

# A HUMAN RIGHTS APPROACH TO DEVELOPMENT OF CAMBODIA'S LAND SECTOR



Discussion Paper



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# **A HUMAN RIGHTS APPROACH TO DEVELOPMENT OF CAMBODIA'S LAND SECTOR**

**A DISCUSSION PAPER**

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## EXECUTIVE SUMMARY

Despite the tens of millions of dollars in aid and concessional loans being spent in Cambodia with the ostensible aim of securing land tenure and making the management of land and natural resources more equitable and sustainable, the evidence shows that tenure insecurity, forced evictions and large-scale land grabbing are escalating to alarming levels. Against this backdrop this discussion paper proposes a better approach to development interventions in the land sector, in which processes and tools that elevate rights, transparency and accountability are incorporated throughout the project cycle and broader country strategy. The paper calls on development partners to adopt a ten-pronged framework for a human rights approach to development that aims to shift power to Cambodia's citizens and increase accountability of decision-makers and power-holders.

The paper begins with a rationale for adopting a human rights approach to development. Human rights are the foundation of just and prosperous societies in which individuals have the opportunity to live dignified, full and meaningful lives. The ultimate goal of development should therefore be a society in which civil, political, economic, social and cultural rights are fully respected and enjoyed as social and legal guarantees on a non-discriminatory basis. The path of development will be most conducive to such an outcome if members of society are encouraged to be active and informed agents in the development process, including through public debate, and are able to hold decision-makers to account.

Cambodia is party to the main international human rights covenants and is thus legally

bound by their provisions. The Royal Government of Cambodia (RGC) bears the primary duty under international law to ensure that human rights are respected, protected and fulfilled within Cambodian territory. However, other States party to the Covenants that partner with the RGC and provide financial and technical assistance to the development process in Cambodia also bear a measure of extraterritorial responsibility to uphold the human rights of Cambodian people.

Fulfilling these legal obligations and achieving positive human rights outcomes requires the adoption of a comprehensive human rights approach to development, in which processes and tools are utilized to shift power towards the Cambodian people, and particularly those directly affected by development interventions. The alternative is to risk feeding into a political economy characterized by abuse of power and an increasingly inequitable allocation of development's benefits and burdens. Development cooperation that does not challenge abuses of power through concerted measures is at best ineffective, wasteful and unsustainable, and at worst risks exacerbating the hardships suffered by the poorest and most marginalized groups and contributing to an increasingly inequitable society.

The central premise of a human rights approach to development is that in all aspects of the process there are rights-holders and duty-bearers. Making this notion meaningful requires the establishment of conditions and mechanisms that shift power towards people who are affected by the development project (rights-holders). It requires concerted efforts to strengthen the capacities and opportunities



of rights-holders, and particularly the most marginalized, to claim and exercise their rights within the context of the particular project and the development process more generally.

Government bodies, donors and others in positions of power vis-à-vis the development process are perceived as duty-bearers: they have a duty to the people who are affected by development to respect their rights and make decisions and take actions that further their enjoyment of human rights. Integral to the role of duty-bearers is that they are accountable to the people who are affected by their decisions – the rights-holders.

The most prominent recent land sector project in Cambodia, the Land Management and Administration Project (LMAP) adopted a more technical approach to the objectives of, inter alia, strengthening land tenure security and resolving land disputes. The cornerstone of the project was systematic land registration. The project donors and implementers believe that LMAP was highly successful because a modern formal land registration system was developed, the technical capacity of the Ministry of Land Management, Urban Planning and Construction was vastly improved and over one million land titles were issued at a relatively low cost by the project's closure in 2009.

However human rights organizations and others point to evidence that over the life of the project and since, the number and magnitude of forced evictions and land conflicts appear to be increasing. Data shows that well over half of Cambodia's arable land mass is controlled by companies through economic land concessions and that many such concessions have been granted in recent years. Rural landlessness is high and escalating, and there is extreme and growing inequality of land

ownership.

In relation to LMAP in particular, some of the most vulnerable households were excluded from the opportunity to strengthen their tenure status through land registration. The majority of beneficiaries have been those living in rural areas not sought after by developers or speculators, and who are thus not those in most immediate need of the security that a land title aims to provide. Because no progress was made on transparently demarcating and recording State property, many legal possessors were told they live on State land and denied requests for title. Many of these households thereafter faced severe tenure insecurity and forced eviction. Meanwhile, households without legal possession rights, the most at-risk families, were left to the same fate.

Despite the considerable "output" successes of LMAP, unjust power dynamics have not been addressed, resulting in exclusions of marginalized groups, entrenchment of a system of power abuse, and contributing to an increasingly inequitable distribution of development benefits and burdens.

### **A framework for a human rights approach to development of the land sector**

Ten elements of a human rights approach to development that aim to shift power from duty-bearers to rights-holders, and in particular to the most marginalized and vulnerable groups, are discussed in detail in Part 3. The way in which each element would be applied to a land administration project in Cambodia is also described.



In summary the ten elements are:

**1. Human rights goals and strategy:**

Relevant human rights and the obligation to respect, protect and take steps to progressively realize those rights should form the basis of the development goals in a given sector. Setting human rights goals injects the value of universally agreed upon norms from ratified international covenants into the development agenda. The international human rights instruments that define and explain each human right, such as the General Comments of treaty bodies and the reports of Special Rapporteurs, should be drawn upon to define goals to be achieved. A program strategy and design should then be developed to meet the goals, after consideration of all relevant options and taking into account lessons learnt from comparable contexts and programs. Priority should be given to those groups within society experiencing the most severe deprivation of human rights or most at risk of suffering human rights violations.

**2. Human rights impact assessments, safeguards and mitigation measures:**

A thorough human rights impact assessment of the development project should be conducted to find ways to maximize the positive human rights impacts and to identify foreseeable risks that could lead to the violation of rights for particular groups. Identified risks should then be avoided in the design of the project or mitigated through human rights safeguard policies, supported by well resourced programs to ensure proper implementation. Human rights safeguard policies and programs should be central and not peripheral to the development assistance.

**3. Informed participation of rights-holders:**

Meaningful participation of people who will be directly affected by a development project should occur from the earliest stages of project initiation, goal setting and design so that they can set priorities, contribute ideas, express concerns and influence decision-making from the outset. Moreover, affected people must be informed from early stages about their rights under Cambodian law and relevant human rights safeguard policies, including how to access legal remedies through accountability mechanisms.

**4. Clearly defined rights and duties:**

Human rights goals, strategies and safeguards that have been identified and devised during the planning and design stage should be translated into clearly defined rights and corresponding duties under the project. Human rights obligations of the government, preferably broken down into specific duties of particular ministries and authorities, and obligations of other development partners, need to be defined in the project agreement documentation. Vague terminology that allows for unwarranted arbitrary discretion to be exercised by power-holders will heighten the risk of abuse of power and rights violations. Conversely, clear definitions and rules that identify duty-holders and require transparency in decision-making are key to reducing the risk of human rights violations.

**5. Transparency:**

Critical information including project design and preparation documentation, project agreements, budgets, supervision reports, evaluations and completion reports as well as non-confidential decisions, actions, and processes





relating to the project must be made publicly available in an accessible form and language. Transparency is essential to the capacity of rights-holders to actively participate in all phases of the development project, and to understand how their rights are being affected under the project. Transparency also has the effect of placing a check on the exercise of power by duty-bearers and making them more accountable, and thus enhances public trust, confidence and support for the development project. Transparency policies and practices should actively aim to make relevant information accessible to affected marginalized groups, who for example, do not have access to the Internet, speak a different language or are illiterate.

6. **Non-discrimination and equal treatment under the law:** The principles of non-discrimination and equal treatment under the law are fundamental components of international human rights and are recognized as basic tenets in legal jurisdictions around the world. The guarantee of non-discrimination applies to both the process and outcomes of development projects and programs. A development program must not discriminate on any prohibited grounds in its design or implementation, by for example, adversely affecting a particular group or excluding a particular group from receiving its benefits. The outcome of a project, such as law or policy, cannot discriminate through for example, provisions that disadvantage particular groups either in form or effect. Moreover during the implementation of the development project or program everyone is entitled to equal protection under the law.

7. **Gender equality:** Distinctions, exclusions or restrictions made either in form or substance on the basis of sex, which has the effect of impairing the enjoyment of rights, is contrary to States obligations under international law. Women must be afforded equal opportunities, protections and benefits during the process and in the outcomes of all development projects. Given the cultural barriers to equal treatment of women in Cambodia, development projects will often need to incorporate specific interventions to ensure that women are able to actively participate in project design and implementation and do not face marginalization and exclusion from receiving project benefits, including as a result of intra-community and intra-household power asymmetries.
8. **Accountability and rule of law:** Providing an avenue for affected people to claim their rights in connection with a development project, through an accessible, fair and impartial mechanism, is perhaps the single most important way to equalize power relations in the development process. In the absence of an independent court system, an alternative accountability mechanism authorized to assess and make findings in relation to violations of the human rights safeguard policies is necessary. All development partners should commit to act upon the findings of violations by the mechanism in order to ensure that effective remedies are available for harm suffered and that necessary corrections are made to the project. If the Cambodian government is unwilling to submit to the jurisdiction and findings of an alternative accountability mechanism, donors should nonetheless institute their own mechanism to investigate claims of



rights violations and commit to doing all they can to remedy harms and rectify project problems. In cases in which the government refuses to work with development partners to remedy serious human rights violations, donors should be equipped to do so on their own, through for example, the establishment of a special reparations fund.

**9. Country human rights strategy and monitoring process:** A country human rights strategy identifies obstacles to equitable development, including unjust and abusive power dynamics and structural discrimination. It identifies potential drivers of change, and develops a theory of change towards a more just society in which there is greater respect for and enjoyment of human rights. It discusses possible entry points for the progressive realization of human rights and identifies and assesses the likely effectiveness of a range of different responses by development partners and the international community to human rights violations. The strategy assesses the risk of entrenching existing inequitable power dynamics through various forms of engagement and support, and how best to avoid doing so. The human rights strategy of a particular development agency will focus on the human rights situation in sectors in which the agency engages or considers engaging.

**10. Donor coordination:** The principle of donor coordination should extend to country human rights strategies, efforts to progress the enjoyment of human rights, and to donor responses to major human rights violations. The effective implementation of a country human rights strategy and the use of tools identified to take advantage

of possible entry points is much more likely if “like-minded” donors are unified on these approaches and send a consistent message about the boundaries of acceptable behavior. Donor coordination on human rights issues should occur through a variety of constructive methods and tools including capacity building and positive incentives. In the face of serious and systematic violations of human rights, coordinated leverage should be used, including through the threat of suspension of aid and, if necessary, the actual suspension of aid, when no other approach is effective.

Recently donors to the land sector have commenced or are investigating a number of potentially positive initiatives to address existing problems and gaps. These initiatives need to incorporate the elements of a human rights approach or they risk feeding into the pattern of manipulation by power holders to the detriment of the poorest households. Given the resource-intensive and cultural changes that are required to adopt a comprehensive human rights approach, multilateral and bilateral development and aid agencies should incrementally adopt the elements of a human rights approach in all of their projects and throughout their organizations. In doing so, they will be supporting a development process that will be ultimately more efficient and effective at achieving sustained and meaningful goals that contribute to a more just, prosperous and stable Cambodian society.



*Justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interest.*

- John Rawls, A Theory of Justice, 1971





## INTRODUCTION

In 2009 the Royal Government of Cambodia (RGC) declared its vision of land policy, “to administer, manage, use and distribute land in an equitable, transparent, efficient, and sustainable manner.”<sup>1</sup> The policy, would, the RGC announced, contribute to achieving national goals of poverty alleviation, ensuring food security, natural resource and environmental protection, and socio-economic development.<sup>2</sup>

In lockstep with RGC, development partners active in the land sector claim that their efforts aim to strengthen land tenure security, achieve more equitable and sustainable land and natural resource management, and promote more equitable land distribution. Multilateral and bilateral development agencies have poured tens of millions of dollars into the sector over the past decade to achieve these

objectives.<sup>3</sup>

Meanwhile, human rights organizations have repeatedly called upon the Cambodian government to give effect to its international human rights law obligations, including by guaranteeing legal tenure security, especially for the poorest and most vulnerable segments of the population. They work closely with the communities most vulnerable to land grabbing and eviction to support them in their efforts to secure their land and housing rights.

Despite these seemingly complementary agendas, faced with the realities of escalating land grabbing and forced evictions, donors and human rights organizations perceive the landscape through different lenses and have conflicting approaches to achieving their goals.

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<sup>3</sup> The objectives of the Land Administration Sub-Sector Program (LASSP), for example, are:

- 1) To strengthen land tenure security and land markets, and prevent or resolve land disputes
- 2) To manage land and natural resources in an equitable, sustainable and effective manner
- 3) To promote land distribution with equity.

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<sup>1</sup> Kingdom of Cambodia, Declaration of the Royal Government on Land Policy, 1 July 2009.

<sup>2</sup> Ibid.





Donors look toward the technical successes of their projects to date – including impressive capacity building achievements in the Ministry of Land, such that land adjudication and registration can now proceed largely without external assistance, and the granting of almost two million titles around the country as of late 2011. They believe in the value of their aid and assistance and consider that they are making important contributions to the country's progress. While development partners working in the land sector are certainly not oblivious to the problem of forced evictions, they perceive their projects as being essentially unrelated to these cases. They view their projects as working as well as they can within the boundaries of what is possible within the existing economic-political reality. They argue that their interventions, and in particular, efforts put into land registration, enhance tenure security for ordinary Cambodians and will in the long run reduce conflicts over land and forced evictions. As such, resources are mobilized to speed up the implementation of land registration.

The attention of the human rights organizations, on the other hand, is captured by the increasing number of communities in both urban and rural areas that are being forcibly displaced from their lands, homes and livelihoods by the State, private companies, powerful individuals and/or military units. They witness the persecution of ordinary Cambodians who are brave enough to protest against pending evictions, and the violence and destruction that often accompanies forced evictions. They see communities being thrust deeper into poverty and the impunity with which the powerful perpetrators illegally profit from the misery of others. Human rights organizations perceive that donor aid and assistance is, at the very least, doing little to prevent this situation, and

at worst, bolstering those who are committing and enriching themselves through these human rights violations.

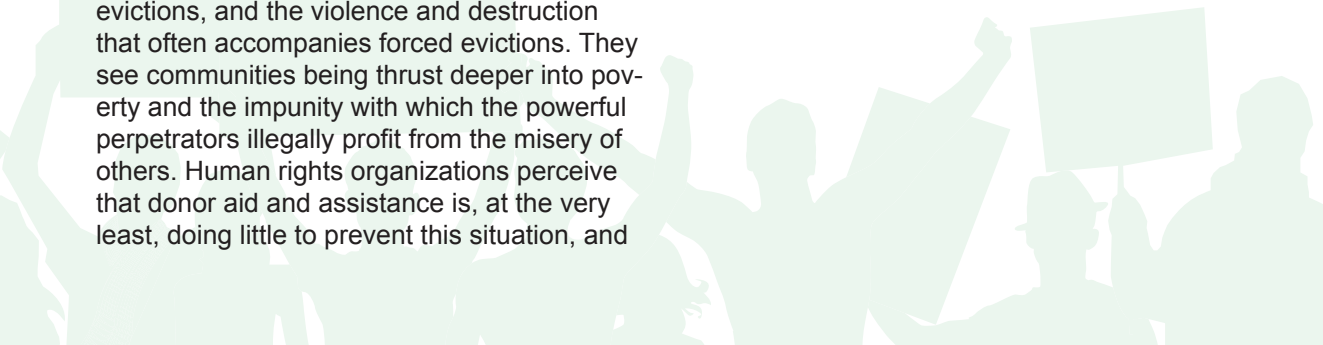
These organizations decry the current model of development aid and assistance to Cambodia's land sector and promote, instead, a human rights approach.

