CUSTOMARY LAND RIGHTS OF INDIGENOUS PEOPLE AND THEIR VIOLATION IN RATANAKIRI PROVINCE, CAMBODIA: AN ASSESSMENT OF THE GOVERNMENT'S RESPONSE

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DEDICATED
TO
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Sokong Chhay

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ABSTRACT

Indigenous people have a special cultural relationship to their customary land. The Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) and the Draft UN Declaration on the Rights of Indigenous Peoples require governments to respect this special relationship to land and the customary land rights of indigenous people.

This thesis argues that the customary land rights of indigenous people in Ratanakiri province have been violated by the previous Cambodian government's granting of land and forest concessions, by the establishment of protected areas, and by land speculation.

This thesis examines relevant international and domestic laws in order to assess the response of the government pertaining to the violation of customary land rights of indigenous people in Ratanakiri province. The study found that the Cambodian government has not ratified any international laws concerning indigenous peoples' rights yet, and Cambodian land laws are ambiguous and incomplete regarding the rights of indigenous people. This situation has allowed violations of customary land rights to continue until now.

In-depth interviews with indigenous people and land experts explored their opinions regarding the land section of the draft General Policy for Highland Peoples' Development (GPHPD). The interviewees agreed that the main obstacle to the adoption of the policy was the central government. However, the study also found that the draft GPHPD was generally seen as having the potential to make a positive contribution to indigenous people's land rights and the protection of their customary lands.

Finally, this thesis recommends that resolution of past violations is the most important work for the government to deal with before moving on to register communal land title for indigenous people in Cambodia. If past violations of customary land are ignored, the violations will be legalized and indigenous people will continue to suffer because their traditional lands will never be returned.

KEY WORDS: CUSTOMARY LAND RIGHTS/ /INDIGENOUS PEOPLE/ HUMAN RIGHTS VIOLATIONS/RATANAKIRI PROVINCE/ CAMBODIA

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LIST OF ABBREVIATION

ADB	: Asian Development Bank
DRD	: Declaration on the Rights to Development
GPHPD	: General Policy for Highland Peoples' Development
HHP	: Highland Peoples' Programme
IPRD	: Indigenous People's Rights and Development
ILO	: International Labour Organization
IMC	: Inter-Ministerial Committee for Highland Peoples' Development
IO	: International Organizations
MAFF	: Ministry of Agriculture, Forestry and Fisheries
MoE	: Ministry of Environment
NGO	: Non-Governmental Organization
PRDC	: Provincial Rural Development Committee
PRK	: People's Republic of Kampuchea
RGC	: Royal Government of Cambodia
SNC	: Supreme National Council of Cambodia
SOC	: State of Cambodia
UN	: United Nations
UNDP	: United Nations Development Programme
UNTAC	: United Nations Transitional Authority in Cambodia

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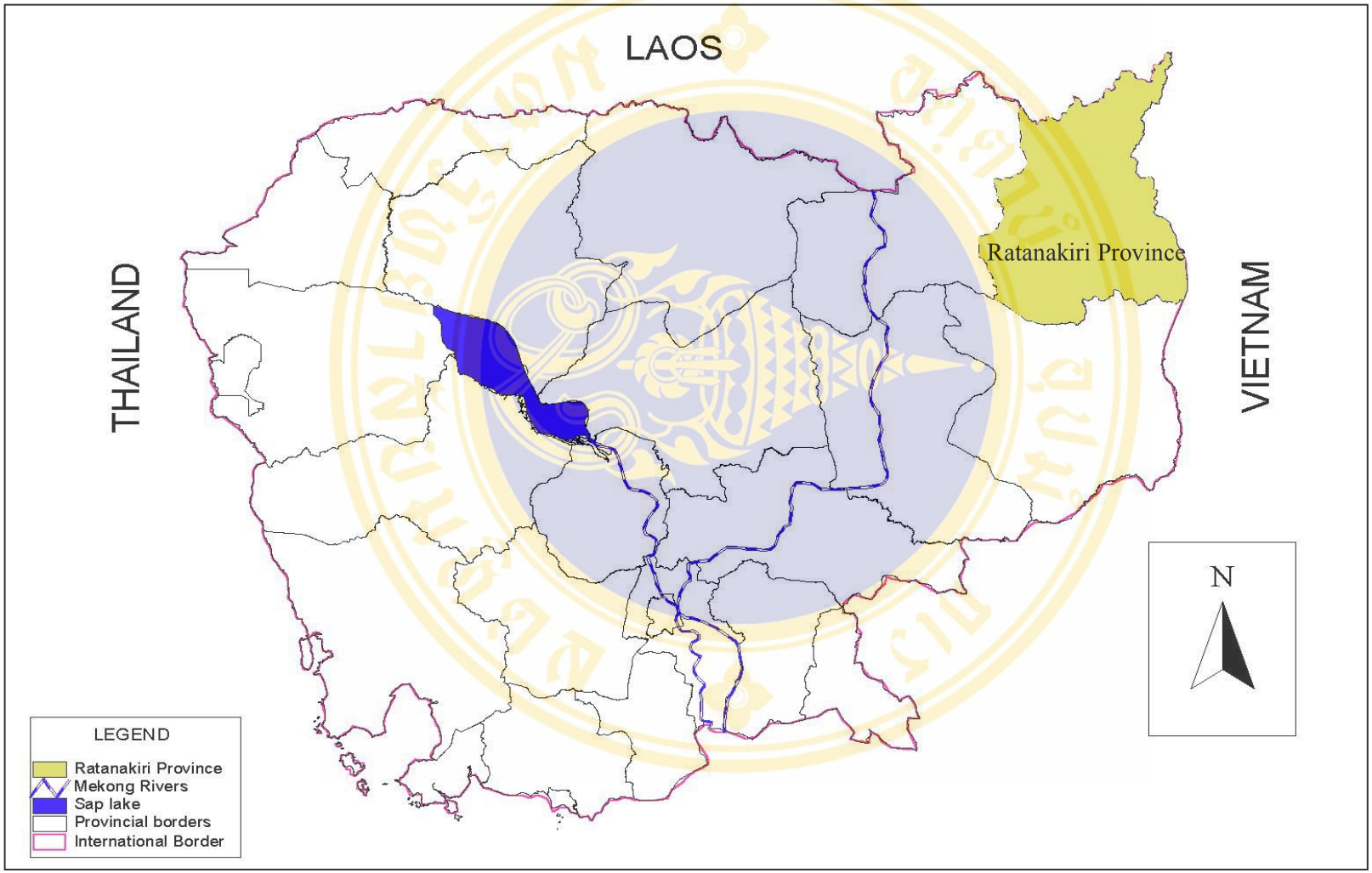
MAP OF CAMBODIA

Source: PLG-Ratanakiri province



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CHAPTER 1
INTRODUCTION

1.1 Background

If a line were drawn on a map of Cambodia from the southwest to northeast, there would be four different geographical areas: coastal, mountainous, lowland, and highland areas. These different areas are settled by different ethnic groups. The major population group, the Khmer, live in the lowland area, while the ethnic minority groups settle in the mountainous and highland areas of the country. The lowland area extends from the northwest to the southeast in the center of the country, which covers the Tonle Sap Lake and the Mekong River. The mountainous and highland areas are located in the southwest and northeast, respectively.

The majority Khmer live in provinces around the Tonle Sap Lake and provinces located along the Mekong River. The Khmer practice permanent agriculture and fishing for daily needs. The highland areas inhabited by indigenous people include the provinces of Kratie, Mondulkiri, Stung Treng, and Ratanakiri, and some of the mountainous areas of Pursat, Kampong Speu, Koh Kong, and Sihanouk Ville. These indigenous groups in the highland areas are distinct from their lowland neighbors in several respects: their long-standing inhabitance, their particular religious beliefs that are bound to the surrounding environment, and their use of semi-settled swidden agriculture techniques (White: 1996). In addition to engaging in shifting agriculture practices, these groups also gather non-timber forest products, and hunt wild animals for their subsistent livelihood.

The location of individual groups is not very well known and there is no reliable map of the distribution of ethnic minorities in the country (Simbolon: 2002). According to Seng and Moul (2000) there are over a dozen indigenous groups in highland areas of Cambodia. A survey on minorities in Cambodia, conducted by UNTAC and quoted by Seng and Moul, that there are six main groups whose members more than 10, 000, namely, the Jarai, Kreung-Brou, Kuay, Mnong, Stieng, and the Tampuan. In addition, there are more than 20 small groups, whose members

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include less than 3000 persons. In contrast, the Inter-Ministerial Committee for Ethnic Minority Development (IMC) stated that in 1997 the ethnic minority population was nearly 105,000 in the three northeastern provinces of Mondulkiri, Ratanakiri, and Stung Treng (Simbolon: 2002).

Although indigenous groups inhabit many different provinces, there is more documentation about Ratanakiri province, where there are many indigenous groups that have maintained a living style and culture that are distinct from the majority Khmer group. Ratanakiri province is located in the northeastern corner of the country, approximately 630 kilometers from Phnom Penh. It borders on Vietnam to the east and Laos to the north. The province has nine districts and covers approximately 12,500 square kilometers (Ojendal: 2001).

In 1999 the population of Ratanakiri province was 94,243,[1] 75[2] percent of which consisted of indigenous peoples from eight different groups, namely, Tampuan, Kreung, Jarai, Kachak, Kavet, Brao, Lun, and Phnong. Among the eight groups, there are three main groups whose members number more than 10,000. Those groups are Tampuan (22,128),[3] Kreung (14,877),[4] and Jarai (15,669).[5]

There is very little detailed historical information about Cambodian indigenous groups. During the French protectorate period (1863-1953), according to Simbolon (2002) rubber plantations were introduced into Ratanakiri and most indigenous people were employed for 15 days out of the month and were organized by the their chiefs and rarely met their colonial administrators. However, the indigenous people were allowed to practice traditional upland agriculture system and their other village ceremonies (Sugiarti: 1997). Despite their occasional employment in other activities, the indigenous peoples of the highland areas have maintained their culture and traditional lifestyle distinct from the dominant majority Khmer.

Ratanakiri province was established in 1959 by the Sangkum Reastr Niyum regime of then Prince Norodom Sihanouk, following Cambodian independence in

[1] WB IUM screening study, quoted from 1998 national census.
[2] Ojendal J. et al, 2001
[3] WB IUM screening study, quoted from 1998 national census.
[4] Ibid.
[5] Ibid.

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1954. In the early 1960s, the government started introducing Khmer culture to the highlanders. At that time several villages were displaced and relocated. The lowland Khmer settled in the towns of the central plateau, lowland plains, and the river zones of highland provinces. Some villages of indigenous peoples were relocated to areas along the river and they were encouraged to practice lowland agriculture.

The indigenous peoples in Ratanakiri province have been living in homogenous communities in their ancestral lands for generations. They have rarely moved outside the boundaries of their ancestral lands. However, during the Khmer Rouge regime (1975-1979), the Khmer Rouge authorities forcibly relocated these indigenous peoples from their ancestral sites and required them to live among different ethnic groups and to cultivate paddy rice. However, once the indigenous peoples were free to move, they immediately returned to their original lands (Fox J., no date). Most of them stopped cultivating lowland paddy rice, and have resumed their traditional rice cultivation on upland swidden areas, called “chamkar” (Sugiarti: 1997).

According to Colm (1997) the indigenous peoples in highland provinces cannot be considered as “nomadic” as commonly thought because their villages move around within the village’s ancestral cultivation areas, usually defined by streams, mountains, or other geographical features.

Traditionally, boundaries between villages are not specifically defined or required unless the cultivation areas from two villages meet one another, in which event the village elders may meet and decide the boundary. Village boundaries inherited for many generations are recognized and respected by neighboring villages. Indigenous villagers never cultivate swidden plots that are located within the boundaries of other villages because they believe that the spirits will be unhappy and cause them misfortune or death.

Most indigenous peoples in the highland areas subsist on swidden agriculture, supplemented by hunting, fishing and gathering of forest products such as forest fruits and vegetables, bamboo and rattan. Forest areas are cleared and burned to establish swidden plots for family groups (White: 1996). Lands and forests within village boundaries are commonly shared rights among all village members while the swidden

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plots, cleared and established by the family, are commonly shared rights within the family only.

Within the swidden plots, indigenous peoples grow a variety of crops and vegetables in their chamkar (Colm: 1997). The swidden plots for agriculture are usually cleared and allowed to dry before they are burned during the dry season. At the beginning of the rainy season, swidden plots are planted. Normally, the same swidden plot may be used for a period ranging from 1-5 years, depending on the quality of the soil.

The study of Wallgren and Watt (2002) shows that each indigenous village has its own customary lands and forests, with certain areas used for collecting and hunting, some areas used for cultivation, and some areas venerated as the dwelling places of spirits. As White (1996) states that "The strong social cohesion of the communal group is provided by the extensive kinship networks which exist and enhanced by the villager's sense of membership in their particular village in a religious sense as they all share a relationship with the tutelary spirits of their village."

While the indigenous peoples have maintained their unique customary land use and land rights system for generations, the different political regimes of the dominant Khmer society have established a variety of land laws in different circumstances. According to Greve (1993) prior to the French protectorate, there was a system of dual property rights: the land belonged to the sovereign, but in practice, the land belonged to the person who cultivated it. The cultivating 'proprietor' could leave one area to start cultivating another and become the owner of the second area without having to go through any legal formalities.

During the French protectorate, a Land Act was promulgated in 1884 but the changes encountered severe resistance among the Cambodians, especially the elite. The land reform consequently was not fully implemented before 1912. At this time, all unoccupied areas became available for sale. This change resulted in the establishment of some large-scale plantations (Greve: 1993).

Following independence from the French in 1954, Cambodia maintained the Western concept of property ownership until the Khmer Rouge regime (1975-1979) abolished private property rights. All land (and other means of production) became the "collective property of the people's State and the common property of the people's

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collectives."[6] After the Khmer Rouge regime was defeated in 1979, the Peoples' Republic of Kampuchea (PRK) still did not recognize the private ownership rights but introduced Krom Samaki (solidarity group) for agricultural cultivation. During this regime, all lands belonged to the state and individuals had no rights to sell or transfer the land.

In 1989, during the national reconciliation negotiations (and just prior to amending the Constitution to, among other things, rename the country the State of Cambodia), the PRK reformed its policy and reintroduced the right of private property ownership and appealed to people to apply for land registration in order to obtain certificates of land possession. However, the implementation of the land registration system was not fully implemented because of the rapid changes of political and economic policy to pave the way for the UN-sponsored general election in 1993.

At the same time, the legal system and legal instruments were insufficient for the new stage of changes. For instance, legal enforcement of land conflicts had to be dealt within the existing legal framework established from the previous government. The right to own private property was reintroduced and recognized; however, there was little activity in the land market even in the urban areas. From 1992 to the election in 1993, the land market was more active and land prices sharply increased in towns and urban areas primarily because many foreigners were pouring into Cambodia and staying in towns. After the 1993 election, land market activities began spreading to rural areas. This increase in land transactions brought with it increased land conflicts. Land conflicts became one of the most critical challenges facing the existing court system and the new government, formed in 1993 after the general election.

Land conflicts have widely occurred from the urban to the rural areas, especially related to land for which there is no legal documentation and former insecure lands – battle field areas – that people could not cultivate during the continued fighting. People living in targeted development areas, lands along the main roads, and large areas suitable for industrial agriculture faced serious problems. Conflicts occurred between ordinary people, members of the armed forces, and government officials regarding ownership, occupancy, and speculation of land.

[6] Constitution of Democratic Kampuchea, article 2

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Because there were so many cases of land conflicts that were not able to be resolved in the courts, the government established a Land Dispute Resolution Commission in 1999. At the national level, the commission was composed of representatives of several concerned ministries. At the provincial level, the commission was chaired by the provincial governors, with the members from relevant departments and commanders of armed forces such as gendarmerie and police. The members of armed forces were included in the commissions because many cases involved land claimed by the armed forces. These commissions had the responsibility to resolve land conflicts through mediation processes.

Indigenous peoples in the highland areas have also faced land conflicts related to their customary lands. Most of the indigenous peoples in highland areas did not have any land certificates to recognize their land rights because indigenous peoples generally have not recognized the modern concepts regarding land registration, but for generations, they have practiced their customary land use within the concepts of customary land rights within their community. Therefore, indigenous peoples are more vulnerable and adversely affected by the rapid changes of land rights because of their cultural relationship to the land. Moreover, customary land rights were being encroached upon as a result of concessions granted by the government for economic purposes, the establishment of protected areas, and individual land speculators from persons outside of the indigenous communities.

Ratanakiri province is rich of natural resources such as fertile soil good for industrial agriculture, dense forest, and waterfalls for hydropower. Therefore, this province has been targeted by the government for resource exploitation in order to reconstruct the national economy after decades of war. In the period beginning shortly after the establishment of government in 1993, many private companies have been granted licenses to exploit natural resources in the province in the name of national economic development. In Ratanakiri province, many development projects of land and forest concessions have been implemented for industrial agriculture plantations. Protected areas have been established, including Virakchey National Park and Lumphat Wildlife Sanctuary.

In addition, the low population density and rich natural resources in the areas attracted lowland outsiders to seek new settlement and engage in land speculation.

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Since the early 1990s, with improvements to security and public transport, Ratanakiri province has become more involved in economic activities and more accessible to markets. The rich natural resources provide opportunities for agro-industry, eco-tourism, forest, and other similar activities. A large number of land and forest concessions were granted to both national and foreign investors (Sugiarti: 1997).

As a result, the number of land conflicts involving indigenous peoples' lands increased. The conflicting parties included government officials, indigenous peoples and concessionaires. In response to urgent challenges to customary land of indigenous peoples in the highland areas, the Royal Government of Cambodia established an Inter-Ministerial Committee (IMC). With the technical and financial support from international community, the IMC has developed a draft policy which specifically focused on development for indigenous peoples in highland areas. The draft policy was titled General Policy of Highland Peoples' Development (GPHPD).

The GPHPD was drafted through many seminars to get inputs from various sources, both experts and indigenous communities. Finally, the final draft emerged in 1997 in the midst of increased land speculation in the highland areas and also at the time of the granting of economic concessions. Unfortunately, the policy has not been adopted and it has not been applied in the customary land conflicts in the highland areas. The legal approach remains the only applicable means to resolve land conflicts, regardless of customary land concepts of indigenous peoples throughout the country.

In August 2001, a new land law was promulgated. This new land law includes of a chapter specifically on the communal land ownership rights for indigenous communities. Article 25 of the 2001 Land Law provides that the measurement and demarcation of boundaries of customary land belonging to indigenous communities will be carried out by procedures established by relevant sub decrees. A sub decree to implement customary land identification and to define communal ownership of customary land by indigenous communities is being drafted in conjunction with pilot projects in the areas of indigenous peoples in Ratanakiri and Mundolkiri provinces.

1.2 Problem Statement

When the Royal Government of Cambodia was formed after the 1993 general elections, the 1992-Land Law, promulgated by State of Cambodia, was still effective

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and remained effective until it was replaced by the 2001 Land Law. The 1992 land law denied the validity of pre-1979 ownership claims, without regard to the customary land rights and cultural relationship to land of the indigenous peoples. The 1992 land law recognized possession rights to land based on occupation of the land for five consecutive years. If the land was abandoned for three years it reverted to state land.

There was confusion about the laws, rights, and procedures related to land among both ordinary citizens and the officials responsible for managing and deciding land issues. Ordinary citizens simply did not know or had wrong information about what the law said or what the correct procedure really was. Although article 10 of the 1992 law recognized the right of communal ownership of land, the law was interpreted in such a way as to dispossess indigenous customary land rights (Williams: 1999). The claims to land by indigenous peoples, based on their historic connection to the area, were denied by the first article of the 1992 land, which state that "The State does not recognize the land property rights existing before 1979."

Land certificates and other formal documents issued by the authority of the State of Cambodia were the only ground to recognize legal land possession. The non-indigenous land speculators from lowland provinces generally enjoyed cooperation with local authorities for individual benefits, or they bought land from local authorities without acknowledgement of the indigenous villagers. Sometimes, the villagers received threatening false information about losing their land. Often indigenous peoples were forced to sell their fallow swidden plots at very cheap prices.

