

Protecting Native Customary Rights: Is Legal Recourse Viable Alternative?

Melindungi Tanah Adat Bumiputra
Adakah Cara Perundangan Alternatif yang Berkesan?

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ABSTRAK

Objektif makalah ini adalah untuk meneliti perlindungan undang-undang hak tanah adat (NCR Land) di Sarawak. Hal ini perlu diberikan perhatian memandangkan pertikaian mengenai tanah NCR yang terjadi antara pemilik tanah NCR dengan pihak negeri telah menyebabkan kaum pemilik tanah NCR lebih terdedah kepada risiko bahaya kehilangan tanah. Pertama, makalah ini melihat masalah tanah NCR dalam konteks negara-bangsa dengan pembuktian sejarah masa lalu. Secara umumnya ini telah dilakukan dengan cara pemeriksaan ke atas status tanah NCR pada tempoh berbagai-bagai kebebasan penggunaannya dan dalam hal ini ia boleh dilihat dari dua dokumen perundangan yang penting, iaitu Kanun Tanah Sarawak (SLC) dan Ordinan Perhutanan Sarawak (SFC). Semenjak tahun 1980-an persaingan penggunaan tanah/hutan di antara pihak negeri dengan golongan peribumi semakin sengit. Perluasan aktiviti pembalakan dan perladangan komersil ke dalam kawasan peribumi telah meminggirkan mereka daripada kewilayahan tradisionalnya. Mutakhir ini komuniti-komuniti peribumi telah bertindak-balas secara terpisah-pisah dan sebuah komuniti telah memutuskan untuk mengambil tindakan undang-undang ke atas penceroboh tanah adat warganya. Kedua, makalah ini juga meneliti kes tanda tanah Nor Nyawai dan membincangkan implikasinya ke atas pergelutan/perjuangan kaum peribumi Sarawak untuk mempertahankan tanah adat mereka. Untuk itu kebolehpercayaan kes ini sebagai alternatif kepada masyarakat peribumi Sarawak perlulah dibuktikan. Sebagai cara alternatif kepada pilihan undang-undang, maka banyak usaha di pihak komuniti peribumi diperlukan, khususnya yang berkenaan dengan pendokumentasian bukti-bukti tanah NCR.

Kata kunci: Hak adat peribumi, tanah adat peribumi, golongan peribumi, Kanun Tanah Sarawak, Ordinan Perhutanan Sarawak, Nor Nyawai

ABSTRACT

The objective of this article is to examine the legal protection of native customary rights over land in the Borneo state of Sarawak. This is necessary because the conflict between native customary rights owners and the state has left the former more vulnerable. Firstly, it will look into the nature of the nation-state with historical evidence as the conflict evolved in the past. This is done generally by examining the state of NCR during the various sovereignties and in particular, two important legal documents, the Sarawak Land Code and Sarawak Forest Ordinance. The contest of land/forest use between the state and the forest peoples/indigenous peoples became sharpened since the 1980s. Commercial logging and cash crop plantations that had expanded in the last two decades had left them marginalised. Different indigenous communities' respond differently and in recent years one community decided to take a legal course. Thirdly, this article looks at Nor Nyawai land mark case and discusses its implication on the indigenous peoples' struggle to protect their land. In doing so, it will also prove its viability as an alternative for the indigenous peoples of Sarawak. As an alternative means to legal recourse requires a lot of efforts on the part of indigenous communities especially in the documentation of evidences of NCR.

Keywords: Native customary rights, native customary lands, indigenous people, Sarawak Land Code, Sarawak Forest Ordinance, Nor Nyawai

INTRODUCTION

Of late, legal protection of the native customary lands became a current issue as more and indigenous communities of Sarawak resort to legal recourse in settling their conflict with the encroaching identities. Whether it is a viable alternative, this article seeks to look at its evolution since the handing of the sovereignty of the territory of Sarawak to Brookes' family rule to the present day Malaysian Federal State of Sarawak.

Under Malaysian law, native title has been described as a *sui generis*, i.e. it is based in statute, common law and native laws and customs. Courts must determine the nature of the right with reference to all the bodies of laws, to give substance to what the courts have called a 'complementary' right' (Bulan 2001). Under the Sarawak law, the main statute relevant to native title is the Sarawak Land Code 1958 (Cap 81)(Land Code 1958). The Sarawak Land Code recognises NCR prior to 1 January 1958 [Land Code 1958, s5(2)(ii)] and whether a native or native community has acquired or lost NCR, prior to 1 January 1958 is determined under the law in effect on 31 December 1957 [Land Code 1958, s 3(2)(ii)]. The law in existence prior to 1 January 1958 NCR is the Land (Classification)(Amendment) Ordinance 1955 and under this law, NCR can be created in IAL after 16 April 1955

if a permit is obtained from the District Officer [Nor Nyawai I (2001 6 MLJ 241, 284)]. However, there were changes to the NCR during the Brookes' era.

The Sarawak Land Code 1958 has been amended numerous times over a period of time depending whether the nation-state took the side of capital or labour or depending on the nature of the state. Nonetheless throughout Sarawak's history, native title has been consistently recognised and protected despite several transitions in sovereignty. However, during the period of sovereignty under the Malaysian Government, various amendments passed had increased the vulnerability of native title.

Thus, the main objective of this article is to discuss the vulnerability of the native customary rights in the face of changing phases of the nature of the state vis-a-vis capital. Who should protect the NCR of the indigenous peoples? Does the nation-state has a role in this? In what way should this role be concretised? This article uses qualitative method in data collecting as well as data analysis. In analysing the role of nation-state, the article adopts pluralist ideology. The pluralist states that power is not a physical entity that individuals have or do not have. Subsequently, it flows from a variety of sources. Subsequently, people or corporate bodies are powerful because they control the various resources. Resources are assets that can be used to force others to do what one wants. Politicians become powerful because they command resources that people want or fear or respect. This list of possibilities could be legal authority, money, knowledge or public support.

