

LAND ISSUES AND TRANSITIONAL JUSTICE IN CAMBODIA

Background

Cambodia has gone through more than two decades of civil war between 1970 to the end of 1991, in which all physical and social infrastructure was destroyed. After a period of long delays and a very costly process, the trials of senior leaders and those most responsible for atrocities committed in the Khmer Rouge period finally started nearly 30 years after the regime first collapsed when the Extraordinary Chambers in the Courts of Cambodia were formally created in early 2006. The tribunal marked Cambodia's first efforts towards transitional justice, which has been defined by the International Center for Transitional Justice as a response to systematic or widespread violations of human rights, while seeking recognition for victims and to promote possibilities for peace, reconciliation and democracy. To date the trial of the first suspect is awaiting a verdict, while the second trial (for four remaining suspects) is expected to begin in 2010.

Land and judicial system reform are two of the key development priorities of the current government in Cambodia as national priorities are defined as enhancing social stability, increasing agricultural productivity, contributing to environment sustainability, the development of an efficient land market, and to help ensure greater land tenure security. Significant progress has yet to be made by the government towards these reforms.

This paper attempts to explore the linkages between those two reform processes against the background of Cambodia's efforts of dealing with its violent past.

Land Issues

The geographic area of Cambodia is 18.1 million hectares (or 181,035 square km). The state owns 14.5 million hectares, approximately 80 percent of this area, while private entities own 3.6 million hectares. Clear demarcation of state land, both public and private, has yet to occur.

There are escalating numbers of poor and vulnerable people being alienated from their land and natural resources in Cambodia, with landlessness estimated to be between 20 to 25 percent¹ of the population. There are higher incidences of women being landless and land poor with much smaller average land holdings compared to men. This trend undermines livelihoods (as 90 percent of the population is dependant on agriculture), decreases food security and worsens the inequality gap. These problems are driven by underlying economic growth patterns which do not equitably share costs or benefits; for example, these growth trends have enabled increased concentration of land holdings by elites.

An increasing number of forced evictions are also resulting from private sector investment, regardless of whether or not the evictee has long standing tenure and thereby possession rights according to law. Over 100,000 Phnom Penh residents have been displaced since 2000². Resettlement policies are implemented without transparency, compliance with legal procedures, international safeguard policies, or fair and just compensation. The Expropriation Law was passed at the end of December 2009, without undergoing public consultation and it

¹ 20% cited in the World Bank's 2007 Equity Report, while the 25% figure is based on a recent study by an international development agency, whose results are not yet public as the final report is being discussed with government agencies before publication.

² The 8 Khan Survey, Urban Poor Resettlements in Phnom Penh of Samakum Teang Tnaut, December 2009

is feared by many that it will further undermine land rights of the country's most vulnerable in particular women headed households.

The livelihoods of Cambodia's indigenous peoples, who equal 1.4% population and are comprised of 17 groups, are increasingly vulnerable due to inadequate existence or implementation of legislation that protects their rights to land and natural resources. This exacerbated by a clear lack of political will by the government to complete legislation for communal land titling. As a result, people are being alienated from traditionally owned land and resources due to land grabbing, illegal sales, the proliferation of Economic Land Concessions (ELCs) and mining concessions, and a general lack of response from judicial systems to implement the rule of law.

To date, almost one million hectares of land has been allocated to private companies through Economic Land Concessions across the country, which the government claims to contribute to economic development and poverty reduction. However, a recent study by The NGO Forum on Cambodia, which studied five ELCs, found no improvement to the livelihoods of impacted communities and in fact documented several cases of the rights of people to access natural resources being violated, undermining their socio-economic security.

NGOs have specific concerns about the impacts of these large-scale land concessions on rural livelihoods and human rights. Firstly, there is poor enforcement and compliance with other legislations (such as the Land and Forestry Laws). Secondly, the safeguards in the sub-decree governing ELCs designed to protect the rights of local people (restrictions on size, ownership and land cover type specifics, the importance of registering land as state property, and the requirements for environmental and social impact assessments and public consultations prior to approval). Thirdly, judicial systems are failing to uphold rights of affected communities or to hold companies accountable. The World Bank's report notes that land appears freely available for ELCs, but scarce for Social Land Concessions (SLCs) – which are intended to re-allocate land to Cambodia's poorest households.