The lowland Khmer migrants to highland areas, particularly Ratanakiri province, were also taking over swidden land plots of the indigenous peoples because they assumed that all lands without possession certificates were state lands. In the mean time, there were very few indigenous peoples had land certificates for customary land. Land disputes were resolved mainly based on a legalistic approach rather than customary concepts of that recognized the rights of indigenous peoples to land they had inherited for generations from their ancestors.

According to research conducted by Ting and Tiann (no date), politically powerful persons and military officials were involved in rampant land speculation and abusive exploitation of natural resources. Those powerful persons, who were acting privately interests, were not held accountable and commercial firms were not

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subjected to any implemented rules and verification of environmental sustainability. Land speculators took advantage of the indigenous peoples' extremely low literacy, their poor command of the Khmer language, their poor understanding of their rights and the law, and their lack of financial means to gain access to justice. The exploitative activities badly affected the basic survival of indigenous peoples and their cultural relationship to ancestral lands.

Moreover, in the name of the national economic interests and without regard to international treaties on indigenous peoples' rights, and in the absence of the customary land use and land rights under the 1992 land law, the Royal Government of Cambodia granted economic land and forest concessions to private companies that ignored the existing customary land use of indigenous peoples on their ancestral sites. Without clear geographical information and detailed studies of the areas in Ratanakiri province, the central government, which had authority to grant both land and forest concessions for economic interests, granted concessions that overlapped borders of indigenous peoples' lands. The overlapping of concessions seriously affected customary lands of indigenous peoples historically recognized by their communities.

Since the 1993 elections, Ratanakiri province has been targeted for industrial plantations and smaller scale investment projects. In 1997, there were more than a dozen pending concession projects, ranging from 100 to 20,000 hectares, on file in the Ratanakiri Cadastral Office (Colm: 1997). For instance, in October 1995 the two prime ministers revealed that the government had granted a 30-year concession for 1.4 million hectares in northeastern Cambodia to the Macro Panin Company. In Ratanakiri province, Macro Panin's concession area takes up most of the province's forested land. At that time, no final management plan or Environment Impact Assessment had been prepared for that massive concession (Colm: 1997).

According to Colm (1996), in 1995, a US $20.36 million investment project approved by the Council of Ministers and the two Prime Ministers called for planting 20,000 hectares of oil palm and constructing a palm oil mill in O'Yadao district. The oil palm plantation would directly affect the livelihood of 15 villages out of the 29 villages, six of out seven communes in the district, or approximately 4,500 people, 95 percent of them from the Jarai ethnic group.

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According to Ting and Tiann (no .date.) the area of concessions granted in Ratanakiri province exceeds the province area, covering 140% of the surface of the province. The concessions were decided without consultation with the provincial authorities, local people, or NGO/IOs, and without any social or environmental impact assessment studies being carried out.

Apart from the effects of these two factors – land speculations and economic land concessions –on customary land rights, the establishment in the early 1990s of the protected area of Virakchey National Park also contributed to the violations of the customary land use and land rights of indigenous peoples in Ratanakiri province. The establishment of protected areas has prevented indigenous peoples, who had been forcibly evacuated by the previous regimes, from returning to their ancestral areas within the national park.

Violations of customary land rights within indigenous communities in Ratanakiri province continue to occur, despite the fact that the 2001 Land Law specifically recognizes immovable property ownership rights of indigenous communities. However, the form of violations has been transformed from large scale plantation to small scale privately owned chamkar. The people involved range from local businessmen, to local and not so local military, national level politicians, multinational companies. Those violations have not been capable of resolution by customary laws of the indigenous communities nor have the indigenous communities been able to develop strategies to prevent the threat to their customary land rights. Therefore, in the near future the indigenous communities will find it difficult to protect themselves from involuntary social changes and to prevent the disappearance of traditional livelihood and belief systems.

1.3 Objectives of the Study

The first objective of this research is to identify the concepts of customary land rights of indigenous peoples. Second, this research seeks to identify the violations have occurred on customary land of indigenous peoples, especially in Ratanakiri province, and the types and process of violations. The third objective is to explain the recognition of customary land rights of indigenous peoples in international laws and the protection of customary land use and land rights of indigenous peoples in

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Cambodian laws. Fourth, the study will explore appropriate resolutions and protections of customary land disputes from other countries to apply in the Cambodia context. The final objective is to seek opinions from knowledgeable indigenous peoples and NGOs and indigenous land experts regarding the draft General Policy of Highland Peoples' Development. The opinions are closely focused on obstacles for adoptions, usefulness, implementation, and the roles of indigenous peoples in the implementation of the policy.

1.4 Research Questions

1. What are the concepts of customary land rights of the indigenous peoples and how do they traditionally use land?
2. How have customary land rights of indigenous peoples in Cambodia been violated?
3. What is the recognition of customary land rights of indigenous peoples in international and Cambodian laws?
4. How can the violations of customary land of indigenous peoples be resolved? Will the GPHPD stop future violations?
5. What are the opinions of indigenous peoples and NGO workers on the draft GPHPD regarding the interpretation, obstacles, implementation, and priorities and roles of indigenous peoples?

1.5 Scope of the Study

Land violations have occurred throughout Cambodia including the areas of indigenous peoples in provinces in the northeastern Cambodia. However, this research focuses mainly on the violations of customary lands of indigenous peoples in Ratanakiri province caused by the economic concessions, conservation establishment, and land speculations. The period of the issues to be studied is from the early 1990s until present. The study is not to update the documents of customary land violations in Ratanakiri province, but to explain the process and parties involved in violation. The research focuses on the issues related to the main ethnic groups: Tampuan, Kreung, and Jarai, who are living in Ratanakiri province only. The knowledgeable indigenous peoples, two for each of the main three ethnic groups above, and NGO workers in

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Ratanakiri province were selected to give their opinions on only the land section of the draft General Policy for Highland Peoples Development Policy.

1.6 Significance of the Study

This research is an academic document from a human rights perspective. It is hoped that the concept of the customary land use and land rights of indigenous peoples will be utilized by NGO workers and relevant stakeholders in the field of indigenous land to advocate and protect customary land rights of indigenous groups in Cambodia. The research will contribute to provide indigenous peoples with rights-based approach on protection of customary land rights through customary land use. In addition, the study will guide, in the researcher's expectation, to develop strategies how to resolve violations on customary lands of indigenous peoples in Cambodia by learning from experience of other countries. Finally, the research will contribute some ideas to consider if the draft GPHPD is considered to be modified before adoption in the future.

1.7 Definitions

Presently, there is no universally accepted definition of the word "indigenous peoples." However, many development agencies and institutions have developed their own definitions with different elements to characterize indigenous peoples. The term "indigenous peoples" in this research covers all the words, used by authors such as tribal people, hill tribes, highlanders, etc., which are consistent to elements of the definitions below. This research conforms to all definitions characterized by institutions, but the definition of the ADB is applied to this study because the elements are consistent to defined indigenous peoples in Cambodia.

The word "**peoples**" is used instead of the word "population" because this term recognizes the existence of organized societies with an identity of their own rather than mere groupings sharing some racial or cultural characteristics (ILO: 1998).

Indigenous Peoples: The ADB specifies two significant characteristics to identify indigenous peoples as peoples who are: (a) descended from population groups presence in a given area, most often before the modern states or territories were created and before modern borders were defined; and who (b) maintain cultural and

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social identities, social, economic, cultural, and political institutions separate from mainstream or dominant societies and cultures. The ADB has some additional characteristics, which are (a) self-identification and identification by other as being part of a distinct indigenous cultural group, and the display of a desire to preserve that cultural identity; (b) a linguistic identity different from that of the dominant society; (c) social, cultural economic, and political traditions and institutions distinct from the dominant culture; (d) economic systems oriented more toward traditional systems of production than mainstream systems; and (e) unique ties and attachments to traditional habitats and ancestral territories and natural resources in these habitats and territories (ADB: Policy on Indigenous Peoples).

Customary Law: The law that indigenous and tribal peoples use among themselves. Often it is not written down, and it may not be respected by the national legal system of the countries where they live (ILO: 1998).

Native Title has its origins in and is given its content by the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. (Meyers G., quoted from Justice Brennan, Australian High Court decision in the Eddie Mabo and Ors v State of Queensland, in 1992).

Native Title will, generally, embrace rights of occupation, rights to participate in ceremonial activity, including hunting and fishing, and the rights to exclude others from land. Native Title is the foundation of their society and the way its society's maintained itself. Native Title cannot be revived. However, the elements of Native Title depend on the traditional laws and practice of the particular group of indigenous peoples holding it (Way F. and Beckett S.: no date)

Land: (for indigenous peoples' concepts) usually embraces the whole territory they use, including forests, rivers, mountains and sea, the surface as well as the sub-surface. Land is not a commodity which can be acquired, but a material element to be enjoyed freely (ILO: 2000). Indigenous peoples refer to "land" as the concepts of "country" and see themselves as custodians of it rather than owners in common law (Way F. and Beckett S.).

Land Rights are fundamental to the continued survival of indigenous peoples. Land and its natural resources are in fact the principal source of livelihood, social and

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cultural cohesion, and spiritual welfare of many indigenous and tribal peoples (ILO: 1998). The Convention also clearly states that indigenous peoples and tribal peoples have rights to the lands they traditionally occupy, which means that lands where indigenous and tribal peoples have lived over time, and which they have used and managed according to their traditional practices (ILO: 2000)

The explanation of the ILO (2000), in a Manual of the Convention No. 169, refers to the Mabo case decision of the High Court of Australia as a historical recognition of indigenous land rights. From that example and the above definitions, it is most likely to suppose that the words "Native Title" and "Land Rights" have the same meanings and they are inter-changeable.

Customary Land Use: there is no commonly accepted definition of customary land use. Indigenous peoples use lands differently from one group to another based on their customary law and particular location. However, many writers mention the use of land for swidden agriculture, forest for hunting and gathering forest products, grazing lands. Land can be shared among different communities or even different peoples. This means that a community or people live in a certain area and also have access to, or are allowed to use another. This is especially the case with grazing lands, hunting and gathering areas and forests (ILO: 2000)

(Land) Ownership: means the rights to own, possess or dispose of something (land). (Black's Law Dictionary)

Customary Land Tenure (**Ownership**): in this context will be referred to as that land which is owned or possessed by an indigenous person or community by virtue of propriety or possessory kind, which belong to that individual or community and arise from and are regulated by custom. (Kalipat: 2003)

1.8 Research Methodology

The study was conducted by the combination of both documentary research tools and supplemented by exploratory in-depth interviews. However, the documentary research is the main tool for study and the exploratory in-depth interview was the supplementary tool for clarification of data collected by the main tool.

(i) Documentary Research

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This tool is used to explore relevant literatures for the study. The documentary research tool covers a large part of this research. The literature review was conducted to identify the general concepts of land rights of indigenous peoples and more specific the customary land use and land rights both in general and in Cambodia in order to document the applicable relevant international legal instruments on the protection of customary land use and land rights. The previous violations to the customary land use and rights in Cambodia, Ratanakiri province in particular, and relevant Cambodian laws were searched to find out what was the process of the violation and what were the roles of the various parties in the violation. This tool is used for reviewing the wide range of documents related to this research topic. NGOs, government, and donors reports and studies relevant to the recognized customary lands and indigenous peoples in Cambodia were sought for the study. In addition, documents, research, books related these aspects were explored for the general concepts of customary land use and land rights of indigenous peoples in other countries. To accomplish the above purpose, online websites, academic libraries, NGOs libraries, documents of government and international institutions were searched for.

(ii) In-Depth Interviews

This research is an exploratory study relating to customary land use and land rights of indigenous peoples. This tool is used to seek opinions from the various persons who were or have been working in the field of land issues, in particular the customary land use and land rights of indigenous peoples, regarding the draft General Policy of Highland Peoples Development.

Interviews with knowledgeable indigenous peoples

The interviews were conducted individually with knowledgeable indigenous peoples from three ethnic groups, Tampuan, Kreung, and Jarai. In total, six interviews were conducted with knowledgeable indigenous peoples, two interviewees from each ethnic group. Some of the interviewees are members of the Commune Natural Resource Protection Network, Network of Advocacy, and some of are also government staff. For the Tampuan ethnic group, which lives in many districts, the interviewer selected one from each different district. For the Jarai group, the

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researcher selected both interviewees from the same district because the large group of Jarai ethnic live in O' Yadao district. The Kreung ethnic group lives in two districts, Banlung and Borkeo, but due to the travel limitation during that the time the research was conducted, the researcher selected both knowledgeable people from the same district but different villages. The details of the topics for the in-depth interview are provided in Appendix A.

Interviews with NGO workers in field of customary land use and land rights

To get more information concerning to the exploratory subjects on the draft General Policy of Highland Peoples Development, a number of NGO workers, who have been working with indigenous peoples in the field of land, were interviewed. Three kinds of NGO key informants were interviewed. Some of them are NGO consultants, NGO workers, and a government official who was involved in the Drafting of the Policy. Seven people from three different NGOs, one Network for Advocacy, and one government official, were interviewed. In addition, one experienced NGO worker, who was working on the field of land rights and was also a consultant in the field of indigenous peoples in Ratanakiri province, was interviewed as well. The names of all interviewees, both knowledgeable indigenous representatives and experienced NGO workers in the field of indigenous peoples, are attached in appendix B.

Procedure for Semi-Structured Interview and Analysis

Before going to the field work, an interview guide was finalized and a number of NGO workers were contacted to get general information regarding the road conditions, accessibility and time availability of the knowledgeable indigenous peoples in the province. Since the interview was an in-depth interview, follow-up questions were prompted without being mentioned in the guideline. Before the interview started, the researcher introduced himself and informed the interview of the purpose of the interview to make them feel comfortable about what they would be asked, and also to get trustworthy and meaningful answers. During the interviews, the researcher used a tape recorder to record the conversations. After the interviews were

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complete, the cassettes were transcribed and analyzed in Khmer and the results were written down in English.

1.9 Trustworthiness

As a human rights student, the researcher has a strong sympathy for the indigenous peoples of Cambodia, and acknowledges that this could bias his perceptions and interpretations. In order to avoid misrepresenting documentary sources when the researcher was unsympathetic to the author's argument, and to avoid maliciously caricaturing views that are oppressed to his own, the researcher attempted to be aware at all times during the research of such negative tendencies and to control their influence.

1.10 Ethical Issues

The researcher was carrying a letter of assignment from the Office of Human Rights Studies, where the researcher is studying. The researcher had made appointments with recommended interviewees prior to the interviews. Interviewees felt free to provide or reject for interviews after briefly self-introducing. Before the actual interviews started, the researcher introduced himself again and showed the letter of assignment to the interviewees to show proof about the status, institution, and the purpose of the researcher. After self introduction, interviewees were asked permission for the conversations to be recorded. At the beginning of the interviews, the interviewers asked the name and brief information about the background and status of interviewees, who were not known by interviewers.

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CHAPTER 2
CUSTOMARY LAND RIGHTS AND THEIR LAND VIOLATION

2.1 Customary Land Use and Land Rights

Presently, there are no universally defined elements of customary land use and land rights. The nature of these land rights depend on the traditional laws and practices of the particular groups or indigenous peoples holding them. Customary land rights have their origin in the content of the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. This study tries to identify some unique practices and beliefs of indigenous peoples as the necessary concepts for customary land use and land rights. These unique practices and beliefs are discussed below: traditional agricultural/swidden cultivation, customary boundary recognition, common ownership, continuous traditional inhabitation, and cultural relationship to land.

A. Traditional Agricultural/Swidden Cultivation

Indigenous peoples have usually settled in a large area, inherited from their ancestors, which they require for traditional cultivation and cultural survival. Indigenous peoples' lands are traditionally used for different purposes based on the cultural practice in a particular place. Mostly, indigenous groups inhabit marginal areas, and require much larger land areas for economic subsistence in order to support the population than would be the case in more fertile regions. Presently, there is no universally defined of classification of land types of indigenous peoples; they utilize their lands differently depending on their culture and adaptations of the groups in specific places. The lands of indigenous peoples are generally classified as agricultural fields, both presently cultivated rice fields and areas reserved for cultivation; graveyards; village sites; streams and drinking water sources; forests both for products and beliefs; and grazing pasture. The indigenous lands are usually passed from one generation to another and are owned by the group. The members have rights to use

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lands within their boundaries, which have been recognized by neighbouring communities for generations. These practices have seen little or no changes during their existence.

Indigenous peoples commonly practice swidden cultivation, which is also known as “slash and burn” or “shifting” cultivation (Kunstadter and Chapman 1978). Swidden cultivation may well be the oldest system devised by man for use of his ecosystem that involves the combination of systematic cultivation of tree, root, and/or seed crops, and the primeval practices of hunting, fishing, and gathering (Pelzer 1978). According to Goodland (1991), the swidden agriculture method, used in tropical forest land use does not damage the environment when practiced by an appropriate number of people, because exhausted soils have time to recuperate while other tracts are planted. Some experts conclude that swidden cultivation system is a sustainable method for cultivation in tropical areas if the number of population is appropriate to the region.

“Swidden” cultivation does not necessarily mean that the people who practice this type of cultivation are nomadic. Swiddeners have different ways of living. Some have settled in villages for hundreds of years and make repeated cyclical use of the same field. Others live in temporary villages that are abandoned as the fields become exhausted after a few years or a few cycles of cultivation and are left fallow. Some swiddeners combine or supplement their use of permanent irrigated fields with shifting cultivation, especially where irrigable land is scarce.

There are many regions where indigenous peoples or hill tribe groups have practiced swidden agriculture. Swidden cultivation systems have been practiced widely in South and Southeast Asia, although this system dominates now only in Borneo and the hills of Thailand, Burma, Laos, Vietnam, Cambodia, and southwestern China (Kunstadter: 1978).

Indigenous peoples, particularly those in Asia, have similar systems and times of swidden cultivation. The season of swidden cultivation is slightly different from one to another according to the weather of the regions. For example indigenous peoples in Bangladesh clear swidden plots between January and April, and cultivate in May (Roy: 2000).. Generally, many types of crops and fruit are mixed when planting in one swidden plot and those crops can be harvested at different times all year long

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(Roy: 2000). The practice of cultivation by mixing different crops in one swidden plot has been seen in the studies of all indigenous groups in Asia. Another common practice, noted by Roy (2000), is that indigenous peoples never use manure or pesticides to increase production. However, they commonly use ash, which is created from the burning of forests when clearing land, as fertilizer.

According to Goodland (1991) the swidden agriculture method used in tropical forest land use does not damage the environment when practiced by appropriate number of people. There are similar patterns in the swidden cultivation system for all indigenous peoples although there may be slightly different times for clearing and types of swidden plots depending on the season and locations of areas inhabitated by particular groups. In Bangladesh, for example, the indigenous peoples clear and burn forests and make plots for cultivation in the sloping areas of the mountain. Indigenous peoples in Thailand practice swidden cultivation on the upper terraces and foothills.

These traditional agricultural and land use practices are key factors supporting the recognition of customary land rights of indigenous people.

B. Customary Boundary Recognition

The modern concept of land ownership based on the boundaries of land having been surveyed and demarcated by land technical experts and on its registration with state institutions in order to get recognition and protection by the state legal system is quite alien to indigenous peoples. Rather, indigenous peoples rely on customary ways of defining their boundaries, which are completely different from the modern legal concepts of private demarcation. Without surveying by using modern equipment; indigenous peoples recognize streams, stones, or mountains as demarcated boundaries that have been recognized and allocated by village elders, or guardians of the villages' collective memory. Human Rights Watch (2002) observed that the perception of the boundaries is passed from one generation to another.

Indigenous communities respect their neighboring traditional land boundaries without overlapping them. The indigenous and tribal community and the surrounding forest abound with spirits including the guardian spirit. It is believed that the boundaries are protected by these land and forest spirits. If a violation occurs, the

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violators would meet bad luck or death caused by the spirits who take care of the boundaries.

The ritual leader, who is patrilineally descended from the founding figure of the community, ritually mediates between the guardian spirit and the community. Boundaries are negotiated between neighbouring communities, and within these boundaries, members cultivate land, gather firewood (for cooking, warmth, and light), building material (bamboo, leaves, and wood) and forest products such as mushrooms, berries, bamboo shoots, herbs and small game (Hayami: 1999).

