

# THE LAWS OF LAND GRABS IN ASIA PACIFIC

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LEGISLATIVE LINKAGES TO LAND GRABBING ACTIVITIES IN PAPUA NEW GUINEA,  
MALAYSIA, INDONESIA, THE PHILIPPINES, SRI LANKA AND PALESTINE





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COVER IMAGE: LOGGING ROAD IN EAST NEW BRITAIN PROVINCE, PAPUA NEW GUINEA  
PHOTO COURTESY OF GLOBAL WITNESS

## CONTENTS

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LIST OF TABLES	3
LIST OF ABBREVIATIONS AND ACRONYMS	4
1. BACKGROUND	5
2. SUMMARY OF FINDINGS FROM COUNTRY REPORTS	8
3. INDIVIDUAL COUNTRY REPORTS	20
PAPUA NEW GUINEA	20
MALAYSIA	26
INDONESIA	33
THE PHILIPPINES	41
SRI LANKA	47
PALESTINE	55

## LIST OF TABLES

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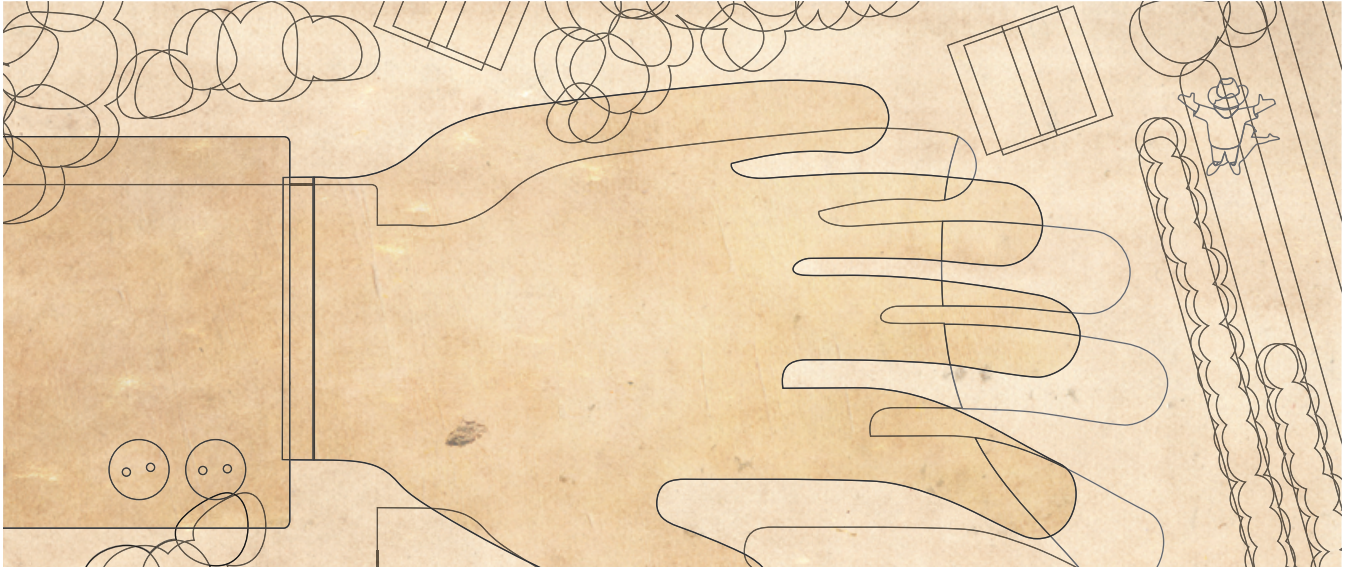
1. CROSS COUNTRY SUMMARY ON LAND TENURE SECURITY, CONSENT AND THE RIGHT TO INFORMATION OF COMMUNITIES	16
2. CAPACITY OF LEGISLATIVE AND POLITICAL SYSTEMS TO PROTECT COMMUNITY LAND RIGHTS	19

## LIST OF ABBREVIATIONS AND ACRONYMS

AMAN	ALIANSI MASYARAKAT ADAT NUSANTARA (NGO IN INDONESIA)
BADIL	RESOURCE CENTRE FOR PALESTINIAN RESIDENCY AND REFUGEE RIGHTS
CADT	CERTIFICATE OF ANCESTRAL DOMAIN TITLE (THE PHILIPPINES)
CALT	CERTIFICATE OF ANCESTRAL LAND TITLE (THE PHILIPPINES)
CEJ	CENTRE FOR ENVIRONMENTAL JUSTICE – FRIENDS OF THE EARTH SRI LANKA
CELCOR	CENTRE FOR ENVIRONMENTAL LAW AND COMMUNITY RIGHTS – FRIENDS OF THE EARTH PAPUA NEW GUINEA
EIA	ENVIRONMENTAL IMPACT ASSESSMENT
FCA	FOREST CLEARANCE AUTHORITY (PAPUA NEW GUINEA)
FMA	FOREST MANAGEMENT AGREEMENT (PAPUA NEW GUINEA)
FOE APAC	FRIENDS OF THE EARTH ASIA PACIFIC
FOEI	FRIENDS OF THE EARTH INTERNATIONAL
FPIC	FREE, PRIOR AND INFORMED CONSENT
ILG	INCORPORATED LAND GROUP (PAPUA NEW GUINEA)
IPRA	THE INDIGENOUS PEOPLES RIGHTS ACT 1997 (THE PHILIPPINES)
JNF	JEWISH NATIONAL FUND
LRC	LAND REFORM COMMISSION (SRI LANKA)
LRC	LEGAL RIGHTS AND NATURAL RESOURCES CENTER – FRIENDS OF THE EARTH PHILIPPINES
NCIP	NATIONAL COMMISSION ON INDIGENOUS PEOPLES (THE PHILIPPINES)
NCR	NATIVE CUSTOMARY RIGHTS (MALAYSIA)
NGO	NON-GOVERNMENTAL ORGANISATION
PENGON	PALESTINIAN ENVIRONMENTAL NGOS NETWORK – FRIENDS OF THE EARTH PALESTINE
PNG	PAPUA NEW GUINEA
SAM	SAHABAT ALAM MALAYSIA – FRIENDS OF THE EARTH MALAYSIA
SABL	SPECIAL AGRICULTURAL AND BUSINESS LEASE (PAPUA NEW GUINEA)
TJG	TIMUAY JUSTICE AND GOVERNANCE (THE PHILIPPINES)
WALHI	WAHANA LINGKUNGAN HIDUP INDONESIA – FRIENDS OF THE EARTH INDONESIA



## BACKGROUND



## OBJECTIVES OF THE PUBLICATION

This publication is a joint effort of six member countries of Friends of the Earth Asia Pacific (FOE APac) under the Food Sovereignty Programme of Friends of the Earth International (FOEI). They include the Centre for Environmental Law and Community Rights (CELCOR) from Papua New Guinea, Sahabat Alam Malaysia (SAM), Wahana Lingkungan Hidup Indonesia (WALHI), Legal Rights and Natural Resources Center (LRC) from the Philippines, Centre for Environmental Justice (CEJ) from Sri Lanka and the Palestinian Environmental NGOs Network (PENGON).

In brief, the publication intends to discuss the land rights security of communities, including but not limited to, those who are ethnically indigenous or culturally traditional, as well as those who form as an integral part of rural agricultural groups, in the face of the intensifying threats of land grabs in the region, especially as a result of the current global agribusiness model and other resource extractive operations. In principle, we believe that land grabs are inherently rooted in the inequitable free market forces, attributable to our flawed economic and developmental systems. Therefore, we believe, there is also a need to understand how legislative and governance systems of the participating countries respond to such land rights threats and the extent to which they are able to protect community land rights from land grabbing and the violations of community land rights.

Moreover, this publication also seeks to learn from and share the various actions that have been employed in land rights defence by communities affected by land grabs and

land rights violations, in partnership with the six member groups. These may include the employment of agroecology activities and community-based forestry management, social forestry programmes, legal aid and various other mobilisation activities.

## METHODOLOGY

The project seeks to understand the linkages between legislative and governance systems and land grabbing activities in the six participating countries with a strong focus on how the laws on land, forests, conservation areas and strategies, natural resource management and indigenous or traditional communities collectively affect community land rights in each country. For this purpose, a standardised survey with a set of questions, was first jointly developed by the member groups, to seek responses from each member group. Responses from the member countries were then comparatively analysed to identify their commonalities and differences. Based on the analysis, the individual country's reports were re-organised into six sections, as published in part three of the publication.

Whenever it is possible, contents of the original legislation and regulations referenced in this publication are accessed directly, but where it is not, further references are provided. Subsequently, the contents from the individual country reports form the basis for the overall analysis and conclusions conducted in part two of the publication.

# WHAT IS LAND GRABBING?

In the last ten years, various definitions have been proposed to describe the term land grabbing. It is not easy to find one which can be used widely across multiple legal contexts and countries. The European Coordination Via Campesina in its document, *How do we define land grabbing?*, published in 2016 has proposed the following inclusive definition:

Land grabbing is the control — whether through ownership, lease, concession, contracts, quotas or general power — of larger than locally-typical amounts of land by any persons or entities — public or private, foreign or domestic — via any means — ‘legal or illegal’ — for purposes of speculation, extraction, resource control or commodification at the expense of peasant farmers, agroecology, land stewardship, food sovereignty and human rights.

This definition also proposes that five factors need to be collectively taken into account in order to understand the term, namely, size, people, control, legality and usage (emphasis ours):

## SIZE

### WHAT AMOUNT OF AREA EQUALS LAND GRABBING?

In order to have a size to identify land grabs, people must look at land holdings in their countries and determine what the average and culturally adapted sizes are and the range that most holdings fall into.

## PEOPLE

### WHO CAN BE CONSIDERED A LAND GRABBER?

Absolutely anyone can be land grabber: individuals, groups or companies; public or private; governmental or non-governmental; domestic or foreign.

## CONTROL

### HOW IS THE LAND CONTROLLED?

Land grabbing is about overall control. Land grabbing can control areas in several ways including leasing land (sometimes through long-term leases from governments, called concessions), having tenant farmers or sharecroppers, or actually owning the land. Land can also be controlled through quota and supply contracts that force people to use the land in a specific way for the benefit of the land grabber.

## LEGALITY

### IS LAND GRABBING LEGAL OR ILLEGAL?

Land grabbing occurs both legally and illegally within current laws. **Most land grabs are actually legal, meaning the deals obey national and local laws. However, these current laws do not protect against land grabbing. In most cases laws at least tolerate land grabbing if not help it. These unjust and illegitimate laws encourage land grabbing and abuse human rights by allowing land grabbing to be a ‘legal’ action.**

## USAGE

### HOW IS THE LAND USED AND FOR WHAT PURPOSE?

Land grabbers use land in harmful ways and for exclusive purposes. Agricultural uses include monocultures and non-agroecological methods (which can even be organic). Other uses include land speculation, commodification, resource control and extraction (meaning local peoples do not benefit from the resources). All of these uses threaten food sovereignty, land stewardship and sovereignty, and human rights.<sup>1</sup>

1. European Coordination Via Campesina (2016).

## STRUCTURE OF THE PUBLICATION

This first part of the publication seeks to introduce the background and objectives of the project and introductory discussion on land grabbing. The second part of the publication provides the overall cross country analysis on the existing linkages between the legislative and regulatory framework applicable to each country and the land grabbing activities taking place within the country. The individual country reports meanwhile are published in part three of the publication, which also contains the recommendations made by each member country on the manner in which its legislative and governance infrastructure can be improved, to provide stronger protection on community land rights and prevent or halt land grabbing activities.

## LAND GRABS AND POOR GOVERNANCE

In the last decade, rising food prices have resulted in increased aggression in the attempts by agricultural investors in finding new opportunities for growing highly profitable agricultural commodities. This aggression includes the occurrence of widespread land grabbing in the global south. In Asia Pacific, countries such as Papua New Guinea, Malaysia, Indonesia, the Philippines, Sri Lanka and Palestine are seeing vast portions of land being taken away for agricultural development. Consequently, large scale monoculture agriculture, with its heavy reliance on chemical fertilisers and pesticides, is also on the rise within the region, leading to massive deforestation, the destruction of valuable ecosystems and the taking away of land that was previously under the control of local communities, including indigenous peoples.

In Papua New Guinea, Malaysia, Indonesia and the Philippines, most land grabbing activities occur in forested land under the customary control of indigenous and traditional peoples. Land grabbing results in the removal of the rights and access of indigenous and traditional customary landowners to their land and natural resources, sometimes even without their prior knowledge. In the tropical forests of these countries, unsustainable transnational logging supported by American interests was first undertaken at the turn of the last century in the Philippines. This transnational timber industry then proceeded to Malaysia, Indonesia and Papua New Guinea in the second half of the century. Beginning from the 1970s, the region saw the growing influence of Japanese timber importers before the rise of the Malaysian logging transnationals in the early 1990s, chiefly from the timber rich state of Sarawak in Borneo. Today, after these forests have been largely stripped of natural timber resources, they are subsequently developed for monoculture agriculture in pursuit of the production of agrocommodities such as palm oil, pulp and paper trees and various food crops.

In the last 15 years, the consumption of palm oil in the United States has increased nearly sixfold. To meet the increase in demand from packaged food manufacturers, palm oil plantation companies have been steadily and rapidly expanding into some of the world's most valuable tropical rainforests. Currently, Malaysia and Indonesia produce more than 80 per cent of the world's palm oil and account for approximately 90 per cent of its global export.

Although the existing global economic model remains as the root cause of land grabs, the destruction of ecosystems and the violations of human rights are also greatly facilitated by flawed policies and legal frameworks that are deeply intertwined with the same unsustainable economic system, working chiefly as a powerful ally and enabler.

An Oxfam publication in 2013, *Poor Governance, Good Business, How land investors target countries with weak governance*, has made it clear how their analysis shows that countries with poor governance are targeted in order to allow land investors to maximise profits and minimise red tape.

Oxfam believes that investors actively target countries with weak governance in order to maximise profits and minimise red tapes. Weak governance might enable this because it helps investors to sidestep costly and time-consuming rules and regulations, which, for example, might require them to consult affected communities. Furthermore in countries where people are denied a voice, where business regulations are weak or non-existent, or where corruption is out of control it might be easier for investors to design the rules of the game to suit themselves.

International and domestic investors, as well as public, semi public or private sellers often operate in legally ambiguous areas where traditional land rights are in conflict with modern forms of property as defined by modern legislation. Governments in the Asia Pacific region, under the pretext of strengthening their economies, have made available their existing legal infrastructure, and often seek to amend existing laws, for the purpose of ensuring that they will work in favour of foreign or domestic agricultural investors. Consequently, through the utilisation or abuse of the laws on land, forests, natural resources, indigenous and traditional communities and environmental protection operating in the host countries, foreign investors are accorded their ease of entry into these countries, at the expense of affected local communities.

It is commonly known that many countries in the global south have weak institutions and even weaker land and forestry governance regimes. According to a report published by Grain in 2015, *Asia's agrarian reform in reverse: Laws taking land out of small farmers' hands*, across the Asian continent, many governments are introducing changes to land laws that threaten to displace millions of peasants and undermine local food systems. In effect, the region is witnessing an agrarian reform in reverse. The number of smallholder farmers in Asia is shrinking, as with the size of their landholding, while the number of corporate farms is growing rapidly.

This publication therefore will focus on how poor governance in respect of policy and legal frameworks function to facilitate land grabbing in the Asia Pacific region, focusing on six countries, namely, Papua New Guinea, Malaysia, Indonesia, the Philippines, Sri Lanka and Palestine.



## SUMMARY OF FINDINGS FROM COUNTRY REPORTS

# 2



LOCAL MIXED CROP GARDEN (TOMATOES AND BANANAS), KILIP BLOCK, BANZ TOWN, JIWAKA PROVINCE, PNG

### THE LAW AS AN ENABLER OF LAND GRABS

This section will report on the overall analysis of the individual country reports for the purpose of examining how the legislative systems of these different countries address the protection of community land rights that are vulnerable to land grabs and other forms of land rights encroachments and violations, in particular within the context of the exploitation of land, forests, natural resources and various land development activities.

The communities of interest to this report are those that have been demonstrated to be highly vulnerable to having their land and properties seized from their possession, or at the very least, to be confronted by their severe degradation, to the extent that their livelihoods and well-being may inevitably be affected permanently. Across these six countries, namely, Papua New Guinea, Malaysia, Indonesia, the

Philippines, Sri Lanka and Palestine, the affected communities may share some demographic commonalities with each other, or none at all. They may be indigenous, or simply traditional rural agricultural communities, part of the majority population or are ethnic minorities, while some may even be victims of displacement, as a consequence of involuntary resettlement or armed conflicts and other forms of military aggression.

On the whole, information from the country reports shows that contrary to popular belief and its linguistic connotation implying unlawful seizures of land, past and present legislative systems applicable to the six countries were and are directly or indirectly responsible in empowering and supporting land grabbing activities. These legislative systems may belong to national or provincial governments,



an aggressive occupying state or even a colonial government. Consequently, land grabs may easily be committed under the authority of legislation and land grabbers do not necessarily have to operate beyond the boundaries of statutory legality. In short, until judicial rulings or legal and governance reforms are able to provide some intervention for justice to be served, legislative systems will continue to function as a key enabler of land grabbing activities.

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## RESOURCE EXTRACTIVE OPERATIONS

Resource extractive operations include activities such as timber harvesting or mining, commonly undertaken by private corporations, with the full support of the state and its legislative framework. Currently, timber harvesting activities are still a main threat to community land rights in Papua New Guinea, Malaysia and Indonesia. Mining and extractive operations meanwhile continue to violate community land rights in Papua New Guinea, Indonesia and the Philippines, and to a certain extent in Malaysia and Sri Lanka.

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## LAND DEVELOPMENT PROJECTS INCLUDING LARGE PLANTATIONS, RESETTLEMENT SCHEMES AND INFRASTRUCTURE CONSTRUCTION

Land development projects include the establishment or expansion of large monoculture plantations, voluntary or involuntary land resettlement schemes and the construction of large infrastructure such as reservoirs or other public or private facilities. Depending on the type of development, this may be perpetrated by state, private or even historical colonial actors. Lands seized for such purposes are also often acquired under the pretext of serving the interests of the public or national development goals. Monoculture agrocommodity plantations are also a major threat in Papua New Guinea, Malaysia, Indonesia and Sri Lanka, whereby oil palm is cited as the key agrocommodity causing the largest or at the very least, significant incidents of land grabs in the four countries.

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## SOVEREIGNTY OR TERRITORIAL CLAIMS AND AUTHORITARIAN POLITICAL CONTROL

Armed conflicts, wars, militarisation and colonisation are common tools used by parties seeking to establish or expand on their territorial control or to strengthen their authoritarian political control within a state. Through systematic violence, land is grabbed for the purpose of claiming or expanding territorial sovereignty or asserting territorial independence, usually strategised to achieve a consequence which results in the confiscation of land and properties deemed to have been abandoned by the displaced persons fleeing the conflict zones.

As discussed in part one, the land grabbing incidents taking place in these countries are linked to a wide range of activities and operations. They may be undertaken by the state, or private actors authorised by the state. However, they can be broadly classed into four groups relating to motives, aims and purposes.

For example, in Palestine, the confiscation of Palestinian lands and properties is an inherent feature of the Israeli occupation of Palestinian land and military aggression against the Arab Palestinian community. Sri Lanka meanwhile had been confronted by a secessionist civil war from 1983 to 2009, which also caused the displacement of communities and the destruction of their lands and properties. The country also has to deal with the legacy of landlessness amongst its peasantry and rural agricultural communities, as a result of systematic colonial land grabbing activities carried out by the British, which targeted the island for the intensive development of a plantation economy. On the other hand, the Philippines and Indonesia were both subjected to militarised authoritarian regimes beginning from 1965. Both regimes were also associated with kleptocracy and massive corruption, characterised by state sanctioned land grabs and the indiscriminate exploitation of natural resources, which served to benefit and strengthen both regimes further. The Philippines ousted the regime in 1986 while Indonesia succeeded in doing the same in 1998. Although political and legislative reforms have been continually undertaken by both countries to correct the historical injustices that had ensued, the legacy left by both dictatorships to a certain extent is still operational within the respective legislative framework of the two countries.

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## ESTABLISHMENT OF PRODUCTION FORESTS, CONSERVATION AREAS AND STRATEGIES AND OTHER GOVERNMENT RESERVES

The reservation of various kinds of protected reserves to serve particular functions is commonly undertaken under the purported primacy of public interest. In particular, the establishment of production forests and conservation areas, usually through forestry or conservation legislation, respectively, has threatened the land rights of numerous indigenous, traditional and agricultural communities in Malaysia, Indonesia and Sri Lanka. The conservation legislation in Papua New Guinea and the Philippines tends to provide relatively better protection for its indigenous and traditional communities, although further regulatory measures may also be introduced for the communities, as the case is in other countries. Depending on the country and legislation, affected communities may find their rights and access to such forests and areas completely terminated or otherwise, heavily reduced or regulated, and in some cases, they may also be confronted by involuntary relocation.

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## THE EXECUTIVE AS AN ENABLER OF LAND GRABS

Based on the country reports, the following conclusions can be made on how systemic legislative and governance conditions have directly or indirectly contributed towards the prevalence of land grabs in the six participating countries.

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### PRIMACY OF STATE POWER, ECONOMIC INTERESTS AND FOREIGN INVESTMENTS

Generally, the laws on land, forests and natural resources in Papua New Guinea, Malaysia, Indonesia, the Philippines and Sri Lanka have been developed to provide stronger protection and benefits on private economic interests and foreign investments. At times these are even expressed in the language of national development, unity and goals, at the expense of community land rights. Any form of legislative recognition on community land rights in these countries can easily be compromised by the legal primacy of state power over land, forests and natural resources.

