

**JKOASM Submission for
Malaysia's United Nations Universal Periodic Review 2013**

Titled:

Malaysia Falls Short of Human Rights Protection for the Orang Asli Indigenous Peoples'

Introduction: Orang Asli Network Peninsular Malaysia (JKOASM)

1. The Orang Asli Network of Peninsular Malaysia (JKOASM) is part of Malaysia Indigenous Peoples Network (JOAS) and has previously submitted reports during the 2009 UPR. JKOASM comprises a network of 400 Orang Asli villages/settlements out of 852 recognised Orang Asli settlements in Peninsular Malaysia. JKOASM is the strong voice for and by the grassroots Orang Asli demanding recognition for human rights, rights as Orang Asli (Generic name for Indigenous Peoples in Peninsular Malaysia) and Malaysian citizens.
2. As Indigenous Peoples, customs, cultural practices and the way of life of the Orang Asli are closely related and highly dependent on customary land and the environment inherited, used, preserved, managed and governed by the local community for generations.
3. In its UPR National Report 2008, the Malaysian government has conceded that Orang Asli possess distinct customs and culture and are free to practice and preserve their customs and culture. However, this statement does not reflect their practice which clearly denies and eliminates the rights of Orang Asli through the use of various policies and strategies in country, as well as its rejection of the recommendation of 8(a) to ratify ILO Convention 169 on Indigenous Peoples and Tribes. This stand contradicts the Malaysian government's unconditional support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
4. To the state legislature and executive, Orang Asli customary land rights are not recognised unless Orang Asli lands are expressly declared as Orang Asli land by the individual State Authority. Orang Asli are frequently accused of encroaching into "State land" despite inhabiting their customary lands long before the formation of Malaysia. In addition, the government refuses to give effect to binding precedents of the Malaysian superior courts such as *Sagong Tasi*,¹ *Adong Kuwau*² and *Madeli Salleh*³ where Orang Asli rights to customary land are recognised as valid and enforceable property rights notwithstanding that these lands are not expressly reserved or granted by the individual State to Orang Asli.
5. In its 2008 National UPR Report, the Malaysian government only touched upon the issue of the customary land rights of the Penan in Sarawak without mentioning the Orang Asli in Peninsular Malaysia. Their refusal to address the issue suggests that the Malaysian government does not recognise Orang Asli customary land rights. Their refusal also suggests that the government does not recognise our rights to preserve and develop our customs, cultures, traditions, beliefs, knowledge and way of life as Orang Asli.

¹ [2002] 2 *Malayan Law Journal* 591; [2005] 6 *Malaysian Law Journal* 289 (Mahkamah Rayuan, Malaysia).

² [1997] 1 *Malayan Law Journal* 418; [1998] 2 *Malayan Law Journal* 158 (Mahkamah Rayuan, Malaysia).

³ [2008] 2 *Malayan Law Journal* 677 (Mahkamah Persekutuan, Malaysia).

DENIAL OF ORANG ASLI IDENTITY

6. According to paragraph 96 of the Malaysian government's National UPR Report 2008, the Orang Asli of Peninsular Malaysia are Indigenous Peoples. However, a recent statement by the Deputy Director General of the Department of Orang Asli Development (JAKOA), Mr. Nisra Nisran bin Asra Ramlan made during the National Human Rights Commission of Malaysia (SUHAKAM) National Inquiry on Indigenous Land Rights on 30th March 2012 casts doubt as to whether the Malaysian government truly recognises Orang Asli as Indigenous Peoples of Malaysia. This statement shows the government's inconsistency in its stand regarding its policy on recognition of Orang Asli and their distinct identity.⁴
7. In the National UPR Report 2008, the government stated that Orang Asli should be assimilated into mainstream society so that they are not 'left behind'. This statement is alarming because development objectives should not be dependent on the assimilation of any Indigenous community as they would have negative implications on the community, including the loss and devastation of culture and identity. The government assumes that the backwardness and poverty experienced by the Orang Asli is mainly attributable to the Orang Asli way of life. On the contrary, Orang Asli way of life must be celebrated as a distinct way of life that has existed for thousands of years. Any development policies must take into account the unique context of the Orang Asli and their special connection to their customary lands.
8. Freedom of religion is a fundamental right that must be respected. However, the government has many a time not respected these rights. In Machap Umboo, Melaka, the Alor Gajah Municipal Council gave an order to demolish the community chapel on 25th November 2011⁵⁶ without affording the Orang Asli a right to be heard. Other Orang Asli community chapel demolition cases include Kampung Jias, Gua Musang, Kelantan on 4th June 2007⁷⁸ and in Kampung Orang Asli Kuala Masai, Johor in 2005⁹¹⁰. All these cases were brought to the courts and won by Orang Asli. In all these cases, JAKOA (formerly known as JHEOA) did not provide any form of legal assistance for the Orang Asli. Affected Orang Asli had resort to volunteer lawyers who handled these cases pro bono.
9. There has been an Islamization program with material benefits implemented by JAKOA over the years, designed to change Orang Asli identity. This program is potentially damaging to our culture and rights as Indigenous Peoples.