In addition, according to Goodland (1991) different indigenous groups sometimes share the same forest area for gathering food for subsistent economy. The extent and boundaries of indigenous peoples' lands are also important for intertribal exchanges. They may travel weeks or even months on hunting or trading expeditions and their migrations are regular; their routes are well-defined and can be demarcated.

C. Common Ownership

Khan and Talal (1987) stated that many indigenous peoples usually live in the remote areas because of the traditional economic activities and adaptation to their environment. All members of the community have the responsibility to keep natural resources for the long term economy of the whole community to utilize together without exclusive rights. Land and natural resources are considered as gifts entrusted to them for safe-keeping and for passing on intact to future generations. Goodland (1991) observed that indigenous peoples regard land as a common good, to which individuals have rights to use, but which cannot be exclusive. Land tenure is in the nature of a trust in which all members – dead, living, and unborn – are co-sharers. Power (2001) made similar observations, stressing that traditionally customary owners never considered their land as property but as a domain for survival of land group members, past, present, and future. All kinds of social, spiritual, ecological, epistemological and subsistence values inhered in such land.

Due to the shared responsibility to maintain the culture and the surrounding environment, indigenous peoples avoid forming overly centralized political institutions and tend to organize at the community level. Decisions are taken only after consensus is reached by the community and the voices of indigenous elders are

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listened to. This practice is not because the other members of the community can call upon forces of coercion, but because they represent a shared knowledge passed on from generation to generation of community life (Khan and Talal: 1987).

In general, indigenous peoples own land communally; everyone has a share of ownership, and none of the members of the community have an exclusive right to any plot of land. However, customary land use and rights implicitly recognize two different concepts within the community; that is, members have rights to use individually and communally based on the types of lands.

According to Human Rights Watch (2002), there are two basic types of indigenous lands. The first category is collective-owned lands, which include grazing pastures ,streams and drinking water sources, and forests for forest products. Because the nearby forests are the resources of subsistence economy, the indigenous peoples have taken special care to preserve them for collection of "non-timber" products such as rattan, bamboo, mushrooms, bamboo shoots, medicinal herbs, and wild animal meat.

The second category of land includes paddy rice fields, swidden plots, graveyards, and house sites, which are considered as family property. These lands are managed and used by the individual family for agricultural cultivation. The families hold customary user rights to their agricultural plots whether they are being farmed or fallowed (Human Rights Watch: 2002).

Swidden lands are held in common, but household use-rights, established by previous use, are recognized, and to some extent are heritable by descendants of the household. Community religious officials have first choice of swidden sites each year and also have the responsibility for settling disputes between claimants to the same parcel of swidden land. Rights to use swidden land freely are inherited by descendants of the village founders, or descendants of families specifically adopted into the village. These households have the first choice of the land remaining after village religious officials have chosen their land. After these families have chosen, the descendants of households without a primary claim on the land may choose their swidden sites. In practice, most households return to the spot they farmed during the previous round of swidden cultivation. If two claimants to the same plot cannot reach a mutually agreeable settlement, the chief priest will allow neither to use the land.

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Household use-rights to swidden plots are usually divided at the time a married son leaves his father's house to establish his household (Kunstadter: 1978).

D. Continuously Traditional Inhabitation

Indigenous peoples usually settle on lands that are recognized for generations from their ancestors. They are not regarded as nomadic people because they have strong attachment to the place of birth and burial of their ancestors. They rarely move their settlements away from ancestral sites but they do move the cultivation fields within the recognized boundary.

The High Court of Australia (Mabo case: 2002) found that the historical inhabitation on land and the traditional connection to the land make indigenous peoples feel that they and their ancestors had been continuously physically present on, or had occupied, used and enjoyed in the areas or large parts of the areas indigenous community claimed. It is clear that the High Court in Mabo, considered continuous habitation in the place as an element that gave the indigenous community rights to the lands. The court affirmed that native title has its origin in and is given its content by the traditional laws acknowledged and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs (Way: n. d.).

The indigenous peoples usually live in the lands inherited from their ancestors. Their lands are traditionally occupied from one generation to another without any legal documents as proof of this fact. The lands are held in common and demarcated only in the perception of their community members. The recognition has been passed verbally from one generation to another. The individual members of a community have respected the rights to use of individual community members (Goodland: 1991).

E. Cultural Relationship to Land

According Daes (2001), in order to understand the profound relationship that indigenous peoples have with their lands, territories and resources, there is a need for recognition of the cultural differences that exist between them and non-indigenous people, particularly in the countries in which they live. As indigenous peoples have explained the situation, it is difficult to separate the concept of indigenous peoples'

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relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with land and all living things is at the core of indigenous societies.

However, as Professor Williams A.R. stated, in the context of discussion about the territorial rights of indigenous peoples in the Working Group on Indigenous Populations, "Indigenous peoples have emphasized that the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories" (Daes: 2001). Professor James Sakej Henderson, quoted by Daes (2001), attempts to illustrate the distinct relationship and conceptual framework, as follows:

> The Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource… Their vision is of different realms enfolded into sacred space… It is fundamental to their identity, personality and humanity… [the] notion of self does not end with their flesh, but continues with the reach of their senses into the land.

Indigenous communities also consider land as a creator and the human life as a gift of creation and they are related to the interdependence and connectedness of all life. It is difficult to express individual ownership within the Native spiritual understanding… life is understood as a gift, and it makes no sense to claim ownership of any part of creation (Mc. Kay)[7].

The areas of the land inherited from the ancestors are the most important for the survival of the indigenous peoples and their culture. The most fundamental need for tribal survival and cultural viability is continued habitation and use of the traditional land areas. The economic resource management, sociopolitical organization, and belief systems of the indigenous peoples are tightly woven into the particular land areas. The access to traditional lands and maintenance of transhumanance routes are vital to the economic, social, and psychological well-being

7 Mc. Kay S., An Aboriginal perspective on the Integrity of Creation.

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of individual tribal members, as well as for the maintenance of the group's cultural stability. (Goodland: 1991).

As shown in the discussion above, the concepts of customary land use and land rights of indigenous peoples are based on five unique practices and beliefs. The practice of the swidden agricultural system, the existence of customary law practices that govern the recognition of customary boundaries and the common ownership of land by the group, indicate that indigenous peoples have not abandoned their land since their ancestral occupation of the land. Indigenous peoples are not nomadic groups, as they have inhabited the specific areas continuously, consistent with their customary land use practices. By continuously living in on ancestral lands, they have established and maintained very strong cultural and spiritual ties to their ancestors. This cultural relationship to land is at the core of indigenous societies, and the traditional survival of indigenous peoples is based on the customary use of land in their areas. In sum, the land area inherited from their ancestors is a fundamental element of the traditional survival and economic subsistence of indigenous peoples.

2.2 Indigenous Peoples and Customary Land Use and Land Rights in Ratanakiri Province, Cambodia

2.2.1 Geographical Landscape of Ratanakiri Province

Ratanakiri province is located in the corner Northeastern Cambodia. This province covers a land area of 1.16 million hectares (Colm: 1997), and has four main agro-ecological zones. The central plateau has a peak elevation near Banlung, provincial town, of just over 500 meters, sloping off to around 200 meters elevation near the border with Vietnam. Ratanakiri has rich-red-basaltic soils that support dense semi-evergreen forests as well as swidden cultivation (Colm: 1997).

The hilly region, which averages 300 meters in elevation, contains dense forests and important watersheds of tributaries of both the Sesan and Srepok rivers. This region supports swidden cultivation on red and gray forest soils, which is practiced in cycles averaging 2 years of planting and 8-10 years fallowing. Older-growth forest areas contain particles of sand and stone or rocky soils which are unproductive for cultivation (Colm: 1997).

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North of the Sesan river is the mountainous region. This older, non-volcanic terrain rises to 1000 meters elevation at certain points along the divide between the Sesan and Sekong watersheds and forms the Cambodian-Lao border. Population density is fairly low in the northeastern mountains, which support some of the densest forests in Cambodia and abundant wildlife. Upland swidden is the main type of agriculture. Because the soils in this area are older and less fertile soils, the typical cycle runs 1-3 years cultivation, and 7-30 years fallow (Colm: 1997).

The lowland plain region has elevations averaging from 60-100 meters, and supports areas of lowland rice cultivation in the younger, more fertile alluvial soils of Sesan and Srepok river valleys. Other parts of the lowland plain contain older, relatively poor soils and support large areas of dry deciduous forests (Colm: 1997).

2.2.2 Indigenous Peoples in Ratanakiri Province

The population of Ratanakiri in 1998, according to the national census, was 94,243[8] of which 75 percent are members of 8 different indigenous groups. In addition, the province is inhabited by Khmers, Vietnamese, ethnic Lao, and Chinese. Those eight indigenous groups are Kreung, Tampuan, Jarai, Kachak, Kavet, Lun, Brao, and Phnong. However, three major ethnic groups Kreung, Tampuan, and Jarai have more members if compared to other ethnic groups in this province. These three groups have lived more or less self-sufficiently on swidden farming and by collecting forest products. Swidden and forests in the village have been more or less in balance for several centuries (Fox: no date).

This study mainly focuses on the three major ethnic groups mentioned above, the Kreung, Tampuan, and Jarai., which are discussed briefly below.

According the 1998 national census, the population of the Kreung ethnic minority is 22,619. The Kreung villages are located in the area extending from Banlung towards the western part of the Central Plateau, and towards the Sesan river in the North (Colm: 1997). Some writers have argued that Kreung, Brao, and Kavet are basically the same tribe; they all speak a Mon-Khmer language and they have a bilateral kinship system (Fox: no date). The strong social cohesion of this communal

[8] Wallgren and Watt: 2002, quoted from National Institute of Statistics 1999

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group is tied not only by the extensive kinship networks which exist, but it is further enhanced by the villagers' sense of membership in their particular village in a religious sense, as they all share a relationship with the tutelary spirits of their village (White: 1996)

The population of the Tampuan tribe is 22,128.[9] according to Colm (1997) this group lives in central Ratanakiri province, on the central plateau around the provincial town of Banlung and throughout much of Lumphat and Borkeo districts, and their region previously extended to the Vietnam border but they were pushed westward in the 18th century by Jarai from Pleiku in Vietnam. Colm (1997) added that the Tampuan, who are linguistically related to the Kachok, belong to the central sub-branch of Bahnaric, speak a Mon-Khmer language. Tampuan live in small longhouses, with two or three matrilineal families in each structure, organized in a circle around a community house (Fox: no date). Some of their religious behavior depends on their geographical situation. Tampuan villages neighboring on Kreung communities have similar spirits found in Kreung communities, whereas Tampuan settlements further east follow a different religious practices similar to that used in adjacent Jarai villages (White: 1996).

The Jarai, which number 15,669[10] in Ratanakiri, are one of the largest highland groups in Indochina, with most of their population living in Vietnam (Colm: 1997). In Cambodia, Jarai are found in the eastern portion of the province along the Vietnam border, presently O' Yadao and Andong Meas districts of Ratanakiri. The Jarai territory includes the Dalac plateau of the south-central Vietnamese highlands around the town of Pleiku and extends into eastern Cambodia. The Jarai speak a Malayo-Polynesian language (Fox: no date). The Jarai have a matrilineal clan system and it is forbidden for those of the same clan to marry. It was said that according to the Jarai mythology the clans are named after the place where their ancestors were first born (White: 1996).

[9] Ibid
[10] Ibid.

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2.2.3 The Practice of Customary Law of Indigenous Peoples in Ratanakiri

The relationship between the indigenous peoples and their environment is very close and inter-dependent. In order to keep a sustainable use, the community has developed customary rules to be applied and the traditional authorities have the mandate to resolve and punish violators. In her research, White (1996) described a vast and complex system of customary law, and acknowledged that her own study could not adequately address its many variations. Nevertheless, her study does give a description of some of its most obvious features of the unknown customary law of indigenous peoples in highland areas:

> [F]irstly, there are rules which govern the relationship with the local environment which are founded on religious beliefs concerning the power of the spirits of the forest. … [C]ustomary law governs the cutting of primary areas of forest and villages are usually surrounded by areas of dense forest which remain untouched. Villagers described how when exploring unknown areas of forest to be cut and cultivated it is often customary procedure to consult with elders to confirm that this is acceptable or these areas are not home to the powerful forest spirits.

Villagers believe that customary law provides the family with rights over cultivation land cleared by the family while the land is being cultivated, and while it lies fallow. If any dispute occurs over the rights to use the fallow land, the village traditional authority will resolve the dispute according to the customary law. White (1996) also observed that:

> according to customary law, a family has rights over the land which they cultivate and over the produce of old plots which are fallow and may be farmed by them later… If there is any dispute between families who wish to farm the same plot then this is resolved through mediation and invariably the contesting parties divide the plot. All the plots are within the boundaries of a village, recognized by neighboring villages. The boundaries of family plots must be respected and amongst some groups strict laws apply to the infringement of boundaries.

In a village there is a group of elders who are considered as the village traditional authority. The members of this traditional authority are chosen and

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accepted by community consensus as "those who know how to speak" and "those who know the differences between wrong and right." The group plays multiple, inter-connected roles in the life of the village, both as the guardian and implementers of customary law, as arbitrator and decision maker in disputes between villagers (White: 1996). Moreover, this traditional authority is instrumental in preserving and handing down the collective identity of the groups in their role as story tellers of the myths and legends which make up both the village and the ethnic group's social history (White: 1996).

There is a vast area of customary law that governs social behavior. It is related to the power of ancestors who, if angered, may punish through misfortune, sickness and even death. The mechanisms for enforcement are standard. If a recognized customary law has been infringed upon, it is usual for a meeting to be called and village elders to decide upon an appropriate fine. Different ethnic groups have different areas of social law and custom. Some groups impose severe punishment and other may be resolved with a lenient fine (White: 1996).

The system of customary law seems to function like any system of law. It exists not just to establish punishment for infringements, but also acts as a deterrent and also keeps villagers aware of their obligations to the ancestors or the power of the spirits. The deterrent is not only the cost of fine, but cost in a spiritual sense. For example, if the forest spirits are angered by the cutting of primary forest they can cause sickness or death. If the ancestors are angered they can intervene in human affairs[11]. Customary lands and forests are not just seen as a source of food and housing materials – they form the basis of the villagers' spiritual lives as well. Any action that damages the forests has repercussions for the indigenous peoples' cultural lives also (Wallgren and Watt: 2002).

Because of their reliance on customary law, indigenous villagers do not see the village chief, who has been appointed by the government, as playing an important role within their community. Rather, the village chief is seen as peripheral to village

11 White (1996) also observed that perhaps as a result of the system of customary law, "crimes" common in larger scale societies such as theft, physical violence, rape, murder, are practically unheard of in these villages.

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affairs, and serves as the government's link to the village, not as the villagers' link to the government. As White (1996) noted:

> In fact, many villagers were very unclear exactly what the work of the village chief entailed, apart from occasionally going to meetings and relaying some messages from the government. He is evidently not seen as a representative of the community as much as a representative of the government.

This traditional authority seems to exist only at the village or community level; with little existing beyond the village level. Disputes over land for instance, between members of different villages appear to be resolved by customary means by the authority vested in the village elders, whereas disputes within a village have been decided by the meeting participated by the community members (Wallgren and Watt: 2002). Through the customary law system, the elders do not function as an independent political force, but attempt to achieve amicable reconciliation with the community (White: 1996). For instance, in one village dispute, an elder brought a charge of petty theft against a younger man in the village and lost his case. It was decided that the elder had made a false accusation and he was ordered to pay a fine in cash and hold a communal feast with sacrificial offering of a pig the following day (White: 1996).

2.2.4 Customary Land Use and Land Rights of Indigenous Peoples in Ratanakiri Province

Presently, the majority of indigenous peoples in Ratanakiri province still practice customary land use and recognize customary land rights within their communities. This is especially true in communities that are inaccessible to the economic activities of the low land Khmers and are far from markets. However, there are changes in the customary land use and land rights for indigenous peoples who are living in and around economic developments such provincial and district markets. These changes are caused by the growth of the market and in-migration of the low land Khmers and the land speculation in the province. In general, it is believed that indigenous peoples still maintain their tradition and practice swidden cultivation.

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According to NTFP (1997) there are eight groups of indigenous peoples, as mentioned above, in Ratanakiri province but in reality their cultures are not so different from each other. In terms of management and use of lands and forests, there are three important systems of the subsistence economy of ethnic minority people: A) The forest is cut and cleared to make gardens (chamkars) for swidden agriculture. B) Fish and crabs are caught in ponds, streams and rivers. C) Non-timber forest products such as fruit, bamboo and rattan are collected from the forests.

2.2.4.1 Swidden Cultivation

As noted in the previous section, swidden agriculture is seen as a common cropping system of the indigenous peoples, especially indigenous tribal peoples in South and Southeast Asia. The swddeners are not considered as nomadic as commonly thought. They normally move their swidden plots around the ancestral site which has been recognized by community members and neighboring communities. The swidden agricultural system requires many plots of land for rotating, plots for current cultivation and reserved fallow plots, while the soil fertility is decreased and causes low crop yields. The fallow plots of swidden agriculture are not abandoned by swiddeners but are left fallow in order to recuperate to make them available for the next cycle. The duration of the fallow period can range from 5 to 10 years depending on the quality of the soil.

Swidden agriculture is the foundation of the indigenous peoples' livelihood. Generally, swidden cultivation cannot provide for all the needs of the swidden households, and forest resources such as fruits, wildlife, fish, traditional medicines and construction materials are indispensable to those practicing swidden cultivation. In this way, forests have provided for generations of the indigenous peoples in Ratanakiri province especially in the time of food shortage. Instead of using buffaloes to till the land, the indigenous peoples prepared the fields by hand because cultivation area was very small and insufficient rice could be produced.

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The process of making chamkar[12], which is used here to refer to swidden plots, is similar among all the indigenous groups in the highland areas. White (1996) explained in her research that the traditional system of upland cultivation is part of a long-term cycle in which every year new plots of land are cleared, allowing previously farmed plots to remain fallow until the forest cover re-grows, they regain their fertility and are fit to be reused. The chamkar typically surround a village, and plots may be up to four or five kilometers.

Before clearing the new areas of land for swidden cultivation, spiritual approval must be ensured. The head of the family groups which wishes to cultivate a new area must first visit the site and make a few cuts to the trees there and the dream the night after the first visit is interpreted as a sign as to whether it is acceptable for the plot to be farmed. Generally, the customary procedure of exploring the unknown forest for swidden plot is conducted by consulting with elders to confirm the acceptable area to make sure it is not the home of powerful spirits (White: 1996).

Indigenous peoples are cautious and untouched the dense forest or primary areas of forest. However, the areas where indigenous peoples clear to make chamkar are usually the secondary forest or forest left fallow from 8 to 20 years. The indigenous peoples rarely cut the old forest to make chamkar except when the secondary forest lacks quality (Colm: 1997). According to the swidden cultivation, forest areas are cleared and burnt by family groups to establish swidden plots which provide them with their food staple of hill rice, together with fruits and vegetables (White: 1996).

The chamkar are planted at the beginning of the rainy season and the same plot may be used for a period ranging from 1-5 years, depending on the quality of the soil. The indigenous peoples grow many kinds of crops in their chamkar, including upland-dry rice, cassava, taro, sugarcane, maize, sweet potatoes, yams, gourds, beans, peppers, sesame, tobacco, pineapples, eggplants, tomatoes, pumpkins, and cucumbers. Fruit trees, such as bananas, and jack fruit, cashews, papaya, and mangoes are grown in the villages and chamkar (Ibid).

[12] "Chamkar" is a Khmer word literally means "farm or garden." This study refers to swidden plot

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The old site of the chamkar can be re-cultivated after a regeneration or fallow period of time, depending on the quality of the soil. The villagers subsequently move their chamkar to other sites that have regained their fertility. Some of the indigenous peoples groups also follow strict regulations in regard to re-cultivating fallow chamkar. If one person wants to re-use another person's old chamkar, the new person must first ask permission from the previous cultivator (Colm: 1997).

