kelapa sawit; dan
- (iv) tekanan ke atas sumber mata pencarian akibat pertambahan penduduk di Belaga.

4. Tindakan SUHAKAM

Berdasarkan Seksyen 4(2)(d) Akta Suruhanjaya Hak Asasi Manusia Malaysia 1999 (**Akta 597**), SUHAKAM telah memutuskan untuk menyasat isu-isu pokok yang telah dibangkitkan dalam keempat-empat memorandum tersebut. Antara langkah-langkah yang diambil adalah seperti berikut:-

(a) Melawat Kawasan Kaum Asli Sarawak yang berkenaan

Dari 27.10.2001 hingga 2.11.2001, satu rombongan SUHAKAM telah melawat kawasan yang terlibat. Ahli-ahli rombongan SUHAKAM terdiri daripada:-

Dato' Dr. Salleh Mohd Nor	-	Pesuruhjaya (Ketua Rombongan)
Professor Chiam Heng Keng	-	Pesuruhjaya
Dr. Mohamad Hirman Ritom Abdullah	-	Pesuruhjaya
Encik Mohd Nasir Abdul Hadi	-	Urus Setia

Lawatan ini bertujuan untuk mendapatkan maklum balas daripada masyarakat asli Sarawak yang terlibat, mendapatkan butir-butir terperinci mengenai aduan-aduan mereka serta menyaksikan sendiri keadaan sebenar masalah yang mereka hadapi.

Kronologi lawatan rombongan SUHAKAM ini terkandung dalam Lampiran 1.

(b) Menemui Wakil Agensi Kerajaan Negeri Sarawak

Pada pagi 13.12.2001, pertemuan di antara Pesuruhjaya SUHAKAM dan beberapa agensi Kerajaan Sarawak telah diadakan di Hotel Hilton, Kuching.

Rombongan SUHAKAM yang terlibat terdiri daripada:-

Tan Sri Dato' Hj. Anuar bin Dato' Hj.

Zainal Abidin	- Pesuruhjaya (Ketua Rombongan)
Dato' Dr. Salleh Mohd Nor	- Pesuruhjaya
Professor Dato' Hamdan Mohd Adnan	- Pesuruhjaya
Professor Chiam Heng Keng	- Pesuruhjaya
Dr. Mohamad Hirman Ritom Abdullah	- Pesuruhjaya
Encik Mohd Nasir Abdul Hadi	- Urus Setia
Encik Sophian bin Osman	- Urus Setia

Agensi kerajaan Sarawak pula diwakili oleh 42 orang yang diketuai oleh Datuk J.C. Fong, Peguam Besar Negeri Sarawak. Dato' Wilson Baya Dandot, Timbalan Setiausaha Kerajaan Negeri Sarawak juga turut hadir. Senarai pegawai dan agensi kerajaan yang hadir terkandung dalam Lampiran 2.

Pertemuan ini bertujuan untuk mendapatkan pandangan dan penjelasan pihak Kerajaan Negeri Sarawak mengenai isu yang telah dibangkitkan oleh masyarakat asli Sarawak.

Datuk J.C. Fong telah memberi taklimat berhubung dengan '*Native Customary Laws and Native Rights Over Land in Sarawak*'. Taklimat Datuk J.C Fong terkandung dalam Lampiran 3. Dato' Wilson Baya Dandot memberi taklimat mengenai rangka dan dasar pembangunan negeri Sarawak. Pengurus Besar Lembaga Pembangunan dan Perlindungan Tanah Sarawak (**PELITA**) dan Pengurus Besar Lembaga Penyatuan dan Pemulihan Tanah Sarawak (**SALCRA**) telah menerangkan tentang kejayaan Kerajaan Negeri Sarawak dalam membangunkan tanah adat melalui usaha sama dengan masyarakat asli Sarawak.

(c) Menemui Wakil Persatuan Pembalakan Sarawak

Pada petang 13.12.2001, rombongan SUHAKAM yang sama telah berdialog dengan Persatuan Pembalakan Sarawak (*Sarawak Timber Association - STA*) yang diketuai oleh Datuk Leo Chai.

Sesi ini juga bertujuan untuk membangkitkan masalah yang dihadapi masyarakat asli Sarawak, tetapi berfokus kepada masalah yang terbangkit akibat daripada kerja pembalakan dan kesannya terhadap alam sekitar serta kehidupan masyarakat tersebut.

Pihak STA menegaskan bahawa ahli mereka sentiasa sanggup untuk berbincang dengan masyarakat asli mengenai masalah yang dihadapi mereka. Mereka juga memberi jaminan bahawa mereka bersedia untuk memberi bantuan yang sewajarnya kepada masyarakat asli yang terlibat.

(d) Menemui Y.A.B. Datuk Patinggi Tan Sri (Dr.) Abdul Taib bin Mahmud, Ketua Menteri Sarawak

Pada 18.2.2002, satu rombongan SUHAKAM yang diketuai oleh Tan Sri Dato' Musa bin Hitam, Pengerusi SUHAKAM, telah berjumpa dengan Y.A.B. Ketua Menteri Sarawak. Datuk J.C. Fong, Peguam Besar Negeri Sarawak, telah turut hadir bersama.

Dalam pertemuan ini, isu-isu yang dibangkitkan oleh masyarakat asli Sarawak semasa lawatan rombongan SUHAKAM telah dibincangkan dengan Y.A.B. Ketua Menteri Sarawak. Ringkasan perbincangan di antara rombongan SUHAKAM dan Y.A.B. Ketua Menteri terkandung dalam Lampiran 4.

5. Matlamat laporan

Laporan ini bertujuan untuk mendokumentasikan perkara-perkara berikut:-

- (a) masalah-masalah masyarakat asli Sarawak yang berkaitan dengan hak asasi yang dibentangkan oleh mereka;
- (b) perbincangan antara SUHAKAM dan pihak-pihak yang berkenaan; dan
- (c) syor-syor untuk menangani masalah-masalah yang dihadapi oleh masyarakat asli Sarawak.

6. Penghargaan

SUHAKAM ingin merakamkan penghargaannya kepada semua pihak yang telah membantunya - sama ada secara langsung atau tidak langsung – untuk menyempurnakan matlamat penyelidikan dan pengumpulan maklumat dan seterusnya menghasilkan laporan ini. Antaranya termasuk:-

- Y.A.B. Datuk Patinggi Dr. Abdul Taib Mahmud, Ketua Menteri Sarawak;
- Y.B. Datuk Amar Hj. Abdul Aziz Hussein, Setiausaha Kerajaan Negeri Sarawak;
- Y. Bhg. Datuk J.C. Fong, Peguam Besar Negeri Sarawak;
- Y. Bhg. Dato' Wilson Baya Dandot, Timbalan Setiausaha Kerajaan Negeri Sarawak;
- Encik Bujang bin Haji Bidin, Pegawai Daerah Belaga;
- Encik Joe Komeok, Baram Penan Association;
- Encik Huvat Laing, Ketua Kampung Uma Lesong;
- Encik Bato Bagi, Ketua Kampung Long Buko;
- Ketua Kampung Long Kevok;
- Ketua Kampung Ba Panggaran;
- Encik Thomas Jalong, Persatuan HAKAM Malaysia;
- Encik Ajang Kiew, Pengerusi Persatuan Kaum Penan;
- Cik Lengiden ak Guba, wakil masyarakat Iban di Miri;
- Persatuan Pembalakan Sarawak;
- Kapten Mohd Dom bin Ahmad, Syarikat Hornbill Skyways Sdn. Bhd.; dan
- Semua individu serta kumpulan lain yang berkenaan.

BAB 2

ISU PENDUDUK DI PENEMPATAN SEMULA SUNGAI ASAP, BELAGA

Penempatan Semula Sungai Asap, Belaga adalah penempatan semula seramai lebih kurang 9,500 orang masyarakat asli Sarawak yang terdiri daripada kaum Kenyah, Kayan, Lahanan, Ukit dan Penan akibat daripada pembinaan empangan hidroelektrik Bakun.

Semasa lawatan ke kawasan yang terlibat, SUHAKAM telah dimaklumkan mengenai isu-isu berikut:-

1. Ketidakpuashatian mengenai pampasan

Akibat daripada perolehan tanah oleh kerajaan negeri Sarawak untuk projek pembinaan empangan hidroelektrik Bakun, penduduk di Penempatan Semula Sungai Asap telah diberi pampasan. Walau bagaimanapun, menurut beberapa wakil Penempatan Semula Sungai Asap, Belaga yang ditemui oleh rombongan SUHAKAM, terdapat segelintir masyarakat asli Sarawak yang berkenaan yang tidak puas hati mengenai pampasan yang diterima mereka. Ini kerana:-

- tanah masyarakat asli yang terletak di luar perimeter kawasan yang akan dibanjiri bagi tujuan pembinaan empangan hidroelektrik tidak diambil kira dalam menentukan jumlah sebenar kadar pampasan;
- tahap ketelusan proses pembayaran pampasan dipersoal. Ini kerana jumlah pampasan yang diberikan kepada seseorang individu berbeza-beza dan ternyata terdapat jurang yang agak jauh antara individu; dan
- masih terdapat masyarakat asli yang belum lagi menerima bayaran pampasan mereka dengan sepenuhnya kerana terdapat prosiding mahkamah yang masih belum memutuskan lagi mengenai jumlah pampasan yang patut diterima.

SUHAKAM menegaskan bahawa masyarakat asli Sarawak mempunyai hak ke atas tanah yang didiami mereka sejak turun temurun walaupun mereka tidak mempunyai dokumen hak milik [lihat kes-kes Mahkamah Tinggi seperti *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 dan *Sagong Bin Tasi & 6 Ors v Kerajaan Negeri Selangor & 3 Ors* (Civil Suit No: MTI-21-314-1996) (12 April 2002)].

Hak masyarakat asli ke atas tanah yang didiami mereka sejak turun temurun ini juga diperuntukkan oleh suratcara antarabangsa seperti *Part II (Articles 13 –19) International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169)*² dan *Part VI (Articles 25 – 30) Draft United Nations Declaration on the Rights of Indigenous Peoples (Draft UN Declaration)*.³

Oleh itu, SUHAKAM berpendapat bahawa hak milik masyarakat asli Sarawak ke atas tanah ini haruslah diberi pengiktirafan dan dihormati oleh semua pihak menurut piawaian tempatan dan antarabangsa.

Selain itu, SUHAKAM berpendapat bahawa hak milik masyarakat asli Sarawak ke atas tanah yang telah didiami mereka sejak turun termurun adalah hak asasi yang dilindungi oleh Perkara 13 Perlembagaan Persekutuan yang menyatakan:-

- “(1) Tiada seseorang pun boleh dilucutkan hartanya kecuali mengikut undang-undang.
- (2) Tiada sesuatu undang-undang pun boleh membuat peruntukan bagi mengambil atau menggunakan harta-harta dengan paksa dengan tiada pampasan yang mencukupi.”

² Konvensyen ini terkandung di dalam Lampiran 5. Walaupun Malaysia belum meratifikasikan Konvensyen ini, ianya patut dijadikan panduan mengenai hak tanah orang asli kerana Konvensyen ini merupakan dasar minima antarabangsa mengenai hak orang asli.

³ Draf Deklarasi terkandung di dalam Lampiran 6. Ia memberi peluang kepada sesebuah negara untuk menggunakan sesuatu instrumen yang selaras dengan pendapat orang Asal serta pakar-pakar tentang hak orang Asal.

[Lihat Mahkamah Tinggi di dalam kes *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 (yang disahkan oleh Mahkamah Rayuan di dalam kes *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158)].

Dengan itu, SUHAKAM menegaskan bahawa sekiranya tanah yang telah didiami oleh masyarakat asli sejak turun temurun perlu diperolehi oleh pihak berkenaan atas alasan yang dibenarkan oleh undang-undang yang berkuatkuasa, pampasan yang mencukupi perlu dibayar seperti yang diperuntukkan dalam Perkara 13 Perlembagaan Persekutuan serta peruntukan-peruntukan antarabangsa seperti *Article 16(4) and Article 16(5) ILO Convention No. 169* dan *Article 10 Draft UN Declaration*.

Berkenaan dengan kadar pampasan yang perlu dibayar, SUHAKAM berpendapat bahawa prinsip-prinsip di dalam keputusan kes Mahkamah Tinggi, *Adong bin Kawau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (yang disahkan oleh Mahkamah Rayuan di dalam kes *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158), patut digunapakai di dalam menentukan kadar pampasan yang perlu dibayar kepada masyarakat asli Sarawak.

Di dalam kes tersebut, mahkamah telah memutuskan faktor-faktor berikut harus diambil kira dalam penentuan kadar pampasan:-

- (a) masyarakat asli bergantung kepada tanah yang didiami mereka sejak turun temurun untuk menampung kehidupan mereka;
- (b) apabila tanah mereka diperolehi, selain daripada kehilangan hak mereka ke atas tanah tersebut mereka juga akan:-
 - (i) kehilangan tanah warisan (*deprivation of heritage land*);
 - (ii) kehilangan kebebasan untuk bermastautin atau bergerak di bawah Perkara 9(2) Perlembagaan Persekutuan [*deprivation of freedom of inhabitation or movement under art 9(2)*];

-
- (iii) kehilangan penggunaan sumber hutan (*deprivation of produce of the forest*);
 - (iv) kehilangan kehidupan masa depan untuk mereka yang terlibat dan keluarga terdekat mereka (*deprivation of future living for himself and his immediate family*); dan
 - (v) kehilangan kehidupan masa depan untuk warisan mereka yang terlibat (*deprivation of future living for his descendants*).

Berdasarkan analisa di atas, **SUHAKAM mengesyorkan bahawa:-**

- (a) Pihak berkuasa mengkaji semula mekanisme pembayaran pampasan supaya mekanisme tersebut adalah adil, telus dan berasas kepada piawaian tempatan dan antarabangsa.
- (b) Baki pampasan yang belum dibayar kepada mereka yang berkenaan dibayar secepat mungkin setelah selesai prosiding mahkamah.

2. Harga rumah dan mutu kemas

Rombongan SUHAKAM telah dimaklumkan bahawa setiap keluarga di Penempatan Semula Sungai Asap perlu membayar RM52,000.00 untuk seunit rumah baru mereka.

Selain itu, mutu kemas rumah mereka kurang memuaskan. Terdapat, antara lainnya, pintu dan tingkap yang telah pecah, dinding yang telah retak dan tangga yang tidak stabil. Bahan binaan yang digunakan juga adalah berkualiti rendah.

SUHAKAM menegaskan bahawa tempat kediaman merupakan hak asasi seseorang seperti mana yang diperuntukkan oleh *Article 25 Universal Declaration of Human Rights* yang menyatakan:-

“Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, **housing** (emphasis supplied) and medical care and necessary social service ...”

Article 22 Draft UN Declaration juga menegaskan sedemikian.

Oleh itu, **SUHAKAM mengesyorkan bahawa:-**

- (a) Walaupun SUHAKAM sedar bahawa mereka yang terlibat mempunyai tempoh lanjutan (*grace period*) selama 5 tahun sebelum mereka perlu membayar untuk rumah mereka, SUHAKAM mengesyorkan bahawa mereka yang terlibat diberi rumah secara **percuma** atas dasar perikemanusiaan. Ini kerana, antara lainnya:-
 - (i) penempatan semula mereka bukanlah atas kerelaan mereka sendiri tetapi disebabkan oleh keadaan; dan
 - (ii) penempatan semula masyarakat asli yang terlibat menyebabkan mereka kehilangan pelbagai aspek kehidupan mereka sebagaimana yang disenaraikan oleh Mahkamah Tinggi di dalam kes *Adong bin Kawau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (yang disahkan oleh Mahkamah Rayuan di dalam kes *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158).
- (b) Pihak berkenaan memperbaiki kerosakan yang dialami oleh setiap rumah secepat mungkin dan tanpa kos.

3. Kemudahan asas yang kurang sempurna

Semasa lawatan ke Penempatan Semula Sungai Asap, rombongan SUHAKAM dimaklumkan bahawa:-

- pembentungan dan perparitan penempatan tersebut adalah kurang sempurna. Kekurangan sistem sedemikian mungkin mendedahkan penghuni-penghuni kepada pelbagai risiko penyakit kesan daripada pembiakan nyamuk dan sebagainya;

-
- sistem pembuangan sampah penempatan tersebut adalah kurang sempurna. Ini menjejaskan kebersihan air sungai yang merupakan punca air bersih penduduk di penempatan tersebut;
 - air yang disediakan oleh loji air yang sedia ada tidak mencapai taraf yang memuaskan; dan
 - jalan raya yang menghubungkan penempatan tersebut dan kawasan bandar lain serta rangkaian jalan raya dalam kawasan penempatan tersebut masih belum diturap.

Seperti yang telah dinyatakan di atas, *Article 25 Universal Declaration of Human Rights* memperuntukan bahawa setiap insan mempunyai hak untuk menikmati taraf hidup yang sempurna.

Dari segi ini, SUHAKAM sedar dan puji usaha-usaha kerajaan untuk menyediakan kemudahan sekolah dan perubatan serta kemudahan asas lain seperti bekalan air dan elektrik, kedai-kedai dan lot industri. Perancangan sedemikian penting bagi menentukan masa depan masyarakat asli yang terlibat, terutama bagi persekolahan anak-anak mereka.

Namun begitu, isu-isu yang dibangkitkan di atas perlu diberi perhatian serius dan rapi dengan seberapa segera dan dengan itu, **SUHAKAM mengesyorkan bahawa:-**

- (a) Berkenaan dengan sistem pembentungan dan perparitan:-
 - (i) sistem pembentungan dan perparitan diperbaiki oleh pihak yang berkenaan secepat mungkin.
- (b) Berkenaan dengan loji pembentungan najis:-
 - (i) pihak berkenaan harus membina loji pembentungan najis di perkampungan yang tidak mempunyai loji tersebut secepat mungkin.
- (c) Berkenaan dengan bekalan air:-

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- (i) pihak Kerajaan memastikan kerja-kerja kawal selia loji pembersihan air dijalankan dengan sempurna bagi memastikan kualiti bekalan air sentiasa di tahap bersih; dan
 - (ii) amalan menyalurkan bahan-bahan buangan dari rumah ke sungai-sungai yang berdekatan harus dihentikan.
- (d) Berkenaan dengan jalan raya:-
- (i) pihak Kerajaan harus memastikan bahawa jalan yang menghubungkan satu kawasan perkampungan dengan kawasan perkampungan yang lain dan juga dengan pusat bandar berada dalam keadaan yang sempurna secepat mungkin.

4. Kesukaran menampung hidup

- Masyarakat asli yang terlibat dalam penempatan semula di Sungai Asap diberi tanah seluas 3 ekar untuk membolehkan mereka meneruskan aktiviti penanaman mereka. Terdapat aduan bahawa tanah seluas 3 ekar tidak mencukupi untuk menampung keperluan harian mereka. Selain itu, ada segelintir masyarakat yang tidak mengetahui lokasi tanah mereka. Selanjutnya, tidak terdapat jalan yang sesuai bagi menghubungkan rumah dan tanah mereka;
- Akibat daripada penempatan semula di Sungai Asap ini, mereka yang terlibat terpaksa menukar cara hidup mereka daripada *subsistence economy* kepada *cash economy*. Oleh kerana pekerjaan sukar didapati di kawasan ini, isu yang timbul adalah bagaimana mereka akan mendapatkan sumber kewangan untuk membiayai keperluan harian mereka. Masalah ini menjadi lebih rumit kerana segolongan masyarakat di penempatan ini tidak fasih dalam teknik penanaman komersial dan usaha kerajaan untuk menggalakkan penanaman komersial didapati kurang berkesan.