Although in Malaysia and Indonesia judicial developments have begun to give stronger recognition on the nature, scope and extent of the indigenous and traditional community land rights, the executive authorities in these two countries have yet to undertake the appropriate measures to align their policy and legislative frameworks to the precedence-setting judicial decisions. In Malaysia, its judiciary has recognised that the indigenous customary land rights is a form of proprietary interest in the land itself, and not merely a usufructuary right on the land. In Indonesia, its judiciary has declared that customary forests are indeed not a subclass of state forest, contrary to the assertion of its forestry legislation. The judiciary in these two countries has also recognised that the indigenous customary land rights owe their existence to customs, instead of executive or legislative authority.

Meanwhile in Palestine, the laws of Israel are imposed on the Palestinian Arab community, in order to give legitimacy to Israeli territorial claims and military actions and its confiscation of Palestinian lands and properties.

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### FAILURE OF THE STATE TO PROVIDE STRONGER PROTECTION ON INDIGENOUS OR TRADITIONAL CUSTOMARY TERRITORIES

In Papua New Guinea, where the population generally still observes customary laws, customary rights are explicitly recognised by its national constitution as a form of proprietary interest in the land. As such, customary territories are not classified as part of state land. The law requires for community consultations to be undertaken and consent, in the

form of written agreements authorised under a legislation, must first be obtained from communities, before the state may re-issue business or commercial licences or permits to third parties on customary territories. Consequently, these agreements have become the operational sites of manipulation and fraudulent activities, which may inevitably result in the legalisation of land grabbing activities, or at the very least, ecological destruction and the loss of livelihoods of affected communities. The state has largely been ineffective in halting such activities.

For Malaysia, Indonesia, the Philippines and Sri Lanka, their legislative frameworks have numerous provisions and regulatory directives which stipulate the manner in which the relevant executive authorities in the countries may bestow stronger protection on the land rights of their respective indigenous, traditional or rural agricultural communities. However, such legal opportunities have not been optimally implemented.

In Malaysia, where there are less issues on jurisdictional overlaps and other complex bureaucratic challenges, executive institutions have simply failed to actively utilise existing legislative provisions, which would provide for the reservation of land or forests for indigenous communities, as well as for the registration of individual or communal titles. When such actions are undertaken, they may even be in conflict with community interests and neglect the concept of territoriality of the indigenous customary land rights, causing such territories to decline in size.

Indonesia, the Philippines and Sri Lanka do in fact possess legislation on land or agrarian reforms, enacted to correct historical injustices and provide land to the landless and marginalised. However, institutional gaps and bureaucratic delays have considerably slowed down such efforts on land reforms, land redistribution or the registration of titles of the rights of communities to their territories or lands.

In Malaysia, Indonesia, the Philippines and Sri Lanka, without strong executive protection, effected either through land reservation or the registration of individual or communal tenure, the lands and territories of indigenous, traditional or other agricultural and rural communities will continue to be viewed by the executive as part of state land, making them inherently vulnerable to land grabbing activities, either as a result of the issuance of state permits for timber harvesting, mining and other resource extractive activities, or for land development activities, including for monoculture plantation operations and the construction of infrastructure.

Meanwhile in Palestine, the Israeli legal structures have been thoroughly developed since 1948, to legalise its militarised actions that had resulted in the Palestinian Arabs being forced to flee and abandon their lands and properties, and the subsequent confiscation of such lands and properties.

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## SUMMARY OF COUNTRY REPORTS

This section provides the individual and cross-country summary on the legislative frameworks of all the six countries, condensed from their individual country reports. In particular, it is focused on the extent to which the respective legislative frameworks are able to provide protection on community land rights against various land grabbing activities. The thrust of this analysis aims to demonstrate how such legislative structures and contents have indeed been assigned, utilised, manipulated or abused to legitimise land grabs. Key legislative contents that are important for a comprehensive understanding on this matter include:

- the extent to which the rights of communities, be they indigenous, traditional or otherwise, are recognised by a legislative system;

- the potential gaps and threats that exist within the legislative system which may affect the land tenure security of communities; and
- the extent to which consultations, consent and the right to information of affected communities and the general public are mandated by the system.

The overall summary under this section is further illustrated in Table 1 and Table 2.

### SUMMARY

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## PAPUA NEW GUINEA

The legislative framework of Papua New Guinea, where customary laws are still observed by its population, explicitly recognises the customary land rights of its traditional communities. As such, the customary land rights in the country are extensively affirmed by various constitutional provisions as well as by its laws on land, forests, conservation areas and strategies and the extractive and mining industry. The customary land is also fully recognised as not being part of state land and likewise, traditional customs are clearly recognised as part of the law of the land. The constitution clearly distinguishes customary landownership from alienated land or state land. It was estimated that 97 per cent of the total land area of the country used to be held under customary land rights, while state land occupied three per cent of the country's total land area, although the size of the former may have dropped by as much as 12 per cent in recent years as a result of land grabs.

Land grabbing in the country results from the lack of consultations with traditional landowners. Various natural resource laws mandate community consultations when there are proposed activities or operations that may affect the rights and well-being of traditional landowners.

The Special Agricultural Business Lease (SABL), which is a lease stated in the main land law, is required before customary land is permitted to be accessed by any other party for the purpose of agricultural or commercial activities. The SABL principally requires the consent of customary landowners to lease their customary land to the state, which in turn will classify the land as alienated land, which can then be leased out to third parties. Further, the SABL also allows

logging operations to be undertaken prior to the commencement of agricultural operations. A Forest Clearance Authority (FCA) issued by the PNG Forest Authority allows for the complete clearance of forested areas in which agricultural projects will take place.

Meanwhile, under the forestry law, the Forest Management Agreement (FMA) must first be signed by customary landowners, as evidence of their consent in allowing the sale of their felling rights to the forestry authority, in exchange of some earnings from timber royalties, before the state is able to re-issue such rights to logging companies. However, since 2006, most new timber harvesting operations have involved clear felling, under the SABL and the associated FCA.

Unfortunately, processes of land acquisition such as the SABL and other legally binding agreements are the mechanisms through which the elaborate constitutional and statutory provisions that protect the customary land rights and their territories are compromised. Many SABLs have reportedly been obtained through manipulative and fraudulent means. The limitations of rural communities who may have modest levels of literacy, knowledge on the law and the documentation procedures on land rights, often get taken advantage of. These communities may also face various technical and logistical challenges in organising and mobilising themselves into an incorporated group as provided for under the law.

The country has constitutional provisions on the right to information but has not enacted a dedicated legislation on it.

## MALAYSIA

The legislative framework of Malaysia sufficiently recognises the customary land rights of its indigenous communities, although this recognition is often limited by the executive interpretation of such rights. Malaysia is a federation of three members, namely, Peninsular Malaysia, Sarawak and Sabah, the last two located in the Borneo Island, where indigenous communities form the majority. Each federation member retains the right to legislate on land, forests, conservation areas and strategies, the affairs of their respective indigenous peoples and most resource extractive activities.

The indigenous customary land rights are constitutionally protected by the provisions on the rights to fundamental liberties, equality and property, as well as those on affirmative actions and the definition of law, which includes customs or usage having the force of law. However, by executive convention, rights that are without any document of title or a reservation status are interpreted as a very limited form of usufructuary rights only, exercisable over state land. In Sarawak, the legislation deems such undocumented customary land rights as a form of land licence, but free from any land rental charges. In Sabah where there are more efforts at documentation, certain registered rights may be subjected to minimum land rental charges. Otherwise, their status may be just as precarious. In Peninsular Malaysia, the statute stipulates that the rights are no better than the rights of a tenant at will. All such approaches however are in conflict with the interpretation of the Malaysian judiciary, which has affirmed that such rights are indeed a form of proprietary interest in the land itself.

In Peninsular Malaysia, there is a specific legislation which addresses the affairs of its indigenous communities, although it contains only limited provisions on their customary land rights. By executive convention again, all affairs of the indigenous community, including their customary

land rights, are interpreted to fall under the jurisdiction of this legislation. The main land law in Peninsular Malaysia meanwhile does not make any mention at all on such rights. Its forestry law and another conservation law (out of several that are in force in the region), have only very brief provisions to allow affected communities the access to certain resources in gazetted forests and areas, but only for their domestic needs and not for profit.

Meanwhile in Sarawak and Sabah, their respective laws on land address the native customary land rights in a slightly more elaborate manner, stipulating the methods in which they can be created and terminated. Similarly, the laws on forests and conservation areas and strategies in both federation members also address the extinguishment or regulation of such rights in the event of the establishment of production forests and conservation areas and strategies.

In the three regions, such rights may also be lost through a land acquisition process undertaken through their respective land laws, for purposes that are deemed to fall under public interest by the state.

Although there are provisions which can serve to protect the indigenous customary territories, which fall under the jurisdiction of state governments, they have not been utilised actively, or utilised in a manner that may cause the size of the territories to decline. Therefore, until the indigenous customary territories are given the highest form of executive protection by the states, they will always remain vulnerable to land grabs. Without further executive protection, such rights are unable to legally counter the powerful provisions of the laws on land, forests, conservation areas and strategies and resource extractive activities.

The country has no provisions on the right to information.



## INDONESIA

The legislative framework of Indonesia sufficiently recognises the customary land rights of its indigenous and traditional communities. The rights are constitutionally enshrined and recognised as *ulayat* rights by its main land law enacted in 1960. However, the effects of this recognition are still subject to other national laws and interests. The land law also fails to define them or to provide guidance on their protection in a detailed manner.

It was only after its political reformation in 1998, following the ousting of a dictatorship that began in 1965, further executive regulatory measures began to be gradually introduced by the central government to elaborate on the scope and extent of such rights, and the procedural actions and steps that can be undertaken to register and protect them, a responsibility that largely falls under the jurisdiction of local governments, although registration of such territories will be finalised by the National Land Agency.

Consequently, in Indonesia, the eventual recognition of customary land rights of indigenous and traditional communities by its national laws and regulations, can only be fully implemented and realised under the discretion of its

local governments. This effectively creates an institutional gap within the legislative and regulatory framework, to the detriment of the communities. This gap is also reflected in the failure of the state to introduce the relevant executive and legislative reforms, following the constitutional court decision in 2012 which ruled that customary forests are not part of state forests.

Therefore until the indigenous and traditional customary territories are given the highest form of executive protection by the local governments, they will always remain vulnerable to land grabs. Without further executive protection, such rights are unable to legally counter the powerful provisions of the laws on land, forests, conservation areas and strategies and resource extractive activities. Additionally, the provisions of several sectoral laws may also collide with each other, creating confusion within the legislative and administrative system. In such cases, affected communities may be doubly victimised by the ensuing jurisdictional overlaps and ambiguities.

The country has enacted a dedicated legislation on the right to information in 2008.

## THE PHILIPPINES

The legislative framework of the Philippines explicitly recognises the customary land rights of its indigenous communities, affirmed by various constitutional provisions as well as its laws on land, forests, conservation areas and strategies and the extractive and mining industry. Although the primacy of the Torrens legal system is asserted by its agrarian law, the country possesses a specific national legislation and a national commission dedicated to the protection of the rights of its indigenous peoples. Most of such legislative contents and institutions were introduced after the ousting of its dictatorship rule, which spanned from 1965 to 1986.

The law on the rights of the indigenous peoples serves to correct the historical injustices perpetuated against the community. Among others, it establishes the indigenous peoples' right to self-determination, the institutional framework for the free, prior and informed consent process and the issuance of two types of certificates of titles over indigenous customary territories. After 1986, other laws on land and natural resources also underwent several reforms, which institutionalised public consultations and community consent, among others.

However, despite the various legislative reforms, protection of the indigenous customary land rights in the country is still hampered by institutional gaps and the national economic priority of protecting foreign investments. The issuance of the certificates of titles for indigenous customary territories by the national commission in charge of indigenous peoples has been severely delayed, in particular by inter-agency jurisdictional issues and bureaucracy. The state has also continued to be overgenerous in its protection of the mining industry and other foreign investments, to the detriment of affected indigenous communities. Executive regulations have in fact been issued to dilute the free, prior and informed consent process mandated by legislation, facilitating resource extractive operations to commence on indigenous customary territories more easily and at a faster speed.

The country has issued an executive order on the right to information in 2016.

## SRI LANKA

The legislative framework of Sri Lanka does not have any direct provisions on the rights of its indigenous communities, who now number less than 3,000 in a country of 21 million. It does however contain limited provisions on the administration of the rights of rural agricultural communities, recognised as units of villages under the leadership of village councils, many of whose members may not possess any documentary titles to their land but are merely allowed to occupy and utilise state land. Due to its colonial and historical context, Sri Lanka does not possess a single main land legislation. Instead, there are more than 40 land related laws operating in the country, of which ten may be considered as key legislation.

Historically, the British targeted the island for the development of an export-oriented plantation economy, whereby coffee, tea, rubber and cinnamon were the main crops of choice. Colonial land laws were enacted to facilitate the brazen land grabs, by capturing as much as possible, community land that was without any form of documentation, including land left in fallow. Such land was then proclaimed to be crown land (later state land), before their transfer to foreign controlled plantations. Further, Sri Lanka was also confronted by a secessionist civil war which lasted from 1982 until 2009, resulting in the significant destruction of land and properties as well as community displacement.

Subsequently, there were various legislative efforts in the country, especially after its independence, to correct this historical injustice. These however were largely focused on consolidating the power of the central government over land matters, for the purpose of establishing land reforms and redistribution measures. They include the introduction of a ceiling for individual land ownership and land

development projects that are supported by land resettlement schemes and the issuance of land titles and leases, for the landless. However, these efforts have also contributed to the enactment of more land laws, complicating the legislative and administrative systems with various jurisdictional and bureaucratic issues. This has created opportunities for political interferences and corruption to take place, all at the expense of rural agricultural communities. Following these reforms, there were also legislative strategies being introduced to devolve the power of the central government to the provinces, which again have been hampered by various political and administrative challenges.

Today, 80 per cent of the total land area in Sri Lanka is classed as state land that is under the authority of its central government, although constitutional amendments in 1987 have placed land under the jurisdiction of its provincial councils. Currently, most of the lands in the possession of private corporations and citizens are actually held under long term leases from the state or some form of tenurial agreements with the state. The public sector, private corporations and the landowning class continue to have greater access to land, although the method and structure of their control over such land may have been altered by legislative requirements. Meanwhile, a significant section of its rural and agricultural communities, along with its indigenous communities, continue to grapple with landlessness and the difficulty in accessing agricultural land or attaining land tenure security.

The country has constitutional provisions on the right to information and has enacted a dedicated legislation on it in 2016.

## PALESTINE

Prior to the establishment of the state of Israel in 1948, Zionist interests, largely represented by the Jewish National Fund (JNF) and its subsidiary, Himanuta, had already begun to privately purchase Palestinian land, an effort that benefitted greatly from the many inefficiencies and loopholes of a legal system that was transitioning from Ottoman to British hands. The *Nakba* or The Catastrophe of 1947-1949 further facilitated this process when Palestinian Arabs were forced to flee from their lands and properties, giving rise to the opportunity for their unlawful seizures and repossessions by the state of Israel.

After the formation of Israel in 1948, its legal structures were systematically developed to legitimise Israeli ownership and repossession of the Palestinian Arab lands and properties that had been confiscated or continued to be seized in the coming decades. Such efforts eventually affected the land that was held under customary rights by the Bedouin herder communities in the desert of Al-Naqab and other local peasant communities. Apart from housing access, Israel also strategised further to ensure the capture of Palestinian agricultural land and water supply.

As a consequence of the militarised Israeli occupation of Palestine and its unlawful construction and expansion of settlements and their related infrastructure on Palestinian land, tens of thousands of Palestinian homes and properties had been demolished and at least 100,000 hectares of land had been seized for Israel's settlement and agricultural projects. In the process, Palestinian farmers are also facing various discriminations by Israel, in particular pertaining to their freedom of movement and their rights to freely access their own farming land and to freely carry out basic agricultural operations such as ploughing and the construction of irrigation systems.

In all, Israel is estimated to have claimed close to 93 per cent of Palestinian land, including 80 per cent of Muslim *waqf* property as its de facto state land, along with uncultivated desert land, held under local customary rights by the Bedouin community. This has led to the scarcity of land, resulting in frequent land disputes and social conflicts, even amongst the Palestinians themselves, and unstable land prices.

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## CONCLUSION

Beyond the established economic and political interests that are at the root of land grabs, and the prevailing destructive globalised development model and its production and consumption patterns, legislative systems serve as the principal functionary whose main role is to legalise what is essentially unjust, discriminatory and inequitable, although land grabs may also naturally benefit from existing institutional or bureaucratic gaps.

As such, in any political movement that seeks for the transformation of our destructive economic and political systems, which have continued to legitimise the massive theft of community lands and environmental destruction, reforms in policy, legislation and governance systems must also remain as an important strategic transformative instrument, along with grassroots resistance and mobilisation.

In principle, our destructive economic and political system is also operationalised as a legal system.

**TABLE 1** CROSS COUNTRY SUMMARY ON LAND TENURE SECURITY, CONSENT AND THE RIGHT TO INFORMATION OF COMMUNITIES

STATUS OF COMMUNITY LAND TENURE SECURITY, COMMUNITY CONSENT AND THE RIGHT TO INFORMATION

REFERENCE LAWS

## PAPUA NEW GUINEA

The indigenous customary land rights are explicitly protected under the constitution and other national statutes on land, forests, conservation areas and strategies and natural resources, with customary territories explicitly recognised as not being a part of state land.

The mandatory requirement for state and private actors to obtain consent from and enter into agreements with affected indigenous communities in order to obtain access to their territories and natural resources can easily be manipulated, by taking advantage of the limitations of rural communities. The information dissemination and consent process is not clearly outlined by legislation while consultation requirements may not even be strictly adhered to.

There are constitutional provisions on the right to information but not a dedicated legislation.

- Constitution of the Independent State of Papua New Guinea
- Land Act 1996
- Land Groups Incorporation Act 1974
- Forestry Act 1991
- Mining Act 1992
- Oil and Gas Act 1998
- Flora and Fauna (Protection and Control) Act 1966
- Protected Areas Bill 2017

## MALAYSIA

The indigenous customary land rights are sufficiently recognised under the constitution. They are further elaborated by the laws on land in Sarawak and Sabah, but not in Peninsular Malaysia. The laws on forestry, conservation areas and strategies and natural resources in Sarawak and Sabah also further recognise such rights.

Although Peninsular Malaysia has a dedicated legislation on the affairs of its indigenous peoples, it has very limited provisions on their land rights, while its other laws on land, forests and conservation areas and strategies, either do not make any mention on them at all or have very brief provisions on them.

By executive convention, rights that are without any documentary title or a reservation status are interpreted as a very limited form of usufructuary rights exercisable over state land, either held under land licences without any rental charges or minimum land rental charges, or rights that are no better than that of a tenant at will. The Malaysian judiciary however, has affirmed that such rights are indeed a form of proprietary interest in the land itself.

- Federal Constitution

### PENINSULAR MALAYSIA

- Aboriginal Peoples Act 1954
- National Land Code 1965
- National Forestry Act 1984
- Wildlife Conservation Act 2010
- National Parks Act 1980

### PENINSULAR MALAYSIA STATES

- National Parks Enactment (Kelantan) 1938
- National Parks Enactment (Pahang) 1939
- National Parks Enactment (Terengganu) 1939
- National Parks (Johor) Corporation Enactment 1989
- Perak State Parks Corporation Enactment 2001
- State mineral enactments



## MALAYSIA CONTINUED

There are no legislative provisions mandating for community consultations to be held or community consent to be obtained, although in certain cases, limited engagements may take place with affected communities.

There are no constitutional provisions or a dedicated legislation on the right to information.

### SARAWAK

- Land Code 1958
- Forests Ordinance 2015
- Wild Life Protection Ordinance 1998
- National Parks and Nature Reserves Ordinance 1998

### SABAH

- Land Ordinance 1930
- Forest Enactment 1968
- Wildlife Conservation Enactment 1997
- Parks Enactment 1984

## INDONESIA

The indigenous and traditional customary land rights are sufficiently recognised under the constitution. They are further described by national laws on land and forests and several executive regulations. However, the registration of such rights and territories falls under the jurisdiction and discretion of local governments, creating an institutional gap between the national and provincial legislative framework. Further, the forestry law has also not been amended to give effect to the decision of the constitutional court in 2012, which ruled that customary forests are not part of state forests.

There are limited legislative provisions mandating for community consultations to be held or community consent to be obtained, although in certain cases, limited engagements may take place with affected communities.

There is a dedicated law on the right to information, enacted in 2008. However, in many cases, applications for information may not be necessarily successful.

- Constitution of the Republic of Indonesia
- Law No. 5/1960 on Basic Regulations on Agrarian Principles
- Ministerial Regulation No. 5/1999 on Guidelines for Resolving Issues on the *Ulayat* Rights of *Adat* Communities
- Ministerial Regulation No. 10/2016 on Procedures for Determining Communal Tenure on Customary Land within Specific Areas
- Law No. 41/1999 on Forestry
- Constitutional Court Decision No. 35/2012
- Law No. 5/1990 on the Conservation of Biological Resources and their Ecosystems
- Governmental Regulation No. 28/2011 on the Management of Nature Reserves and Conservation Areas
- Law No. 27/2007 on the Management of Coastal Areas and Small Islands
- Law No. 32/2009 on Environmental Protection and Management
- Law No. 41/2009 on Sustainable Agricultural Land Protection
- Law No. 39/2014 on Plantations
- Law No. 4/2009 on Mineral and Coal Mining
- Law No. 14/2008 on Public Information Disclosure

## THE PHILIPPINES

The indigenous customary land rights are explicitly protected under the constitution and other national laws on the rights of indigenous peoples, land, conservation areas and strategies and natural resources. The issuance of certificates of titles for indigenous customary territories has been greatly hampered by the prioritisation of economic interests and foreign investments and by institutional gaps and bureaucratic delays, while the free, prior and informed consent process has been diluted by executive regulatory interventions. The primacy of the Torrens legal system is also stipulated by its agrarian law.