Most farmers initially choose their fields so as to be able to enlarge and expand around the sides of the originally cultivated fields and when the soil fertility is decreased then the family shifts to another place (Fox: no date). Normally, indigenous villagers have two to four different sites of chamkar that they use for three to five years before fallowing. If their land is sufficiently fertile some people have only two pieces to move back and forth between them. Each swiddening site has an area of approximately one to three hectares. Villagers prefer to locate their fields close to the water and within one hour walk of the village as they usually go back and forth every day (Fox: no date)

Even though the majority of the indigenous peoples practice swidden cultivation, some also cultivate paddy rice. This paddy rice practice stems from past contact with Laos lowlanders and Khmer peoples during the Sangkum regime (1953-1970), during the Pol Pot period (1975-1979), and more recently due to the government's encouragement. However, this paddy cultivation is in addition to farming upland rice (White: 1996). For example, this dual system cultivation is seen in one Kreung village in Veun Sai district, Ratanakiri province, where families farm paddy rice on one side of the Sesan river while farming swidden rice on the other (White: 1996).

2.2.4.2 Boundary of Customary Land

As noted in earlier sections, without modern technology to recognize the boundary, the indigenous peoples have taken the natural geographical features as their boundaries. The recognition of the boundaries is verbally passed from one generation to another and the members of the community have to respect this perception of land rights transferring. This concept of customary land boundaries is important in establishing the rights of indigenous peoples to own their lands.

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In Cambodia, the highlanders have a clear sense of the physical extent of village land used for cultivation, usually defined by streams, mountain, or other geographical features. Village sites do not move as much as is commonly thought. Although village sites do move within the village's ancestral cultivation area, normally the movements are within a few kilometers (Colm: 1997). The specific reasons for moving are, for instance, political upheaval, government relocation, bad omens, excessive illness, or other hardships at the current site. However, the tradition of moving villages is still considered an option in some situations. In many cases villagers consider it to be to their advantage to remain at one site whenever possible (White: 1996).

A study conducted by Jefferson Fox (no date) documents the movements of Kres village, one of the Kreung villages in Ratanakiri province, which has moved several times within the last 50 years. Kres village is one of the Kreung villages in Ratanakiri. By using the aerial photographs and sketch mapping techniques, the study was able to trace the spatial history of the village. The study showed that the location of the village has been moved around from the French protectorate period to the present day. In some cases, the village name was changed to reflect the name of the elder and headman in the village.

For instance, in the early 1950s, the village was called Ban Poey, when the name of the village headman at that time was Ta Van Poey. In the late 1950s, the village was named Ya Poey when the villager elder was Ya Nanch. Later on in the early 1960s, the village moved to a nearby location and was named Pin Pin village, when the elder was Ya Bot. During the war period, this village moved deeper into the forest to escape the war, and during the Khmer Rouge regime the villagers of the Kres village were forcibly relocated to Taveng district, where it was completely out of the ancestral areas. In 1979, when the Khmer Rouge regime was toppled and people were set free, the Kres villagers moved to their original lands and they considered the entire tract of land to be their ancestral land (Fox: no date).

From the past to the present, the indigenous villagers have defined the boundaries of their village including their agricultural land by geographical characteristics, mentioned above, such as streams, stones, big trees, or mountains. All of the agricultural plots are within the traditional boundaries of a village and

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recognized by the neighboring villages. The boundaries of family plots of villagers are recognized and amongst some groups, strict laws are applied to the infringement of boundaries (White: 1996).

Village boundaries have been defined by the natural features and taken care of by the spirits. However, the sense of specific boundaries between villages was not traditionally required unless the cultivation areas of two villages met one another. The villagers believe that if outsiders farm on the other side of another village's swidden fields and hence have to cross that village's fields frequently, the spirits will be unhappy and cause misfortune or death (Fox: no date)

2.2.4.3 Relationship to Land and Environment of Indigenous Peoples

In general, the indigenous peoples have very strong relationship to their lands according to their customary law practice. As the Special Rapporteur, Mrs. Erica-Irene A. Daes[13], mentioned in the final working paper "as indigenous peoples have explained, it is difficult to separate the concept of indigenous peoples' relationship with their lands… the relationship with the land and all living things is at the core of indigenous societies." Moreover, Mc. Kay stated that indigenous community members never claim land and environment as ownership because of the interdependence and connectedness to the human life. Therefore, the customary law is the effective rule for community discipline and it is difficult for the outsiders to understand.

In general, the highlanders (indigenous peoples) can be distinguished from their lowland neighbours not only by their long-standing inhabitance of the upland areas but their particular religion which is bound to their surrounding environment, and their use of semi-settled swidden agriculture techniques (White: 1996). The same author (White: 1996) also added that the indigenous peoples believe that the entire natural environment such as sky, earth, forest, water sources, hills, stones and rice fields are populated by a vast of array of spiritual forces. For example, the primary forest areas surrounding the village are believed to be inhabited by forest spirits, as

[13] E/CN.4/Sub.2/2001/21

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one villager described the big trees were born in the time of the gods, and it is forbidden for these areas to be cut.

Land and the surrounding forest is attached to all sectors of traditional institutions of indigenous peoples in Ratanakiri province, including culture, religion, agriculture, and health care. According to McCausland (2001) indigenous peoples considered ancestral land and sacred forest are the sources of medicine; that is, herbal medicines are obtained from the forests, and health care providers obtain spiritual powers after praying or making sacrifices to the forests. Generally, the indigenous peoples choose to follow this traditional belief system first before seeking to modern health services.

For instance, in cases of illness, where supernatural interference is believed to be the cause, in times of severe misfortune, or at other opportune times of the year, such as weddings or funerals, the various spiritual forces are offered animal sacrifices and rice wine as part of an organized communal ritual. The members of each village are bound together, not only through kinship ties but also in a religious sense as every village has its own tutelary protective spirits which must be regularly appeased with a sacrificial offering and feast (White: 1996).

Due to their traditional practice associated with the environment mentioned above, the Kreung ethnic group in particular, has been able to live and subsist in their forests for hundreds of years. They have followed the traditional use of land and forest from one generation to another through their oral tradition. Land used for swidden agriculture is guided or inhabited by spirits. If the spirits do not allow the swiddeners to cultivate on a particular plot, the permission or prohibition from the spirits would be informed through dreams of the elders. The Kreung, like most of the indigenous groups in Ratanakiri, follow spiritual beliefs in regard to farming chamkar. They have spiritual connection to the spirits of land for swidden agriculture. They make contact or respect to land by performing agricultural ceremonies, six or seven times each year (Rat PRD et al. 2000).

2.2.4.4 Customary Ownership over Land

Indigenous peoples have a sense of common responsibility to keep the natural resources for the long term use for community members. Land tenure is believed to be

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shared by the dead and living community members. Exclusive rights over lands are not available but community members have the rights to use whether individually or commonly, based on the customary law. Some indigenous groups listen to the traditional authority's decisions and others allow kinship members to have rights to use lands within community boundaries.

According to White (1996) the kinship groups of Cambodia's highlanders organize themselves in self-governing villages. The strong social cohesion of communal groups is provided not only by the extensive kinship networks, but is further enhanced by the villagers' sense of membership in their particular village in a religious sense, as they all share a relationship with the tutelary spirits of their village.

White (1996) also stated that village membership is the most important status for individual person among the indigenous groups in Ratanakiri province. Anyone residing in a village is expected to conform to the traditional authority of the group, which rests with the village elders. White (1996) added that most of the indigenous groups, in Ratanakiri province, marriage patterns or social behavior are organized through a process of marriage bi-locality. Before becoming to the member of a village, a newly married couple first spends several years living and farming with the bride's parents. The couple then moves to the home of the groom's parents, until finally settling in the bride's village.

The indigenous people in Ratanakiri province have practiced for generations the customary rights of access to land for cultivation on the basis of the membership in a community rather than on the basis of private ownership (Ting and Tianne: no date). Since there is no exact proof of how the customary lands have been transferred from generation to another, it is likely that in-village-form communal rights have been passed from one generation to another not based on blood connection, but on village membership.

According to Colm (1997) the villagers cannot encroach on the land of a neighboring village and neither can the neighbors encroach on their land. Within their own community boundary, the cultivation land is distributed according to decisions by the village elders and spiritual beliefs, but often the result is that the land is distributed equitably.

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The villagers do not have any legal papers for any of their lands but they claim that they have managed their land for several generations and in their minds, the lands they have traditionally used or occupied are their lands. The village member who cleared the forest to make swidden plots has rights over it, even when the swidden plot is fallow. However, it is not the exclusive rights for any individual family but based on the family's membership rights to the village communal land. If a village member wants to cultivate the old swidden plot of the person who cleared it, the new person has to ask permission from the person who cleared the land, if the land has been fallow for a period of 5 to 10 years. Normally, the person who first cleared the land would allow another village member to cultivate the land if the person who cleared the land does not need it to cultivate any more. Normally, there no fees are paid for granting rights over cultivating the fallow swidden plots.

However, if the fallow period of swidden plot is too long, another person can make a swidden plot on it without asking any permission from the first person who had cleared it. As one Jarai explained to Colm's interviews, (Colm: 1997), if it has been fallow very long time, the forest grows large and spirits have returned to take over. Then it has become a wild place again so humans take some risk in trying to re-claim it. According to the villager, a member of the village establishes a claim by clearing the land, but if the land is abandoned for a long time the right is lost because the trees are big and the spirits have returned.

2.3 The Violation of Customary Land Rights in Ratanakiri Province

2.3.1 Introduction

In the wake of the Cambodian peace process in the early 1990s, the reshuffling of international political allies, the liberalization of the economy and the substantial rewriting of the Constitution and other dependent laws, a "hit-and-run" economy emerged (Ojendal: 2001). In the absence of a modern land law, and in the face of weak legal institutions, all kinds of land violations occurred throughout Cambodia. The Land Law of1992 was still in effect following the adoption of the Constitution in 1993, and until a new law was enacted and promulgated on August 30, 2001. Williams (1999) found that many loopholes led to violations of the land rights of vulnerable people:

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> The current administration of land titling under the guise of the Land Law 1992 seems to be organized in such a way that the rural poor and other disadvantaged groups find that it is prohibitively expensive and dauntingly complicated to obtain certification of their land rights. Some Cambodian elites appear to be exploiting this situation, by expropriating formally untitled property occupied by vulnerable families and then abetting evictions to effect dispossession of the occupants who have been targeted by speculators or developers.

The long period between the promulgation of the Constitution and the new Land Law of 2001 provide more opportunity to grab land and resources in the name of economic development, particularly where there were no legal documents to prove ownership or possession rights. Powerful people and some investors cooperated with each other to get favorable concessions of agricultural and forest land from the state. According to Ojendal (2001) the central government, which previously worked with authoritarian methods, turned into a laissez faire regime and became unable or unwilling to stop the often ruthless exploitation of natural resources to which it, at times, had been a party.

Based on a review of the documents, Williams (1999) stated that many Cambodian farmers were losing their land because of the combined effects of the market economy and the wholesale privatization of what previously were commonly used resources such as forest and wetlands. It was reported that more than 8 million hectares of Cambodia were under long term forestry concessions, and 3.3 million hectares under conservation management (Williams: 1999, qtd. MoE: 1998).

According to Russell (1989) in Ratanakiri province alone, concessions, greater than 15,00 hectares, granted by the Ministry of Agriculture, Forestry and Fisheries consumed approximately 161,500 hectares and the protected areas established by the Ministry of Environment (MoE) took 811,261 hectares. One cross-provincial areas timber concession was granted to Macro-Panin for 1,432,930 hectares in three provinces one of which was Ratanakiri province.

Apart from the problems mentioned above, there are many factors which led to the violation the land rights of the vulnerable groups, and indigenous peoples in

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particular. More details of land violations in Ratanakiri province are described in the discussion that follows.

2.3.2 General Situation of Land Dealings in Cambodia

Since 1989 land disputes have been a major concern throughout the country, especially in development areas and accessible rural areas. The variety of disputes ranges from the grievances of those who have been disenfranchised from their landholdings prior to 1975, disputes over the right to land occupied under the collectivization policy of the People's Republic of Kampuchea (PRK) and State of Cambodia (SOC) governments; and general ownership disputes caused by a number of claims being lodged over the one land parcel. These disputes often resulted in violence. In some provinces, land dispute cases accounted for almost 50 percent of the total cases before the provincial court (Russell: 1998)

In 1992, the State of Cambodia promulgated a land law which recognized the right of citizens to possess and use land, and to receive lawful products of the land. Since that time, the land market has been active in Cambodia. People began selling their immovable property, which includes their houses and lands. Some state property was transferred to private companies in various forms with the justification of furthering the free market policy. Land speculation increased in urban areas, targeted development areas, and rural areas with potential for development.

According to Russell (1998) in the early 1990's, there was an influx of foreigners into Cambodia in the lead-up to the United Nations-sponsored elections. The buying and selling of land and houses were seen to be very active and booming, particularly in urban areas and in the areas along the main highways, causing the prices of land and houses to rapidly increase. A state of anarchy on land matters developed around the country, resulting in disputes between the authorities and ordinary people and among ordinary people. There were instances of illegal occupation of public land and other reserved land. There were claims based on ownership of land prior to 1979. There were instances of seizures of land which people had abandoned between 1979 and 1989; and of land being bought and held without being utilized (Russell: 1998).

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In Phnom Penh, with land prices much higher than in other towns or provinces, some medium income and poor families sold their property and moved to urban areas or provinces where cheaper land was available. In this way, these people would have some capital to open businesses and possibly buy land for farms or for speculation. Highland provinces were target settlement areas for some of them because the areas are not densely populated and the land price was still very cheap. As a result of this situation, Ratanakiri province has become an attractive location for many Khmer lowlanders.

2.3.3 Types of Customary Land Violations in Ratanakiri Province

Because Ratanakiri is known as home to many indigenous groups that constitute the majority of the population within the region, they have enjoyed a degree of isolation from the activities and affairs of the rest of the nation. However, since the opening up of the economy in early 1990s, Ratanakiri province has been challenged with the same pressure of land security as other provinces. The in-migration of Khmer settlers caused an increase in market activities in the province and has resulted in Khmer settlers obtaining land ownership over the customary lands of indigenous peoples (McAndrew: 2000).

The increase in the population in the province from 1992 until 1998 was significant. According to the Population Census conducted in 1992 by the United Nations Transitional Authority in Cambodia, the population of Ratanakiri was 66,764. In contrast, National Population Census, conducted by the Ministry of Planning in 1998, showed that the population of Ratanakiri province increased to 94,243.

The population growth in Ratanakiri could be explained as natural, but the in-migration constitutes a major factor. In the 1998 census, 8,776 persons, or 9 percent of the total Ratanakiri population, reported their previous residence as another Cambodian provinces, while 739 persons out of the total population reported their previous residence as another country (McAndrew: 2000).

Normally, when the population increases, large areas of land is needed to accommodate the increase. The in-migration of Khmer lowlanders to Ratanakiri province demanded large areas of land for both residence and agricultural plantations, including subsistence and commercial plantations. Because of the experience of the

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Khmer lowlanders in the land market, some of them have been in a position to engage in land speculation in Ratanakiri province. Regardless of the source, however, land speculation engaged in by the non-indigenous peoples has adversely affected the security of ancestral land rights and customary land use practices of indigenous peoples.

Obvious, Khmer in-migration is not the only factor threatening the subsistent livelihood of the indigenous peoples. For instance, according to Ojendal (2001) a number of various interests - ranging from local businessmen, to local and not so local military, national level politicians, multinational companies and international development agencies – have approached the area with plans on how to tap its riches. Development workers who live in the area expect accelerated land grabbing, illegal logging, legal but disastrous logging, the establishment of cash-crop farms, dam building, and other similar activities in the near future.

As a result of these developments, indigenous peoples – who previously were the primary users of the land – have less opportunity to make their voices heard and to protect their customary land rights. As a further result, the access of indigenous communities to land and natural resources on which their livelihoods depend are seriously under stress, not only because of logging and plantations.

There are many kinds of land expropriation and eviction of indigenous communities from land inherited from their ancestors. However, this study mainly focuses on the major activities which caused violations on customary land use and land rights of indigenous peoples in Ratanakiri province. Those kinds of violations are: granting licenses for forest and land concessions by the central government to private companies, establishment of protected areas, and all forms of land speculation.

A. Land and Forest Concessions

In the past, the land conflicts of indigenous peoples were likely to occur only between adjacent villages, and the solution worked out between village elders. After the new RGC was established in 1993, the RGC, in the name of economic development and national interests, areas customarily claimed by indigenous peoples were granted to private companies for agricultural plantations and logging concessions. This one-sided, economic approach from the central government in

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Phnom Penh has changed the nature of land conflicts affecting indigenous people. No longer can disputes be resolved by customary law, and within the local and provincial levels, as the disputes now involve land encroachment of concession areas belonging to private companies onto indigenous peoples' historical and ancestral areas. Moreover, according to Ojendal (2001), from Global Witness 1996, agricultural concessions have been granted and land has been sold by ministry and government officials in Phnom Penh-sometimes providing local leaders with a share of the profit, sometimes plainly undermining benevolent local leaders who lack the power or courage to go against deals made at the central level.

Many of the land and forest concessions in Ratanakiri province were granted to both local and foreign private companies. In the late 1990s, it was observed that areas of concessions allowed in Ratanakiri province covered an area larger than the surface area of the province. According to Ting and Tianne (no date), "concessions allowed in Ratanakiri cover 140% of the surface of the province. All were decided without consultation with the provincial authorities, local people, or NGO/IOs present, and without any social and environmental impact assessment studies being affected." In addition to the already-granted concessions, in 1997 the Ratanakiri Cadastral Office had records of more than a dozen pending concession projects in the province, ranging from 100 hectares to 20,000 hectares (Colm: 1997). Some of these projects were implemented as scheduled, and others have partially started or for unknown reasons have not yet started their projects. Not only will indigenous peoples be affected, but also ordinary peoples in Ratanakiri province will be affected, if all of the granted projects are implemented.

The following are some case studies of how land and forest concessions that have adversely affected the land and lives of indigenous peoples in Ratanakiri province.

Case Study: Oil Palm Concession

One of the biggest land concessions in Ratanakiri province was an oil palm plantation project granted by the central government. According to Colm (1997) the Council of Ministers approved a US $20.36 million investment project of the oil palm plantation and in 1995 the two prime ministers called for planting 20,000 hectares of

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oil palm and constructing a palm oil mill in O' Yadao district. The concession was a joint venture between two Cambodian companies- Rama Khmer International and Mittapheap- Men Sarun- and a Malaysian partner, Globaltech Sdn. Bhd. Out of the 11 representatives of Rama Khmer International. Five were high ranking officials from the Ministry of Defense and commanders of Military Region Number 1, which is located in Stung Treng province and also covers Ratanakiri province.

According to Colm (1996) the O' Yadao district covers a total 159,100 hectares. Most of O' Yadao's villages, 31 out of 35, lie in the northern part of the district, clustered within 8 kilometers of highway 19, largely overlapping with the area allotted for the oil palm plantation. The 20,000 hectares of oil palm plantation would directly affect 15 out of the 29 villages in six out of the seven communes in the O' Yadao district. There were approximately 4,500 people living in the areas which would be affected by the oil palm plantation. The population is 95 percent Jarai ethnic minority. The Jarai practice swidden agriculture and rice cultivation primarily on a subsistence basis, rather than using a cash economy.

The affected Jarai villages were ignored and would need to be relocated because the concession plantation overlapped onto Jarai lands. No where does the project application discuss the resolution of any land claims or compensation for the villagers paid by the company or the government. Instead, in its application, the company, which justified the project on the basis that it would contribute to national economic rehabilitation, promised to build infrastructure such as houses, roads, a hospital, a school, and a pagoda for the poor people in the area. This seemed to provide more facilities for the poor people.

However, there was no detailed plan for building the houses – such as the numbers of houses, the name of villages where the houses would be built, and when the construction would start. It was not clear whether the villagers in the affected area would need houses donated by the company because most of the villagers in the areas were the indigenous villagers who have practiced traditional way of living.