⁴ Timbalan Ketua Pengarah JAKOA menerangkan sebab kenapa UNDRIP tidak diterima-pakai; Dari Inkuiri Tanah SUHAKAM 30 Mac 2012 https://facebook.com/note.php?note_id=361422953901637&_ft_=fbid.299759560094155.

⁵ <http://thestar.com.my/news/story.asp?file=/2012/5/11/nation/20120511195002&sec=nation>.

⁶ <http://www.freemalaysiakini2.com/?p=62228>.

⁷ <http://gospel2poor.org/jias.html>.

⁸ <http://www.malaysiakini.com/news/68585>.

⁹ <http://thestar.com.my/news/story.asp?file=/2010/9/24/courts/7092378&sec=courts>

¹⁰ <http://www.nst.com.my/latest/johor-govt-will-compensate-orang-asli-community-1.121892>

10. The continued existence of JAKOA as the sole department dedicated for the administration of a particular ethnic community indicates that the government have a condescending framework in dealing with the Orang Asli which is an affront to Orang Asli dignity and self-determination. As far as the State is concerned, JAKOA have the absolute power to represent and to make decisions for Orang Asli. This is a form of discrimination that has to be stopped.
11. The Tok Batin (Village headmen) has no absolute power to represent his people because the Tok Batin is fully controlled and paid by JAKOA in accordance with Act 134 (1954) and Village Headmen Protocols (1998). This system violates and defies traditional Orang Asli leadership and decision-making systems that have existed and practiced for generations. Further, the current system may and has influenced many Batin not be involved in any issues or initiatives deemed as critical of the government. Moreover, the Batin system does not fully reflect Orang Asli traditional institutions or leadership systems. Orang Asli possess other traditional institutions that have not been recognised by the government (for example, the MaiRaknak system and Lemaga Adat for the Semai and Jahut ethnic groups respectively).¹¹
12. Additionally, community representatives such as JKOASM members frequently become victims of harrasment by the police, JAKOA, gangsters and government politicians especially when actively champion Orang Asli rights and when they are involved with opposition political parties.

LAW AND POLICIES FOR ORANG ASLI

13. The denial of Orang Asli rights to their customary land has been documented through a memorandum by JHEOA/JAKOA in 2002 which states Orang Asli are merely squatting on State land because Orang Asli lands are not formally recognised by the grant or reserve of lands. This stand is contrary to the courts decisions mentioned in paragraph 4 above.
14. The Orang Asli Land and Development Policy (DPPTOA) which was approved by the National Land Council on 14th December 2009 infuriated the grassroots Orang Asli. A memorandum of protest was handed to the Prime Minister's representative and Minister in Ministry of Rural Development on 17th March 2010 by a crowd of 4,000 Orang Asli. In the DPPTOA, the government denies Orang Asli rights in several respects:
 - 1) The DPPTOA does not recognize nor respect Orang Asli customary land and communal arrangements.
 - 2) The DPPTOA was approved without the free, prior, informed consent (FPIC) or meaningful consultation with affected Orang Asli.
 - 3) In agregate, the DPPTOA will result in the loss of more than 70% of Orang Asli land. The government equates Orang Asli as illegal immigrants. The government assumes that Orang Asli are landless people, hence the government wants to 'give' land to the Orang Asli.
 - 4) The total area that the government wants to 'give' by way of titles to individual heads of households is much smaller than the actual customary land area. The

¹¹ See Prosedur/Protokol Pelantikan Batin Orang Asli.

