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Mandate of the Special Rapporteur on the

rights of indigenous peoples

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Excellency,

I have the honor of addressing you in my capacity as United Nations Special Rapporteur on the Rights of Indigenous Peoples, in accordance with Human Rights Council Resolution 15/14.

On 18 February 2011, I sent your Excellency's Government, together with the Special Rapporteur on the right to food, a letter regarding the situation of the **Long Teran Kanan village and native customary rights in Sarawak**.

This letter took place in the context of my ongoing communications with your Government regarding a potential visit to the country. As you are aware, on 4 February 2011, I wrote your Excellency's expressing my interest in carrying out a visit to the country at the end of 2011 or during the first quarter of 2012, and noted that such a visit could prove extremely fruitful to the consideration of issues relevant to my mandate and provide a unique and valuable opportunity for consultation and dialogue. Following that request, on 7 March, I met with your Excellency in Geneva to discuss this visit request, and upon your suggestion, I sent a follow up letter to your Government, on 24 May, describing the specific issues that I would be interested in examining during such a visit. As I noted in that letter, I would be interested in looking at issues related to land and development affecting indigenous peoples, and examine potential ways for harmonizing competing interests in this connection, in accordance with relevant international human rights standards related to indigenous peoples. These issues are relevant to the situation of native customary rights in Sarawak that is the subject of my communication to you today.

I regret that to date, there is no record of any reply from Malaysia to my letter of 18 February 2011 and I have not received a response to my request for a visit of 4 February 2011. Nonetheless, I consider it important, in fulfillment of the terms of my mandate, to provide brief observations on the situation of native customary rights in Sarawak that I hope will be conducive to addressing this human rights situation. At the same time, I would like to reiterate my interest in carrying out a visit to Malaysia to look into these and related issues in depth. I intend to include these observations in my report to the Human Rights Council for its consideration.

## **Background**

Before setting forth my observations on the situation, allow me by way of background to provide a brief summary of the information and allegations conveyed in my letter of 18 February 2011.

According to the information received, the Kayan indigenous community of the Long Teran Kanan village in Tinjar, Miri, in the state of Sarawak, has been involved in a legal dispute over its land for the past 12 year, which resulted in the Miri High Court ruling in favour of the community on 31 March 2010. I understand that, in its decision, the court affirmed the village's "native customary rights over their native customary lands" and held that the provisional leases issued within the area by the Sarawak Government to the Land Custody Development Authority and IOI Pelita Plantation Sdn. Bhd., all of who were named as defendants in the case, were null and void. The court further found that the rights of the Long Teran Kanan community under article 5 (right to life) and article 13 (right to property) of the Federal Constitution of Malaysia had been violated.

Nevertheless, IOI Pelita Plantation Sdn. Bhd. has reportedly appealed the judgment and has allegedly not respected the court order in the interim, continuing palm oil operations in the Long Teran Kanan community. According to the information received, as a result of the continued presence of IOI Pelita Plantation in the area, community members reportedly have limited to no access to the lands that they traditionally have used for agriculture and other subsistence activities. Allegedly, the village's crops have been bulldozed and planted with oil palms, destroying the Kayan people's traditional livelihoods and forcing them to purchase food, medicine and wood that they previously collected from their community lands. Moreover, most of the community's former water catchment area has been cleared and planted with oil palms by the company, thereby depleting available water sources.

I have been informed that the case of the Kayan indigenous community of the Long Teran Kanan village is emblematic of the over 200 cases currently before the Sarawak courts relating to indigenous communities' ability to exercise their native customary right over their lands, upon which they depend for fishing, hunting or farming, and which are essential to their cultural survival. Despite the fact that the courts of Malaysia have upheld native peoples' customary right to land under the Constitution of Malaysia and the common law on several occasions, the Government of Sarawak has allegedly failed to implement these decisions and has failed to respect indigenous communities' customary rights to land in other cases. Moreover, the manner in which communities' consent has been obtained for the transfer of land for various development activities in Sarawak has reportedly been problematic. For example, in a number of cases, agreement for surrender of land and native customary rights has allegedly been obtained by only the village chief signing an agreement with companies, without the knowledge of the broader community.