Another point raised by the company, the building of pagoda, likely would be viewed, as an unwanted donation because most of villagers are indigenous peoples who historically practice animism. Animists respect the spirits of forest and have connections with surrounding environment. One could understand how the building

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of a pagoda in their areas might be viewed by indigenous people as a reflection that the indigenous people who are animists would be converted.

Moreover, the letter, dated 21 September 1995, of approval from the Council of Ministers stipulated that the concession area should not be located on dense forest or degraded forest. And it also ordered the Ministry of Agriculture, Forestry and Fisheries to prepare a detailed contract in order to avoid clearing dense forest and the cutting of any large trees for the purpose of gaining income before the oil palm is planted. However, despite these clear instructions, since early 1995, the oil palm company had cleared approximately 300 meters on either sides of national road 19 between Ratanakiri province to the Cambodia-Vietnam border, for a total of between 400-500 hectares in O' Yadao district. According to local villagers, cleared land included semi-dense forest, secondary forest, secondary scrub, and cultivated and fallow swidden plots. The affected villagers were not mentioned by the approval letter from the Council of Ministers. Regardless of the intentions, the effect of the government's actions showed a disregard for the basic rights and any other compensation for the indigenous villagers.

According to Colm (1997) after the clearing forest along the highway, the company planted about 20 hectares of oil palm and 100-200 hectares of coffee as a trial plot near one village, called Som Kaning village. There has been little activity from the company to proceed with the planting of the oil palm plantation. The company reportedly was facing financial difficulties. Agricultural experts have expressed the opinion that oil palm might be not suitable for Ratanakiri province because there is not enough total rain fall and the dry season is too long for viable oil palm production. Colm (1997) added that the company representative had admitted that the foreign partners were reluctant to proceed because of the uncertainty of the political situation and the poor infrastructure, which made it difficult to take equipment into the area.

According to Colm's research (1997) assessed that if project is fully implemented, the oil palm plantation would take away the sources of livelihood of more than 4,500 people, mostly Jarai ethnic minority, living in the six communes within the concession area. At best, the oil palm plantation would provide 400 jobs for local villagers. Even if those 400 individuals would be able to support their entire

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families on salaries ranging from 40-80 a month, at the most 2,000 people could be provided for through employment with the oil palm company.

Colm (1997) added that the remaining 2,500 people affected by the plantation currently support themselves on subsistence farming within the unutilized concession area. These people will very likely face severe economic difficulties if they are forced to move out of the area in the future. Since the majority of affected villagers are working in swidden plots and paddy rice, they will have no lands to cultivate because their land will be taken over by the company, and they have no other means of survival. The outlook for the villagers who would be employed by the company is also not very good, as the stability of income would be connected to market changes, which for them is potentially less reliable than their traditional subsistence way of living It is likely that it would be very difficult for the indigenous group to adjust to such drastic changes in traditional way of living and working.

In her research, Colm (1997) mentioned the interviews in March 1996 with Jarai villagers that the company never consulted with the affected communes until after they began clearing the land in early 1995. Some of the commune chiefs and villagers in the affected area said that they were pressured or intimidated into signing documents from the company which were not clearly explained. According to Colm (1996) there were 33 active chamkars of residents in three villages were taken by the company without compensation.

On the other hand, Colm (1997) added that in interviews, in 1996, the company representative, Mr. Men Vuthy, initially said that villagers' rice paddies and fallow chamkars would be made into oil palm plantation. In the future all the villagers would be living along the highway and working for the company so there would be no need for them to farm rice. In addition, Colm (1996) added that the oil palm and district officials encouraged villagers to relocate to half-hectare plots along highway 19. The villagers said these half-hectare plots do not provide sufficient land on which to support themselves by farming, as most families in O' Yadao require 6-8 hectares of land to insure food security. Many villagers said that if the relocate along highway 19, they had no intention of abandoning other lands they used, particularly original village sites, on which their ancestors' graves and fruit trees are located. If the

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relocation is conducted, the villages indicate they want to maintain both the old and new village sites.

Will the indigenous villagers be happy with the work for the company? And will the company secure the life of indigenous villagers if they only work for the company? According to Colm (1997) the company complained that the company had difficulties recruiting and maintaining employees because the indigenous people do not work in a normal manner. They work two or three days and then once they get money they stop working and drink the rest of the week. The company claimed that it did not have enough workers and the company did not depend on the indigenous peoples. If the company does not recruit indigenous villagers to work in the plantation as the company claimed, how those indigenous peoples survive while the land belong to company and their labor will not be needed by the company. Will their land be returned in order to let them work in the form of swidden agriculture or paddy rice?

In February 1997, the company pledged not to encroach on paddy or chamkar land and pledged instead to give land to the local Jarai ethnic minority to farm. However, any land not under active cultivation after two years would be confiscated by the company. This policy clearly does not allow the villages to practice the traditional cultivation methods, in which the land is fallowed for a period of time as a means to re-fertilize the land for long term use.

It seems that the plan was kept secret from the affected villagers. Colm (1997) noted that some two years after the company had started its activities in O' Yadao, accurate maps and information about the project had not been disseminated to affected villagers or commune and district officials, the majority of whom are unaware of the full extent of the land area granted to the company. Until February 1997, there was no further activity of the company to clear land, so the villagers have not been complaining. Villagers have never seen a map of the concession and they do not know that the company plans to start up again. They think the concession is only taking 300 meters along the road and do not understand it covers 20,000 hectares. (Colm: 1997 and 1996)

It is apparent that the granting of the concession apparently was not carefully studied by the central government. Not only does the oil palm concession land encroach on indigenous village boundaries, but also on the land of another

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concessionaire.. Global Witness mentioned in its publication (1996) that part of the oil palm company overlapped with Macro-Panin concession. The report noted that: "Part of their concession coincides with Macro-Pannin's concession, causing a dispute between the two companies, illustrating how lack of clarity in the RGC's forest policy confuses not only observers, but the timber companies themselves."

Case Study: Hero Taiwan Company Forest Concession

According to the Cultural Resource Study (2000), conducted by join departments[14] in Ratanakiri province and other relevant ministries and institutions, showed that in January 1998, the Royal Government of Cambodia granted the Hero Taiwan Company, Ltd., a concession to log 60,150 hectares of forest land in Ratanakiri province. The forest lands are located in O' Chum, Veunsai, and Taveng districts, all north of Banlung, the provincial town.

The study (2000) also added that concession the agreement allowed the Hero Taiwan to carry out selected logging operations under the control of the Department of Forestry and Wildlife (DFW) of the Ministry of Agriculture, Forestry, and Fisheries (MAFF). The Management Plan for logging operations (required as part of the Investment Agreement between the Company and the government, and written and submitted by the company to the government) states that "culturally important areas [and] areas which the community has requested to be excluded from logging" are to be excluded from the concession area.

The same study reported that the Hero Company Management Plan (section 11.5.1) stated that forest lands shall be excluded from logging if the areas are: sites important to culture or tradition, areas the community wishes to protect, areas where traditional use of forest is threatened by logging, watershed areas that serve as water sources for communities, …etc.

Although the agreement provided that some areas would be excluded from the logging areas, the body and procedure to identify those areas were not established by any involved parties. Only local indigenous villagers are knowledgeable about the

[14] Rat Provincial Rural Development Dept., Ministry of Environment, Rat Provincial Environment Dept., Rat Provincial Culture Dept., CIDSE, UNDP-CARERE, NTFP, ADHOC, and VNP

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sacred forest and traditional and cultural sites within their territory, so inclusion of local indigenous villagers in the operational activities is the most important way to avoid adverse impacts on local people as provided in the agreement.

The study (2000) further stated that in March 1999, conflict arose between the company and the Kreung people living in the affected areas. Villagers claimed that logging was taking place in spirit forests and forests where they collected non-timber forest products. Villagers also expressed concern that the logging would cause the spirits of the forests to become angry, causing illness, misfortune, and natural calamity to the villages. The villagers wanted to protect those forests for future generations to insure a source of livelihood and to preserve sacred sites, and were upset that neither the company nor government representatives consulted with them before logging began.

According to the Cultural Resource Study (2000) there were nearly 10,000 people were living in thirty-three villages in the forest concession areas. The villagers, living in locations where logging had started in spirit forests and NTFP forest, said that misfortune had fallen on villagers who entered those areas afterwards to collect NTFP.

Apart from the anger of the spirits, the logging operations had more negative impacts on the local villagers and environment. The study (2000) added that:

> The NTFP areas were also physically impacted by logging operations. Fallen and discarded logs and underbrush cause the forest understory to become too thick, making it difficult to graze cattle or for people to travel through the area to collect firewood and NTFPs. Streams and rivers are also clogged by timber litter, destroying aquatic resources and blocking fish migration. In addition, wildlife living in NTFP collection forests were scared off by logging operations.

B. Protected Area (PA) Establishment

The declaration of the establishment for PAs in Cambodia, after the new government was established by the 1993-general elections, showed that Cambodia had resumed its long history of PA management. Cambodia, the first nation in Southeast Asia to take such action, declared its forested land, 10,800 hectares, around the

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renowned temples of Angkor as a national park in 1925. Later on, in 1959, one third of the country was classified into 173 forest reserves (Baird: 2000).

The establishment of the PAs is a good sign for environment protection, wildlife survival, and collection of non-timber forest products for peoples in the areas. On the other hand, the negative effects always come along with positive ones. Many PAs have been established nationwide; however, this study looks specifically at the Virachey National Park (VNP). The discussion that follows examines the extent of negative effects of the VNP on the targeted-area people, especially indigenous peoples and how the negatives effects happened:

In November 1993, His Majesty Norodom Sihanouk signed a Royal Decree entitled, "The Creation and Designation of Protected Areas." The Royal Decree included two protected areas in Ratanakiri province. One is Virachey National Park (VNP), in the Northern part of the Ratanakiri province, which extends from Stung Treng province. The other one is Lumphat Wildlife Sanctuary, situated in Southern Ratanakiri province, covering the provinces of Ratanakiri and Kratie (Baird: 2000). This study focuses only on the VNP.

According to Baird (2000) Virachey is Cambodia's largest National Park and one of its most expansive PAs, with an area of 332,500 hectares in Siam Pang district, in Stung Treng province, and Veun Say and Taveng districts in Ratanakiri province. The park is bordered on the north by Laos' Attapeu province, and on the east by Vietnam's KonTum and Gia Lai provinces, and is bounded on two sides by major rivers, the Sekong to the west and the Sesan to the south.

The location of the VNP is adjacent to the international borders with Laos and Vietnam and it is covered with evergreen forest, dry deciduous forest, and scattered second forests and the vegetation types are diverse. However, many groups of indigenous peoples have lived within the park for a long time and the area is regarded as their historical homeland. According to Baird (2000):

> Although there are presently no villages situated inside VNP, however, indigenous groups of Brao, Brao-Kavet and Kreung peoples historically lived throughout much of the PA, and consider most the land included within it to be their traditional homeland. Many ethnic Brao, Brao-Kavet, Kreung and Lao villagers are presently situated in the

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> buffer zone, including a total population of approximately 11,799 people live in nine communes comprising 41 villages.

Most of the Brao-Kavet who used to live inside VNP were forcibly evicted from their traditional lands near the Lao border by successive Cambodian governments, beginning with the Sihanouk government in the mid-1950s, by the Khmer Rouge in the mid to late 1970s, and finally by the PRK government in the early to mid-1980s. Most were relocated to lowland areas near the Sesan and Sekong rivers, although many have been gradually moving back into their traditional lands (Baird: 2000). Four villages in Kok Lak commune, located in the lowland areas along the Sesan river in the northern side, have moved away from the Sesan river up north where it is next to a stream closer to the VNP areas. It is believed that area is the buffer zone of the park (Ibid).

When the boundaries of the VNP were established, the existing indigenous peoples villages living around or south of the park were not given much attention. Baird (2000) indicated, based on information received through his personal communication with officials at the Ministry of Environment, that "The boundaries of the VNP were apparently set using topographical maps and aerial photographs in Phnom Penh, and there was apparently little consideration of the human ecology of the area at the time the park's boundaries were established" (Ibid).

It certainly seems logical that the government should consider local people or indigenous peoples in the areas of proposed to establish PA because involvement local community can contribute to the sustainable management of protected areas. The indigenous community's interests in the PA and traditional way of life will encourage the community to actively participate in PA management. For instance, Colchester (1994) quoting from Schaller (1993), stated that:

> Conservation cannot be imposed from above. Any conservation effort must involve the local people, based on their interests, skills, self-reliance, and traditions, and it must initiate programs that offer them spiritual and economic benefits. Innovative programs of this kind have been developed worldwide in and around various reserves, some based on tourism, some on sustained use of critical resources.

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Likewise, the government should take into consideration the resolution of the International Union for the Conservation of Nature and Natural Resources (IUCN), recognizing the value and importance of traditional ways of life and the skills of the people which enable them to live in harmony with their environment. The resolution also recommends that governments "maintain and encourage traditional methods of living" and "devise means by which indigenous people may bring their lands into conservation areas without relinquishing their ownership, use or tenure rights."

According to Baird (2000) some Brao-Kavet villagers conducting swidden agriculture in Kok Lak want to return to their original homelands inside the VNP, but have so far been discouraged by the government due to the concerns related to security, the provision of government services to villagers, and PA management. A the same time it imposes the restriction on the local villagers for the reasons just mentioned, the government granted the buffer zone of the park to an industrial logging concession which covers 350,000 hectares.

The indigenous peoples who usually settle in the forest and practice swidden agricultural have been seen as the one who destroyed forest. Moreover, it has also been alleged that their beliefs and animist religion are merely excuses to claim for land areas for themselves. For instance, Ojendal (2001) pointed out that:

> The co-director of the Provincial Department of Forestry and Wildlife is of the opinion that the indigenous peoples are the ones destroying the forests and that the concessionaires are following regulations. When asked about the illegal felling inside culturally valuable forests, he says that the indigenous peoples use spirits as an excuse to claim areas for themselves.

Land is the most important thing for the survival of indigenous peoples, and ancestral lands and historical village sites are strongly connected to their cultural survival. From the perspective of indigenous land rights the indigenous peoples who used to live in the area prior to the establishment of the PA should be allowed to return. The earlier relocation of those indigenous peoples from the present PA areas due to the lack of security in the area at that time is no longer a valid reason to deny people the right to return. According to the Draft UN Declaration on the Rights of

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Indigenous Peoples, the indigenous peoples should have an option to return to their territory after conflict ended.

C. Land Speculations

There are many disadvantages at present for the indigenous peoples because of increasing land prices and population along with the arrival of investors. Indigenous peoples need a lot of land to sustain their lifestyle through their traditional agricultural practices, and many of them do not have any legal documents because they own traditionally. According to the Ojendal (2001) it is commonly believed among provincial officials that the environment degradation and ecological imbalance are the responsibility of the indigenous peoples themselves while more important factors, such as the rapid and massive influx of lowlanders to Ratanakiri province which forced the indigenous peoples to gather in smaller areas is rarely mentioned. Many outsiders assume that all land without a certificate of official tenure is government property.

Land speculation occurred after the establishment of protected areas in early in 1990s, and later on from the mid to late 1990s the granting of concessions. Land speculation occurred on a small scale, but with serious consequences for customary land use and land rights of indigenous peoples. This kind of violation seemed to be acceptable because it involves obtaining consent from indigenous communities to sell their lands. However, there are other forms of land speculation in Ratanakiri province by exploitation through legal claim, manipulating information, and power maneuver of dishonest individual holders. Land speculation led to land grabbing, forced evictions, and forced agreement to land deals. Generally, indigenous peoples are ignorant about their rights to land, and reportedly have sold their land at a cheap price based on false information about their legal rights. That is, some indigenous people were told that under the old land law, all land belonged to the state and that people had rights to use the land but that the state could take the land without compensation at any if required for the national interest. Based on this understanding, the indigenous peoples would sell their land at a cheap price because they thought some compensation was better than no at all.

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According to Ojendal (2001) there have been many people involved in the land speculation and many forms of speculation have been occurring in Ratanakiri province, most speculators realize that they can make a large profit if they buy land and resell it or use it for large-scale plantations. In Ratanakiri province, there are numerous accounts of dishonest individuals holding either formal or informal power at village, commune, district or provincial levels selling communally or family used land to outsiders or grabbing it for themselves, their families or their friends (Ojendal: 2001).

For instance, land dealing in southern O' Chum district posed a very serious threat to the indigenous customary lands. According to the Colm's (1997) study, it was known that in La'ak commune, O' Chum district; more than 100 people including district officials and some local businessmen; have applied for title to much of the "available" land to sell to future investors. Moreover, villagers were led to give up their land by coercion or after being promised that it would only be temporarily "borrowed" in exchanged for development of wells or other local improvements. Meanwhile the company representatives proceeded to apply for land title. For instance, Colm (1997) stated that:

> In one example Tampuan were convinced to give up their fallow chamkar and cattle grazing land by a high-ranking local official, who promised to install electricity and other services in the commune. Those pledges never materialized, but the Tampuan lost their land and are now seeing a coffee plantation go in.

Most ordinary indigenous villagers, who generally lack education, are unaware of their rights and lack the confidence to approach the authorities who might facilitate the procedure of filing a complaint. Furthermore, the complaint process is likely to cost money and be very slow, thus making it even more difficult for ordinary people who lack of money and time. Sometimes, the same individuals who are supposed to be protecting people such as judges, policemen and soldiers are the ones who take advantage of them (Ojendal: 2001). There are also reports of officials asking for bribes and tricking illiterate people into placing their thumbprints on documents that deprive them of their land. For example one indigenous village chief said:

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> Khmers from outside are taking all our land. They don't contact the owners, only the big power men. The outsiders think the land is available and take it without permission. They think we are doing nothing on the land and take it. But even if I'm not currently working the land it's my old chamkar. (Colm: 1997)

The case studies below are some cases of speculation which led to customary land violations. One of the cases had been closely followed by civil society while another one was a complaint recently lodged by the indigenous peoples themselves to a human rights NGO in Ratanakiri province. The studies also indicate the involved parties and the pattern of violations regarding to land speculations since the early 1990s until present.

Case Study: False and Forgery of Official Documents

According to Human Rights Watch (2001) the disputed land, consisting of 1250 hectares, was located in three villages of two communes. The Chet and Klik villages are in Seun commune and Chrong village in Kok commune. Both communes are located in Borkeo district, in the eastern part of Ratanakiri province. The villagers of Chet and Klik are ethnic Tampuan, while the Chrong villagers are ethnic Jarai. It is believed that these ethnic groups have been living in the location of disputed land for generations.

The Human Rights Watch added that in 1997, Bokeo district officials told the villagers, who are members of the Jarai and Tampuan ethnic minority groups, that their land was needed for a government development project. Beginning in February 1997, functionaries of Gen. Nuon Phea[15], working in collaboration with Borkeo district and commune officials, began titling the lands of three villages: Klik, Chrong, and Chrong. The Seun commune secretary received instructions from the district police chief[16] to compile village statistics for the three villages and then to get villagers to thumbprint individual applications for land title certificates for just less than five hectares per villager (Ibid.).

[15] According the HRW 2001, Gen. Nuon Phea is a former high ranking military official in military region 1. Currently he is based at the Ministry of Defence in Phnom Penh where he is in charge of border issues.
[16] Name is withdrawn

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Local authorities have an important role in land speculation whether the speculation is in good faith or otherwise. Land buyers and sellers usually get the signature of the local authority in order to recognize the deal and to proceed with further legal requirements. The land violation in this case involved a speculator who was the powerful military official in the region. The local authority was dishonest to his own people by falsely giving information to the indigenous peoples and by trying to benefit from land speculator.

Villagers were told they would receive salt if they thumbprinted the documents. If they did not, they were told that they would not have any land to live on. Since many of the villagers were not present in the village when the incident happened, others were pressured to thumbprint documents in the names of their fellow villagers. In Chrong village, about twenty people thumbprinted, five or six had done so not only for themselves, but for dozens of others who were working in their fields at the time. In Chet village, about ten people thumbprinted for the majority of the village. In Klik village, most of the people thumbprinted for themselves. However, there were a few cases where children thumbprinted for their parents.