SUHAKAM mengambil kira keputusan Mahkamah Persekutuan di dalam kes *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 yang

memutuskan bahawa “kehidupan” dalam Perkara 5 Perlembagaan Persekutuan adalah cukup luas bagi meliputi hak untuk menampung kehidupan (*right to livelihood*).

Tidak dapat dinafikan bahawa penempatan semula masyarakat asli ke Penempatan Semula Sungai Asap bertujuan untuk meningkatkan taraf hidup mereka. Namun demikian, langkah-langkah tertentu perlu diambil oleh pihak yang berkenaan untuk memastikan bahawa kesan penempatan ini tidak akan menyebabkan segolongan masyarakat menghadapi kesukaran untuk menampung kehidupan mereka.

Mahkamah Rayuan membayangkan keadaan ini di dalam kes *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158 apabila ia memutuskan bahawa:-

“It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds ... The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.”

SUHAKAM mengesyorkan bahawa:-

- (a) Mengenai tanah 3 ekar:-
- (i) pihak yang berkenaan menunjukkan kepada tuan punya tanah lokasi sebenar bidang tanah 3 ekar mereka;
 - (ii) pihak yang berkenaan membina jalan menghubungkan rumah dan tanah kebun penghuni-penghuni di Penempatan Semula Sungai Asap bagi memudahkan perjalanan ulang-alik mereka;
 - (iii) pihak tertentu perlu mengambil tindakan menerusi jentera kerajaan yang sedia ada untuk meningkatkan pengetahuan masyarakat asli mengenai penanaman komersial;

-
- (iv) setelah tanah 3 ekar ini digunakan secara sepenuhnya dan didapati bahawa tanah ini tidak mencukupi untuk menampung kehidupan seharian mereka, seperti yang dinyatakan oleh Ketua Menteri Sarawak semasa sesi perbincangan dengan SUHAKAM, kerajaan boleh menimbangkan permohonan tanah yang lebih luas; dan
 - (v) pihak Kerajaan patut menimbangkan pengwujudan satu kawasan *communal reserve* bagi masyarakat asli Sarawak yang berkenaan.
- (b) Mengenai peluang pekerjaan:-
- (i) pihak Kerajaan patut berusaha agar penghuni-penghuni di Penempatan Semula Sungai Asap mempunyai peluang pekerjaan. Ini kerana menurut *Article 23 (1) Universal Declaration of Human Rights* yang menyatakan bahawa:-

“Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

Dari segi ini, panduan boleh didapati daripada, antara lain, *Article 20 ILO Convention* dan *Paragraph 26.9, Chapter 26, Agenda 21 – Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3– 14 June 1992*⁴ sebagai panduan kepada pihak Kerajaan.

SUHAKAM telah dimaklumkan bahawa Sarawak Hidro Sendirian Berhad akan menawarkan pekerjaan kepada mereka yang telah dipindahkan ke Sungai Asap;
 - (ii) pihak Kerajaan Negeri Sarawak patut memastikan masyarakat asli yang terlibat dengan projek pembinaan empangan hidroelektrik diberi peluang

⁴ Laporan ini terkandung dalam Lampiran 7. *Agenda 21* merupakan pelan tindakan komprehensif yang patut dilaksanakan pada peringkat antarabangsa, kebangsaan serta tempatan oleh organisasi Persatuan Bangsa-Bangsa Bersatu, pihak Kerajaan serta kumpulan-kumpulan yang dapat mempengaruhi dasar alam sekitar.

untuk memiliki saham (yang diamanahkan kepada sebuah badan yang berkenaan) di dalam projek tersebut;

- (iii) pihak Kerajaan Negeri Sarawak juga harus menggalakkan penyertaan tempatan (*local participation*) yang aktif dalam projek pembinaan empangan hidroelektrik Bakun; dan
- (iv) majikan yang memberi peluang pekerjaan kepada penghuni-penghuni di sini harus menyediakan program latihan khas untuk mereka. Ini bertujuan supaya masyarakat tempatan boleh memberi sumbangan yang berkesan kepada projek hidroelektrik Bakun.

5. Kemudahan keselamatan yang kurang sempurna

Semasa lawatan rombongan SUHAKAM ke Penempatan Semula Sungai Asap didapati terhadap sebuah pondok Polis yang hanya menempatkan seramai 3 orang anggota sahaja. Selain daripada itu, didapati tidak adanya agensi keselamatan/kecemasan lain yang ditempatkan di kawasan tersebut.

SUHAKAM mengesyorkan bahawa:-

- (a) Pihak kerajaan menyediakan perkhidmatan keselamatan dan kecemasan yang selaras dengan jumlah penghuni dan keadaan persekitarannya.
- (b) Pihak kerajaan harus melatih tenaga sukarelawan daripada kalangan penghuni Penempatan Semula Sungai Asap untuk menampung keperluan keselamatan dan kecemasan masyarakat di situ.

BAB 3

ISU PENDUDUK DI HULU SUNGAI BALUI DAN KAWASAN PERSEKITARANNYA

Penduduk yang ditemui oleh rombongan SUHAKAM pada bulan Oktober/November 2001 terdiri daripada penduduk daripada penempatan berikut:-

- (a) Long Lawen;
- (b) Long Jawe;
- (c) Long Buko;
- (d) Sang Anau; dan
- (e) Rumah Nyabing.

Butir kawasan yang dilawati adalah seperti berikut:-

(a) Long Lawen

Long Lawen merupakan kawasan penempatan semula masyarakat Kenyah Badung dari Long Gang yang memilih untuk tidak berpindah ke Penempatan Semula Sungai Asap. Perkampungan tersebut mempunyai penduduk seramai 380 orang yang terdiri daripada 65 keluarga dan telah berpindah ke kawasan tersebut sejak tahun 1996. Menurut penduduk di sini, sebanyak 30% daripada pampasan akibat daripada perolehan tanah mereka di Long Gang oleh kerajaan negeri Sarawak untuk projek pembinaan empangan hidroelektrik Bakun telah dibayar kepada mereka. Namun demikian, menurut mereka, kerajaan negeri Sarawak hanya akan membayar baki pampasan sebanyak 70% apabila mereka berpindah ke Penempatan Semula Sungai Asap.

Kemudahan yang ada di perkampungan tersebut adalah sebuah tadika, *flying doctor service* dan sebuah janakuasa hidro. Tadika dan janakuasa hidro dibiayai oleh *Bernett Foundation*.

(b) Long Jawe

Perkampungan Long Jawe merupakan perkampungan yang akan ditenggelami air berikutan pembinaan empangan hidroelektrik Bakun. Penduduk yang masih

tinggal di sini terdiri daripada 23 keluarga yang enggan berpindah ke Penempatan Semula Sungai Asap. Sebuah sekolah rendah telah ditutup oleh kerajaan. Penduduk mendakwa bahawa sehingga kini mereka masih tidak mendapat pampasan bagi tanah untuk kegunaan bersama (*communal land*) mereka.

(c) Long Buko

Long Buko adalah satu perkampungan baru kaum Kayan yang berasal dari sebahagian penduduk Batu Keling yang enggan berpindah ke penempatan baru di Sungai Asap. Mereka percaya Long Buko adalah di luar sempadan yang akan ditenggelami air akibat daripada pembinaan empangan hidroelektrik Bakun dan mendakwa bahawa Long Buko adalah di luar sempadan (*perimeter*) kawasan yang akan ditenggelami air. Walau bagaimanapun, rombongan SUHAKAM mendapati bahawa berdasarkan *altimeter* helicopter yang telah dibuatnya, kawasan tersebut berada di bawah paras yang akan ditenggelami air berikutan pembinaan empangan hidroelektrik Bakun.

Penduduk Long Buko mendakwa mereka masih belum menerima 70% baki pampasan dari pihak kerajaan. Dalam dialog di Long Buko beberapa wakil penduduk dari Sang Anau dan Rumah Nyaving telah turut serta untuk mengemukakan aduan.

Semasa lawatan ke kawasan yang terlibat, SUHAKAM telah dimaklumkan mengenai isu-isu berikut:-

1. Baki pampasan yang tertunggak

Berdasarkan aduan daripada mereka yang terlibat, baki pampasan akibat daripada perolehan tanah masyarakat asli yang terlibat kerana pembinaan empangan hidroelektrik Bakun hanya akan dibayar sekiranya mereka berpindah ke Penempatan Semula Sungai Asap. Mereka menuntut pampasan tersebut dibayar walaupun mereka tidak berpindah.

Sepertimana yang telah dijelaskan di dalam Bab 2,⁵ sekiranya tanah yang telah didiami oleh masyarakat asli sejak turun temurun perlu diperolehi oleh pihak berkenaan atas alasan yang dibenarkan oleh undang-undang yang berkuatkuasa, pampasan yang mencukupi perlu dibayar.

SUHAKAM berpendapat bahawa hak ke atas pampasan tersebut tidak tertakluk kepada penempatan semula masyarakat asli ke kawasan yang telah dikenalpasti oleh pihak yang berkenaan.

Oleh itu, **SUHAKAM mengesyorkan bahawa** pihak berkenaan membayar wang pampasan yang masih tertunggak kepada masyarakat asli yang tanah mereka perlu diperolehi sungguhpun mereka tidak berpindah ke Penempatan Semula Sungai Asap.

2. Keengganan segelintir penduduk untuk berpindah

Penduduk di kawasan hulu Sungai Balui dan kawasan sekitarnya tidak ingin berpindah ke Penempatan Semula Sungai Asap atas beberapa alasan yang termasuk:-

- (a) mereka tidak bersetuju dengan tawaran dan jumlah pampasan yang ditetapkan oleh kerajaan;
- (b) mereka tidak ingin mengalami pengalaman yang dianggap pahit sepertimana yang dialami oleh mereka yang telah berpindah ke Penempatan Semula Sungai Asap; dan
- (c) sumber makanan di tempat yang dipilih oleh mereka sekarang ini mencukupi untuk menampung keperluan harian.

SUHAKAM sedar bahawa pihak Kerajaan berharap agar masyarakat asli Sarawak yang berkenaan berpindah ke Penempatan Semula Sungai Asap kerana pihak kerajaan ingin meningkatkan taraf hidup mereka.

⁵ Sila lihat Bahagian 1, Bab 2

SUHAKAM dimaklumkan oleh pihak Kerajaan Negeri Sarawak bahawa pemindahan semula ke kawasan Penempatan Semula Sungai Asap ini adalah selaras dengan usaha kerajaan untuk membangunkan negeri Sarawak. Pemindahan semula ke kawasan Penempatan Semula Sungai Asap akan memberi peluang kepada masyarakat asli untuk membangunkan diri dan meningkatkan taraf hidup mereka.

Namun begitu, SUHAKAM berpendapat bahawa masyarakat asli juga mempunyai hak untuk menentukan keutamaan mereka sendiri dalam proses pembangunan sepertimana yang diperuntukkan dalam suratcara antarabangsa seperti *Article 7(1)* dan *Article 16(2) ILO Convention No. 169* dan *Article 30 Draft UN Declaration on the Rights of Indigenous Peoples*.

Oleh itu, SUHAKAM berpendapat polisi pembangunan Kerajaan dan hak masyarakat asli untuk menentukan keutamaan dalam proses pembangunan, perlu diseimbangkan.

Dengan itu, **SUHAKAM mengesyorkan bahawa:-**

- (a) Masyarakat asli yang ingin menetap di kawasan yang lain daripada kawasan Penempatan Semula Sungai Asap harus dibenarkan bermastautin di kawasan pilihan mereka sekiranya keselamatan mereka terjamin.
- (b) Pihak berkenaan memberikan maklumat penuh kepada masyarakat asli yang tinggal berhampiran empangan hidroelektrik Bakun mengenai sempadan kawasan yang dijangka akan ditengalami air untuk memastikan keselamatan penduduk berkenaan terjamin.
- (c) SUHAKAM mengesyorkan bahawa kerajaan mengikut peruntukan antarabangsa seperti yang terkandung di dalam *Article 2* dan *Article 7(2) ILO Convention No. 169*.
- (d) SUHAKAM berpendapat bahawa perancangan pembangunan sosial dan ekonomi yang melibatkan masyarakat asli memerlukan perundingan dengan semua pihak yang berkaitan sebelum sesuatu projek dimulakan. Panduan mengenai pembangunan masyarakat boleh didapati dalam Chapter 26, *Agenda*

21 dan juga Perenggan 14 and 15 *World Bank Operational Directive 4.20 (September 1991)*.⁶

3. Kemudahan asas dan awam yang kurang sempurna

Walaupun terdapat masyarakat asli, seperti masyarakat asli di Long Lawen, yang menikmati kemudahan asas dan kemudahan awam yang sederhana, masyarakat asli yang lain yang memilih untuk tidak berpindah ke Penempatan Semula Sungai Asap tidak berpeluang menikmati kemudahan asas dan awam seperti bekalan air, pendidikan dan kesihatan yang sewajarnya.

Sepertimana yang telah dijelaskan di dalam Bab 2,⁷ setiap insan mempunyai hak untuk menikmati taraf hidup yang sempurna.

Selain itu, SUHAKAM menegaskan bahawa pendidikan merupakan satu aspek yang wajib untuk setiap kanak-kanak sebagaimana yang disebut di dalam *Article 28(1)(a) Convention on the Rights of the Child*.⁸ Oleh yang demikian masyarakat asli tidak boleh dinafikan hak untuk mendapatkan pendidikan. Hak untuk pendidikan juga merupakan salah satu daripada hak asasi yang dijamin oleh Perkara 12 Perlembagaan Persekutuan dan suratcara antarabangsa seperti *Article 26(1) Universal Declaration of Human Rights* yang menyatakan:-

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

SUHAKAM juga menegaskan bahawa adalah penting untuk masyarakat asli yang berkenaan diberi kemudahan kesihatan yang sewajarnya. Hak untuk kesihatan dijamin oleh Perkara 25 *Universal Declaration of Human Rights* dan juga *Part V ILO Convention No. 169* dan *Article 24 Draft UN Declaration*.

⁶ Dokumen ini terkandung dalam Lampiran 8.

⁷ Sila lihat Bahagian 3, Bab 2

⁸ Malaysia telah meratifikasikan Konvensyen ini.

Oleh itu, **SUHAKAM** mengesyorkan bahawa:-

- (a) Pihak berkuasa seharusnya memastikan masyarakat asli yang tidak berpindah ke Penempatan Semula Sungai Asap mendapat kemudahan pendidikan dan kesihatan.
- (b) Masyarakat asli harus menggunakan kesemua kemudahan asas dan awam yang disediakan oleh pihak berkuasa.
- (c) Masyarakat asli harus faham bahawa penempatan baru seperti Penempatan Semula Sungai Asap adalah satu langkah kerajaan untuk meningkatkan mutu pendidikan dan kesihatan mereka. Mereka diseru untuk mengambil kesempatan yang sedia ada demi kebaikan dan masa depan anak-anak mereka.

BAB 4

ISU KAUM PENAN

Kaum Penan Sarawak yang ditemui oleh rombongan SUHAKAM pada bulan Oktober/November 2001 terdiri daripada kaum Penan dari:-

- (a) Kawasan Perkampungan Ba Penggaran, Ulu Baram, Bahagian Miri;
- (b) Kawasan Penempatan Semula Long Kevok; dan
- (c) Kampung Suai, Miri;

Rombongan SUHAKAM juga berpeluang singgah sebentar di *Samling Central Base Camp* untuk mendapat maklumat berkenaan dengan pembalakan di kawasan tersebut.

Butir-butir kawasan yang dilawati adalah seperti berikut:--

(a) Perkampungan Ba Penggaran

Kawasan Ba Penggaran didiami oleh 30 keluarga Kaum Penan dari suku Serungguh sejak lebih kurang enam tahun yang lalu. Sebelum itu, kumpulan ini telah hidup secara berpindah randah dari satu tempat ke satu tempat sehingga mereka menetap di Ba Penggaran ini yang bersempadan dengan Ba Jo - satu penempatan masyarakat asli dari Suku Kayan.

Rombongan SUHAKAM telah dimaklumkan bahawa mengikut bancian pada tahun 90an, terdapat lebih kurang 100 penempatan di sekeliling Ba Penggaran dengan penduduknya melebihi 10,000 orang. Selain memburu binatang dan mengambil hasil-hasil hutan, keramaian kaum Penan yang telah menetap di kawasan sekitar telah mula bercucuk tanam seperti menanam padi bukit dan juga menanam rotan.

(b) Kawasan Penempatan Semula Long Kevok

Long Kevok merupakan kawasan penempatan semula. Penempatan semula ini berupa sebuah rumah panjang yang telah dibina pada tahun 1989. Ia didiami oleh seramai 24 keluarga. Bancian pada tahun 1998 mendapati bahawa terdapat seramai 112 orang penghuni di rumah panjang ini.

Long Kevok merupakan pusat perkhidmatan (*service center*) untuk kaum Penan. Ia mengandungi sebuah sekolah rendah berasrama, sebuah klinik desa dan juga sebuah pejabat pertanian. Pusat perkhidmatan ini telah beroperasi sejak tahun 1991.

(c) Kampung Suai, Miri

Kampung Suai adalah kawasan penempatan kaum Penan yang berasal dari Ulu Kapit, Belaga yang telah berpindah randah sejak 200 tahun yang lalu. Rombongan SUHAKAM dimaklumkan bahawa kaum Penan ini akhirnya menetap di kawasan ini pada tahun 1971 bersama-sama 30 keluarga. Pada masa ini terdapat sebanyak 98 keluarga dengan jumlah penduduk seramai 444 orang dengan kawasan tanah simpanan seluas 8,000 ekar yang diperuntukkan oleh pihak kerajaan negeri Sarawak.

Rombongan SUHAKAM telah dimaklumkan bahawa sejumlah 5,000 ekar dari kawasan tersebut telah ditanam dengan tanaman kelapa sawit iaitu secara usaha sama dengan Lembaga Pembangunan Tanah Sarawak (**SLDB**). SLDB dikatakan memiliki 70% pegangan saham manakala 30% dimiliki oleh penduduk setempat. Perjanjian tersebut telah dimeterai untuk tempoh 60 tahun. Keramaian penduduk di kawasan ini bekerja di ladang kelapa sawit tersebut dengan pendapatan di sekitar RM 12.00 hingga RM 13.00 sehari.

Kawasan selebihnya iaitu seluas 3,000 ekar telah dibahagi-bahagikan kepada penduduk dengan kawasan seluas lebih kurang 30 ekar bagi setiap keluarga. Kawasan ini dikekalkan sebagai kawasan simpanan kaum Penan untuk digunakan untuk menanam pokok buah-buahan dan tanaman lain.

Terdapat sebuah sekolah rendah berasrama di Kampung ini manakala sekolah menengah yang terdekat adalah lebih kurang 32 kilometer dari Kampung Suai.

(d) Samling Central Base Camp

Rombongan SUHAKAM berpeluang berdialog dengan pihak pengurusan Syarikat Samling Sdn. Bhd. iaitu sebuah syarikat pembalakan di Sarawak. Pertemuan diadakan di *Samling Central Base Camp* di kawasan Baram. Semasa

pertemuan tersebut, pihak pengurusan syarikat tersebut menyatakan kesudiannya untuk membantu kaum Penan dari segi meningkatkan keperluan asas mereka. Pihak syarikat juga memaklumkan bahawa mereka kerap kali menghulurkan bantuan kepada kaum Penan di kawasan pembalakan mereka seperti membekalkan tangki-tangki air, menyediakan jenerator dan bekalan-bekalan makanan.

