

A case study of indigenous traditional legal systems and conflict resolution in Rattanakiri and Mondulkiri Provinces, Cambodia

EXECUTIVE SUMMARY



Cambodia



Ministry of Justice



Ministry of Interior

© 2007, Ministry of Justice, Ministry of Interior and UNDP Cambodia
A case study of indigenous traditional legal systems and conflict resolution in Ratanakiri and Mondulakiri Provinces, Cambodia

DISCLAIMER

The responsibility for opinions in this publication rests solely with the authors. Publication does not constitute an endorsement by the United Nations Development Programme or the institutions of the United Nations system.

**A case study of
indigenous traditional legal systems
and conflict resolution
in Rattanakiri and Mondulakiri
Provinces, Cambodia**

EXECUTIVE SUMMARY



Abbreviations and terms used

| | |
|---------|--|
| DKCC | District/Khan Cadastral Commissions |
| DRC | Dispute Resolution Committee |
| HA | Highlander's Association |
| ICCPR | International Covenant on Civil and Political Rights |
| IPs | Indigenous peoples |
| IYDP | Indigenous Youth Development Project |
| MoI | Ministry of Interior |
| MoJ | Ministry of Justice |
| MLMUPC | Ministry of Land Management, Urban Planning and Construction |
| MRD | Ministry of Rural Development |
| OLMUPCC | Office of Land Management, Urban Planning, Construction and Cadastre |
| PILAP | Public Interest Legal Advocacy Project |
| PMCCs | Provincial/Municipal Cadastral Commissions |

I. Overview

This paper presents a summary of the findings of a participatory action-research Case Study into Indigenous Traditional Legal Systems in Rattanakiri and Mondulakiri Provinces (the Case Study).¹ The research took place during March and April 2006. The two main objectives of the Case Study were:

To describe traditional justice systems and practices and develop recommendations to policy-makers on amendments to legal provisions and institutional arrangements which would ensure indigenous peoples have improved access to justice through both their customary legal practices and the formal justice system.

2

To describe some of the difficulties indigenous peoples face in finding just resolutions to their problems outside their villages and to suggest some possible solutions.

Indigenous peoples of Cambodia are a marginalised group with poor access to justice through the formal legal system.³ A major factor causing this marginalisation is the almost total absence of formal legal services and institutions where indigenous peoples might be able to have their cases fairly adjudicated. Often social protest is the last resort when individuals and community members have been unable to seek just redress from the courts for their land disputes. 'Protesters' are often jailed for long periods, without appropriate hearings, legal procedures or legal representation.⁴

The rapid and uncontrolled development processes in indigenous areas (which have traditionally been rich in natural resources) is also a marginalising factor. With improved infrastructure throughout the country there

1 See Backstrom, M. Ironside, J. Paterson, G. Padwe, J. and Baird, I.G. 'A Case Study of Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Mondulakiri Provinces, Cambodia.' UNDP/Ministry of Justice, Legal and Judicial Reform Programme, August 2006, for a more detailed discussion of the issues presented in this summary.

2 In this abstract the words 'informal', 'traditional' and 'customary' will be used interchangeably.

3 See also Yrigoyen Fajardo, Raquel Z., Kong Rady and Phan Sin. 2005. Pathways to Justice: Access to Justice with a Focus on Poor, Women, and Indigenous Peoples. Phnom Penh: UNDP Cambodia/Ministry of Justice, Royal Government of Cambodia.

4 See for example 'Land Alienation in Indigenous Minority Communities - Ratanakiri Province, Cambodia' NGO Forum on Cambodia, August 2006 - page 44 and 'ATTACKS & THREATS AGAINST HUMAN RIGHTS DEFENDERS IN CAMBODIA 2006' - page 25, LICADHO, December 2006, <http://www.licadho.org>.

has been a rapid increase in migration to remote regions. This has resulted in large-scale alienation of indigenous community land and increasing numbers of land and natural resources conflicts. Wealthy and powerful people, inside and outside the government, and especially outsiders to the region, are better able to take advantage of the opportunities afforded by expanding markets and improved transport. Highland villagers, on the other hand, find themselves without their land, the necessary capital, resources and knowledge to take advantage of new opportunities.

This summary will discuss some of the main policy issues that need to be dealt with as part of a reform process to enhance access to justice for indigenous peoples. It will also describe the process of participatory research undertaken and summarise the main recommendations.