At least 247 land titles were produced, covering at least half of the villages' lands. The villagers were completely unaware that they were thumbprinting for land title certificates and that technically they had become legal owners of their land. Instead, their understanding was that their land was going to be used for a development project (HRW: 2001).

After pressuring the villagers to make land title certificates, the district official[17], then-deputy district governor (who retired in 1999), brought a joint application of the 247 families to the Provincial Land Title Department. Before approving the application, the land title department sent an inspection team to the site, including a district police chief to represent the district authority, a soldier[18], who served as a representative of Nuon Phea. The land title department authorized the distribution of the land titles. However, the villagers never saw the titles.

[17] Name is withdrawn
[18] Name is withdrawn

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Later, a sale contract agreement was produced, transferring the 247 land titles from the villagers to Nuon Phea. At this time villagers were forced to thumbprint the sale agreement without knowing what it was. As one villager, who thumbprinted four times, said "I was told that if I did not thumbprint the papers, I would not have salt to eat nor any land to live on." Another villager, who is illiterate, said no one dared to ask what the thumbprinting was about. "They said no thumbprint means no land to live on."

On May 1, 1997, Nuon Phea's representative signed an agreement with district officials that recognized the transfer of US $ 35,000, in four installments (February 16, March 16, April 12, and May 1) to district officials. In addition, 70,000 Riels (or approximately US $18) was allocated to each village, with 30, 000 Riels provided as gifts for each village chief, and 20,000 Riels for each deputy village chief and also as chief of militia.

About a month after thumbprinting, the commune secretary hired villagers to cut and clear their own agricultural land (chamkar) around their villages. Villagers were promised 100,000 Riels for every hectare they cleared. Most never received the promised payment apart from one villager, who complained to the local authorities and received the full amount. Villagers became suspicious when they saw that concrete poles were being placed along the road to their village. It was then that they learned that the land had been "sold" to Gen. Nuon Phea.

Six months after the thumbprint, the villagers all received two bags (or approximately 2 kg) of salt, per family. (Human Rights Watch: 2001)

Case Study: Land Speculation with Local Authority Facilitation

In the year 2003, two Tampuan villages, PaTang and ChangRa, filed a complaint to a Human Rights organization in Ratanakiri province. The complaint accused a member of the PaTang commune council of selling their community forest land, 35 hectares, to a new comer lowland Khmer, who came to live in the same commune but different village of Ratanakiri province in the year 2002. The report said that the forest land belonged to the two Tampuan villages where there are 113 families. The forest land is located at the source of the Chrang Pri stream within Chang Ra village boundary, PaTang commune, Lumphat district, Ratanakiri province.

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On the day the event occurred, February 15, 2003, the member of the commune council lied to the villagers and told them that the land was distributed to the outsider because he did not have any land. However, the complaint mentioned that the land was sold for 3,780,000 Riels (approximately US $ 945) according to the lowland Khmer who presumably received the forest land.

After the indigenous villagers tried to demand the land back for the communities' use, dispute conciliation, between the villagers and the commune authority, was organized on one occasion. During the conciliation the villagers demanded to get the forest land back but the member of the commune council said that it was impossible because the land had been distributed. However, the member of the commune council compromised with the people by dividing the forest land into two pieces and offering 20 hectares of forest land to the villagers and the keeping the remaining 15 hectares for the lowland Khmer, known as the buyer. Then the member of the commune council about the amount of money that indigenous villagers would demand for the compensation of the 15 hectares of forest land. The indigenous villagers still did not agree and demanded all the forest land back for communities' use.

The indigenous villagers claimed in the report that that forest land has been in Chang Ra village since the time of their ancestors and was reserved forest lands of two villages mentioned above, for the future swidden cultivation. The report also mentioned that after the selling of that land, the commune authority had a meeting with the villagers to disseminate the land law, and saying that people have ownership rights over cultivation land and residential land only. According to the report, the commune authority reported that the commune authority has rights to manage, therefore the commune authority can do whatever the commune wants to do without consultation with the elders and villagers. (Complaint Code No. 033/RAT/2003, HR NGO in Ratanakiri province.)

As shown by these case studies, the violations caused by concessions, PA establishment, and land speculation are serious violations on customary lands of the vulnerable indigenous peoples in Ratanakiri province. It is clear that since the early in 1990s, the land violations of indigenous peoples have not been eliminated. However,

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the forms of violation have been transformed from land and forest concessions and establishment of protected areas with large scale to medium and small scale land speculation. In addition, there are many more projects that have been approved by the authorities and have not yet been implemented. If these projects are implemented there will be more violations affecting the indigenous communities. This shows that the violation tendency will not be seriously taken into consideration on time by the government, and the violations will continue to take place and which will seriously endanger to the indigenous peoples' land rights and lives in Ratanakiri province.

Presently, it seems there are slow and insufficient measures to resolve the past violations and stop present violations on customary lands of indigenous peoples. In order to assess the Cambodian government's response to customary land violations of indigenous peoples, the next chapter, Chapter three, will look at international laws, ILO Convention No. 169, the Draft UN Declaration, and the Declaration on the Rights to Development, both of which are relevant to customary land rights of indigenous peoples.

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CHAPTER 3
INTERNATIONAL LAWS RELEVANT TO INDIGENOUS PEOPLES' CUSTOMARY LANDS

3.1 Introduction

The Universal Declaration on Human Rights applies universally and indivisibilyly for all human beings including indigenous peoples. Universality and indivisibility guarantee that human rights standards are not applied in a discriminatory way, and are not denied on the basis of gender, or religion, or race. They guarantee that human rights are not recognized in a piecemeal or selective manner, full rights for some people, and a watered-down version for others, as is often the case for indigenous peoples (Moses: 1997).

Two organizations, the International Labour Organization and the Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, are actively working on issues affecting the minority population, in particular the indigenous peoples throughout the world. To work on the indigenous issues, the two bodies have developed the Convention and Declarations to guide governments in the rights of indigenous peoples. Generally, the convention or declarations relevant to indigenous peoples cover many sections however this chapter only focuses on the section of customary land rights of the indigenous peoples. There are many international laws which are relevant to indigenous peoples and ethnic minority but there are ILO No. 169, the Draft United Nations Declaration on the Rights of Indigenous Peoples, and Declaration on the Rights to Development, are relevant to customary land rights of indigenous peoples. Therefore, this study will briefly discuss the customary land rights of indigenous peoples in the International Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169, and the Draft United Nations Declaration on the Rights of Indigenous Peoples, and the Declaration on the Rights to Development.

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3.2 International Labour Organization (ILO)

Cambodia has been a member of the ILO since 1969 and has signed many ILO treaties. Cambodia has not yet signed ILO Convention No. 169, the Convention concerning Indigenous and Tribal Peoples in Independent Countries; but presently Cambodia allows an ILO office to operate and work on various sectors in Cambodia. As a member of the ILO, the Cambodian government should not ignore any treaty to which it is not a signatory, and should cooperate with ILO and use the not-yet-signed treaty as a guideline to implement the various development projects within the areas of indigenous peoples in Cambodia. The ILO (1998) stated that the principles of the Convention could also guide and influence the aid or development policies and programmes promoted and implemented by the developing countries, which ratified the convention 169, in support of indigenous and tribal peoples.

Although Cambodia has not ratified the convention, Cambodia as an under-developed country that benefits from many development projects of international development agencies. Therefore, ILO convention No. 169 has provided fundamental concepts for other policies of indigenous peoples developed by various development agencies. As ILO (1998) stated, the ILO followed closely and contributed, upon request of the concerned organizations, to the drafting of international legal instruments by providing comments and suggestions on the draft instruments and by participating in the sessions of the bodies responsible for the actual drafting. For these reasons, the ILO Convention No 169 is an important instrument for the Cambodian government to take into consideration for the protection and recognition of customary land rights of indigenous peoples in the country.

3.2.1 Background of ILO Convention No. 169

Since the establishment of the ILO in 1919, many conventions have been drafted and adopted. The drafted Conventions are treaties and they are the agreements that are legally binding once ratified by governments. The ILO began to work on the situation of native workers in the colonies of European powers in early 1921. From that work, the ILO developed the fundamental text of basic human rights of dependent peoples faced with pressure and even assimilation from external culture. Moreover, during a time of much human rights activity, the ILO began work on indigenous

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peoples and produced an Indigenous and Tribal Populations Convention No. 107 in 1957. Convention No. 107 was drafted in collaboration with the rest of the United Nations system in the first attempt to regulate, on an international level, the conditions of work and life of these peoples. This convention remained unique in international law until the adoption by the ILO of a replacement Convention No 169 in 1989.

In 1985 ILO examined the possibility of revising Convention No. 107 during a time of increasing criticism (ILO 1998). The first discussion was held in 1986 in a Meeting of Experts, which gave rise to the discussion in the ILO Conference on a revised version of the Convention. This was adopted in 1989 as Convention No. 169. ILO Convention No. 169 is regarded as the most comprehensive and up-to-date international instrument on the conditions of life and work of indigenous and tribal peoples, and it is the only Convention on the subject other than the earlier ILO Convention adopted in 1957 (ILO 1998). As of June 1996 the Convention has been ratified by ten countries, namely Norway, Mexico, Bolivia, Peru, Colombia, Costa Rica, Paraguay, Honduras, Denmark and Guatemala. ILO No. 169 and its predecessor No. 107, are the only comprehensive international statements in binding instruments on the rights of indigenous peoples and of states' obligations towards them (ILO: 1998).

3.2.2 Customary Land Rights in ILO Convention No. 169

A detailed look of the provisions of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries shows strong support for the recognition of the customary land use and land rights of indigenous and tribal peoples. Article 13 of the Convention acknowledges that the life of indigenous peoples is interrelated to their lands and environment, and is not capable of being separated. I instead of mentioning the customary land rights, the Convention requires governments to respect the special importance of the cultures and spiritual values of indigenous peoples, of their relationship with the lands or territories which they occupy and, in particular, the collective aspect of this relationship. Article 13, first paragraph, of the ILO Convention No. 169 states:

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> In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Many indigenous and tribal peoples have a special relationship to the land where they have lived for generations. In many cases, their traditional knowledge and oral histories are connected to the land, which may be sacred, or have a spiritual meaning. Land is central to many indigenous and tribal peoples' cultures and lives. It is the basis for their economic survival, their spiritual well-being and their cultural identity. Thus loss of ancestral lands threatens their very survival of community and people (ILO: 1998).

Article 13 states clearly the idea that the term "territories" includes the concepts of the total environment of the areas of the indigenous and tribal peoples, and is not used to refer to national sovereignty or ownership. For instance, the workers' members endorsing the view of the indigenous representatives who attended the Committee session, declared that: "This term was the only appropriate one to describe the special relationship which indigenous and tribal peoples collectively attach to specific geographic areas" (ILO: 1998).

The term "lands" itself does not have implications for national sovereignty or ownership. However, the recognition of land areas, to which indigenous and tribal peoples have special rights, is intended to give them a stable base for their economic, social and cultural undertakings and future survival. Clearly, there was no intent to create a "State within a State." The Convention is, in fact, explicitly oriented towards action "within the framework of the States within which they live" (ILO: 1998). From this perspective, there is no reason for a country like Cambodia to be concerned that if indigenous peoples are provided more rights with respect to their lands, they will separate a new state within Cambodia (as such a result would be absolutely prohibited by article 3 of the 1993 Cambodian Constitution).

In this point, the Convention may refer to the land of the indigenous or tribal peoples that can be shared among different communities or even different peoples. This means that a community or people living in a certain area also has access to, or is

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allowed to use another area. This is especially the case with grazing lands, hunting and gathering areas and forests (ILO: 2000).

We can also see that in the second paragraph of article 13 of ILO Convention No. 169 : "[t]he use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."

According to ILO (1998), Article 14 is the basic provision on land rights in Convention No. 169. The article requires that the rights of ownership and possession of the peoples concerned with the land they traditionally occupy shall be recognized. The lands which the convention refers to are the lands where indigenous and tribal peoples have lived over time, and which they have used and managed according to their traditional practices. These are the lands of their ancestors, and which they hope to pass on to future generations. It might in some cases include lands which have been recently lost.

However, this does not necessarily mean that indigenous and tribal peoples always have the right to title over their traditional lands because it talks of "rights" in plural. This may be the case, for instance, in situations where isolated indigenous and tribal peoples live on reserves or where there is shared use of certain lands. In the latter case the right to possession may be more appropriate than full title. (ILO: 1998). The first paragraph of Article 14 of the Convention No.169 states:

> The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

In order to protect indigenous and tribal peoples' rights to the lands they traditionally occupy, it is necessary to know which lands they have. Therefore, the identification of indigenous and tribal peoples' lands is important. The Convention also requires the government to take steps to identify lands which these peoples traditionally occupy and to guarantee effective protection of their rights to ownership

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and possession. The second paragraph of the article 14, states that a "government shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession". This offers strong protection, as the word "effective" means that there has to be real and practical protection, not merely protection in law.

Sometimes the problems may arise out of land claims with other indigenous communities or with outside settlers or other stakeholders. In these cases, the convention requires a procedure for land claims be established within the national legal system to resolve land claims by these peoples. The government has also to establish procedures to resolve these claims in a way that gives indigenous peoples a real possibility of obtaining the return of their lands or compensation for lost lands. The third paragraph of Article 14 provides that "[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned." This paragraph does not require that the land must be occupied in a traditional manner.

Another important aspect of the land rights of indigenous and tribal peoples is displacement and resettlement. This is one of the key provisions of the Convention, given that these peoples are often displaced from their lands, mainly because of the denial of their customary rights, and, when relocated, both compensation and resettlement packages are usually inadequate.

The Convention, at paragraph one of article 16**,** generally does not allow indigenous peoples to be removed from their land: "subject to the following paragraphs of this article, the peoples concerned shall not be removed from the lands which they occupy." And, as stated in article 16, when relocation is necessary as an exceptional measure, it should take place only with free and informed consent and where it may be unavoidable. To improve the way such situations are handled, Convention 169 lays down certain basic steps: the peoples concerned must be asked to agree to the relocation. They should do so only after they have clear and accurate information on all the relevant facts and figures. This means that governments first are required to seek the free and informed consent of indigenous and tribal peoples. In the cases in which consent cannot be obtained, relocation can only take place after appropriate procedures established by national law and regulations. These have to

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include public enquiries, whenever appropriate, and the peoples concerned should have the opportunity for effective representation at these enquiries in every case (ILO: 1998).

Paragraph 3 of Article 16 establishes *the right* of displaced indigenous and tribal peoples to return, whenever possible, to their traditional lands as soon as the grounds for relocation cease to exist. It is important that this is included as, in many cases, indigenous and tribal peoples are removed from their lands because of an emergency situation, such as an ecological disaster, or war or conflict. Far too often, when the cause has passed, the indigenous and tribal peoples find that they have lost their land forever, a result that clearly should not occur. This paragraph goes on to provide that, when return is not possible, these peoples should be provided in all possible cases with lands of quality and legal status, at least equal to the lands they have lost, and that these lands should be suitable to provide for their present needs and future development. It may also be that these peoples express a preference for compensation in money or in kind, and if so, their decision should be respected (ILO: 1998).

With reference to the situation in Cambodia, many indigenous ethnic groups have been relocated from their ancestral customary lands by previous governments before and during the war period, since the late 1960s until the 1980s, due to the insecurity in their areas. Based on article 16 of the convention, the indigenous peoples should have been allowed to return to their ancestral customary lands within the protected areas or areas that were known as their ancestral lands. However, some customary land areas of the indigenous peoples in Ratanakiri province are now classified as protected areas and indigenous peoples have not been allowed to return, although the country has been at peace since 1993.

There is a trend among developing countries, as part of their plans for economic liberalization and modernization, to amend their land laws and relevant Constitutional provisions. The major aim is to lift the restrictions, introduced through agrarian reform laws and programmes, on ownership, size, and use of agricultural lands, including those belonging to indigenous and tribal peoples. Therefore, according the ILO (1998) the article 17 of the Convention is very important as it requires governments to respect the traditional procedures for land rights transmission among indigenous and tribal peoples themselves. But, whenever governments consider adopting measures affecting

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the ability of these peoples to alienate or transmit their rights to non-indigenous people, consultations have to be held, on scope and implication of amendments, with indigenous and tribal peoples. Moreover, this article 17 also requires the governments to prevent non-indigenous citizens from taking advantage of indigenous and tribal peoples' lack of knowledge of national laws, as follows:

> 1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. 2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community. 3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 17 contains significant concepts that should be considered in the Cambodian situation. Since resuming peace in 1993, the Cambodian government introduced economic development, through free market policy and foreign investment incentive policy, as the top priority for government. As a result, many companies have been granted forest and land concessions by the Cambodian government. The granting of land and forest concessions, as shown in chapter two, adversely affected the customary land of indigenous peoples in Ratanakiri province in particular. It appears that the decisions to grant the concessions were made without adequate information about the land, and without considering the facts that indigenous peoples occupied the areas for their villages and cultivation lands. It also appears that the concessions were decided at the central government level, with little or no involvement or consultation with provincial and local authorities. Furthermore, article 18 of the Convention requires the government to establish deterrent measures to prevent non-indigenous citizens from intruding on or using the indigenous peoples' lands without authorization. The article states: "Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences."

In summary, ILO Convention No. 169 provides the roadmap for the Cambodian government to use to resolve violations of customary land rights of indigenous peoples in highland areas. However, Cambodia should consider the adoption of the

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GPHPD which was already finalized in 1997 while Cambodia is not party to the ILO No. 169. The draft policy was titled General Policy of Highland Peoples' Development (GPHPD)

By taking preventative measures as provided in article 18 of Convention 169, the violation on the traditional lands of indigenous peoples will be reduced and the members of the indigenous peoples would be made to feel secure of their ownership, possession and use of land belonging to them under the terms of article 17(3). However, as noted above, a significant number of the violations on the customary lands of indigenous peoples were caused by the state through development projects – particularly land and forest concessions -- that did not recognize the customary land which indigenous peoples occupy and their customary land rights based on their historical use and occupancy of the land.. (See Appendix C for the land section of ILO No. 169).

3.3 Draft United Nations Declaration on the Rights of Indigenous Peoples

The International Year of World's Indigenous Peoples was opened at the United Nations General Assembly on 10th December 1992. This day was a critical turning point in the recognition and implementation of the rights of indigenous peoples all over the world. The following year, 1993, was the International Year for Promotion of Indigenous Rights, and the International Decade ran from 1994 through 2003.

The Draft United Nations Declaration on the Rights of Indigenous Peoples was finalized in 1994, and while it is ready for final adoption, it has yet to be passed by the General Assembly. The chairman of the Center for the World Indigenous Studies, Rudolph Ryser, mentioned that "the main reason of the long delay on the Declaration is the opposition by the states governments like the United States, China, Australia and Canada. These states are concerned that the Declaration, once adopted by the UN General Assembly will serve as a prelude to rapid fire dismemberment of a number of states as a result of indigenous nations seeking independence." [19]

[19] Replied to Sokong Chhay, by email dated February 4, 2003

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There are many important points in the draft UN Declaration, apart from those included in ILO No. 169, that are relevant to the customary land rights of indigenous peoples. One very significant one is that the Draft UN Declaration always uses the term "lands or territories" to refer to the areas of indigenous peoples as compared to ILO No. 169, which uses only the word "lands" talking referring to the areas of indigenous and tribal peoples.

If one looks back through the history of indigenous peoples' societies, one can observe the gradual deterioration of the societies resulting from the non-recognition of the profound relationship that indigenous peoples have to their lands, territories and resources, as well as the lack of recognition of other fundamental human rights. In a number of countries, indigenous societies are in a state of rapid deterioration and change due in large part to the denial of the rights of the indigenous peoples to land, territories and resources (Daes: 2001). In response to this, the Draft UN Declaration, in its preamble, recognizes the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.

The Draft UN Declaration would not allow States to forcibly remove indigenous peoples from their lands or territories. Article 10 sets out the specific requirements in the event of unavoidable relocation: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

The Draft UN Declaration also includes a non-relocation clause in the event of armed conflicts. In such a case, the rights of Indigenous Peoples receive special protections, as provided in article 11(c):

> States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes.