The aim of this discussion paper is to explain the rationale for the call to change current development practice and adopt a human rights approach, and to clarify what implementing the approach in the land sector entails in practice.

The discussion that follows contains the following parts:

1. A rationale for adopting a human rights approach to development
2. Setting the context: Land sector development in Cambodia
3. A framework for a human rights approach to development of the land sector.

Our hope is that this paper provides a basis for discussion and action for policymakers, development practitioners and Cambodian civil society, in order to contribute to a more just and equitable development process, and ultimately, a more prosperous Cambodia in which all her people can thrive.







## PART 1

### **A rationale for adopting a human rights approach to development**





## 1.1 The value and legally binding nature of human rights in the context of development

The adoption in 1993 of the Vienna Declaration and Programme of Action at the World Conference on Human Rights reaffirmed the international consensus that “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”<sup>4</sup> Underlying this consensus, and the Universal Declaration of Human Rights nearly half a century before it, was a recognition that human rights are the foundation of just and prosperous societies in which individuals have the opportunity to live dignified, full and meaningful lives. The starting point of this discussion is, therefore, that the ultimate goal of development should be a society in which civil, political, economic, social and cultural rights are fully respected and enjoyed as social and legal guarantees on a non-discriminatory basis. The path of development will be most conducive to such an outcome if members of society are encouraged to be active and informed agents in the development process, including through public debate, and are able to hold government agencies to account for their decisions. Moreover, the contribution that each member of society can make to national development is maximized when people have the capabilities and opportunities afforded by human rights guarantees.<sup>5</sup> This discussion paper thus takes the view that in the pursuit of just and prosperous societies, human rights

are intrinsically valuable and interlinked to both the process and outcomes of development.

Reflecting this rationale, there is a strong legal foundation for the notion that human rights must be respected and progressed during the process of development. Cambodia and most of the states that provide financial and technical support to Cambodia’s development are party to the main international human rights covenants and are thus legally bound by their provisions. As such, the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and the other main human rights treaties<sup>6</sup> form a solid normative basis upon which to base development decisions. The United Nations treaty bodies and other mechanisms have provided more precise definitions of the Covenant provisions over the past two decades in order to assist governments in understanding and fulfilling their obligations. The result is a large and evolving body of binding international human rights law that has seminal importance for development.<sup>7</sup>

While the Royal Government of Cambodia (RGC) bears the primary duty under international law to ensure that human rights are

<sup>4</sup> Vienna Declaration and Programme of Action, 1993, paragraph 5.

<sup>5</sup> See, Amartya Sen, *Development as Freedom* (Anchor Books, New York, 1999) and Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (The Belknap Press, Cambridge, 2011).

<sup>6</sup> Other widely ratified human rights treaties include the Convention on the Rights of the Child (1989), the Convention on the Elimination of Discrimination against Women (1979) and the International Convention on the Elimination of All Forms of Racial Discrimination (1966).

<sup>7</sup> In addition to the decisions of the regional human rights courts, human rights, including economic and social rights, have been the basis of national court adjudications, either as binding treaty obligations or as rights recognized in domestic law, in for example, Argentina, Bangladesh, Canada, Colombia, Finland, Germany, Kenya, Hungary, India, Ireland, Latvia, the Philippines, South Africa, Switzerland, Venezuela, and the USA. (See, A. Nolan et al, ‘Leading Cases on Economic, Social and Cultural Rights: Summaries – Working Paper No. 7’ (Geneva; COHRE, 2009).



respected, protected and fulfilled within Cambodian territory, states party to the Covenants that partner with the RGC and provide financial and/or technical support to the development process also bear a measure of responsibility to uphold the human rights of Cambodian people. Beyond the obligations placed on a state vis-a-vis people living within its geographical boundaries, it is increasingly recognized that states also have extra-territorial human rights obligations that are triggered in particular circumstances.<sup>8</sup>

Of particular relevance to this discussion is whether states are obliged to ensure that their development assistance facilitates the progressive realization of human rights and does not contribute to a retrogression in the enjoyment of human rights in recipient countries. Indeed, by consenting to the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the main International Covenants, states have committed to contributing to the realization of human rights for all. The International Covenant on Economic, Social and Cultural Rights in particular affirms that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...<sup>9</sup>

The duty under this provision should be viewed as extending to both state recipients and benefactors of international assistance.

In September 2011, the *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* were adopted by a group of experts in international law and human rights.<sup>10</sup> The Maastricht Principles clarify the scope and nature of states' extraterritorial duties. They affirm that states have an obligation to respect, protect and fulfill economic, social and cultural (ESC) rights, *inter alia*, in situations over which state acts or omissions bring about foreseeable effects on the enjoyment of these rights outside its territory. These human rights obligations also extend to situations in which the state, acting separately or jointly, is in a position to exercise decisive influence or to take measures to realize ESC rights extraterritorially.<sup>11</sup>

The Principles clarify that states must desist from acts and omissions that create a real and foreseeable risk of nullifying or impairing the enjoyment of ESC rights in other territories.<sup>12</sup> States must refrain from any conduct that aids or assists another state to breach ESC rights obligations, where the former state does so "with knowledge of the circumstances of the act."<sup>13</sup> Presumably this would include, for example, the provision of financial or technical support to a project that is implemented in a manner that violates these rights, where the

<sup>8</sup> For example, the German Federal Ministry for Economic Cooperation and Development (BMZ) in its Strategy Paper on Human Rights in German Development Policy states: "Human rights impose obligations on states not only within their own territory but also in relation to their actions in international organisations and in other countries." (BMZ Strategy Paper 4, 2011e)

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights (1966), article 2.

<sup>10</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 28 September 2011, available at <<http://www.fian.org/resources/documents/others/maastricht-principles-on-extraterritorial-obligations-of-states>>

<sup>11</sup> Ibid, paragraph 9.

<sup>12</sup> Ibid, paragraph 13.

<sup>13</sup> Ibid, paragraph 21.



donor state was aware or should reasonably have been aware in the circumstances that the violation was likely to ensue. The Principles further clarify that development cooperation agreements and standards must be interpreted and applied in a manner consistent with human rights obligations.<sup>14</sup>

The notion that donor States should be limited and guided by human rights norms in its aid and development decision-making is thus a legally binding imperative. Yet respecting and fulfilling human rights obligations through development assistance in some cases requires fundamental shifts in the way development agencies currently approach their work. Satisfying these obligations is not to be understood in a reductive sense, such as funding the construction of basic infrastructure, issuing grants to a few human rights organizations and sending observers at election time. Rather it involves the adoption of a comprehensive human rights approach to development aid and assistance.

## 1.2 A human rights approach to development

At its most elementary level, human rights law provides two framing concepts to define the relationship between citizen and State. Human rights place binding limits on State power, on one hand, and place responsibilities on governments to adopt measures aimed at progressively increasing opportunities for members of society to thrive, on the other.

These framing concepts are of course far from the reality in many developing countries. In Cambodia, the state frequently demonstrates

that it is neither constrained nor directed by its human rights treaty obligations.

The challenge for practitioners of a human rights approach to development is to actively steer the development process onto a course in which it is increasingly the norm that the two framing concepts hold true. The alternative is to risk feeding into a political economy characterized by abuse of power and an increasingly inequitable allocation of development's benefits and burdens. The result is that the opportunities and capacities of some groups within society to thrive within the context of development are impeded by the abuse of power by others. These groups are not only excluded from sharing in development's benefits but they are made to shoulder its costs, through for example, economic and physical displacement, social disarticulation, and loss of cultural identity. Often these are the most vulnerable and marginalized groups in society, least equipped to bear the burden of these costs.

Development cooperation that does not challenge abuses of power and formal and informal unjust power structures through concerted measures is at best ineffective, wasteful and unsustainable. At worst it risks exacerbating the hardships suffered by the poorest and most marginalized groups and contributing to an increasingly inequitable society. Regardless of frequently touted indicators of development, including high economic growth rates, the development path is off-course from a human rights perspective when a situation of extreme power abuse and distributive injustice continues unabated.

Adopting a human rights approach means driving change by utilizing existing healthy power sources and relations, and shifting or breaking down unjust ones, at all stages of the

<sup>14</sup> Ibid, paragraph 17.





development process. Addressing power dynamics by strengthening rights and accountability at both the macro and micro (project) levels thus becomes fundamental to effective and sustainable development and aid delivery.

The central premise of a human rights approach to development is that in all aspects of the process there are rights-holders and duty-bearers. Making this notion meaningful requires the establishment of conditions and mechanisms that shift power towards people who are affected by the development project (rights-holders). It requires concerted efforts to strengthen the capacities and opportunities of rights-holders to claim and exercise their rights within the context of the particular project and the development process more generally. Conditions, mechanisms and capacity building efforts are designed so as to prioritize increasing the power of those in society who are currently the most vulnerable, or face discrimination, exclusion and marginalization due to existing structures, customs and norms.

Government bodies, donors and others in positions of power vis-a-vis the development process are perceived as duty-bearers: they have a duty to the people who are affected by development – the rights-holders – to respect their rights and to act so as to further their enjoyment of human rights. As such, conditions and mechanisms are established to ensure that duty-bearers are accountable to those affected by their decisions. In societies with a democracy deficit, and with non-independent or non-functioning judiciaries, particular care must be taken to establish accountability processes and mechanisms that effectively shift power from duty-bearers to rights-holders.

The necessity of addressing issues of power in order for development aid and assistance

to be effective has for at least two decades been, at least implicitly, acknowledged in the literature and policy documents of multilateral and bilateral development agencies. Issues of power relations are inherent in the now ubiquitous references by development agencies to the importance of, *inter alia*, good governance, accountability, anti-corruption, rule of law, transparency, participation and consultation, and sustainable development. All of these elements of effective development are intrinsically aimed at placing a check on the exercise of power of duty-bearers and shifting power to rights-holders, even though the language of rights and duties is rarely used.

A human rights approach to development fundamentally differs from a utilitarian perspective because it takes the view that it is unacceptable for vulnerable and marginalized groups to suffer harms in order to accrue benefits for the majority. To the contrary, measures must be taken to ensure those currently experiencing the most extreme conditions of human rights deprivations (ie. the poorest and most marginalized) are the priority targets of development efforts.

A human rights approach seeks to dig deeper than a needs-based approach to uncover the structural roots of poverty, inequity and exclusion and it addresses these as obstacles to healthy development towards an equitable society. It seeks to transform perceptions of power vis-à-vis the relationship between citizen and state so that people view the role of government as to serve their interests and fulfill their rights through the process of development, in which they are active agents. As distinct from a needs-approach, a human rights approach places paramount importance on accountability so that rights-holders can claim their rights through fair and impartial





mechanisms and seek remedies if their rights are violated.

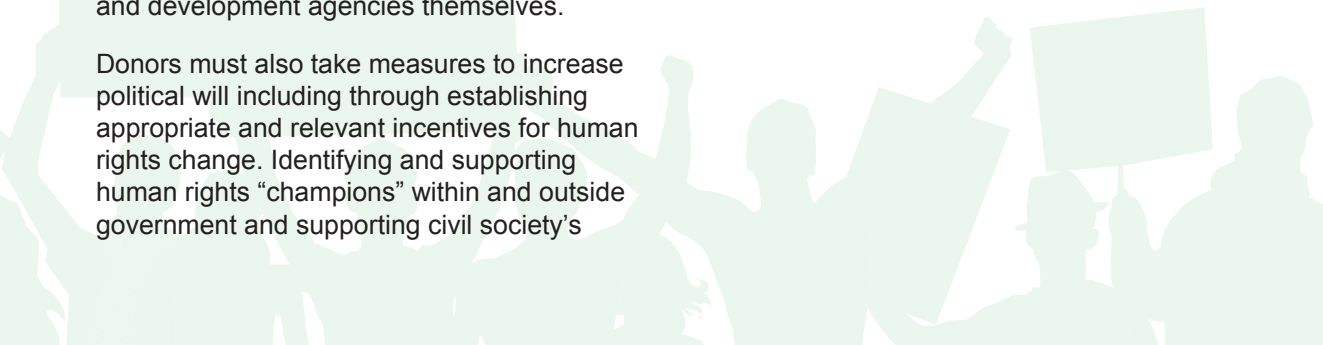
A human rights approach to development also recognizes that economic growth in and of itself is not a development goal, but one means to the end of creating a just and prosperous society in which all people have the capacities, opportunities and freedoms necessary to live full, meaningful and dignified lives. The approach recognizes that everyone should have an equal opportunity to both contribute to and benefit from economic development.

Ultimately the effective implementation of a human rights approach to development requires sufficient resources, capacities and political will. Development projects and broader country support strategies should thus be aimed at increasing all of these elements to the extent that they are lacking. This means that project budgets should include the extra costs of putting the appropriate conditions and mechanisms in place to shift power to local communities that are affected and ensuring that their rights are respected and fulfilled. Targeted efforts should be made to improve the capacities of all relevant actors so that rights-holders are informed of their rights and are in a position to hold duty-bearers to account, while duty-bearers understand their obligations and how to implement them. Support to both rights-holders and duty-bearers should be ongoing through project cycles, often requiring increased capacity within aid and development agencies themselves.

Donors must also take measures to increase political will including through establishing appropriate and relevant incentives for human rights change. Identifying and supporting human rights “champions” within and outside government and supporting civil society’s

capacity to demand respect for their human rights are also important ways to increase political will. As accountability is at the heart of a human rights approach, donors and the international community have an important role to play in making it clear that serious or persistent human rights violations are unacceptable and cannot occur without repercussions to the development partnership.

Adopting a human rights approach requires specific interventions tailored to each context, sector and project. The context itself is dynamic and thus interventions need to be flexible and adaptive. This discussion is concerned with development of the Cambodian land sector. Part 2 thus provides an overview of the land tenure history and development efforts over the past 15 years. It illustrates how, despite output successes, unjust power dynamics have not been addressed through these interventions, resulting in exclusions of marginalized groups and entrenchment of a system of power abuse, contributing to an increasingly inequitable distribution of development benefits and burdens. Part 3 sets out 10 elements of a human rights approach to development and explains how they can be applied to Cambodia’s land sector to address and reverse these negative trends.





## PART 2

### Setting the context: Development of the land sector in Cambodia





This section sets out the recent history of land rights and tenure in Cambodia and describes relevant development efforts in the sector in order to set the context for applying a human rights approach to development. The section focuses on land rights and tenure arrangements as a subset of the land sector because land administration systems, and in particular land registration, have been the cornerstone of donor-supported development efforts in the over the past decade.