The free, prior and informed consent process for affected indigenous communities is mandated under various laws but has been diluted by executive regulatory interventions.

There is an executive order on the right to information, issued in 2016. However, in many cases, applications for information may not be necessarily successful.

- Constitution of the Philippines (1987)
- The Indigenous Peoples Rights Act 1997
- Comprehensive Agrarian Reform Law 1988 (as amended)
- Mining Act 1995
- National Integrated Protected Areas System Act 1992
- Executive Order No. 2 (2016) or Freedom of Information Order

## SRI LANKA

The land rights of rural and agricultural communities are sufficiently recognised under the constitution and to a lesser extent, under the different land laws. Landlessness of such communities can be largely traced back to the British colonial legacy that targeted the country for the development of a plantation economy. Legislative efforts on land reforms and equitable land redistribution have been greatly hampered by the prioritisation of economic interests and foreign investments and by institutional gaps and bureaucratic delays. There are no specific legislative provisions to address the rights of its indigenous peoples, estimated to number less than 3,000 in a population of 21 million.

There are no legislative provisions mandating for community consultations to be held or community consent to be obtained, although in certain cases, limited engagements may take place with affected communities.

There are constitutional provisions and a dedicated law on the right to information, enacted in 2016.

- Constitution of the Democratic Socialist Republic of Sri Lanka
- Crown Lands Encroachments Ordinance 1840
- Land Settlement Ordinance 1931
- Land Development Ordinance 1935
- Crown Lands Ordinance 1947
- Land Reform Act 1972
- Land Grants (Special Provisions) Act 1979
- Land Acquisition Act 1950
- State Lands (Recovery of Possession) Act 1979
- Mahaweli Authority of Sri Lanka Act 1979
- Agrarian Development Act 2000
- Forest Ordinance 1908
- Fauna and Flora Protection Ordinance 1938
- Mines and Minerals Act 1992
- Right to Information Act 2016

## PALESTINE

The land and property rights of the Palestinian Arabs have been aggressively violated by the state of Israel. The confiscation of lands and properties abandoned by Palestinian Arab owners fleeing the Zionist military campaigns since the 1940s have been legalised by various Israeli legal structures.

The Palestinian Arabs continue to face the threats of displacement, the destruction of their lands and properties and the prevention of access to their land and natural resources by the Israeli military aggression.

### OTTOMAN

- Land Code 1858

### BRITISH MANDATE

- Land (Settlement of Title) Ordinance 1928
- Land (Acquisition for Public Purposes) 1943
- British Mandate Defense (Emergency Regulations) 1945
- Emergency Regulations regarding the Cultivation of Fallow Lands and Unexploited Water Sources 1948

### ISRAEL

- Emergency Regulations regarding Absentee Property 1948 (revised, 1950)
- Absentee Property Law 1950
- Development Authority (Transfer of Property) Law 1950
- State Property Law 1951
- Land Acquisition (Validation of Acts and Compensation) Law 1953
- Basic Law: Israel Lands 1960
- Israel Lands Law 1960
- Israel Lands Administration Law 1960
- Land Law 1969

**TABLE 2** CAPACITY OF LEGISLATIVE AND POLITICAL SYSTEMS TO PROTECT COMMUNITY LAND RIGHTS

COUNTRY	RECOGNITION OF COMMUNITY LAND RIGHTS	MANDATORY COMMUNITY CONSULTATION AND CONSENT	RIGHT TO INFORMATION	PROLONGED MILITARISED REGIMES OR ARMED CONFLICTS
PAPUA NEW GUINEA	YES	YES	LIMITED	NO
MALAYSIA	LIMITED	NO	NO	NO
INDONESIA	YES	NO	YES	1965–1998
PHILIPPINES	YES	YES	YES	1965–1986
SRI LANKA	LIMITED	NO	YES	1983–2009
PALESTINE	NO	NO	NO	YES

## INDIVIDUAL COUNTRY REPORTS



FOREST CLEARANCE FOR SABL (OIL PALM EXPANSION) IN BAIRAMAN VILLAGE  
PICTURE COURTESY OF GREENPEACE

# PAPUA NEW GUINEA

MEMBER COUNTRY  
**CENTRE FOR ENVIRONMENTAL LAW AND  
COMMUNITY RIGHTS – FRIENDS OF THE  
EARTH PAPUA NEW GUINEA (CELCOR)**

## BACKGROUND

Papua New Guinea (PNG) is a land of 46 million hectares, with a population of 8 million. PNG is one of the most culturally diverse countries in the world, with more than 800 languages. 85 per cent of the population still live in rural areas and practise subsistence agriculture. They depend entirely on the country's land, forests, rivers and seas to meet their food and other basic needs. Customary laws are still being widely observed, including those on the management of land, forests and natural resources.

The country is richly endowed with natural resources, including minerals such as gold, oil and copper as well as forests and marine life, which includes a large portion of

the world's major tuna stocks. Subsistence and cash crop agriculture provides a livelihood for 85 per cent of the population and contributes approximately 30 per cent to the gross domestic product. Meanwhile, minerals, including gold, oil and copper, account for 70 per cent of export earnings. Palm oil production has also grown steadily in recent years to become a key agricultural export, largely grown by estates but with an extensive output from out growers or contract farmers. Coffee is also another major export commodity, largely grown in the highland provinces, followed by cocoa and coconut products, such as coconut oil and copra, mainly grown in the coastal areas. Tea and rubber are also produced by estates and smallholders.



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## LEGAL PROVISIONS ON COMMUNITY LAND RIGHTS AND NATURAL RESOURCES

### CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA

The Constitution of PNG explicitly acknowledges traditional societies. Article 5 of the Constitution recognises cultural, commercial and ethnic diversity of its citizens as its strength and states the need for continued appreciation of the traditional ways of life and culture, and their dynamic and creative application for development. It also expresses the wish for traditional villages and communities to remain as viable units of society and protects their continuing importance to local and national life.

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### LAND ACT 1996

This is the country's main legislation on land. Among others, the law provides for land acquisition, leasing, rentals, conveyance and reservation processes and through numerous provisions, asserts the clear legal status of the customary land rights. In principle, the law recognises that the customary land title has a legal basis to inalienable tenure.

The land law has extensive provisions to affirm the primacy of traditional customs and customary laws. Section 4 of the act states that all land in the country, other than customary land, is the property of the state, and only estates, rights, titles and interests, other than customary rights in land, are held by the state. 'Customs' is described as the customs and usages of indigenous inhabitants of the country, existing in relation to land or the use of land, regardless of whether or not the custom or usage has existed from time immemorial. 'Customary land' is described as land that is owned or possessed by an automatic citizen or communities, by virtue of rights of a proprietary or possessory kind, which arise from and are regulated by custom.

With such explicit recognition that customary land is part of the rights of citizens to their property, it was once estimated that customary land covered around 97 per cent of the total land area of the country, leaving only three per cent of the country's total land area that is classed either as state land or land that may be held under a state lease. In recent years however, there has been a significant drop of 12 per cent in the estimated size of customary land due to the issuance of the controversial Special Agricultural and Business Leases (SABL). The issuance of the SABL is principally established to allow customary landowners to lease their customary land to the state, which in turn will be empowered to classify the land as alienated land, which can then be leased out to third parties.

Section 11 of the act permits the state to acquire and subsequently lease customary land for the purpose of granting

the SABL to a third party. The issuance of an SABL, which can be implemented by the state on behalf of customary landowners, serves as conclusive evidence that the state has a good title to the lease and that all customary rights in the land, except those which may have been specifically reserved in the lease, are suspended for the length of period stated by the lease. Section 102 of the law meanwhile oversees the issuance of the SABL for land acquired under section 11. The SABL may be granted to individuals, land groups, business groups or other incorporated bodies to whom the customary landowners have agreed that such a lease should be granted. The lease may be granted for a period of up to 99 years and similarly, no rent is payable for the lease.

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### LAND GROUPS INCORPORATION ACT 1974

This law seeks to provide the legal recognition of the incorporated status of customary and similar groups, and to confer on them, as corporations, the power to acquire, hold, dispose of and manage land, and other ancillary powers. This law was amended in 2009, along with the land law, to introduce further improvements on the management of state land and the mechanisms for dispute resolution over land, to enable customary landowners to have easier access to finance support and possible partnerships for their land, for the purpose of rural or urban development economic activities, and to further encourage more traditional communities to use this legal approach, as a means for the state to recognise the customary land owning group as a legal entity.

Apart from having to submit specific information about the proposed group and its members, communities must also submit a sketch, drawing or plan of the land to describe their land size and location, land use activities, boundaries and other community details, including any existing boundary disputes with neighbouring communities.

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### FORESTRY ACT 1991

The main forestry legislation of the country provides for the signing of the Forest Management Agreement (FMA) between customary landowners and the state, prior to the undertaking of any industrial forestry activities. Through these agreements, customary landowners are permitted to sell their cutting rights to the Forest Authority, which in turn may re-issue such rights to private corporations. In exchange, landowners are to earn some timber royalties.

Section 57 stipulates that an FMA requires the consent of customary landowners. The titles to customary land may



either be vested in a land group incorporated under the Land Groups Incorporation Act 1974 or registered under the relevant law. If such a documentation process is deemed as impractical, the FMA may still be executed on behalf of customary owners by agents authorised by such groups, who are expected to act in a manner which is consistent with the customs of the group, with the written consent of 75 per cent of its adult members.

Section 58 describes the features of the FMA. First, the FMA must be in writing. Second, it specifies the monetary and other benefits to be received by the landowners in consideration for the rights granted. Third, it specifies the estimated volume or quantity of merchantable timber in the area under its coverage. Fourth, it specifies a term of sufficient duration for proper forest management measures to be carried out to completion. Fifth, it must be accompanied by a map. Sixth, it contains a certificate from the Provincial Forest Management Committee verifying the authenticity of the customary tenure and the consent of the landowners.

Further, the National Forest Authority is also empowered to issue a Forest Clearance Authority (FCA) to a leaseholder of the SABL, to carry out logging operations through clear felling, prior to the commencement of agricultural operations such as oil palm plantations.

## MINING ACT 1992, OIL AND GAS ACT 1998

Both statutes are related to resource extractive industries. The Mining Act 1992 stipulates that all minerals existing on, in or below the surface of the land, and those existing in the water lying on the land of the country, as property of the state. The Oil and Gas Act 1998 also asserts that petroleum as property of the state. Both laws contain recognition on the rights of customary landowners. Similarly, both laws also provide for consultative spaces to be established with customary landowners affected by the permits issued under their authority, for their views, concerns and consent to be obtained as well for the appropriate benefit sharing mechanisms and compensation payments to be discussed, before any resource extractive operations are permitted to take place on their customary land.

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## FLORA AND FAUNA (PROTECTION AND CONTROL) ACT 1966

This law addresses the conservation of wildlife and protected areas. Although it does not address the rights of customary landowners directly, it does provide requirements for consultation spaces to be established for any decision-making process that may affect landholders or any other stakeholders. PNG is also in the process of establishing new policies and legislation for the establishment and management of its network of protected and conservation areas, as seen in the repeal of its Conservation Areas Act 1978 and the tabling of the Protected Areas Bill 2017.

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## POLITICAL AND LEGAL THREATS ON COMMUNITY LAND RIGHTS

### ABUSE OF THE SPECIAL AGRICULTURAL AND BUSINESS LEASES (SABL)

Through the SABL, leaseholders have been able to apply for permits for logging, plantations and other destructive activities, including the clear cutting of forests. This is the method through which foreign corporations may be able to side step logging regulations intended to reduce environmental damage and implement procedures to ensure a more sustainable management of timber resources. The leases function to provide transnational corporations easier access to the country's diverse and valuable timber species.

With poor governance transparency, it is possible for corporations to employ manipulative strategies to obtain the SABL. These may be done by exploiting the limitations of poor, rural communities who live in a largely oral tradition, who may possess modest levels of literacy and knowledge on the law and the documentation procedures on land

rights and community consent. In effect, in such cases, the free, prior and informed consent of most of the members of affected communities has not been genuinely obtained. Many customary landowners have had no prior information on the execution of SABL projects on their land. They ended up as mere spectators on their land, suppressed by the very government that is supposed to protect their interests.

Further, many of the SABLs have also been used to access natural timber resources through clear felling operations. Prior to the commencement of agricultural operations such as oil palm plantations, SABL leaseholders are able to obtain the Forest Clearance Authority (FCA) from the National Forest Authority. Although selective logging operations in the country have also been plagued by the systematic failure to obtain genuine community consent and other legality issues, since 2006, most new timber harvesting operations have involved clear felling, under the SABL and the associated FCA.<sup>2</sup>

2. For more information, please see Lawson (2014).

## LAND ACQUISITION OF CUSTOMARY LAND

The customary land may also be acquired through compulsory land acquisitions when they are needed to serve what is deemed as a public purpose by the state. In such cases, landowners are forced to give up ownership of their land to the state for the construction of schools, hospitals, roads and other infrastructure development. Although through the process of negotiations, customary landowners are allowed to voice their concerns and discuss issues on compensation and community welfare, whether with the state authorities or the third parties involved in any development activities, they are however, not permitted to object against the land acquisition process itself.

## OBSTACLES IN ORGANISING COMMUNITIES AS AN INCORPORATED GROUP

It is extremely challenging for communities to organise its members into an Incorporated Land Group (ILG) under the Land Group Incorporation Act 1974, especially after its amendments in 2009. The law requires for specific documentary identification of members of a customary community and other supporting documentation to be submitted to the state to demonstrate their validity as the landowning community of a specific territory. This process includes the requirement for all intended members of the ILG to provide their birth certificates. However, many of such communities are living in rural areas where there are

no proper records maintained by poorly resourced aid posts or rural clinics. Further, there is also a fee attached to the production of birth certificates and applications must usually be sent out of the province to the capital city to be processed and returned. This entails many months of waiting by which during this period of time, companies may have already succeeded in obtaining the rights to enter such customary land to carry out their operations. Consequently, the amendments have been largely perceived to work in favour of foreign companies.

## POWERFUL PROVISIONS OF RESOURCE EXTRACTIVE LAWS

The laws on mining as well as on the oil and gas sector are also prejudicial to community land rights. First, such laws proclaim that all resource rights automatically belong to the state. Second, there is also weak implementation of a clear information dissemination process to affected communities. It is possible for a memorandum of agreement to be signed with an affected customary landowner community without all of its members having the full understanding of the full legal implications that may be effected by the document. For example, community members may not even be aware that they are surrendering their land rights to the state and companies through a stringent agreement that is heavily weighted against their rights and interests, and that they no longer have any rights to further negotiate for other outcomes on matters that may affect their lives and livelihoods or to halt any aspects of the operations or to opt out of such agreements totally.

## STATE OF KEY GOVERNANCE INDICATORS

### LAND TENURE SECURITY

Under the various land, forestry and natural resource laws, customary land rights are fully recognised and protected and may not be sold. However, through various legal mechanisms established by legislation, access to such land may easily be granted to foreign entities, for activities deemed as important for national economic development. Although the country's land and other natural resource legislation is indeed comprehensive in recognising customary land rights, the government is able to systematically disregard such rights through the SABL and other legally binding agreements, turning over huge swaths of land and forests to foreign-owned logging, agribusiness and mining companies. The government has thus far failed to hold accountable those who had acquired the SABL illegally and through fraudulent means and has taken no action to strengthen the institutions meant to protect the legal rights of customary landowners. Until the appropriate steps are undertaken, fraudulent activities associated with the SABL and other legally binding agreements will continue to be

widespread and customary landowners will end as foreigners on their customary land.

### FREE, PRIOR AND INFORMED CONSENT PROCESS (FPIC)

There are no provisions in all the relevant laws which clearly outline the state's responsibility to appropriately inform the landowners on matters that will affect them, including their land rights. There are also no provisions for the implementation of the FPIC process. Although legislative provisions may prescribe the obligation of the state and project proponents to engage with customary landowners through various fora and consultations, these processes are rarely followed through. Additionally, they tend to be undertaken after such projects have received their operation or development permits, and not prior to the issuance of such permits. In fact, they may even be undertaken after the operations or development have commenced and caused

much damage to the environment and the livelihoods and lives of affected communities. In effect, such fora and consultations only tend to function as a rubber-stamping process to allow for such destructive activities to proceed.

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## ACCESS TO INFORMATION

Although access to information is a constitutional right, there is no specific piece of legislation passed to give effect to this right or provisions in any of the existing legislation that clearly provide for such a process in the country. Consequently, the state or project proponents may freely choose not to divulge information to customary landowners and the public. When landowners are deprived of their constitutional right to vital information relating to specific resource extractive or development operations, with the state continuously undermining their traditional landowning rights, affected landowners will not have the capacity to defend their land against both the multinational corporations and the state.

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## COMMUNITY GOVERNANCE STRUCTURE AND THE ROLE OF WOMEN

The country has constitutional goals which clearly set the tone for gender equality to be achieved. Hence, policies and laws have also been introduced or amended to promote gender equality. For example, the Gender Equity and Social Inclusion Policy includes targets to increase the participation of women within the public sector and the number of women in public service leadership positions.

Customary law recognises patrilineal and matrilineal communities whose assets and ownership rights are passed down through the male and female lineage, respectively. In matrilineal communities, women own the land and make decisions regarding land within their clans. Land is passed down from mother to daughter, following the female generation line. For this very reason, women in matrilineal communities are held to a higher status. However in PNG, patrilineal communities account for three-quarter of the country's population. Therefore, women born or married into patrilineal communities will not only be the primary care givers to their children, they are also obligated to learn the rituals of their husbands' clan. In such a case, a woman's status is therefore dependent on her ability to raise her children and the providence of her services such as cook, food producer, nurse, nurturer, in compliance to her cultural obligations.

The prevailing cultural attitudes on gender relations have remained as a significant barrier in preventing women in the country from playing greater roles in leadership and decision making. However, over the years, one of the most significant catalysts for change is the empowerment of women that has resulted in the overcoming of gender stereotypes and negative cultural attitudes. This has created the space for women to develop their skills and talents and contribute to the community in ways that were traditionally reserved for men.

CELCOR works directly with female members of its partner communities during its capacity building activities. As an organisation where women form the majority of its staff, CELCOR is mindful in demonstrating to the communities it works with, the potential for women to play important roles and contribute constructively in community development discussions.

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## EXAMPLES OF COMMUNITY RESISTANCE AND MOBILISATION ACTIONS

### COMMUNITY AWARENESS, PARALEGAL TRAININGS AND LEGAL SERVICES

CELCOR conducts various activities designed to empower communities. It conducts environmental and ecological awareness programmes, community workshops and paralegal training to develop community groups whose members are capable of responding to the needs of protecting the environment and the customary property rights owners.

CELCOR also provides legal services and representation on behalf of customary landowners and other resource owners. It also conducts analyses, research and other activities for the purpose of contributing towards the improvement of national policies on environmental protection, sustainable natural resource development, biodiversity conservation and the protection and promotion of community based property rights. For example, CELCOR has extensively spoken on and even written to the National Department of Lands, on the

need to repeal sections 11 and 102 of the Land Act 1996 which provide for the issuance of the much abused SABL.

Due to many challenges that the organisation faces, community trainings, despite being very effective, unfortunately may sometimes be held only during the implementation of a development project, or even after a project has been completed, when affected communities are already struggling to cope with a damaged environment. Many are deeply frustrated by the prevailing governance conditions and the lack of information dissemination, which have deterred them from protecting their land and resources effectively. Such trainings however have led to various protest actions by rural communities, such as road blocks and marches, as well as the filing of court cases to hold the companies to account for their destructive activities.

## PAPUA NEW GUINEA RECOMMENDATIONS

The following are the transformative political and legislative measures that can ensure greater protection of community land rights, the prevention of land grabs and human rights violations and the sustainable management of natural resources in PNG:

- i The cancellation of all Special Agricultural and Business Leases (SABL) found to have been illegally obtained as well as the withdrawal of other operating permits connected to such illegal SABLs, following which, the affected land must be returned to the customary landowners. There needs to be a collaborative political will to ensure that customary landowners' voices are heard and that their environment is sustainably managed. Provincial and local governments must also play a more active role in defending owners of customary land and their resource rights, as well in ensuring the sustainable management of natural resources and the preservation of the cultural practices of communities.
- ii The introduction of legislative provisions which will allow the halting of resource extractive licences and permits if there exist failures to conduct proper consultations with affected customary landowners and the process of obtaining their free, prior and informed consent.
- iii The introduction of legislative provisions which guarantee the right of customary landowners to freely access information on resource extraction and development activities that will affect their rights, livelihood, and well-being.
- iv The introduction of legislative provisions to further define the rights of customary landowners in order to improve its scope and clarity, in particular,
  - v in respect of the freedom of customary landowners to make individual decisions on all activities affecting their land and the natural resources found within such land, such as the stipulated period of time for a land acquisition process to take place and the power to limit, renew or alter in any way, the course of land development and resource extractive operations taking place on their land.
  - vi The introduction of legislative provisions to clearly emphasise on the responsibility of the state to carry out social mapping for the purpose of identifying customary landowners.
  - vii The introduction of legislative provisions to allow the creation of trust funds which can ensure that benefit-sharing mechanisms for landowners may be extended to future generations.
  - viii The introduction of legislative provisions to ensure that the rights of customary landowners will not be totally suspended and that their access to particular parts of their land may still be permitted after a land acquisition process. Currently, the Land Act 1996 declares that the state has the absolute control over the issuance of land titles and any land acquisition process, whether or not an affected land is already held under title. At the point of a land acquisition process, all customary rights will be totally suspended. This has allowed the state to freely conduct development activities according to their will, at the expense of the affected landowners.
  - viii The review of the constitutionality of legislative provisions that directly vest the title of natural resources found underground to the state.