This first part of this article examines the state of NCR in Sarawak during the different sovereignty, that is from the Sultan of Brunei to the White Rajahs, the cession of Sarawak to the British Crown and Sarawak's independence within the Malaysian Federation. Secondly it will look at the various efforts indigenous communities took to protect their NCR and finally, the article will look at the Nor Nyawai land case.

NCR UNDER THE FEUDAL STATE OF BRUNEI SULTANATE

During the period prior to 1841, i.e. before the period of Brooke's acquisition of sovereignty over Sarawak, the Sultan of Brunei recognised and respected the pre existing land rights of natives. Prior to the Brookes' Rule (1841), the land tenure system in Sarawak was based on the traditional *adat* law system where usufruct rights were observed when it comes to usage of land and forest. Native customary land rights are now applicable to areas such as forest *temuda*, fruit trees, small trees, small hills, rivers, gardens, graveyards, ceremonial grounds, *jerami* (rice fields after harvesting) and *pemakai menoa*. A *temuda* is farm land and includes land deliberately left fallow for varying periods of time, for upward of 25 years, for the soil to regain fertility and for the forest to regenerate. *Pemakai menoa* refers to forests allocated for community use. According to Gerunsin

Lembat (1994), a *pemakai menoa* is an area of land held by a distinct longhouse or village community, and include farms, gardens, fruit groves, cemetery, water and forests within a defined boundary (*garis menoa*) normally following streams, watersheds, ridges and permanent landmarks. A *pemakai menoa* includes cultivated land (*tanah umai*), old longhouse sites (*tembawai*), cemeteries (*pendam*) and forest areas (*pulau*). *Pulau* is a term for primary forest preserved to ensure a steady supply of natural resources like rattan and timber and for water catchment, to enable hunting, for animals to be carried out and to honour distinguished persons.

In 1841, Rajah Muda Hashim, the Sultan of Brunei's viceroy to Sarawak, transferred "the Government of Sarawak together with the dependencies thereof its revenues and all its future responsibility" to James Brooke (Mooney 1967). This transfer was subject to the condition that "all laws and customs of the Malays of Sarawak forever be respected" (Ibid 1967). In 1842, the Sultan of Brunei ratified Rajah Muda Hashim's transfer by appointing James Brooke to serve as the Sultan's representative and "govern province of Sarawak" (Ibid 1967). Finally, in 1846, the Sultan issued an outright grant of Sarawak to Brooke (Ibid 1967).

ERA OF THE WHITE RAJAHS

Towards the latter part of the nineteenth century, three land laws were introduced - 1863 Land Regulations, 1875 Land Order and 1899 Fruit Trees, Order 1. Under the 1863 Land Regulations, unoccupied and wasteland were the property of the Sarawak government. The government could lease land or alienate it for private ownership. Natives could no longer claim rights to land outside existing domain without permission of the government. With the introduction of gambier and pepper, and the commercialisation of agriculture, the 1875 Land Order was introduced. Squatters were not allowed to occupy land cleared and abandoned by others. Even though this was the first attempt to curtail native customary land tenure, both land orders recognised the existence of native customary rights and continued to do so for the next 24 years. In 1899, the Fruit Trees Order 1 was enacted to prevent natives from establishing native customary rights over new areas. They could not claim, sell, and transfer farmland when moving away unless they had grants. In 1920, state control of land increased with Land Orders VIII and IX. Both orders consolidated all previous laws and decreed that state land included all areas not "leased or granted or lawfully occupied by any person," which meant that customary rights were recognised only if they were registered with the authorities.

Cash crop production increased in the 1920s and 1930s. This was reflected in land legislation, whereby the colonial government consolidated its powers to claim ownership over all non-registered land. In the 1931 Land Order (Order 1-2),

a classification system was used to delineate (1) Native Areas for natives under customary law (2) mixed zones, i.e. land that could be owned/occupied by non-natives, and (3) state land i.e. all land without title. While this Order also empowered the Superintendent of the Land and Survey Department to declare any area as native land reserves only for natives, native rights could also be extinguished by a later Order. Two years later, the state had powers of compulsory purchase over any native customary land. In the 1933 Land Settlement Order, the settlement officers of the Land and Survey Department determined all rights within gazetted settlement areas. By 1939, Native Customary tenure had been formalised through Secretariat Circular No 12/1939. Village boundaries were defined and demarcated and became native communal reserves. Additions were not allowed without permission from the District Officer.

CESSION OF SARAWAK TO THE BRITISH CROWN

In 1946, Sarawak was handed over to the British government and the new authorities established another land classification system that is preserved by the present legislation, the 1958 Land Code. Equally important was the enactment of the Sarawak Forest Ordinance.

Under the 1948 Land Classification Ordinance (LCO), all land was classified under five categories i.e. (1) Mixed Zone land, (2) Native Area Land (3) Native Customary land (NCL) (4) Reserved Land and (5) Interior Area Land (IAL). In 1951, the Sarawak government issued an official paper stating its intention to eliminate customary tenure. A year later, natives occupying NCL became licensees of 1948 LCO of Crown land. The creation of new NCR was restricted to six methods: (1) the felling of virgin jungle and the occupation of the land thereby cleared; (2) the planting of land with fruit trees; (3) the occupation of cultivated land; (4) use of land for burial grounds or shrines, (5) the use of land for any class of rights of way; and (6) any other lawful method. This Land Code remains an important piece of land legislation. As from 1958, the creation of new NCR has been prohibited.