## 2.1 A brief history of land rights and tenure

During the Democratic Kampuchea regime from 1975 to 1979, private property rights – which were introduced under the French protectorate and recognized throughout the *Sangkum* and Khmer Republic periods – were abolished and most land records were destroyed. All property was claimed by the State (or *Angkar*). A new system of collectivized land use and agricultural production was imposed in rural areas during the Vietnamese-administered People's Republic of Kampuchea (PRK) period from 1979-1989. It was, however, not strictly enforced by the regime.<sup>15</sup> Phnom Penh, which was evacuated and left largely vacant during the Khmer Rouge reign, saw an influx of hundreds of thousands of people during this period and housing was occupied and land settled upon, largely on a 'first-come first-served' basis. While all land remained property of the State, a small informal housing market developed during this period.<sup>16</sup>

The PRK regime reinstated some measure of private property rights, although not complete ownership rights, in 1989 with a constitutional amendment that permitted citizens to "have full rights to hold and use land" as well as to bequeath land rights through inheritance. Occupation of land and buildings from the beginning of the PRK period was legally recognized by sub-decree.<sup>17</sup> The recognition of proprietorship and possession rights of occupiers was later affirmed by the 1992 Land Law, although, confusingly, the opening articles of the legislation declared all land State property.<sup>18</sup> The law also invalidated all property claims originating before 1979.<sup>19</sup>

In the early 1990s, with the withdrawal of the Vietnamese military and administration, socialist policies were officially abandoned and a market economy was introduced under the tutelage of the United Nations administration, the International Monetary Fund, the World Bank, the Asian Development Bank (ADB) and other development institutions. Policies aimed towards private sector development and foreign investment, including the formalization of land ownership, were adopted.

While no comprehensive formal land registration mechanism was established in the 1990s, land ownership, possession, use and transfers continued to be "informally" recognized by local authorities through the issuance of various forms of documentation. Although the 1992 Land Law provided the legislative basis for land registration, no clear mechanism or process for it to occur was established until the

<sup>15</sup> Paul Rabe, From "Squatters" to citizens? Slum dwellers, developers, land sharing and power in Phnom Penh, Cambodia, Doctoral dissertation, University of Southern California, 2009, page 79.

<sup>16</sup> Ibid, page 78.

<sup>17</sup> Sub-decree No. 25 (1989).

<sup>18</sup> Land Law (1992), articles 1 and 2.

<sup>19</sup> Land Law (1992), article 1.



enactment of the new Land Law in 2001.<sup>20</sup>

The 1993 Constitution of the Kingdom of Cambodia confirmed the right of all citizens to own property, which cannot be taken by the State except in the public interest and with the payment of fair and just compensation in advance.<sup>21</sup> In the early 1990s, Cambodia also ratified five international human rights treaties, including the International Covenant on Economic Social and Cultural Rights, which has been interpreted as recognizing the right to secure land tenure as an essential component of the rights to adequate housing and an adequate standard of living.<sup>22</sup>

A Department of Cadastre was established in 1989 under the Ministry of Agriculture. Of 4.5 million applications lodged with district cadastral offices over the next decade, just over 500,000 'certificates of possession' were granted due to capacity deficiencies. The process of land registration was slow, cumbersome and expensive.<sup>23</sup> The Department was shifted to the Council of Ministers in the middle of the decade, reflecting an elevation in priority of issues relating to land access and control. In 1998 the Department of Cadastre, renamed the General Department of Cadastre and Geography, was relocated to the newly

established Ministry of Land Management, Urban Planning and Construction (MLMUPC).<sup>24</sup>

Following the partial reinstatement of private property in 1989, and as a result of the distribution of land to farmers for cultivation, land holding distribution at the time was fairly equitable<sup>25</sup> and people had a legal underpinning for the private possession and use of their land.<sup>26</sup> By 2000, however, the Cambodia Development Resource Institute (CDRI) described agricultural land holdings as "highly unequal".<sup>27</sup> A number of factors led to the escalating inequality in landholdings and increasing landlessness in the 1990s. These included rapid population growth and family size, further displacement as a result of a recurrence of civil conflict, returning refugees and demobilized soldiers who were in most cases not granted any or sufficient-sized land plots, unmanageable family debt burdens and so-called "distress sales" often due to family illness and high medical expenses.<sup>28</sup>

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24 Ibid, [4.2].

25 Paul Rabe, op cit., page 83 (citing, Shaun Williams, *Review of Secondary Sources Relating to Land Tenure and Access Issues* (Phnom Penh: Oxfam Great Britain, Cambodia Land Project, 1999)); and Frank Van Acker, "Hitting a stone with an egg? Cambodia's rural economy and land tenure in transition", Centre for Asian Studies (CAS) Discussion Paper, April 1999, page 35.

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20 *Management Report and Recommendations in response to the Inspection Panel Report: Cambodia LMAP*, World Bank, January 2011, paragraph 19.

21 Constitution of the Kingdom of Cambodia (1993), article 44

22 International Covenant on Economic, Social and Cultural Rights, art 11(1); UN CESCR, *General Comment 4: The right to adequate housing* (1991).

23 Chan Sophalet. al., *Land Tenure in Cambodia: A Data Update*, CDRI, Working Paper 19, 2001, [4.3]; and Frank Van Acker, "Hitting a stone with an egg? Cambodia's rural economy and land tenure in transition", Centre for Asian Studies (CAS) Discussion Paper, April 1999, page 37-38.

26 Note, however, that Greve and later Van Acker point out that "[a]t least a million people were put at a disadvantage by the private ownership rights granted in 1989: the refugees in third countries and Thailand, the border people living along the Cambodian-Thai border (Khmer Rouge areas), the internally displaced people, and those forcibly relocated to strategic hamlets inside Cambodia. Frank Van Acker, op cit, page 44, (citing Sophie Hanne Greve, "Land Tenure and Property Rights in Cambodia," Phnom Penh, 1993, page 50).

27 Sik Boreak, *Land Ownership, Sales and Concentration in Cambodia*, CDRI, Working Paper 16, 2000.

28 Alfons Ullenberg, *Foreign Direct Investment (FDI) in Land in Cambodia*, GTZ, 2009, page 13.





Exacerbating this situation, the transition to privatization and a market economy in the early 1990s, and an influx of capital and increasing economic activity – including as a result of the arrival of 30,000 UN staff and other foreign agencies – soon led to “a dramatic increase in land prices as demand exceeded supply”,<sup>29</sup> particularly in Phnom Penh.

These factors, coupled with the re-emergence of the patronage system and the absence of administrative and judicial protection of legal rights, soon led to an escalating pattern of land-grabbing and forced evictions. Citing recorded figures of at least 4,000 urban families affected between 1990 and 1996, Paul Rabe describes a policy of forced evictions in Phnom Penh beginning during this period. He explains that:

Even as high-level officials from government, the police and the armed forces (in their private capacity) were stimulating squatting through their ties with informal brokers, and even as politicians were encouraging squatting for political gain in the run-up to the national elections in 1993, the Municipality of Phnom Penh and local authorities embarked on a violent forced eviction campaign.<sup>30</sup>

One of the justifications put forward by the Municipality of Phnom Penh at the time was that “squatters” were “illegal” and “anarchic” because they were occupying land “to which other people held land titles”.<sup>31</sup> Rabe points out that this was “a dubious claim in the early

1990s, as no new land titling exercises had yet taken place since the PRK regime had declared all previous land rights invalid”.<sup>32</sup> This included State land, which had not been fully defined, demarcated or registered.

The granting by both the government and military of large tracts of agricultural land, forest and fishing lots to Cambodian and foreign investors during the 1990s often led to the displacement of local communities from housing and farming land, and reduced access to forests, water and other essential natural resources.

The granting of economic land concessions occurred with minimal transparency. Although legal regulations were developed in later years, concession rights have continued to be issued according to dubious criteria and without regard for social and environmental safeguards.

The lack of certainty regarding land rights also affected private investors who were unable to clarify the land tenure situation relating to sought-after land. Indeed, the widespread absence of land tenure security was – and remains – a hindrance to the proper functioning of the market. As development and economic growth increased in the 1990s, tenure insecurity escalated. Further, as the policy and practice of forced evictions in the name of development became entrenched, the problem of insecure land tenure became increasingly harder to correct and continued to distort the land and natural resource market and thus the wider economy.

<sup>29</sup> Ibid.

<sup>30</sup> Paul Rabe, op cit, page 93.

<sup>31</sup> Ibid, (citing Bronwyn Curran, “Fate of Squatters in the Balance”, *Phnom Penh Post*, 25 February 1994).

<sup>32</sup> Ibid.





## 2.2 Main donor efforts to clarify and secure land rights

### The Land Law

In the mid-90s the ADB made a US\$30 million dollar concessional loan package to the agricultural sector conditional on the inclusion of a new, clearer legislative regime over land.<sup>33</sup>

According to the ADB, “[a]mong the key objectives of the loan was to introduce policy and institutional reform measures for market-oriented agricultural development”.<sup>34</sup> The drafting of the new legislation began in 1996, with technical support from the ADB. The law, as described by the ADB, aimed to “overhaul the way land [was] managed and distributed, and, most importantly to protect property rights.”<sup>35</sup>

Urooj Malik, ADB’s Resident Representative in Cambodia at the time, regarded the passage of the law by the National Assembly in 2001, as a “major milestone in the sustainable development and management of Cambodia’s natural resources given the gravity of governance issues in relation to landlessness.”<sup>36</sup>

The new Land Law, passed after an unprecedented consultation process, was indeed widely hailed as progressive and transformative, providing a strong legislative basis for the

equitable protection of land rights. Importantly, the law confirms that people who occupied property before 31 August 2001, and meet a number of other conditions, have exclusive rights to the property, which can be transferred to full ownership.<sup>37</sup> Such rights are known as “possession rights” and form the legal basis of the adjudication process in the land titling and registration program that commenced the following year. Importantly, the Land Law makes a penal offence any act that hinders peaceful possession of land in an area not yet covered by the cadastral index map.<sup>38</sup> This means that, if a household has not yet had its rights to the land adjudicated and determined through proper legal processes, its possession of the land should not be interfered with, including by threat of or actual eviction. The effect of this provision is to place a legislative moratorium on eviction of all households whose rights have not yet been legally assessed. The Law also contains provisions that recognize indigenous peoples’ customary rights to land and vests the State with power to grant collective ownership over land to indigenous communities. The law provides for interim protection including against eviction until indigenous lands are registered.

It must be noted that there remain serious legislative gaps in terms of securing tenure and protecting people from forced eviction. Possession of property that is State public property, as defined by the law, or someone else’s private property is not legal. Any occupation of land that commenced after the passage of the law is also illegal. The Law leaves households that fall into these categories – potentially tens

33 ADB Loan 1445-CAM(SF): Agriculture Sector Program, approved 20 June 1996. In the mid-90s the ADB was also providing technical and financial support for urban development programs.

34 ADB, Media Centre, “ADB Congratulates Cambodia on Passage of Land Law” 2001, available at <<http://www.adb.org/Documents/News/CARM/2001/carm200101.asp>>

35 Ibid.

36 Ibid.

37 Land Law (2001), Article 38.

38 Land Law (2001), Article 248.



of thousands – without any form of tenure security or protection from forced eviction. The failure to include a comprehensive legal regime on a range of tenure forms, evictions, compensation and resettlement, either in the Land Law or in a supplementary law or sub-decree, is noteworthy given the scale of the practice of forced evictions that already existed at the time the law passed.

Nonetheless, for the majority of Cambodian households the new Land Law was a positive development in terms of providing legislative clarity of their tenure status and providing a legal framework for dispute resolution and the registration of land rights.

The ADB recognized, however, that the enactment of a progressive Land Law would not be enough to secure property rights and transform the landscape of pervasive tenure insecurity. Malik noted upon the passage of the law by the National Assembly that the “true test for improving governance in resource management will be the implementation of the law.”<sup>39</sup> The ADB approved a \$600,000 first-phase TA in 2000 and a further \$600,000 for a second phase TA in 2003 for assistance in implementing the Land Law, which included the drafting of necessary regulations; training of judges, lawyers and land registry officers on the application of the law; and raising people’s awareness of their rights under the law and how to realize their rights.<sup>40</sup> The ADB was cognizant that, despite the passage of the law, powerful individuals, officials, and military commanders were increasingly involved in land grabbing, and that, as a result, many

people, especially the poor and powerless, continued to lose their land and were taking to the streets to demonstrate. In its phase one TA approval document the ADB emphasized that a “failure to restore a transparent and fair system of land ownership and an effective enforcement mechanism will increase social inequity and has the potential of leading to civil unrest, undermining the already fragile rule of law and state legitimacy.”<sup>41</sup>

## **The Land Management Administration Project**

With a clear legislative framework for claiming property rights, registration and settling disputes now in place, the Cambodian government, with the financial and technical support of multilateral and bilateral donors, began to move forward with the process of land administration, including formal titling and registration. Pilot mapping and registration projects supported by Germany and Finland since the mid-1990s could now be scaled up into a full-fledged land sector project.

The Land Management, Administration and Distribution Program (LAMDP) was to be implemented through a number of donor and government funded projects over a 15-year period. LAMDP aimed to give effect to key provisions of the 2001 Land Law, with the objectives of strengthening land tenure security and land markets, preventing and resolving land disputes, managing land and natural resources in an equitable, sustainable and efficient manner, and promoting equitable land distribution.

39 ADB, Media Centre, op. cit.

40 ADB Technical Assistance to the Kingdom of Cambodia for Implementation of Land Legislation, December 2000, page 2.



The Land Management and Administration Project (LMAP)<sup>42</sup> commenced in 2002 as the first phase of LAMDP.<sup>43</sup> LMAP was originally to be implemented over five years, but in 2007 was extended for a further two years.<sup>44</sup>

LMAP was designed to focus on five key components:

1. Development of land policy and regulatory framework: developing capacity of the Council of Land Policy, formulating policy, developing and drafting legal documents, and dissemination of policy, law and procedures.
2. Institutional development: long-term development of the MLMUPC, developing land management and administration education programs, and developing a private surveying industry.
3. Land titling and development of a land registration system: information dissemination and community participation, systematic and sporadic titling, and developing a modern land registration system.

4. Strengthening mechanisms for land dispute resolution: strengthening the Cadastral Commissions and providing legal assistance for the disadvantaged.
5. Land management: Clarifying the procedures for identifying and demarcating different types of land.

The project's primary donors were the World Bank (pledging \$28.83 million), GTZ (\$3.5 million in technical assistance), and the Government of Finland (\$3.5 million in technical assistance).<sup>45</sup>

The Canadian International Development Agency (CIDA) joined the project in 2004 committing more than CN\$10 million in both funding and technical assistance to components of LAMDP through to 2012.<sup>46</sup>

The successes, achievements, shortcomings and failures of LMAP have been the subject of much scrutiny and analysis in recent years, particularly by the World Bank, the World Bank Inspection Panel, independent analysts, researchers and NGOs. Broadly speaking, the narrative according to the project's implementers and bilateral supporters (Germany, Finland and Canada) is overwhelmingly positive, with emphasis placed on output successes in terms of numbers of titles issued, and increased institutional capacity to adjudicate and register land. This technical account of the achievements of LMAP's implementation, captured in excerpts below, is countered by others such as human rights organizations,

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42 The LMAP design documentation publically available are the World Bank's Project Appraisal Document and the World Bank's aide memoirs. Project design documentation of bilateral donors and the government has not been disclosed. Thus the information that follows pertaining to project design is drawn from World Bank documents.

43 Along with the land distribution program (LASED).

44 In 2006 World Bank funding to LMAP was suspended following an investigation that revealed that 17 contracts had been mis-procured due to corruption, with a combined value of US\$0.7 million. After remedial steps were taken, the project restarted in February 2007. (World Bank Website, *Cambodia: World Bank releases new statement and update*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAEXTN/0,,contentMDK:20947353~menuPK:50003484~pagePK:141137~piPK:141127~theSitePK:293856,00.html>>

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45 World Bank Website, *LMAP summary*, available at <[http://sit-eresources.worldbank.org/INTCAMBODIA/Resources/Cambodia\\_Project\\_Updates.pdf](http://sit-eresources.worldbank.org/INTCAMBODIA/Resources/Cambodia_Project_Updates.pdf)>

46 CIDA Website, *Cambodia: CIDA funded projects*, available at <<http://www.acdi-cida.gc.ca/CIDAWEB/cpo.nsf/fWebCSAZEn?ReadForm&idx=01&CC=KH>>





researchers and the World Bank Inspection Panel, which have assessed LMAP's implementation through a political-economy, human rights and/or safeguard policy compliance lens. In effect, these analyses, described below, point to a failure to address inherent unjust power dynamics, which allowed what became a narrow technical development project to be manipulated by powerful interests to consolidate and expand their control of land-holdings. This manipulation came in particular at the expense of marginalized groups who were excluded from having their rights recognized during project implementation, putting them at risk of losing their land.