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Clearly, the Draft UN Declaration attempts to prevent the kind of situation that has occurred with the indigenous people in Ratanakiri province, where they were forced to relocate during the war and period of insecurity in the region. They were evacuated from their ancestral lands and have not been allowed to return to their lands due to the establishment of the protected areas, as discussed in chapter two.

Taking a slightly different approach from ILO Convention No. 169, the Draft UN Declaration recognizes rights of the indigenous peoples, whereas ILO No. 169 recognizes the duty of the government to respect the rights of indigenous peoples to their customary land. However, both instruments contain a similar provision that recognizes the special relationship to the customary land rights of the indigenous peoples. Generally, the Draft UN Declaration was written with a minimum of requirement so that it can be accepted by States, and provides more alternative options for governments to resolve issues concerning indigenous peoples' customary lands.

In one example, the Draft UN Declaration recognizes the right to maintain and strengthen the relationship that indigenous peoples have with their lands. The Draft UN Declaration states clearly that the lands or territories that have a relationship to indigenous peoples are those lands or territories that they have traditionally owned or occupied or used. The indigenous peoples also have responsibility to transfer their land rights to the future generations, as provided in article 25:

> Indigenous Peoples have the rights to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generation in this regard.

According to Daes (2001) the failure of States to acknowledge indigenous peoples' rights to lands, territories and resources has caused fundamental and widespread problems, which could be avoided if States were to recognize the existence of indigenous use, occupancy and ownership, and to accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land. Daes (2001) added that that was possibly the main reason for the special emphasis that the Draft UN Declaration places on the recognition of the

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existing traditional laws and land ownership of indigenous peoples. Article 26 of the Draft UN Declaration recognizes that indigenous peoples have a broad range of laws traditions and customs and institutions for the development and management of their resources and requires State to effectively prevent any interference or encroachment on their rights. The article 26 states:

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

The Draft UN Declaration, in contrast to the ILO, requires States to return, to the indigenous peoples, their lands or territories that have been confiscated, occupied, or damaged without the peoples' free and informed consent. If restitution is not possible, indigenous peoples have the right to just and fair compensation. However, compensation must take the form of comparable land and resources, unless otherwise freely agreed to by the people involved, as provided in article 27:

> Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Another important right that would be recognized by the Draft UN Declaration is the right of indigenous peoples to manage or protect the environment and the productivity capacity of their land – including the right to withhold consent to the conduct of military activities on their land. The Draft UN Declaration recognizes that government assistance may be needed in order to realize these rights, and provides the way this assistance should be given, as state in article 28, paragraph one:

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> Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

To respond to the lesson learnt where the indigenous peoples' lands have been targeted for development in the name of economic interests – because their lands are large and marginal areas – the Draft UN Declaration provides the right to indigenous peoples to determine the priorities and strategies for the development or use of their lands, territories and other resources. The Draft UN Declaration also requires States to get approval in advance from the indigenous peoples through free and informed consent before implementing any projects that would affect their lands, territories, and other resources. These requirements are at article 30, which states:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The Draft UN Declaration on the Rights of Indigenous and Tribal Peoples, the section of customary land, is attached in the appendix D.

3.4 Declaration on the Rights to Development (DRD)

In addition to ILO No. 169 and the Draft UN Declaration the Declaration on the Rights to Development contains provisions that are relevant to the customary land rights of indigenous peoples. The Declaration on the Rights to Development was adopted by the General Assembly on December 4, 1986. After the adoption of the Declaration of the Rights to Development, the 1993-Vienna World Conference on

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Human Rights urged States to ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them (UN: A/CONF.157/24: paragraph 31).

According to Sengupta (1999) the Declaration on the Rights to Development reaffirmed the right to development as a universal and inalienable right and an integral part of fundamental human rights. Based on article 1 of the Declaration, Sengupta explained that first, there is a human right that is called the right to development, and this right is "inalienable," meaning it cannot be bargained away. Then,, there is a process of "economic, social, cultural, and political development," which is recognized as a process in which "all human rights and fundamental freedoms can be fully realized." The right to development is a human right, by virtue of which "every human person and all peoples are entitled to participate in, contribute to and enjoy" that processes of development. Article 1 recognizes that not only "every human person" but "all peoples," regardless of indigenous peoples, are entitled to the right to development. As article 1 of paragraph 1 states that:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Paragraph 2 of the article explicitly refers to the right of peoples to self-determination. But that does not mean that "peoples' rights" can be seen as countering to or in contradistinction from an individual's or "every human person's" right (Sengupta: 1999). Article 1 paragraph 2 states that:

> The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

This must be taken to include land. Thus a government cannot simply take the lands of indigenous people for the sake of national development but provides appropriate development for indigenous people rather than force them into a particular

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model of development based on the idea of individual land ownership and capital accumulation, they should be free to pursue and, if it is reachable, to adopt their traditional way of life and values.

Moreover, paragraph 1 of article 2 categorically states that "the human person" is the central subject of development in the sense of the "active participant and beneficiary of the right to development." In addition, paragraph 2 of article 2 defines the responsibility that all human beings, regardless of group classification, have for development:

> All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

Often development projects that have been formulated by the national level fail to include the free and meaningful participation of the community peoples. And, there are numerous examples of where the benefits from development are not fairly distributed among all the peoples To prevent these situations from happening, the Declaration requires States to formulate appropriate national development policies to improve the well-being of the entire population and all individuals, as stated in article 2, paragraph 3:

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.

As shown in the discussion above, the Declaration on the Rights to Development has specific relevance to the customary land rights of indigenous peoples. In particular, and as provided in paragraph 3 of article 2, the development in indigenous peoples' areas must be carried out in a way that respects indigenous peoples' rights over their land and resources, and cannot be carried out without obtaining the prior informed consent of the indigenous peoples involved.

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In addition, the last article of the Declaration demands all measures and steps to be taken in order to fully exercise and progressively enhance the human rights to development. Article 10 states that "steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels."

As shown in this chapter, there are three international laws that are particularly relevant to the recognition and protection of the customary land rights of indigenous peoples: ILO Convention No. 169, the Draft UN Declaration on the Rights of Indigenous Peoples, and the UN Declaration on the Rights to Development. The next chapter will discuss the Cambodian national laws which are relevant to these customary land rights.

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CHAPTER 4
CAMBODIAN LAWS RELEVANT TO INDIGENOUS PEOPLE'S CUSTOMARY LANDS

4.1 Introduction

In the last 50 years Cambodia has encountered extreme social and political changes, people have badly suffered, and the economy has not been developed. In October 23, 1991, the Cambodian fighting factions signed a Peace Agreement in Paris to cease fire in Cambodia. The Peace Agreement provided the United Nations with the mandate to organize a general election, the elections was conducted in 1993. Prior to the UN-sponsored elections; a Supreme National Council of Cambodia (SNC), comprised of 12 members from four fighting factions; had been established to represent Cambodia and to cooperate with the United Nations Transitional Authority in Cambodia (UNTAC). The international community, participating countries in the Paris Peace Agreement, played an important role by committing themselves to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia, as embodied in the relevant international instruments to which they are party (Final Act of the Paris Conference on Cambodia, point 12 paragraph 2).

During the transitional period prior to the elections in 1993, the many International Covenants, Conventions, Treaties, and especially the International Human Rights instruments were signed by the SNC on behalf of Cambodia as a State. In addition, many legal instruments and laws were drafted by the UNTAC to replace some of the laws that had been promulgated by the previous regimes. The UNTAC-legal instruments and laws have been effective until the present day; except where new laws, promulgated by the post UN-sponsored-election governments, have replaced them.

After the UN-sponsored general election, the members of the Constituent Assembly, 120 members, were elected. Those members of the Constituent Assembly drafted the Constitution to provide a liberal and democratic Cambodian society. In

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September 1993, four months after the general elections, Cambodia promulgated its Constitution. This constitution is generally recognized as superior to the previous ones, in terms of recognition of freedoms, fundamental human rights and liberal democratic principles.

No tradition of compromise had ever existed between the mortal enemies in Cambodia's political culture (Brown and Timberman: 1998). Presumably, the recognition of human rights and democracy in the constitution was the result, at least in part, of the influence from the United Nations, the international community, and the Paris Peace Agreement. The possible reasons are the guideline from the Paris Peace Agreement and attached conditions for international aid for reconstruction of the war-torn Cambodia. Inarguably, the Paris Peace Agreement on Cambodia did provide a principle for the new Cambodia Constitution to recognize fundamental human rights. Annex 5, Principles for a New Constitution for Cambodia, of the Paris Peace Agreement states:

> Cambodia's tragic recent history requires special measures to assure protection of human rights. Therefore, the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.

As a result, the 1993 Constitution consists of series of rights which are mentioned in the Universal Declaration of Human Rights, and other fundamental rights such as rights to own property individually and collectively. More specific rights stated in the Constitution related to Indigenous Peoples and Customary Land Use and Land Rights will be described below.

4.2 Constitution 1993

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Although Cambodia has not ratified the most relevant international convention on indigenous peoples, International Convention on Indigenous Population in Independent Country, Cambodia has been a member of the ILO since 1969. The Constitution of Cambodia, article 31(a), indicates more clearly "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights." The same article, in paragraph 2, recognizes the equal legal status of the Khmer citizen by stating "Khmer citizens shall be equal before the law and shall enjoy the same rights, freedom and duties, regardless of their race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, resources and any position."

The question is whether the indigenous peoples in Cambodia shall enjoy the rights provided by the Constitution in article 31, mentioned above? And, if they can enjoy the rights stated in the Constitution, can they enjoy their rights to practice their culture which has very strong relationship to lands through customary land use and practice animism religion through spiritual beliefs?

In the spirit of the constitution of the Kingdom of Cambodia, during the constitutional debate, Indigenous Peoples in the highland areas were considered as Khmer citizens and have the same rights and obligations as the majority Khmer (Simbolon: 2002). Moreover, article 34 states "Khmer citizens of either sex shall enjoy the right to vote and to stand as candidates for the election." Given these provisions, it would appear that indigenous peoples in Ratanakiri province have the right to vote in the national elections, and to hold office. This is supported by the fact that there is one member of the National Assembly who comes from Ratanakiri and is a member of an indigenous group. In addition, some indigenous peoples in Ratanakiri province are provincial officials for the Royal Government of Cambodia.[20]

In addition to the rights of Khmer citizens mentioned above, the Constitution recognizes the rights to ownership both individually or collectively for Khmer citizens. Article 44(a) of the constitution states clearly: "All persons, individually or collectively, shall have the right to ownership. Only Khmer legal entities and citizens

[20] During my interviews with indigenous peoples in Ratanakiri province, some of them indicated they were staff of government at the provincial level.

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of Khmer nationality shall have the right to own land." Furthermore this article also provides the protection to the legal private ownership as follows: "Legal private ownership shall be protected by the law" (Article 44(b)). The Constitution requires the payment of fair and just compensation prior to the taking of any person's private property for the public interests: "The right to confiscate possessions from any person shall be exercised only in the public interest as provided for under law and shall required fair and just compensation in advance." (Article 44(c))

Cambodia is a party to some important legal instruments that protect the rights of indigenous peoples, including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of all Forms of Racial Discrimination. Cambodia is also a while a member of the ILO, and while Cambodia has not ratified the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169/1989), it does not mean that Cambodia does not need to respect the rights of indigenous peoples that are protected in the ILO Convention. As discussed in chapter 2, the ILO Convention may be used as a guideline for the countries that have not ratified it, although it is a legal binding only after ratification.

Apart from the Constitution, which recognizes the status of the indigenous peoples, the Land Law of 2001 explicitly recognizes the rights of communal ownership and traditional agricultural practice of indigenous communities. More detail of the recognition of Land Laws relevant to the customary land use and land rights of indigenous peoples is discussed below.

4.3 Cambodian Land Laws

4.3.1 Development of Cambodian Land Laws

Ancient Cambodia, prior to the French protectorate, was governed by the King. The society had a system of dual property rights. In theory all the lands within the country belonged to the sovereign, but in practice the land belonged to the farmers tilling it. The person cultivating the land could leave one area and move to another area and begin farming it without going through any formalities (Greve: 1993).

During the French protectorate, Cambodia's ancient system of land tenure proved inadequate for industrial and commercial development. Cambodia adopted the

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French system of geographical surveying and land title conveyance and recordation, and *Land Acts* were promulgated in 1884, but the land reform was not fully implemented before 1912. In 1920 the Cambodian Civil Code was promulgated, which laid down the definitive principles of land ownership (Greve: 1993). The Code provided for the certification and recording of particular parcels of land. Under this system, the title would be registered in favor of an individual farmer who could prove ownership (based on cultivation). Despite the imposition of a formal land registration system, the traditional Cambodian principle of "acquisition by the plow" was the system of land tenure recognized in the sparsely populated and un-surveyed rural regions (Ibid).

The French reserved to themselves the right to determine the distribution of virgin land and the right of eminent domain over all lands under their political control. Rubber plantations were introduced into Ratanakiri province, employing mostly indigenous peoples. Outside the rubber plantations, however, the traditional practice of indigenous peoples land tenures remained intact (Simbolon: 2002).

After French rule ended in 1953, Cambodia retained the French philosophy of land ownership. Under the leadership of then Prince Norodom Sihanouk, from 1953 until 1970, the Constitution of Cambodia recognized the land ownership and property rights of the citizen. Cambodian citizens had the right to own, use, bequeath and inherit land granted by the state for the purpose of living on it and exploiting it (Greve: 1993). During this time the Khmer elite had embraced private property as an acceptable form of investment, a view not necessarily followed by the Khmer rural masses. Simbolon (2002) proposed that the elite's idea of private property and individual land holding may have been the inspiration for government resettlement projects to bring the highland indigenous peoples into sedentary rice farming.

The Khmer Republic was declared after Prince Sihanouk was dethroned by a military coup d' etat on March 18, 1970. Private property rights continued to be recognized under the Khmer Republic. During this period Cambodia was drawn into the war in Vietnam, and the country was under bombardment by American warplanes. Hoards of the people moved into the cities in order to escape from the bombs, abandoning their land and homes.

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Things radically changed during the Democratic Kampuchea regime, from 1975-1979. The Constitution of the so-called as Khmer Rouge reversed all developments toward privatization since the arrival of the French in the mid-nineteenth century. All important means of production were privatized, existing property rights and the right to own land were eliminated, and the principal right of citizens was the right to work. Many indigenous peoples' villages in Ratanakiri province were grouped together to form larger communities. The groupings contained villagers from the various tribal groups.

The People Republic of Kampuchea (PRK), with the support of the Vietnamese government, overthrew the Khmer Rouge and took power in 1979. The PRK continued the line of collective property rights. People were formed in solidarity groups (Krom Samaki) to work on the land, all of which belonged to the state. However, the system of collectivized agricultural work proved unpopular, and people reverted to family-based farms. Land and housing belonged to the state. In 1985, sub-decree No. 6 was promulgated, which prohibited the purchase, sale, or rent of land. In response to the encouragement by the PRK, indigenous peoples returned to their original village sites, where, for the most party, they reverted to the traditional slash and burn agricultural practices, and upland rice cultivation (Russell: 1998).

Due to the increasing pressure from the United Nations, the Vietnamese progressively withdrew from Cambodia to give the Cambodian people autonomous control of their nation in 1989. Then the State of Cambodia (SOC) promulgated a Constitution in May 1989. The right of private property ownership was reintroduced under the SOC Constitution. Under Article 15, Khmer citizens had the right to "enjoy fully the right to own use, bequeath and inherit land granted by the State for the purpose of living on it and exploiting it" (emphasis added). The right to own and use land was to be fixed by a law (Article 17, 1989 Constitution). In the same year – and apparently in anticipation of the law required by Article 17, the Council of Ministers issued Instruction No. 3, on the Implementation of Land Use and Management Policy, which clarified that all the land belonged to the State, specified that no person could claim property rights that existed prior to 1979, defined categories of land use, and set limits for individual allocation. The principles governing cultivation land were based

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upon the collective land systems established under the PRK government. Instruction No. 3 remained in force until a land law was promulgated in 1992.

4.3.2 Land Law of 1992

In 1992, the SOC promulgated a land law that permitted exclusive ownership rights over residential land only, and provided that all other uses of land were held under the right of "temporary possession" (Russell 1998). However, land held under the right of "temporary possession" could be converted to exclusive ownership after a period of five years continuous use. At that time, persons in possession of land were required to apply for possession certificates. Despite this requirement in the law, the process of land registration of possession rights was not fully implemented for a variety of reasons, including the lack of funding to undertake such a registration system. . Some provinces issued some possession certificates to people, while others partially complied with the registration requirements, ie., accepted application forms and issued receipts to note that the application forms had been received.

There are some articles in the land law 1992 which may conflict with the practice of customary land use and land rights of indigenous peoples in general, including the groups in Ratanakiri province. The 1992 land law specified that all land belonged to the State and it that was governed and protected in agreement by the State. In addition, the land law specifically did not recognize pre-1979 property rights. Article 1 states "all the land in Cambodia belongs to the State and shall be governed and protected in agreement by the State. The State does not recognize the land property right existing before 1979."

Under the land law 1992, temporary possessors were required to possess or maintain continuously the land for a specified period of time. Article 68 states "The temporary possessor shall continuously possess and maintain the temporary possession which means shall regularly do other things as usual without abandoning during any period of time that might contrast with the process of the property itself." It is clear that the regular doing other things means continuously possess or maintain. The law also provides a required period of 5 consecutive years for temporary possessor to become a legitimate owner (article 74). Under Article 76, the non-utilization of land for a period of three consecutive years by the temporary possessor

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constituted abandonment with the result that the land reverted to the private domain of the state.

However, article 70 of the 1992 land law creates an exception to these general rules, and specifies that "acts to keep a low yield soil in order to make it fertilized cannot be considered as abandonment. The manner of possessing the temporary possession in such condition during that period is considered as being continuously possessed."

One interpretation of articles 68 and 70 of the 1992 land law is that some particular acts – regularly doing things – by the possessors are required in order to constitute soil recuperation and to avoid being considered as abandonment of the land. This may mean, for example, that farmers would regularly do things on the land, such as apply fertilizers or work the land to improve the condition of the soil while not actually cultivating it. This very rigid interpretation would make it difficult for indigenous peoples to meet the requirements for continuous possession. In the case of traditional swidden practices of indigenous peoples in highland provinces, including Ratanakiri province, the soil recuperation does not need any acts from human beings. Rather, the method of completely depends on allowing the forest to grow and replenish the soil.

It is also not clear how the 3 year abandonment rule in article 76 applies in the case of traditional swidden agricultural practices. Article 76 provides that land not continuously occupied for three consecutive years would be considered abandoned and would revert to the state. If this provision is rigidly applied, it would have serious adverse impacts on the indigenous peoples who, as noted earlier, traditionally allow their land to lie fallow for long periods of time, from 5 to 10 years. And, as noted earlier in chapter 2, this long period is required to allow the marginal lands to recuperate in accordance with the traditional swidden agricultural methods of indigenous peoples, which have been practiced for centuries by indigenous peoples around the world, and in Ratanakiri and other provinces in Cambodia. If article 70 is interpreted to exclude these traditional swidden land recuperation practices by indigenous peoples, article 76 would effectively dispossess the indigenous peoples of their swidden lands, and return the traditional lands of indigenous peoples to the private domain of the State.

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In practice, the 1992 Land Law did little to protect the rights of indigenous peoples to their traditional lands. It appears that the various provisions of the 1992 Law were applied in favor of individual interests, rather than the traditional land ownership concepts of indigenous peoples. The situation was made more complicated by the registration requirements, which were contradictory to the customary land rights of indigenous peoples in Ratanakriri province. Moreover, the registration of lands was never fully implemented and has created serious confusion about land ownership throughout Cambodia, with an especially harsh impact on indigenous peoples who were not able to register their traditional lands. The fact that indigenous peoples have not registered their land has been used as a legal excuse to dispossess them of their unregistered lands resulting in numerous land conflicts throughout the country until the present time.