INDEPENDENCE: THE NINGKAN ERA

Despite the 1958 Land Code, the Colonial government was of the opinion that sound agricultural development was still being hindered by the system of native land tenure, which it felt did not sufficiently discourage shifting cultivation (Sarawak Year Book 1963: 52 quoted in Hong 1987: 53). In 1962 a land Committee was set up to and one of its main aims was 'to induce the native to abandon this present method of cultivation and to develop his land productivity in the national interest' (Sarawak Report of the Land Committee 1962: para 3 quoted in Hong

1987: 53). In 1963 the Committee published a report with recommendations for major changes in land tenure. It advocated for the abolition of the 1958 Land Classification system which means the present five categories will reduce to only two categories, namely Registered and Unregistered Land.

All lands under customary rights should now be registered, but natives need not pay premium or rent for obtaining these titles. This meant the abolition of customary rights and its replacement by private ownership through holding of titles. In order to 'protect the natives', they would not be allowed to sell, lease or otherwise dispose their land except with the Resident's consent. All Unregistered Land would be State land or Customary not as yet registered. The recommendations were tabled in Bills presented to the Council Negeri in May 1965 but faced opposition and they had to be deferred.

INDEPENDENCE: THE RAHMAN YA'AKUB ERA

In 1974, various amendments made to the Sarawak Land Code further restricted the rights and autonomy of the indigenous communities. Although NCL can be granted to individual natives in Land Code Amendments Section 18, Part IX, Section 213(1), the Governor was allowed to make rules to allow non-natives to use NCR land that contradicted the basis of indigenous culture and *adat* relating to land. In 1975, Amendments to the Land Code gave wide powers of discretion to the Land and Survey.

The Land and Survey Department to determine compensation for NCR land. In 1979, the Land Code Amendment Ordinance Section 209 gave extended definitions of unlawful occupation state land. The scope of offences for unlawful occupation was widened to include erection of buildings, clearing, ploughing, digging, enclosing and cultivating any state land. Senior officers of the Land and Survey Department are empowered to evict, seize, demolish or remove cultivations or buildings erected on the land. Previously only police officers could carry out this function; now, they are duty bound to help Land and Survey Department officers. In the same year, the Sarawak Forest Ordinance was also amended. The 1979 Forest Ordinance Amendment, Section 90, extended State powers and penalties for activities with protected Forests, Forest reserves or on state land forests. Anyone found trespassing, felling timber or collecting produce in such areas can be evicted by a police officer with a court order. The court has no discretion but to issue such an order if the Director applies for it. In Part III, Section 3 of the Amendment, any police officer or forest officers shall not be liable for loss, injury or damage as a consequence of performing their duties. This clause renders such officers virtually unaccountable as has often been alleged in many cases.

INDEPENDENCE: TAIB ERA

Logging activities intensified throughout Sarawak in the eighties. From 1981 to 1982 production surged by 28.5 percent. The average annual production increase was 11.5 percent for the decade. As a result, more indigenous forest land was degraded. Attempts on the part of the indigenous peoples to negotiate usually failed. By the late 1980s, many indigenous communities chose the only recourse which appeared available, i.e. to deter logging activities and to blockade access roads. The State response was to overcome them by further legislative changes and enforcement as well as police deployment and condoning the private use of coercion and violence.

In 1987, the Forest Ordinance was amended in response to massive blockades in the Baram area. Blockades have been the last resort in protecting land and forests against logging. The amendment made such activities criminal offences. The 1987 Forest Ordinance Amendment, Section 90(B)(1), states that anyone who commit the following offences will be jailed for two years and fined RM6, 000/- for the first offence, and RM50/- each day that the offence continues:-

1. Sets up a blockade on any road constructed or maintained by the holder of a logging licence or permit.
2. Prevents any forest or police officer, or licence or permit holder from removing the blockade.

Section 90B(2) states that a forest officer not below the rank of Assistant Director of Forests may give a written order to the person believed to be committing the offence, to remove the blockade. Section 90B(3) empowers such an officer, or the licence holder or permit holder, to remove the blockade, if the original order to remove is not complied with. The costs of removing the blockade have to be paid to the government by the person committing the offence and until discharged, interest shall be paid at 3 per cent per year. Section 90B(4) and Section 90B(5) empowers any forest officer to arrest - without warrant - any person involved in a blockade; and such person will be taken to the nearest police station. Section 90B(6) makes it compulsory for any police officer, if requested, to help a forest officer in removing a blockade or arresting anyone involved in a blockade.

Legislative changes continued in the nineties, which further undermined indigenous communities control over land and forests. In 1990, the Wildlife Protection Ordinance, part II set out the procedures for the establishment of a wildlife sanctuary, the extinguishment or compensation of land rights therein, and limitations on human activity within the sanctuary. On 15 November, the Minister of Social Development, Datuk Adenan Satem moved the Forest Ordinance Amendment Bill, Section 90(B) for a second reading at the Sarawak State Assembly proceedings. The amendment stipulated that any person found or arrested at a place where a barrier is set up is presumed guilty - until he proves

otherwise – of erecting or laying the barrier or barricade. According to the Minister, ... “this assumption is justifiable because there is no reason for someone to be present and amend a barricade unless he is involved in or interested in setting up and maintaining the existence.”

In 1998, the Wildlife Protection Ordinance, 1990 to ‘protect’ wildlife was repealed. The amendment aim to prevent the further depletion of wildlife in Sarawak and attempts to control commercial exploitation of wildlife. It was explicitly admitted that the depletion of wildlife has been the direct result of opening up land in previously inaccessible areas (except to local indigenous people) through logging and other related activities (*Sarawak Tribune* 6 May 1998). Yet, no penalties have been imposed on logging or other companies for the destruction of Sarawak’s wildlife. On the contrary, the amendment is to scapegoat indigenous communities by making it a criminal offence for anyone to be found hunting in wildlife sanctuaries.