The "positive" narrative is that there were significant output successes of the land sector project, including the development of a modern formal land registration system, the improved technical capacity of the MLMUPC and the issuance of over one million land titles. (1.6 million parcels were registered out of a total of approximately 11 million parcels.<sup>47</sup>) FINNMAP, the consulting company that provides technical assistance to Finnish-funded development cooperation projects in Cambodia's land sector, describes achievements in land administration as of 2011 (including from successor programs to LMAP) as follows:

The programme achievements so far are impressive: more than 2 million land parcels have been surveyed and adjudicated, delivering official land titles to private land owners for the first time. More than 1000 cadastral officers, 9000 local level decision-makers and 3500 cadastral commission members have been trained to undertake land registration, maintain

the established land register and solve land disputes. The previous paper-based cadaster has been replaced by a digital cadaster and a countrywide geodetic network and digital orthophoto coverage has been established. Today the land administration system in Cambodia stands out in a regional comparison. The systematic registration of land is more effective and less expensive than in the neighbouring countries and Cambodia is the only country to use modern digital technology to support land registration and the cadastral system.

It continues:

An important lesson from Cambodia is that successful technical assistance must be based on local needs, mutual trust and understanding, and be adapted to the local cultural and historical context. The solid results of the Cambodian project are due to both strong and committed local ownership and the long-term approach of the technical assistance teams. FINNMAP has mainly used long-term experts who thoroughly understand the local conditions and practices.<sup>48</sup>

A 2011 evaluation commissioned by CIDA of its contribution to land registration in Cambodia, named: *Land Titling in Cambodia: Securing 1000 Basic Human Rights Every Day*, found that the Canadian project:

... is **relevant** to the needs of its Government partner; **effective** in achieving the intended results; **efficient** in mobilizing resources to surpass objectives and produce cost-effective outputs; and particularly **well-coordinated and harmonized**

<sup>47</sup> Fabian Thiel, *Gender Equality and Land Law in Cambodia*, FIG Congress 2010, page 3.

<sup>48</sup> Finnmap International Job Advertisement for a Land Registration/ Cadastral Expert, October 2011.



with the lead Government agency and other development assistance to land administration in Cambodia. Competent partnering and commitment by the Government has led to one of the highest possible levels of **ownership** by the Government. Not only does Cambodia own the management of this initiative, it actually pays a large part of its realization out of its own budget resources.<sup>49</sup>

Placing a high significance on country ownership, the evaluation states that:

The strength of the partnership allowed the Government partner to make its own decisions, exercising its "right to error" as it learned by doing. This is the paramount achievement of the partners... the basis on which everything else could be built. The inevitable mishaps and shortcomings will eventually be solved because Cambodians drive the land sector in Cambodia, having been empowered and capacitated to make the necessary improvements. CIDA's enlightened, flexible and responsive management has allowed [the project] to adopt the essential iterative and holistic approach to transferring ownership to Government. This being said, while CIDA, the Canadian project and the other international partners were highly effective in this undertaking, the Cambodian partners were the principal leaders and implementers of this successful development initiative.<sup>50</sup>

Yet, in a prevailing environment characterized by increasing forced evictions, displacement and landlessness and the regular granting of

dubious economic land concessions and mining licenses, other observers have pointed to considerable failures in relation to the over-riding land sector goals of improving the way land is managed and distributed, and securing property rights according to the law. So called "country ownership", critics point out, has led to manipulation of the program and unchallenged abuse of power to the severe detriment of excluded households and has at best done little to tackle the problem of forced evictions.

Local NGO Sahmakum Teang Tnaut (STT) has estimated that between 1990 and 2011 approximately ten percent of Phnom Penh's population was displaced, with the vast majority experiencing displacement between 2000 and 2011.<sup>51</sup>

While the Ministry of Agriculture claims that a total of 1.19 million hectares of land have been granted as economic land concessions (ELCs), according to the Cambodian human rights organization LICADHO, as of February 2012 the figure is well over 2 million, representing more than 56 percent of Cambodia's arable land mass.<sup>52</sup> Another human rights organization, ADHOC, reports that in 2010 alone 800,000 hectares of land were granted as ELCs.<sup>53</sup> LICADHO maps show that a further 1.9 million hectares are the subject of mining concessions. The number of forced and threatened evictions from land granted

49 Project Services International (PSI) Cambodia Land Administration Support Project (CLASP), Evaluation Report: Land titling in Cambodia: Securing 1000 Basic Human Rights Every Day, September 2011, page 5.

50 Ibid.

51 STT, Facts and Figures 19 (May 2011): Displaced Families: Phnom Penh 1990 -2011.

52 LICADHO, Economic Land Concessions and Mining Concessions Map of Cambodia, 21-02-2012; and May Titthara and David Boyle, Kingdom's arable land all but gone, *The Phnom Penh Post*, 1 March, 2012, available at <<http://www.phnompenhpost.com/index.php/2012030154799/National-news/kingdoms-arable-land-all-but-gone.html>>

53 May Titthara and David Boyle, op cit.





under these concessions, and the total impact on livelihoods as a result of local communities' loss of access to the land is unknown. However, the almost daily reports of land conflicts, often violent, in connection with the concessions, suggest an alarming magnitude of displacement and adverse impacts. Partly as a result of concessions, USAID has reported that landlessness has continued to climb, estimating rates of landlessness in 2009 at between 20 to 40 percent.<sup>54</sup> While these figures do not necessarily point to direct flaws of LMAP per se, and clearly involve sources of power that extend well beyond the Ministry of Land, they do portray a problematic and worsening environment with respect to tenure security and the equitable management and distribution of land.

A number of reports have found significant flaws in LMAP itself, some of which have arguably contributed to the deteriorating situation described above. The report, *Untitled*, released by Bridges Across Borders Southeast Asia (BABSEA), Center on Housing Rights and Evictions (COHRE), and Jesuit Refugee Services (JRS) in 2009 found that vulnerable households with legitimate claims to land are routinely and arbitrarily denied access to land titling and dispute resolution mechanisms, undermining the project's aim of reducing poverty and promoting social stability.<sup>55</sup> The report states:

A key factor in the design of LMAP, and one that has effectively excluded tens of thousands of households from being eligible for titling, is that areas "likely to be disputed" and areas of "unclear status" would not be targeted by the titling system. These terms are not defined in the LMAP design, and in practice this has resulted in a lack of access to the titling system for households and communities that lie in the path of planned developments or concessions, or whose lands have been targeted by well connected individuals or companies. There are many examples of communities that, despite having well documented possession rights, are not targeted for systematic titling and have had requests for sporadic title ignored. This means that many households at risk of being evicted and becoming landless, even if they qualify for title under the Land Law, are not being served by this project.<sup>56</sup>

While some of the most vulnerable households were excluded from the opportunity to strengthen their tenure status through land registration, the report also found that the majority of beneficiaries of systematic titling have been those living in rural areas that have not been sought after by developers or speculators. While many systematic title recipients have been poor households, they have not necessarily been those in most immediate need of security that a land title aims to provide.<sup>57</sup> The report states:

It could also be argued that the majority of those who have received title through LMAP already had relatively strong security of tenure through the local tenure system that existed prior to the project.

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54 2009 estimate. USAID Land Tenure and Property Rights Portal, available at <<http://usaidlandtenure.net/usaidltp/products/country-profiles/cambodia>>

55 Mark Grimsditch, et al., *Untitled: Tenure Security and Inequality in the Cambodian Land Sector*, BABSEA, COHRE and JRS, April 2009, page 1. (Full disclosure: the author of this discussion paper was an editor of the *Untitled* report)

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56 Ibid, page 3.

57 Ibid, page 4.



It is apparent that LMAP has evaluated the success of the titling program largely based on its outputs, particularly the number of titles issued, rather than its impacts, such as clear improvements in tenure security and a reduction of land-grabbing and disputes.<sup>58</sup>

The report goes on to say that the exclusion of those communities at risk of displacement entrenches the inequitable system that existed before LMAP commenced:

In areas where households have been able to access the new titling system, tenure security has likely been improved; however, by expanding access to titling through LMAP, the pre-existing tenure system has simultaneously been weakened. This has arguably left urban and rural households that have been unable to access the new system, despite having possession rights, with weaker tenure and further exposed to accusations of being illegal “anarchic squatters.” In turn, these households may have become *more vulnerable* to land rights violations, including land confiscation with inadequate compensation. The fact that these households do not have title is often used against them as a justification for eviction, despite the fact that many have documented rights under the law. Meanwhile, the wealthy and well-connected have little difficulty in acquiring land title in high value areas in which poor communities reside due to their connections or their ability to pay the high “unofficial fees” for sporadic title.<sup>59</sup>

The report also highlights serious problems in relation to unexplained gaps between the number of land plots adjudicated as having

possession rights and the number of titles actually issued; a low rate of registration of land transfers due to, *inter alia*, fee and tax implications; and corruption and ineffectiveness of the Cadastral Commission and other land dispute resolution bodies.<sup>60</sup>

Perhaps the most significant shortcoming of LMAP was the failure to make serious progress on the establishment of a State land management system, and in particular the transparent demarcation and recording of State public and private property. Doing so in accordance with the law would require a direct challenge to powerful interests that profit from a lack of finite clarification of State landholdings. In this regard, *Untitled* states that:

A lack of adequate progress towards identifying State land has a crucial impact on the tenure security of Cambodia's poor and those vulnerable to displacement. Many legal possessors continue to be denied requests for title, as they are told they live on State land. Without any coordinated mapping and registration according to proper procedures, and no access to a database of results, this can be neither verified nor disproved, and in the vast majority of cases the weaker party loses out. The lack of progress on this component also threatens the success of the Social Land Concession (SLC) policy, which aims to provide secure tenure to landless or land poor families. SLCs can only be granted on State private land, and until comprehensive identification of State land is conducted, the progress of land distribution projects will continue to be slow.<sup>61</sup>

58 Ibid.

59 Ibid, page 7.

60 Ibid, page 4 and 5.

61 Ibid, page 6.



In September 2009, a few months before the project was set to end, the Cambodian government rejected remaining World Bank disbursements to LMAP after the World Bank raised a number of significant problems with project implementation with high-level officials. The same month, LMAP became the subject of a World Bank Inspection Panel investigation when representatives of residents of Boeung Kak Lake, who were unjustly excluded *en masse* from the land adjudication process and faced forced eviction, submitted a request for inspection.<sup>62</sup> The request was deemed eligible in December 2009 and the Inspection Panel finalized its Investigation Report in November 2010.

The Panel found that a number of World Bank safeguard policies had been breached in the design, implementation and supervision of LMAP and that this had contributed to the “grave harm” suffered by the Requesters and other households in similar situations.<sup>63</sup> In particular, the Panel, corroborating findings of the *Untitled* report, found that “design flaws in the Project led to the arbitrary exclusion of lands from the titling process and that this denied residents, especially the poor and vulnerable, the opportunity to claim and formalize their pre-existing rights through the adjudication process under LMAP.”<sup>64</sup> This flaw constituted a breach of the Bank’s Operational Policy on Project Appraisal.<sup>65</sup> The Panel also

found that Bank Management’s supervision of the Project “overlooked the critical issue of adjudicating private claims on land claimed by the State.”<sup>66</sup> Finally, the Panel found that the Bank did not pay enough attention to the “social consequences of titling, including potential evictions,” and that it “should have detected the serious problems faced by people in the [Boeung Kak] area at an earlier stage, and considered appropriate actions.”<sup>67</sup> Failing to do so, the Panel held, was not in compliance with the Bank’s policy on Project Supervision.<sup>68</sup>

Meanwhile, *sans* the World Bank, the bilateral donors have continued to provide their support to land registration and other aspects of land administration after the close of LMAP through the similarly constructed Land Administration Sub-Sector Program (LASSP).

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62 The issue of exclusions is discussed further in Part 3.

63 World Bank Inspection Panel, 2010. *Investigation Report, Cambodia: Land Management and Administration Project* (Credit No. 3620-KH), November 23, 2010, [54] and [177].

64 Ibid, Annex 1, page 82.

65 Ibid.

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66 Ibid, Annex 1, page 78.

67 Ibid, [233].

68 Ibid.



## PART 3

**A framework for a human rights approach to development of the land sector**







The sections below describe ten 10 interdependent elements of a human rights approach to development and discuss, as an example, how a land administration project in Cambodia could adopt each of these elements. Although the discussion below focuses on land administration, the elements described should also be applied to other aspects of land sector development, including land management and distribution. Indeed, with forests and other natural resources being destroyed or sold off at an alarming rate and high and escalating levels of landlessness, these aspects of land reform have deep-seated human rights implications. Land distribution and management should be prioritized in equal measure to land administration in order to ensure equitable and sustainable access to land and natural resources. For the sake of brevity, however, the land administration component is used as an example to illustrate how the 10 elements could be applied to land reform efforts.

The following elements are mutually supporting and interconnected, making the separate discussions of each somewhat artificial. However, it is hoped that the breakdown of the elements facilitates easier discussion, understanding and application of a human rights approach to development. The elements encompass a combination of applied human rights standards and principles as well as strategies to make human rights meaningful, and indeed claimable, during the development process. It is recognized, however, that development projects are designed and implemented on a basis of ongoing negotiation between the government, development agencies and other stakeholders. In cases in which a government is unwilling or only partially willing to apply a human rights approach, or particular elements of the approach, partner development agencies should negotiate to the best of their

ability processes and goals that will further, and not hinder, a human rights agenda. In cases in which the overall advancement of human rights does not seem possible within the given constraints, donors should reconsider their support to the project and potentially the government in question.

## 1. Human rights goals and strategy

A human rights approach to development recognizes that the State has an obligation to take steps to progressively realize human rights within its maximum available resources, as well as a duty to refrain from human rights abuses and protect against human rights violations by third parties. These obligations, as they relate to relevant human rights, form the basis of the development goals in a given sector. These obligations also inform the rationale and goals of narrower development projects that, for example, support the construction of infrastructure. When a project's main objective is to stimulate economic growth, the extent to which revenue from the project is likely to be used to contribute to the realization of human rights should be assessed, maximized through design, and clearly stated. More specific and direct positive human rights impacts should be included as project goals and maximized through the design of the project.

Setting human rights goals injects the value of universally agreed upon norms from ratified international covenants into the development agenda. Cambodia, like many of its development partners, has ratified the major international human rights covenants and has thus committed to respect, protect and



progressively fulfill the rights therein.<sup>69</sup> The international human rights instruments that define and explain each human right, such as the General Comments of UN Human Rights Treaty Bodies<sup>70</sup> and the reports of Special Rapporteurs,<sup>71</sup> should be drawn upon to define goals to be achieved within the given context.

Efforts to develop the land sector have a clear human rights dimension and affect the enjoyment of many human rights. The extent to which people have secure access to and control over land and natural resources has a direct bearing on their level of enjoyment of their rights to adequate housing, food and in many cases also water, work and health. Given the independence and indivisibility of human rights – and the central importance of land to people's lives, community and society – other economic, social, cultural, civil and political rights are directly or indirectly affected by land sector development.