## **Observations**

Malaysia should be recognized for its longstanding legal protection of native customary rights to land, both by statute, including the Sarawak Land Code, and in jurisprudence of Malaysia courts<sup>1</sup>. In my view, this legal framework, in particular the jurisprudence of Malaysia courts, is to a large extent, in line with article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly in September 2007, with an affirmative vote by Malaysia, and which states:

*Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Yet, from the information I have received regarding the situation of the Long Teran Kanan community and in the state of Sarawak in general, it is evident that the native customary rights of indigenous peoples, even where these rights are recognized by law, are not being adequately respected. I observe that it is not uncommon for the protection of native customary rights to give way to competing interests over those same lands, including in relation to natural resource extraction projects, especially forestry and palm oil activities. Further, it appears that too often, political forces seek to undermine protections of native customary lands, in many cases for personal or political motives.

In general, the information I have received also indicates that there is not an adequate mechanism of consultation with indigenous peoples affected by major development projects. According to numerous reports, with regard to many such projects, consultations have not taken place directly with the affected indigenous peoples through their own representative institutions, prior to approval of the projects and with the objective of achieving informed consent, as required the Declaration on the Rights of Indigenous Peoples (arts. 19, 32.2).

As highlighted in the case of the Long Teran Kanan village, adding to these challenges with respect to native customary rights in Sarawak is the apparent absence of adequate mechanism of participation of indigenous peoples in the design and implementation of the development initiatives, the absence of adequate mitigation measures that take into account indigenous environmental and cultural concerns, and the absence of equitable sharing in the benefits of the development projects. I would like to note that article 32 of the Declaration, with its call for the free prior and informed consent

<sup>1</sup> *Adong bin Kuwau v. Kerajaan Negeri Johor* [1997] 1 MLJ 418; *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158; *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591.

of indigenous peoples and measures of redress, provides an important template for avoiding these problems and for the possibility of such economic and infrastructure development projects to not just avoid harm to indigenous peoples but to advance their own development interests along with those of the larger society.

I understand that an in-depth inquiry into the situation of native customary rights to land, including the situation in Sarawak, is currently being undertaken by the Human Rights Commission of Malaysia (SUHAKAM). I expect that this study will also include a concerted investigation of the practices of government entities at all levels in issuing concessions for natural resource extraction projects in lands over which indigenous communities have native customary rights, with a view towards documenting potential irregularities in these practices and analyzing their compliance with national and international standards.

I welcome this initiative by SUHAKAM and believe that it will be an important point of reference for the future task of fully harmonizing Government laws, policies and initiatives for economic development with those that provide recognition and protection of the land and resource rights, and related rights, of indigenous peoples. I look forward to examining the results of SUHAKAM's inquiry, and would like to offer assistance to the Government of Malaysia in connection with this process and future processes, if it would be deemed useful.

### **Concluding comments**

Excellency, these observations represent only an initial overview and assessment of this situation, and I would welcome the opportunity to maintain a continued dialogue with your Government in this regard. Therefore, I would like to reiterate my interest in carrying out an on-site visit to Malaysia to examine in greater detail issues related to native customary lands and development projects, in accordance with my mandate from the Human Rights Council to "examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples [...] and to identify, exchange and promote best practices" (HRC Res. 15/14). I believe this visit could be complementary to SUHAKAM's inquiry into native customary land rights that is currently underway in the country.

In any case, I invite comments by your Excellency's Government on the above observations. As noted earlier, I intend to include these observations in my report to the Human Rights Council for its consideration. If I receive comments by your Excellency's Government prior to **20 July 2011**, I can make assurances that these will be included alongside my observations and the summary of communications in my next public report to the Council.

Please accept, Excellency, the assurances of my highest consideration.

James Anaya  
Special Rapporteur on the rights of indigenous peoples