II. Key Findings and Main Policy Issues

2.1 Key Findings

Indigenous Communities overwhelmingly trust, use and support their customary laws and conflict resolution processes within their communities.

This is perhaps the main finding from the village consultations, with community members clearly stating that they wish to be able to continue practicing these. The vast majority of the indigenous people that were interviewed see the traditional system as more fair, more pro-poor and easier for local people to access than the formal justice system.

The findings of the research demonstrated that the concept of justice for indigenous communities extends much wider than simply punishing the offender. It also includes other important elements such as compensating the victim, restoring harmony in the community and reconciling the two parties. To achieve these other aspects of justice requires a wide and active participation of community members in the conflict resolution process. The result of such a process is that indigenous community members have a strong and clear sense of right and wrong. From this perspective, the decisions indigenous community members see coming out of the courts do not conform to any moral code they use, implement and know. As villagers from Reu Hon Village put it, in the courts:

“What is wrong is right and what is right is wrong.”

Some problems with traditional systems raised included: at times unfair and overly heavy fines and, more recently, cases in which more powerful people pay off the adjudicators. Women also complained that sometimes their suggestions and input is not given the same weight as suggestions/ input from men. However, in general women supported their traditional justice systems, as the proceedings are carried out in their local languages and they are supported by their families. Indigenous youth also generally support their system, but some see traditional systems as not being able to deal with modern day conflicts, especially those involving outsiders.

Indigenous Groups are marginalised in the formal legal system

As a result of the above, indigenous communities make only very limited use of the formal legal system (provincial level courts), and when necessary seek assistance at the village, commune and district government levels for conflicts which cannot be resolved internally. Results showed that out of 257 cases dealt with by the traditional authorities in ten villages in the recent past, 170 were resolved by the traditional adjudicators. Of those which were taken to a higher level; 87 were taken to the government appointed Village Chief for his/her further assistance, 30 were taken to the Commune Council, 19 to the Commune Police, nine to the District level, and only six were taken to the Courts.

Indigenous community members are intimidated and marginalised in court.⁵ They are often unfamiliar with both the written and spoken Khmer language and with Khmer legal systems and terminology. They are fearful of high-ranking officials and police, and they do not have support from their friends and family, which is a key part of traditional legal processes. There is also little or no legal defence offered to indigenous peoples, and there are no trained indigenous lawyers working on behalf of their own people. Because the formal system often requires the use of money (both for legal fees and bribes),⁶ indigenous peoples are unable to get 'justice' from this avenue. The court system is often used by powerful interests to appropriate and further disenfranchise them.

Dysfunctional Formal Legal System

As described above "new" disputes are not being addressed by the formal system. 'There is the law, but no one obeys the laws' (Kanat Thoum villagers). As the traditional authorities lack the authority to deal with new disputes, there is no forum for aggrieved parties to have their case heard. In particular, the Land Law and other national laws are not being

5 See Yrigoyen Fajardo, Raquel Z., Kong Rady and Phan Sin. 2005. Pathways to Justice: Access to Justice with a Focus on Poor, Women, and Indigenous Peoples. Phnom Penh: UNDP Cambodia/Ministry of Justice, Royal Government of Cambodia.

6 See Ibid and personal communication by the authors with indigenous villagers who have had dealings with the formal justice system.

implemented or followed. This lack of access to justice is creating a very dangerous situation, with increasing numbers of conflicts and an increasing threat of violence each year. In the absence of justice, communities are disintegrating, and expropriated individuals find themselves without land and unable to call upon traditional forms of mutual aid. The result is increasing impoverishment of the already poor.

Traditional law allows minority cultures to maintain their integrity and deal with change

Indigenous communities consulted in the Case Study made it clear that the preservation of their culture and traditions (their very survival) is premised on the maintenance of community solidarity. Traditional law plays a much wider role in these societies as it is the key way in which community harmony and solidarity is preserved. As well as maintaining intact societies, supporting traditional legal systems allows communities time to adapt to changing circumstances.