A central objective of LMAP was to strengthen land tenure security. Tenure security is also one of the components of the right to

adequate housing<sup>72</sup> as defined by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 4.<sup>73</sup> The CESCR defines tenure security as a legal guarantee against forced eviction, harassment and other threats.<sup>74</sup> The Committee notes that tenure takes a variety of forms and is not limited to ownership. It places an obligation on States to “take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.”<sup>75</sup> Steps are to be taken progressively and in a non-discriminatory manner towards universal tenure security throughout the country in question.<sup>76</sup>

These and other interpretive instruments on the right to adequate housing hold important instructive value for setting development goals and objectives in the land sector. For example, an overriding goal for land sector development might be:

*Secure and equitable access to land, in order to help ensure that all Cambodians can enjoy an adequate standard of living on a non-discriminatory basis.*

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69 Cambodia ratified the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, and the International Convention on the Elimination of All Forms of Racial Discrimination, amongst other human rights treaties, in 1992.

70 General Comments of treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, provide authoritative interpretations of the content of international human rights covenants.

71 Special Rapporteurs are independent experts appointed by the United Nations Human Rights Council with the mandate to monitor, advise and report on particular human rights and the human rights situations in particular countries. Reports can include thematic analysis, recommendations and guidelines for the greater enjoyment of particular human rights.

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72 The right to adequate housing is recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights.

73 UN CESCR, *General Comment 4: The right to adequate housing* (1991), paragraph 8. While secure land tenure is relevant to the enjoyment of other human rights, it has been given the most attention in international law documentation in relation to the right to adequate housing.

74 Ibid.

75 Ibid.

76 *Forced Evictions: Analytical report compiled by the Secretary-General pursuant to Commission resolution 1993/77*, UN Doc E/CN.4/1994/20 (1993), paragraph 160.



A goal for the land administration sub-sector might be, for example:

*Security of tenure is improved, especially for vulnerable and socially disadvantaged households and communities, including a legal guarantee of protection from forced evictions.*

A program designed to meet this goal would necessarily work to bring about the legal recognition and conferral of a range of tenure types and arrangements to suit households and communities in different legal, social and economic situations, with a particular focus on those households and communities that currently have the weakest tenure security. It would also seek to develop and build the government's capacity to implement a legal and regulatory framework on evictions and resettlement (discussed further in the following section).

By contrast, the overall goals of LMAP were to “reduce poverty, promote social stability, and stimulate economic development.” The vast majority of human and financial resources invested in this project and its successor program, LASSP, have been primarily focused on determining and registering one form of tenure status: private ownership. This reflects the dominant development agenda in which the notion of private property rights is perceived as a key pillar of economic growth and poverty reduction. It also reflects the Hernando de Soto-influenced formula favored by the major development institutions, in which titling individual land plots unlocks access to capital for poor households, providing them with the opportunity to lift themselves out of poverty.<sup>77</sup>

Challenges and criticisms of this formula are now ubiquitous and the Cambodian experience, in which landlessness, land disputes and forced evictions continue to rise, and in which there is no concrete evidence that titling has increased access to credit for poor households, is in itself an important example of why a more holistic and nuanced approach is necessary.

The LMAP project appraisal document (PAD) indicates that no substantive alternative options to the singular focus on land titling were considered to achieve the goal of improving land tenure security. Under the heading “Project Rationale” there is a brief section that describes two design options that were considered and rejected.<sup>78</sup> The first concerns the World Bank lending instrument to be used and the second explains why LMAP would not include a land distribution component. Neither of these considerations are alternatives to the substantive land administration system adopted by LMAP. A fairly standard land tenure system exclusively focused on securing private ownership rights, as promoted by the dominant development paradigm, was apparently the only road to consider.

A human rights approach is antithetical to a “cookie-cutter” approach. A land administration project that adopts a human rights approach would consider the range of options available to maximize tenure security in the short- and long-term across the board, with a focus on the most insecure and vulnerable groups.

<sup>77</sup> For example see Hernando de Soto, *The Mystery of Capital* (Black Swan, London, 2001).

<sup>78</sup> Project Appraisal Document on a Proposed Credit in the Amount of SDR 19.3 million to the Kingdom of Cambodia for a Land Management and Administration Project, January 29, 2002, page 11.





Indeed, one clear problem with LMAP's approach from a human rights perspective was that households without possession rights were never given the opportunity to achieve security of tenure. This approach left untold numbers of households insecure and exposed to forced eviction. This included households on land defined as State property under the Land Law as well as renters, together constituting a major segment of the population.

A project designed to achieve human rights goals would create avenues for securing tenure of these vulnerable households. For example, there could have been an additional component of LMAP or a complementary project aimed at ensuring that these households would have also had the opportunity to strengthen their tenure security.<sup>79</sup> This component or project would widen the narrow focus of LMAP on ownership rights to a recognition and conferral of other forms of secure tenure, such as cooperative tenure arrangements on common property resources, and inheritable leasehold and usufruct rights on State property that are only revocable in particular, clear and non-arbitrary circumstances. Similarly a component or separate project could have been initiated that prioritized the enforcement of protection of indigenous communal land rights as recognized in the Land Law.

## 2. Human rights impact assessments, safeguards and mitigation measures

Human rights impact assessments measure the impact of policies, projects and programs on the human rights of affected people. The aim of carrying out a human rights impact assessment of a development program is to find ways to maximize the positive human rights impacts and to identify foreseeable risks that could lead to the violation of rights for particular groups. Identified risks should be avoided in the design of the project or mitigated through human rights safeguard policies and programs.

Comparative studies about the experiences of other similarly situated countries should be examined and the likely manifestation in the Cambodian context assessed. For example, before introducing a centralized and formalized land titling system, which in some other countries have in fact led to reductions of tenure security and other negative impacts, answers to the following types of questions should be explored:

- Is formalized land titling and the expected increase in land market activity likely to exacerbate land speculation?
- Could this in turn increase the incentive for the State and/or powerful private interests to confiscate land and thus exacerbate insecurity and increase forced evictions?
- Could this impede the capacity for land to be used in a manner that provides the most widespread benefits and will this negate the social function of land and natural resources?

<sup>79</sup> There was in fact a parallel UN-Habitat and Municipality of Phnom Penh program initiated at around the same time as LMAP, called the Phnom Penh Urban Poverty Reduction (UPR) Project, which aimed to upgrade and strengthen tenure security for low-income informal settlements. However, the UPR Project only ever aimed to support 150,000 beneficiaries in Phnom Penh. All other households on land claimed by the State were left unprotected. The UPR project ended in 2005 before the land registration process was fully underway and the project was not effective in conferring legal secure tenure to beneficiary households.





- As prices rise, are distress sales likely to increase resulting in greater landlessness?
  - Could rental prices increase on titled land, pricing one of the most vulnerable groups out of the market and, indeed, out of a house?
  - Do the other necessary factors and institutions exist to improve access to credit on manageable terms for the poorest households? Is it likely that titled land used as collateral for credit will lead to an increase in unmanageable debt burdens, and more frequent defaulting on interest repayments, and thus the acquisition of land by creditors?
  - Could prevailing discrimination against women within society mean that women will be marginalized from and disadvantaged by the formal land titling process? Could formalization entrench this type of discrimination against women and other groups?
  - What is likely to happen to households that, once adjudicated, are found ineligible for title? Looking at the existing context, are they likely to be forcibly evicted without access to alternative adequate housing?
  - Are there risks of arbitrary exclusions from the land titling system given existing patterns? Could the project result in increased abusive and manipulative actions by power holders to displace poor and vulnerable groups from their land and find dubious ways to gain formal title? Could formalization entrench inequality?
  - What is the likely impact on indigenous customary tenure of formalization of a privatized land tenure system within the given context? Is there a danger of sudden and/or gradual displacement of communities from their ancestral lands as a result?
- Consideration of such questions would force the designers of the project to recognize that land titling does not occur in a vacuum and dominant assumptions that form the basis of the development justification for land titling projects often do not hold true in complex developing country contexts. If a decision is made that registration of ownership rights is a sensible way to improve tenure security in the circumstances, an honest examination of this type will at the very least lead to the conclusion that titling is not *enough* to reach human rights goals. Other components of the development project are necessary to secure the rights of other groups and especially the most vulnerable.
- This analysis would identify risks of human rights violations that need to be monitored, avoided or mitigated through project design and implementation. One of the main risks of a land registration project is that untitled households could be forcibly evicted either as a direct or indirect result of the project. For example, households found through the adjudication process to be ineligible for title, whether or not that process occurred with due process according to the law, could be made more vulnerable to forced eviction. The land registration process could also increase the incentive on powerful figures to confiscate untitled land and forcibly evict residents in the expectation of a rise in land values once the area is registered.



Forced evictions constitute a gross violation of a number of human rights, including the right to adequate housing. The practice is defined by the CESCR as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”<sup>80</sup> The prohibition of forced evictions applies to all households, including owners, renters and informal settlers.<sup>81</sup> Forced evictions propel families into poverty and are thus counterproductive to the stated aims of all development cooperation agencies active in Cambodia’s land sector. Ending forced evictions should thus be at the top of the agenda of all development actors engaged in the land sector.

The establishment of clear rules that govern evictions, resettlement and compensation is a critical mitigation measure to counter the risk of forced evictions. The drafting and enactment of such laws should be a central priority, and not a peripheral concern, of land sector development. In addition, donors to the land sector should have their own human rights safeguard policies, including a resettlement and compensation policy that is attached to all development projects in which forced evictions are a foreseeable risk.

A number of international human rights instruments can be drawn upon to develop human rights-compliant eviction and resettlement laws and policies. For example, in its General Comment No. 7 the CESCR has clarified that

while forced evictions are in all cases a violation of international law, evictions are allowed in certain circumstances and when certain protections are properly in place. Evictions are only lawful in exceptional circumstances, such as to make way for a development that is genuinely in the public interest. All feasible alternatives to eviction must first be explored in consultation with the affected persons.

In circumstances in which an eviction is considered necessary and justified, it must be carried out in accordance with general principles of reasonableness and proportionality.

The eviction must occur in strict compliance with procedural protections, including the following:

- Those affected by the eviction must be provided with an opportunity for genuine consultation;
- All affected individuals must be given adequate and reasonable notice prior to the scheduled date of eviction;
- Within a reasonable time prior to the eviction taking place, information about the proposed eviction and the alternative purpose for which the property is to be used, is to be made available to all affected persons;
- Government officials or their representatives are to be present during an eviction;
- All persons conducting the eviction are to be properly identified;
- The eviction must not take place in particularly bad weather or at night unless the affected persons consent

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<sup>80</sup> UN CESCR, *General Comment 7: Forced evictions, and the right to adequate housing* (1997), paragraph 3.

<sup>81</sup> UN CESCR, *General Comment 4: The right to adequate housing* (1991), paragraph 8.



otherwise;

- Individuals affected must be provided with access to legal remedies; and
- Legal aid should be provided to persons who require it to seek redress from the courts.<sup>82</sup>

No one should be made homeless or vulnerable to the violation of other human rights as a result of eviction. The State is obligated to ensure in consultation with the affected families that they have access to adequate alternative housing, through, for example, resettlement to a location close to livelihood opportunities and with access to basic services.<sup>83</sup>

Another important instructive source for the development of human rights-compliant policies are the Basic Principles and Guidelines on Development-Based Evictions and Displacement, which were presented by the Special Rapporteur on adequate housing in his 2007 report to the Human Rights Council.<sup>84</sup> The World Bank, International Finance Corporation, the Asian Development Bank and other regional development banks have adopted involuntary resettlement policies that can also be drawn upon to the extent that they meet human rights standards.

Importantly, the development of a resettlement law or policy must be accompanied by an implementing program. History shows

that the development of laws or the inclusion of such policies in development assistance agreements alone will do little to stop human rights violations, especially where the implementation of such policies are complex and resource-intensive. In the case of a resettlement law or policy that will hinder the ability of powerful interests to continue the practice of accumulating wealth through land confiscation, the challenge is even more stark. The gravity of the human rights violations involved means that the challenge cannot be ignored but must be tackled through a strategic and comprehensive development program that attempts to progressively improve the situation. The program would include training components to explain to relevant government officials the extreme but avoidable harm caused to families, communities and society by forced evictions. It would build their capacity to assess whether an eviction can be lawfully carried out and if so, how to carry out the eviction in compliance with the law or policy, including all the procedural and substantive protections before, during and after evictions as set out above. The costs of implementing such a program should be factored into the wider development assistance agreement.

A Resettlement Policy Framework (RPF) was in fact prepared for LMAP and attached to the credit agreement between the World Bank and the government, in accordance with the World Bank's operational policies. The RPF, and the requirement for adherence to World Bank safeguard policies more generally, was an important mitigation measure for the risk of forced eviction of households found to be living on land registered as State property under the project.

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<sup>82</sup> UN CESCR, *General Comment 7: Forced evictions, and the right to adequate housing* (1997), paragraph 15.

<sup>83</sup> *Ibid*, paragraph 16.

<sup>84</sup> The Basic principles and guidelines on development-based evictions and displacement, Annex I of the report of the Special Rapporteur on adequate housing to the Human Rights Council (2007).



The RPF, however, failed to provide protection against forced evictions in practice for a number of reasons, including an unrealistic assessment at the project appraisal stage that the risks of involuntary resettlement were small. Perhaps partly because of this erroneous assessment, which drastically downplayed the risk, no efforts were made to clarify the duties of the government under the policy and no implementing program or resources were attached. These failures became apparent in the case of Boeung Kak, when residents found themselves facing forced eviction after being denied title *en masse* without having the opportunity to have their land rights adjudicated under LMAP, despite the fact that their commune was a declared adjudication zone. The residents were denied due process when the area was *de facto* deemed by authorities to be State property, without adherence to the relevant legal procedures.<sup>85</sup> The World Bank found that the Boeung Kak situation triggered the RPF, but the government took a different view – a disagreement that ultimately led to the government's decision to terminate the LMAP loan agreement prematurely and the residents' decision to file a complaint to the Bank's Inspection Panel. (These problems will be discussed further under the sections on “Clarifying rights and duties”, “Non-discrimination and equality” and “Accountability”.)

An important part of making human rights-based eviction policies and programs successful is to make it clear that respecting

human rights does not pose an obstacle to development. Evictions are possible for genuine public interest development purposes under human rights law, and in cases of private development, most people living on land required for a project will be willing to sell their land for a reasonable amount of compensation determined on the basis of a fair negotiation. A human rights approach and the prohibition on forced evictions, however, will mean that poor households are not made to shoulder the costs of development through forced eviction that will almost invariably lead to severe impoverishment and the elimination of their opportunity to benefit from and contribute to development of the country. Instead, human-rights compliant policies and practices will lead to a just development process and an equitable distribution of benefits. The cost of carrying out an eviction and ensuring access to alternative adequate housing either, for example, through appropriate compensation or the provision of appropriate resettlement land must be internalized into development project budgets. The immediate financial costs to the state, development partner or developer should pose a disincentive to carry out evictions unless there are no feasible alternatives. The long-term economic, social and political costs of carrying out forced evictions that impoverish countless Cambodian families will ultimately outweigh any perceived short-term gains.