- State government and the local authorities and JAKOA have the absolute power to decide on how big the area and the location of the allocation.
- 5) The individual titles to be 'given' pursuant to the DPPTOA is only for housing and farming and will be managed by a third party before the land is handed to the Orang Asli head of household after a period of 15 years.
 - 6) individual titles will only be 'given' to the head of household.
 - 7) land rights under the individual title is limited to a period of 99 years.¹²
15. The DPPTOA does not comply with international standards contained in the UNDRIP which was unconditionally supported by the Malaysian government on 30th June 2006 and 13th September 2007 during the Human Rights Council Assembly and United Nations General Assembly respectively.
 16. During the 2009 UPR, the Malaysian government stated that Orang Asli customary land rights are 'adequately protected under existing laws, including the right to compensation'. This statement is misleading and far from the truth. The Aboriginal Peoples Act 1954 (Act 134), the principle act for the administration of the Orang Asli in Peninsular Malaysia, does not guarantee the rights of the Orang Asli. Sections 6(3) and 7(3) provides that the individual State Authorities have the rights to revoke Orang Asli areas and Orang Asli reserves without the need for prior consultation with Orang Asli. The decision on whether or not Orang Asli land is protected lies in the sole discretion of the individual State Authorities (see sections 6(1) and 7(1) Act 134). As at December 2010, only 14.2 percent of official Orang Asli land were gazetted by the State Authorities¹³. The remaining customary land of the Orang Asli are experiencing widespread encroachment or under threat of it. During the SUHAKAM National Inquiry, Orang Asli from Peninsular Malaysia have lodged 289 reports on land encroachment and land grabs.¹⁴
 17. According to sections 10 and 12 in Act 134, compensation for the loss of land will only be granted at the discretion of the State Authority, and compensation is limited to crops grown by the Orang Asli. Under section 3(3) Act 134, an Orang Asli has no authority to decide on whether or not he/she is an Orang Asli because such authority lies in the hands of the Minister in charge of the Orang Asli (a non-Orang Asli).
 18. Orang Asli can be denied from contacting and interacting with outsiders/outside world under sections 14 and 15 Act 134. Act 134, an act designed for the protection, well-being and advancement of Orang Asli has been manipulated by the government to control and dominate Orang Asli, especially in terms of land/customary lands, the advocacy of their rights and assertion of their identity. There is no other ethnic group in Malaysia, including other Indigenous Peoples from Sabah & Sarawak who are subject to such potentially repressive laws.
 19. The incidents of Orang Asli arrested by the police for encroaching government land is on the increase. For example:
 - a. On 17th December 2012, two Orang Asli from Kampung Tanam, Rompin, Pahang were arrested on charges that they were interfering with a contractor

¹² Dasar Pemberimilikan dan Pembangunan Tanah Orang Asli 2009.

¹³ Jabatan Kemajuan Orang Asli, *Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015* [Department of Orang Asli Development Strategic Plan 2011-2015] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language), 55.

¹⁴ Hasmy Agam, 'Opening Address' (Speech delivered at the Public Hearings of the National Inquiry on Indigenous Land Rights, Kuala Lumpur, 27 March 2012).

who was clearing the area for a government project when in fact the land concerned was part of Kampung Tanam's customary land which had been cultivated with various crops.¹⁵

- b. On 14th February 2012, six Jakun Orang Asli from Buluh Nipis, Pahang were charged in courts for allegedly entering Wildlife Reserves and 'disturbing' *Keruing* trees. This area was in fact their customary land for generations. Five of the Orang Asli were fined RM8000 for every charge and one of them was released with a warning, because he was under age. Only one of five was released because he managed to pay the fine while the other four had to serve a sentence of three months because they could not afford to pay the fine.¹⁶

DEVELOPMENT PROJECTS THAT BRINGS DESTRUCTION TO THE ORANG ASLI

20. Palm Oil Commercial Replanting (TSK) is a government project scheme aimed at uplifting the economic standard of Orang Asli through palm oil plantation. This scheme is conducted by JAKOA and RISDA¹⁷ for the Orang Asli. However, it has woefully fallen short of its aim. TSK effectively destroys crops that have been cultivated for generations and pollutes and reduces the customary land area. The income and profit is also very low and unfair to Orang Asli participants. There is also no systematic or transparent information of dividend payments to Orang Asli participants. Moreover, there have been complaints of deceased participants' ownership or title in the TSK being transferred to third parties without the heirs' consent. The use of the letter of undertaking by the government is a form of trap for Orang Asli participating in the TSK. When participants sign the undertakings, they no longer have the choice to opt out from the scheme without paying a fine to be decided by these agencies.¹⁸