Although the traditional legal system is still widely used, like many aspects of indigenous culture, it is clear that it is facing several challenges to its continued existence. Change is taking place in indigenous communities at a more rapid pace than at anytime in the past, and this is undoubtedly causing problems for traditional systems. However, throughout history traditional justice systems have always adapted to changing circumstances. Even in the face of rapid change and even in communities which have been seriously impacted by land loss, etc., the traditional justice system is still managing to maintain a strong moral code and is trying to adapt and deal with many new and complex conflicts.

There is a lack of interface between the formal and the traditional legal systems

There are several examples of good cooperation between traditional legal systems and local governments (commune and district levels) in resolving conflicts. Community members by and large see the commune and district levels as the 'formal' legal system, because government officials are involved in adjudicating cases and it is thought they are using the national

laws to do this. Often, however, decisions, fines and punishments at these 'local' levels are based on concepts and norms of traditional law, as much as or more than they are on the application of national laws. Several cases dealt with criminal matters, which the commune and district officials also do not have a legal mandate to reconcile.

There are very few examples, however, of cooperation between the traditional legal systems and the formal judicial system and some villages surveyed had never had a conflict go to the provincial court. There also appears to be tension between the police and the traditional legal system. Police sometimes perceive the traditional system as being in competition with them (particularly in their informal conflict resolution capacity). This is partly because police often extract fines from the violators and this money is often not shared with the victim.

The formal and traditional legal systems address different rights, responsibilities and conflicts

Traditional systems address issues within the community, or more rarely, between two villages. The traditional system focuses on such areas as inheritance, theft, marriage, and other local concerns.⁷

A judge in Rattanakiri's provincial town, Ban Lung commented that court cases between outsiders and indigenous people are mainly about land, and cases where both parties are indigenous are mainly related to divorce and assault/domestic violence, while the most common cases between Khmer people are divorce and contract disputes over loans.

The system chosen (traditional or formal) to resolve a dispute depends on who the community members trust and seek help from in a conflict, and whether the traditional authority is able and has the authority to deal with the conflict.

Foremost among new problems which traditional authorities have to deal with is an increasing number of disputes with more powerful people — usually outsiders — over control of the village's land and forests. Disputes

⁷ There is however a strong tradition of dealing with all types of criminal and civil offences, including serious crimes.

with neighbouring villages over village boundaries and ancestral land claims are becoming increasingly difficult to solve because of these new pressures from the outside. With increasing numbers of outsiders now living in indigenous villages, as a villager in Reach village commented: "In the past outsiders who came to live in the village had to agree to follow the traditional law. Now there is an influx of outsiders who don't respect the village law. If there is a conflict, they don't agree, respect, listen to the traditional resolution. They depend on the national law and the courts."

A key issue impacting the effectiveness and authority of traditional legal systems is a lack of any status or recognition in Cambodian law. This means that in recent years even community members who have money can sometimes bypass traditional systems and achieve the decision they want by paying off commune and district authorities, and Court officials.

2.2 Policy Discussion

For policy level recommendations to improve the poor access to justice situation of marginalised indigenous communities, this research has identified two key aspects that need to be dealt with:

1. the role of traditional law within the formal legal system should be acknowledged, and
2. reform of the formal legal system is essential.

Acknowledging traditional law within the formal legal system

The principles of equality before the law and non-discrimination, which are enshrined in the Cambodian Constitution and international human rights instruments that Cambodia is a state party to, may be drawn on to enhance the role of traditional law within the formal Cambodian legal

system.⁸ These established principles give the Cambodian Government the legal authority to pass/amend legislation to achieve these ends, which local and other authorities then have an obligation to implement in a positive manner.

The historical analysis carried out as part of the Case Study showed that French colonial authorities both recognised and encouraged 'tribal' customary law in special courts as a way to control local populations. This analysis constitutes a warning about the perils of pulling informal or non-state systems into the sphere of state regulation. As the Pathways to Justice report indicates and the research for the Case Study has found, it is their very independence from state political structures that gives these traditional legal processes their legitimacy in the eyes of community members. In contrast, the fact that village chiefs, commune councils and the courts draw their legitimacy from state authority and that these representatives of the state often adjudicate unjustly, makes this avenue for achieving justice unappealing to villagers. Balancing the independence of the traditional justice system with recognising it as part of Cambodia's legal structure is a key policy question/dilemma.

Obviously pilot activities may be able to answer these questions, but even these should be approached and planned with care and with the close cooperation of communities, their representatives and indigenous advisors. This is important work and a key principle must be not to harm existing structures and processes delivering justice to these groups. Unwise, top down, but well-intentioned, interventions could cause more problems than they solve.