Semasa lawatan ke kawasan yang terlibat, SUHAKAM telah dimaklumkan mengenai isu-isu berikut:-

1. Hak Kaum Penan ke atas tanah adat serta sumber asli hutan

Kaum Penan di kawasan yang dilawati beranggapan bahawa pihak Kerajaan dan syarikat pembalakan gagal menghormati hak mereka ke atas tanah adat serta sumber asli hutan. Sebagai contoh, mereka mengadu bahawa syarikat pembalakan sering melaksanakan aktiviti pembalakan di kawasan penempatan mereka serta kawasan sekitarnya tanpa perbincangan terlebih dahulu dengan wakil mereka. Keadaan ini menyusahkan mereka kerana kawasan penempatan mereka serta kawasan sekitarnya merupakan tanah tradisional dan nenek moyang mereka. Mereka bergantung kepada tanah tersebut untuk mata pencarian menurut tradisi mereka.

Masalah ini telah wujud sejak 1980an lagi. Ada beberapa insiden yang buruk telah berlaku akibat sekatan (*blockades*) yang telah didirikan oleh kaum Penan untuk menghalang pembalakan oleh syarikat berkenaan kerana ingin melindungi hak mereka. Beberapa orang Penan pernah ditangkap oleh pihak berkuasa dan dipenjarakan. Ada juga yang cedera akibat sekatan tersebut. Keadaan yang tegang di antara kaum Penan dan pihak Kerajaan serta syarikat pembalakan ini telah mendapat perhatian antarabangsa dan telah menjadi asas *Anti-tropical Timber Campaign* di Eropah dan Amerika Syarikat pada 1990an.

Kerajaan Negeri Sarawak menyatakan bahawa kaum Penan telah dipengaruhi oleh pihak tertentu dari luar negara dan Pertubuhan Bukan Kerajaan Antarabangsa. Antara individu yang dinamakan ialah Bruno Manser yang dianggap sebagai seorang *enviromentalist extremist*.

Berdasarkan penjelasan-penjelasan di Bab-Bab 2 dan 3, SUHAKAM berpendapat bahawa untuk menangani masalah ini, tiga faktor utama harus dihargai:-

- (a) Pihak Kerajaan ingin membangunkan tanah-tanah adat kaum Penan dan ingin meningkatkan taraf hidup kaum tersebut;
- (b) Kaum Penan berhak ke atas tanah adat mereka. Hak asasi ini harus dihormati dan diberi pengiktirafan; dan
- (c) Kaum Penan inginkan pembangunan. Namum demikian, mereka berhak untuk menentukan keutamaan mereka sendiri dalam proses pembangunan.

Dengan itu, **SUHAKAM mengesyorkan bahawa:-**

- (a) Kaum Penan berhenti daripada mengadakan sekatan untuk menghalang pembalakan kerana mengadakan sekatan tidak akan menyelesaikan masalah.
- (b) Pihak Kerajaan dan syarikat pembalakan patut memahami, menghormati dan mengiktiraf adat Penan berkaitan tanah.
- (c) Sebelum sesuatu aktiviti pembalakan di kawasan yang melibatkan kaum Penan dilaksanakan, satu kajian berkaitan kesan sosial (*social impact*) perlu dilaksanakan dan laporan mengenainya harus diambil kira.
- (d) Untuk situasi di mana sudah berlakunya pertikaian ekoran aktiviti pembalakan dan pembangunan, SUHAKAM menyeru agar kesemua pihak berunding untuk menyelesaikannya.
- (e) Sekiranya aktiviti pembalakan perlu atau ingin dilaksanakan:-
 - (i) pampasan yang secukupnya menurut piawaian tempatan dan antarabangsa patut dibayar kepada kaum Penan;

- (ii) satu kawasan khas harus dikekalkan sebagai kawasan tadahan air untuk menjamin bekalan air bersih yang berterusan dan untuk mencegah pencemaran air bersih yang lazimnya berlaku akibat aktiviti pembalakan;
- (iii) sebahagian kawasan penempatan asal patut dikekalkan sebagai tanah hutan simpanan supaya kaum Penan dapat meneruskan usaha memburu binatang dan mengambil hasil hutan bagi dijadikan sumber makanan dan sumber ekonomi mereka.

Syor ini selaras dengan keputusan Mahkamah Tinggi dan Mahkamah Rayuan dalam *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 118 yang menyatakan:-

“... the aboriginal people’s rights over land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself ...”

Selain itu, cadangan ini juga selaras dengan peruntukan antarabangsa seperti *Article 13* dan *Article 15 ILO Convention No. 169* yang memperuntukkan untuk hak orang Asal untuk mempraktikkan tradisi dan adat mereka yang istimewa; dan

- (iv) jalan pembalakan patut dijaga secara berterusan dan dinaikkan taraf dari masa ke semasa untuk memudahkan perjalanan harian kaum Penan.

2. Kemudahan asas yang kurang sempurna

Semasa lawatannya, rombongan SUHAKAM mendapati bahawa kebanyakan penempatan kaum Penan:-

- Tidak terdapat keperluan asas seperti bekalan air bersih. Sebagai contoh, sumber bekalan air mereka adalah air hujan atau sungai yang tercemar akibat pembalakan yang tidak terancang. Pencemaran sungai ini menyusahkan mereka

kerana sungai merupakan sumber utama bekalan air mereka. Selain itu, sungai juga merupakan salah satu sumber makanan mereka.

- Tiada bekalan elektrik yang sempurna. Selain daripada Pusat Perkhidmatan Long Kevok, kebanyakan penempatan Penan tidak menikmati bekalan elektrik.
- Terdapat sebilangan perkampungan Penan yang tiada sekolah dan klinik. Untuk menikmati kemudahan-kemudahan tersebut, mereka yang berkenaan terpaksa membuat perjalanan jauh. Contohnya, untuk menikmati kemudahan sekolah dan klinik, kaum Penan di Ba Panggara terpaksa membuat perjalanan darat kira-kira empat jam ke perkampungan Long Lellang. Selain itu, di penempatan yang ada sekolah dan klinik, seperti di Sekolah Rendah Long Sait, kemudahan yang sedia ada adalah kurang sempurna.

SUHAKAM menegaskan bahawa kaum Penan sepertimana kaum-kaum lain mempunyai hak untuk menikmati taraf hidup yang sempurna. SUHAKAM sekali menegaskan betapa pentingnya hak untuk pendidikan dan kesihatan untuk masyarakat asli.

Oleh itu, **SUHAKAM mengesyorkan bahawa:-**

- (a) Berkenaan dengan Bekalan Air:-
 - (i) syarikat pembalakan patut melaksanakan aktiviti pembalakan mereka secara bertanggungjawab. Sekiranya syarikat ini tidak menjalankan aktiviti mereka secara bertanggungjawab, denda harus dikenakan ataupun lesen pembalakan mereka harus ditarik balik;
 - (ii) pihak Kerajaan harus memastikan bahawa setiap penempatan kaum Penan mempunyai bekalan air bersih yang sewajarnya dengan sebagai contoh, menyediakan kemudahan bekalan air seperti *gravity feed*; dan
 - (iii) pihak Kerajaan hendaklah memastikan apabila pembalakan dilakukan, kawasan tadahan air sentiasa dilindungi.
- (b) Berkenaan dengan Kemudahan Kesihatan:-

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- (i) terdapat kemudahan klinik di Long Kevok yang memuaskan. Namun adalah sukar untuk kerajaan menyediakan kemudahan sedemikian untuk setiap penempatan kaum Penan. SUHAKAM menyeru agar pihak Kerajaan meneruskan khidmat *The Flying Doctor Service* dan meningkatkan kekerapan khidmat ini di setiap penempatan kaum Penan; dan
 - (ii) kaum Penan harus menerima dan melaksanakan nasihat pegawai-pegawai perubatan.
- (c) Berkenaan dengan Kemudahan Pendidikan:-
- (i) pihak Kerajaan seharusnya memastikan bahawa hak kaum Penan untuk pendidikan terjamin. Semua anak kaum Penan perlu diberi peluang pendidikan yang berkualiti; dan
 - (ii) kaum Penan seharusnya menghantar anak-anak mereka ke sekolah.
- (d) Pihak Kerajaan harus mewujudkan lebih banyak lagi pusat perkhidmatan untuk kaum Penan.
- (e) Sistem penempatan yang dilaksanakan oleh Kerajaan untuk kaum Penan di Kampung Suai, Miri boleh digunakan sebagai model pembangunan kaum Penan.

3. Penternakan dan Pertanian yang kurang maju

Adalah pemerhatian SUHAKAM bahawa kaum Penan masih mundur dalam teknik penternakan dan pertanian.

SUHAKAM mengesyorkan bahawa:-

- (a) Pihak Kerajaan Negeri Sarawak melatih kaum Penan dalam teknik penternakan serta pertanian yang lebih maju dengan menghantar pegawai Jabatan Pertanian ke sesuatu penempatan kaum Penan.

4. Pendaftaran kelahiran dan hak mengundi

- Rombongan SUHAKAM telah mendapati bahawa terdapat segolongan kaum Penan yang tiada sijil kelahiran dan juga kad pengenalan.
- Kaum Penan juga telah menyuarakan kesal mereka kerana tidak berpeluang mengundi pada beberapa pilihan raya yang lalu.

SUHAKAM menegaskan bahawa mengundi adalah hak asasi manusia di dalam sebuah negara berdemokrasi. Hak untuk mengundi juga dijamin oleh Perkara 21 *Universal Declaration of Human Rights* yang menyatakan:-

- “1. *Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
2. *Everyone has the right to equal access to public service in his country.*
3. *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”*

SUHAKAM mengesyorkan agar:-

- (a) Jabatan Pendaftaran Negara menghantar pegawainya ke penempatan kaum Penan sekurang-kurangnya 6 bulan sekali untuk memastikan mereka yang berkenaan mempunyai sijil kelahiran serta kad pengenalan dan untuk mendidik kaum Penan tentang prosedur-prosedur yang perlu diikuti supaya masalah ini tidak berulang lagi.
- (b) Suruhanjaya Pilihanraya seharusnya menghantar pegawainya ke penempatan kaum Penan sekurang-kurangnya 6 bulan sekali untuk memastikan kaum Penan didaftarkan sebagai pengundi.

BAB 5

ISU KAUM IBAN

Kaum Iban di Sarawak yang ditemui oleh rombongan SUHAKAM pada bulan Oktober/November 2001 terdiri daripada kaum Iban di sekitar Ulu Niah, Sarawak. Dua buah rumah panjang yang dilawati adalah:-

- (a) Rumah Busang; dan
- (b) Rumah Lajun.

Semasa lawatan ke kawasan yang terlibat, SUHAKAM telah dimaklumkan mengenai isu-isu berikut:-

1. Hak kaum Iban ke atas tanah adat dan adat berjalai

Isu utama yang dibangkitkan oleh kaum Iban yang ditemui ialah Kerajaan tidak mengiktiraf tanah adat dan juga adat berjalai mereka.

Kedua-dua perkampungan ini telah wujud sejak tahun 1976. Walaupun kaum Iban di sini telah mengemukakan beberapa permohonan kepada pihak kerajaan untuk mendapatkan pengiktirafan ke atas perkampungan dan ladang mereka, mereka tidak menerima sebarang jawapan.

Syarikat Sarawak Oil Palm Sdn. Bhd. (**SOP**) telah mendapat kebenaran dari pihak Kerajaan untuk memajukan kawasan pertanian kaum Iban sebagai sebuah kawasan penanaman kelapa sawit secara komersial. Ini telah menimbulkan pertikaian di antara penduduk dengan syarikat tersebut.

Kaum Iban telah membawa pertikaian tersebut ke Mahkamah Adat. Keputusan Mahkamah Adat memihak kepada kaum Iban. Mahkamah Adat telah memutuskan bahawa pekerja-pekerja SOP telah mencero bohi (*trespass*) kawasan penduduk Iban. Namun demikian, SUHAKAM dimaklumkan bahawa keputusan Mahkamah Adat tidak diendahkan oleh SOP kerana syarikat tersebut telah meneruskan projek tersebut.

Masalah yang dibangkitkan oleh kaum Iban ini mempunyai ciri-ciri yang sama dengan isu yang telah dibangkitkan oleh kaum Penan.⁹ Oleh itu, SUHAKAM mengulangi bahawa untuk menangani masalah ini, tiga faktor utama berikut harus diambil kira:-

- (a) Pihak kerajaan ingin membangunkan tanah adat kaum Iban dan ingin meningkatkan taraf hidup kaum Iban;
- (b) Kaum Iban berhak ke atas tanah adat mereka. Hak ini harus dihormati dan diberi pengiktirafan; dan
- (c) Kaum Iban inginkan pembangunan. Namun demikian, mereka berhak untuk menentukan keutamaan mereka sendiri dalam proses pembangunan.

Oleh itu, **SUHAKAM mengesyorkan bahawa:-**

- (a) Kaum Iban menghentikan pertikaian mereka dengan pihak Kerajaan dan syarikat penanaman komersial yang berkenaan.
- (b) Pihak Kerajaan dan syarikat penanaman komersial patut mengiktiraf, memahami dan menghormati perasaan kaum Iban berkaitan dengan isu tanah.
- (c) Sebelum sesuatu aktiviti pembangunan ingin dijalankan di kawasan yang melibatkan kaum Iban, satu kajian berkaitan dengan kesan sosial perlu dilaksanakan dan laporan mengenainya harus diambil kira.
- (d) Untuk situasi di mana sudah berlakunya pertikaian ekoran aktiviti penanaman komersial dan pembangunan, SUHAKAM menyeru agar kesemua pihak berunding untuk menyelesaikannya.
- (e) Sekiranya aktiviti penanaman komersial dan pembangunan perlu atau ingin dilaksanakan:-
 - (i) pampasan yang secukupnya menurut piawaian tempatan dan

⁹ Sila lihat Bahagian 1, Bab 4.

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- antarabangsa patut dibayar kepada kaum Iban;
- (ii) satu kawasan khas harus dikekalkan sebagai kawasan tadahan air untuk menjamin bekalan air bersih yang berterusan dan untuk mencegah pencemaran air bersih yang lazimnya berlaku akibat aktiviti penanaman komersial;
 - (iii) sebahagian kawasan penempatan asal patut dikekalkan sebagai tanah hutan simpanan supaya kaum Iban dapat meneruskan usaha memburu binatang dan mengambil hasil hutan bagi dijadikan sumber makanan dan sumber ekonomi mereka;
 - (iv) jalan yang dibina untuk memudahkan penanaman komersial patut dijaga secara berterusan dan dinaikkan taraf dari masa ke semasa untuk memudahkan perjalanan harian kaum Iban.
- (f) Sekiranya kepentingan syarikat persendirian dan kaum Iban tidak dapat diselaraskan, badan pembangunan tanah negeri Sarawak seperti Lembaga Penyatuan dan Pemulihan Tanah Sarawak (**SALCRA**) patut mengambil alih pembangunan tanah tersebut.
- (g) Langkah kerajaan untuk memajukan kawasan pertanian di sekitar perkampungan kaum Iban hendaklah melibatkan masyarakat tersebut sama ada melalui konsep usaha sama antara kaum Iban dan agensi kerajaan atau lain-lain konsep kerjasama yang akan menguntungkan kedua-dua pihak.
- (h) Keputusan dan perintah Mahkamah Adat harus dipatuhi oleh semua pihak yang terlibat.

2. Keadaan Encik Jalen @ Jalan ak Antom di Penjara Miri

Pertikaian di antara Iban dan SOP telah menyebabkan berlakunya empat kematian dan kecederaan kepada beberapa pekerja SOP. Encik Jalen @ Jalan ak Antom, seorang penduduk Rumah Lajun yang berumur 73 tahun telah dituduh menyebabkan kematian

tersebut. Beliau telah didapati bersalah oleh Mahkamah Tinggi Miri dan dijatuhi hukuman penjara selama 12 tahun.

Pada 14 Disember 2001, satu rombongan SUHAKAM telah melawat En. Jalen @ Jalan Ak Atom di Penjara Pusat di Miri dan mendapati bahawa beliau sedang menghidapi penyakit mata yang sungguh serius dan memerlukan pembedahan.

SUHAKAM telah menyarankan kepada pihak berkuasa Penjara Miri untuk menyediakan satu laporan untuk membolehkan pembedahan dilakukan ke atas mata En. Jalen dengan segera.

3. Pampasan yang terlalu rendah atau tertunggak

- SUHAKAM telah dimaklumkan bahawa akibat daripada pencerobohan ke kawasan ladang yang didakwa dimiliki oleh kaum Iban, wang pampasan sebanyak RM500.00 telah dibayar kepada setiap ketua keluarga. Ketua-ketua keluarga kaum Iban tidak berpuas hati dan rayuan berhubung dengan jumlah pampasan telah dibuat kepada Menteri yang bertanggungjawab dan juga kepada Jabatan Tanah dan Ukur. Sehingga kini tiada jawapan diterima.
- Sebagai tambahan, SOP juga dikatakan telah menawarkan sebidang tanah seluas lima ekar untuk setiap keluarga tetapi sehingga kini tiada sebarang keputusan dicapai.

SUHAKAM mengulangi bahawa sekiranya tanah adat Iban perlu diperolehi oleh pihak berkenaan atas alasan yang dibenarkan oleh undang-undang yang berkuatkuasa, pampasan yang mencukupi perlu dibayar seperti yang diperuntukan dalam Perkara 13 Perlembagaan Persekutuan serta peruntukan-peruntukan antarabangsa seperti *Article 16(4)* dan *Article 16(5) ILO Convention No. 169* dan *Article 10 Draft UN Declaration*.¹⁰

Oleh itu, **SUHAKAM mengesyorkan bahawa:-**

¹⁰ Lihat Bahagian 1, Bab 2.

- (a) Pihak Kerajaan membayar pampasan yang secukupnya menurut piawaiian tempatan dan antarabangsa kepada kaum Iban sekiranya hak kaum tersebut ke atas tanah adat mereka terjejas akibat aktiviti pembangunan dan penanaman komersial.
- (b) Pihak yang berkenaan harus memberi pampasan yang masih tertunggak kepada kaum Iban secepat mungkin.

BAB 6

MASALAH PENDUDUK DI BAHAGIAN HILIR EMPANGAN HIDROELEKTRIK BAKUN

Satu daripada memorandum yang diterima oleh SUHAKAM:-

- menyuarakan kebimbangan penduduk di bahagian hilir Empangan Bakun terhadap paras aliran air sungai yang menjadi punca utama mata pencarian hidup mereka.
- mengadu bahawa tragedi mungkin berlaku sekiranya empangan hidroelektrik Bakun mengalami kerosakan.
- mengadu bahawa penduduk di bahagian hilir empangan hidroelektrik Bakun tidak dibayar pampasan untuk tanaman mereka di tepi sungai yang telah dimusnahkan oleh pihak kerajaan.

Walaupun rombongan SUHAKAM tidak melawat masyarakat yang berkenaan, SUHAKAM telah membangkitkan isu-isu ini dengan pihak berkuasa yang mengawal selia projek pembinaan empangan hidroelektrik Bakun semasa perbincangan dan lawatannya.

Pihak tersebut telah menegaskan bahawa:-

- (a) paras aliran sungai akan dikawal supaya kekal pada paras yang mencukupi untuk kegunaan masyarakat di hilir empangan; dan
- (b) kemungkinan berlaku kerosakan ke atas empangan Bakun adalah sangat kecil dan jika berlaku, perancangan keselamatan akan disediakan.