In the same year, the Land Code Amendment (No. 2) was amended so that any natives occupying an Interior Land Area without prior permission in writing from the authorities, or attempting to create customary rights upon any such land shall be guilty of an offence. The amendment was aimed at those indigenous people who have been displaced from land or who have moved to, or closer to, urban areas in search of employment.

In 1998, National Parks and Nature Reserves Bill was introduced. It represents a further restriction of the rights of the indigenous people. Whilst declaration of nature reserves or national parks may be welcomed if accompanied by a strict no-logging policy, it is important to state that indigenous communities have been living in and around such areas for generations. In particular, this bill would affect the Berawans in the Loagan Benut National Park and the Penan in the Mulu National park of Miri Division. Their rights to use the resources in the national parks are restricted.

INITIAL PROTECTION OF NCR

Attitudes of indigenous communities to logging activities vary. For the younger generation, it offers opportunities for employment. If we assume a pro-loggers’ position, we can say that logging also provide cash incomes for customary landowners in the form of compensation of loss land use right and damage done, although a frequent complaint is that this is insufficient and not evenly distributed. We may consider that in isolated areas, logging roads often give greater access while logging companies have often helped with transport and other services as the managers of some logging companies have sought to develop good relations with local communities. Gifts are given to local headmen, beer is provided for parties at festival times, care is taken to avoid desecrating burial grounds while logging. Logging camps may also provide markets for locally produced

vegetables, fruits and poultry. In such cases, a temporary mutually beneficial relationship may develop between the longhouse community and the logging company, reducing the prospect of conflict. It could be assumed that opposition to logging is more likely when loggers do not actively develop such good relations and that lack of communication is a major problem between local people and the companies as well as with the government.

A frequent complaint is that indigenous people do not know that their land has been licensed out for logging until logging operations actually start (Hong 1987: 86). Customary rights may be extinguished and land reserved for forestry without the people concerned being informed. There is the case of the Milne Protected Forest being gazetted and licensed for logging on land to which the Penan of Long Palo, Long Jenalong, Long Kevok and Long Leng have customary rights (Sahabat Alam Malaysia 1989: 145-6). There was neither consultation nor enquiries before hand, although Penan rights were based on evidence of long years of occupation of the area, settlement sites, burial grounds, and fruits trees planted. These rights are recognised under Section 5 of the Land Code. Appeals by and on behalf of the Penan often received no response from the government. Attempts to discuss problems and issues such as compensation with timber concessionaires met with similar fates. The fact that many concessionaires are political leaders or their relatives means that they live far away and rarely, if ever, visit the concession areas. This makes communication difficult, as does the structure of the timber industry, in which actual operations are usually contracted out to another company on a profit and production-sharing basis. Frustration at not being heard has often led normally peaceful and law-abiding people to take direct action. An example of this occurred on the Apoh river in 1980, when the consistent failure of the managing director of the Wan Abdul Rahman timber company to negotiate with the local people led them to stop the company operations, resulting in their being arrested by the police.

Compensation payments may take several forms. In some cases, they are for loss of land rights; in others, for damage done to land, crops and fruit trees. Payment may also be made for damage caused to burial places and hunting, fishing and water supplies, although this is rare.

In the case of the Kenyah, Lian (1987: 188) states that the amounts vary according to the bargaining power of the owners and their knowledge of how much they are able to claim. Some are able to drive a hard bargain, and Lian (1987: 189) quotes a rent of RM750 a month being charged for an area for a timber camp and logging pool. He also describes payments of as much as RM100/- a time being made by timber contractors to customary landowners for mooring their rafts.

Many other groups not in such a strong negotiating position, such as the Penan, receive far less or nothing. The Penans often received no compensation because their customary rights are not usually recognised, and even when their burial sites, farmland, and crops are damaged, as in the case of the dispute

between the people of Long Bangan and the Baya Lumber Company in 1986, they received nothing (Sahabat Alam Malaysia 1989: 138-9).

However, there are also instances of Penan rejecting monetary compensation. The *Borneo Bulletin* (13 December 1986) reported the story of a member of the Long Adung community refusing the offer of a RM100 note from a Limbang Trading Company timber camp manager for destruction of his parents' graves, with the statement, ... "I told him our bodies, dead or alive, were not for sale, and I pleaded with him that if he had so much money already to please leave our land alone."... The same article also quoted Penan leaders explaining why they wanted the government to understand why they wanted change at their own pace:- "... making our own choices and choosing development based on our own needs. We want the government to respect our decisions and stop the logging operations, which are destroying life."

Damage to the environment has been a major source of concern to both the Penan and other indigenous communities affected by logging activities. Destruction of the topsoil and soil erosion caused by logging operations are not only harmful for agriculture, but also a major cause of water pollution and river siltation. The Penan have also been alarmed by the effects of logging activities on their forest resources. Important economic trees have been cut down, even though they are protected under forestry regulations and the terms of timber concessions. Sago, fruit trees, rattan, *gaharu* and *illipe* nut trees have also been destroyed by indiscriminate felling and careless timber extraction. Wildlife has become scarcer as habitat is disturbed and the construction of logging roads has made the forests more accessible to hunting by outsiders. An extract from a letter to the Sarawak government and the timber companies in 1985 from the Penan and Punan of the Ulu Tutoh/Limbang area stated:

We see, with sorrow, logging companies entering our country. In these areas, where timber is already extracted there is no more life for use by nomadic people. Our natural resources like wild fruit trees, sago palms, wood-tree for blowpipes, dart poison and other needs will fall. Animals like wild boar, which is our daily food, will flee. Rivers will be polluted and quickly over fished. In a likewise destroyed jungle it will be difficult to get the daily food, for us now or our children and great grand children later on. (Sahabat Alam Malaysia 1989: 128).