Policy to enhance the formal role of the traditional authorities has to acknowledge and allow for the fact that, like all justice systems, the traditional system needs to evolve and adapt to changing circumstances. As has been shown, an inherent part of these systems is their ability to incorporate aspects of other justice systems from former (and present)

8 Article 31 the Cambodian Constitution and article 26 the International Covenant on Civil and Political Rights (ICCPR). 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,' article 26 ICCPR.

regimes.⁹ The Brao, Kreung and Kavet, for example, typically cite legal precedent from different regimes through history when deciding on cases, indicating that their legal system is grounded in the concept of following precedent and changing with the times. One of the recommendations from communities is that there should be a codification of their law by indigenous communities themselves. If this were done it would be possible to understand the diverse influences and the way this body of law has adapted and evolved. It would also illustrate the variations across communities and ethnic groups as traditional law is by its nature adaptive, learned by experience and passed down orally from generation to generation.

A further key point with implications for poverty reduction is that the work of the traditional authorities is directly benefiting not only the communities, but also the wider Cambodian society through ensuring justice for the most vulnerable community members, maintaining community law, order and wellbeing, etc. Indigenous elders are dealing with the consequences of social disintegration that is being caused by new development pressures in their communities as long as they still can. To avoid the disintegration of indigenous cultures and societies in the face of these changes, and the inevitable widespread social consequences that will result, communities and their elders need to be supported and their work in maintaining social order needs to be recognised. It could be argued that actually maintaining and supporting these systems is the key to indigenous peoples' development and poverty reduction for the foreseeable future.¹⁰

Reform of the formal system

A further policy issue is that justice reform also needs to focus on the reform of the formal system. While the indigenous system may 'work better' than the formal one, it does not follow that traditional justice systems can be made to substitute or repair a broken 'formal' system. As has been pointed out before, the two systems often deal with different rights, responsibilities and conflicts.

9 See Appendix 2 of the Case Study

10 Personal observation by the authors who all together have more than 25 years experience working with indigenous communities in Ratanakiri Province.

A policy assumption that needs to be addressed is that bolstering alternative/traditional dispute mechanisms will fix the highlanders' problems. As the Case Study research has shown, many of the problems indigenous people face come from outside their communities. Justice in this sense is not something that can operate, be delivered or exist as an island. Indigenous communities, of course, need the authority to implement their traditional law and to manage their traditional areas. However, that authority needs to be supported by an environment where laws are implemented and people are punished for their crimes. If not, impunity, corruption, power of position and money will continue to be the de facto law of the country and eventually will infect and poison the lower level traditional systems also.

Policy should also focus on enhancing the participation of the indigenous groups and any policies affecting them should only be pursued with their informed consent. This goes beyond simply consulting the indigenous peoples and involves including them in decision-making in the development process. The right to self-determination (or participation rights) forms the basis by which indigenous peoples may share power with the state, and gives them the right to choose how they will be governed.

Given the size of the indigenous population in Cambodia and the present decentralisation process, the commune councils, although a foreign construct in highland indigenous customary structures, still afford the best opportunity for self-determination (or participation) in communes where the minority groups are in the majority. These participation rights should be further explored with the indigenous groups.

III. Methodology of the Study

Following the Terms of Reference for this Case Study, fieldwork was primarily focused on reviewing and cataloguing customary practices in conflict resolution in indigenous communities in Rattanakiri and, to a lesser extent, Mondulkiri province. Interviews were also conducted with state officials in Rattanakiri province, but less emphasis was given to this task.

An important objective of this study was to provide a basis for ongoing dialogue, consultation, and follow-up research, with the intended beneficiary indigenous communities, but also with representatives of local government. The fieldwork was therefore structured to provide a starting point for this dialogue. Also important has been capacity building for indigenous peoples' representatives (women, youth and elders) so that they can (and did) conduct the fieldwork themselves. The action research approach adopted meant that indigenous resource people in the target communities are now more conversant with the policy discussion to improve access to justice and are willing to be involved in future consultations and pilot activities which may take place.