Mining concessions (for minerals such as gold, copper, chromium, iron and bauxite) are granted regardless of existing land use, whether it is used by indigenous people, forest-dependent communities or are located in biodiversity conservation areas. The mining operations lack transparency and good governance, they do not require prior informed consent by affected communities and create significant environmental and socio-economic impacts. There are also concerns about how the Government is going to ensure that revenues from these mining concessions are going to be managed for the benefit of Cambodia's citizens. The same concerns are held about revenue from recently discovered oil and gas resources.

Cambodia's laws, judiciary and enforcing institutions are weak and inconsistent not just in terms of land and natural resource management. The legal framework is incomplete with contradictions between existing legislation. Enforcement is hindered by difficulties of interpretation and lack of political will to implement the rule of law – for example legal impunity of powerful individuals is common and they select and apply whichever legal norm supports their case. This further disadvantages access to justice for Cambodia's poor and vulnerable, particularly women and indigenous groups who not only lack the capacity and/or support to understand the legal complexities and respond effectively but also face multiple discrimination.

Government institutions lack the capacity and strength to equitably resolve land disputes and the number of 'unjust' resolutions is increasing. The National Authority for Land Dispute

Resolution (formed in February 2006) has not effectively improved resolution processes and undermines existing legal structures, such as the Cadastral Commission.

The Link between Land and Transitional Justice

In light of forced displacement of millions of people at the hand of the Khmer Rouge, it seems to be surprising that there seems to be little direct linkages between transitional justice processes and land issues in Cambodia. Land dispossession has not played any part in the court proceedings so far and the restitution of land rights is not among the requests of victims of the Khmer Rouge regime.

However, recent history has played an important role in terms of creating the basis for current land tenure insecurities. The Khmer Rouge regime collectivized all land holdings and destroyed the land registry. After they lost power in 1979, land was organized as small collectives called the *Krom Samaki*, in which 20-30 families worked to cultivate the land collectively. Privatization of land did not begin until the mid-late 1980s and was formalized in 1989. Because of these significant changes in land ownership, only a few of today's land conflicts can be directly attributed to the actions of the Khmer Rouge. But what remains today is the impact of the Khmer Rouge regime in the perceptions of today's ruling elite. This regime previously assigned all ownership rights over land to the state, disregarded the private rights by common people and decisions were made by those with power. This has helped contribute to today's situation, in which the state feels no obligation towards the poorest members of society.

Although as many steps in the land reform process, the decision to redistribute land to families in the 1980s was made based on external pressure – in this case the return of refugees from the camps on the border to Thailand – it benefited everyone and was widely accepted as compensation for the loss suffered by all. Cambodian's have a saying for this “the land was given by the dead to the living”. The system might have not been perfect but it created by and large an equitable distribution of land, which stands in stark contrast to the situation today with both inequality in land distribution and landlessness in agriculture significantly higher than in neighboring Asian countries³. It was estimated that 46 percent of rural particularly women headed households own less than 0.5 hectares, and that only 12 percent of households hold land greater than 3 hectares and these people own a total of 72 percent of Cambodia's privately owned land⁴.

How can land inequality and landlessness have reached such high proportions in only two decades? After 1991 Paris Peace Agreements, Cambodia opened its doors to market economy. The subsequent influx of foreign capital altered the perception of land: it became a commodity. Large-scale land transfers and sub-divisions occurred during the 1990s with local urban and foreign buyers acquiring land for commercial farming, logging, and non-agricultural activities, as well as for speculation⁵. Responding to demands of the international community, Cambodia promulgated a new land law in 2001 that supported the re-establishing of the land registry, systematic and sporadic titling, and supplementary institutional reforms to the land sector. The 2001 Land Law ensures the recognition of rights of land possessors in a way that reflects proper transitional justice practice (e.g. recognition of peaceful and uncontested possession), yet the law is not implemented and often violated. There are

³ World Bank Report, Sharing Growth, 2007

⁴ Oxfam GB 2007.