It is the widespread damage caused by the logging that has most alarmed the Penan. Langub (1989: 179) quotes the suggestion of one of the elders about the operation of the timber companies: ... "if they are working on the right side of the stream they should preserve the left"... To the Penan, with their tradition of environmental stewardship and resource management, the pace of logging activities seems bound to destroy their life-support systems. The case of the Penans clearly indicates the money cannot buy everything. More significantly, the conflict is not a communication problem which can be handled by good public relations. It is an issue of respect for community self-determination. Notably the community's expressed choices appear to be founded on traditions of knowledge, experiences and culture, consistent with sound forest management proposed by modern scientific researchers.

The above raises the question of whether other communities would have accepted compensation, however 'high', if given a choice. Urban quarter of various ethnic groups from rural communities will take a stand against the infringement of logging into NCR even though they no longer depend on the forest. Although some migrated to town for a better standard of living even before logging threatened their rural livelihoods, they indicate a wish to return to their rural 'home' if conditions at home improve. In fact their attachment to the land is evidenced by weekend farming.

One strategy attempted by indigenous people to protect their forest resources has been to request for communal forests to be established. There is provision in the Sarawak forest legislation for local communities to establish this type of reserve to extract timber and forest products for subsistence purposes on a sustained yield basis. Faced with the threat of logging in their areas, Penan applied to the government for communal forest reserves by writing through district officers and forestry officers. They stated reasons such as the need to safeguard fruit trees and burial grounds, providing timber for longhouse repair, boat-building and making tools. These applications do not seem to have been successful. In Sarawak as a whole, the total area of communal forest reserves has declined from 303 square kilometres in 1968 to 53 square kilometres. Eighteen communities in the Limbang and Baram areas have applied for Communal Forest reserves and none has been approved.

The refusal of the government to create additional communal forest reserves has caused mounting frustration among the indigenous communities, as has been the failure to grant requests to stop logging on customary land. With little prospect of gaining assistance from either government officials or elected representatives, the people have turned to direct confrontation.

PROTECTION THROUGH COMMUNITY ACTIONS

In 1987, after further requests to the government to stop logging activities on their land, the indigenous communities in the Miri and Limbang Divisions took to blockading the logging roads. Barricades were constructed across the road by Penan, Kayan, Kenyah and Kelabit communities, effectively stopping the movement of logs, labour and supplies. Twelve blockades were established in the Tutoh, Apoh, Upper Baram and Limbang river areas. The blockades were set-up in protest against infringement of their forests by the contractor companies owned by Samling Strategic Companies. The operations of the nine timber companies were drastically affected. Military and police forces moved into the area and removed some of the barricades, but these were usually replaced as soon as they left.

Two years after the initial blockades in the Baram district, the Iban in the Sangan area of the Bintulu Division were also involved in direct confrontation. In August 1989, they formed blockades to protest against the logging activities

of Daiya Malaysia Sendirian Berhad (later taken over by Shin Yang Sendirian Berhad). A year later, the Kenyah of Kapit Division took part in a human blockade to protest against the logging activities of Seriku Sendirian Berhad. In the same year (1990), two Iban detained tractors belonging to Hua Seng Sawmill Sendirian Berhad to demand compensation for the destruction of their *menoa* land in Rumah Ubong, Rumah Manila, and Rumah Sumbang of Ulu Machan. In November 1992, failure to fulfil promises of employment and royalty payments of RM2 per ton for logs extracted prompted the Iban of Balingian district, Sibul Division to block a timber road off the Sibul-Bintulu Road, about 109 km from Sibul Town. In Kuching Division, more than 70 Bidayuh (Sarawak Tribune 6 November 1991) from Kampung Opar, Bau went up the Gunung Undan Range to stop illegal logging and river pollution.

SEEKING PROTECTION BEYOND THE NATION-STATE

In 1988, Sarawak entered the international limelight as the European Parliament passed a resolution on Sarawak. The resolution called upon the European community and member states to ... “suspend imports of timber from Sarawak until it can be established that these imports are from concessions which do not caused unacceptable ecological damage and do not threaten the way of life of the indigenous people” ... (Doc. B2-1205/87). In September 1989, three million signatures from 60 countries were presented to the UN calling for active measures to protect tropical forests.

In 1990, three indigenous persons - Mutang Urud, Unga Paran and Mutang Tu’o - participated in a world tour to publicly express their concern to audiences around the world. Over the six weeks (8 October - 2 November 1990) the delegation visited Australia, Canada, Europe and Japan, speaking to parliamentarians, senators, government ministers and representatives of national and international organisations such as the UN, UNESCO, ITTO, the World Council of Churches and WWF. In 26 October 1990, the tour gained support and a resolution introduced to the US Senate, which stated in part:

...that it should be the policy of the United States to call upon the government of Malaysia to act immediately in defence of the environment of Sarawak by ending the uncontrolled exploitation of the rainforests of Sarawak, and to formally recognise the uphold the traditional land rights and the internationally established human rights of all its indigenous peoples...

National campaigns were also organised. In July-August 1992, a group of indigenous leaders visited Peninsular Malaysia to explain their problems to various interest groups. In August 1996, the Penan communities from the Upper Baram delivered a petition letter to then Deputy Prime Minister, Anwar Ibrahim. The letter appealed for his intervention to (1) stop logging activities in their ancestral lands (2) withdraw all Police Field Force personnel from their ancestral lands and (3) abolish section 90(B) of the Sarawak Forest Ordinance.