### 3. Informed participation of rights-holders

Access to information and meaningful participation of the public is a key tool in creating ‘bottom-up’ human rights change and more equal power relations in the context of de-

<sup>85</sup> The legal procedures that must be followed to register land as State property are set out in Sub-Decree 118, Sub-Decree on State Land Management, 07 October, 2005 and *Prakas* No. 42 on Identification, Mapping and Classification of State Land, 2006. The procedures for reclassification of land from State public to State private property are set out in Royal Decree on ‘Principles and Transitional Provisions on Transferring Public Properties of the State and Public Legal Entities’ 03 August, 2006.





velopment. Land reform and administration, in particular, is an issue of immense public importance and development approaches and plans should be subjected to critical public debate. Informed active participation of civil society in setting development goals and designing and implementing development projects are essential in helping to challenge the power imbalances that currently characterize access to and control over land and natural resources in Cambodia.

Meaningful participation of people who will be directly affected by a development project should occur from the earliest stages of project initiation, goal setting and design so that they can set priorities, contribute ideas, express concerns and influence decision-making from the outset. Valuing the participation of various stakeholders, and especially people who will be directly affected, recognizes that people have a right to be active agents in development that will affect their lives and have significant contributions to make about the best way to achieve goals that are important to them. It also recognizes that active and informed participants of a development process are better equipped to become active and informed citizens of a democratic state. Successful participation in a development project is thus not only an important part of the process but also a valuable end in itself.

Creating avenues for active participation requires the identification and utilization of appropriate participatory tools and techniques at the various stages of the project cycle for different groups. Ensuring access to information and meaningful participation requires a range of flexible tools and approaches, including interactive learning techniques and community level forums that provide accessible and safe environments for particular groups such as

women and the poorest and most marginalized people to express their needs, concerns and opinions.

During the implementation of land tenure projects awareness raising and participation at the community and household-level is particularly crucial at the adjudication stage, when land plots are demarcated, claims to a land parcel are recorded, and boundary and other disputes arise along with possibility of loss of access to land, eviction and resettlement. Effective community legal education and participation at this stage of the process is critical to a legitimate and successful land administration project.

LMAF was designed to include a public awareness and community participation (PACP) component during its implementation through the contracting of local NGOs to fulfill a number of roles including explaining legal rights under Cambodian law, promoting the participation of women and other disadvantaged groups and explaining the benefits of registering land. However, no NGOs were contracted to carry out these roles apparently because they were required to enter into contracts directly with the Ministry of Land and were unwilling to do so.<sup>86</sup> Instead of redesigning PACP in a more innovative and practical manner, the provision of information and participation was limited to steps necessary for the land adjudication process to take place.<sup>87</sup>

<sup>86</sup> Mark Grimsditch, op cit, page 43.

<sup>87</sup> As required by *Instruction relating to the Implementation of the Procedure of Establishing the Cadastral Index Map and Land Register*, Ministry of Land Management, Urban Planning and Construction, No: 001DNS/SD/19 August 2002.



An undisclosed 2006 “Independent Review of Transparency and Accountability Issues” in LMAP commissioned by GTZ reportedly found a systemic lack of information provided to households regarding the systematic titling process and the procedures involved. According to a World Bank Inspection Panel report, the Independent Review found that “the proposed beneficiaries; do not know ‘the who? What? Where? When? Why? and by/for whom?’ relating to the process”.<sup>88</sup> The Review apparently states that households are not being adequately informed of “the potential issues of compensation/resettlement when the lands they claimed are disputed by the State” or on residents’ possible rights to compensation “as outlined in the RGC agreed social safeguards to be applied in the LMAP project”.<sup>89</sup>

Given the widespread lack of legal awareness in the Cambodian population, access to information about laws, rights and how to exercise rights, is an important step to creating a more level playing field in the face of land disputes with the state, powerful individuals and companies. Thus it is important that affected people are informed about their rights, not only under Cambodian law but also under relevant human rights safeguard policies, including how to access legal remedies through accountability mechanisms. If affected people are aware of the project and how it will affect them, as well as their rights and how

to access remedies, their power during the development process increases manifold. This wider understanding of access to information and how it relates to accountability is discussed further in section 7.

#### 4. Clearly defined rights and duties

For a human rights approach to development to be effective, human rights goals, strategies and safeguards that have been identified and devised during the planning and design stage should be translated into clearly defined rights and corresponding duties under the project.

Human rights obligations of the government, preferably broken down into specific duties of particular ministries and authorities, and obligations of other development partners, need to be defined in the project agreement documentation. For example, there must be a clear understanding of specific duties and measures to be taken to uphold the principles of non-discrimination in the implementation of the project and obligations under human rights safeguard policies. Vague terminology that allows for unwarranted arbitrary discretion to be exercised by power-holders will heighten the risk of abuse of power and rights violations. Clear definitions and rules that identify duty-holders and require transparency in decision-making are key to reducing the risk of human rights violations. (See further discussion and example in the section on “Transparency” below.)

Ensuring clarity and a mutual understanding of rights and duties of all development partners to a project will also often require training of key implementers. All duty-bearers should be made aware of their obligations in connec-

<sup>88</sup> World Bank Inspection Panel Investigation Report, Cambodia; Land Management and Administration Project (Credit No. 3650-KH), November 23, 2010, [174], (citing Declan O’Leary, *Independent Review of Transparency and Accountability Issues in the Systematic Land Titling Field Systems and Procedures of the Land Management Administration Project (LMAP) Adjudication Areas*, February 2006, page 16.)

<sup>89</sup> Ibid, (citing Declan O’Leary, page iii and 16).



tion with the project and the implications of these obligations, including how they will be held accountable for non-fulfillment that leads to harm.

As mentioned above, one of the reasons that the Resettlement Policy Framework attached to the LMAP agreement was not effective in protecting people's rights was that no efforts were made during the project agreement process to ensure that there was mutual awareness and understanding about what the RPF meant, when it would be triggered and what the precise obligations on development partners were in terms of implementation and resourcing. It is possible that the government, and certainly relevant authorities and officials, were not even aware of the existence of the RPF, let alone what it meant in practice. The extent of the World Bank task team's knowledge and understanding of the RPF and how it applied to LMAP is also questionable.

Had the RPF and development partners' roles and responsibilities under the framework, including implementation, support and resourcing responsibilities, been discussed, agreed upon and clarified among development partners at the outset, it is possible that the conflict between the World Bank and the government could have been avoided. It is also possible that the discussion about the RPF itself could have led to a wider dialogue about support required to address the gaps in Cambodia's legal framework on evictions and provided a basis for progress on this important aspect of land sector development.

Conversely it is also possible that, had the existence and implications of the RPF been highlighted, the Cambodian government would have regarded the obligations as too onerous

and refused to enter into the agreement for LMAP with the World Bank at all. This danger applies to all projects with safeguard policies that extend beyond the laws, policies and practices of recipient governments and thus has far reaching implications.

As stated previously, it is recognized that development cooperation occurs in the context of contested values and agendas, and for a human rights approach to development to be practical it cannot remain blind to these political realities. Thus, where the situation allows and to the extent possible, a clear agreement and mutual understanding of human rights-compliant safeguard policies should be reached. In more difficult contexts, the approach taken should be one that furthers the overall human rights situation, including through a commitment to the implementation of the strongest possible human rights safeguards. In cases in which a foreseeable advancement of human rights is at best dubious and the risk of human rights violations is high because of a lack of commitment to safeguards, the donor should reconsider its engagement.

## 5. Transparency

Making project information available to the public in a timely manner should be standard practice of all development partners as a part of a human rights approach and good development practice. Transparency requires that information including project design and preparation documentation, project agreements, budgets, supervision reports, evaluations and completion reports as well as non-confidential decisions, actions, and processes relating to





the project are made publicly available in an accessible form and language. Transparency is essential to the capacity of stakeholders and rights-holders to actively participate in all phases of the development project, and to understand how their rights are being affected and how to claim them under the project. Transparency also has the effect of placing a check on the exercise of power by duty-bearers, and as such, a culture and practice of transparency in a project can help to avoid bad decision-making, inefficient performance of duties, failures to comply with required procedures, and corruption. Transparency is thus key to accountability of duty-bearers and enhances public trust, confidence and support for the development project.

Under a human rights approach to development, transparency policies and practices would be instituted that actively aim to make relevant information accessible to the people who need it most, including marginalized groups who, for example, do not have access to the Internet, speak a different language or are illiterate. While it may not be practicable for all project information to be disseminated to these groups, key information that affects the capacity and opportunity of people to exercise and enjoy their rights would be made available in an accessible manner and through appropriate media.

A transparency policy that applies to the development project should exist and itself be made available and accessible to the public so that stakeholders understand how information, and what type of information, will be made available to them and what they can do if they cannot find information that they seek. For information that is genuinely confidential, the policy should require an explanation of the non-disclosure decision consistent with a

defined set of reasons established under the policy. All development partners, including the government, should agree to the transparency policy as part of the project agreement.

The lack of transparency under LMAP, coupled with design flaws in a number of crucial areas, allowed power-holders to manipulate the system to their benefit and to the detriment of predominantly poor families that lived on sought-after land. As explained in Part 2, by design LMAP never intended to adjudicate and register land categorized as an area “where disputes [were] likely” or an area “of unclear status”.<sup>90</sup> These categories were not defined in project documentation and no reasons were ever made public for classifying an area in this way during the implementation of LMAP. This undoubtedly vested undue discretionary powers in authorities known to be complicit in land-grabbing. The lack of transparency surrounding decisions to excise particular areas from the adjudication process, or indeed to abort the adjudication process in other areas, constituted a major flaw in the implementation of the systematic titling component of LMAP.

Furthermore, a clear and updated State property registry was never made public, effectively allowing the State to arbitrarily lay claim to valuable land.

The opaque nature of decision-making under LMAP seriously eroded its credibility as a fair, rule-based land reform project and meant that rights-holders under the project were denied crucial information and completely excluded

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<sup>90</sup> Project Appraisal Document on a Proposed Credit in the Amount of SDR 19.3 million to the Kingdom of Cambodia for a Land Management and Administration Project, January 29, 2002, page 24.





from the decision-making process. The lack of transparency also had irreparable adverse implications for accountability at all levels under the project.

In terms of design, supervision, monitoring and evaluation documentation, very little information about LMAP was made available during the project cycle. Despite being bound by its own disclosure policy, the World Bank made scant information available on its website. The Bank did improve its practice of disclosure as problems with the project came to light and internal evaluations were carried out in response. Other development partners released very little information about the project and their engagement.

For example, the 2006 “Independent Review of Transparency and Accountability Issues” in LMAP commissioned by GTZ was, ironically, never publically disclosed. The evaluation reportedly found serious problems with LMAP, including that “at least a fifth of households (19.6%) in 13 of the adjudication areas visited [were] being adversely affected by the systematic land titling process, usually through the refusal to register land in household possession or use.”<sup>91</sup>

Despite these important findings that have clear and direct implications for people’s rights and lives, the evaluation has not been released.

In May 2009 the Centre on Housing Rights and Evictions (COHRE), an international NGO active in Cambodia, sent letters to GTZ, CIDA, the Finnish Ministry for Foreign Affairs, Finnmap and the Cambodian Ministry of Land

requesting copies of documents about the successor program to LMAP. No development partner replied to the request.

Development partners should recognize the vital role access to information plays in challenging inequitable power relations and empowering citizens to demand their rights and effectively participate in public affairs. Encouraging a culture of transparency is not just crucial for a just development process but an important element in the wider goal of building a vibrant democratic state.

## **6. Non-discrimination and equal treatment under the law**

The principles of non-discrimination and equal treatment under the law are fundamental components of international human rights and are recognized as basic tenets in legal jurisdictions around the world. The International Covenant on Economic, Social and Cultural Rights places an obligation on States to guarantee the exercise of ESC rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>92</sup> In addition to a corresponding provision in the International Covenant on Civil and Political Rights, it also contains an independent guarantee of equal and effective protection before and of the law.<sup>93</sup>

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<sup>92</sup> International Covenant on Economic, Social and Cultural Rights (1966), article 2(2).

<sup>93</sup> International Covenant on Civil and Political Rights (1966), article 2(1) and article 26. See also General Comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

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<sup>91</sup> World Bank Inspection Panel Investigation Report, op cit. [174], (citing Declan O’Leary, page ii).



The guarantee of non-discrimination applies to both the process and outcomes of development projects and programs. A development program must not discriminate on any prohibited grounds in its design or implementation, by for example, adversely affecting a particular group or excluding a particular group from receiving its benefits. The outcome of a project, such as law or policy, also must not discriminate, through for example, provisions that disadvantage particular groups either in form or effect. Moreover during the implementation of the development project or program everyone is entitled to equal protection under the law.

The Committee on Economic, Social and Cultural Rights has affirmed that “[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective.”<sup>94</sup> It has further clarified that “[a] failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all the resources that are at the State party’s disposal in an effort to address and eliminate the discrimination, as a matter of priority.”<sup>95</sup>

With respect to land and property rights, as a component of the right to adequate housing, “steps are to be taken progressively and in a non-discriminatory manner towards universal tenure security throughout the country in question.”<sup>96</sup> Under LMAP, however, significant

segments of the population – and in fact the most vulnerable segments – were excluded from the opportunity to strengthen their land tenure status and have been denied their right to be protected from forced eviction. These exclusions occurred for a number of different reasons and at a number of different levels. Exclusions resulted from the following characteristics of LMAP:

- LMAP only ever aimed to secure the land rights of legal possessors. This meant that, in the absence of a complementary program, the tens (or perhaps hundreds) of thousands of households that do not have legal possession rights, including those that live on land that was defined as State property in the 2001 Land Law (eg. along riverbanks), were left without any support to secure their land tenure. This exclusion left many of the poorest households vulnerable to forced evictions. At the same time, in its implementation LMAP failed to make progress on demarcating and registering State property according to the law. This failure meant that authorities – and powerful affiliated interests – were left to arbitrarily declare an area State property and use this as a pretext to evict residents from that area.<sup>97</sup>
- The decision to choose LMAP adjudication areas – and exclude others – was left to authorities that in some cases have reportedly been perpetrators, or associated with perpetrators, of forced evictions or the grant of dubious economic land

<sup>94</sup> UN CESCR, *General Comment 20: Non-discrimination in economic, social and cultural rights* (2009), paragraph 13.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Forced Evictions: Analytical report compiled by the Secretary-General pursuant to Commission resolution 1993/77*, UN Doc E/CN.4/1994/20 (1993), paragraph 160.

<sup>97</sup> See World Bank, *Cambodia Land Management and Administration Project: Enhanced Review Report*, 13 July, 2009, page 6, paragraph 15; World Bank Inspection Panel Investigation Report, op cit page 46; and *Untitled: Tenure Security and Inequality in the Cambodian Land Sector*, op cit., page 57-58.



concessions. Once again the exclusion of households outside of designated adjudication areas left those households vulnerable to forced eviction, especially in cases in which such households were unable to access the sporadic titling system due to lack of information, prohibitive costs or corruption.<sup>98</sup> Exclusions within declared adjudication areas also occurred. As discussed above, the design of LMAP allowed areas “likely to be disputed” and areas of “unclear status” to be excluded, without ever defining these terms or setting out when, and under what process, the rights of these households would be determined. This design feature was ripe for manipulation and indeed households and entire villages and communities have been designated as falling within these categories and denied due process rights, frequently because a well-connected individual or company lays claim to the land in question. These exclusions were the subject of the World Bank Inspection Panel case. The Boeung Kak lake residents who submitted the request for inspection to the Panel were excluded in this manner, and were subsequently referred to by authorities as illegal squatters and subjected to forced eviction. These types of exclusions meant that households affected were not afforded equal treatment under the law as compared to other households whose rights were fully adjudicated.

- The decision to exclude indigenous communities from the donor-supported land registration project essentially meant that no communal titles would be issued over

- the life of the project at a time when indigenous territories were under severe threat by outside interests. As a result indigenous peoples were denied the opportunity to strengthen their tenure status because of their different customary practices and relationship with the land as compared to the general Khmer population.