⁵ Chan, S. and Acharya, S. (2002) Land Transactions in Cambodia: An Analysis of Transfers and Transaction Records, CDRI Working Paper No. 22, Phnom Penh

numerous cases to date, in which land has been claimed back by the government despite claims by families and local communities that they meet possession rights requirements.

One important aspect of transitional justice is the restoration of trust. Yet when the government refuses to recognize previous land certificates, documentation proving possession rights and simultaneously granted questionable claims to the powerful elite, they undermine this trust. At the same time, the government violates the social contract it has entered when land was distributed to Cambodian families in the 1980s. The recent program of granting social land concessions to landless and land poor is a telling example of the demonstrated lack of responsibility towards Cambodia's poor. The amount of land provided for social land concessions is less than 18,000 hectares a mere window dressing for land allocation practices that favor private investors on economic land concessions.

The Impact of Transitional Justice Process on the Development in Cambodia

The impact of transitional justice processes, particularly the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC), on the development in Cambodia has been limited given numerous issues, including the absence of a practical and functioning rule of law and an accessible justice system for all, as well as the power imbalances between different stakeholders.

The ECCC themselves have been plagued by accusations of corruption and political interference. Its structure constitutes a compromise between the Cambodian government and the international community. After years of negotiations it was agreed to hold the trials in Cambodia using Cambodian staff and judges together with foreign personnel. Being an integral part of the Cambodian court system, the ECCC is expected to provide a role model for court operations in Cambodia and to strengthen a justice sector in dire need of reform. So far, little of this hope has materialized with only limited influence on criminal court procedures. It is therefore hoped that in the long-term personnel from the ECCC will become the drivers for reforms of the judiciary.

While the Khmer Rouge tribunal's first case has been important in helping to establish justice and recognition for victims and survivors (especially civil parties) and has helped to restore their dignity, it so far has had limited impact on the wider society. But there is a clear potential for the process to create awareness and inspire demands for social justice. The presence of civil parties in the court proceedings sets a clear signal that encourages civic engagement and serves as role model for victims of land conflicts, helping to demonstrate aspects of victim's empowerment. Another important aspect of the ECCC lies in its contribution to establish the historical truth. The commitment to seek and investigating the "truth" also influences other sectors of the society.

Finally, the tribunal could send out a message that "never again shall individuals or elites claim to represent the state of Cambodia." When elites are equated with the state there is no accountability on the part of the government and no demand for this accountability on the part of the citizenry.

However, these potential benefits are met with strong resistance. The current lack of responsibility of the state/government has been demonstrated in its position in the discussion on reparation, which has experienced particular strong political influence. Reparations are limited to symbolic and collective (e.g. memorials or victims registration). This is not that different from the position of the state in conflicts involving investors in land and natural resources. If the process of transitional justice fails to ensure a fair and equitable distribution

of land and of revenues gained from natural resources, this will not only hamper a sustainable development but may also lead to larger conflicts in the Cambodian society.

Conclusion and recommendation

- Reform of the entire judiciary is required. In terms of the land sector reforms must include a review of the mandate of the Cadastral Commission and its relationship with the court and the National Authority for Land Dispute Resolution. The linkage between access to land and transitional justice should be part of the “Legacy Discussion” of the Extraordinary Chambers in the Courts of Cambodia.
- International donors should increase both financial and technical support to Cambodia’s government and non-governmental organizations, in order to ensure future land distribution is more equitable. This support should be dependent on the Government engaging with the public and civil society during the formulation and implementation of laws and regulations.
- A simple step towards re-building trust between the State and its citizens would be for the Cambodian Government to provide access to information on these sensitive issues and to welcome free expression of their concerns as input into policy formulation and implementation.
- The Government and donors must speed up the process of granting collective land rights and titles to indigenous minority groups. The Government must also prioritize the allocation of land to social land concessions for the landless poor across Cambodia, instead of allocating it to ELCs.
- The Government and donors must work together to accelerate the land dispute resolution process through strengthening the performance of resolution mechanism so they can ensure fair and just resolution to victims.