On 21-31 February 1999, 10 Penan headman and representatives from Ulu Baram arrived in Kuching to meet the chief minister as a follow-up of the 1998 visit. The meeting did not materialise. Another follow-up meeting was organised in October 1999. Again, the meeting did not materialise. The six representatives then submitted a memorandum to the Chief Minister. They also visited other

TABLE 1. Arrests of Indigenous Persons 1987-1994

Year	Month	Ethnic Group	Location		Arrested		Days imprisoned	
			Name of place/town	Division	No	Subtotal		
1987	August 28	Penan	Layun	Miri	7		14	
	November 1	Kayan	Uma	Miri	42	50	14	
	December 10	Kayan	Bawang Marudi	Miri	1		60 (ISA)	
1988	November 11	Kelabit/Penan	Long Napir	Miri	2		-	
	December 10	Penan	Long Late	Miri	21	23		
1989	January 12-21	Penan	Tutoh	Miri	105		14-20	
	July 15	Kenyah	Long San	Miri	7		-	
	September 15-20	Penan	Baram	Miri	87	229	83 of them - 60 days	
	September 21	Penan/Murut	Magoh	Miri	6		7	
	September 25	Kelabit/Penan	Long Napir	Miri	24		19	
1990	July 26	Kenyah	Long Geng	Kapit	10		4 (brutally treated)	
	August 28	Kenyah	Long Geng	Kapit	14	24	36	
1991	February 4	Iban	Tinjar	Miri	10		10	
	March 26	Iban	Bintulu	Bintulu	1		14	
	April 13	Iban	Long Anap	Miri	16	58	14	
	June 24	Kelabit/Penan	Long Napir	Miri	23		-	
	August 4	Iban	Tatau	Bintulu	8		6-9 months	
1992	January	Iban	Rh Langkah	Sibu	5		10	
			Rh Tadong	Sibu				
			Rh Sepaulu	Sibu				
	January 10	Iban	Rh Mathew	Sibu	5		-	
	January 12	Kenyah	Long Geng	Kapit	2	46	14	
	January 12	Kenyah	Long Geng	Kapit	32		13	
	February 5	Kelabit	Miri	Miri	1		28	
	October 12	Kenyah	Kapit	Kapit	1		7	
	1993	July 18	Bidayuh	Kg Raso	Kuching	2		-
	September 28	Penan	Sebatu	Miri	11	13	-	
1994	February 22	Kenyah	Sibu	Sibu	9		30	
	June 8	Kenyah	Miri	Miri	1		8	
	May 1	Berawan		Miri	4	16	14	
	May 7	Berawan	Long Terawan	Miri	2		14	
			Long Terawan					
Grand Total						459		

Sources: (i) Personal communication with communities concerned, (ii) Various newspapers 1987-1994

departments such as the Department of Education office and the Department of Health and Medical Services.

WITHER THE ROLE OF THE NATION-STATE

While international support for the indigenous communities has been positive, the response from the nation-state in Sarawak has been quite different. The Sarawak government practised a policy of containment by making arrests, using paramilitary forces, withdrawing of travel documents of local leaders, and banning entry of foreign activists into Sarawak. Arrests have been the most common method. From the period 1987 to 1994, a total of 459 indigenous persons have been arrested (Table 1).

Initial arrests were made in 1987. In March 1987, the first blockade involved Penan, Iban, Kayan, Kenyah and Kelabit in Marudi and Limbang District, where logging activities were heaviest on their native customary lands. In the period May to December 1987, 49 Penan, including one Kayan, were arrested under the Internal Security Act (ISA). The ISA allows detention without trial for an initial period of 60 days and can be extended indefinitely.

In 1988, twenty-three were arrested and this number increased to 229 the following year. In 1990, blockades spread to Kapit Division and twenty-four were arrested. On 26 July 1990, 4 Kenyah were brutally tortured near a logging camp by a police inspector before they were brought to Belaga. The following year, arrests were also made in Bintulu Division. In 1991, the number of arrested was fifty-eight. The method of containment also used the para-military force, the Police Field Force. The timber companies employed the PFF to break-up a blockade, to protect their camp, and incite indigenous people to engage in violent confrontation.

During the Sebatu blockade, over 200 Penan from various communities were able to protect their forest from the loggers for eight months. The PFF came to dismantle the blockade by force. On 28 September 1993, the Police Field Force assisted Forest Department personnel to dismantle the blockade and chased the people away by using tear gas. The tear gas was thrown into the *lamin* (open-walled temporary hut), where a four-year-old Penan was waiting for his mother. Following the tear gas attack, the boy died on 6 October 1993. These are the words of Bulan Yoh, Sonny's mother

Sonny has just returned from a one month hospital stay where he was operated on for an inflammation under his left ear. On the second day after our arrival at the Sebatu blocade, many police (PFF) units and special federal (FRU) units, together with forest employees and loggers, appeared, certainly more than 300 people.

My husband and others were arrested. I heard him crying out in pain and ran towards him to help. At the moment, the police, without provocation from our side and without warning, threw gas into the crowd. At the same time, police armed with M-16s encircled the area. I was afraid for my children. I had left four of them (between four and eight years old) in the hut

which was now shrouded in tear gas. People were swearing. The police tried to keep us away from the huts. After a long time and almost suffocating from gas, I was able to reach the huts. I found Sonny coughing, screaming and vomiting. He coughed and vomited until the following day, and was barely able to eat and drink.”

And according to Sonny’s father, Laot Kayan:

When the Police Field force came to disperse the blockade, I went to help my friends who had been arrested. While doing so, I was grabbed by four policemen. They held my arms behind my back and put on handcuffs. One clubbed me in the stomach and in the ribs, another sprayed a chemical substance in my face. It burned a lot. My face was red and painful for a week. I had given them no reason for such violent action against me.” “At the same time, the police threw tear gas without warning. All those arrested had to stand in the hot sun for almost four hours. They threatened us with their guns, when we wanted to go in the shade. We were not given any water. Our blockade and our huts were destroyed with bulldozers and chain saws.

When I was free again, I found my wife in the forest with my son Sonny. He was coughing, screaming and constantly vomiting. One week later, he died in Long Sait.” (Manser 1996)

A month later, a Penan child was raped by two Police Field Force personnel. Sarah Buet from Long Kerong, 12 years old was raped by two Police Field Force personnel while spending a night in the house of Datu Abeng in Long Mubui in October 1993. This is her account:

I fell asleep and was awakened when I heard someone knocking on the door. Martha went to open the door. Then, she let some people in. I did not them speak to Martha. They came directly to where I was sleeping.