SUHAKAM menge syorkan bahawa:-

- (a) Berdasarkan keyakinan yang telah diberi oleh pihak berkuasa Bakun, penduduk di bahagian hilir empangan hidroelektrik Bakun tidak perlu bimbang tentang paras aliran air sungai yang berdekatan dan sekiranya terdapatnya masalah, penghuni-penghuni di situ seharusnya memaklumkan pihak berkuasa Bakun untuk tindakan selanjut mereka secepat mungkin.
- (b) Pihak berkuasa Bakun harus mengadakan sesi penerangan dengan penduduk di bahagian hilir empangan hidroelektrik Bakun dan menjelaskan langkah-langkah keselamatan yang harus dipatuhi sekiranya berlaku sebarang kerosakan terhadap empangan tersebut.
- (c) Pihak berkenaan harus membayar pampasan untuk tanaman yang terpaksa ditinggalkan oleh penduduk di bahagian hilir empangan hidroelektrik Bakun akibat penghijrahan mereka ke kawasan baru.

BAB 7

RUMUSAN

1. Pengenalan

Daripada lawatan rombongan SUHAKAM ke tempat-tempat yang berkenaan serta perbincangan dan dialog bersama agensi kerajaan dan bukan kerajaan, SUHAKAM telah mengenalpasti beberapa kebimbangan (*concern*) masyarakat asli yang berkaitan dengan hak-hak asasi yang berikut:-

- hak ke atas tanah dan sumber;
- hak untuk pampasan yang mencukupi;
- hak untuk menentukan arah tuju kehidupan;
- hak untuk kemudahan asas;
- hak untuk menampung hidup;
- hak kewarganegaraan; dan
- hak keselamatan.

Kebimbangan tersebut jika tidak diambil kira akan menjadi suatu isu dan sekiranya tidak ditangani dengan sewajarnya, isu tersebut akan berkembang menjadi suatu masalah bagi semua pihak sama ada secara langsung atau tidak langsung.

SUHAKAM sedar bahawa kebimbangan yang dibangkitkan bukan perkara yang baru dan pihak berkuasa sememangnya peka tentang kebimbangan tersebut. SUHAKAM juga mengakui bahawa pelbagai usaha telah diambil oleh pihak Kerajaan melalui agensinya untuk membantu masyarakat asli di Sarawak. Namun demikian daripada siasatan SUHAKAM didapati bahawa beberapa kebimbangan perlu ditangani untuk memastikan hak masyarakat asli Sarawak terjamin.

2. Hak asasi masyarakat asli

Hak masyarakat asli diperuntukkan di dalam perundangan tempatan serta antarabangsa. Peruntukan perundangan tersebut adalah seperti berikut:-

(a) Perlembagaan Persekutuan

Peruntukan yang berkenaan adalah Bahagian II Perlembagaan Persekutuan, terutamanya Perkara 13 yang berkaitan dengan hak terhadap harta dan pampasan yang mencukupi.

(b) Perisytiharaan Sejagat Hak Asasi Manusia 1948

Peruntukan yang berkenaan adalah:-

- Perkara 3 – Hak untuk nyawa, kebebasan diri dan keselamatan.
- Perkara 15 – Hak kewarganegaraan.
- Perkara 17 – Hak terhadap harta.
- Perkara 21 – Hak untuk mengundi.
- Perkara 23(1) – Hak untuk bekerja.
- Perkara 25 – Hak untuk taraf hidup yang sempurna.
- Perkara 26 – Hak untuk pendidikan.
- Perkara 27 – Hak untuk mengamali budaya masyarakat.
- Perkara 29 – Hak untuk perkembangan sahsiah.

(c) Konvensyen Organisasi Buruh Antarabangsa (No. 169) Mengenai Orang Asal dan Suku Kaum Negara Bebas

Konvensyen No. 169 ini mempercayai bahawa budaya dan institusi orang asal dan suku kaum harus dihormati. Mereka mempunyai hak untuk mengekalkan identiti mereka dalam masyarakat kebangsaan, menubuhkan institusi sendiri dan menentukan hala tuju pembangunan untuk diri sendiri. Konvensyen No. 169 juga menyarankan supaya kerajaan berunding dengan masyarakat asli dalam hal-hal perundangan dan pentadbiran yang melibatkan mereka secara langsung dan juga menubuhkan mekanisme untuk melibatkan mereka dalam membuat keputusan mengenai polisi dan program yang berkaitan dengan mereka.

Peruntukan-peruntukan yang penting dalam Konvensyen ini adalah:-

- Perkara 4 - Keperluan untuk kerajaan untuk mengambil langkah yang khas untuk melindungi hak masyarakat asli.

- Perkara 5 - Keperluan untuk kerajaan untuk mengenali dan menghormati nilai dan amalan sosial, budaya dan kerohanian masyarakat asli.
- Perkara 6 – Keperluan kerajaan untuk berunding dengan masyarakat asli dalam semua perkara yang berkaitan dengan mereka.
- Perkara 7 – Hak masyarakat asli menentukan pilihan/keutamaan mereka sendiri dan tanggungjawab pihak Kerajaan melindungi alam sekitar masyarakat asli.
- Perkara 8 – Keperluan untuk undang-undang kebangsaan yang mengiktiraf adat suku kaum dan undang-undang adat.
- Perkara 13 - Keperluan untuk penghormatan terhadap perhubungan di antara kejiwaan dan kebudayaan masyarakat asli dan tanah mereka.
- Perkara 14 - Keperluan untuk pengiktirafan hak milik tanah yang didiami oleh masyarakat asli secara tradisi dan mengadakan satu sistem bagi menyelesaikan sebarang pertikaian.

Walaupun Malaysia masih belum meratifikasikan Konvensyen ini, Kerajaan patut menggunakan Konvensyen ini sebagai garis panduan dalam pengurusan hal ehwal masyarakat asli.

(d) Deraf Perisytiharaan Pertubuhan Bangsa-Bangsa Bersatu Mengenai Hak Masyarakat Asli

Deraf pengistiharan ini meliputi hak dan kebebasan asasi yang berkaitan dengan masyarakat asli termasuklah:-

- Hak untuk melindungi dan memperkembangkan ciri-ciri budaya dan identiti yang khusus mereka;
- Hak untuk memiliki dan menggunakan tanah tradisional dan sumber asli;
- Hak berkaitan agama, bahasa dan pendidikan;

- Hak untuk mengambil bahagian di dalam hal ehwal politik, ekonomi dan sosial di dalam masyarakat di mana masyarakat asli hidup; dan
- Hak untuk menentukan hala tuju kehidupan sendiri dan untuk mengawal hal ehwal yang berkenaan dengan masyarakat asli (*right to self-determination and to self-government in matters related to indigenous affairs*).

3. Syor-syor SUHAKAM

Berdasarkan dapatan siasatan SUHAKAM dan selaras dengan hak masyarakat asli yang telah diiktirafkan dalam Perlembagaan Persekutuan serta suratcara-suratcara antarabangsa, SUHAKAM mencadangkan bahawa pihak Kerajaan (sama ada Kerajaan Persekutuan dan/atau Kerajaan Negeri Sarawak), masyarakat asli dan pihak lain yang berkenaan mengambil tindakan seperti berikut:-

(a) Pengiktirafan hak masyarakat asli ke atas tanah dan sumber

SUHAKAM sedar bahawa perundangan negeri Sarawak sememangnya mengiktirafkan hak masyarakat asli ke atas tanah dan sumber. Namun demikian, SUHAKAM berpendapat bahawa perundangan negeri Sarawak perlu diperbaharui untuk memastikan hak masyarakat asli lebih terjamin dan diselaraskan mengikut prinsip yang menghormati hak asasi manusia termasuk prinsip berikut:-

- peruntukan perundangan menghormati serta melindungi hak masyarakat asli ke atas tanah, kawasan dan sumber supaya hak tersebut dilindungi oleh undang-undang;
- peruntukan perundangan menghormati adat istiadat dan adat hak milik tanah masyarakat asli. Sesuatu kawasan yang didiami oleh masyarakat asli hanya akan dibangunkan setelah perundingan diadakan dengan masyarakat asli dan setelah persetujuan masyarakat asli yang berkenaan didapati;

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- peruntukan perundangan memastikan bahawa hak masyarakat asli tidak boleh dicanggahi dengan sewenang-wenangnya oleh mana-mana pihak dan tanpa melalui proses undang-undang; dan
 - peruntukan perundangan harus memastikan bahawa hak-hak serta perlindungan undang-undang masyarakat asli ke atas tanah tidak akan berkurangan atau dinafikan atas alasan bahawa hak milik atau kepentingan lain dipegang secara bersama atau dipegang oleh sekumpulan orang masyarakat asli dan bukannya oleh individu.

Dengan itu, **SUHAKAM mengesyorkan agar:-**

- (i) pihak Kerajaan menubuhkan suatu jawatkuasa pembaharuan perundangan di Kamar Peguam Besar Negeri untuk:-
 - mengkaji undang-undang yang mungkin mengurangkan hak masyarakat asli ke atas tanah dan sumber. Suatu panduan tentang undang-undang yang boleh ditafsirkan yang mengurangkan hak masyarakat asli ke atas tanah dan sumber boleh didapati di dalam kes Mahkamah Tinggi *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241;
 - membuat kajian untuk mengkanunkan adat-adat masyarakat asli kepada hal-hal berkaitan dengan tanah dan sumber serta tidak hanya merangkumi hal-hal yang berkaitan dengan adat istiadat masyarakat asli sepertimana yang telah dibuat untuk kaum Iban di dalam *Adat Iban Order 1993*, kaum Bidayuh di dalam *Adat Bidayuh Order* dan kaum Kayan-Kenyah dalam *Adat Kayan-Kenyah Order 1994*;
 - mengkaji lain-lain perundangan serta tatacara pentadbiran yang berkaitan dengan hak masyarakat asli ke atas tanah dan sumber.

Dalam melaksanakan tanggungjawabnya, jawatankuasa tersebut haruslah mengambil kira dasar perikemanusiaan.

- (ii) Pihak Kerajaan mengambil tindakan segera untuk mengeluarkan surat hak milik tanah atau lain-lain dokumen yang berkenaan kepada mereka yang berhak. Mereka yang berkenaan termasuk mereka yang telah menetap di sesebuah tanah sebelum 1958.
- (iii) Pihak Kerajaan harus menggunakan budi bicara dan perikemanusiaan untuk mengeluarkan surat hak milik kepada masyarakat asli yang tidak memenuhi syarat atau mempunyai kelayakan untuk memiliki tanah di bawah *Sarawak Land Code* 1958 tetapi telah menduduki di tanah Kerajaan untuk tempoh sekurang-kurangnya selama 20 tahun sebelum tahun 2002.

(b) Pemberian pampasan yang mencukupi

SUHAKAM sedar bahawa perundangan negeri Sarawak berkenaan dengan kadar pampasan yang perlu dibayar untuk perolehan tanah oleh pihak kerajaan adalah komprehensif. Namun demikian didapati bahawa masih terdapat masalah tentang mekanisme pembayaran pampasan.

Oleh itu, **SUHAKAM mengesyorkan bahawa** pihak berkuasa mengkaji semula mekanisme pembayaran pampasan supaya mekanisme tersebut adalah adil, telus dan berasas kepada piawai tempatan dan antarabangsa.

(c) Pengiktirafan hak masyarakat asli untuk menentukan hala tuju kehidupan

SUHAKAM sedar dan memuji dasar kerajaan untuk membangunkan masyarakat asli. Daripada siasatan SUHAKAM, didapati masyarakat asli juga inginkan pembangunan tersebut dan ingin terlibat dalam perancangan pembangunan.

Untuk menjayakan projek pembangunan masyarakat asli, **SUHAKAM mengesyorkan bahawa:-**

- (i) Pihak kerajaan harus memberi maklumat yang secukupnya mengenai sesuatu projek pembangunan kepada masyarakat asli yang terlibat

supaya mereka dapat membuat keputusan yang termaklum (*informed decision*).

- (ii) Pihak kerajaan harus mengadakan perundingan dengan masyarakat asli yang berkenaan untuk mengenalpasti keperluan dan keinginan masyarakat tersebut dan bukan setakat bermesyuarat untuk memberi maklumat kepada mereka sahaja.
- (iii) Pihak kerajaan harus mengakomodasikan keperluan dan keinginan serta menghormati pilihan yang dibuat oleh masyarakat asli dalam pelaksanaan projek pembangunan.
- (iv) Pihak kerajaan harus memastikan penyertaan masyarakat asli di dalam setiap tahap projek pembangunan yang melibatkan mereka.

(d) Penyediaan kemudahan asas

SUHAKAM sedar bahawa pihak kerajaan sememangnya menyediakan kemudahan asas seperti perkhidmatan pendidikan dan kesihatan untuk masyarakat asli. Namun demikian, didapati bahawa terdapat beberapa penempatan masyarakat asli yang tidak mempunyai kemudahan asas dan didapati juga kekurangan kemudahan asas di beberapa kawasan penempatan masyarakat asli.

SUHAKAM mengesyorkan bahawa:-

- (i) Kemudahan Pendidikan:-
 - pihak Kerajaan seharusnya memastikan bahawa hak masyarakat asli untuk pendidikan terjamin. Semua anak masyarakat asli perlu diberi peluang pendidikan yang berkualiti; dan
 - masyarakat asli harus memastikan anak-anak mereka berilmu dengan menghantar mereka ke bersekolah.
- (ii) Kemudahan Kesihatan:-

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- pihak Kerajaan menubuhkan infrastruktur kesihatan untuk masyarakat asli;
 - pihak Kerajaan meneruskan khidmat *The Flying Doctor Service* di kawasan pedalaman dan meningkatkan kekerapan khidmat ini; dan
 - masyarakat asli harus menerima dan mematuhi nasihat pegawai perubatan dan kesihatan.
- (iii) Kemudahan jalan raya:-
- pihak Kerajaan harus memastikan bahawa jalan yang menghubungkan satu kawasan perkampungan dengan kawasan perkampungan yang lain dan juga dengan pusat bandar berada dalam keadaan yang sempurna secepat mungkin; dan
 - pihak Kerajaan harus memastikan bahawa jalan pembalakan dikawal selia untuk memudahkan perhubungan masyarakat asli di kawasan pedalaman.
- (iv) Kemudahan bekalan air:-
- pihak Kerajaan harus memastikan bahawa kerja pembalakan dan penanaman komersial tidak mencemarkan sumber bekalan air bersih masyarakat asli;
 - pihak Kerajaan harus memastikan kerja kawal selia loji pembersihan air dijalankan dengan sempurna di penempatan masyarakat asli yang mempunyai loji pembersihan air untuk memastikan kualiti bekalan air sentiasa bersih dan selamat; dan
 - masyarakat asli harus menghentikan amalan menyalurkan bahan buangan dari rumah ke sungai yang berdekatan.

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- (v) pihak Kerajaan harus mewujudkan pusat perkhidmatan di penempatan masyarakat asli yang tiada kemudahan tersebut.

(e) Penyediaan peluang untuk menampung hidup

Terdapat masyarakat asli yang berasa sukar untuk menampung hidup seharian mereka, terutamanya mereka yang ditempatkan di kawasan penempatan semula. Oleh yang demikian SUHAKAM mengesyorkan bahawa:-

- (i) Memberi bantuan dari segi pertanian:-
- Pihak kerajaan harus menempatkan pegawai pertanian yang terlatih di kawasan masyarakat asli untuk melatih dan membantu masyarakat asli untuk meningkatkan taraf hidup; dan
 - Masyarakat asli harus sanggup dilatih untuk menggunakan teknik pertanian yang lebih berkesan.
- (ii) Menyediakan peluang pekerjaan:-
- Pihak kerajaan dan sektor swasta harus memberi peluang pekerjaan kepada masyarakat asli dengan memberi latihan khas termasuk latihan pemahaman etika dan syarat pekerjaan; dan
 - Pihak kerajaan dan sektor awam harus memberi masyarakat asli tempoh peralihan (*transitional period*) untuk menyesuaikan diri sebagai seorang pekerja sambil lewa kepada seorang pekerja yang lebih berdisiplin.

(f) Pemberian hak kewarganegaraan

Setiap rakyat mempunyai hak untuk mempunyai sijil beranak, kad pengenalan dan hak untuk mengundi.

SUHAKAM mengesyorkan bahawa:-

- (i) Sijil beranak dan kad pengenalan:-

- Jabatan Pendaftaran Negara menghantar pegawainya ke kawasan masyarakat asli sekurang-kurangnya 6 bulan sekali untuk memastikan mereka mendaftar kelahiran anak dan juga memohon kad pengenalan; dan
 - Masyarakat asli mesti berusaha mendaftar setiap kelahiran anak mereka dan juga untuk memohon kad pengenalan.
- (ii) Hak untuk mengundi:-
- Suruhanjaya Pilihanraya seharusnya memastikan masyarakat asli didaftarkan sebagai pengundi dan menyediakan kemudahan bagi membolehkan mereka membuang undi semasa pilihanraya ; dan
 - Masyarakat asli patut mempergunakan hak untuk mengundi mereka semasa pilihanraya.

(g) Penjaminan Keselamatan

Setiap kawasan masyarakat asli perlu ada pegawai keselamatan dan kecemasan yang terlatih untuk menjamin keselamatan penghuni.

SUHAKAM mengesyorkan bahawa:-

- (i) Pihak kerajaan menyediakan perkhidmatan keselamatan dan kecemasan yang selaras dengan jumlah penghuni dan keadaan persekitarannya.
- (ii) Pihak kerajaan harus melatih tenaga sukarelawan dari kalangan masyarakat asli yang tinggal di kawasan pendalaman untuk menampung keperluan keselamatan dan kecemasan masyarakat.

4. KESIMPULAN

Kerajaan mempunyai tanggungjawab untuk membangunkan negeri dan rakyatnya. Selaras dengan tanggungjawab ini, sejak kemerdekaan, pihak kerajaan dan agensinya telah mengambil pelbagai usaha untuk membangunkan negeri Sarawak pada amnya

dan masyarakat asli pada khususnya. Usaha-usaha yang diambil berkenaan dengan masyarakat asli termasuk pembangunan tanah adat mereka dan penyediaan kemudahan pendidikan dan kesihatan untuk masyarakat tersebut.

Hasil daripada usaha-usaha tersebut, negeri Sarawak telah membangun dengan pesat dari segi ekonomi, sosial dan kebudayaan. Dari segi ini, SUHAKAM mengambil maklum pencapaian pihak kerajaan negeri Sarawak membangunkan tanah adat masyarakat asli melalui agensinya seperti Unit Perancangan Ekonomi Negeri, PELITA, SALCRA dan SLDB.

Namun demikian, secara tidak sengaja, wujudnya jurang yang ketara di antara masyarakat umum dan segolongan masyarakat asli Sarawak. Memandangkan wujudnya jurang ini, hak masyarakat asli perlu diberi perhatian yang khas.

SUHAKAM membuat pengamatan bahawa terdapatnya perbezaan di antara pandangan dan pemahaman masyarakat asli tentang hak dan adat mereka dan perundangan negeri yang sebenarnya mengawal hak milik tanah adat seperti Kanun Tanah Sarawak dan undang-undang lain yang berkaitan adat masyarakat asli (*Customary Laws*).

Sehubungan dengan itu, pihak kerajaan seharusnya, semasa merangka dan menguatkuasakan undang-undang, peraturan dan polisi, menyedari tentang wujudnya suratcara dan pengisytiharan antarabangsa yang berkaitan dengan hak masyarakat asli.

Pada masa yang sama, masyarakat asli juga harus memahami bahawa dalam menikmati hak asasi, ianya perlu berlandaskan undang-undang dan perlu mengimbangkan hak dan tanggungjawab semua pihak yang terlibat.