CHILD PROTESTING AGAINST OIL PALM PLANTATION OPERATIONS AND LOGGING IN BAIRAMAN VILLAGE  
PICTURE COURTESY OF GREENPEACE



FOREST CLEARANCE FOR SABL (OIL PALM EXPANSION) IN BAIRAMAN VILLAGE  
PICTURE COURTESY OF GREENPEACE





CUSTOMARY LAND OF INDIGENOUS COMMUNITIES FROM SUNGAI BURI, MIRI IN SARAWAK THAT HAS BEEN ISSUED WITH AN OIL PALM PLANTATION DEVELOPMENT LICENCE, WITHOUT THEIR KNOWLEDGE AND CONSENT

# MALAYSIA

MEMBER COUNTRY  
**SAHABAT ALAM MALAYSIA – FRIENDS  
 OF THE EARTH MALAYSIA (SAM)**

## BACKGROUND

The Federation of Malaysia is a land of 33 million hectares and a population of 32 million people, made up by its three members, namely, Peninsular Malaysia (formerly Malaya), which contains a further eleven states, and the larger states of Sarawak and Sabah in Borneo. Malaysia is a deeply multicultural and multireligious society, with 50 per cent of its population considered to be Malay, while another 30 per cent are of Chinese and Indian heritage. Indigenous peoples comprise another 12 per cent of the population, with close to 90 different ethno-linguistic groups. Whilst in Peninsular Malaysia indigenous peoples are a small minority of around 200,000, in Borneo they form the majority population. Peninsular Malaysia, at 13.2 million hectares, is the most densely populated region, harbouring a population of around 25 million. Meanwhile Sarawak at 12.4 million hectares has a population of only 3 million and Sabah at 7.2 million hectares, has a population of 4 million.

The three-member structure of the federation entails that each member has governance autonomy on land, forests, conservation, environmental protection, the affairs of indigenous peoples and most natural resources. Its federal government has extremely limited legal and administrative instruments to influence decisions on such matters.

In the early twentieth century, Malaya was an important global exporter of rubber and tin. However, between the 1980s and the 1990s, the country transitioned into the world’s leading exporter of tropical logs, mainly destined for Japan. Today, although its timber exports have declined considerably, Malaysia, along with Indonesia, are two of the largest exporters of palm oil in the world. Currently, Malaysia’s other main exports also include semiconductor and electronic products as well as gas and petroleum. Agricultural commodities such as cocoa and rubber are also important export crops.

Industrial logging began to intensify in Peninsular Malaysia and Sabah in the late 1960s, before the industry turned to Sarawak in the 1980s. Such operations by and large take place on indigenous customary territories. The overharvesting of natural timber throughout the 1980s and 1990s eventually caused a serious depletion in natural timber resources by the late 1990s resulting in the conversions of forests, especially in Sarawak and Sabah, for the purpose of developing oil palm and pulp and paper plantations. Consequently, the land grabs of indigenous territories became even more devastating, as plantations require the clear felling of entire forested areas and the land clearing of productive agricultural areas.

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## LEGAL PROVISIONS ON COMMUNITY LAND RIGHTS AND NATURAL RESOURCES

### FEDERAL CONSTITUTION

The indigenous customary land rights are constitutionally protected by provisions on the right to fundamental liberties, equality and property, as well as those on affirmative actions and the definition of law, which includes customs or usage having the force of law.

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### PENINSULAR MALAYSIA

#### ABORIGINAL PEOPLES ACT 1954

The law regulates affairs of the indigenous communities in Peninsular Malaysia. It defines indigenous territories into three legal classes. Two of these classes require a reservation process which provides the territories with a slightly higher legal protection. The third category comprises the bulk of indigenous territories, those which have yet to undergo any reservation process. The legal consequences of the termination or reduction of indigenous customary land rights, as a result of land acquisition or land and forest reservation process initiated by other land, forestry or conservation laws is addressed by this law.

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#### NATIONAL LAND CODE 1965

This main land law for the region does not address indigenous customary land rights. By convention, the regulation of indigenous customary land rights is interpreted to be outside of its jurisdiction and falls under the ambit of the Aboriginal Peoples Act 1954. This law proclaims that land without any documentary title as state land. It provides for land acquisition for public purposes, without any reference to a specific process for indigenous customary territories.

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#### NATIONAL FORESTRY ACT 1984

The law proclaims that all forest produce as state property. It only contains brief provisions which allow indigenous peoples very limited access to forest products on non-reserved forests for a number of purposes without having to pay royalty charges. It provides for the establishment and regulation process of forests classed as the permanent reserved forest, either for production or protection purposes, which results in the extinguishment or reduction of the indigenous customary land rights.

### WILDLIFE CONSERVATION ACT 2010

The law only contains brief provisions which allow indigenous peoples very limited access to hunt specific wildlife for their domestic needs and not for sale. It provides for the establishment and regulation process of wildlife reserves and wildlife sanctuaries, which results in the extinguishment or reduction of the indigenous customary land rights.

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#### NATIONAL PARKS ACT 1980

The law does not mention the existence of indigenous customary land rights and how they must be addressed. It provides for the establishment and regulation process of national parks, which results in the extinguishment or reduction of the indigenous customary land rights.

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### PENINSULAR MALAYSIA: INDIVIDUAL STATES

NATIONAL PARKS ENACTMENT (KELANTAN) 1938, NATIONAL PARKS ENACTMENT (PAHANG) 1939, NATIONAL PARKS ENACTMENT (TERENGGANU) 1939, NATIONAL PARKS (JOHOR) CORPORATION ENACTMENT 1989, PERAK STATE PARKS CORPORATION ENACTMENT 2001

All the above laws fail to mention the existence of indigenous customary land rights and how they must be addressed. They provide for the establishment and regulation process of national parks or state parks, depending on the terms used by the legislation concerned within the concerned states, which results in the extinguishment or reduction of the indigenous customary land rights.

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#### STATE MINERAL ENACTMENTS

The laws fail to mention the existence of indigenous customary land rights and how they must be addressed. It permits the issuance of permits for mineral mining operations except for rock materials and petroleum in each state in Peninsular Malaysia.





CUSTOMARY LAND OF INDIGENOUS COMMUNITIES FROM SUNGAI BURI, MIRI IN SARAWAK THAT HAS BEEN ISSUED WITH AN OIL PALM PLANTATION DEVELOPMENT LICENCE, WITHOUT THEIR KNOWLEDGE AND CONSENT

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## SARAWAK

### LAND CODE 1958

The law proclaims that land without any documentary title as state land. It however has a subclass of state land defined as native customary land. It describes how native customary rights (NCR) to land can be acquired, limited up to 1958, unless a special permit is obtained. The law permits NCR acquisition chiefly through activities related to jungle felling, land occupation and cultivation but is less clear on rights creation through hunting and resource harvesting activities on forested land. It also allows for the establishment of native communal reserves and the issuance of native titles, although these have not been undertaken widely. The law also provides for the extinguishment of the NCR prior to any land acquisition process.

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### FORESTS ORDINANCE 2015

The law proclaims that all forest produce as state property although it does acknowledge the existence of the NCR. It provides for the establishment and regulatory process of production forests classed as forest reserves and protected forests, which results in the extinguishment or reduction of the NCR. Communities are allowed access only to non-timber resources found on the remaining non-reserved forests, and only with state authorisation. Although the law also provides for the reservation of community forest reserves for indigenous communities, this provision has not been actively utilised by the state since the 1980s.

### WILD LIFE PROTECTION ORDINANCE 1998

The law does acknowledge the existence of the NCR. It provides for the establishment and regulation process of wildlife sanctuaries, which results in the extinguishment or reduction of the NCR.

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### NATIONAL PARKS AND NATURE RESERVES ORDINANCE 1998

The law proclaims that all national parks and nature reserves as state property although it does acknowledge the existence of the NCR. It provides for the establishment and regulation process of national parks and nature reserves, which results in the extinguishment or reduction of the NCR.

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## SABAH

### LAND ORDINANCE 1930

The law proclaims that land without any reservation status or documentary title as state land. It however does have a definition for native customary rights (NCR) and customary tenure, including how they can be acquired, without any cut-off limit on the year of its acquisition. The law permits this chiefly through activities related to land possession, jungle felling, cultivation and animal grazing after a continuity of three years. It also allows for the establishment of native reserves and the issuance of individual and communal native titles. The state has made relatively better efforts at giving such recognition in comparison to Peninsular Malaysia and Sarawak, although these are far from adequate. The law also provides for the extinguishment of the NCR prior to any land acquisition process.

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### FOREST ENACTMENT 1968

The law proclaims that all forest produce found within forest reserves as state property although it does acknowledge the existence of the NCR. It provides for the establishment and regulation process of seven classes of forest reserves, either for production or conservation purposes, six of which will result in the extinguishment or reduction of the NCR. Communities are allowed access to both timber and

non-timber resources but only on the remaining non-reserved forests and only for their domestic needs. The law also provides for the establishment of forest reserves that are classed as domestic forests, for the utilisation of intended indigenous communities, although a very small percentage of such forests have been established.

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### WILDLIFE CONSERVATION ENACTMENT 1997

The law proclaims that all animals under its protection as state property although it does acknowledge the existence of the NCR. The law provides for the establishment and regulatory process of wildlife sanctuaries, wildlife conservation areas and wildlife hunting areas, which results in the extinguishment or reduction of the NCR.

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### PARKS ENACTMENT 1984

The law proclaims that the land and resources found within a park as its property although it does acknowledge the existence of the NCR. It provides for the establishment and regulation process of state parks, which results in the extinguishment or reduction of the NCR.

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## POLITICAL AND LEGAL THREATS ON COMMUNITY LAND RIGHTS

### INDIGENOUS CUSTOMARY LAND RIGHTS AS A VERY LIMITED USUFRUCTUARY RIGHT

In all the three regions, indigenous customary land rights without any documentary title or a communal reservation status are interpreted by the state as a limited form of rights to use the land that essentially still belongs to the state. Depending on the region, such land rights may be interpreted as a form of tax-free land licence on state land or as a right no better than that of a tenant at will. As such, the state tends to interpret that indigenous peoples only have limited ownership rights to the crops and built structures found on their land. However, this executive policy is in contradiction of the judicial decision that has affirmed that such rights are indeed a proprietary interest in the land itself. The Malaysian judiciary has also recognised that the pre-existence principle of indigenous customary land rights renders that they owe their existence to customs, and not to any executive, legislative or judicial authority.

### INDIGENOUS CUSTOMARY LAND RIGHTS LIMITED TO HOUSING AND CULTIVATED AREAS

There is a general policy tendency to refuse recognition on the rights that are exercised over forested areas, only conceding that they may exist on housing and cultivation areas. As such, there is failure on the part of the executive and legislation to appreciate the concept of territoriality of indigenous lands.



## RESERVATION OF PRODUCTION FORESTS OR CONSERVATION AREAS AND LAND ACQUISITION

The reservation of production and conservation forests under the three regional forestry statutes and the reservation of conservation forests and areas under the federal, regional or state conservation statutes, all involve the extinguishment or reduction of the indigenous customary land rights. Additionally, there will also be numerous prohibitions enforced in such reserved areas which interfere with the traditional way of life and the sustainable livelihood strategies of affected indigenous communities. The listing of the different classes of protected species also creates the same disruption for affected communities. Land acquisition is also another frequent threat, usually undertaken for the purpose of large infrastructure construction such as dams.

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## TERMINATION OR REDUCTION OF INDIGENOUS CUSTOMARY LAND RIGHTS THROUGH A POOR NOTIFICATION PROCESS AND WITHOUT THE PAYMENT OF ADEQUATE COMPENSATION

None of the past and present statutory provisions which regulate land acquisition and the reservation of production forests, conservation areas and other reserved areas require the consent of affected indigenous communities. Likewise, they also have poor notification process for affected communities and do not guarantee the payment of adequate compensation as demanded by the Federal Constitution. As a result, since the colonial era, many affected indigenous communities were not even aware of the reservation process of production forests and conservation areas until it had reached its final stages.

In Peninsular Malaysia, the Aboriginal People's Act 1954 does not specify on notification procedures. It explicitly allows for compensation payments to be assessed based on the discretion of the state. In Sarawak, its land, forestry and conservation laws only require for the notification to be published in the state gazette and a newspaper and displayed in the local district office. Subsequently, the people are required to submit their claims in 60 days. Duration for appeal submission is set at 21 days under the land legislation and 30 days under the forestry and conservation laws. In Sabah, the forestry and conservation laws require the notification to be published in the state gazette and in suitable areas within the land in Malay and English languages, and other appropriate local languages, if necessary. The people are required to submit their claims or objections in three months. An enquiry process will follow to determine on all matters related to the people's submissions. Duration for appeals submission varies, depending on the legislation.

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## POWERFUL PROVISIONS OF LAND AND RESOURCE EXTRACTIVE LAWS

Statutory provisions for the issuance of permits for logging, timber tree and oil palm plantations, large vegetable farms, mining and other resource-extractive activities do not take into account that land without any reservation status or documentary title may still be encumbered with legitimate indigenous customary land rights claims. In reserved production forests, the indigenous customary land rights are in fact deemed to have been largely extinguished, even if the purported loss of rights was not effected through adequate notification and with the payment of adequate compensation, if any at all.

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## STATE OF KEY GOVERNANCE INDICATORS

### LAND TENURE SECURITY

Due to the refusal of the state to actively utilise existing statutory provisions to strengthen state recognition of indigenous customary territories, indigenous customary land rights have largely remained without any documentary title or a reservation status, recognised only in a limited and arbitrary fashion. Worse, a large part of indigenous territories have also been reserved either as production forests and conservation areas, where their rights are deemed to have been successfully extinguished or reduced. The interpretation on the extent of the boundaries of such territories is largely done unilaterally by the state, generally without further action to communicate the information to the communities through maps, boundary demarcation and other supporting documents.

### FREE, PRIOR AND INFORMED CONSENT (FPIC)

There is no provision in any of the existing laws to compel that a mandatory free, prior and informed consent process is conducted on matters affecting the affairs of indigenous peoples, including their land, forests and natural resources. Their consent is not required for matters related to land acquisition, the reservation of production forests and conservation areas and the issuance of logging, plantation, mining and other resource-extractive permits, as well as for determining the size and boundaries of their territories through participatory mapping and ground documentation process.

There are also no statutory provisions to mandate consultations to be undertaken in such matters, whether before or

after key decisions have been made. As such, consultation spaces may be established, in a formal or informal manner, only at the discretion of the state or the companies, or as a result of the persistent demands made by affected communities. They tend to function more as information dissemination or conflict resolution process, which in any case, may not necessarily produce any favorable outcome for the affected communities. Compounding the situation is the fact that representation to such consultations may also be controlled as indigenous village leaderships today are directly appointed by the state.

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## ACCESS TO INFORMATION

There is no provision in any of the existing laws to compel the state to provide thorough information to affected indigenous peoples on the reservation of production forests and conservation areas, the issuance of logging, plantation, mining and other resource-extractive permits as well as the state interpretation on the boundaries of their territories. While information on the permits issued for logging, plantation, mining and other resource-extractive activities can be found on signboards that must be erected in their areas of operation, maps for logging and plantation operations are more difficult to be obtained by the communities. Indigenous communities also have further difficulty to obtain maps and other related documentary information on how the state interprets the boundaries of their territories.

## COMMUNITY GOVERNANCE STRUCTURE AND THE ROLE OF WOMEN

The traditional governance structure of indigenous communities requires that community leaders and village committee members to be elected by way of a community consensus. The support of community members is therefore imperative. However today, only state-appointed village chiefs and committee members will be recognised, who can also be dismissed from their positions by the state. This has effectively negated the democratic nature of the indigenous traditional governance structure. With direct state control, it is difficult for indigenous village leadership today to function in a truly independent manner, sometimes leading to numerous intra-community conflicts. This state-controlled system tends to also permeate various formal and informal consultation spaces, marginalising the views of ordinary members of affected communities and essentially, eroding their legitimacy.

The traditional roles of women tend to be especially affected when men are often named as heads of households and the official recipients of compensation payments. Forced resettlement schemes are often developed without taking into account the needs of women. This adversely affects their mobility, by replacing the primacy of river transportation with that based on roads and motorised land vehicles, weakening their ability to provide livelihoods and income for their families.

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## EXAMPLES OF COMMUNITY RESISTANCE AND MOBILISATION ACTIONS

### AGROECOLOGY AND COMMUNITY BASED FOREST MANAGEMENT

SAM is involved in facilitating the establishment of residents associations, specifically in the state of Sarawak, to support the protection of community land rights and the carrying out of agroecology activities as part of a community land rights defence strategy. The residents associations are a legally established entity which are also intended to function as an alternate leadership structure to the one appointed by the state. Consequently, these activities have been able to produce many positive outcomes for participating communities.

First, they have strengthened the protection of community land rights by way of demonstrating the communities' sustained and active control over their land, even when the land had previously been subjected to logging and plantation encroachments. In particular, reforestation efforts have functioned as an effective method to demonstrate claims over their forested territories, as the state of Sarawak continues to maintain a questionable policy of disputing the existence of the customary land rights over forested areas.

All such activities serve to improve the unity and confidence of communities to stop any further encroachment of logging and plantation operations on their land. Second, they have also strengthened the capacity of participating communities and further enriched their agricultural skills. Third, the activities have also helped to improve the health of local ecosystems that had been adversely impacted by logging activities, in particular through reforestation efforts of logged over areas. The sustainable agricultural practices have improved soil fertility and the productivity of farms, without the communities having to resort to expensive and dangerous chemicals and pesticides. Such activities are especially beneficial for areas that have been impacted by logging in the past. Fourth, agroecology activities have also provided additional income to participating communities, through a combination of lower crop production costs and increased productivity. In addition, reforestation activities also provide renewed sources of livelihood for the communities.

## MALAYSIA

### RECOMMENDATIONS

The following are the transformative political and legislative measures that can ensure greater protection of community land rights, the prevention of land grabs and human rights violations and the sustainable management of natural resources in Malaysia:

- i The introduction of a definition of indigenous customary land rights in the statutes regulating on land and indigenous people, in accordance with how such rights have been structured and developed by the customs and laws of the community. There must be a detailed definition of the features of such land rights that are consistent with community perspective and its traditional systems of land use management, respecting the concept of communal territoriality.
- ii The amendments to all the relevant laws to confirm that indigenous customary land rights, with or without any documentary land title or a reservation status, are a form of proprietary interest in the land itself, which comprises both communal and familial rights. Such provisions will serve to ensure that indigenous customary land rights are no longer referred to as a mere right to use the land which still legally belongs to the state or as a right no better than that of a tenant at will. Such changes will also ensure that customary land rights and titles will have an equal standing with the documentary land title. They will further ensure that adequate compensation is paid for the loss of such land rights and that licences for any resource-extractive and land development activities cannot be issued within indigenous customary territories without the free, prior and informed consent of affected communities.
- iii The introduction of the free, prior and informed consent process for all matters that affect the rights, livelihood and well-being of indigenous peoples, including but not limited to, those on land, forests, conservation areas and strategies, mining and other resource-extractive operations.

The reservation of production forests and conservation areas and land acquisition actions must include provisions on consent and objections. A transparent notification process is also required, which takes into account the language of the notice, the manner in which the notice is displayed and delivered and the duration of time affected communities can put forward objections and claims for adequate compensation.

- iv The utilisation of existing legislative provisions which can provide stronger executive recognition and protection on indigenous customary territories, in their entirety, either through a land or forest reservation process or the issuance of communal titles. The state must halt its practice of unilaterally interpreting the boundaries of indigenous customary territories, without community consultations and the dissemination of information, documents, maps and boundary demarcation.
- v The introduction of the legislation on the right to information and other policy directives to guarantee that indigenous communities are able to freely obtain information that may affect their rights, livelihood and well-being. Such reforms will ensure governance transparency and increase community participation in decision making. They include but are not limited to, detailed information and high quality maps of production forests, conservation areas and licensed areas for any resource-extractive and land development activities.





LAND GRABBING AND DEFORESTATION BY OIL PALM PLANTATION IN SEMUNYING VILLAGE, WEST KALIMANTAN

## INDONESIA

MEMBER COUNTRY  
**WAHANA LINGKUNGAN HIDUP  
 INDONESIA – FRIENDS OF THE EARTH  
 INDONESIA (WALHI)**

### BACKGROUND

Indonesia is a land of 192 million hectares and 13,000 islands, with a population of 262 million, of which between 50 and 70 million are estimated to be members of indigenous or traditional communities. Apart from indigenous communities, Indonesia is also home to a diversity of traditional societies who still maintain their respective traditional governance structures, with members who have remained committed to the application of customary laws in their daily lives, including those which pertain to the management of land and natural resources. The main resource extractive or land development activities which threaten community land rights are oil palm and timber tree plantations, logging, mining and infrastructure construction.

Agricultural and forestry commodities have remained as the country's largest exports, along with petroleum, gas and coal. Indonesia, along with Malaysia, are two of the largest exporters of palm oil in the world. Land grabs,

deforestation and environmental destruction continue to plague such export-oriented industries.

Between 1966 and 1998, Indonesia was ruled under an authoritarian regime, which saw a strong presence of a militarised political culture, the weakening of democratic institutions and processes and the intensification of corruption at the highest levels of its political hierarchy. However, since the advent of political reformation in 1998, the country has embarked on a long road towards reforming key state institutions and other democratic political processes, a task which however has been made more complex by its sheer size, geography, population and diversity. The power dynamics permeating the relations between the central government and its provinces, which today have been allowed greater autonomy, has a significant influence on the governance and management of forests and natural resources and the protection of community land rights.