The land registration program could not reasonably be expected to cover every household at the same time, and by nature systematic land registration is incremental. Nonetheless some of the exclusions, resulting from both poor project design and an abuse of power, amounted to unequal treatment under the law (i.e. in the application of Land Law provisions) and discriminatory treatment on the basis of prohibited grounds, arguably including economic and social status, property or place of residence and ethnicity, regarding the progressive realization of the right to adequate housing.<sup>99</sup> In this regard the Committee on Economic Social and Cultural Rights has clarified that States party to the Covenant should ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.<sup>100</sup>

<sup>98</sup> Mark Grimsditch, *op cit*, page 36.

<sup>99</sup> See, UN CESCR, *General Comment 20: Non-discrimination in economic, social and cultural rights* (2009).

<sup>100</sup> *Ibid*.



## 7. Gender equality

Distinctions, exclusions or restrictions made either in form or substance on the basis of sex, which has the effect of impairing the enjoyment of rights, is contrary to States' obligations under international law, including the ICCPR and the ICESCR. Unequal treatment and discriminatory practices that inhibit the enjoyment of rights by women are also a contravention of the Convention on the Elimination of Discrimination against Women (CEDAW).<sup>101</sup> As a subset of the principle of non-discrimination and equal treatment, women must be afforded equal opportunities, protections and benefits during the process and in the outcomes of all development projects.

Given the cultural barriers to equal treatment of women in Cambodia, development projects will often need to incorporate specific interventions to ensure that women are able to actively participate in project design and implementation and do not face marginalization and exclusion from receiving project benefits, including as a result of intra-community and intra-household power asymmetries.

CEDAW requires States to take all appropriate measures to ensure "the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."<sup>102</sup> In Cambodia despite Constitutional and formal legal protections, women face significant disadvantages with respect to both access to and control

over land.

Female-headed households are considerably more likely to be landless and land poor<sup>103</sup> – an issue that requires urgent attention of development partners. Under LMAP, the right of women to be recorded as joint owners on land titles was promoted and of the one million titles issued, 20 percent record the wife as owner, 5 percent recorded the husband as owner and 70 percent record joint husband-wife ownership.<sup>104</sup>

However, even in cases in which both husbands and wives are recorded as joint owners, social norms and practices can inhibit the decision-making power of women with respect to land. This disempowerment of women is exacerbated in cases of divorce, death or family break-up, which can lead to women losing their rights to land.<sup>105</sup>

While joint-ownership registration provides an important protection for women in these situations, it is often not enough to secure their rights. For women who were already divorced, separated or abandoned at the time of land registration, in some cases their rights may have been weakened by the formalization of ownership.

Anecdotal evidence recorded in a study on systematic land registration and women, shows that, despite requests for registration of

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<sup>101</sup> Convention on the Elimination of Discrimination against Women (1979)

<sup>102</sup> Convention on the Elimination of Discrimination against Women (1979), article 16(h).

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<sup>103</sup> Cambodia land titling rural baseline survey report, Cambodia Development Resource Institute, December 2007.

<sup>104</sup> Sar, Sovann and Franz-Volker Mueller. "Experiences of land management in Cambodia." Presented at the international conference "Policy Meets Land Management: Contributions to the Achievements of the MDGs." April 17-18, 2008, Munich, Germany.

<sup>105</sup> USAID Land Tenure and Property Rights Portal, available at < <http://usaidlandtenure.net/usaidltp/products/country-profiles/cambodia> >





sole ownership from female-headed households in this situation, land registration officers have recorded joint-ownership of husband and wife.<sup>106</sup> This practice occurred despite contrary rules under the Land Adjudication Guideline. In at least some of these cases “[t]he women were under the impression that their land had been registered in their names only”, and once they became aware of the joint-ownership registration they were concerned about losing their control over and rights to the land if their husband returned.<sup>107</sup>

Some of these women thought that they would have been better off without land title because under the informal system there were fewer complications about who had rights to the land, especially in cases in which the husband or former husbands had married again and had other children.<sup>108</sup> According to the study, barriers to information for women about the law, their rights and the registration process thwart their active engagement in land adjudication and registration and their capacity to strengthen and defend their rights.<sup>109</sup> A gender assessment carried out by USAID found that, “the confusion and costs associated with certifying ownership rights have had a negative impact on women’s land rights, especially for female-headed households.”<sup>110</sup>

Land administration development projects must ensure that strategies are in place to strengthen women’s control over land, including ongoing female-oriented participation forums and appropriate educational programs targeting both men and women aimed at challenging discriminatory social and cultural norms and practices.

Intensive training programs must target village leaders and authorities, as well as land adjudication and registration teams, who often perpetuate discriminatory perceptions and treatment of women and are frequently unaware of progressive laws, policies and guidelines or lack an understanding of how to apply them to individual, sometimes complex, cases. Donors should also encourage and support legal aid programs that have a special focus on protecting women’s rights to land including facilitating women’s access to dispute resolution bodies and the courts. Programs must be closely monitored and evaluated for their gender impacts and appropriate changes must be incorporated in design and implementation where discriminatory practices and impacts are identified.

It should also be noted that, as the primary caregivers and custodians of the home, women bear the brunt of involuntary resettlement and forced evictions. Women must endure and keep the household together despite loss of access to jobs and livelihoods, the disruption of children’s education, diminished access to health services, and a deterioration of the family’s mental and physical well-being. Forced evictions also often mean the breakdown of community support networks that women rely upon in their daily lives.

106 Mehra Mehrvar, Chhay Kim Sore and My Sambath, *Women’s Perspectives: A Case Study of Systematic Land Registration in Cambodia*, Gender and Development for Cambodia and Heinrich Boll Stiftung Cambodia, 2008, page 10.

107 Ibid.

108 Ibid. page 16.

109 Ibid.

110 “Gender analysis and assessment,” USAID Cambodia, March 2006.



Forced evictions are one of the most debilitating human rights abuses and injustices faced by Cambodian women today. Therefore strengthening the land tenure of all women, and not just legal possessors, as well as human rights-compliant resettlement policies and practices, should be viewed as a priority of all development partners who seek to promote the rights of women and gender equality through their development assistance and cooperation. As noted in Section 1, alternative forms of tenure and secure access to land is necessary both to combat forced evictions and reduce landlessness of women-headed households. Development partners should design and implement programs with innovative approaches for promoting secure access to land for vulnerable women, such as long-term leases on State property and cooperative tenure arrangements on common property resources.<sup>111</sup>

## 8. Accountability and rule of law

Accountability of all development actors to those affected by their projects is fundamental to a human rights approach to development. Placing a check on the power of government and donors to a development project through accountability mechanisms and providing an accessible avenue for affected people to claim their rights is perhaps the single most important way to equalize power relations in the development process.

Accountability means that duty-bearers are responsible for their decisions and actions that affect others and that they are able to

demonstrate that they have fulfilled their responsibilities effectively and fairly and in accordance with laws, rules and procedures that bind their work. Accountability also means that when duty-bearers are unable to demonstrate this, they accept responsibility and act to rectify problems and remedy harms done.

Transparency and informed participation throughout the project cycle are central to accountability because they allow processes, decisions, actions and impacts to be subjected to external monitoring, evaluation and critical debate.

Accountability should occur through a variety of formal and informal channels that are accessible to people affected by a development project. For example, village level forums and processes through which people can easily register questions, concerns and complaints and receive immediate or prompt responses and resolutions can contribute to accountability throughout the project cycle. Administrative accountability should also operate within the project implementing ministry or department itself. For example, staff should be answerable to their bosses and each other in relation to their job performance including the fulfillment of their human rights duties.

Some important administrative accountability processes were incorporated into land adjudication procedures under LMAP, for example, during the public display of the Cadastral Index Map,<sup>112</sup> although information about the perceived fairness and rigor of these processes is unavailable.

111 See, Fabian Thiel, Gender Equality and Land Law in Cambodia, FIG Congress 2010, page 4.

112 As required by *Instruction relating to the Implementation of the Procedure of Establishing the Cadastral Index Map and Land Register*, Ministry of Land Management, Urban Planning and Construction, No: 001DNS/SD/19 August 2002.



An essential feature of accountability is that people who are or will be affected by a development project, or who are unfairly excluded from a development project, have a meaningful opportunity to claim their rights through a fair and impartial mechanism. Cambodia, like many other developing countries, does not have effective and independent administrative and judicial institutions that place a check on power and hold those that violate laws and rights to account. Strengthening country justice systems should be a development priority, however the reality remains that the courts are currently not an effective avenue for upholding rights.

In the absence of alternative mechanisms, there is therefore an alarming absence of accountability with respect to most development projects in Cambodia. People who feel that they are harmed by a development project essentially have no opportunity to meaningfully claim their rights and seek remedies. This accountability deficit exists despite the plethora of evidence that many development projects cause serious harm to at least some people, usually those that are already poor, marginalized and vulnerable.

Adopting a human rights approach to development means establishing or utilizing an effective, impartial and accessible accountability mechanism that is vested with the mandate to assess claims of rights violations and make findings that place obligations on all development partners (duty-bearers) to rectify problems and remedy harm. The accountability mechanism should be authorized to assess and make findings in relation to violations of the human rights safeguard policies that are included in project agreements. The mandate, composition, procedures and powers of the accountability mechanism should also be

established in the project agreement. Government and donors to the project should commit to act upon the findings of the mechanism in order to ensure that effective remedies are available for harm suffered by rights-holders and that necessary corrections are made to project design and/or implementation.

Every effort should be made to secure a commitment by all development partners, including the government, to bind itself to the findings of the accountability mechanism. However if the government is unwilling to do so, donors should nonetheless institute their own accountability mechanism to investigate claims of rights violations and commit to doing all they can to remedy harms and rectify project problems.

In cases in which the government refuses to work with development partners to remedy serious human rights violations, donors should remain accountable as duty-bearers and be equipped and empowered to do so on their own, through for example, the establishment of a special reparations fund. Wider donor responses to major human rights violations and recipient governments' persistent unwillingness to comply with human rights obligations and remedy harms are discussed in sections 8 and 9 below.

Accountability mechanisms must be accessible to rights-holders. As mentioned in section 3, it is imperative that project-affected people are made aware of their rights under the project and the opportunity to submit a complaint to the accountability mechanism if they are violated. Legal aid should also be made available to facilitate access to accountability mechanisms, especially for the most marginalized and disadvantaged households who may face particular obstacles to claiming



their rights.

The Boeung Kak case provides a good illustration of the use of an accountability mechanism and the importance of the characteristics described above. In 2009 a group of NGOs informed residents of Boeung Kak of the existence of the World Bank Inspection Panel and the fact that, as people affected by LMAP, they had a right to submit a complaint (known as a Request for Inspection) to the Panel. The NGOs explained LMAP's land adjudication and registration component to the community and informed them that it appeared that their rights to have their ownership or other claims to the land adjudicated under the project were breached when laws and procedures were not properly followed. The NGOs further explained that this meant that a number of World Bank policies may not have been properly complied with and that this could have contributed to the threat of forced eviction that they were facing.

This process continued for several months to ensure that the Boeung Kak community understood their rights, the process and possible implications of the strategy. Meanwhile, representatives of the community had several meetings with World Bank Management and country office staff to try to find a resolution. By August 2009, a large number of community members had made the informed decision to file a complaint to the Panel and requested NGOs that had been supporting their campaign to submit the Request on their behalf.

Clearly a request to the Inspection Panel would never have been filed if NGOs working with the community had not been aware of the opportunity to do so and had not educated community members about their rights and options. The submission of the request itself

was also facilitated by the NGOs, who adopted the role of legal aid providers. While NGOs may often be best placed to provide educational and legal aid services, development partners cannot rely on NGOs to play this role for all development projects (or all World Bank-financed projects). These services that make accountability mechanisms accessible must be built into all development projects either through the direct provision by specialized donor staff or through financial and technical support to NGOs (or a combination of both).

Following the submission of the complaint, the Panel undertook two missions to Cambodia and held meetings with Boeung Kak residents. The Panel process thereby involved the community members, who felt empowered by the fact that a quasi-legal body was assessing their rights under a development project in an impartial manner and taking efforts to directly hear their grievances and bear witness to their plight. For people who do not have the opportunity to have their claims and voices heard by a competent and independent court this process itself was highly significant.

In November 2010 the Panel released its report on the case and found that a number of World Bank operational policies had not been complied with and that this had contributed to the harm suffered by Boeung Kak residents. The finding was an important vindication of the long and difficult community struggle but there were two interrelated major impediments to the translation of the Panel's findings into a meaningful remedy.

First, as explained in section 4, the Resettlement Policy Framework, although technically a part of the LMAP agreement between the Bank and the government, was never clearly understood in terms of its applicability and the





specific rights and duties that it conferred. This became a major issue when the Panel found that the associated operational policy had not been complied with. The government took the view that the policy was not applicable to the case. The policy's application and implications should have been clarified from the beginning and mutually understood by the World Bank and the government (and all the other development partners).

Second, the Inspection Panel is only mandated to investigate non-compliance with policy by the World Bank and not by the borrowing government. This distinction meant that even when the World Bank Board agreed to accept and act on the findings of the Panel (its findings are not binding on the Bank – yet another impediment to a meaningful remedy in many cases), the government did not accept the Panel's findings and refused to cooperate with the Bank on remedies and mitigation measures. Under its mandate the World Bank (specifically the International Development Association) cannot operate in a country without the consent of the government. An effective accountability mechanism should bind all development partners, including the borrower or recipient government.

This turn of events left the World Bank in a situation where the only recourse available to it, if it wanted to continue its efforts to secure a remedy for Boeung Kak residents - and indeed make it clear that its safeguard policies are binding - was to suspend all new lending to Cambodia. While undoubtedly a number of factors contributed to the result, in August 2011, shortly after the World Bank's suspension became public, the Prime Minister issued a sub-decree granting 12.44 hectares of land back to most remaining residents. Land titles have since been issued to the majority of the

approximately 750 remaining households.

Approximately 85 families still living in the area have been excluded from the sub decree and many of the 3000 or so families that have already been displaced from the area continue to suffer hardships and seek remedies for the violations of their rights. Nonetheless the sub decree and subsequent grant of titles was a significant positive development for the realization of human rights and there may be new opportunities for the resolution of excluded and displaced families' situations, which could pave the way to full reengagement by the Bank in Cambodia.

The World Bank's Inspection Panel is an important and commendable accountability mechanism, despite the significant shortcomings that exist in connection with the Panel's mandate and powers. While some other multilateral development agencies, such as the Asian Development Bank (ADB), have similar (yet weaker) accountability mechanisms, bilateral donors to Cambodia by and large operate completely outside any effective and accessible accountability process through which project-affected people can claim their rights. While bilateral aid agencies are theoretically accountable to parliaments and citizens of their home countries, this is rarely an effective form of accountability, especially in terms of impacts of aid on the rights of people in recipient countries.

The establishment and strengthening of safeguard policies backed by adequate resources and accountability mechanisms to allow people to meaningfully claim their rights is of first order importance to a human rights approach to development. It is also crucial to ensure adherence to applicable laws, policies and procedures under the project and the



identification and rectification of flaws in the way that a project is being implemented.

## **9. Country human rights strategy and monitoring process**

For foreign donors and development agencies, the central purpose of adopting a human rights approach to development is to ensure that financial aid and technical assistance contributes to an evolving situation of greater respect for, and protection and fulfillment of, human rights. Aid and assistance should never exacerbate inequities or contribute either directly or indirectly to the violation of human rights, including by bolstering an undemocratic and abusive regime.