SUHAKAM berharap semua pihak - pihak kerajaan, agensi-agensi kerajaan, pihak swasta dan masyarakat asli - akan mengambil berat syor-syor yang terkandung di dalam laporan ini. SUHAKAM juga berharap kesemua pihak ini akan terlibat sama secara positif dan membina dengan satu tujuan untuk membangunkan negeri dan rakyat tanpa meninggalkan kesan sebaliknya ke atas hak asasi semua yang terlibat, keselamatan negara dan alam sekitar.

LAMPIRAN 1

KRONOLOGI LAWATAN ROMBONGAN SUHAKAM

27 Oktober 2001

Ahli-ahli rombongan SUHAKAM tiba di Miri, Sarawak. Taklimat dan perbincangan dengan pegawai dari Syarikat Penerbangan Hornbill Skyways Sdn. Bhd. telah diadakan sebagai persiapan sebelum memulakan perjalanan ke kawasan pendalaman Sarawak.

28 Oktober 2001

Memulakan perjalanan menaiki helikopter menuju ke Daerah Marudi, Bahagian Kapit Sarawak. Singgah sebentar di Long Lellang iaitu penempatan kaum Bidayuh, Ba Abang dan seterusnya bermalam di Ba Penggaran, Belaga, Bahagian Kapit Sarawak. Di sebelah malamnya mengadakan taklimat dan dialog bersama-sama dengan 22 ketua kampung atau wakil ketua kampung kaum Penan dari kawasan sekitar Ba Penggaran.¹¹ Sejumlah 272 penduduk hadir untuk mendengar taklimat dan sesi dialog tersebut.

Kawasan Ba Penggaran didiami oleh 30 keluarga Kaum Penan dari suku Serungguh sejak lebih kurang enam tahun yang lalu. Sebelum itu, kumpulan ini telah hidup secara berpindah randah dari satu tempat ke satu tempat sehingga mereka menetap di Ba Penggaran yang bersempadan dengan Ba Jo - satu penempatan masyarakat asli dari Suku Kayan.

Rombongan SUHAKAM dimaklumkan bahawa mengikut bancian pada tahun 90an, terdapat lebih kurang 100 penempatan di sekeliling Ba Penggaran dengan penduduknya melebihi 10,000 orang. Selain memburu binatang dan mengambil hasil-hasil hutan, keramaian kaum Penan yang telah menetap di kawasan sekitar telah mula bercucuk tanam seperti menanam padi huma dan juga menanam rotan.

¹¹ Senarai Ketua-ketua dan Wakil Penduduk Kaum Penan di Perkampungan Penan Ba Penggaran Yang Mengemukakan Aduan Semasa Sesi Dialong terkandung dalam Lampiran 1(1).

29 Oktober 2001

Mengadakan temu bual dengan penduduk-penduduk di Long Lellang, Long Sait, Long Krong dan Ba Abang. Perbincangan seterusnya dibuat dengan pegawai-pegawai dari Syarikat Pembalakan Samling Sdn Bhd di *Samling Central Base Camp*. Satu lawatan ke kawasan pembalakan yang terletak bersebelahan dengan Ba Penggaran juga telah dibuat untuk melihat akibat pembalakan, pembinaan jalan pembalakan dan kesan pembalakan terhadap sungai dan alam sekitar.

Meneruskan perjalanan dan bermalam di perkampungan Long Kevok. Di sebelah malamnya mengadakan taklimat dan dialog bersama-sama dengan 15 ketua kampung atau wakil ketua kampung kaum Penan dari sekitar kawasan Long Kevok.¹²

Long Kevok merupakan kawasan penempatan semula. Penempatan semula ini berupa sebuah rumah panjang yang telah dibina pada tahun 1989. Ia didiami oleh seramai 24 keluarga. Bancian pada tahun 1998 mendapati bahawa terdapat seramai 112 orang penghuni di rumah panjang ini.

Long Kevok merupakan pusat perkhidmatan untuk kaum Penan. Ia mengandungi sebuah sekolah rendah berasrama, sebuah klinik desa dan juga sebuah pejabat pertanian. Pusat perkhidmatan ini telah beroperasi sejak tahun 1991.

30 Oktober 2001

Mengadakan lawatan ke Pusat Perkhidmatan Long Kevok di mana terdapatnya sebuah sekolah rendah berasrama, klinik desa dan juga pejabat pertanian.

Meneruskan perjalanan. Singgah di perkampungan Long Bee, Long San sebelum mengadakan sesi dialog dengan Encik Bujang Bin Haji Bidin, Pegawai Daerah Marudi, di pejabat pembangunan Penempatan Semula Sungai Asap.

¹² Senarai Ketua-ketua dan Wakil Penduduk Kaum Penan di Long Kevok yang hadir terkandung dalam Lampiran 1(2).

Satu taklimat berhubung dengan perkembangan pembangunan di kawasan Penempatan Semula Sungai Asap Belaga telah diberikan oleh Encik Bujang Bin Haji Bidin di Pusat Komuniti 1 Penempatan Sungai Asap. Taklimat ini turut dihadiri oleh Encik Liman Numpang dari Unit Perancang Ekonomi Sarawak dan Encik Albania Linus dari Jabatan Pertanian Sarawak.

Penempatan semula masyarakat asli di Kawasan Penempatan Semula Sungai Asap, Belaga melibatkan seramai lebih kurang 9,500 masyarakat asli yang terdiri daripada kaum Kenyah, Kayan, Lahanan, Ukit dan Penan.

Proses penempatan semula mengandungi 3 fasa seperti berikut:-

- (a) Ops Exodus I – melibatkan 6 rumah panjang (644 keluarga) bermula dari 15/9/98 – 28/9/98. Rumah panjang tersebut ialah *Uma Ukit, Uma Lesong, Uma Badang, Uma Belor, Uma Daro dan Uma Nyaving*.
- (b) Ops Exodus II – melibatkan 4 rumah panjang (580 keluarga) bermula dari 2/3/99 – 20/4/99. Rumah panjang yang terlibat ialah *Uma Kelap, Uma Kulit, Uma Bakah dan Uma Balui Ukap*.
- (c) Ops Exodus III – melibatkan 4 rumah panjang (246 keluarga) bermula dari 18/5/99 – 21/6/99. Rumah panjang yang terlibat ialah *Uma Bawang, Uma Balui, Uma Penan Talun dan Uma Lahanan*.

Rombongan SUHAKAM seterusnya telah melakukan lawatan ke keseluruhan kawasan Penempatan Semula Sungai Asap dan telah bermalam di Perumahan Uma Lesong iaitu kawasan penempatan semula suku kaum Kayan. Satu majlis taklimat dan dialog bersama-sama dengan 15 ketua rumah panjang dan wakil-wakil mereka telah diadakan.¹³

¹³ Senarai ketua-ketua kaum masyarakat asli dan wakil penduduk adalah seperti di Lampiran 1(3).

31 Oktober 2001

Meneruskan perjalanan dengan mengadakan lawatan ke sekitar kawasan Penempatan Semula Sungai Asap. Mengadakan lawatan ke rumah panjang Uma Juman, Uma Kodit, Pusat Kesihatan Sungai Koyan Dua, Belaga dan Sekolah Rendah Kerajaan Sungai Koyan Dua. Singgah di kawasan pembinaan Projek Hidroelektrik Bakun dan mendengar taklimat daripada Jurutera Residen, Encik Wan Mohd. Suut bin Wan Moss.

Rombongan SUHAKAM dimaklumkan bahawa perbincangan untuk membina sebuah empangan hidroelektrik di Bakun telah bermula lebih 30 tahun yang lepas. Sekiranya rancangan ini berjaya, empangan ini akan merupakan yang terbesar di Asia Tenggara yang mana memakan kos pembinaan sebanyak RM7 bilion dan merupakan yang termahal. Empangan ini dijangka akan dapat menghasilkan 2,400 megawatt elektrik dan mampu menampung seluruh Kepulauan Borneo termasuk Semenanjung Malaysia menerusi kabel bawah permukaan laut sejauh 650 km.

Empangan ini terletak di Batang Balui di bahagian utara Sungai Rejang di mana terletak 37 km daripada Belaga. Keluasan pembinaan ini ialah 2.86 km² dan dapat dihubungi melalui jalan darat daripada Bandar Bintulu. Pembinaan empangan Bakun mengakibatkan penempatan semula penduduk di situ - seramai lebih kurang 9,500 penduduk masyarakat asli yang terdiri daripada masyarakat kaum Kenyah, Kayan, Lahanan, Ukit dan Penan.

Rombongan SUHAKAM telah dimaklumkan bahawa projek hidroelektrik Bakun telah dimulakan pada tahun 1994. Penempatan semula telah bermula pada tahun 1998, tetapi ada segolongan masyarakat asli yang tidak mahu berpindah.

Fasa pertama projek tersebut merupakan pembinaan tiga buah terowong. Kontrak secara pengswastan bagi pembinaan terowong tersebut telah diberikan kepada *Bakun Hydroelektrik Corporation*. Berikutan dengan kelembapan ekonomi serantau, pembinaan terowong tersebut telah terlewat dan seterusnya telah diambil alih oleh Kerajaan pada tahun 1998.

SUHAKAM dimaklumkan bahawa pada masa kini peratus kemajuan bagi keseluruhan projek adalah kurang dari sepuluh peratus dan projek empangan dijangka akan disempurnakan sepenuhnya pada tahun 2007 atau awal tahun 2008.

Pembinaan empangan ini telah menimbulkan banyak kontroversi kerana empangan ini boleh membanjiri kawasan sekitar 700 km persegi sekiranya berlaku sebarang trajedi ke atas empangan tersebut. Pembinaan ini telah tertangguh beberapa kali.¹⁴

Meneruskan perjalanan ke perkampungan Long Lawen, Long Jawe dan bermalam di perkampungan Long Buko.

Kawasan hulu Sungai Balui dikatakan tidak akan tenggelam berikutan pembinaan empangan bagi projek hidroelektrik Bakun.

Penduduk di sekitar Sungai Balui ini merupakan penduduk yang enggan berpindah ataupun mereka ini berpindah ke hulu Sungai Balui atau ke kawasan-kawasan baru yang mereka jangkakan tidak akan ditenggelami air berikutan pembinaan empangan tersebut.

Majlis taklimat dan dialog bersama-sama dengan ketua-ketua kaum atau wakil-wakil mereka telah diadakan dalam lawatan ke penempatan-penempatan di atas. Rombongan SUHAKAM seterusnya telah bermalam di rumah Encik Bato Bagi iaitu Ketua Kampung bagi perkampungan Long Buko, hulu Sungai Balui, Belaga.

Keputusan untuk tidak berpindah ke Penempatan Semula Sungai Asap dan sebaliknya memilih untuk membina hidup baru di kawasan pilihan sendiri di hulu Sungai Balui dibuat kerana mereka tidak yakin yang kehidupan di kawasan Penempatan Semula Sungai Asap akan membawa perubahan-perubahan yang lebih baik seperti yang dijanjikan. Selain daripada itu, mereka percaya bahawa mereka mempunyai hak untuk menentukan hala tuju masa hadapan mereka.

¹⁴ Kronologi pembinaan empangan tersebut adalah seperti di Lampiran 1(4).

1 November 2001

Meneruskan perjalanan ke Daerah Miri iaitu ke penempatan suku kaum Iban di Ulu Niah. Rombongan SUHAKAM telah menemu bual Tuai Rumah Busang dan Tuai Rumah Lajun. Bermalam di perkampungan rumah panjang Lajun dan di sebelah malamnya mengadakan taklimat dan sesi dialog dengan wakil-wakil kaum Iban di sekitar Miri dan juga Sibul, Sarawak.

2 November 2001

Meneruskan perjalanan menuju ke Kampung Suai, Miri, Sarawak iaitu kawasan penempatan masyarakat asli dari suku kaum Penan. Satu sesi taklimat dan dialog telah diadakan dengan Datuk Hassan Suai yang mewakili penduduk-penduduk kampung tersebut.

Kampung Suai adalah kawasan penempatan kaum Penan yang berasal dari Ulu Kapit, Belaga yang telah berpindah randah sejak 200 tahun yang lalu. SUHAKAM dimaklumkan bahawa kaum Penan ini akhirnya menetap di kawasan tersebut pada tahun 1971 bersama-sama 30 keluarga. Pada masa ini terdapat sebanyak 98 keluarga dengan jumlah penduduk seramai 444 orang dengan kawasan tanah simpanan seluas 8000 ekar yang diperuntukkan oleh pihak kerajaan negeri Sarawak.

SUHAKAM telah dimaklumkan bahawa sejumlah 5,000 ekar dari kawasan tersebut telah ditanam dengan tanaman kelapa sawit iaitu secara usaha sama dengan Lembaga Pembangunan Tanah Sarawak (**SLDB**). SLDB dikatakan memiliki 70% pegangan saham manakala 30% dimiliki oleh penduduk setempat. Perjanjian tersebut telah dimeterai untuk tempoh 60 tahun. Keramaian penduduk di kawasan tersebut bekerja di ladang kelapa sawit tersebut dengan pendapatan di sekitar RM 12.00 hingga RM 13.00 sehari.

Kawasan selebihnya iaitu seluas 3,000 ekar telah dibahagikan kepada penduduk dengan kawasan seluas lebih kurang 30 ekar bagi setiap keluarga yang mana dikekalkan sebagai kawasan simpanan untuk kaum Penan bagi digunakan untuk menanam pokok buah-buahan dan tanaman lain.

Terdapat sebuah sekolah rendah berasrama di Kampung tersebut manakala sekolah menengah yang terdekat adalah lebihkurang 32 km dari Kg. Suai.

Rombongan SUHAKAM menamatkan siri lawatan dan bermalam di Miri, Sarawak.

3 November 2001

Rombongan SUHAKAM bertolak balik ke Kuala Lumpur.

LAMPIRAN 1(1)**SENARAI KETUA KAMPUNG DAN WAKIL MASYARAKAT PENAN DI SEKITAR
KAWASAN BA PENGARAN YANG MENGEMUKAKAN ADUAN SEMASA
SESI DIALOG**

- | | | | |
|-----|--------------------------|---|---------------|
| 1. | Encik Bilong Oyoi | - | Long Sait |
| 2. | Encik Jawa Nipan | - | Long Ajing |
| 3. | Encik Damai Irang | - | Ba Abang |
| 4. | Encik Lole Mirai | - | Long Lang |
| 5. | Encik Ala Beling | - | Long Belok |
| 6. | Encik Wan Sopie | - | Long Lateh |
| 7. | Encik Ngoi Lowin | - | Long Nen |
| 8. | Encik Sungei Malau | - | Long Krong |
| 9. | Encik T.K. Sound | - | Long Benalih |
| 10. | Encik Balang Toi | - | Long Laman |
| 11. | Encik Tony Bujan | - | Pengaran Iman |
| 12. | Wakil Kampung Long Balan | | |

LAMPIRAN 1(2)**SENARAI KETUA KAMPUNG DAN WAKIL MASYARAKAT PENAN DI SEKITAR
KAWASAN LONG KEVOK YANG MENGHADIRI SESI DIALOG**

- | | | | |
|-----|--------------------|---|--------------|
| 1. | Encik Seman Ngang | - | Long Kevok |
| 2. | Encik Din Murang | - | Long Lang |
| 3. | Encik Phlip Jeling | - | Long Nen |
| 4. | Encik Rado Kurau | - | Long Merean |
| 5. | Encik Ting Gadang | - | Long Kawah |
| 6. | Encik Ajan Peng | - | Long Lateh |
| 7. | Encik Tajan Anyek | - | Long Latin |
| 8. | Encik Sapoh Lawai | - | Long Kawi |
| 9. | Encik Lapong | - | Long Lilin |
| 10 | Encik Ungat Yong | - | Long Sean |
| 11. | Encik Ajan Kel | - | Long Lateh |
| 12. | Encik Nyipak | - | Long Melapeh |
| 13. | Encik Marong | - | Long Pulin |
| 14. | Encik Wek | - | Long Itam |
| 15. | Encik Ajang Kiew | - | Long Sayan |

LAMPIRAN 1(3)**SENARAI KETUA KAMPUNG DAN WAKIL PENDUDUK KAWASAN PENEMPATAN
SEMULA SUNGAI ASAP YANG MENGHADIRI SESI DIALOG**

- | | | | |
|-----|---------------------|---|----------------|
| 1. | Encik Huvat Laing | - | Uma Lesong |
| 2. | Encik Rajal | - | Uma Ukit |
| 3. | Encik Awie | - | Uma Daro |
| 4. | Encik James Lawai | - | Uma Badang |
| 5. | Encik Richard Inang | - | Uma Lahanang |
| 6. | Encik Niku Loyang | - | Balai Liko |
| 7. | Encik Ujang Bago | - | Uma Bawang |
| 8. | Encik Niru Magoi | - | Wakil Penan |
| 9. | Encik Osek Udong | - | Uma Kulit |
| 10. | Encik Lawing Luat | - | Uma Bakar |
| 11. | Encik Lejal Lian | - | Long Bala |
| 12. | Encik Balan Dato' | - | Uma Baloi Ukap |
| 13. | Encik Wing Miku | - | Uma Nyaving |
| 14. | Wakil Uma Juman | | |
| 15. | Wakil Umah Ukit | | |

LAMPIRAN 1(4)

KRONOLOGI PEMBINAAN EMPANGAN HIDROELEKTRIK BAKUN

- | | |
|------------|---|
| 1960 | Survei untuk potensi hidro dilakukan oleh <i>Snowy Mountains Hydroelektrik Authority of Australia</i> di bawah <i>Colombo Aid Programme</i> |
| 1997 | Bakun dikenalpasti oleh <i>Sarawak Electricity Supply Corporation (SESCO)</i> sebagai berpotensi |
| 1981 | Bakun dikaji |
| 1985 | Pembinaan ditangguhkan sebab kegawatan ekonomi |
| Sept. 1993 | Kabinet bersetuju meluluskan pembinaan di mana 2,400 megawatt elektrik dapat disalurkan ke Semenanjung Malaysia menerusi kabel bawah laut |
| Jan. 1994 | Projek diserahkan kepada <i>Bakun Hydroelektrik Corporation (BHC)</i> |
| 1995/96 | <i>Environmental Impact Assessment (EIA)</i> telah disediakan oleh konsortium yang diketuai oleh Universiti Malaysia Sarawak yang diluluskan oleh <i>Natural Resources & Environment Board (NREB)</i> |
| 5 Mac 1996 | Kontrak <i>River Diversion Works (RDW)</i> telah ditandatangani antara BHC dan <i>Dong Ah Construction Industrial Co. Ltd (DACI)</i> |
| Sept. 1997 | Pembinaan tertangguh disebabkan kegawatan ekonomi |
| Nov. 1997 | Kementerian Kewangan mengambil alih projek dari BHC |
| Nov. 1999 | <i>Sumber Hydro Management Sdn Bhd (SHM)</i> menyediakan tenaga jurutera pengurusan projek untuk Kontrak RDW |
| Mei 2000 | Tandatangan kontrak RDW antara (<i>Bakun Hidroelektrik Sdn.Bhd</i>) BHSB dan DACI |
| Okt. 2000 | BHSB bertukar nama kepada <i>Sarawak Hidro Sdn Bhd (SHSB)</i> |
| Feb. 2001 | Kabinet mrujuk semula pembinaan diteruskan. |