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## LEGAL PROVISIONS ON COMMUNITY LAND RIGHTS AND NATURAL RESOURCES

### CONSTITUTION OF THE REPUBLIC OF INDONESIA

The highest law of the country recognises the rights of indigenous and traditional peoples, collectively referred to as *masyarakat adat* or literally, customary communities. Its article 18B(2) recognises and respects such communities and their customary rights, insofar as they remain in existence, and are in line with societal development and the principles of a unified republic, and remain regulated by the state. Further, its article 28H guarantees the right of each citizen to live in physical and spiritual prosperity, to be in possession of a home, to enjoy a good and healthy environment and to obtain medical care. Its article 33(3) also stipulates that the land, waters and natural resources are under the authority of the state, although they shall be used to the greatest benefit of the people.

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### LAW NO. 5/1960 ON BASIC REGULATIONS ON AGRARIAN PRINCIPLES

This law is the main statute regulating land management in the country. Among others, its aim is to ensure that indigenous and traditional communities will continue to have rights over their land and agricultural resources and that no group shall hold large amounts of land. Article 3 of the law stipulates that in relation to its articles 1 and 2, which largely address the control of the state over the nation's land, water, airspace and natural resources on behalf of its citizens, the implementation of the indigenous and traditional rights, collectively termed as *ulayat* rights, and the rights that are of similar nature to them, insofar that they still exist, is to be carried out in a manner that is appropriate to national and state interests, based upon the principles of national unity and without contravening other higher laws and regulations. The effort to verify the legitimacy of the identity of the various groups of indigenous or traditional communities meanwhile can be further formalised by ministerial regulations.

Article 16(1) of the law also provides for the different classes of private documentary rights to land. The strongest amongst these is the right of ownership, which entails a documentary title, rendering the land as a form of property owned by the party who has managed to secure it. Unfortunately however, there is no provision which further allows for such a right to be registered under a communal tenure. Without another supporting regulation, indigenous and traditional communities who would like to seek further state recognition for their land may have to resort to registering their land under the names of individuals,

such as those belonging to community leaders, a legally precarious approach which communities generally refuse to undertake. Meanwhile, other forms of private land rights are the right of exploitation, the right of building, the right of use, the right of lease, the right of opening up land and the right of collecting forest products. The law also allows for other regulations to be made in order to recognise other forms of rights outside of the abovementioned categories.

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### MINISTERIAL REGULATION NO. 5/1999 ON GUIDELINES FOR RESOLVING ISSUES ON THE *ULAYAT* RIGHTS OF *ADAT* COMMUNITIES

This ministerial regulation came into force as a guideline to clarify on a host of issues surrounding the land rights of the country's indigenous and traditional communities. Claims on *ulayat* rights are to be investigated and determined individually at the level of local government, which may enact regulatory measures to record, document and map recognised territories.

The executive document clarifies further the nature of *ulayat* rights as a collective right to land of specified indigenous peoples to specific territories with which they have established physical and spiritual relationships. This includes their right to exploit the natural resources found on their territories, for the benefit of their survival and daily needs. Indigenous and traditional communities meanwhile are recognised as a legal community living under a unified customary law, operating on the basis of residence or descent.

*Ulayat* rights may be regarded to have subsisted when first, there remains a community whose members still feel bound by the governance of its customary law, and continue to live in accordance with its recognition and application; second, the *ulayat* land has continued to exist and forms as part of the community environment, from which resources are obtained by community members for their daily needs; and third, there still exists a customary governance system which provides for the management, authority and usage of the *ulayat* land, and continues to be faithfully observed by the community members.

The regulation however further prescribes such rights as alienable. It permits the registration of such rights under the names of individuals, in accordance with the agrarian law. Subsequently, this will permit communities with registered *ulayat* rights to transfer their rights to the state, which can then issue a temporary right of usage to a third party for a stipulated period of time.

## MINISTERIAL REGULATION NO. 10/2016 ON PROCEDURES FOR DETERMINING COMMUNAL TENURE ON CUSTOMARY LAND WITHIN SPECIFIC AREAS

This regulation seeks to replace and improve on a prior regulation, the Ministerial Regulation No. 9/2015. Both regulations spell out the procedures to be undertaken by local governments in the processing of the applications and registration of communal tenure with the National Land Agency, as well as in the formation and responsibilities of an investigating team that is tasked to verify the claims on communal tenure. There are two types of collective land rights that can be registered under the communal tenure. The first is the collective ownership rights of indigenous or traditional societies over their customary land. The second is the collective ownership rights that have been issued to communities residing on land that has been classed as either forests or plantations.

Indigenous or traditional communities are qualified based on four factors. First, the community must still be living in accordance with the concept of *paguyuban*, a state of communally maintaining the consciousness of belonging and relating to a cohesive socio-cultural group. Second, the community must still possess traditional governance structures. Third, the community must also possess a clear territorial claim. Fourth, the community must still maintain its own governance institutions and legal structures that are still being faithfully observed by its members.

Meanwhile, other local communities may also apply for the registration of a communal tenure if they are able to fulfil another set of conditions. First, the community has been in continuous physical possession of the land for a minimum of 10 years. Second, the community still conducts the harvesting of natural resources in their territory for their daily needs. Third, such natural resources are the main sources of their livelihoods and income. Fourth, the social and economic activities of the communities are integrated into their communal lives.

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## LAW NO. 41/1999 ON FORESTRY

Section 1(6) of the law defines customary forest as a state forest located within the territories of customary communities. Section 4 stipulates that the authority of the state over forests must take into account the rights of indigenous and traditional societies, insofar as they still exist and do not contravene with national interests. Section 5 meanwhile distinguishes state forests, or forests that are unencumbered by any claim of right, from those that are under a claim of right. The section continues to repeat that customary forest is in fact part of state forest, insofar such customary rights still exist.

Section 6 further classifies three categories of forests based on their functions. First, conservation forests, which can be

further classed into three sub-categories, are forests that are conserved either for biodiversity protection or sustainable hunting activities. Second, protection forests are forests that are protected for their ecological functions, such as water catchment protection, flood control, erosion control, salt water intrusion control and soil protection. Third, production forests are forests that can be exploited for their resources.

Subsection 67(1) of the law stipulates several rights of indigenous and traditional communities to forested areas. First, their right to carry out the harvesting of forest produce in order to fulfill their daily needs. Second, is their right to use the forest in accordance with their customs and in a manner that is not in contravention of the law. Third, communities also have a right to obtain empowerment, in the pursuit of their well-being. Subsection 67(2) meanwhile stipulates that the jurisdiction to recognise or deny the existence of such community rights, rests with the local government, which is authorised to make regulations on such matters. Section 68 on the whole promotes governance transparency and community participation in forestry management and guarantees compensation for forest-dependent communities who are deprived of their access to forest resources as a result of any lawful decision made by the authorities.

The forestry law also elaborates on five requirements for the recognition of the rights of an indigenous or traditional community. The first four conditions are the same as stated in the abovementioned Ministerial Regulation No. 10/2016. The fifth condition meanwhile stipulates that the harvesting of forest produce must still be practised by members of such a community for the purpose of fulfilling their daily needs. The law also spells out a brief guideline on how local governments may undertake a consultative and participatory process for the purpose of providing legal recognition on the existence of the rights of such communities.

The law also authorises the state with the power to issue various licensing schemes for forestry activities to be undertaken by private corporations. The rights of indigenous and traditional communities to their customary forest can easily be disregarded in this process, as the law has deemed such forests as part of state forest.

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## CONSTITUTIONAL COURT DECISION NO. 35/2012

In 2012, the Indonesian judiciary produced the landmark Constitutional Court Decision No. 35/2012, which provides judicial recognition on customary forests under the control of indigenous peoples. The judgement was made in response to a petition filed with the court by the Aliansi Masyarakat Adat Nusantara (AMAN). This petition among others, objected against the manner the provisions of the Law No. 41/1999 on Forestry categorise forests under customary law control as part of state forest, where the

rights of indigenous and traditional communities to such forests remain merely as a very weak form of usufructuary right. Such provisions have allowed the state to grant logging, plantation and mining permits to corporations at the expense of the rights and well-being of indigenous and traditional communities and their territories.

Principally, this decision declares that sections 1(6), 5(1) and 5(3) of the forestry law as inconsistent with the Constitution and therefore having no binding legal force, unless they are amended accordingly. In short, this decision removes the references of the customary forest as being part of state forest. It redefines customary forest as a forest that is located within the territory of an indigenous or traditional community, and that it does not in fact form as part of the state forest.

Apart from the above, this decision also recognises that customary rights are hereditary in nature, which arose from the process of community civilisation, instead of rights that have been granted by the state. It agrees with the problematic practice of the state issuing various permits within state forests without first consulting impacted communities. It acknowledges the strong attachment of such communities to their customary forests and the wisdom of indigenous forestry management practices. It rules that section 5 of the forestry law has clearly given the government the power over a matter that is not within its authority, for the existence of an ethnic group should not be handed over to the state, as it is part of human rights.

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#### LAW NO. 5/1990 ON THE CONSERVATION OF BIOLOGICAL RESOURCES AND THEIR ECOSYSTEMS, GOVERNMENTAL REGULATION NO. 28/2011 ON THE MANAGEMENT OF NATURE RESERVES AND CONSERVATION AREAS

Law No. 5/1990 provides for the establishment and regulation of conservation areas. Sanctuary reserves are subclassed into strict nature reserves and wildlife sanctuaries while nature conservation areas are subclassed into national parks, grand forest parks and natural recreation parks. The legislation also provides for the protection of protected plants and endangered or rare animal species. The prohibition against several activities within such conservation areas may potentially interfere with the traditional way of life and sustainable livelihood strategies of affected indigenous and traditional communities. This law does not make any specific mention on the customary land rights of such communities.

To address this gap, the Governmental Regulation No. 28/2011 was issued. It recognises the rights of indigenous and traditional communities within such areas, and stipulates the requirement for public consultations in the development of the management and zoning plans

of areas under the authority of the legislation, including those with affected indigenous and traditional communities. It also requires for specific areas to be identified for community housing and the exercise of traditional livelihoods and the protection of sites with spiritual, cultural and historical significance.

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#### LAW NO. 27/2007 ON THE MANAGEMENT OF COASTAL AREAS AND SMALL ISLANDS

This law provides for the management of coastal areas and isles and in particular for their planning, utilisation, monitoring and control by the state. These include activities such as conservation, disaster mitigation, coast reclamation, rehabilitation of coastal damage, rights and access of communities, settlement of conflicts and provisions to address international conventions. It defines traditional society as a society of traditional fishery who still exercises traditional rights in conducting the activity of fish catching or other marine activities. Local wisdom is defined as the values which still take procedural effects in the life of a community.

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#### LAW NO. 32/2009 ON ENVIRONMENTAL PROTECTION AND MANAGEMENT

This law includes the continuation of livelihoods and human welfare as part of the definition of the environment. It provides for the establishment of systematic and integrated efforts to preserve the environment and prevent environmental pollution and destruction. It also emphasises the need for sustainable development as a strategy that integrates environmental, social and economic concerns, as well as effective planning, utilisation, control, preservation, supervision and law enforcement by the state. These include the legal recognition given to local wisdom, defined as values intended to protect and manage the environment in perpetuity, and the need to develop policies to recognise the existence of traditional communities and their rights.

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#### LAW NO. 41/2009 ON SUSTAINABLE AGRICULTURAL LAND PROTECTION

This law aims to provide protection on agricultural land, farmers and food security. Among others, it stipulates the need to ensure the availability and sustainability of agricultural land, the protection of the rights of farmers to their land and improving on their well-being and ensuring adequate employment opportunities. It also notes the need to value the wisdom of local cultures and the rights held by indigenous and traditional communities.

## LAW NO. 39/2014 ON PLANTATIONS, LAW NO. 4/2009 ON MINERAL AND COAL MINING

Apart from the forestry law, other laws on the exploitation of natural resources also operate on the basis that land that is without documentary support still belongs to the state. The state is therefore free to issue licences which destroy the living spaces of indigenous and traditional territories.



LAND GRABBING AND CRIMINALISATION OF PEASANTS BY OIL PALM PLANTATION ASTRA AGRO LESTARI IN CENTRAL SULAWESI

## POLITICAL AND LEGAL THREATS ON COMMUNITY LAND RIGHTS

### LIMITATIONS TO THE FORMALISED STATE RECOGNITION OF *ULAYAT* RIGHTS AND COMMUNAL TENURE

Although Law No. 5/1960 on Basic Regulations on Agrarian Principles recognises the existence of *ulayat* rights amongst indigenous and traditional communities, the effects of this recognition are highly limited in nature. Principally, the agrarian law stipulates that *ulayat* rights may only be exercised in accordance with other national laws and their subsidiary regulations and must not be in conflict with what is deemed to be of national interest. Further, despite its recognition on *ulayat* rights, the agrarian law still fails to define them and does not provide guidance on their protection.

Meanwhile, the Ministerial Regulation No. 5/1999, although providing a more comprehensive definition of *ulayat* rights, stipulates that the rights cannot be claimed when the land in question is already encumbered with other ownership or usage rights that have been registered under the agrarian law, or if it has already been acquired or disposed of by the state, legal entities or private individuals in accordance with the law.

Finally, the implementation of Ministerial Regulation No. 10/2016, which lays down procedures for local governments to issue (or deny) recognition on the communal tenure for *ulayat* territories, including their scope and limits, is itself dependent on the discretion of local governments to respond to the *ulayat* claims of local communities in a favourable, swift, fair and effective manner. Principally, the effective recognition of *ulayat* rights today has been relegated to take place at the level of a district regulation. Further, many aspects of this communal tenure have remained unclear. These include the possibility that the tenure may be transferrable to other non-indigenous parties in particular circumstances, and the lack of clarity on the rights of exploitation of the communities on the land.

### POLITICAL REPRESSION AND MILITARISATION

Indonesia has had a long history of political repression. During the three decades of dictatorship, the country was subjected to an authoritarian regime and increased militarisation. Under this regime, policies and laws were enacted to proclaim that all land without any form of ownership registration was deemed to be a property of the state, giving the state the absolute authority to control such land and hence, to license out the exploitation rights of such land to corporations for various resource extractive as well as land and infrastructure development activities. All these could be carried out by the state through a repressive approach, including the seizures of community land and eviction of the affected communities. Although today indigenous and traditional communities may have more opportunities to improve their land tenure security, there is no guarantee in the law which can protect their land from being acquired by the state for a host of commercial and development purposes.



## POWERFUL PROVISIONS OF LAWS ON LAND, FORESTS AND NATURAL RESOURCES

Although there are national laws to protect indigenous and traditional communities, their implementation at the local level has been weak. Furthermore, they fail to legally counter the powerful provisions contained in national natural resource laws which permit resource extractive and land development activities to take place on indigenous and traditional territories that are without any documentary rights. At times, in the face of community protests, such licensed operations, which have in fact increased in number after Indonesia embarked on efforts to augment regional autonomy after the fall of the dictatorship, may still be protected by the state aggressively, through the employment of security forces, including the police and military.

## CONFLICTING PROVISIONS BETWEEN DIFFERENT LAWS ON LAND, FORESTS AND NATURAL RESOURCES

There are many sectoral laws on natural resources which collide with each other. Sometimes such statutory inconsistencies will result in the issuance of different exploitation rights within the same area. Often such resource rich areas, where logging, plantations, mining and other resource extractive activities take place, are located within the customary territories of indigenous and traditional societies. In such a situation where an overlap of jurisdictions occurs, affected communities may further be victimised when this fails to be collectively resolved by the different state authorities.

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## STATE OF KEY GOVERNANCE INDICATORS

### LAND TENURE SECURITY

Although the customary land rights of indigenous and traditional communities are recognised in various laws, there is no legal guarantee that can prevent permits for resource extractive, land development and infrastructure construction activities from being issued on customary territories. Furthermore, such territories are also legally vulnerable to land acquisition actions. The implementation of executive ministerial regulations which describe the manner in which indigenous or traditional territories may receive executive recognition through registration at the National Land Agency, falls under the jurisdiction and discretion of local governments, which commonly results in delays or inaction altogether.

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### FREE, PRIOR AND INFORMED CONSENT (FPIC)

The legislative framework does not provide for an effective implementation of the FPIC process for indigenous and traditional communities in matters that may affect their rights, livelihoods and well-being in relation to the protection of their land, forests and natural resources. In fact, many affected communities are not even informed by the state prior to the issuance of various permits to private corporations for resource extractive and land development operations. Many affected persons have been criminalised for protesting, trespassing, farming, and even for theft, when their territories are encroached upon by the concession areas of private corporations.

### ACCESS TO INFORMATION

Access to information is very limited within the legislative framework, despite the existence of Law No. 14/2008 on Public Information Disclosure. There is a policy tendency to withhold information under the guise of corporate confidentiality. In many cases, affected communities are forced to file legal actions against private corporations or the Public Information Commission to demand for more information on matters that may affect them, which in the end may not even produce outcomes that are favourable for them.

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### COMMUNITY GOVERNANCE STRUCTURE AND THE ROLE OF WOMEN

Indonesian law does not discriminate against women with respect to their rights to own land. However, in many communities, men may still lead and dominate community governance structures and hence, the decision making process concerning land. As a result, women tend to function more as passive and secondary information recipients, even as corporations capture the right to operate on their land. In such cases, women would not only lose their freedom to work on their land and to contribute their share of family income, they too may end up as labourers working for the companies, relegated to carry out hard physical work with the least degree of employment protection. At home, women would also be doubly burdened by other domestic challenges as a result of the loss of income and natural resources and the onset of poverty caused by landlessness.

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## EXAMPLES OF COMMUNITY RESISTANCE AND MOBILISATION ACTIONS

### SOCIAL FORESTRY AND AGRARIAN REFORMS

Since the 1990s, WALHI has been working to promote community-based forestry management and agroecology practices in provinces located in Kalimantan, Sumatera, Java and Nusa Tenggara. These activities, undertaken to support local communities to maintain their traditional governance and management systems over their land and forested territories, were part of an effort to counter the destructive dominant forestry development model advocated by the state. Unfortunately, during the rule of the former authoritarian military regime, such efforts certainly did not receive any state support. Therefore, much work had to be continually carried out at the national level to educate both the state and the public on this matter.

Today, such efforts have paid off significantly. During the previous presidential elections, the current president and his then campaign team, paid a visit to WALHI in their effort to learn about various structural governance matters related to natural resource management, including viable strategies to halt natural resource-based conflicts which had violated the rights of numerous communities. Today, the proposals recommended by WALHI have been adopted by the Indonesian presidential office, which has launched a social forestry programme and a series of agrarian reforms. These two initiatives aim to provide recognition and protection to the land rights of forest-dependent communities, in targeted areas totalling some 12.7 million hectares under the social forestry scheme and another 9 million hectares under agrarian reforms. The implementation of this social forestry programme will include the issuance of state recognition over customary land and forests.

However, the implementation of the programmes is not free from enormous challenges that must still be overcome. Their successful implementation will certainly entail the reduction in the concession areas licensed out to the corporate sector. The corporate lobby has naturally not remained silent at the national and provincial levels in its effort to ensure that national and provincial policies, legislation and law enforcement will continue to work in its favour. For example, in recent years, the national palm oil sector has engaged in a lobby for a law intended to serve the interests of the industry even further, but one which will certainly threaten traditional community land rights and agroecology practices. Further, many members of the country's public administration have continued to adhere to their belief in the dominant economic paradigm, where

the control of natural resources by private corporations is seen as the more profitable and therefore beneficial approach for the national economy, in comparison to one which is community-based.

In general, the implementation of the programmes has not moved forward very swiftly. As long as such community-centred initiatives fail to reach their optimal potential, communities will continue to be exposed to various threats of land grabs, including those that are posed by infrastructure development. In particular, the implementation of agrarian reforms has been slow. Currently, it is still only limited to the processing of certification for communities. Without other progressive actions, the initiative cannot be construed as having fulfilled the nature of true reforms.

Therefore, continued political pressure needs to be asserted to support a systematic paradigm shift in the development model of the nation. Effective law enforcement, the revocation of operational permits which violate community land rights and their territories and the reduction in areas under corporate control must continue to be promoted. All such efforts must be done with the participation of local communities and even engagement in electoral spaces at both the central and provincial levels. Strengthening communities and campaigns, lobbies and dialogues on policy and legislation, as well as grassroots mobilisation to continue demanding for the rights of the people are all parallel strategies that must be continued.

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### SUPPORTING THE LEADERSHIP OF WOMEN

In promoting community-based forestry and natural resource management, WALHI makes its best effort to promote the participation of women with its community partners. Women are not only the direct experienced holders of traditional knowledge, they also suffer from specific impacts when community living spaces are destroyed. WALHI continues to provide support to the many women who are in the front lines defending their living spaces and territories and those who suffer from various violations and even criminalisation for their courage.

## INDONESIA

### RECOMMENDATIONS

The following are the transformative political and legislative measures that can ensure greater protection of community land rights, the prevention of land grabs and human rights violations and the sustainable management of natural resources in Indonesia:

- i The strict enforcement of the law with respect to the management of natural resources and the protection of the environment. This includes whenever necessary, the review of natural resource exploitation licences and permits that have been granted to corporations, in the event of any irregularities and the violations of community land rights.

This requires the full application of the provisions contained in Law No. 5/1960 on Basic Regulations on Agrarian Principles, Law No. 41/2009 on Sustainable Agricultural Land Protection and Law No. 32/2009 on Environmental Protection and Management, which seek to protect the rights of indigenous peoples and local communities, as well the environment, within the framework of the legal principles that have been determined by the Constitutional Court Decision No. 35/2012.