21. Within this past 4 years, the number of cases related to forced or questionable evictions and encroachment on Orang Asli customary lands are again on the increase. For example:

- a. The building of the Ulu Jelai Dam in Cameron Highlands, Pahang affects 13 Orang Asli villages. The Pahang Chief Minister said that only one village (Kampung Susu) is affected by the project and will have to be evicted to make way for the project. According to the Environment Impact Assessment (EIA), all 13 villages must be evicted. The Orang Asli in this area were not informed about the outcome of the EIA. When this project is implemented, the affected Orang Asli are going to face the risk of pollution, encroachment, destruction and even the possibility of losing their lives.^{19 20}
- b. The building of Ulu Telom Dam in Kuala Lipis, Pahang will commence in 2017 and this project affects six Orang Asli villages (including their customary land). The Orang Asli in this area have not been informed about this project but the

¹⁵ <http://www.sinarharian.com.my/edisi/pahang/beri-notis-sebelum-musnah-hasil-tani-1.103983>

¹⁶ <http://www.perakspeak.com/v2/index.php/image-gallery/238-jakun-orang-asli-of-buluh-nipis-pahang.html>

¹⁷ Rubber Industry Smallholders Development Authority (RISDA).

¹⁸ Akujanji Peserta Ladang TSK dan RPS (JAKOA Pahang).

¹⁹ OA Serah Memo ke TNB Part, 1: http://www.youtube.com/watch?v=viHlqS_Edhg

²⁰ <http://www.youtube.com/watch?v=amJ43WDTDM8>

process of forcibly evicting the Orang Asli in this area is actively taking place.²¹

THE QUALITY OF EDUCATION FOR ORANG ASLI

22. JKOASM is disappointed that recommendations 22 and 51 of the UPR Report are yet to be properly implemented by the Malaysian government.
23. The quality of education for the Orang Asli students in the interior is still unsatisfactory in terms of infrastructure, facilities, learning, and poorly trained teachers. It is known that some teachers with discipline issues or bad records are sent to teach in these rural Orang Asli postings.
24. Furthermore, the education for Orang Asli students and generally all Malaysian students do not include the teaching of history, geography and culture related to Orang Asli to elevate the dignity of Orang Asli culture. On the contrary, there are cases where teachers inculcate Islamic values by force in school. For example in SK Bihai, Kelantan, a teacher slapped four students for not reciting Islamic prayer (doa makan) before meal.²²
25. With reference to recommendation 51, as explained earlier, whenever there are cases where Orang Asli are defending their customary land their fundamental rights, Federal government lawyers (as lawyers for JAKOA) would be in court fighting the Orang Asli rather than providing legal assistance.

JKOASM RECOMMENDATIONS

26. In enacting new law or introducing new policies affecting Orang Asli and their customary lands, the government must respect, implement and adopt the standards contained in the UNDRIP. Recommendation 58 of the UPR Report provides that the Malaysian Government shall continue 'to share and extend its experience and best practices in the efforts in developing comprehensive policies and strategies for the advancement of indigenous groups which focus on uplifting the status and *quality of life* of the community via socio-economic programmes'. Programmes for enhancing the 'quality of life' in Orang Asli must necessarily incorporate Orang Asli customary lands, part and parcel of Orang Asli well-being. If the Malaysian government's pledge to consider ratification of the ICCPR and ICEARD (recommendation 1) is to be taken seriously, it must take steps to recognize Orang Asli customary land rights and rights to internal-self determination as these rights are protected under both instruments.
27. Any implementation of any program or development projects that involve Orang Asli must apply FPIC standards as recommended by the UN Permanent Forum on Indigenous Issues, and this consultation process must involve all affected Orang Asli, not just the leaders or selected representatives.

²¹ EIA – Cadangan Pelaksanaan Projek Hidroelektrik Telom – Di Daerah Lipis, Pahang.

²² <http://www.freemalaysiakini2.com/?p=60146>

28. The Malaysian government must respect the rights to Orang Asli freedom of speech and association and refrain from prescribing support for any one political party.
29. The Malaysian government and its agencies especially JAKOA and other enforcement agencies must stop threatening and intimidating Orang Asli merely because Orang Asli are defending, championing or exercising their rights to customary lands, freedom of speech and political freedom as Malaysian citizens