Partner Organizations

This research process involved a partnership between the study team and two indigenous groups (para-organisations):

The Highlander's Association (HA), a local grassroots organisation in Rattanakiri representing the interests of the province's indigenous people. HA has considerable experience, having conducting consultations with indigenous communities since 2001, among other things acting as a vehicle for public participation in the formulation of legal instruments to implement the 2001 Land Law.

The Indigenous Youth Development Project (IYDP) was created in 2000 to provide opportunities for educated indigenous youth to contribute to the development of their own communities. Action research has been one of the capacity building and awareness raising tools used by the IYDP programme since its inception.

Human Resources

A total of 14 elders (from the HA elders council) and 14 youth (including four women) from IYDP were selected as research assistants. These were divided into eight research teams each with one or two elders and one or two youth. This is based on a model which has been found to work well for community development in indigenous villages in Rattanakiri: educated and literate youth working in close cooperation with elders who lack the necessary literacy skills, but who have the legitimacy and embody the customary knowledge of their group. As far as possible, research assistants were matched with target communities of their own language. Through their legitimacy the elders helped build trust with community members, explained the objectives of the study and facilitated group sessions. The youth research assistants guided the process according to a semi-structured interview format and documented the results. Fieldwork took a total of three to four days in each target village. Evenings were used for larger group meetings while daytime was used for focus group discussions and individual interviews. Members of the research team trained the research assistants in advance and monitored the process through spot checks.

Study Sites

Fifteen villages within the HA network were chosen as study sites in Rattanakiri. Three villages were later chosen in Mondolkiri. These were selected to represent the range of ethnic groups in all nine districts of Rattanakiri, plus two districts of Mondulkiri. Stable communities and those facing serious social disruption (such as in-migration and land loss) were included in the study in order to compare the range of responses.

On average, at least 40 members participated in each target village. This means that over 600 indigenous community representatives (at least 30 percent women) were consulted during the course of the fieldwork and verification workshops.

In addition to the above, village-level research was conducted in a Jarai village in Andong Meas district and some Brao villages in Ta Veang district. An interview was also conducted with Brao people living in the provincial

capital of Ban Lung to determine the extent that traditional justice systems are still used there.

Process and Research Content

The research format was developed in consultation with a group of elders from the HA Advisory Council. This was further adjusted and adapted at a trial consultation organised by the HA where the research teams tested the methodology with over 55 participants, divided into five ethnic/language groups. Based on the experience of this trial (which itself generated a great deal of information), the research teams were trained for three days. Each research team went to two study sites in Rattanakiri. Based on their experiences in Rattanakiri, one team later travelled to Mondulkiri and conducted research in three Phnong (Bunong) ethnic villages. This was useful for comparison with the groups in Rattanakiri.

Verification of the field data and findings in Rattanakiri was done at two workshops. These workshops were conducted primarily in local languages with facilitators from HA and IYDP youth assisting with translation and documentation. Local authorities from the village, commune and district levels also participated.

Because the marginalised indigenous groups are the claim holders of policies to improve access to justice, understanding their situation and their justice reform needs helped in understanding the likely impact of any proposed policy. An historical perspective/analysis was also undertaken to understand changes that traditional legal systems are undergoing, and have undergone, in order to develop appropriate policy recommendations.

During the village level research, mixed groups of elders (both women and men) were consulted, as well as disaggregated groups of women and youth. This was done to ensure participation from all groups in the community, even the most marginal, and to understand important differences between groups. For example, what are the differences in access to traditional conflict resolution processes within communities, what differences are there in perspectives on the traditional authorities' conflict resolution effectiveness, what differences in power exist within the communities.

Topics of discussion included:

1. Customary law
2. Identifying traditional authorities and their role (past and present)
3. Identifying the process of conflict resolution and adjudication for different kinds of cases
4. Analysis of case load in the village over the preceding years or decades
5. Documentation of specific cases of interest
6. Identifying changes which have taken place in the customary system
7. Perception of the customary system by specific groups (women, youth, local authorities)
8. Identifying strengths and weaknesses of formal and customary justice systems
9. Identifying interfaces with the formal justice system and local authorities
10. Community recommendations

Interviewing state officials was also important, as any measures to improve access to justice for indigenous peoples will, to a certain extent, be implemented by non-indigenous state officials. Commune, district and provincial officials, heads of the provincial Office of Land Management, Urban Planning, Construction and Cadastre (OLMUPCC), the provincial Department of Rural Development, police and military police were interviewed. One interview was also conducted at the national level with H.E. Suong Leang Hay, the Deputy Director of the Project Management Unit and some of his colleagues at the Council for Legal and Judicial Reform. In this meeting possibilities for recognising traditional conflict resolution in the overall judicial reform programme were discussed.