Development and aid agencies that adopt a human rights approach recognize that economic growth in and of itself is not a development goal, but one means to the end of creating a just and prosperous society in which people have the capacities, opportunities and freedoms necessary to live full, meaningful and dignified lives. They also recognize that poverty that exists because of, or is exacerbated by, abuse of power will not be significantly reduced without shifting or breaking down the power dynamics that perpetuate social injustice and inequality.

Broad development assistance strategies therefore need to reflect this understanding by focusing directly on the human rights situation and identifying potential drivers of positive human rights change. Donors should then use their human rights strategy to guide their sector specific efforts, interventions and decisions to help ensure they are contributing and not hindering respect for human rights.

A country human rights strategy identifies obstacles to equitable development including unjust and abusive power dynamics and structural discrimination. The strategy identifies and analyses potential drivers of change and develops a theory of change towards a more just society in which there is greater respect for and enjoyment of human rights.

It discusses possible entry points for the progressive realization of human rights, including through capacity building and financial and technical support to particular government and non-government actors in or across sectors that are likely to have positive human rights impacts. It identifies problematic areas that have cross-cutting negative impacts on the enjoyment of several human rights and assesses which interventions are possible to tackle the source of injustice.

The strategy identifies and assesses the likely effectiveness of a range of different responses by development partners and the international community to human rights violations. It also assesses the risk of entrenching existing inequitable power dynamics and how best to avoid doing so. The strategy may identify a “red line” at which human rights violations are considered so severe and systematic that direct support to and partnership with the government will become inappropriate and harmful. It may also identify the sort of civil society groups to be supported and the best means and methods of that support.

The human rights strategy of a particular development agency will focus on the human rights situation in sectors in which the agency engages or considers engaging. In doing so it draws upon relevant information from United Nations human rights monitoring bodies, such as reports of human rights treaty bod-



ies (eg. the CESCR) and UN-Charter bodies (eg. reports of the Human Rights Council and its special procedures, such as the Special Rapporteur on the situation of human rights in Cambodia and the Special Rapporteur on adequate housing). It will also take into account information from reports and assessments of human rights organizations with relevant expertise.

A human rights-approach does not provide hard and fast rules or answers about when donors should “speak out” against human rights violations or end support to a human rights-violating regime when these acts would jeopardize genuine positive contributions to the enjoyment of human rights for some groups. In any given situation, various complex and often competing factors need to be weighed and considered in making such decisions. However, a comprehensive human rights strategy, based on a rigorous human rights and socio-political analysis, provides an important basis upon which these critical decisions should be made.

This should prevent inconsistencies in messages sent to the government about boundaries of acceptable behavior with regard to human rights. Arbitrary and inconsistent messages from the international community about major violations, such as forced evictions and the persecution of human rights defenders, can seriously undermine the perceived legal authority of human rights.

Adopting a comprehensive human rights approach to development and basing interventions and engagement on a broad human rights strategy should equip development agencies with a range of tools to use over the long-term, including dialogue, capacity building, incentives to respect human rights

through support to positive reforms, and consistent firm communication about the boundaries of acceptable behavior. The persistent and consistent use of these tools should help to avoid a crisis situation in which the donors must decide whether or not to withdraw support or engagement altogether – a blunt instrument for effecting change.

Ultimately, however, a decision to cease or suspend development cooperation must be based on an honest assessment of whether, on balance, donor engagement with the government is contributing to a more prosperous and just society with a greater respect for human rights (and not merely to economic growth). For the land sector, this assessment must examine, inter alia, whether security of tenure is on the whole being strengthened for Cambodians and especially for the most marginalized and vulnerable groups.

Regardless of “output” project achievements, a consistent trend of increases in land-grabbing, forced evictions, poor resettlement practices and displacement does not bode well for a positive overall assessment of human rights progress. This situation requires either a change of strategy (how can development engagement do better at shifting unjust power relations and ending rights violations?) or, if all engagement is determined to be futile, a decision to disengage until sufficient political will exists to make genuine substantive improvement in the human rights situation.

The country human rights strategy should be reassessed and updated every two to three years based on consistent monitoring of progress and/or deteriorations in the human rights situation for disaggregate groups and of particular cases relevant to the sectors in which the development agency engages.





The periodic strategy reassessment process provides an important opportunity for reflection and evaluation of whether development assistance is contributing to a better society in which there is an increasing respect for and fulfillment of human rights and there are enhanced opportunities and capacities of the poorest and most marginalized people to benefit from the development of the country.

## 10. Donor coordination

It is widely accepted among development agencies and practitioners that donors should coordinate behind common (country-driven) objectives for aid to be effective. “Harmonization” of aid is one of the fundamental principles of the Paris Declaration on Aid Effectiveness (2005). The principle of donor coordination should extend to country human rights strategies, efforts to progress the enjoyment of human rights, and to donor responses to major human rights violations. The effective implementation of a country human rights strategy and the use of tools identified to take advantage of possible entry points is much more likely if “like-minded” donors are unified on these approaches and send a consistent message about the boundaries of acceptable behavior.

The German development ministry BMZ articulates the need for donor coordination and political dialogue on human rights, as well as the challenges posed, in its recently published Human Rights Strategy Paper:

The issue of human rights violations must be addressed in **political dialogue**. However, this always requires a high degree of sensitivity: some partner countries refuse to discuss the human rights situation, while others play off the principle

of ownership of development processes, enshrined in the Paris Declaration on Aid Effectiveness, against their human rights obligations. Among donors, despite violations of human rights occurring in partner countries, other, often conflicting interests may prevail, with the result that a coordinated and targeted approach is rarely achieved. Furthermore, donors often do not agree on which action is most likely to end the abuses to which objection is made, and they may also disagree on the likely impacts of a continuation or suspension of cooperation on the general public. These issues continue to pose challenges which cannot be resolved even with an explicit human rights-based approach in German development policy. However, mainstreaming the human rights-based approach in a country strategy or in joint donor strategies, together with the proactive use and further development of political dialogue as well as dialogue with human rights organisations at the local level and via country discussions, can at least help to foster a debate about appropriate strategies.

The challenges of donor coordination were prominent in the Boeung Kak forced eviction case. The World Bank responded to community and NGO advocacy by arranging internal reviews of whether there were problems with the implementation of LMAP (and whether those problems constituted non-compliance with Bank operational policies). When the review mission found that there were in fact major problems with LMAP and safeguard policies should have been triggered, the World Bank took a principled stand through efforts to encourage the government to respect the rights of Boeung Kak residents under the project. As mentioned previously, the government responded by terminating the LMAP agreement with the Bank and rejecting all remaining





funds.

Bilateral development partners took a different approach and prioritized their relationship with the government in order to be able to continue their support to LASSP and other programs. In their view these are important contributions to Cambodia's development that, while perhaps not perfect, should not be jeopardized because of exclusions of households such as those around Boeung Kak lake.

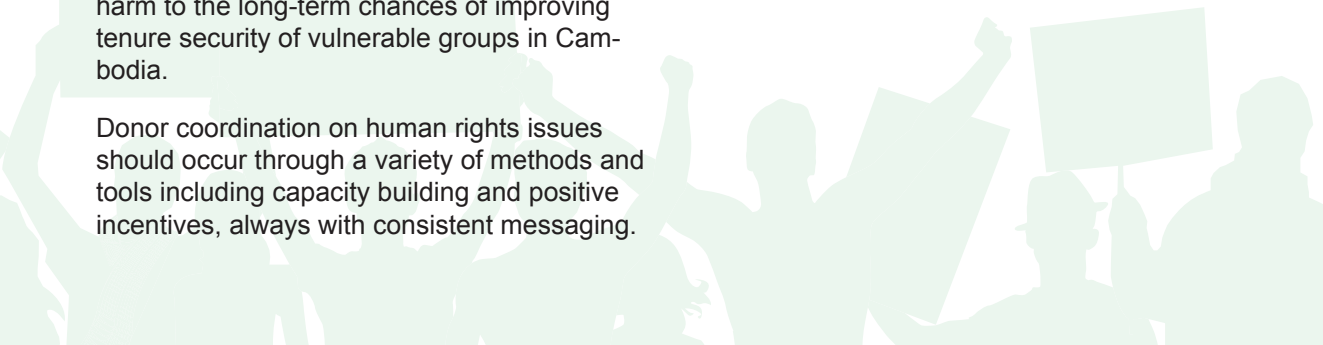
A human rights approach to development provides no categorical answer about the correct approach to take in these circumstances; however given the serious and systematic nature of the human rights violation at hand – mass forced evictions, and the fact that this violation was related to a donor-supported project – a clear and coordinated donor response was in order. The response had to send an unambiguous message to the government that the forced evictions were a violation of international human rights law and were unacceptable and that the link with a donor-supported land sector project could not be overlooked.

It is possible that a strategic principled coordinated donor message and response could have prevented the forced eviction of many households around Boeung Kak. It is probable that the lack of donor coordination in this regard and the mixed messages about the acceptability of forced evictions and manipulation of donor-supported projects did significant harm to the long-term chances of improving tenure security of vulnerable groups in Cambodia.

Donor coordination on human rights issues should occur through a variety of methods and tools including capacity building and positive incentives, always with consistent messaging.

In the face of serious and systematic violations of human rights, coordinated leverage should be used, including through the threat of suspension of aid and, if necessary, the actual suspension of aid, when no other approach is effective.

Even as new actors, such as China, take a dominant role in the aid “market”, other donors should not lower the bar to compete and pander to authoritarian rights-violating regimes in a scramble to stay relevant. If they do so, they should re-evaluate and publicly re-articulate their underlying rationale for continuing to provide development assistance in the face of serious and systematic human rights violations. The emergence of new aid providers makes the need for donor coordination by agencies that profess to promote human rights and improve the lives of the world's poor even more acute.





*The Dey Krahorm community forcibly evicted in January 2009, stand outside their former land and spell out “Development” with their shoes.*

## CONCLUSION





Development actors that adopt a human rights approach to development recognize the inadequacy of development goals solely focused on economic growth in contributing to a better society, in which people have the opportunity on an equal basis to live full, meaningful and dignified lives. They recognize that it is unacceptable for a few to bear the brunt of development enjoyed by the many, or worse still, by an elite few. They recognize that development is rarely a purely technical process and that unjust power relations must be tackled for sustainable positive change to occur.

Yet, adopting a human rights approach to development is resource intensive, challenging and in some cases involves a dramatic shift in current development practice. Designing and implementing a land administration project using all the elements described above is complex and expensive. Setting human rights goals and developing strategies to meet these goals, including the consideration of a range of policy options, completing a comprehensive human rights impact assessment, and creating mitigation measures to avoid risks requires considerable time, resources and commitment of development partners.

Creating mechanisms for genuine informed participation, and establishing accessible accountability mechanisms is also undeniably challenging, and efforts to do so are likely to face opposition from those whose decisions and actions would be subject to scrutiny. Donor coordination on issues that strike at the heart of political power is no easy feat. The political nature of these tasks and the need to take into account and address complex socio-political factors makes them even more daunting.

However, the complex realities on the ground, and the way in which these realities are exacerbating inequality and harming the most disadvantaged and marginalized groups in society, require complex interventions. This need is stark in the land sector as forced evictions, landlessness and land conflict continue to rise despite the tens of millions of dollars spent in efforts to secure land tenure over the past decade. The fundamental importance of land and access to natural resources to peoples' lives in Cambodia and other developing countries means that short cuts are simply unacceptable.

If sufficient resources were invested in setting human rights goals and identifying the best way to maximize security of tenure across the board in the design phase, and then implementing a project designed to avoid and mitigate risks of human rights violations, some of the problems encountered during the implementation of LMAP could have been anticipated and avoided. LMAP also could have been a much stronger tool for the realization of human rights in Cambodia.

A number of recent efforts and opportunities have emerged that could address some of the weaknesses of LMAP, including the policy and programmatic gaps in securing the rights of non-owners.

During development cooperation negotiations in December 2011, Germany and Cambodia agreed to a set of milestones for 2012 to 2015, "meant to measure the progress made in important areas of the land reform, including





relating to human rights.”<sup>113</sup> The release of funds committed by Germany “will be linked to the successive implementation and satisfactory progress of the milestone process.”<sup>114</sup> One of two short-term milestones is the elaboration of a concept for speeding up systematic land registration. This in itself is troubling if abuses of power and flaws in the registration process, including those described above, are not addressed. The fine print does refer to the registration of land of indigenous communities and of land “held by formerly informal settlers”, but it is unclear whether targets are set for securing the rights of these previously excluded groups and, for the latter group, by what means this could occur. At the time of writing, two indigenous communities have recently received collective land titles as a result of support from GIZ. CIDA has committed to continued funding for indigenous land registration until mid-2013.

One of four medium-term milestones for German support, to be defined by June 2012, is on the “[a]voidance of (temporary) exclusions from registration process”. The type of exclusions referred to is not clarified in public documentation and nor is the method for addressing the problem. Nonetheless, the inclusion of the issue in the milestone dialogue is certainly a positive development, if this is used as an entry point to take meaningful measures to systematically deal with all types of exclusions, including those that occurred under LMAP and continue to emerge under LASSP.

Circular No. 3 (2010) and the draft National Housing Policy are potentially a basis for new positive developments in relation to securing tenure of households without legal possession rights. However these instruments must be interpreted in a manner consistent with rights conferred under the Land Law, and in particular their implementation must be preceded by a fair adjudication of land rights for all relevant households. Moreover the Circular in particular must be interpreted consistently with human rights obligations to avoid eviction wherever possible, grant secure tenure rights to households on State property and facilitate upgrading of housing conditions. Any resettlement that occurs under the Circular must also fully respect the human rights of those affected and present an opportunity to progressively realize their rights and improve their living standards.

The ADB is considering providing technical assistance to the RGC to draft a resettlement sub-decree, which is much needed. However, given the poor track record on resettlement and the extreme harm suffered by thousands of Cambodian families as a result of bad resettlement practice, the process must be subjected to meaningful civil society consultations. The sub-decree must be human rights-compliant and be backed by capacity building initiatives and well-resourced implementation programs, as described in section 2 above.

The systematic land registration process and other land sector development support, such as projects implementing Circular No. 3, as well as technical assistance for the drafting of a resettlement sub-decree, need to incorporate the elements of a human rights approach described in this discussion paper. Otherwise they risk feeding into the very same pattern of manipulation by power holders to the

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113 Summary Record of the Negotiations on Development Cooperation between the Government of the Federal Republic of Germany and the Royal Government of Cambodia held in Bonn on 13 and 14 December 2011, available at <[http://www.cdc-crdb.gov.kh/cdc/Donor\\_Development\\_Cooperation\\_Programs/Germany/Negotiation\\_on\\_Development\\_Cooperation\\_2011/summary\\_record.htm](http://www.cdc-crdb.gov.kh/cdc/Donor_Development_Cooperation_Programs/Germany/Negotiation_on_Development_Cooperation_2011/summary_record.htm)>.

114 Ibid.





detriment of the poorest and most vulnerable households as occurred under LMAP.

Development agencies should work to build on existing positive aspects of their projects and development relationships that effectively shift power to rights-holders and hold duty-bearers accountable for their decisions and actions. Given the resource-intensive and cultural changes that are often required to adopt a comprehensive human rights approach, multilateral and bilateral development and aid agencies should incrementally adopt the elements of a human rights approach in all of their projects and throughout their organizations. In doing so, they will be supporting a development process that will be ultimately more efficient and effective at achieving sustained and meaningful goals that contribute to a more just, prosperous and stable Cambodian society.