Two men then raped me, one after the other. I struggled, screamed aloud and cried, but I was not able to stop them or to escape.

The first rapist was wearing a long-sleeved shirt of thick material, with buttons in front. The shirt also had two pockets in front. He also wore long trousers of thick material and a belt. This rapist was of big build and had a large stomach. The second rapist was of slim build and also wore long trousers. I do not remember anything else about him. Neither of the rapists said anything to me. While I was screaming, they did not do anything to stop me from screaming. After they had both raped me, they left. In the morning, when I woke up, I saw a live bullet on the floor nearby. I kept it. I was certain the bullet was not there the night before; otherwise I would have seen it (Manser 1996).

On 18 April 1995, twenty Penan from Ba’ Lai were threatened with M16 guns by PPF personnel while asking to negotiate with the U-Mas timber company manager. By 1996, the method of containment changed. The Police Field Force stepped up its campaign of intimidation and arrests of indigenous persons defending their land and forests against the encroachment of logging activities. On 13 March 1997, 75 Penan went to a logging camp to deliver a protest letter to the head of the logging company. They were met by members of the Police Field Force who started to hit and arrest them. About 30 Penan were injured and four were arrested and severely wounded (Roos 1998). The logging companies also employed PPF members to guard their timber camps. Since 1992, Samling Company has invited the PPF to be stationed at their base camp, Km 10 Jalan Samling, near Kampong Long San.

The state also uses state power to control the movement of local indigenous leaders. Thomas Jalong, an indigenous NGO activist, was on his way to attend the International Tropical Timber Organisation (ITTO) meeting in Tokyo in 1992 when he was stopped at the Kuala Lumpur airport. Officials said that he had been stopped because he was involved in the anti-logging campaign outside the country. Jalong's international passport was confiscated. Another activist, Jok Jau Evong had his passport taken from him at the airport in Kuching on 22 August 1993 when he was going to attend a conference of the International Alliance of the Indigenous Tribal Peoples of the Tropical Forests in Peru. He was also told that he could not leave Sarawak, as he had been involved in anti-logging campaigns. On his way to Thailand for the Asian Indigenous Peoples' Pact meeting in 1994, Gara Jalong, an indigenous local leader, faced the same fate. Three years later, another Sarawakian activist, Raymond Abin, had his passport taken from him at Kuala Lumpur International Airport on 2 March 1997. Raymond was on his way to attend a conference of the International Alliance of the Indigenous Tribal Peoples of the Tropical Forests in India. As with the others, the order, which prevented him from leaving the country, had come from the Chief Minister of Sarawak, Taib Mahmud (World Rainforest Movement and Forest Monitor Ltd 1998:22). A number of non-Sarawak-based Malaysian and international NGO representatives have been barred from entering Sarawak.

Another response to indigenous communities' demands has been non-action. In June 1989, 13 longhouse communities representing Kenyah, Kayan and Penan Communities in Upper Baram sent a petition to the Federal Minister of Science, Technology and Environment to immediately enforce the Environment Quality (Prescribed Activities) Environment Impact Assessment Order 1987 (Sarawak Tribune 21 June 1989). The order required that an environment impact assessment (EIA) report be done on specific activities such logging. Logging activities covering an area of 500 hectares or more are among activities requiring an EIA study. During the March 1989 sitting of the Parliamentary session, the then Deputy Minister of Science, Technology and Environment, Law Hieng Ding was quoted as saying that any company involved in logging activities in Sarawak was required to conduct an EIA. At the time of writing there was still no answer from the relevant authorities on enforcing the laws as requested by the petition letter.

Many letters of appeals and memorandums have been to the relevant authorities since the eighties. The most important ones have been sent to the Chief Minister of Sarawak (See Table 2 below) who holds the forestry portfolio. In 1989, the Declaration of the People of the Ulu, signed by 40 headmen of indigenous communities from Ulu Limbang, Ulu Tutoh and Ulu Baram demanded that the Chief Minister ... "withdraw all logging licences inside our areas and stop handling out further licences inside our areas..." The Upper Baram communities send letters of appeal in 1998 and 1999. On 11 July 2000, the nomadic Penan of Limbang Division also sent an appeal letter to stop logging activities on their native customary lands.

TABLE 2. Appeal Letters to the Chief Minister of Sarawak

Year	Areas (Division)	Appeals	Purpose	Response
January 1985	Belaga (Kapit Division)	Letter to Chief Minister	Stop logging activities	No response
July 1989	Ulu Limbang, Ulu Tutoh and Ulu Baram	Letter to Chief Minister of Sarawak	Stop logging activities	No response
September 1992	Kpg Opar, Bau, Kuching Division	Chief Minister of Sarawak	Stop logging activities	Logging stopped
April 1995	16 Penan communities	Submitted a letter to Chief Minister of Sarawak	Protect their forest areas	No response
1998	Upper Baram	Submitted a memorandum to Chief Minister of Sarawak	Stop logging activities and withdraw timber licences	No response
Feb 1999	Upper Baram	Submitted a memorandum to Chief Minister of Sarawak	Follow-up the 1998 letter	No response
July 2000	Nomadic Penan of Limbang Division	Submitted a letter of appeal to Chief Minister of Sarawak	Stop logging on their NCL	No response

Sources: Personal communication with the communities concerned
Various newspapers 1985-2000

SEEKING LEGAL RECOURSE

The indigenous communities have taken numerous legal actions to protect their NCRs over forested areas. Many of these cases are still pending adjudication in courts. Others have been struck out or dismissed, mainly on technical grounds. In June 1990, the Kayan community of Uma Bawang in Miri Division filed a court case to claim customary rights over the Lemiting Protected Forest which is licensed to Marabong Lumber Sendirian Berhad. The community sought native customary rights over their *pemakai menoa*, and not just *temuda* (secondary forest), as well as for the timber licence to be declared invalid. It was found that the area had been declared a forest reserve in 1950. The action was then struck out for being filed out of time.