Lessons Learned

It was important that the claim holders themselves were involved at an early stage of the research. This allowed the research to be designed according to the issues and problems that need to be addressed from the claim holders' viewpoint.

It was also found that this type of research cannot be rushed and that the

phase of understanding the problems from the claim holders' perspective is very important. Significant time and effort is required to understand the living conditions of the marginalised groups during the early part of the research process in order to develop appropriate policy recommendations. The group of researchers that undertook this Case Study have many years experience in working with indigenous groups in North-Eastern Cambodia. They were, therefore, able to make use of existing information and practical experience. This was necessary with the short timeframe that was allocated for the Case Study to be able to move quickly to in-depth investigation of critical issues.

The following are guidelines for the research process:

- Develop a broad understanding of the living conditions and customary practices of the marginalised groups from both primary and secondary research to allow for an in-depth investigation of critical issues and the identification of policy issues to be addressed.
- Ensure participation from all groups in the community, even the most marginal, to understand important differences and variations in opinions between them.
- To achieve this broad participation from all groups in the community, the consultations should be carried out in local languages to the largest extent possible.
- Ensure capacity building for indigenous peoples' representatives (women, youth and elders) to allow them to conduct the fieldwork.

The following is an overview of the sequence of the fieldwork process described above:

- Research topics were identified and the research format was developed in consultation with a group of elders from the HA advisory council.
- The research villages were chosen based on existing partnerships and to maximise comparison between and within language groups.
- Secondary data was collected and analysed (when available).
- Key informants were interviewed to gain a better understanding of the topics and the research sites.
- A semi-structured list of interview questions was developed in consultation with key informants.

- The interview questions and the elder/youth research teams were piloted at a trial consultation with members of the different ethnic target groups.
- The semi-structured interview questions were re-evaluated and finalised.
- Based on the feedback about the methodology, the research teams were trained for three days.
- Each research team began in villages they were already familiar with.
- Field data and findings were verified at two workshops conducted primarily in local languages with facilitators from HA assisted by IYDP researchers.

IV. Recommendations

Emphasis should be on initiating and supporting a process by which indigenous peoples themselves are engaged in documenting/codifying their own justice system and conflict resolution processes. As discussed, flexibility is one of the advantages of the traditional system and utmost care must be taken not to sacrifice this. The aim is to strengthen what already exists and is working and to develop the capacity to address external problems. Consultation needs to include dialogue about dealing cooperatively with tricky issues such as the application of village-based restitution/penalties for more serious criminal offences and how to integrate the traditional system with the formal system. It must be emphasised that this is a process that may take several years. It is not possible to come up with a list of instant recommendations to be implemented. Some suggestions include:

- 1. Create a facility within the Ministry of Justice (two to three people)** authorised to liaise with other relevant institutions (e.g., Ministry of Interior [MoI] and Department of Ethnic Minorities in the Ministry of Rural Development [MRD]). This facility would dialogue on a regular basis with designated indigenous representatives, about ongoing research and documentation of indigenous customary law/systems, and about initiatives to create an interface between customary and formal systems. Such a facility would be responsible for training commune, district and court officials about operating on the interface between two legal systems.
- 2. Support an ongoing process of consultation, research and documentation with Indigenous Peoples' communities** (in a number of provinces). This should be led by indigenous organisations/networks, and feed into national level consultations (as in point one above). The objective would be to build agreement on how traditional systems can best be recognised by the formal system, and how the interface between the two could function. The present study is a starting point for more in-depth action/reflection research and analysis.
- 3. In the meantime, it is strongly recommended that the traditional authorities be allowed to continue providing the valuable social function that they are already doing**, including allowing the constructive interface already happening between traditional and local

authorities (at the commune and district levels) while the dialogue (in points one and two above) is ongoing.

