

Mandates of the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the situation of human rights in Cambodia

REFERENCE:
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1 December 2017

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights of indigenous peoples and Special Rapporteur on the situation of human rights in Cambodia, pursuant to Human Rights Council resolutions 33/12 and 36/32.

In this connection, we would like to bring to the attention of your Excellency's Government concerns over the **current slow pace at which indigenous land titling is currently taking place**.

As your Government is aware, the situation of indigenous peoples in Cambodia and their right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership, occupation and use was the subject of communications by the former Special Rapporteurs on the Rights of Indigenous Peoples (KHM 4/2007, KHM 5/2008, KHM 5/2009). We regret that your Government has not replied to these communications. The communications raised concerns over the lengthy procedural steps required for the collective titling of indigenous lands, and noted that these may result in a prolonged titling process and jeopardize the effective protection of indigenous peoples' lands from encroachment by outsiders.

Similar concerns were voiced by the Committee on Economic, Social and Cultural Rights which in its 2009 concluding observations on Cambodia's implementation of the International Covenant on Economic, Social and Cultural Rights urged the Government "to implement the 2001 Land Law without further delay and to ensure that its policies on registration of communal lands do not contravene the spirit of this law" (E/C.12/KHM/CO/1 paragraph 16).

Since the communications of the former Special Rapporteurs to Your Excellency's Government, we have continued to receive information alleging that complex and costly land titling processes – in which indigenous peoples and supporting organisations bear the bulk of the financial costs – are putting indigenous peoples in Cambodia at serious risk of losing their traditional lands and resources, in particular sacred forests and gravesites, and their distinct identities as indigenous peoples.

According to the information received:

The Cambodian government has made significant progress in adopting legislative and policy framework supportive of the rights of indigenous peoples. In particular, the 2001 Land Law contains important provisions on the protection of indigenous peoples' lands and allows indigenous peoples to apply for collective

land titles rather than individual titles, and prevents the sale and transfer of indigenous lands. In 2009, the Government adopted *Sub-Decree on Procedures of Registration of Lands of Indigenous Communities (Sub-Decree 83)* which further detailed the procedures required for the collective titling of indigenous lands, including steps for boundary demarcation, surveying and public display. In 2009, the Government of Cambodia also adopted a National Policy on the Development of Indigenous communities, which sets an ambitious goal to ensure that the cultures of indigenous peoples throughout the country are safeguarded and that their living conditions are approved in a consistent manner across all sectors.

With regards to the implementation of the Land Law's provision on indigenous peoples, Sub-Decree 83 establishes a three-step procedure that indigenous communities must follow in order to obtain collective land title and in which several ministries are involved: First, communities must apply to be recognized as indigenous communities with the Ministry of Rural Development (MRD); second, they must apply to be registered with Ministry of Interior (MoI) as legal entities; and third, they must apply register their land collectively with the Ministry of Land, Urban Planning and Construction (MLMUPC). In addition, Sub-Decree 83 – which had not been subject to broad public consultation – introduced a limitation on the maximum amount of sacred forests and gravesites that indigenous peoples can claim for their titles to 7 hectares respectively.

In May 2011, the MoI and MLMUPC issued an inter-ministerial circular, providing for interim protective measures for indigenous peoples awaiting their collective land title. While a welcome development, protections have in reality been lacking as the protective measures only apply to the communities that have submitted their application for collective land title to the MLMUPC, and further excludes any plots that the Royal Government has agreed in principle for investment or development prior to these measures coming into effect.

The process for applying for collective land titles is complex and expensive, as each step of entails the preparation of supportive documentation, including preliminary maps with GPS coordinates. In practice, these requirements have meant that most, if not all, approximately 500 indigenous communities in Cambodia find themselves entirely dependent on development partner organisations to be able to apply for collective titles. The preparation of a preliminary map, in particular, requires significant technical skills and funds to complete. While the first two steps of the collective land title application process are, in some degree, supported by the responsible ministries – the Ministry of Rural Development for the self-identification phase and the Ministry of the Interior for the legal entity registration – preliminary mapping is not substantively or financially supported by any Government agency. Indigenous communities are therefore left in an institutional void for one of the most complex aspects of the collective land titling process. This is of particular concern as supporting non-governmental organisations often lack both the financial and technical capacity to produce maps of the level of detailed required. The submission of insufficiently

detailed maps continues to be the main reason for applications for collective land registration being rejected at the provincial level.

As of October 2017, more than 16 years after the supportive legal framework was adopted, only 130 indigenous communities have been recognized by the MRD (step 1); the MoI has endorsed and registered 115 communities as legal entities through the process of formalizing their community by-laws (step 2); and only 19 collective land titles have been issued by the MLMUPC (step 3). The Government has publicly pledged to provide at least ten collective land titles per year starting from 2014, however, as has been noted, indigenous communities remain entirely reliant on technical and financial support from development partners, UN Agencies and civil society organisations in order to prepare and submit their applications.

We express concerns that as it stands now, the land titling process is too slow to secure protection of indigenous land, especially in a context where land is sold or leased easily, often in disregard of national law and procedural safeguards. Communities sometimes learn about their land being leased as the company and its bulldozers enter a concession area to clear the land. This has led to tensions and conflicts between communities and the companies, with indigenous communities rarely receiving their land back.

The complex process is further hampered by insufficient coordination between the key line ministries (the MRD, the MoI and the MLMUPC, and the Ministry of Environment, should protected areas or protected forest be included in claims for land), as well as insufficient monitoring and reporting by the Ministries of the overall process. In addition, the work of all three ministries, both at provincial and national level, appears to be constrained by a limited budget to fulfil their tasks. In practice, this has meant that ministerial representatives are only able to support indigenous communities, including through necessary field missions, if funding is made readily available to them by development partners.