- ii The acceleration of the fulfillment of the presidential pledge to recognise and protect customary territories

through social forestry and agrarian reform programmes, including those for indigenous peoples and traditional communities. Agrarian and forestry reforms are a solution that is also part of a conflict resolution strategy, which can address existing inequalities relating to the control of agrarian and forest resources, which has been dominated by corporations for decades.

- iii The institution of an effective and meaningful free, prior and informed consent process for indigenous and traditional societies. This would allow affected communities to freely reject decisions that may affect their well-being, livelihoods and rights, including on matters pertaining to the management of natural resources.
- iv The establishment of a moratorium on the issuance of oil palm plantations and mining licences, for the purpose of introducing improvements in natural resource governance.
- v The halting of violence and criminalisation against indigenous peoples, local communities, farmers, fishers and women, who are fighting for the rights over their lands and livelihoods.



"NO TO LARGE SCALE MINING ACTIVITIES. RESPECT THE RIGHTS OF THE PEOPLE. ALL ACTIVITIES OF THE COMPANY CANNOT ENTER HERE"  
LOCALS EXPRESS THEIR RESISTANCE TO OCEANA GOLD MINING CORPORATION, DIDIPIO, KASIBU, PROVINCE OF NUEVA VIZCAYA

## THE PHILIPPINES

MEMBER COUNTRY  
**LEGAL RIGHTS AND NATURAL  
RESOURCES CENTER – FRIENDS OF THE  
EARTH PHILIPPINES (LRC)**

### BACKGROUND

The Republic of the Philippines is a land of 34 million hectares, made up by more than 7,500 islands, with a population of over 103 million. Indigenous peoples are estimated to comprise between 10 and 20 per cent of the population. On the whole, it has been estimated that there are more than 110 ethno-linguistic indigenous groups in the country.

The country is believed to harbour the second largest gold deposits after South Africa, apart from sizeable deposits of other minerals such as copper and nickel. It has been estimated to be one of the five most mineral-rich countries in the world, although many of these mineral resources may not be easily accessible. Nevertheless, indigenous customary territories are still being frequently encroached upon by highly destructive mining operations.

Apart from minerals, its other important exports include semiconductor and electronic products, transport

equipment as well as agricultural products such as coconut oil and a variety of tropical fruits, from bananas to pineapples. The country also has a sizeable community of overseas workers, whose remittance into the country contributes significantly to the national economy.

From 1965 to 1986, Philippines was ruled under the authoritarian regime of Ferdinand Marcos, who placed the country under martial law between 1972 and 1981. His rule was characterised by massive corruption, kleptocracy, brutality and the weakening of democratic institutions and processes. He was finally ousted through the People's Power Revolution in 1986, after which significant policy and legislative reforms were initiated by the succeeding governments to correct the historical injustices perpetrated by his dictatorship, although such efforts nevertheless have been confronted by numerous political, economic, legislative and bureaucratic challenges.



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## LEGAL PROVISIONS ON COMMUNITY LAND RIGHTS AND NATURAL RESOURCES

### CONSTITUTION OF THE PHILIPPINES (1987)

Under the statement on state policies, section 22 of the Constitution requires for the state to recognise and promote the rights of indigenous cultural communities within the framework of national unity and development. The house of representatives is also required to ensure the inclusion of representation from indigenous peoples.

Under article XII which deals with national economy, there are various provisions which may affect indigenous communities. Its section 2 first maintains that all lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the state. With the exception of agricultural lands, all other natural resources may not be alienated. The state also has the full control and right to supervise the exploration, development and utilisation of natural resources. The state may directly undertake such activities or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations, at least 60 per centum of whose capital is owned by citizens. Such agreements may not exceed 25 years, after which renewals may be extended again for another 25 years. For water rights for irrigation, water supply, fisheries or industrial uses other than the development of water power, its beneficial use may be used as the measure to limit the duration of the grant. The congress may also make laws to allow the small scale utilisation of natural resources of citizens, as well as cooperative fish farming, with priority given to subsistence fishermen and fishery workers in rivers, lakes, bays and lagoons.

The succeeding section 3 further stipulates that lands of the public domain are classified into agricultural, forest or timber, mineral lands and national parks. Only agricultural land may be further classified and alienated in accordance with its use. Alienable land of the public domains may only be held by corporations or associations under a lease issued by the state for not more than 1,000 hectares. Private citizens meanwhile may lease not more than 500 hectares, or acquire not more than 12 hectares of agricultural land by purchase, homestead or grant.

Its section 5 stipulates that the state shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being, subject to the provisions of the Constitution and national development policies and programmes. The congress may also provide the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

Under article XIII which addresses social justice and human rights, its section 6 provides for the application of the principles of agrarian reform or stewardship in the disposition or utilisation of natural resources. These include lands of public domains that are under lease or concession and are suitable for agriculture and subject to prior rights, including the rights of indigenous communities to their ancestral land.

Under article XIV, section 17, the state is required to recognise, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions, whereby such rights must be considered in the formulation of national plans and policies. Under article XVI, section 12, the congress also has the power to create a consultative body to advise the president on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities.

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### THE INDIGENOUS PEOPLES RIGHTS ACT 1997 (IPRA)

This law was meant to correct the historical injustices perpetuated against indigenous peoples and proclaims on essential rights that should be granted to them. It provides indigenous peoples with the right to self-determination and guarantees that the right of the community to freely pursue their economic, social and cultural development is under state protection. The law contains four significant legal aspects. The first is the recognition of the rights to self-governance; the second is the recognition of the bundle of rights held by the indigenous peoples; the third is the establishment of a process for the formal recognition of land rights through the introduction of the Certificate of Ancestral Domain Title (CADT) or Certificate of Ancestral Land Title (CALT); and fourth is the creation of the National Commission on Indigenous Peoples (NCIP), the agency mandated to protect the rights of the indigenous peoples.

The IPRA potentially may help indigenous peoples delay or prevent the entry of any unwanted projects that intend to encroach upon their ancestral land or domain through certification preconditions. State agencies are strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP which verifies that activities ensuing from any of such authorisation do not overlap with any ancestral domain. The NCIP certification in turn shall not be issued without the free and prior written consent from the indigenous communities concerned.

## COMPREHENSIVE AGRARIAN REFORM LAW OF 1988 (AS AMENDED)

Among the objectives of this law is to protect the welfare of the landless farmers and farm workers, for the purpose of promoting social justice and the establishment of owner cultivatorship of economic size farms, as the basis of the Philippine agriculture. It aims to support the redistribution of private and public agricultural lands and the survival of small independent farms regardless of their land tenurial arrangement. This law defines ancestral lands as those including, but not be limited to, lands in the actual, continuous and open possession and occupation of the community and its members. The law protects the rights of indigenous communities to their ancestral lands to ensure their economic, social and cultural well-being. The law provides that the system of land ownership, land use, and modes of settling land disputes of indigenous cultural groups and indigenous peoples shall be recognised and respected in line with the principles of self-determination and autonomy.

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## MINING ACT 1995

This law is the main legislation that governs all mining activities in the Philippines, including the exploration, development, processing and utilisation of mineral resources in the country and defines areas where mining may or may not take place. This law includes various measures to protect the environment and national interest by ensuring that the benefits from mining are shared with the government through the Mineral Production Sharing Agreement. Section 16 of the law provides that ancestral lands shall only be opened for mining operations with the prior consent of the indigenous cultural community concerned. Its section 70 requires for an environmental clearance certificate to be obtained by mining applicants before operating.

## NATIONAL INTEGRATED PROTECTED AREAS SYSTEM ACT 1992

The law establishes the National Integrated Protected Areas System broadly classified into strict nature reserves, natural parks, natural monuments, wildlife sanctuaries, protected landscapes and seascapes, resource reserves, natural biotic areas or other categories established by national laws or international treaties. The management plan of a protected area requires planning strategy which provides guidelines for the protection of indigenous communities and other tenured migrants and sites and for close inter-agency and private sector coordination. It disallows indigenous communities within a protected area from being resettled elsewhere. It explicitly stipulates that ancestral lands and customary rights and interests must be given due recognition. The state is still empowered to prescribe rules and regulations to govern ancestral lands within protected areas, but this must be done in consultation with affected communities. Further, the state is not permitted to evict or resettle affected indigenous communities without their consent.

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## POLITICAL AND LEGAL THREATS ON COMMUNITY LAND RIGHTS

### LEGAL CONSTRAINTS IMPOSED BY THE TORRENS LEGAL SYSTEM

Despite the clear protection of the rights of indigenous peoples under the Constitution and other laws, its implementation is still fundamentally hampered by section 9 of the agrarian reform law, which whilst also recognising the rights of indigenous communities to their ancestral lands, it expressly subjects this recognition to the proviso that the Torrens System shall be respected.

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### EXECUTIVE INTERVENTIONS DILUTING THE POWER OF IPRA

Throughout the years, several administrative regulations issued by executive departments have systematically diluted the rights of indigenous peoples, especially their right to self-determination. For example, the rules on the FPIC process had been revised by the NCIP twice, which increases the ability of resource extractive operations of private corporations to commence more easily and at a faster speed. By having the said guidelines, it actually weakens the very mechanisms communities may have used to defend their land and livelihoods.

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### FAILURE OF THE NCIP TO ISSUE CADT AND CALT

Two decades after the IPRA was enacted, numerous indigenous communities have yet to obtain their Certificates of Ancestral Domain Title or Certificates of Ancestral Land Title from the NCIP, as a result of an overwhelmingly bureaucratic process. The NCIP has also engaged in a lengthy process to engage other government departments, forming a group known as the Joint Administrative Order No. 1 with other executive agencies. This has caused further delays in the issuance of the certificates, totally undermining the rights of indigenous peoples to their lands, territories and resources in the process.

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### POWERFUL PROVISIONS OF RESOURCE EXTRACTIVE LAWS

Principally, the mining legislation is overgenerous in its favour of the industry and foreign investors. In fact, it was due to pressures from the global extractives industry, northern countries and international financial institutions, which pushed for structural adjustment programmes that

had forced the country to change their mining laws to facilitate the entry and access of multinational mining corporations in mineral rich countries like the Philippines. Under the law, foreign entities are allowed to enter into financial or technical assistance agreements with the government. However, in reality, foreign corporations have gone beyond these legal limitations and have fully controlled mining operations in the country. Additionally, the industry also enjoys other benefits such as a four-year tax holiday, tax and duty-free capital equipment imports, value added tax exemptions and accelerated depreciation and income tax deductions, when posting losses.

As such, the mining legislation has also been used to sabotage local government's efforts to protect the health, environment and livelihoods of their constituents; corrupt the free, prior and informed consent process of indigenous peoples; render inutile the environmental impact assessment (EIA) system and bring about a long string of human rights violations against communities and individuals resisting mining.

For example, since 1997, the NCIP has revised the rules on the FPIC twice, with the underlying objective to make the entry of extractive projects easier and faster. The 2006 FPIC Guidelines, for example, was issued to give way to the commitments made under the Mineral Action Plan of the Philippines facilitating the rapid and easy entry of mining projects in ancestral domains through the so-called harmonisation of the IPRA with the mining law. In fact, as early as 2008, almost 60 per cent of projects that require FPIC were mining projects.

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### OVERLAPPING JURISDICTIONAL ISSUES

Indigenous communities also suffer from the unresolved overlapping jurisdictional issues between different government agencies such as the Department of Agrarian Reform, the Department of Environment and Natural Resources, the Land Registration Authority and the National Commission on Indigenous Peoples. This has implication on the ability of the legal system to resolve land encroachment and violation incidents efficiently.

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## STATE OF KEY GOVERNANCE INDICATORS

### LAND TENURE SECURITY

Despite the existence of the IPRA, the efforts in providing thorough security to the indigenous customary land tenure are hampered by a jurisprudential system which favours big corporations over the rights of indigenous peoples. Compounding the matter, the provision of land tenure security of indigenous peoples also suffers from conflicting jurisdictions of different government agencies. In the face of land encroachments and violations by corporations, affected communities usually begin by participating in dialogues with the representatives of government agencies, local governments and corporations. Thereafter, if all negotiations continue to produce unsatisfactory outcome, they may continue with demonstrations, blockades and other mass actions.

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### FREE, PRIOR AND INFORMED CONSENT (FPIC)

The real challenge faced in the implementation of the FPIC process arises from the fact that 60 per cent of ancestral territories suffer from the intrusions of destructive development projects. In a country that has prioritised a policy of offering its natural resources to foreign investors, the state does not wish to risk losing such foreign investments due to a strong FPIC process. As a result, although the FPIC process is guaranteed under the IPRA, it has suffered from deliberate executive dilutions, rendering it unable to fulfill its fullest legal potential in protecting the rights and interests of indigenous peoples.

For example currently, the FPIC process may exclude individuals who are opposed to destructive projects that violate their community land rights for the purpose of producing and securing the façade of community consent that is in favour of companies. Added to this burden is that migrant indigenous communities are also not included in the FPIC process under the justification that the land in their possession does not qualify as ancestral territories. One great example of this is the struggle of Ifugaos from Didipio, Nueva Vizcaya. Upon the entry of the mining company, their FPIC was not considered necessary since they are deemed as migrant communities.

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### ACCESS TO INFORMATION

The Executive Order No. 2, also known as the Freedom of Information Order was signed by the president in 2016. Among others, the executive order mandates full public disclosure on public records, documents, papers, transactions,

decisions and research data used as the basis for policy development, and any information requested by the public. It applies to all government offices, including the national government and its offices, departments, bureaus, and instrumentalities, including government-owned and controlled corporations.

The coverage of the order includes written documentation in the form of papers, reports, letters, contracts, meeting minutes, books, maps, photographs, audio-visual recordings and data stored electronically. There are however nine exceptions made to the order, largely on the basis of executive privilege, national security, defence, international relations, law enforcement, public or personal safety, privacy, premature disclosure and banking and financial legislation. There is more room for ambiguity for exceptions relating to the privileged confidentiality of certain disclosures made to the state, certain aspects of public operations and any other types of exceptions.

Therefore, with respect to the requests for information related to land, forest and natural resource management, these may not have been necessarily fulfilled by the state, at all times. Government agencies sometimes tend to ignore requests for the details on mining or plantation operations, under the pretext of security concerns.

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### COMMUNITY GOVERNANCE STRUCTURE AND THE ROLE OF WOMEN

Despite the good intentions of many of the existing laws, it can be construed that the government somehow fails to respect some of the traditional governance structures of the affected communities. First, during the selection process of the Indigenous Peoples Mandatory Representative in a given area, some members of the indigenous communities have alleged that notices informing them of the supposed selection process were defective, with no proper campaign to educate community members on this matter. Meanwhile, the manipulation of the FPIC process of including and excluding individuals based on the likelihood of their respective acceptance or rejection of particular destructive projects may even sometimes cause a breakdown in communal and familial relationships, when siblings, parents and neighbours are pitted against each other. Such practices run counter to their customary laws, which are largely structured around community consensus and fair representation. Additionally, the role of women may also be affected despite the fact that women are recognised to have rights and opportunities equal to men under the law. Men are also often listed as beneficiaries and recipients of various provisions of state support and compensation or benefit-sharing mechanism payments, as the primary heads of households recognised by the state.



## EXAMPLES OF COMMUNITY RESISTANCE AND MOBILISATION ACTIONS

### REVIVING *SULAGAD*, THE INDIGENOUS AGROECOLOGY SYSTEM

LRC is currently involved in a project in the forested landscape of the Teduray and Lambanigan ancestral domain in Maguindanao Province in the island of Mindanao, in partnership with Timuay Justice and Governance (TJG). A key component of the project is the revival of the *sulagad*, which is essentially an indigenous system of knowledge and practices of agroecology and food sovereignty that has largely been replaced by commercial farming methods and systems. In 2017, LRC completed the first phase of the project where a field-based research on the *sulagad* was conducted. This became the basis for a *sulagad* conference among Teduray and Lambangian community leaders, where they resolved to work for its revival. During the second year

of the project, LRC will be working with five focus villages for further *sulagad* education and advocacy. Women leaders and community members have thus far also volunteered to be trained as facilitators and coordinators for this work. Further, there will also be a TJG conference which will discuss on how the principles of *sulagad* that were traditionally practised at the family and community levels may be applied at the level of an ancestral domain, as well as other issues surrounding food sovereignty and community economic and livelihoods development.

Challenges to the success of this endeavour include garnering the support of local government units and agencies to opt for the *sulagad* farming system, instead of large-scale commercial farming. Further, focus must also be given on weaning away indigenous farmers from chemical based commercial agriculture.

## THE PHILIPPINES RECOMMENDATIONS

The following are the transformative political and legislative measures that can ensure greater protection of community land rights, the prevention of land grabs and human rights violations and the sustainable management of natural resources in the Philippines:

- i With respect to strengthening land tenure security, the amendment or revision of the current Joint Administrative Order No. 1 signed by the National Commission on Indigenous Peoples with the other government agencies, the establishment of the necessary collaborative mechanisms must be pursued to help avoid and/or resolve conflicts and operational issues resulting from the enforcement of the respective mandates, programmes and policies of the agencies involved in the implementation of land affairs.
- ii With respect to the FPIC process, the establishment of a process based on the full disclosure of information for informed and proper decision making by indigenous peoples must be developed. The process should be free from any external pressure or coercion from representatives of the government or extractive companies. The FPIC process should be obtained from legitimate indigenous peoples, whether they are directly or indirectly affected by such projects, and in accordance with their customary laws and practices. There should be a creation of an independent oversight group that will attest to the truthfulness and transparency of the FPIC process. There should also be a thorough evaluation of the National Commission on Indigenous Peoples in the fulfilment of its mandate in protecting the interests and rights of indigenous peoples.
- iii The implementation of the Mining Act 1995 with a strict adherence to the requirements of the FPIC process, as well as all other environmental regulations. The requirements to respect the indigenous customary land rights under this law are indeed substantial. As such, the government must not resort to shortcuts to favour big corporations in their applications for mining permits and/or mineral agreements. The policy lens of government must shift from being profit-oriented to prioritising the protection of the environment and respecting and upholding the rights of indigenous people and local community members.
- iv The implementation of the Comprehensive Agrarian Reform Law in a manner which will allow the attainment of its original intention. Mechanism must be developed to effectively detect the possibility of farmers being manipulated by business interests to facilitate further land grabs. The National Commission on Indigenous Peoples must also be further empowered to effectively protect the rights of indigenous peoples, where accountability mechanisms are developed to address the gross failure on the part of the commission to protect lands and rights of indigenous peoples effectively.



WOMEN FIGHTING AGAINST SUGARCANE PLANTATION IN BIBILA, SRI LANKA

## SRI LANKA

### BACKGROUND

Sri Lanka is an island of 6.5 million hectares, with a population of around 21 million, with 99 per cent of the population is described to fall within four main cultural groups. British colonisation aggressively sought to develop a plantation economy by legalising the land grabs of the largely rural peasantry, at first focusing on coffee, before turning to tea, rubber and cinnamon.

The Sinhalese is the majority ethnic group which forms 75 per cent of the population, a predominantly Theravada Buddhist community. The Sri Lankan Tamils, who form around another 11 per cent of the population, have had a long history on the island, beginning from the turn of the last millennium. The religious association of the majority of Sri Lankan Tamils is commonly connected to aspects of Hinduism and the Vedic tradition, although around 20 per

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cent are described to be Roman Catholics, a minority religious community that emerged after the Portuguese conquest. The Sri Lankan Tamils are culturally distinguished from the Tamils of Indian origin, or other ethnicities of South Indian origins, who form around four per cent of the population. They are largely descended from the indentured labourers brought in by the British to work in the tea plantation sector, although a smaller percentage had also migrated on their own to engage in trading activities on the island. The Muslims who are estimated to form nine per cent of the national population, are predominantly the mixed descendants of Muslim Arab traders who settled on the island around the eighth century and other ethnicities from South India with a Muslim heritage. Today, most members of the community are Arabic or Sinhalese influenced Tamil speakers, although many are also Sinhalese speakers.

The indigenous peoples of Sri Lanka meanwhile are known as the Veddas, a reference which has linkages with *vedu*, which means hunting in Tamil, although the community also self-references as the *Wanniya-laeto*, which means forest dwellers, *wanni* being the word for the dry monsoon forest. They are the earliest inhabitants of the island, who now number less than 3,000. As a very small minority, the Vedda language is also infused with Sinhalese and to a certain extent Tamil, and is greatly endangered today. Their ancestral homeland is in the central hilly region of the island, although now the population is concentrated in the flatlands located within the dry zone of the island. Few other Vedda communities who recognise their Vedda heritage, also exist elsewhere on the island, despite having largely assimilated into Sinhalese or Tamil cultures. The Veddas traditionally adhere to a nature-based spirituality, with a strong component of honouring ancestral relationships and fluid enough to have integrated some Buddhist and Hindu elements. They were originally a hunter and gatherer community before their adoption of shifting cultivation, traditionally possessing common customary lands. Originally, their diet used to be based on proteins sourced from wild animals and fish and supported by wild plants and honey. However, the community has been victimised and even relocated by national development and land resettlement schemes, such as the Mahaweli and Galoya irrigation schemes and the reservation of national parks.

The colonial plantation legacy is clearly culpable for the landlessness faced to this very day by the country's rural communities, the challenges that Sri Lanka has to confront in its attempts at decentralisation and power devolution and the severe escalation of ethnic tensions in the country. Between 1983 and 2009, the island suffered from a civil war, fought between armed Tamil secessionist groups, who demanded for an independent Tamil state in the northern and eastern parts of the island, and the Sri Lankan government, which eventually defeated the former. The conflict included several high profile political assassinations and human rights abuses on both sides. It caused much hardship to the population, resulting in community displacement, the loss of land, properties and livelihoods, environmental destruction and the estimated deaths of more than 100,000 people.