LAMPIRAN 2

LAMPIRAN 2

SENARAI PESERTA YANG HADIR SEMASA MAJLIS DIALOG BERSAMA SUHAKAM PADA 13 DISEMBER 2001

Bil.	Nama	JAWATAN / AGENSI / JABATAN
1	Datuk J.C.Fong	Peguam Besar Negeri Sarawak
2	Datuk Wilson Baya Dandot	Timbalan Setiausaha Kerajaan Sarawak
3	Abg. Ghafur Sharif	Jabatan Ketua Menteri
4	Ose Murang	Jabatan Ketua Menteri
5	A. Razak Tready	Jabatan Undang-Undang Negeri Sarawak (SGA)
6	Cheong Ek Cheong	SGA
7	Dewi Rahmaz	SGA
8	Susan Gau	SGA
9	Tri Johan	SGA
10	Jumuieyah Shara'ai	SPU
11	Peter Sawal	SPU
12	Liman Numpang	SPU
13	Tay Joo Choon	State Financial Sec. Office
14	Philip T.Assan	Jabatan Tanah & Ukur
15	Baijuri	Jabatan Tanah & Ukur
16	Andrew Riging	Lembaga Penyatuan & Pemulihan Tanah Sarawak (SALCRA)
17	Nawong Dugat	SALCRA
18	Vasco S. Singkang	SALCRA
19	Edwin Lau	SALCRA
20	Ahmad Rafa'ee	SALCRA
21	Amxwell S. Landong	SALCRA

22	Polit Hamzah	Lembaga Pembangunan dan Perlindungan Tanah Sarawak (PELITA)
23	Abg. Shamsudin Seruji	PELITA
24	Joseph Ng	PELITA
25	Datuk Balan Seling	Ahli Dewan Negara
26	Jayle Langub	Majlis Adat Istiadat
27	Tom Hem Mijod	Majlis Adat Istiadat
28	Nillie Tangai	Majlis Adat Istiadat
29	Dato Sri Tra Zehnder	Majlis Adat Istiadat
30	Francais Kuleh Jan	Mahkamah Bumiputera Sarawak
31	Hj. Hamzah b. Drahman	MPRM
32	Datuk Leo Chai	Persatuan Pembalak Sarawak (STA)
33	Yang Nyan Sing	STA
34	Tong Teck Wong	STA
35	Wong Kie Yik	STA
36	Kho Chun Seng	STA
37	Loretta Lau	STA
38	Barney Chan	STA
39	John Kan Chubo	STA
40	Annie Ting	STA
41	Lau Buong Tung	W.T.K Sibul
42	Poh Wan Hwa	Sin Chew Jit Poh

LAMPIRAN 3

**NATIVE CUSTOMARY LAWS
AND
NATIVE RIGHTS OVER LAND
IN SARAWAK**

**PRESENTATION TO
SURUHANJAYA HAK ASASI MANUSIA MALAYSIA
(SUHAKAM)**

Date : 13 December 2001

Prepared by : STATE ATTORNEY GENERAL'S CHAMBERS, SARAWAK

NATIVE CUSTOMARY LAWS
AND NATIVE RIGHTS OVER LAND IN SARAWAK

1. **PREAMBLE**

- 1.1 Native Customary law system prevailing in Sarawak is peculiar to our State. What is “native customary law” must be determined with reference to the laws of the State, and what constitutes “native customary rights” over land must also be determined with reference to the relevant State laws.
- 1.2 Native Customary Rights to land is also a system which recognizes the rights of the native community to occupy and use land which by law belongs in the old days to the Crown, but nowadays by reason of Section 12 of the Land Code, belongs to the State.
- 1.3 The system of native customary rights over land had evolved over near one and half centuries; since 1841 when the Rajah James Brooke decided to make his first pronouncement pertaining to Land. Through this process of evolution, native rights to land were recognized, under certain conditions spelt out in the various Proclamations and Orders made by the Rajahs and subsequently, in various legislations passed by the Council Negeri (now Dewan Undangan Negeri of Sarawak).
- 1.4 As such, land occupied by natives under native customary tenure, are untitled i.e. there is no document of title to show ownership. Whether a native has rights to such land would depend on whether he or his forefathers fulfilled certain requirements under the laws **prevailing at the time** which rights to the land were said to have been created.
- 1.5 Native customs which could create rights over land had been modified in Sarawak by laws made by the Rajahs and subsequently by the Council Negeri. At this juncture, it ought to be pointed out that in all legal systems, indigenous rights may be modified or extinguished by legislative or executive action. Professor Douglas Sanders in his Paper on “Indigenous And Tribal Peoples: The Right to Live On Their Own Land” (presented at the 12th Commonwealth Law Conference held in Kuala Lumpur in September, 1999) stated:

“A leading Australian constitutional text summarizes the basic rule from the **Mabo** decision as follows:

The indigenous population had a pre-existing system of law, which along with the rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action.”

- 1.6 It must be emphasized that the evolution of our laws on native customary rights over land over more than 1½ centuries was a peaceful and orderly process, without any serious discord amongst the various communities in Sarawak or between them and the Government, and has enabled the Government of the day to improve the social and economic position of these communities and bring about overall development and progress to the rural areas.

2 **NATIVE CUSTOMS AND NATIVE CUSTOMARY LAW**

- 2.1 It is pertinent to observe there is a significant difference between **native customs (Adat)** and **native customary law**.

- 2.2 AJN Richards (a former Resident and acknowledged authority on this subject) in his book **Land Law and Adat** at page 9, stated:

“As was pointed out by Mooney, as Crown Counsel and Hickling, the law does not, in fact, give effect to any customs whatsoever except the codified law of delicts, ...”

- 2.3 The Land Code and its predecessor defines “**customary law**” to mean “**a custom or body of customs to which the law of Sarawak gives effect**”.

- 2.4 The natives of Sarawak may have and in fact do have many customs, but for these customs to have effect as “customary laws” they must have the sanction of the Law. This is what characterized the difference between **native customs** and the **customary laws**; and this differentiation is

acknowledged by the definition of “Adat” in the Majlis Adat Istiadat Sarawak Ordinance, Ord. No. 5 of 1977 where “**Adat**” is defined as “**native custom or body of native customs to which lawful effect has not been given thereto**”.

- 2.5 Thus, in relation to land, the practice of native custom does not necessarily give rise to rights over land. It is only the practice of those customs which are part of the customary law of Sarawak, which can create rights to land and this is evident by the provisions of Section 5(1) of the Land Code which provides, inter alia, that native customary rights over land may be created “in accordance with native customary law”. “**Native customary rights**” to land, however, received its first statutory definition in the Land Settlement Ordinance (also known as Rajah Order L-7 of 1933), enacted on 22.6.1933. It is defined by Section 66 of that Ordinance as follows:

“**Native customary rights** shall be recognized in respect of –

- (a) land **planted with fruit trees**, when the number of fruit trees amounts to twenty and upwards to each acre;
- (b) land that is in **continuous occupation** or has **been cultivated** or built on within three years;
- (c) burial grounds or shrines;
- (d) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above.” (*emphasis added*)

- 2.6. However, the Government has always respected the Adat of the natives in Sarawak and established the Majlis Adat Istiadat to codify the Adats of the various communities and established a Native Courts System to see that native customs are enforced. So far the following Adats have been codified.

- (i) Adat Iban Order, 1993 (Swk. L.N. 18/93)
- (ii) Adat Bidayuh Order, 1994 (Swk. L.N. 27/94); and

- (iii) Adat Kayan-Kenyah Order, 1994 (Swk. L.N. 28/94)

Those Adats which have been codified would constitute the native customary law of the State. The unmodified customs and traditions can be practiced by the native communities but they do not form part of the native customary law of the State.

3. PRE-1933 LEGAL POSITION ON NATIVE RIGHTS TO LAND

3.1 Although the Land Settlement Ordinance provides the first statutory recognition to native customary rights over land, the exercise of rights by natives over land were regulated by various pronouncements and orders made by the Rajahs prior to 1933.

3.2. In fact, the exercise by the natives of customary rights over land had been recognized since the days of the first Rajah. Writing in his journal in 1840, the first Rajah stated:

“The fruit trees about the Kampong, and as far as the jungle round, are private property, and all other trees which are in any way useful, such as bamboo, various kinds for marking bark-cloth, the bitter kony.... and many others. Land, likewise, is individual property, and descends from father to son; so, likewise, is the fishing or particular rivers, and indeed most other things...”

3.3 Legislation was subsequently introduced to deal with specific aspect of customary law. In 1899, the second Rajah issued the *Fruit Trees Order*. Section 1 reads:

“Such fruit trees which have chiefly spring up from seeds thrown out of and about houses, and have become common property of the inhabitants of a long houses or village, are in no cases to be sold or in any way transferred or claimed by individuals leaving such houses or villages.”

And section 2 reads:

“Any Dyak removing from a river or district may not claim, sell, or transfer any farming ground in such river or district, nor may be prevent others farming thereon, unless he holds such land under a grant.”

- 3.4. The significance of this Order is that it sets out the manner in which claims to native customary tenure may be made by a native community through the cultivation of fruit trees on land which was deemed to belong to the State. Another important characteristic of native customary tenure was apparent, i.e. rights so created through native customary tenure may be lost if a native moved from one river system to another.
- 3.5. The next development occurred in 1920 when the Rajah’s Order No.VIII, 1920 was published on 21.10.1922, the relevant parts of which reads as follows:

- “22. (i) Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws **provided that where possible claims to fruit groves and farming lands shall be registered.** Records of such claims shall be kept by all Native Headmen and also in the Land Office in each district.
- (ii) A certificate in the form of Schedule A of Notification No..... of 1920 may be issued to registered land holders under this part.”
(*emphasis added*).

A supplement to the Order reads:

- “2. (i) Native land reserves shall be made in suitable situations and **these shall be divided into lots of three acres and any native born subject of His Highness the Rajah shall be permitted to occupy one such lot free of all charges** (excepting fees for demarcation) provided that no person not being a native of the Country shall occupy land in such reserves and further that no one person shall occupy more than one lot at one and the same time.
- (ii) A record of the names of those occupying land under this section shall be kept by all Tuah Kampong and also in the Land Office in each district.
- (iii) A certificate in the form of Schedule A may be granted to each native land holder on application.” (*emphasis added*).

3.6 From these Orders and the Land Settlement Ordinance (formerly known as Rajah Order L-7 of 1933), it is obvious that the only recognition, given by written laws as pronounced by the Rajah, requires physical occupation of an area before a native can establish his rights over the same. As AJN Richards noted in *Land Law and Adat* at page 8 – “Occupation under custom appears to have been generally regarded as ‘lawful occupation’ and ‘lawful ownership’”. The 1920 Order and the 1933 Ordinance even required some form of registration of such rights to accord natives protection of their claims over land. Additionally, it is to be observed that the Rajah did place a limitation on the amount of land that a native could occupy by the exercise of rights under his Adat. **At that point in time, the Rajah only allowed each native to occupy one lot of three (3) acres.** Also, under the 1933 Ordinance, land claimed on the basis of cultivation by a native must be in continuous occupation or had been cultivated on “within three years”.

- 3.7 In 1939, the Rajah realized a need to prevent some communities from moving into territories occupied by other native communities. Hence, the Prohibited Areas Ordinance was passed to prevent some communities from moving into areas already occupied by others. In other words, native communities do not have absolute licence to move into any area, clear virgin jungles and settle thereon. The Restricted Areas Notification (see: Vol. VII of the Revised Edition of the Laws of Sarawak page 153) prohibits Sea Dayaks (Ibans) from remaining in the then Baram Administrative District for an aggregate period of more than 60 days in any calendar day without the permission in writing of the District Officer, Baram or District Officer, Limbang.
- 3.8 After the 1933 Land Settlement Ordinance, rules and administrative circulars were introduced to reinforce the requirement for natives to occupy and clear their land before they could have rights over the same. This is illustrated by the Appendix made to the Tusun Tunggu (Third Division) Order, published in Vol. VII of the Revised Edition of the Laws of Sarawak 1958, as a **“guide to Judges, Magistrates and others on adoption, divorce, the acquisition and disposition of property as practiced amongst Sea Dayaks of the Third Division, ratified at the Penghulus’ Conference, held at Sibü on 15 July 1952’**. The relevant portions thereof read :-

“7. Theoretically all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of the ir padi farms confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes *temuda*. It is a recognized custom that *temuda* is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.

In former days there were no restrictions on anyone felling jungle provided that he did not

destroy valuable commercial trees such as gutta, jelutong and engkabang. But it is not so now. Since the introduction of the Forest and Erosion Ordinance no one is allowed to fell jungle without permission from the proper authority.

No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.

There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. When a Dayak abandons his land *temuda* and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the right." (*emphasis added*).

- 3.9 It ought to be pointed out that what is set out above has been made an Appendix to the Tusun Tunggu (Third Division) Order and was also adopted by the Tusun Tunggu (Fourth Division) Order and Tusun Tunggu (Fifth Division) Order. It therefore has the effect and authority and constitutes the customary laws of the Sea Dayak (Iban) in Sarawak.

-
- 3.10 What is contained in this Appendix is also consistent with what was contained in **Secretariat Circular No. 12/1939** which briefly outlined the creating of rights over land through native customary tenure as follows:-
- (i) The right to cultivate cleared land vests in the community with priority to the heirs of the original faller of the big jungle. **The right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community.** The cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion.
 - (ii) Where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary rights of user.
 - (iii) Individual ownership is limited by the customary right of the community to a say in the matter of disposal to anyone outside the community.
 - (iv) **No community or individual may hold up land in excess of requirements** and, the extreme case, removal to another district automatically extinguished all rights of user. The old Order (a) dated 10.8.89 is an excellent exposition of this principle.
- 3.11 In summary, the creation and exercise of native rights over land, prior to the present Land Code which came into force on 1st January 1958, were regulated by laws or Orders made by the Rajah or Council Negeri and not just by the customs and traditions of the natives. These laws or Orders have the effect of modifying or overriding customs or traditions practiced by the natives, and they set out the customary laws for creation or exercise of rights to land. They laid down the conditions and restrictions for the creation of native rights to land and limited the size of the land, without title, which natives may occupy and claim "ownership".

3.12 Subsequent to 1958, native customary rights may be cleared over Interior Area Land upon these 2 conditions, viz:

- (a) a permit is obtained under section 10(3) of the Land Code from the Superintendent; and
- (b) by deploying any of these methods -
 - (a) felling of virgin jungle and occupation of land thereby cleared;
 - (b) planting of land with fruit trees;
 - (c) occupation or cultivation of land;
 - (d) use of land for burial ground or shrine;
 - (e) use of land of any class for rights or way; or
 - (f) any other lawful method.

3.13 Other lawful methods must refer to the Appendix to the Tusun Tunggu – see paragraph 3.8 above i.e. by gift or inheritance. It is necessary to note that fishing or collection of jungle produce do not create rights over land.

4. **RELATIONSHIP BETWEEN NATIVE CUSTOMARY LAW AND OTHER STATE LAWS**

4.1 As the definition of **customary law** implies, the written laws of the State must take precedence over native customs. This is because for native customs to have the status of customary laws, they must be those which the laws of Sarawak gives effect. This is further reinforced by the provisions of Section 9 of the Native Customs (Declaration) Ordinance 1996, which reads:-

“If any provision of a code is found to be repugnant to or is inconsistent with a provision of any written law, the latter shall prevail.”

- 4.2. This is further reinforced by Section 10(4) of the Land Code which re-enacted Section 8(4) of the Land (Classification) Ordinance 1948. Section 10(4) reads:-

“The occupation of Interior Area Land by a native or native community without a permit in writing from a Superintendent shall not, **notwithstanding any law or custom to the contrary**, confer any right or privilege on such native or native community and, in any such case, such native or native community shall be deemed to be unlawful occupation of State land and section 209 shall apply thereto.” (*emphasis added*).

- 4.3. The legal position taken by the State with regard to the relationship between customs and written law is no different from that adopted in any other common law jurisdiction; that is, customs may be overridden by statutes.

5. **COLLECTION OF FOREST PRODUCE, FISHING AND HUNTING BY NATIVES.**

- 5.1 Although natives have been collecting timber and other jungle produce from forests for their domestic or personal use, such as for firewood, building of houses and boats, the exercise of such rights by natives have been regulated by law since the end of the 19th century. The following are the relevant legislations governing the taking of timber or forest produce:-

- (a) The **Rajah’s Order dated 22.6.1899** states, inter alia, that “any person wishing to work and collect timber for whatever purpose shall first obtain permit at the Resident’s office.

...

Any person working timber without a license on and after the 1st day of August, 1899 will render himself liable to a fine not exceeding \$25.”

(b) **Order No. 1, 1912** states that, inter alia, “it is hereby ordered that the felling of *Enkabang* and *Keito* trees is strictly forbidden”.

(c) **Order No. IX, 1912** provides, inter alia, that –

“Whenever any person or persons are desirous of planting plots of marsh land which have been cleared within three years previously or hill land which has been cleared within seven years previously, such person or persons will be permitted to destroy all kinds of *Enkabang*, *Keito* and *Jelutong* trees found on such lands when necessary without penalty, but when a person or persons desire **to clear marsh land covered with jungle of a growth of more than three years old or hill land covered with a growth of more than seven years old where such trees are growing, permission must be first obtained of the Officer in Charge of the district; otherwise the penalty will be enforced.**” (*emphasis added*).

(d) Similarly, **Order XIV, 1921** provides, inter alia, as follows:

“2. (i) Except as provided in rules 9 and 10 below no person shall –

(a) cut, saw, convert or remove any tree, timber or firewood on or from State land; or

...

(c) cut, collect or remove on or from State land any of the kinds of forest produce mentioned in Schedule I, except under and in accordance with the conditions of a license in Form 1 under the hand of a Forest Officer or

other Officer duly authorized in that behalf.

9 (i) With the written permission of the Conservator **permits** in Form 17 may be issued under the hand of a Forest Officer to cut, collect and remove on or from State land any forest produce therein specified.

11 (i) Notwithstanding anything in this Order contained it shall be lawful for any subject of H.H. the Rajah of Sarawak to cut and remove from State land any timber or forest produce required by him for his own use and not for sale, exchange or profit.” (emphasis added).

(e) **Section 108 of the Land Ordinance (Cap. 27)** provides inter alias, that any person who shall be found unlawfully occupying any Crown land either by cultivating any part thereof or **cutting timber or produce thereon** shall be **guilty of an offence** against the Ordinance.

(f) **The Forests Ordinance (Cap. 31) of 1934 and Forests Rules, 1947.**

Collection of forest produce from State land forests or **communal forests** were also regulated by the **Forests Ordinance of 1934, which** has been superseded by the Forests Ordinance (Cap. 126) of 1953, which came into force on 1.1. 1954. Section 37 of the Forests Ordinance of 1934 provides that **when the Resident is satisfied that it is the desire of a majority of the members of a community that a communal forest shall be constituted he shall, with the approval of the Chief Secretary, publish a proclamation in the requisite form.**

Once a communal forest has been duly gazetted, section 43(1) of the Forests Ordinance of 1934 provides that subject to any conditions imposed in writing by the District Officer under section 42, any member of the community may remove free of royalty or fee any forest produce for his own use and not for sale, exchange or direct profit. Section 43 (2) provides that no other person shall remove forest produce for whatever purposes.

(g) **The Forests Ordinance (Cap. 126) of 1953**

This Ordinance came into force on 1.1.1954 and further regulates the taking of timber or forest produce, even by natives. For instance, section 65 follows any inhabitant of Sarawak to remove, from State land, which is not a forest reserve, timber produce exclusively for his own use and not for trade or barter or profit.