Of particular concern is also that local authorities often lack knowledge about the domestic legal framework relating to the right of indigenous peoples to their lands and resources and the overall process to ensure these rights, including their own roles and responsibilities in this regard.

At present, the Government of Cambodia is in the process of finalizing a number of Laws which will all have a particular bearing on the rights of indigenous peoples, including the right to their lands and resources. These include a new Environment and Natural Resources Code of Cambodia and associated guidelines and a new Law on Agricultural Land which are foreseen to be adopted in 2017. With regard to indigenous peoples, these laws and guidelines do not correspond to Cambodia's international human rights obligations – in particular with regard to procedural safeguards including consultation and consent – nor to the 2001 Land Law and its recognition of indigenous peoples' land rights.

While we do not wish to prejudge the accuracy of the allegations above, we would like to refer Your Excellency's Government to relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples – adopted by the UN General Assembly on 13 September 2007 and endorsed by Cambodia – and international human rights jurisprudence that is pertinent to the subject of this communication:

As affirmed in Article 26 of the Declaration: “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” Article 26 further provides that indigenous peoples have the right “to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired” and establishes a positive duty on States to “give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

We would also like to refer your Excellency's attention to jurisprudence from international human rights bodies, which, in interpreting the State's obligation to recognize and guarantee the exercise of the right to collective property by indigenous peoples, have affirmed that the mere adoption of legislative or administrative mechanisms is insufficient if these do not lead, in practice, to guaranteeing the right to collective property and within a reasonable time.¹ Adding to the foregoing, the Inter-American Court on Human Rights has noted that international standards and practice are clear in requiring that indigenous peoples be consulted and fully involved in all steps along the way, including in the design of the legal and policy framework and implementing administrative procedures. The State is expected to play a leading role, in particular by ensuring that delimitation and demarcation of the territory to which the people's property right extends is effectively carried out.² In other words, onus is on the State to ensure that indigenous peoples can effectively exercise their right to property, including by establishing and executing measures that stand the test of effectiveness and reasonable time.

A key consideration for collective land titling schemes is the costs involved in implementing measures to delimitate demarcate and title indigenous lands. Depending on the complexity of the administrative procedures that the State chooses to put in place, costs may be significant and therefore, sufficient financial and human resources must be allocated on a continuous basis to the agencies that are tasked with implementing these measures. States should ensure that indigenous peoples have the necessary technical support, including for cadastral surveys of their community, recognition of their legal status and completion of the necessary procedures once they have submitted their applications.

¹ See, for instance, [I/A Court H.R., Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs: Judgment of November 28, 2007. Series C No. 172, par. 115]

² IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 132.

In line with international human rights standards relating to the rights of indigenous peoples, until indigenous peoples' lands have been delimited, demarcated and titled, States must abstain from any acts that might affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the peoples concerned.³ Therefore, interim protective measures should apply whenever indigenous peoples are present in or have a collective attachment to an area proposed for development activities or land sales, and these measures should remain in place until the process to delimitate, demarcate and title the lands has been concluded.

As we have already noted, international human rights standards – including the UN Declaration on the Rights of Indigenous Peoples in its Article 26 – establish that indigenous peoples have the right to the lands, territories and resources which they have *traditionally owned, occupied or otherwise used or acquired*. Therefore, parts of indigenous peoples' lands and resources, such as sacred forests and gravesites, should not be excluded from consideration for collective land titles, nor should limitations –such as the 7 hectare limitation on sacred forests and gravesites in Sub-Decree 83 – be imposed on indigenous communities.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Whether any regular follow-up and coordination between relevant ministries is taking place to ensure the practical implementation of the National Policy on the Development of Indigenous Communities, and whether the Government has identified indicators and set benchmarks for the monitoring of its implementation, and allocated budgetary means to ensure that the stated goal of the policy – to ensure that the cultures of indigenous peoples throughout the country are safeguarded and that their living conditions are approved in a consistent manner across all sectors – is achieved.
3. The reasons for restrictions on indigenous peoples' sacred forests and gravesites (seven hectares respectively) in collective land title applications, and whether the Government has any plans to revoke this limitation.

³ IACHR, Report No. 40/04, Case 12.053, Maya indigenous communities of the Toledo District (Belize), October 12, 2004, paragraph 197 – Recommendation 2.

4. The applicability of interim protective measures and whether the Government will consider extending it to all communities that have been recognized by the Ministry of Rural Development (first step of the collective land title process).
5. Whether the Government intends to simplify the collective land title application process, including by reducing procedural requirements such as preliminary mapping and the number of ministries involved.
6. The current levels of earmarked funding for the three key line ministries – the Ministry of Rural Development, the Ministry of Interior and the Ministry of Land, Urban Planning and Construction – at both national and provincial levels to ensure that they can fulfil their mandates and support indigenous communities to effectively engage with the collective land title application process.
7. The current coordination between the three key line ministries at a technical level, including any working groups or regular meetings at national and provincial levels.
8. Whether there is currently a long-term strategy to build the capacity of both indigenous communities and local authorities on the rights of indigenous peoples under national law, notably the 2001 Land Law, and, in particular, the roles and responsibilities of local authorities in this regard.
9. How indigenous peoples and procedural safeguards – including requirements for their free, prior and informed consent – have been included in laws currently being drafted, including the Agricultural Land Law and the Environment and Natural Resource Code of Cambodia, and related guidelines on public participation in environmental impact assessments.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Rhona Smith
Special Rapporteur on the situation of human rights in Cambodia