Today, the major exports of Sri Lanka include tea, textiles, gemstones and industrial minerals. Apart from the expansion of plantations growing new commodities such as oil palm, banana and hybrid corns, the development of other types of destructive activities has continued to cause the loss of community lands and environmental destruction. These include large public or private infrastructure and industrial construction activities, some of which supported by massive foreign investments, from highways, irrigation systems, airports, harbours, hydropower plants to mining operations, in particular for metals, sand and gems.

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## LEGAL PROVISIONS ON COMMUNITY LAND RIGHTS AND NATURAL RESOURCES

### CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Article 27 of the Sri Lankan Constitution addresses the directive principles of state policy for the establishment of a just and free society. Article 27(2) states the objectives of the state. Among others, these include the full realisation of the fundamental rights and freedoms of all persons; the promotion of the welfare of the people by securing and protecting as effectively as it may, a social order in which social, economic and political justice shall guide all the institutions of national life; the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good; and the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the state, state agencies or in the hands of a privileged few, but are dispersed among and owned by the people of Sri Lanka. Article 27(7) calls for the elimination of economic and social privileges and disparities as well as the exploitation of peoples while article 27(8) prohibits detrimental concentration of wealth and the means of production. Article 27(14) guarantees that the state shall protect, preserve and improve the environment for the benefit of the community.

In 1987, the Indo-Sri Lanka Peace Accord was signed between India and Sri Lanka in order to resolve the Sri Lankan civil war. Among others, the peace accord sought to introduce the devolution of power of the central Sri Lankan government to the provinces, implemented through a series of constitutional amendments and the enactment of a separate legislation to establish provincial councils during the same year. However, despite the fact that the autonomous provincial councils are not placed under any ministerial authority, some of their functions are still structured under central executive bodies. The accord, which also called for the withdrawal of Sri Lankan troops in the northern part of the island, the surrender of the Tamil secessionist groups and the cease of Indian support to the armed Tamil separatist groups, did not succeed in putting an end to the civil war, which ended only in 2009.

Under this new legislative content, matters related to land including land rights, land tenure, land transfer and alienation, land use, land settlements and land improvement, are listed under the jurisdiction of the provincial councils. This jurisdiction however has certain stipulated limitations, which tend to reinforce the power of the central government. For example, state land shall continue to vest in the central government and the alienation or disposition of state land remains under presidential authority, with



provincial councils functioning in an advisory capacity. Inter-provincial irrigation and land development projects, which tend to cause large land acquisition and community displacement and involve large land redistribution and resettlement undertakings, will also remain under the authority of the central government. As a result, while the selection of land allottees in relation to such schemes will be under the authority of the central government, the actual application of the settler selection criteria and other incidental matters, from the degree of their landlessness, income level, family size to their agricultural background will be within the powers of the provincial councils. As such, it comes to no surprise that the devolution of power has not been successfully implemented in the Northern province, where the majority of the Tamil population resides. Further, under these amendments, the central government is also supposed to establish the National Land Commission, for the purpose of formulating a national policy on the use of state land with the participation of the provincial councils. However, the commission has failed to be established to this very day.

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## CROWN LANDS ENCROACHMENTS ORDINANCE 1840

During the colonial era, the very brief Crown Lands Encroachments Ordinance 1840 was enacted to proclaim the legal primacy of crown land, later re-named as state land through later revisions. This law served to deter communities from accessing, claiming and using lands deemed as crown or state land without authorisation. This law stipulates that all forest, waste, unoccupied or uncultivated lands shall be presumed to be the property of the state until the contrary is proven. In addition, cinnamon lands that are in continuous possession of the state for at least 30 years, demonstrable by way of the carrying out of tree peeling activities on the land, are also deemed to be state property. Further, shifting agricultural land left in fallow is also proclaimed to be the same, except in certain provinces, but only if a private grant had earlier been issued over the land and all the associated requirements of registration and taxes had been fulfilled by the owners.

This law set the framework for the simultaneous criminalisation of rural communities who were engaged in traditional forms of agriculture that was based upon their customs, and the expansion of private and foreign-controlled plantations, in particular for coffee, tea and rubber in nineteenth century Sri Lanka.

## BRIEF EXPLANATION OF SRI LANKAN LAND LAWS<sup>3</sup>

As a result of its specific historical colonial context, unlike in many other countries, Sri Lanka does not have a single main land legislation. Instead, for land matters, there are several key statutes of more modest lengths, each regulating a highly specific area of concern. Collectively, as a result of its colonial legacy, the evolution of the body of Sri Lankan land laws appears to be driven by different sets of political and economic aims.

First, beginning from the nineteenth century, there was the colonial attempt to claim as much land as possible for the British crown, undertaken for the clear purpose of developing a British-controlled, export-oriented plantation economy. These legal strategies were employed to the serious detriment of rural communities, whose agricultural activities were traditionally based upon their oral customs without any formal documentation. Second, there were then various post-independence efforts to correct this historical injustice. These however were largely focused on consolidating the power of the central government over land matters, ostensibly for the purpose of establishing land reforms and redistribution measures, which eventually may not necessarily be considered as very successful. Subsequently, there were attempts to devolve the power of the central government to the provinces, which however have been confronted by various political and administrative challenges. Therefore, on the whole, Sri Lanka continues to grapple with the lasting impacts of the colonial legacy of British land grabs, with the peasantry and the poor today continuing to live without adequate land tenure security and the rights to access agricultural land.

Generally, the land laws do not make any mention on the rights of the island's indigenous communities. However, they do contain limited provisions on the administration of the rights of rural agricultural communities, recognised as units of villages under the leadership of village councils, many of whose members may not possess any documentary titles to their land but are merely allowed to use land that is deemed as state land.

3. Apart from directly accessing the laws listed in this section, the analysis under this section is also further enriched by information from Land Watch Asia (2011).



## LAND SETTLEMENT ORDINANCE 1931

The effort of the colonial power to claim more land under its authority was followed up by the Land Settlement Ordinance 1931. This law regulates the settlement of land rights claims by interested parties, over forest, waste and unoccupied land, land left in fallow or land that had been under cultivation or undergone some form of improvements in the last 25 years, prior to the issuance of a settlement notice by the state. Prior to any settlement decision or agreement, an inspection and inquiry process will first be conducted. However, the failure to submit any claims within three months from the date of the notice will enable the state to claim such land as its property and will then be dealt with on account of the state. This law also permits for a settlement to be undertaken with the consent of affected villagers, whereby a settlement in favour of the state, may still provide for the establishment of communal reserves for land left in fallow, for the use of the village inhabitants, which may only be used by the state for other purposes with the consent of two-thirds majority from the community.

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## LAND DEVELOPMENT ORDINANCE 1935

This law was enacted to introduce the systematic development and alienation of state land in the country. This law was the first legislative attempt developed to correct the historical injustice and landlessness that had ensued amongst rural agricultural communities as a result of earlier colonial legislative strategies. It has continued to be used as a legal instrument to provide land for the landless peasantry. This law defines state land as all land to which the state is lawfully entitled to, together with all the rights, interests and privileges attached to it. Among others, it provides for the establishment of land authorities and the general institutional framework relating to the issuance of permits and grants, land disposition and land succession as well as ejection and taxes.

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## CROWN LANDS ORDINANCE 1947

More than a decade later, this law came into force to provide greater procedural details on the issuance and registration of grants, leases and other dispositions relating to state land, including the issuance of permits for resource extractive activities such as mining, lands vested for the use of the state and village councils, land and road reservation, management of foreshore and freshwater resources, land taxes and land administration structures and regulatory processes. This law has been utilised to authorise industrial development activities and the issuance of long-term leases to private corporations.

## LAND REFORM ACT 1972

This law was enacted to introduce a ceiling on the extent of individual agricultural land ownership and authorise a land redistribution process for the purpose of increasing agricultural productivity and employment opportunities, under the authority of the newly established Land Reform Commission (LRC). The land redistribution process includes the alienation of land for landless persons, whereby prioritisation is conducted in accordance with their districts of residence.

Under this law, land ownership and holding is established on an individual basis. It covers land ownership title that is subject to a mortgage, or a lease, usufruct or life interest exercised by another party or when the land is held on a permit or grant under the Land Development Ordinance 1935, or when the land is held under a lease from the state. In cases where the land is co-owned, each owner is treated as a distinct legal entity. In cases where the agricultural land is owned by a private company or a cooperative society, its shareholders shall still be deemed to own such land on an individual basis, in proportion to the shares held by each shareholder of such a group.

The ceiling was set at 10 hectares for paddy land and 20 hectares for land cultivated with other agricultural crops, per individual. Consequently, any ownership or holding of land in excess of the ceiling will be subject to a process that results in the excess land to be vested in the LRC which may be further held by the affected party under a statutory lease from the LRC. The vesting is preceded by an elaborate compensation payment process and has the effect of giving the LRC the absolute title to such land, free from all encumbrances.

Section 14 of the law permits the LRC the rights to utilise the land vested in its name in several ways. First, it may alienate such land for the development of agriculture or animal husbandry by way of sale, exchange, rent purchase or lease to landless persons or persons whose land ownership has remained below the ceiling. Second, it may alienate such land by way of sale, exchange, rent purchase or lease for agricultural development or animal husbandry for a cooperative or collective farm. Third, it may alienate such land by way of sale in individual allotments to persons for the construction of residential houses. Fourth, the LRC may also manage the land as a farm or a plantation. Fifth, the land may also be utilised for any public purpose. Sixth, the land may also be alienated by way of sale to minors, whose parents had been dispossessed of such land as a result of their landownership being in excess of the ceiling. In fact, section 14 of the law also allows for a three-month period for a statutory lessee to apply for the transfer of their land to any adult child or parent of the child, by way of sale, gift or exchange. Essentially, these provisions allow for a wealthy landowning family to still undertake planning for the re-distribution of their land amongst its members. Seventh, the land may also be alienated to statutory corporations authorised to undertake agricultural and plantation activities under two other different laws.

In 1975, amendments were introduced to also bring estate land owned or possessed by public companies under this law. The amendments stipulated that all such land shall be deemed to vest in and be possessed by the LRC and to be managed under a statutory trust for and on behalf of the LRC.

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## LAND GRANTS (SPECIAL PROVISIONS) ACT 1979

Seven years later, the Land Grants (Special Provisions) Act 1979 was enacted to provide for more detailed procedures to enable the transfer, free of charge, of the agricultural or estate land vested in the LRC to landless persons.

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## OTHER LAND RELATED LAWS

Apart from the above, Sri Lanka has also legislated other land laws to address specific regulatory measures on land. Among others, these include:

- The Land Acquisition Act 1950 deals with the acquisition of land by the state.
- The State Lands (Recovery of Possession) Act 1979 provides for procedures for the state to recover the possession of land from persons deemed to be in unauthorised possession or occupation of state lands.
- The Mahaweli Authority of Sri Lanka Act 1979 addresses the implementation of the Mahaweli Ganga Development Scheme, a multipurpose national development programme which commenced in 1961, with the participation of both public and private sectors. Among others, the scheme involves the construction of reservoirs, irrigation distribution systems and hydroelectric power generation and land development plans for the purpose of increasing agricultural productivity and the resettlement of farming communities.
- The Agrarian Development Act 2000 came into force with the repeal of the Paddy Lands Act 1957 and the Agrarian Services Act 1979. It regulates farmer organisations and the protection of the agricultural community, among others.

## FOREST ORDINANCE 1908

This is the country's main forestry legislation. It provides for the protection of forests and forest resources, the regulation for the leasing of forested land, the harvesting of timber and other forest produce as well as the reservation of reserved forests and village forests, among others. Reserved forests can be established on state land, which has been declared as so under the land resumption, land settlement or the land acquisition laws. The prohibition against several activities within the reserved forests may potentially interfere with the traditional way of life and sustainable livelihood strategies of forest dependent rural communities. Although the village forest is reserved for the use of intended local communities, certain species of protected trees within it are still deemed to be the property of the state. Further, the state is also free to make further regulations on the management of such forests. The legislation does not contain any specific references to the rights of the indigenous peoples in the country.

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## FAUNA AND FLORA PROTECTION ORDINANCE 1938

The law provides for the protection and conservation of the country's fauna, flora and biodiversity, the prevention of their commercial and other misuse. It provides for the establishment of three classes of conservation areas, namely, national reserves, sanctuaries and managed elephant reserves. National reserves may be further subclassed into five categories, namely, strict natural reserves, national parks, nature reserves, jungle corridors and marine parks. The prohibition against several activities within such conservation areas certainly interferes with the traditional way of life and sustainable livelihood strategies of forest-dependent rural communities. For example, the indigenous Vedda or *Wanniya-laeto* community have been adversely affected by the reservation of the Maduru Oya National Park, apart from the Mahaweli land resettlement and dam construction activities in their ancestral land. The affected communities were forcibly relocated to a Mahaweli resettlement scheme where they were expected to resettle as rice farmers.

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## MINES AND MINERALS ACT 1992

This law regulates mining activities in the country. The issuance of any form of mining licence renders that mineral ownership within the licensed area is vested in the state, which supersedes the private ownership rights of any person to the soil on, in, or under which the minerals are found or situated. Mining licences are prohibited to be issued on areas that have been legally protected under various laws for their cultural, environmental, historical and other recognised importance, including any land falling within any reserved forest, village forest, national reserve or sanctuary without the approval from the concerned ministers.

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## POLITICAL AND LEGAL THREATS ON COMMUNITY LAND RIGHTS

### LANDLESSNESS AND THE COLONIAL LEGACY OF A PLANTATION ECONOMY

The land grabs of community land in Sri Lanka began intensely with British rule, which officially commenced in 1815. The British targeted the island for the intensive development of a colonial plantation economy, especially for coffee, tea and rubber. The British sought to capture as much community land as it could through newly introduced statutory measures, to turn untitled land into crown land, later renamed as state land. Community traditional agricultural practices such as land fallowing, an integral feature of subsistence agriculture in the dry zones for the restoration of soil fertility, were legally used against the people, in order to bring more land under crown/state ownership. By the early twentieth century, the British had transferred close to 900,000 hectares of crown land under its authority, or 14 per cent of the island, to private plantation estates.

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### INSTITUTIONAL CHALLENGES TO EQUITABLE LAND RIGHTS REDISTRIBUTION

Since the 1930s onwards, policy and legislative efforts had been introduced to address the landlessness brought about by the British colonial legacy on the island through the granting of land titles or long-term leases to the landless. These may involve land reform laws for the purpose of land redistribution, the execution of land development schemes with a land resettlement component, the development of village expansion plans and even the regularisation of land encroachment, where landless farmers deemed to have encroached upon the state land were granted with some form of rights to the land that they had steadfastly worked on without state permit.

However, such efforts have been met with various institutional challenges. For example, there are more than 40 land laws being enforced in the country, giving rise to conflicting or overlapping jurisdictions of government agencies and their statutes. At the same time, the devolution of powers from the central government to the provinces, as required by the constitutional amendments in 1987, has not been successfully implemented, for reasons that may be more political than technical, creating confusion within the land administrative system at the expense of the landless. In such governance conditions, unwarranted political interferences and corruption may also result in the access to land being captured by private entities, further complicating matters for the landless. Last but not least, some of the island's peasant communities had also been either adversely affected or in fact, displaced, as a result of conflicts and natural disasters.

### UNEQUAL ACCESS TO STATE LAND BETWEEN THE PRIVATE SECTOR AND COMMUNITIES

More than 80 per cent of total land area in Sri Lanka is classed as state land, with only the remaining 20 per cent is held under private ownership. As such, the state is the largest landowner in the country. Many private corporations and citizens in fact are holding their land under long-term leases from the state or other forms of tenurial agreements. However, despite the many policy and legislative attempts to provide land for the landless and the poor, access to state land has yet to be equally allocated across different sectors. Private corporations on the whole continue to have a larger access to state land in comparison to individual landless persons. The difficulty for individual citizens, especially the poor and marginalised, to obtain freehold land ownership is a reality which continues until today.

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### COMPULSORY LAND ACQUISITION OF LAND AND GAZETTING EXERCISES

Compulsory land acquisition for development projects and land reservation for a variety of public purposes including special development zones, forest reserves and conservation areas may be undertaken, with adverse impacts on affected communities.

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### POWERFUL PROVISIONS OF RESOURCE EXTRACTIVE LAWS

The laws on mining are also prejudicial to community land rights, whereby the issuance of a mining licence renders that mineral ownership within the licensed area is vested in the state, which supersedes the private ownership rights of any person to the soil on, in, or under which the minerals are found or situated.

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## STATE OF KEY GOVERNANCE INDICATORS

### LAND TENURE SECURITY

Despite the development of various legislative and executive measures by the state to provide more land tenure security to communities who have been deeply affected by various historical injustices, in particular to landless rural and agricultural communities, the country's land administration system is still grappling with various institutional inefficiencies, community poverty and the aftermath of a civil war that had caused considerable human displacement.

Although land reform laws have been introduced to put a ceiling on individual land ownership and nationalise land resources, for all intents and purposes, private estates and the landowning class have largely retained control over their land, although the method and distribution of this control may have been altered by legislative requirements. 60 per cent of the beneficiaries of the land reform and redistribution initiatives were reportedly made up by public sector agencies, while the peasantry received only 10 per cent of the redistributed land.

Furthermore, without a robust governance system, the regularisation of encroachments tends to increase the opportunity for corruption and even environmental violations to occur, when the encroachments take place within protection areas, such as buffer zones. Poverty may also affect the ability of peasant communities to hold on to any form of rights issued by the state to them, when they end up having to engage in the transfer of such rights.

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### FREE, PRIOR AND INFORMED CONSENT PROCESS (FPIC)

There are no provisions in all the relevant laws which clearly outline the state's mandatory responsibility to appropriately inform the affected communities on matters that will affect them, including their land rights. There are no provisions either for the implementation of the FPIC process.

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### ACCESS TO INFORMATION

Article 14A of the country's Constitution guarantees that every citizen or a group of incorporated or unincorporated citizens, to the right of access to any information for the exercise or protection of a citizen's right. It covers information held by the executive at all levels of governance or any person in possession of such information relating to any executive institutions. Restrictions to these rights however can be made in accordance with democratic principles, on the grounds of national security, territorial integrity, public safety, the prevention of disorder or crime, protection of health, morals or the reputation or rights of others, privacy,

prevention of the contempt of court, protection of parliamentary privilege, prevention of the disclosure of information communicated in confidence or the maintenance of the authority or impartiality of the judiciary.

Based on this constitutional provision, Sri Lanka enacted its Right to Information Act 2016 which established the Commission on the Right to Information. The law elaborates on the responsibility of the executive to maintain catalogued and indexed records, biannual ministerial reports and public authority annual reports, as part of their duty to provide information to the public. Its section 9 stipulates the ministerial duty to inform the public and affected persons on the intention to carry out any foreign or locally funded projects costing in excess of USD100,000 or 500,000 rupees, respectively, three months prior to their commencement. In urgent cases, this period may be minimised to one week, provided the reasons for the urgency is communicated to the commission. Subsequently, continual updates must also be provided by the executive throughout the implementation of such projects.

However, the new law has yet to be effectively implemented, as reported by a civil society monitoring group, based on their search on government websites and telephone conversations, in order to determine whether the basics of the right to information, as required under the law, has been fully operationalised.<sup>4</sup> Among others, the group reported on the difficulty faced in determining the officers in charge of overseeing the implementation of the law in many ministries and in digitally accessing and sending information request forms.

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### COMMUNITY GOVERNANCE STRUCTURE AND THE ROLE OF WOMEN

The land laws do recognise the existence of the village councils, within the governance structure of traditional rural communities. Apart from this, there are three prominent customary legal systems in Sri Lanka which are still recognised by the state. First, is the Kandyan law, rooted in the ancient Sinhalese land tenure tradition. Gender equality is certainly not foreign to the Kandyan land customs. In marriages where the husband relocates to live on his wife's land, she traditionally maintains absolute ownership over the land and has the power to request for him to leave. Fraternal polyandry was also practised until it was outlawed recently in modern times. Second, the Thesavalamai law is applicable for Tamil communities in the Jaffna peninsula. Third, the Muslim law is also practised in relation to land and property inheritance by the Muslim community.

In rural and indigenous communities, the position of women as the matriarch of the family is still very much respected. However, patriarchal values are also well-established in the larger society, which may also minimise the participation of women in communal leadership and decision-making.

4. For more information, please see the website of the Sri Lanka Brief at <http://www.srilankanbrief.org>.



## EXAMPLES OF COMMUNITY RESISTANCE AND MOBILISATION ACTIONS

### FORESTRY GOVERNANCE, LEGAL AID AND ENVIRONMENTAL AWARENESS PROGRAMMES

CEJ has been actively carrying out forestry governance, free legal aid and environmental awareness programmes in the course of its work. Such activities are greatly focused on empowering and supporting community participation in environmental, land and forestry governance and the protection of community land rights. Since 2004, CEJ has filed over a hundred civil actions at the courts under its free legal aid programme. Currently, two legal actions have been filed against the development of banana and sugar cane plantations.

Today, CEJ continues to be heavily involved in providing assistance to farmers affected by the development of oil palm, banana, sugar cane and hybrid corn plantations. It supports the mobilisation and protests of affected farming communities and plantation workers and inter-community exchanges between affected communities. Among the major campaigns CEJ is currently focused on is the struggle

of the local communities in Rideemaliyadda, Bibile, in the Uva province, who are defending some 25,300 hectares of their farm lands and forests from being grabbed by a proposed sugarcane plantation.

Furthermore, CEJ also conducts community awareness programmes to provide greater understanding amongst communities on environmental law and governance, including the environmental impact assessment (EIA) process. Currently, the organisation has fostered partnerships with around 40 community groups who conduct ground monitoring activities on any illegal or environmentally destructive operations which take place in their respective localities.