- 5.2. (a) It is to be noted that under both the Forests Ordinance 1934 and the current Forests Ordinance 1953, the Government has the right to constitute Protected Forests, Forest Reserves and Communal Forests. In constituting Protected Forests, the Government would acknowledge and concede certain rights or privileges to the affected native communities. For instance, when the Lemiting Protected Forest (216,800 acres) was constituted on 15 September 1951, the Government acknowledged the rights of the communities expressly named therein "to farm their secondary forest (*temuda*) but it shall be an offence to clear high forest except with the authority of the Conservator of Forests. The persons named shall have the right to cultivate the rubber and fruit gardens named with the provisos that no tree may be felled and no more trees may be planted" (emphasis added).
- (b) Thus the rights of the natives within a particular protected forest are strictly regulated by the Notification constituting the same e.g. G.N.S. 881/1951 constituting the Lemiting Protected Forest.

- 5.3. (a) In the case of forest reserves, the amount of jungle produce that could be taken therefrom are controlled. For instance, in constituting the Binatang Forest Reserve (vide L.N. 791 dated 3.7.1951), it is stated, inter alia, that:

“The Forest Reserve is constituted for the benefit of the following longhouses and kampongs who shall have the right to take jungle produce for their own use and not for sale or barter. Provided that the quantity that may be taken annually shall be subject to the control of the Conservator of Forests.”

- (b) Not only the taking of jungle produce but also fishing and hunting would be regulated when, for instance, National Parks are constituted. A typical example is the Gunong Mulu National Park Proclamations (G.N 2852 and 2853 of 3.10.1974) which confined fishing and hunting by the communities named therein to certain specified areas of the Gunong Mulu National Park.

- 5.4 Where there is a need to maintain a forest area for the benefit of a local community, the Government could declare an area as Communal Forest, see for instance, the Kabong Communal Forest (2,500 acres) (G.N.S. 96/61) which is for the benefit of the inhabitants of Kampongs Kabong and Palog.

- 5.5. All these show that the right of the natives to take timber and jungle produce have been regulated, even before Malaysia Day, by laws and are controlled by the Conservator (now Director) of Forests. Although the natives may have their own customs, such as, *pemakai menoa* and *pulau galau*, these customs are not part of the Tusun Tunggu or the Adat Iban or any other Codes produced by the Majlis Adat Istiadat Sarawak. Hunting, fishing and collection of jungle produce, therefore, do not create rights over land (see: Appendix to the Tusun Tunggu and Section 5 of the Land Code and Section 66 of the Land Settlement Ordinance). The natives unfortunately have a wrong perception that it is their customs, though not part of native customary law, which gives them rights to land, the jungles and in some cases, the streams and rivers near their longhouses. But, the written laws which have evolved

over 160 years do not recognize certain of their customs as customary laws upon which they could create rights over untitled State land.

6. GOVERNMENT POLICIES AND PRACTICES REGARDING RECOGNITION OF NATIVE RIGHTS TO LAND

- 6.1 When the Government introduced the Land Code (Amendment) Bill 2000, the Government's firm intention is to recognize native rights **lawfully** created over land. That is still the objective of the Government.
- 6.2 This means that the Government can only recognize those rights of natives which have been lawfully created. In other words, these rights must have been created in accordance with the native customary law i.e. law that gives force to native customs.
- 6.3 All land belongs to the State. In the case of native customary land, with no titles, natives with legitimate customary rights to the land, (i.e. created in accordance with the law), occupy the land as licencees of the Government.
- 6.4 The Government intends to survey the land, settle or confirm their rights to the land and have their interests or rights registered and ultimately, grant titles to the land. This process is bound to take time. Additionally, in the meantime, the Government wants the NCR land to be developed into plantation estates. In this regard, the Government has started the NCR land bank concept whereby the native NCR claimant can "pool" their land together into a large estate and enter into joint ventures with established plantation companies for the development thereof into oil palm plantations or the large scale cultivation of other cash crops. Under this scheme, the natives will have shares in the joint venture companies which would be granted leases over the NCR land for a term of 60 years. Upon expiry thereof, the land will either be reverted back to the natives or their heirs or if the natives agree, the lease to the joint venture companies can be extended. In this manner, the Government intends to facilitate the development of the NCR land and to bring better economic returns or value for such land to the natives. Up to October 2001, 43,975.5 hectares of NCR land has been constituted as "land bank", with 27,505 hectares cleared and 19,755 hectares planted.

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- 6.5 The objective mentioned in paragraph 6.4 is difficult to achieve if the native communities make claims which are not consistent with the laws governing the creation of native customary rights over land or where there are disputes between the natives themselves as to the size or boundaries of their respective holding.
- 6.6 As regards claims to forests (pulau), the Government will maintain the stand that the pulars are not "temuda" (farming land) as they are never brought under cultivation. The natives have no legitimate right to the pulars and no legal rights to the land therein. If there is a need by any community for jungle produce etc. from a forest area for their own subsistence or use, the Government could declare such a forest area as a communal forest. The native community ought not to claim jungle which they have never brought under cultivation as their NCR land.
- 6.7 The Government maintains that what a native could claim as his NCR land must be for his own farming requirement and must be limited to what he needs or is capable of cultivating based upon traditional farming methods. In other words, the size of his NCR land must not exceed what he needs for himself and his family, and using the conventional or traditional method of farming, able to bring cultivation.
- 6.8 What a native claims as rights under native customary law must be restricted to what the laws over the last 1½centuries permit. If he required more land than what he could obtain through the native customary law system, he may apply, like any other Sarawakian, to the Government to alienate him land. He should not attempt to increase the size or area of his land by pleading that he is entitled to have more land because of certain customs which are not recognized as, or not part of, the customary law of the State. The law on NCR which has evolved more than a century must be respected. For instance, the principle that NCR land is temuda land (i.e. land cleared of virgin jungles for cultivation) and occupied by the natives or used as burial ground or right of way, has been part of the native customary law since 1933 and reinforced by the Secretariat Circular of 1939 and declared as port of the Tusun Tunggu of the Ibans and restated in Section 5 of the Land Code. The

Government cannot agree to any change in this fundamental concept which has governed land utilization, planning and development for nearly a century.

- 6.9 NCR land like titled or alienated land may be required for public purpose. Under the Land Code, if NCR land is needed for public purposes, the lawful holder of such land will be paid compensation. NCR land claimants will not be treated differently from registered proprietors of land; consistent with the relevant provision in the Federal Constitution for the protection of property and against discrimination.

7. **CONCLUSION**

- 7.1 The Government will always respect all native rights to land, lawfully acquired in accordance with the native customary laws of the State. Likewise, the Government expects the natives to respect such laws evolved in a peaceful and orderly manner over more than 1 ½centuries.
- 7.2 The Government will continue to facilitate the development of NCR land with a view to enabling the natives who lawfully have rights over such land, to enjoy better economic returns and value for the land; and in the process, also to enhance development of the rural areas and to improve the living standards of the rural communities.
- 7.3 The Government will respect and honour the constitutional protections accorded to the natives by awarding recognition of their legitimate rights to their NCR land and if such land are required for public purposes, to pay the due compensation.
- 7.4 The Government recognizes the need of the natives to maintain their traditional way of life and farming and the need to take timber and jungle produce from, and to hunt and fishing, in our forests. Where there is a need for the natives to take timber or timber products from a forest area, the Government will declare that area as a communal forest. In cases where a particular native community needs to be settled in a specified area which suit their traditional way of life and farming, the Government would, pursuant to

Section 6 of the Land Code, declare that area as a Native Communal Reserve. Examples of Native Communal Reserves declared recently are:

- (a) The Native Communal (Agriculture) Reserve Order, 2001 (Swk.L.N. 77/2001);
- (a) The Native Communal (Kampung) Reserve Order, 2001 (Swk.L.N. 65/2001);
- (b) The Native Communal (Community Hall) Reserve Order, 2001 (Swk.L.N. 28/2001);
- (c) The Native Communal (Surau) Reserve Order, 2001 (Swk.L.N. 93/2001);

7.5 But the natives must at the same time understand and respect the rights of the Government to realize, for the benefit of the country, the full economic potentials of the resources of our forests which are not part of our national parks, natural reserves and wildlife sanctuaries.

7.6 In a democratic society where the Rule of Law must be upheld, the interests and rights of any individual should be exercised or advanced without any disregard for the Law and the interest of the State and Nation. The native people should not take the law into their own hands by setting up blockades or intimidating those undertaking development projects in their areas. Their rights, if any, to land can always be enforced by proceedings either before the Civil Court or the Native Courts which are set up, amongst other reasons, to adjudicate on disputes or claims to NCR land. SUHAKAM, as an institution, should encourage the people to uphold and respect the Law and help to explain the Law to those who are supposed to observe and abide by the Law.

LAMPIRAN 4

RINGKASAN PERBINCANGAN DENGAN Y.A.B. KETUA MENTERI SARAWAK

(Ringkasan Perbincangan SUHAKAM dengan Yang Amat Berhormat Datuk Patinggi Tan Sri (Dr) Haji Abdul Taib Bin Mahmud, Ketua Menteri Sarawak pada 18.2.2002 jam 10.30 pagi di Pejabat Ketua Menteri di Petra Jaya Sarawak.)

Yang Amat Berhormat Ketua Menteri memaklumkan bahawa tanah-tanah di Negeri Sarawak perlu dibangunkan termasuklah tanah-tanah NCR. Pada masa yang sama undang-undang juga perlu dipinda untuk memastikan pembangunan dapat dijalankan. Tanah yang tidak dibangunkan tidak akan menghasilkan nilai ekonomi yang baik.

Adalah tradisi kehidupan masyarakat asli yang sentiasa berpindah dari satu tempat ke satu tempat yang lain. Apabila penghijrahan berlaku, hak mereka ke atas tanah yang asal akan terhapus dan selalunya berlaku pertindihan tuntutan ke atas satu-satu kawasan di antara masyarakat asli. Sekiranya ini berlaku, maka akan berlaku perbalahan. Untuk mengatasi masalah ini, pihak Kerajaan akan merujuk kepada *area photography* dan didapati kebanyakan kawasan adalah merupakan hutan asli di mana mereka tidak mempunyai sebarang hak ke atas kawasan tersebut.

Kerajaan mewujudkan bank tanah dan juga projek usaha sama dengan masyarakat asli setelah perbincangan dilakukan dengan mereka dan lebih daripada 70% bersetuju dengan cara ini. Selepas 5 tahun berlaku banyak perbalahan dan kes-kes dibawa ke mahkamah yang mana menyebabkan perbelanjaan yang banyak berbanding dengan nilai sesuatu tanah tersebut dan selalunya perkara ini masih diteruskan atas dasar maruah.

Kerajaan memulakan pembangunan ke atas tanah *native* dan selepas itu *native* menuntut tanah-tanah tersebut. Di bawah sistem tanah *native*, apabila mereka berpindah, mereka tidak boleh lagi menuntut tanah tersebut. Sekiranya masyarakat asli menuntut tanah tersebut supaya diberi milik ke atas tanah tersebut kerajaan tidak menghalangnya tetapi selalunya apabila mereka memohon sebarang tanah, selalunya didalangi oleh seseorang. Keadaan di sini berbeza dengan di Semenanjung di mana terdapat Tanah Rezab Melayu. Masyarakat asli mempunyai hak terhadap kawasan hutan. Mereka mempunyai hak ke atas hasil-hasil hutan dan boleh memungut hasil hutan. Di dalam tahun 60-an banyak tanah *communal forest reserve* dituntut oleh komuniti dan mereka menuntut wang dari kerajaan, untuk

*Laporan Aduan dan Siasatan SUHAKAM
Hak Masyarakat Asli Sarawak
Jun 2002
(Lampiran 4)*

mewujudkan '*pulau*' ataupun memotong kayu balak di mana ini bukanlah merupakan polisi kerajaan.

Berkenaan kawasan Penempatan Semula Sungai Asap, kerajaan tidak boleh menghalang mereka daripada balik ke tempat asal mereka tetapi mereka tidak boleh menuntut pampasan sekali lagi untuk tujuan tersebut. Sebenarnya banyak keuntungan diperolehi daripada pembangunan Sungai Asap.

Berkenaan kaum Penan, mereka sebenarnya dihasut dari luar. Kerajaan mempunyai masalah untuk membawa mereka ke kehidupan cara moden. Kerajaan mewujudkan *service center* untuk mereka. Bagi generasi muda, kerajaan mewujudkan sistem persekolahan sungguhpun tidak ramai anak-anak Penan yang hadir ke kelas tetapi sekurang-kurangnya terdapatnya sekolah untuk memberi pendidikan kepada anak-anak mereka. Di Baram pula, kanak-kanak mudah menyesuaikan diri mereka kerana pengaruh dari suku kaum lain di sekitarnya. Kerajaan mendapati bahawa individu seperti Bruno Manser inginkan kaum Penan untuk mengekalkan cara hidup asli mereka bukannya pembangunan. Akibatnya, banyak halangan yang dibuat mengenai pembalakan sehingga ada kalanya hingga 3 bulan lamanya. Kaum Penan tidak ada konsep untuk memiliki satu kawasan kerana adat mereka yang sentiasa berpindah-randah. *Area survey* adalah terlalu mahal untuk dilakukan ke atas tanah-tanah dan juga sempadan tanah individu. Ianya lebih kepada tanah-tanah atau kawasan satu-satu masyarakat asli tetapi banyak berlaku tuntutan daripada individu. Mereka akan merujuk pertikaian ini ke mahkamah dan ada kalanya mengambil masa sehingga 20 tahun. Kerajaan sedar bahawa terdapatnya kekurangan pegawai untuk menunjuk ajar kaum Penan terutamanya pegawai-pegawai pertanian. Sekiranya kaum Penan ditempatkan di sesuatu penempatan mereka akan merasa tertekan dan berasa sedih. Maka dengan sebab itu kerajaan tidak mahu memaksa mereka tetapi bagi kanak-kanak mereka, ini boleh diubah. Kerajaan tidak boleh mengubah adat kaum Penan dalam satu malam. Mereka perlukan proses perubahan. Bagi sukarelawan Penan bilangan mereka sangatlah kecil dan bukanlah mudah untuk mendapatkan pekerja untuk bekerja di kawasan kaum Penan. Terutamanya yang terlalu jauh di pedalaman dan bergunung-ganang. Maka banyak perkara dan nilai-nilai yang perlu diambil kira. Untuk mewujudkan pembangunan penempatan di kawasan pedalaman pula, kosnya sangat tinggi untuk membangunkan sesuatu kawasan di pedalaman. Ianya mesti dihubungkan dengan pembangunan tanah. Masyarakat asli memerlukan

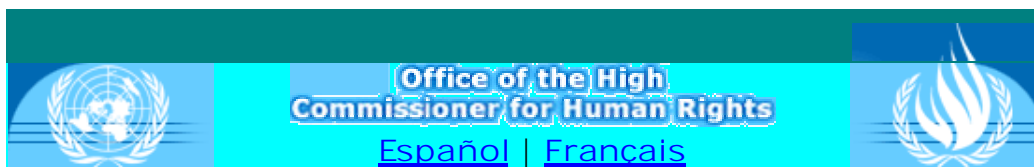
kemahiran dan pendidikan yang secukupnya. Sekiranya di sekitar Kuching dan Sibulok perkara ini boleh dilakukan tetapi tidak di kawasan-kawasan pedalaman. Pertanian cara moden hanya boleh dilakukan melalui pengurusan pusat.

Berikutan dengan pemusnahan tanah-tanah perkuburan pula, Kerajaan sedia membayar pampasan kepada mereka yang terlibat tetapi mereka enggan menerimanya. Bagi mereka yang enggan berpindah ke Sungai Asap, rumah-rumah tersebut telah diperuntukkan kepada orang lain iaitu anak-anak penduduk yang telah menetap di Sungai Asap. Kerajaan membayar pampasan tetapi sekiranya mereka merasakan ianya tidak mencukupi kesnya boleh dibawa ke mahkamah. Hasrat kerajaan sebenarnya ingin melihat perubahan dalam kehidupan mereka. Kerajaan telah menghantar pegawai-pegawai yang berkebolehan untuk menjelaskan rancangan kerajaan dan juga berbincang dengan mereka. Tetapi mereka enggan dengar dan Kerajaan tidak boleh buat apa-apa. Tetapi perkara ini akan menyebabkan masalah lain seperti pentadbiran yang akan melibatkan wang yang banyak. Bagi kawasan penempatan semula kerajaan harapkan ada kemajuan pada masa akan datang. Untuk mewujudkan rancangan tanah seperti Felda di Sarawak keadaannya sangat berbeza jika dibandingkan dengan Semenanjung Malaysia. Kerajaan mahukan mereka bekerja di dalam kawasan perusahaan.

Bagi kawasan kaum Penan biasanya kawasan tersebut tidak ramai penghuninya tetapi apabila mereka mengetahui adanya pembangunan di kawasan tersebut dan penduduk didapati semakin ramai. Bagi kaum Iban pula, sekiranya mereka mempunyai tanah jadikan ia sebagai bank tanah dan bangunkan secara usaha sama dengan syarikat. Konsep harta bagi masyarakat asli adalah tanah adalah satu harta/asset. Kerajaan berusaha untuk meningkatkan asset mereka melalui saham yang biasanya nilainya akan meningkat. Bagi rumah-rumah panjang yang dibina selepas tahun 1958, apa yang berlaku ialah mereka berpindah ke kawasan baru tetapi masih menuntut kawasan lama yang telah ditinggalkan.

Perbincangan tamat jam 12.30 tengah hari.

LAMPIRAN 5



**Convention (No. 169) concerning Indigenous and Tribal Peoples
in Independent Countries**

Adopted on 27 June 1989 by the General Conference of the International Labour Organisation

Organisation at its seventy-sixth session

entry into force 5 September 1991

The General Conference of the International Labour Organisation

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its seventy-sixth session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957,

Adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989:

PART I. GENERAL POLICY

Article 1

1. This Convention applies to:
 - (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
 - (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:

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- (a) Ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
 - (b) Promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
 - (c) Assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

- (a) The social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
- (b) The integrity of the values, practices and institutions of these peoples shall be respected;
- (c) Policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1. In applying the provisions of this Convention, Governments shall:
 - (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of

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- decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
- (c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

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2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II. LAND

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) The provision of the means required to promote the development of the lands which these peoples already possess.