A court injunction against Borneo Pulp and Paper Sendirian Berhad (BPP) was filed in February 1999 to stop the company from encroaching onto NCL at Sg. Bawang/Sg. Kemena, between the 70th and 87th mile of the Sibu-Bintulu road. Although plantation work has been halted temporarily, there is no permanent solution yet. A notice in the Sarawak Government Gazette was said to have extinguished their NCR over the land in dispute (Rengah 1999).

In the same year, another case was also filed against the BPP by representatives of Rumah Nor for encroaching into their NCL. Two years later, in May 2001, the community won the court case. This is a landmark case, which will affect future legal development in NCRs and logging in Sarawak. This is the first case that proceeded to a full hearing of the merits of the arguments, including what NCR constitutes and the extent of NCL boundaries. In this landmark case the community took legal action against the Defendants which includes the State Government of Sarawak over their Native Customary Land (pulau) which has included in a provisional lease granted to thest defendant for the planting of acacia trees. In the trial the Court has to examine the rights (NCR) of an indigenous Iban in relation to the lands and its resources which they had no documentary title (NCL), and the recognition of the common law for the pre-existing rights under native under custom. Further the dispute also called for consideration of whether the various legislation from period prior to 1841 to the time of Sarawak's independence in Malaysia.

The findings of the Court indicated the three points. According the Bian (2007), the three points are: Firstly, the Ibans have a body of customs referred to as customary rights and the plaintiffs' ancestors must have practiced the same customs as the present-day Ibans. Evidence adduced indicated that the plaintiffs' ancestors had accessed the land for hunting, fishing, farming and collection of forest produce-all in the exercise of NCR. The rights of an Iban arise by virtue of being a member of a community that occupies a longhouse and these rights, unless lost, pass down through the generations. The plaintiffs therefore were rightfully in possession of these rights.

Secondly, the very presence of a longhouse and its proximity to the disputed area, compounded by the fact that the disputed area fell within the boundaries of the longhouse, together with other evidence of communal existence render it probable and support the assertion that the plaintiffs and their ancestors had indeed accessed the disputed area until they were prevented from doing so by the total destruction of the trees by the defendants.

Thirdly, customary law is a practice by habit of the people and not the dictate of the written law. All orders dating from the era of Rajah Brooke to current legislation declare in no uncertain terms the right of a native to clear virgin jungle, access the land surrounding the longhouse for cultivation, fishing, hunting and collection of jungle produce. Legislation has neither abolished nor extinguished NCR. On the contrary, legislation has consistently recognized and honoured NCR even though it was not in written form.

However, the Defendants appealed against the decision of the High Court and the Court of Appeal allowed their appeal on one ground, that the plaintiffs failed to prove their claim of occupation over the *pulau* area, but *affirmed the legal position as stated by the Learned trial Judge*. The Plaintiffs had appealed against that decision of the Appeal Court on the finding of facts but interestingly the State Government of Sarawak did not appeal on the finding of law as stated

above. As such it is submitted that what was held by the High Court Judge is the true and legal position of NCR in Sarawak today (Bian 2007).

Since the formation of the Malaysian Human Rights Commission (SUHAKAM) in 2000, a memorandum on the adverse effects of the Bakun Dam on, inter alia, forest resources in Sarawak, has been submitted to the commission. In September 2001, Penan communities from the Ulu Baram also submitted a memorandum on their problems arising from the non-recognition of their land rights and logging since the 1980s. SUHAKAM visited various parties in Sarawak after the September 2001 state election (Malaysiakini 2001).

CONCLUSION

As logging threatened their livelihoods and encroached into their customary lands, the indigenous communities attempted to negotiate with the companies and appealed to the government for protection. Failure to achieve satisfactory solutions prompted direct confrontations in the form of blockades as well as international and local campaigns. The state colluded with capital and used physical force to contain dissent. Except for the government's reply to appeal letters from Kampong Opar, Bau, all other letters received no response.

Indigenous blockades and campaigns to protect customary forests have been outlawed and legislation has been enacted to check protests. Central to the conflicts over forests has been the issue of native customary rights (NCRs). According to the court, NCRs have survived government legislation. The court recognised the customary rights of the plaintiffs over the disputed land and held accordingly. This legal development opens an avenue for legal recourse, hitherto unavailable to Sarawak's indigenous peoples in their customary rights' claims to the forests (Rengah 2001a).

Nonetheless, the State Government may pass new legislation and amendments to negate court decisions in favour of NCRs. In October 2001, the Sarawak State Assembly debated the Land Surveyors Bill 2001. The Bill proposes to, inter alia, render maps prepared by parties other than the Department of Land and Survey (e.g. by communities, private surveyors, or NGOs) as inadmissible in court. If the inadmissibility of mapping by communities had been effected, the Rumah Nor court case would never have become a landmark case in favour of the indigenous community (Rengah 2001c).

Protecting native customary rights using legal recourse is a viable alternative. But for indigenous communities, court cases also require considerable funding, which can be eased by the establishment of solidarity funds. In the land conflict case where some community members in Ulu Niah were charged with the murder of four workers of Shin Yang Sendirian Berhad, a solidarity fund was established to defend the accused. In fact, solidarity actions amongst indigenous peoples and non-indigenous proponents of NCRs have grown, as evidenced by the

organisation of Gawai celebrations and the turnout during court hearings related to NCRs. Research and documentation is needed to present a strong evidence for the court hearings. This is urgently needed for the successful protection via the legal means.

NOTE

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