The organisation is also involved in campaigns which deal with specific harmful consequences of plantations. One is focused on halting the use of any hybrid or terminator seeds that may destroy local varieties and involve the heavier use of pesticides. Another is focused on managing human-elephant conflicts, promoting the use of natural fences instead of electric fences, which have caused numerous deaths of the animal.

## SRI LANKA RECOMMENDATIONS

The following are the transformative political and legislative measures that can ensure greater protection of community land rights, the prevention of land grabs and human rights violations and the sustainable management of natural resources in Sri Lanka:

- i The state must take active steps to ensure that the private sector and the public, in particular the poor and the landless are treated equally by the governance system. The landless must be given more access to state land.
- ii Amendments must be made to existing land laws to repeal legal provisions that are no longer relevant and only serve to further complicate the land administrative system, to the detriment of communities and their land rights.
- iii Land acquisition and its associated processes such as compensation payments or the provision of alternative land to affected persons must be made more transparent and systematic to ensure that justice is served.

- iv The centrality of good governance in the land administration system must be further promoted. There must be strict measures to ensure the accountability and transparency of policy and law enforcers in order to prevent them from surrendering to political influence or engaging in corruption.
- v The participation of women in communal leadership and its decision making process must be further encouraged.
- vi The introduction of corrective measures to remedy the traditional practice where women are unable to automatically inherit and own their family lands.
- vii The maintenance of the customary rights to lands and other traditional practices, including protecting common public lands such as reservoir catchments, riverbanks, beaches, forests, wetlands etc. that are not part of any conservation forests or wildlife areas.



WOMAN WORKING FIELDS USING AGROECOLOGY METHODS CLOSE TO HER HOME

# PALESTINE

MEMBER COUNTRY  
**THE PALESTINIAN ENVIRONMENTAL  
 NGOs NETWORK – FRIENDS OF THE  
 EARTH PALESTINE (PENGON)**

## BACKGROUND

In 1917, Britain issued the Balfour Declaration to declare its support for the ‘establishment in Palestine of a national home for the Jewish people’, an outcome of the sustained lobby efforts by the international Zionist movement. Although the precise boundary of this proposed Jewish nation was not identified by the declaration, from the sixteenth century until the end of the First World War in 1918, this historical land of Palestine had been under the control of the Ottoman Empire. Historically, a large part of the Palestinian homeland was occupied by various peasant and herder communities who had lived based on their traditional oral laws and customs.

Following the victory of the Allied Powers in the First World War over the Central Powers, the latter of which the Ottoman Empire was a party to, the empire was partitioned by the victors through several agreements, one of which was the Sykes-Picot Agreement, which had been entered into by Britain and France secretly in 1916, to define their respective future spheres of influence in the region. In 1922, the partition, among others, led to the creation of the British Mandate of Palestine under the mandate system of the Covenant of the League of Nations.

The conflicts that ensued in the subsequent years in Palestine as a result of the various post-war developments, the colonial political agenda, the Arab independence movement and the organised Zionist efforts to purchase land and promote the migration of Jewish settlers in Palestine, finally developed into inter-communal wars that culminated into the Arab-Israel war, which lasted from 1947 until 1949. This war was known as the *Nakba* in Arabic or literally, the Catastrophe. The *Nakba* was marked by a period of intensive ethnic cleansing campaign which saw 750,000 Palestinians being expelled from their homes and land by Zionist militia and Israeli forces. The state of Israel proclaimed its independence in 1948.

Consequently, most of the Palestinian refugees settled in the West Bank and the Gaza strip, which were respectively controlled by Jordan and Egypt until the Six-Day War in 1967, forming the present Palestinian population of 11.5 million. The remaining Palestinians within the Israeli state meanwhile have been denied their full rights as citizens and are often subjected to various discriminatory practices.<sup>5</sup> Today, 78 per cent of the Palestinian land has been claimed as part of the state of Israel while the West Bank and the Gaza strip take up 21 per cent and 1 per cent of the territory, respectively.

5. The National Committee for the Heads of the Arab Local Authorities in Israel (2006).



In the 1990s, the Oslo Interim Accords divided the West Bank into three administrative areas. Area A which makes up around 18 per cent of the West Bank, is exclusively under the control of the Palestinian National Authority. Another 18 per cent is known as Area B, which is partially under the control of the Palestinian National Authority. The remaining land, Area C and a nature reserve, which takes up the remaining 61 per cent and 3 per cent of the land, respectively, is under Israeli military and administrative control, along with the entire border. In Area C, more than 200 Israeli settlements have been built with nearly 1,000 km of roads.



PALESTINIAN TRAINING IN AGROECOLOGY IN THE FIELD

## LEGAL PROVISIONS ON COMMUNITY LAND RIGHTS AND NATURAL RESOURCES

### LAND GRABS IN PALESTINE AND THE SYSTEMATIC ATTEMPT AT THEIR LEGALISATION BY ISRAEL

Prior to the establishment of the state of Israel in 1948, Zionist interests, largely represented by the Jewish National Fund (JNF) and its subsidiary, Himanuta, had already begun to privately purchase Palestinian land, an effort that benefitted greatly from the many inefficiencies and loopholes of a legal system that was in transition from Ottoman to British hands. The *Nakba* of 1947-1949 further facilitated this process when Palestinian Arabs were forced to flee from their lands and properties, giving rise to the opportunity for the unlawful seizure and repossession of the lands and properties that they were forced to leave behind by Zionist forces.

After the formation of the state of Israel in 1948, Israeli legal structures were systematically developed to secure ownership of the lands and properties that had been and continued to be seized and to ensure their continued possession by settlers and the state of Israel. Such efforts eventually also affected the land that was held under customary control by the Bedouin herder communities in the desert of Al-Naqab and other local peasant communities. Apart from housing access, the state of Israel also strategised further to ensure the capture of agricultural land and water supply, at the expense of Palestinians.

The following is the chronology of how the various historical legal structures were utilised to conduct the land grab of almost an entire homeland.

6. Legal information for this section was largely sourced from BADIL (2000).

### LAWS UNDER OTTOMAN AUTHORITY AND THE BRITISH MANDATE 1918-1947<sup>6</sup>

Nearing the end its rule, the Land Code 1858 was introduced by the Ottomans in an effort to implement a more organised land registration system for the purpose of strengthening its tax regime and political control over the area.

This law classified land into five classes. The two most common land types were the *mulk* and the *miri*. *Mulk* referred to private land under the total ownership and utilisation of its owners, which is akin to the freehold lands of the common law system. *Miri* meanwhile included state land on a long-term lease for specific purposes which must be adhered to by the leasee, vacant land, escheated land, land where some form of presumption of title existed without a grant and land where its title grant had been lost. *Miri* land also included communal and common lands. Meanwhile, *waqf* was land or property traditionally donated in perpetuity as a religious endeavour, intended for specific beneficiaries, who may benefit either from its direct utilisation or the revenues derived from its utilisation, held in trust by legally recognised Muslim or Christian entities. *Matruka* referred to the commons which included pasture lands. *Mewat* was a reference to undeveloped or idle state land, which could be turned into *mulk* by royal permission or into *miri* by demonstration of continuous utilisation, with the payment of land tax.

After 1918, the Ottoman land law and its land and property registration system gradually transitioned into a British one. Eventually, the British introduced the Land (Settlement of Title) Ordinance 1928 to continue the effort of registration. In these conditions fraught with the intersections of colonial and Zionist agendas, the land registration system became susceptible to the manipulation by parties with vested interests, at the expense of communities and families who had long exercised their lawful rights over their lands for actual residential use as well as for livelihood activities such as agriculture, herding and trade. Inevitably, these conditions rendered many plots of land to become

highly vulnerable to strategic land purchases by organised Zionist interests, sometimes from absentee landowners.

Zionist interests had in fact begun its land purchase campaigns by the end of the nineteenth century and were largely represented by the Jewish National Fund (JNF) and later its subsidiary, Himanuta. These organisations were strictly self-governed by their organisational bylaws which prohibited the resale of Palestinian land that had been purchased to non-Jewish interests. Five other British laws had to be enacted later due to Palestinian Arab concerns on such land purchases and the ensuing evictions of agricultural tenants by mostly absentee landlords who may not even be Palestinian. However, these British laws also continued to fail in protecting the interests of the Palestinian Arab landowners, including the customary herder and agricultural communities.

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## ISRAELI LEGAL STRUCTURES AND LAWS<sup>7</sup>

As a result of the *Nakba*, Israeli forces obtained military control over 78 per cent of Palestinian land under the British Mandate, which led to the proclamation of the independence of the state of Israel. Many Palestinian Arabs therefore had to flee their homes and land. Most sought refuge in the Gaza Strip and West Bank, which before the Six-Day War in 1967, were part of the territories of Egypt and Jordan, respectively. At the same time, the Arab political and professional elites had also been mostly exiled. In the involuntary absence of the Palestinian Arabs, the confiscation of lands and properties by the state of Israel could be carried out with little physical or legal challenges. Members of the remaining Arab population within the new state of Israel meanwhile were primarily rural and impoverished, with little land tenure security.

Subsequently, Israel proceeded to evolve a series of legal structures and more than 40 laws to consolidate its power to seize, retain, expropriate, reallocate and reclassify Palestinian land and properties that it had appropriated, apart from utilising existing colonial laws. The purpose of such laws was to legalise the transfer of Palestinian Arab lands to Jewish citizens of the Israeli state, or the Israeli state itself, especially for the purpose of establishing secure settlement and agricultural areas.

This was first done by enacting the Emergency Regulations regarding the Cultivation of Fallow Lands and Unexploited Water Sources 1948, which served to legitimise the seizure and re-allocation of appropriated Palestinian Arab land, even retrospectively. In addition, the British Mandate Defense (Emergency Regulations) 1945 was also used to authorise the military closures of targeted areas, which disrupted the access of Palestinian Arabs to their land, leading to the eventual creation of more 'vacant' land and properties and absentee landowners. The Land (Acquisition

By the time the *Nakba* broke out, Zionist interests had managed to secure ownership of around 7 per cent of Palestinian land. Many Palestinian landowners meanwhile found themselves in a very vulnerable situation. Many had had their rights to their land lost as a result of the manipulation of the land registration system by parties with vested interests. Others with ownership certificates unwittingly lost their access to their documents after submitting them to the various local British Land Settlement Offices. With the division of Palestine after the ceasefire agreements of 1948-1949, the access of Palestinian landowners to their certificates was effectively cut off when the documents were transferred to for archival purposes in colonial administrative centres such as London, Amman and West Jerusalem.

for Public Purposes) 1943 meanwhile could also be used to forcefully acquire more Palestinian lands, albeit with some compensation payments, for purportedly public purposes, which included the construction of Jewish settlements in areas with a predominantly Palestinian population.

Following this, the Emergency Regulations regarding Absentee Property 1948 (revised in 1950) was established to facilitate the expropriation of ownership of land and properties deemed to be in fallow, vacant or even supposedly abandoned. Such land and property would subsequently be deemed as state property. Their ownership would be vested in the Custodian of Abandoned Property (later renamed as Custodian of Absentee Property), which possessed wide ranging and at times, discretionary administrative powers, including those on the seizure of land and properties and the issuance of short leases over them to third parties, as well as quasi-judicial authority.

Absentees were defined by the said law as citizens or subjects of one of the Arab countries at war with Israel, in any of such countries or in any part of Palestine outside of the jurisdiction of the regulations, or Palestinian citizens who had abandoned their normal place of residence. However, the law also contained the provision which allowed the exemption of absentees who left their homes due to their fear of Israel's enemies or military operations, or who were capable of managing their property efficiently without aiding Israel's enemies. In effect, such provisions served to discriminate against the reclaim of such land and properties by the returning Arab owners, but not to those of Jewish descent, although all had vacated their homes and land due to the war. Worsening the situation, the law also shifted the burden of proving non-absentee status to the owners.

Subsequently, the Absentee Property Law 1950, the Development Authority (Transfer of Property) Law 1950 and the State Property Law 1951 were enacted. The first empowered the Custodian of Absentee Property to sell land

7. Legal information for this section was largely sourced from Forman and Kedar (2004).



under its custody to the Development Authority alone; the second allowed the Development Authority to sell land to the state and the Jewish National Funds only; and the third prohibited the state from transferring ownership of agricultural land to any party except to the Jewish National Fund, the Development Authority or a local authority.

These three laws served to settle the new ownership and possession of land and properties that had been confiscated by the Israelis during a period of war. They bypassed the need to demonstrate conclusive evidence of permanent abandonment by their original owners, who had in reality been forced to temporarily flee to seek refuge elsewhere due to the war, and minimised the risks of their legal reclaim. It also systematically closed the loop of the ownership and possession of such lands and properties.

A few years later, the Land Acquisition (Validation of Acts and Compensation) Law 1953 was enacted. This law served to legitimise the seizure of land that did not fit into the classification of absentee property and hence, its possession by any party at this point of time, had no proper legal basis within the legislative framework of the state of Israel. By this time, the state of Israel had already been inundated by legal claims of many of the original land and property owners who had returned and did not prove to be absent after all, but found that they could no longer even retake the possession of their land and properties. Generally, such claims were met with very little success, mostly limited to a handful of non-landed properties. In order to protect the interests of the settlers and Israeli military, the state instituted a policy refusal to reject any claims on rural lands.

The law applied to all land that was used for what is deemed as essential development, settlement and security purposes between May 14, 1948 and April 1, 1952, and after this stipulated period, was still needed for at least one

of the three purposes and was not in the possession of their original owners. The expropriation of such land was limited to a year after the enactment of the law. Expropriated land would be held instead by the Development Authority, which in turn was authorised to sell the land only to the state and the JNF. To bring the process to a close, owners of expropriated land and properties would receive compensation based on their market value in 1950, with a three per cent annual interest.

Subsequently in the 1960s, three laws were collectively enacted with the aim of consolidating a unified legal system on land governance for Israel. These three were the Basic Law: Israel Lands 1960, the Israel Lands Law 1960 and the Israel Lands Administration Law 1960. In addition, the Israeli and the JNF also entered into a covenant to further define the terms of their partnership in supporting the new legislative framework. The design of these legal initiatives produced a series of intended legal effects. First, they legitimised the existence of what is defined as 'Israel Lands', which comprised lands under the control of the state of Israel, the Development Authority and the Jewish National Fund. Second, they prohibited the sale or transfer of such lands, except amongst the three entities. Third, they established key institutions for the legal system, including the Israel Lands Council and the Israel Lands Administration Agency.

Finally the Land Law 1969 concluded the consolidation of the legal system for land and property governance. This law sets out all the rights, rules and regulations concerning the ownership and possession of immovable properties and land. It repeals previous land categories and any remaining Ottoman land laws and establishes the category of public and reserved lands as well as a land registry. It also proclaims that unworked land as state property, affecting the rights of the Bedouin community to their customary grazing grounds in the al-Naqab desert.



FARMER USING AGRO ECOLOGY METHODS IN PLANTING CLOSE TO HIS HOME

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## POLITICAL AND LEGAL THREATS ON COMMUNITY LAND RIGHTS

### LOSS AND DESTRUCTION OF PALESTINIAN LAND AND PROPERTIES

The unlawful construction and expansion of settlements and their related infrastructure on Palestinian land are a defining feature of the Israeli occupation. Tens of thousands of Palestinian homes and properties had been demolished and at least 100,000 hectares of land had been seized for Israel's settlement and agricultural projects. The Israeli legal structures have also been designed to provide further supporting legislative mechanisms for settlers to build their homes and establish their farms on the confiscated land. Land is also further seized by the Israeli state for strategic military purposes and to secure the access to water for homes and agricultural land. In all, Israel is estimated to have claimed close to 93 per cent of Palestinian land, including 80 per cent of Muslim *waqf* property as its de facto state land.

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### UNCULTIVATED LAND HELD UNDER LOCAL CUSTOMARY RIGHTS CLAIMED AS ISRAELI STATE PROPERTY

The Land Law 1969 proclaims that unworked land that had been held under customary claims without any registration as state property. Such land includes the vast grazing grounds of the Bedouin community in the desert of al-Naqab.

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### SCARCITY OF LAND LEADING TO COMMUNITY LAND DISPUTES AND SOCIAL CONFLICTS

The scarcity of land as a result of Israeli occupation and the on-going conflicts and violence have also given rise to frequent localised conflicts amongst Palestinian communities themselves. In addition, the local government also has the right to acquire land for purposes that are deemed to be for public interest, although with some compensation payment. Consequently, conflicts pertaining to boundary disputes often arise between neighbouring parties. These can take place between owners of residential properties and in particular between owners of agricultural land. Sometimes they can lead to actual land infringement actions and even physical assault incidents. Local communities often attempt to resolve such conflicts through a mediation process with the participation of community leaders, failing which, affected persons may have to resort to seeking judicial interventions. This creates a difficult atmosphere pervading fractured local neighbourhoods where personal animosity and social conflicts are normalised.

### UNSTABLE LAND PRICES AS A RESULT OF THE SCARCITY OF SAFE LAND

The continued confiscation of land and properties and the on-going conflict have also resulted in unstable land prices. For example, a land and property confiscation exercise in one area, may drive the price of land and property up in other areas. On the other hand, land and property prices in confiscated areas, along with those located in the surrounding vicinity, may plunge sharply if confiscation threats become imminent. This in turn would also adversely affect trade and other livelihood activities in all such areas.

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### DISCRIMINATION AGAINST PALESTINIAN FARMERS

Most of Palestinian agricultural areas are located in Area C, which is under Israeli control. Consequently, the access of the Palestinian Arabs to this land has become very restricted. Palestinian Arab farmers do not have the rights to unrestricted access of their land, the freedom of movement and the liberty of managing their land autonomously. In fact, Palestinian Arab farmers may have to face unnecessary hindrances in carrying out even basic agricultural operations such as ploughing and constructing the wells, springs and irrigation systems that are necessary for their farms. All these in turn prevent Palestinian Arab farmers from optimally and sustainably managing their land and water resources.

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### DISCRIMINATION AGAINST THE REMAINING PALESTINIAN ARABS WITHIN ISRAEL

Palestinian Arabs who have continued to remain in Israel today privately own no more than three per cent of the land after decades of expropriation.

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## STATE OF KEY GOVERNANCE INDICATORS

### LAND TENURE SECURITY

Generally, the persistent aggression of the Israeli state against the Palestinian Arabs and their land, has festered a sense of great anxiety amongst the latter, in respect of the security and safety of their land, properties and economic activities. There is a pervading sense of fear that more land will be confiscated by Israeli settlers within the community. There is also confusion for the community on the most appropriate course of actions in the face of such threats. For example, the simple action of selling off one's land for fear of the possibility of its value or even physical loss may be wrongly construed by others as a disloyal act of cooperating with the Israeli occupiers and settlers, who have consistently engaged in attempts to purchase more Palestinian lands, especially those that are located in close proximity to confiscated areas. Furthermore, confiscation will also bring the threats of further restrictions.

On the whole, Israeli aggression against the Palestinians and their land has contributed towards the scarcity of land and soaring land prices, especially in residential areas deemed to be safer from threats of confiscation. Many people have remained landless and unable to purchase their homes. Further, there is also a high rate of migration and relocation, in the struggle to find and build a stable home and family life.

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### FREE, PRIOR AND INFORMED CONSENT (FPIC)

Today, Israeli military and legal aggression continues to commit gross human rights violations and land grabs against the Palestinian Arab community. In these conditions, the issue of the Palestinian Arab consent is irrelevant to the aggressors.

### ACCESS TO INFORMATION

Today, Israeli military and legal aggression continues to commit gross human rights violations and land grabs against the Palestinian Arab community. In these conditions, the issue of the Palestinian Arab access to information is irrelevant to the aggressors.

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### COMMUNITY GOVERNANCE STRUCTURE

Despite Israeli occupation, many Palestinians still refer to the authority of the Ottoman Land Code 1858 in describing the rights and entitlements to their lands and properties. The Palestinian attachment to their lands and properties that had been confiscated by Israeli forces has remained intact to this very day. This perseverance can be seen in the maintenance of spiritual, cultural and emotional bonds between religious communities and their *waqf* properties and the Bedouin communities and their grazing lands. Communities also continue to organise themselves, resorting to community leadership structures to mediate internal land conflicts which may arise as the result of Israeli aggression.

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## EXAMPLES OF COMMUNITY RESISTANCE AND MOBILISATION ACTIONS

The following are some of the strategic activities undertaken by PENGON and other civil society organisations to continue working on the protection of the rights, interests and well-being of Palestinians. First, PENGON is involved in many activities to continuously raise the awareness on the rights of the vulnerable and marginalised Palestinian Arab community at local, national and international levels. Second, it is also involved in empowering such vulnerable and marginalised communities through various ways. These include supporting communities in maintaining their resistance against the Israeli decision of constructing the apartheid wall, in developing their own community infrastructure and in carrying out their own efforts to rehabilitate their damaged lands. Last but not least, PENGON also continues to highlight the continued land rights violations of the Palestinian Arab community through various documentation activities and media tools, publicising issues which affect the access of the community to water, natural resources and a clean and safe environment.

### PALESTINE RECOMMENDATIONS

As the occupation of Palestinian land by Israeli forces and the continued Israeli aggression against the Palestinian Arab community are a human rights conflict of international scope, the way forward is also dependent on the dynamics of international politics. As such, at the level of civil society, these are some of the acts of resistance that have been undertaken to protect the land rights of the Palestinian Arab community:

- i The increased focus on the development of legal actions against unlawful Israeli occupation of Palestinian Arab lands and properties that are based on historical documents that have recently been accessed.
- ii The carrying out of advocacy and lobby activities at regional and international levels.
- iii The continuation of activities to raise the awareness amongst the Palestinian Arab community on the legitimacy of their land rights.



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THE LAWS OF LAND GRABS IN ASIA PACIFIC



**Friends of  
the Earth**  
Asia Pacific