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT**Article 20**

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
 - (a) Admission to employment, including skilled employment, as well as measures for promotion and advancement;
 - (b) Equal remuneration for work of equal value;
 - (c) Medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
 - (d) The right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
 - (a) That workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
 - (b) That workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
 - (c) That workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

-
- (d) That workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.
 4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V. SOCIAL SECURITY AND HEALTH

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PART VI. EDUCATION AND MEANS OF COMMUNICATION**Article 26**

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations. They shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with

these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.
3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

PART VII. CONTACTS AND CO-OPERATION ACROSS BORDERS

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII. ADMINISTRATION

Article 33

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.
2. These programmes shall include:
 - (a) The planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;

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- (b) The proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

PART IX. GENERAL PROVISIONS

Article 34

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X. FINAL PROVISIONS

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - (a) The ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
 - (b) As from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

* This is a direct link to the ILO ILOLEX database. Ratification information is updated daily

LAMPIRAN 6

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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities

REPORT OF THE SUB-COMMISSION ON PREVENTION OF
DISCRIMINATION AND PROTECTION OF MINORITIES
ON ITS FORTY-SIXTH SESSION

Geneva, 1-26 August 1994
Rapporteur: Mr. Osman El-Hajjé

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II. RESOLUTIONS AND DECISIONS ADOPTED BY THE SUB-COMMISSION
AT ITS FORTY-SIXTH SESSION

A. Resolutions

1994/45. Draft United Nations declaration on the rights of
indigenous peoples

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Recalling its resolutions 1985/22 of 29 August 1985, 1991/30 of 29 August 1991,
1992/33 of 27 August 1992, 1993/46 of 26 August 1993,

Taking into account, in particular, paragraph 3 of its resolution 1993/46, in which it
decided to postpone until its forty-sixth session consideration of the draft United

*Laporan Aduan dan Siasatan SUHAKAM
Hak Masyarakat Asli Sarawak
April 2002
(Lampiran 6)*

Nations declaration on the rights of indigenous peoples agreed upon by the members of the Working Group on Indigenous Populations, to request the Secretary-General to submit the draft declaration to the appropriate services in the Centre for Human Rights for its technical revision, and to submit, if possible, the draft declaration to the Commission on Human Rights with the recommendation that the Commission adopt it at its fifty-first session,

Recalling Commission on Human Rights resolution 1994/29 of 4 March 1994, in which the Sub-Commission was urged to complete its consideration of the draft United Nations declaration at its forty-sixth session and to submit it to the Commission at its fifty-first session together with any recommendations thereon,

Bearing in mind General Assembly resolution 47/75 of 14 December 1992, paragraph 12 of Commission on Human Rights resolution 1993/30 of 5 March 1993, paragraph 6 (a) of Commission resolution 1993/31 of 5 March 1993 and paragraph II.28 of the Vienna Declaration and Programme of Action (A/Conf.157/23),

Having considered the report of the Working Group on Indigenous Populations on its twelfth session (E/CN.4/Sub.2/1994/30 and Corr.1), in particular the general comments on the draft declaration and the recommendations contained in chapters II and IX respectively of the report,

Taking into account the technical review of the draft declaration prepared by the Centre for Human Rights (E/CN.4/Sub.2/1994/2 and Add.1),

1. Expresses its satisfaction at the conclusion of the deliberations on the draft United Nations declaration on the rights of indigenous peoples by the Working Group on Indigenous Populations and the general views of the participants as reflected in the report of the Working Group on its twelfth session;
2. Expresses its appreciation to the Chairperson-Rapporteur of the Working Group, Ms. Erica-Irene Daes, and to the present and former members of the Working Group for their contributions to the process of elaboration of the draft declaration;
3. Expresses its appreciation to the Centre for Human Rights for its technical revision of the draft declaration;
4. Decides:
 - (a) To adopt the draft United Nations declaration on the rights of indigenous peoples agreed upon by members of the Working Group as contained in the annex to the present resolution;
 - (b) To submit the draft declaration to the Commission on Human Rights at its fifty-first session with the request that it consider the draft as expeditiously as possible;
 - (c) To request the Secretary-General to transmit the text of the draft declaration to indigenous peoples and organizations, Governments and intergovernmental organizations and to include in the note of transmittal the information that the draft declaration is to be submitted to the Commission on Human Rights at its fifty-first session;

5. Recommends that the Commission on Human Rights and the Economic and Social Council take effective measures to ensure that representatives of indigenous peoples are able to participate in the consideration of the draft declaration by these two bodies, regardless of their consultative status with the Economic and Social Council.

36th meeting
26 August 1994

[Adopted without a vote. See chap. XVI.]

Annex

DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS
OF INDIGENOUS PEOPLES

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
- (b) Recruit indigenous children into the armed forces under any circumstances;
- (c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;

- (d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.

This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

LAMPIRAN 7

Agenda 21

Chapter 26

RECOGNIZING AND STRENGTHENING THE ROLE OF INDIGENOUS PEOPLE AND THEIR COMMUNITIES

PROGRAMME AREA

Basis for action

- 26.1. Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.
- 26.2. Some of the goals inherent in the objectives and activities of this programme area are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights, being prepared by the United Nations working group on indigenous populations. The International Year for the World's Indigenous People (1993), proclaimed by the General Assembly in its resolution 45/164 of 18 December 1990, presents a timely opportunity to mobilize further international technical and financial cooperation.

Objectives

- 26.3. In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

Establishment of a process to empower indigenous people and their communities through measures that include:

Adoption or strengthening of appropriate policies and/or legal instruments at the national level;

Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;

Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;

Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;

Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;

Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;

Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;

Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Activities

- 26.4. Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:

Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;

Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.

- 26.5. United Nations organizations and other international development and finance organizations and Governments should, drawing on the active participation of indigenous people and their communities, as appropriate, take the following measures, inter alia, to incorporate their values, views and knowledge, including the unique contribution of indigenous women, in resource management and other policies and programmes that may affect them:

Appoint a special focal point within each international organization, and organize annual interorganizational coordination meetings in consultation with Governments and indigenous organizations, as appropriate, and develop a procedure within and between operational agencies for assisting Governments in ensuring the coherent and coordinated incorporation of the views of indigenous people in the design and implementation of policies and programmes. Under this procedure, indigenous people and their communities should be informed and consulted and allowed to participate in national decision-making, in particular regarding regional and international cooperative efforts. In addition, these policies and programmes should take fully into account strategies based on local indigenous initiatives;

Provide technical and financial assistance for capacity-building programmes to support the sustainable self-development of indigenous people and their communities;

Strengthen research and education programmes aimed at:

Achieving a better understanding of indigenous people's knowledge and management experience related to the environment, and applying this to contemporary development challenges;

Increasing the efficiency of indigenous people's resource management systems, for example, by promoting the adaptation and dissemination of suitable technological innovations;

Contribute to the endeavours of indigenous people and their communities in resource management and conservation strategies (such as those that may be developed under appropriate projects funded through the Global Environment Facility and the Tropical Forestry Action Plan) and other programme areas of Agenda 21, including programmes to collect, analyse and use data and other information in support of sustainable development projects.

- 26.6. Governments, in full partnership with indigenous people and their communities should, where appropriate:

Develop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them;

Cooperate at the regional level, where appropriate, to address common indigenous issues with a view to recognizing and strengthening their participation in sustainable development.

Means of implementation

(a) Financing and cost evaluation

26.7. The Conference secretariat has estimated the average total annual cost (1993-2000) of implementing the activities of this programme to be about \$3 million on grant or concessional terms. These are indicative and order-of-magnitude estimates only and have not been reviewed by Governments. Actual costs and financial terms, including any that are non-concessional, will depend upon, inter alia, the specific strategies and programmes Governments decide upon for implementation.

(b) Legal and administrative frameworks

26.8. Governments should incorporate, in collaboration with the indigenous people affected, the rights and responsibilities of indigenous people and their communities in the legislation of each country, suitable to the country's specific situation. Developing countries may require technical assistance to implement these activities.

(c) Human resource development

26.9. International development agencies and Governments should commit financial and other resources to education and training for indigenous people and their communities to develop their capacities to achieve their sustainable self-development, and to contribute to and participate in sustainable and equitable development at the national level. Particular attention should be given to strengthening the role of indigenous women.

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LAMPIRAN 8

THE WORLD BANK OPERATIONAL MANUAL

September 1991

Operational Directive OD 4.20

This directive was prepared for the guidance of staff of the World Bank and is not necessarily a complete treatment of the subjects covered.

Indigenous Peoples

Introduction

1. This directive describes Bank¹⁵ policies and processing procedures for projects that affect indigenous peoples. It sets out basic definitions, policy objectives, guidelines for the design and implementation of project provisions or components for indigenous peoples, and processing and documentation requirements.
2. The directive provides policy guidance to:
 - (a) ensure that indigenous people benefit from development projects, and
 - (b) avoid or mitigate potentially adverse effects on indigenous people caused by Bank-assisted activities. Special action is required where Bank investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources.

Definitions

3. The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.
4. Within their national constitutions, statutes, and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.

¹⁵ "Bank" includes IDA, and "loans" include credits.

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5. Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:
- (a) a close attachment to ancestral territories and to the natural resources in these areas;
 - (b) self-identification and identification by others as members of a distinct cultural group;
 - (c) an indigenous language, often different from the national language;
 - (d) presence of customary social and political institutions; and
 - (e) primarily subsistence-oriented production.

Task managers (TMs) must exercise judgment in determining the populations to which this directive applies and should make use of specialized anthropological and sociological experts throughout the project cycle.

Objective and Policy

6. The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. More specifically, the objective at the center of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits.
7. How to approach indigenous peoples affected by development projects is a controversial issue. Debate is often phrased as a choice between two opposed positions. One pole is to insulate indigenous populations whose cultural and economic practices make it difficult for them to deal with powerful outside groups. The advantages of this approach are the special protections that are provided and the preservation of cultural distinctiveness; the costs are the benefits foregone from development programs. The other pole argues that indigenous people must be acculturated to dominant society values and economic activities so that they can participate in national development. Here the benefits can include improved social and economic opportunities, but the cost is often the gradual loss of cultural differences.
8. The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the *informed participation* of the indigenous people themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.

9. Cases will occur, especially when dealing with the most isolated groups, where adverse impacts are unavoidable and adequate mitigation plans have not been developed. In such situations, the Bank will not appraise projects until suitable plans are developed by the borrower and reviewed by the Bank. In other cases, indigenous people may wish to be and can be incorporated into the development process. In sum, a full range of positive actions by the borrower must ensure that indigenous people benefit from development investments.

Bank Role

10. The Bank addresses issues on indigenous peoples through
- (a) country economic and sector work,
 - (b) technical assistance, and
 - (c) investment project components or provisions.

Issues concerning indigenous peoples can arise in a variety of sectors that concern the Bank; those involving, for example, agriculture, road construction, forestry, hydropower, mining, tourism, education, and the environment should be carefully screened.¹⁶ Issues related to indigenous peoples are commonly identified through the environmental assessment or social impact assessment processes, and appropriate measures should be taken under environmental mitigation actions (see OD 4.01, *Environmental Assessment*, to be issued).

11. *Country Economic and Sector Work.* Country departments should maintain information on trends in government policies and institutions that deal with indigenous peoples. Issues concerning indigenous peoples should be addressed explicitly in sector and subsector work and brought into the Bank-country dialogue. National development policy frameworks and institutions for indigenous peoples often need to be strengthened in order to create a stronger basis for designing and processing projects with components dealing with indigenous peoples.
12. *Technical Assistance.* Technical assistance to develop the borrower's abilities to address issues on indigenous peoples can be provided by the Bank. Technical assistance is normally given within the context of project preparation, but technical assistance may also be needed to strengthen the relevant government institutions or to support development initiatives taken by indigenous people themselves.
13. *Investment Projects.* For an investment project that affects indigenous peoples, the borrower should prepare an indigenous peoples development plan that is consistent with the Bank's policy. Any project that affects

¹⁶ Displacement of indigenous people can be particularly damaging, and special efforts should be made to avoid it. See OD 4.30, *Involuntary Resettlement*, for additional policy guidance on resettlement issues involving indigenous people.

indigenous peoples is expected to include components or provisions that incorporate such a plan. When the bulk of the direct project beneficiaries are indigenous people, the Bank's concerns would be addressed by the project itself and the provisions of this OD would thus apply to the project in its entirety.

Indigenous Peoples Development Plan³¹⁷

Prerequisites

14. Prerequisites of a successful development plan for indigenous peoples are as follows:
- (a) The key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous people affected by the project.
 - (b) Studies should make all efforts to *anticipate adverse trends* likely to be induced by the project and develop the means to avoid or mitigate harm.¹⁸
 - (c) The institutions responsible for government interaction with indigenous peoples should possess the social, technical, and legal skills needed for carrying out the proposed development activities. Implementation arrangements should be kept simple. They should normally involve appropriate existing institutions, local organizations, and nongovernmental organizations (NGOs) with expertise in matters relating to indigenous peoples.
 - (d) Local patterns of social organization, religious beliefs, and resource use should be taken into account in the plan's design.
 - (e) Development activities should support production systems that are well adapted to the needs and environment of indigenous peoples, and should help production systems under stress to attain sustainable levels.
 - (f) The plan should avoid creating or aggravating the dependency of indigenous people on project entities. Planning should encourage early handover of project management to local people. As needed, the plan should include general education and training in management skills for indigenous people from the onset of the project.

¹⁷ Regionally specific technical guidelines for preparing indigenous peoples components, and case studies of best practices, are available from the Regional environment divisions (REDs).

¹⁸ For guidance on indigenous peoples and environmental assessment procedures, see OD 4.01, *Environmental Assessment*, and Chapter 7 of World Bank, *Environmental Assessment Sourcebook*, Technical Paper No. 139 (Washington, D.C., 1991).

- (g) Successful planning for indigenous peoples frequently requires long lead times, as well as arrangements for extended follow-up. Remote or neglected areas where little previous experience is available often require additional research and pilot programs to fine-tune development proposals.
- (h) Where effective programs are already functioning, Bank support can take the form of incremental funding to strengthen them rather than the development of entirely new programs.

Contents

15. The development plan should be prepared in tandem with the preparation of the main investment. In many cases, proper protection of the rights of indigenous people will require the implementation of special project components that may lie outside the primary project's objectives. These components can include activities related to health and nutrition, productive infrastructure, linguistic and cultural preservation, entitlement to natural resources, and education. The project component for indigenous peoples development should include the following elements, as needed:
- (a) *Legal Framework.* The plan should contain an assessment of:
 - (i) the legal status of the groups covered by this OD, as reflected in the country's constitution, legislation, and subsidiary legislation (regulations, administrative orders, etc.); and
 - (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wild-life, and water) vital to their subsistence and reproduction.
 - (b) *Baseline Data.* Baseline data should include:
 - (i) accurate, up-to-date maps and aerial photographs of the area of project influence and the areas inhabited by indigenous peoples;
 - (ii) analysis of the social structure and income sources of the population;
 - (iii) inventories of the resources that indigenous people use and technical data on their production systems; and

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- (iv) the relationship of indigenous peoples to other local and national groups. It is particularly important that baseline studies capture the full range of production and marketing activities in which indigenous people are engaged. Site visits by qualified social and technical experts should verify and update secondary sources.
- (c) *Land Tenure.* When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the state and where it is inappropriate to convert traditional rights into those of legal ownership, alter-native arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples. These steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.
- (d) *Strategy for Local Participation.* Mechanisms should be devised and maintained for participation by indigenous people in decision making throughout project planning, implementation, and evaluation. Many of the larger groups of indigenous people have their own representative organizations that provide effective channels for communicating local preferences. Traditional leaders occupy pivotal positions for mobilizing people and should be brought into the planning process, with due concern for ensuring genuine representation of the indigenous population.⁵¹⁹ No foolproof methods exist, however, to guarantee full local-level participation. Sociological and technical advice provided through the Regional environment divisions (REDs) is often needed to develop mechanisms appropriate for the project area.
- (e) *Technical Identification of Development or Mitigation Activities.* Technical proposals should proceed from on-site research by qualified professionals acceptable to the Bank. Detailed descriptions should be prepared and appraised for such proposed services as education, training, health, credit, and legal assistance. Technical descriptions should be included for the planned investments in productive infrastructure. Plans that draw upon indigenous knowledge are often more successful than those introducing entirely new principles and institutions. For example, the potential contribution of traditional health providers should be considered in planning delivery systems for health care.
- (f) *Institutional Capacity.* The government institutions assigned responsibility for indigenous peoples are often weak. Assessing the

¹⁹ See also "Community Involvement and the Role of Nongovernmental Organizations in Environmental Assessment" in World Bank, *Environmental Sourcebook*, Technical Paper No. 139 (Washington, D.C., 1991).

track record, capabilities, and needs of those institutions is a fundamental requirement. Organizational issues that need to be addressed through Bank assistance are the:

- (i) availability of funds for investments and field operations;
 - (ii) adequacy of experienced professional staff;
 - (iii) ability of indigenous peoples' own organizations, local administration authorities, and local NGOs to interact with specialized government institutions;
 - (iv) ability of the executing agency to mobilize other agencies involved in the plan's implementation; and (v) adequacy of field presence.
- (g) *Implementation Schedule.* Components should include an implementation schedule with benchmarks by which progress can be measured at appropriate intervals. Pilot programs are often needed to provide planning information for phasing the project component for indigenous peoples with the main investment. The plan should pursue the long-term sustainability of project activities subsequent to completion of disbursement.
- (h) *Monitoring and Evaluation.*²⁰ Independent monitoring capacities are usually needed when the institutions responsible for indigenous populations have weak management histories. Monitoring by representatives of indigenous peoples' own organizations can be an efficient way for the project management to absorb the perspectives of indigenous beneficiaries and is encouraged by the Bank. Monitoring units should be staffed by experienced social science professionals, and reporting formats and schedules appropriate to the project's needs should be established. Monitoring and evaluation reports should be reviewed jointly by the senior management of the implementing agency and by the Bank. The evaluation reports should be made available to the public.
- (i) *Cost Estimates and Financing Plan.* The plan should include detailed cost estimates for planned activities and investments. The estimates should be broken down into unit costs by project year and linked to a financing plan. Such programs as revolving credit funds that provide indigenous people with investment pools should indicate their accounting procedures and mechanisms for financial transfer and replenishment. It is usually helpful to have as high a share as possible of direct financial participation by the Bank in project components dealing with indigenous peoples.

²⁰ See OD 10.70, *Project Monitoring and Evaluation*.

Project Processing and Documentation

Identification

16. During project identification, the borrower should be informed of the Bank's policy for indigenous peoples. The approximate number of potentially affected people and their location should be determined and shown on maps of the project area. The legal status of any affected groups should also be discussed. TMs should ascertain the relevant government agencies, and their policies, procedures, programs, and plans for indigenous peoples affected by the proposed project (see paras. 11 and 15(a)). TMs should also initiate anthropological studies necessary to identify local needs and preferences (see para. 15(b)). TMs, in consultation with the REDs, should signal indigenous peoples issues and the overall project strategy in the Initial Executive Project Summary (IEPS).

Preparation

17. If it is agreed in the IEPS meeting that special action is needed, the indigenous peoples development plan or project component should be developed during project preparation. As necessary, the Bank should assist the borrower in preparing terms of reference and should provide specialized technical assistance (see para. 12). Early involvement of anthropologists and local NGOs with expertise in matters related to indigenous peoples is a useful way to identify mechanisms for effective participation and local development opportunities. In a project that involves the land rights of indigenous peoples, the Bank should work with the borrower to clarify the steps needed for putting land tenure on a regular footing as early as possible, since land disputes frequently lead to delays in executing measures that are contingent on proper land titles (see para. 15(c)).

Appraisal

18. The plan for the development component for indigenous peoples should be submitted to the Bank along with the project's overall feasibility report, prior to project appraisal. Appraisal should assess the adequacy of the plan, the suitability of policies and legal frameworks, the capabilities of the agencies charged with implementing the plan, and the adequacy of the allocated technical, financial, and social resources. Appraisal teams should be satisfied that indigenous people have participated meaningfully in the development of the plan as described in para. 14(a) (also see para. 15(d)). It is particularly important to appraise proposals for regularizing land access and use.

Implementation and Supervision

19. Supervision planning should make provisions for including the appropriate anthropological, legal, and technical skills in Bank supervision missions during

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Hak Masyarakat asli Sarawak
Jun 2002
(Lampiran 8)*

project implementation (see para. 15(g) and (h), and OD 13.05, *Project Supervision*). Site visits by TMs and specialists are essential. Midterm and final evaluations should assess progress and recommend corrective actions when necessary.

Documentation

20. The borrower's commitments for implementing the indigenous peoples development plan should be reflected in the loan documents; legal provisions should provide Bank staff with clear benchmarks that can be monitored during super-vision. The Staff Appraisal Report and the Memorandum and Recommendation of the President should summarize the plan or project provisions.