- 4. Enhance indigenous peoples' participation (self-determination) as a basis on which the groups can share power with the state.** This goes beyond simply consulting the indigenous peoples and involves including them in decision-making in the development process in their areas. Given the size of the indigenous population in Cambodia and the present decentralisation process, this can best be accommodated under the commune councils where the indigenous groups are in the majority. The new organic law on the structure, roles and duties of the sub-national levels of government should consider the participation rights of indigenous populations and accommodate specific needs in indigenous areas.
- 5. Explore the opportunity for the Traditional Authorities to have a more formalised role of Conflict Resolution under the commune councils with delegation of power from the Ministry of Justice (MoJ) and Mol.** The Ministries can delegate power to the commune councils under article 44 of the law on Administration of Communes (Khum-Sangkat). The MoJ and Mol should explore opportunities should be explored by the MoJ and the Mol on what role can be delegated in both criminal and civil disputes/conflicts to the traditional authorities and the commune councils under this provision. It is important, however, to make sure that traditional adjudicators are not overly reliant on commune council members and that the more formal role that traditional authorities would take on under the commune councils would have to be worked out in consultation with indigenous representatives.
- 6. Develop the role of the Dispute Resolution Committee (DRC) that can be set up under article 27 of the sub-decree on Decentralisation of Powers, Roles and Duties to Commune/Sangkat Councils.** The DRCs in highland areas could be developed to be an important instrument in the formal interface between the traditional system and the formal system with a legal mandate to facilitate and conciliate civil disputes.
- 7. The government should invest traditional authorities with the formal authority to deal with illicit land sales and conflicts, and to mediate boundary disputes, including ancestral land claims.** The role of the traditional authority to manage their communal property

under the 2001 Land Law must be interpreted to include an authority to manage land conflicts on their lands, and this role should be further defined and strengthened. Guidelines need to be formulated **[as a matter of urgent priority]** for these land dispute resolutions (following existing laws). This also needs to be constructed in such a way that the traditional authorities remain accountable to the whole community. The role of the traditional institutions should also include the authority to formally recognise village boundaries that have been decided through agreement of village elders from the neighbouring villages.

- 8. Traditional conflict resolution processes should also be recognised within existing government structures (Cadastral Commission, Provincial Land Allocation Committee, etc.).** And where such processes already are, as with local elder trustees functioning as ad hoc members of the DKCC under Article 5 of the sub-decree on the Organisation and Functioning of the Cadastral Commission, they should be strengthened and utilised.
- 9. Traditional conflict resolution processes should further be formally recognised in the (sporadic) Procedures for Registration of Indigenous Immovable Property.** As this legislation is currently under development, there is an excellent opening to explore opportunities for merging traditional and national law regarding conflict resolution in relation to immovable properties of indigenous communities.
- 10. Measurement and demarcation of communal land.** Under article 25 of the 2001 Land Law the traditional authority is given a certain role in the measurement and demarcation of immovable properties of indigenous communities. This role should, for the time being, be further defined under existing legal procedures for registering immovable properties and later further developed in the (sporadic) Procedures for Registration of Indigenous Immovable Property.
- 11. In communities where indigenous peoples are in the majority the traditional system should apply and be respected.**
- 12. In communities where the indigenous peoples have become a minority,** they should still have the right to practice their traditional justice system within their own group (if they wish), and to have rep-

resentation in the conflict resolution of the wider community.

- 13. Improve the formal legal system and enhance the official role of the traditional authorities under it.** Continue the fight against corruption in the formal legal system. With a view to protect and preserve the indigenous peoples' cultures and traditional systems, create an environment where the traditional system can function as a separate, but integrated system in Cambodia. The government has support and an obligation to do this under the Cambodian Constitution and international instruments that Cambodia is a state party to. Points eight to fourteen should be implemented to enhance the official role of the traditional authorities under the formal legal system.
- 14. Ultimately, it is the traditional legal system that needs recognition, not the traditional authorities.** Certain individuals should not be vested with authority, but the authority should be vested with communities so that they are able to follow their present practices in choosing different adjudicators and go-betweens depending on the circumstances. Traditional authorities are chosen by the community members based on their performance and integrity, not based on their position. Any traditional authority who becomes biased or corrupt is not further utilised by the community members. The system works because the community – not an outside authority – has ownership and takes responsibility for it. This is an important check and balance in the system.



UNDP Cambodia
No. 53, Pasteur Street
Boeung Keng Kang I
Phnom Penh, Cambodia
Tel: 023 216 167
www.un.org.kh/undp

Cambodia