4.3.3 Land Law of 2001

A. Introduction

Many reforms were anticipated in the 1993 Constitution, which was promulgated in 1993 following the Paris Peace Accord in 1991. Free market policies, liberal democracy, and human rights protections are all specifically protected in the Constitution, as described in previous sections. One of the most important laws to ensure these principles and to generate the development of free market policies is the Land Law, which was promulgated in the year 2001.

Specifically, the 2001 Land Law includes provisions designed to address the situation faced by indigenous peoples, and described by Williams (1999):

> The semantics of the Land Law 1992 are being used to dispossess native titleholders. Their historic connection to the area is rendered irrelevant by legislative denial of the validity of pre 1979 claims. The mobility required to successfully swidden the forests is characterized as rootlessness. The communal nature of traditional land ownership is said to blur responsibility for land.

The debate on the new Land Law was extensive, and included consultation with various stakeholders. One of the important reforms in the new land law is a specific chapter on the immovable property rights of the indigenous communities in Cambodia.

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This chapter reportedly was one of the main obstacles in the long delay of the new land law. As Ojendal (2001) noted:

> A new land law has now been debated for along time and a draft drawn up in consultation with various stakeholders has been presented, containing a fairly far-reaching chapter regarding the rights of the indigenous peoples. At one stage, this chapter was removed by politicians at the central level. But NGOs organized an offensive where the ADB was reminded that it should honour its policies on human ad minority rights and reject the draft as a basis for its involvement in funding Cambodian development. After this, both H.M King Norodom Sihanouk and H.E. Prime Minister Hun Sen made statements directed to the Council of Ministers on the importance of such a chapter, and chapter eventually was reinstated.

Williams observed that the obstacles to recognition of the land rights of indigenous peoples reflected the reluctance at the top level of government to recognize these rights, in contrast to the low level officials, who clearly accepted the role of indigenous peoples in forest management. It was believed that forests and lands of the indigenous peoples was the a source of wealth for the elite groups, and if the indigenous peoples were provided rights to control their traditional forests and historical lands, the sources of wealth would be cut off to the elite and powerful groups. Williams (1999) stated that:

> Recent attempts to have indigenous land rights accommodated in a revised legislative framework appear to be progressing slowly. Recognition of the vital stewardship role indigenous people play in the management of the forest seems to have achieved at provincial level but not within all the central administration. Mythologizing the ‘remote’ and ‘resource rich’ northeast border provinces, and their ‘primitive’ occupants is a device that can be used by the Cambodian elite to justify expropriation.

On 20 July 2001, the Cambodian National Assembly passed the new Land Law, which was signed by the King on August 30, 2001. With the promulgation of the Land Law 2001, Cambodia has entered a very interesting period in the development of its property rights. The Law of marks an unprecedented period where the land rights of indigenous communities are legally and explicitly recognized by the state. The

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inclusion of Chapter 3 on "Immovable Property of Indigenous Communities" (as one type of collective ownership) should be understood in the specific historical context of Cambodia, where the various regimes in the past have never explicitly recognized the land rights of indigenous communities.

B. Indigenous Community Rights in the 2001 Land Law

Part two of the Land Law 2001, on the Immovable Property of Indigenous Communities, consists of six articles. The six articles include definitions of indigenous communities and member of indigenous communities, lands of indigenous communities, ownership rights, the exercise of the communal ownership rights, and the prohibition of outside authority to acquire the property of indigenous communities. (See appendix E for part 2 of the Land Law 2001)

The land law attempts to define what the indigenous community should look like within Cambodia in order to be recognized by the State regardless of the existing diversity of indigenous communities. Simbolon (2002) stated that "from the socio-legal perspective, the inclusion of indigenous community land rights in the formal land law of the state is, on the one hand, a process of uniformation of the existing plurality of property rights and, on the other, a legitimization of state law hegemony over the indigenous communities." Article 23, paragraph one, defines an "indigenous community: as "a group of people who reside in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use."

Article 23 recognizes the rights of indigenous peoples in the context of "community" and "customary land use practices." The existing indigenous communities have not yet been legally recognized because the land law requires the law on communities to be established. Therefore, Simbolon (2002) argues that the practice of customary land use pre-define an indigenous community because the land law requires a legal construction of an indigenous community, which implies redefinition and reinvention of tradition in the establishment of the new entity acceptable to the state. As article 23, paragraph two, states, "prior to their legal status being determined under a law on communities, the groups actually existing at present

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shall continue to manage their community and immovable property according to their traditional customs and shall be subject to the provisions of this law."

In addition, the Land Law 2001 provides the definition of the individual member of an indigenous community. The definition is mainly characterized by two criteria: the acceptance of the person to the unity and subordination leading to the acceptance of the community and recognized by the majority of the community members. Article 24 states:

> An individual who meets the ethnic, cultural and social criteria of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered to be a member of the indigenous community and is eligible to have the benefit of the guarantees, rights and protections provided by this law.

Article 25(a), states that "the lands of indigenous communities are those lands where the said communities have established residence and where they carry out traditional agriculture." This clause limits the meanings of access to lands of indigenous peoples, which must be based on the residential lands and the lands to carry out traditional agriculture. The article seems to be ambiguous in meaning to classify the lands of the indigenous people since they have maintained the types of land utilization inherited from their ancestors. As chapter 2 described earlier, indigenous peoples have many types of lands within their traditional boundaries including streams, forest for non-timber forest product collection, and historical sacred sites. According to Simbolon (2002) it is difficult to see how the indigenous community membership will be devised to fit the requirement of the new land law because the anthropological studies on indigenous peoples of Cambodia are very rare.

Article 25 also recognizes the traditional mobility of the members of indigenous community as part of their way of managing their land. If compared with previous land laws, the Land Law 2001 provides a legal recognition of the swidden cultural lands both cultivating lands and reserved lands required by the traditional agricultural system. According to Simbolon (2002) this new land law is much better than the previous regimes which relocated indigenous communities in order to stop traditional shifting cultivation. However, the Land Law 2001 requires the swidden lands be

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recognized by the administrative authority. It is easy to see how the last conditional clause in this article could be used to dispossess the customary lands from the indigenous peoples. Paragraph 2 of article 25 states: "the lands of indigenous communities include not only lands actually cultivated but also includes reserved land necessary for the shifting of cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities."

Regardless of historical recognition of traditional boundaries, the indigenous communities land boundaries are basically required to be demarcated under the general procedure which applies to all land registration in Cambodia. Title VI, mentioned in article 25(c) below, is the procedure of the cadastral administration in order to establish cadastral index maps, issue ownership titles, and register all lands in Cambodia. The relevant sub-decree for registration of indigenous lands, mentioned in article 25(c), is under the process of drafting by the Ministry of Land Management, Urban Planning, and Construction. One of the requirements is that indigenous communities claim with the agreements of neighboring villages. Article 25(c) states that:

> The measures and demarcating of those immovable properties of indigenous communities shall be determined according to the factual situation as asserted by the communities, in agreement with their neighbors, and as prescribed by procedures in Title VI of this law and relevant sub-decrees.

The indigenous communal ownership rights of the indigenous community; in contrast to private ownership rights, are recognized by the Land Law 2001 in accordance with the existing traditional rule practice. However, the Land Law requires those rights over community customary lands to be granted by the state through legal registration procedure mentioned in article 25 above. As article 26, paragraph 1, states "ownership of the immovable properties described in article 25 is granted by the State to the indigenous communities as communal ownership…." This provision is contradictory to the concepts of the customary land rights of indigenous people (mentioned in chapter 2).

Moreover, article 26 is ambiguous about whether all customary lands are State public property and all customary lands of indigenous communities that will be

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granted to indigenous communities are state public property. If the indigenous community lands are State public property, then it is not at all clear how the indigenous peoples are entitled to enjoy their rights as the private owners. As article 26a state" "this communal ownership includes all of the rights and protections of ownership as are enjoyed by private owners under this law, but the community does not have the right to dispose of any communally owned property that is State public property to any person or group."

The Land law acknowledges the existence of the traditional authorities which have traditional mechanism for decision-making according to the customs of the indigenous communities. However, the way to protect the indigenous community rights to land is subordinate to and restricted by the laws of general enforcement, including the regulations protecting the environment. These can be seen in article 26(b), which states:

> The exercise of all ownership rights related to immovable properties of a community and the specific conditions of the land use shall be subject to the responsibility of the traditional authorities and mechanisms for decision-making of the community, according to their customs, and shall be subject to the laws of general enforcement related to immovable properties, such as the law of environmental protection.

On the other hand, the Land Law eventually highlights the superiority of the state in managing the land in the name of national interests or a national emergency. This clause is mentioned in article 26(c): "The provisions of this article are not an obstacle to the undertaking of works done by the State that are required by the national interests or a national emergency."

Article 27 seems to conflict with the previous clause mentioned in article 26(a), which does not allow the community to dispose of any communal lands which are the State public property. Moreover, it is ambiguous that communal lands, subjected to transfer the share to the community members who wish to leave, are State public property. Article 27 states:

> For the purposes of facilitating the cultural, economic and social development (evolution or progress) of members of indigenous communities and in order to allow such members

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> to freely leave the group or to be relieved from its constraints, the right of individual ownership of an adequate share of land used by the community may be transferred to them.

This article 27 seems to encourage the breaking up of unity of the indigenous communities because generally the indigenous peoples try to prevent the influence from outside and to impose internal customary rule to be unified.

Finally the land law provides provision to deter outsiders in taking any property from the indigenous communities. Article 28 states: "No external authority other than the community may acquire any rights on immovable properties belonging to an indigenous community." This article is a positive sign for preventing the violations of the customary lands of indigenous peoples. The meaning of "external authority" is ambiguous; it is not clear whether the term means any kind of authority that is a non-traditional authority recognized by the community or whether it includes the local administrative authority existing within indigenous community such as commune and village authorities.

The Land Law 2001, chapter 3 on immovable property of indigenous communities, completely ignores the violations on their traditional lands that have occurred prior to the promulgation of the law and does not mention any compensation to the lost historical recognized lands of indigenous communities. However, the Land Law 2001 seems to manage to prevent future violations from occurring on the property of indigenous communities through communal land title. The registration of the communal land title may lead to legalization of the past violations on the customary lands of indigenous communities.

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CHAPTER 5
THE DRAFT OF GENERAL POLICY ON HIGHLAND PEOPLES' DEVELOPMENT (GPHPD)

5.1 Development of Draft GPHPD

5.1.1 Introduction

It was a coincidence that in 1993 a new Royal Government of Cambodia (RGC), was democratically elected in the UN-sponsored elections and the UN proclaimed the International Year of Indigenous People. With its obligation to provide fundamental human rights to Cambodian society, pursuant to the Paris Peace Agreement and the new 1993 Constitution, the RGC had no reason to ignore the International Year of the Indigenous People in 1993 especially given the level of involvement with the UN and international community.

According to United Nations Development Programme (UNDP) Leaflet No. 11 (no date), since the International Year of Indigenous People in 1993, the UNDP has involved its small grant programmes, and its national and regional programmes with indigenous people' communities. The initiatives have focused on poverty eradication, environmental conservation, conflict prevention and resolution, and cultural revitalization. In addition, UNDP has supported projects under the Indigenous Knowledge Programme, which has the main objective to promote indigenous knowledge through targeted capacity-building and direct support for projects formulated and implemented by Indigenous Peoples' Organizations (IPOs).

In the Mekong Sub-region, the UNDP initiated its first Indochina Sub-regional project including four countries: Cambodia, Laos PDR, Vietnam, and Thailand. The project was called the Development of Highland Peoples through Participatory Capacity Building, known as the Highland Peoples Programme (UNDP-HPP: no date). The programme was to target ethnic minority development operations in the highland areas of the Mekong Sub-region. According to Seng and Moul (2000) the immediate objective of the HPP was to increase government, non-government and

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highland community organizational capabilities in the participatory planning and management of the development of highland peoples.

According to UNDP Leaflet No. 11 (no date), the programme focused on poverty reduction by applying a participatory, decentralized, and localized bottom-up approach. It established exchange mechanisms and procedures to encourage dialogue and information-sharing between multi-stakeholders, i.e. governments and IPOs, regarding highland peoples' development at regional, national, and local levels. In Cambodia, HPP has focused on providing support to the Inter-Ministerial Committee and the developing Policy Guidelines for Highland Peoples Development. The Guidelines were formulated with broad participation from the grassroots and central levels, as well as with regional participation.

To show its commitment to respect human rights and to affiliate to the international community, the RGC welcomed and actively participated in the program by establishing a high-level committee to coordinate with the UNDP. More detail of the process of establishment and work of the committee will be described below.

5.1.2 Establishment of the Inter-Ministerial Committee (IMC)

To be a counterpart for the HPP of the UNDP, the countries in the Mekong Sub-region established their own National Focal Point Institution. In Cambodia, the National Focal Point Institution was the Inter-Ministerial Committee for Highland Peoples Development (IMC). The IMC was created by sub-decree, dated 1994, of the Royal Government of Cambodia. The IMC was a high level institution directly under the cabinet of the council of ministers, and was comprised of ten government ministries.[21] A secretariat, responsible for facilitating administrative functions, was based in the Ministry of Rural Development (Seng and Moul: 2000).

According to UNDP-HPP (no date), a consultancy report, the IMC was designed to oversee the highland development work in Northeast Cambodia where the indigenous people live and to coordinate its work with UNDP and the Provincial Rural

[21] The ministries of Agriculture, Education, Environment, Health, Public Works, Industry, Rural Development, Social Welfare, Women's Affairs, and the Cambodian Mine Action Center.

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Development Committee (PRDC) to ensure the successful outcome of highland development activities. The IMC would report directly to the two prime ministers.[22]

The objective of the collaboration between the HPP and IMC was to enhance the capacity of the IMC to formulate and implement appropriate national development policies in the highland regions of Cambodia (Seng and Moul: 2000). The IMC was responsible for the formulation of policy guidelines on highland peoples' development in Northeast Cambodia while the HPP was a consultative body to the IMC.

5.1.3 Drafting Process of GPHPD

After the establishment of the IMC, this national body implemented its assigned duty which was to formulate the GPHPD. The process of drafting the policy was initiated by the HPP through workshops on policy formulation and to provide capacity building for the IMC staff.

Before the draft of the GPHPD was finalized September 25, 1997, a series of workshop were sponsored by UNDP-HHP and managed by the IMC. The participants came from various participants and resources persons. According to Mr. Say Leun (per comm.: 2003) there were many participants from Ratanakiri province and most of them were government officials. He stated that he was the only indigenous person from Ratanakiri province to attend the workshop in Phnom Penh. However, there were also indigenous-originated-high-ranking officials in Phnom Penh who participated in the workshops.

Further information about the series of workshops is found in the IMC report (1997) and indicates that workshops were conducted both inside and outside of Cambodia. For instance, first workshop was conducted in Kien Svay district, Kandal province, Cambodia, and the objective was focusing on brainstorming on the Highland Peoples Development Policy. The second workshop took place in Chiang Mai with the objective to provide capacity building for IMC members in policy-making of the Highland Peoples Development. The third workshop was held in Phnom Penh with the objective to draft guidelines for the GPHPD.

The improvement of the Draft GPGPD was the main topic in the fourth workshop, which was conducted in Phnom Penh. Other objectives of the workshop

[22] From 1993-1998 Cambodian government was headed by two prime ministers

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were to share experiences and understand the local needs from the Task Force from IOs and NGOs and PRDC, and to discuss the contents of the draft to have good new ideas in order to establish a final draft of a policy of a Highland Peoples Development for the government (IMC: 1997).

The fifth workshop was a comparative regional workshop aimed at sharing learning experiences, approaches, vision and problems among the national focal points for highland peoples' development and organizations and individuals on highland peoples' development in mainland Southeast Asian countries. This workshop also provided an opportunity to review the draft GPHPD (Ta Prum: 1997).

The IMC conducted a sixth workshop, which was a field visit to the target provinces in the highland areas including Kratie, Stung Treng, and Ratanakiri provinces. A seventh workshop was a field visit to Mondulkiri province. The objectives of the field trips were to continue a liaison with the PRDC structure and to exchange ideas on policies and strategies for highland peoples' development, to increase understanding of the extent of matters to be incorporated into development projects, and to enhance the competence of IMC members and the IMC secretariat in monitoring project management and evaluation with IMC policies guidelines (Ta Prum: 1997). In addition, according to Tiann Monie (per comm.) the IMC officials from Phnom Penh took study tour to highland provinces to find out about the reality of indigenous communities and to get feed back regarding to the draft GPHPD.

The process of finalizing the Draft GPHPD, was an exhaustive one that involved with many stakeholders from various institutions. It is unfortunate that after all this work and effort, the final draft was not adopted or implemented by the RGC. Different stakeholders have proposed different reasons for the government's failure to approve and implement the policy. The last part of this chapter, discussing opinions from the Ratanakiri province, will relate what the stakeholders both NGO workers and indigenous people expressed about the possible reasons to the indefinite delay.

5.1.4 Provisions of the Draft GPHPD

The draft GPHPD, contains several different sections, including sections discussing the environment, land, agriculture, education, health, culture, and infrastructure. This study focuses only on the section of land in the draft GPHPD.

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The draft of the GPHPD was finalized in the middle of the wave of land violation in the provinces of indigenous people and at the time of the RGC seemingly focused on one-sided economic development. In the wake of free market development, with its incentive policy to attract foreign investors, the indigenous people's lands in highland areas were seen as economic development areas for industrial agriculture. As a result, indigenous peoples' have encountered problems protecting their customary lands from land encroachment by companies, and land speculation by outsiders.

The draft GPHPD was the first paper to challenge of the lack of protections afforded customary land rights of indigenous people under the 1992 Land Law (which, as noted earlier had adopted by the State of Cambodia prior to the promulgation of the 1993 Constitution). Thus, the draft GPHRD is seen as a significant and positive guideline to focus on indigenous peoples, who are considered to enjoy less opportunity and advantage than other ethnic groups.

The land section of the draft GPHPD provides many significant points to secure customary land rights and prevent violation on customary land of indigenous people. This study of the literature will look at two aspects: the first is the management to secure customary land rights and the second is how to resolve the violation of customary land of indigenous people. The in-depth interviews will provide supplementary views on many other aspects of the draft GPHPD.

A. Customary Land Use and Land Rights

The draft GPHPD provides guidelines by which the Cambodian government would respect, recognize, and endorse the customary lands of indigenous people, as distinguished from strengthening the implicit existing customary rights to land of indigenous people. The participation of indigenous people is required by the draft GPHPD in the process of customary land identification. The draft acknowledges that indigenous people already have special relationship, culture, beliefs and traditional agriculture practice within lands and other natural resources and this relationship needs to be respected and protected by the government for the survival of the relationship. For this reason, the draft GPHPD requires the RGC to respect the relationship to land of indigenous people, as mentioned in provision 2.1: "the

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government respects the special relationship highland peoples have with their traditional and neighboring lands, from which they depend for their livelihood and use natural resources." This article is consistent to article 13 of the ILO Convention No. 169, and article 25 of the Draft UN Declaration.

In order to protect the special relationship to land, the land itself has to be identified and steps taken to protect it. Within the Cambodia legal context, only the government is in the position to initiate the customary land identification and protection with the support of civil society and participation of indigenous people. In recognition of this situation, provision (2.2) requires the government to identify the land traditionally occupied and used by the indigenous peoples and then protect it.

In addition, the draft GPHPD requires the land title authority to endorse customary land demarcation within the village boundaries with the agreement of indigenous people communities (provision 2.3). The participation of the indigenous people in the process of identification and protection of traditional land use and village boundary is important, as would enable them to decide on the identification of their traditional village boundaries. As noted in provision 2.3, "with agreement of the Highland People's community and the Land Title Authority, the Government shall recognize, endorse and protect traditional land use rights and the demarcation of the lands within village boundaries…"

The recognition by the government – at 2.5 of the draft GPHPD – of the swidden cultivation methods of the indigenous people from the government would be an important and positive step to obtain customary land rights. Swidden agriculture implies the continuous occupation over the land because leaving the land fallow land is a basic requirement of that cultivation method. This practice does not mean that the fallow land is the abandoned land. Provision 2.5, if adopted, would clearly oppose the legal-based expropriation of customary lands from indigenous peoples: "The government recognizes the use of swidden systems of agriculture and the appropriate forest products gathering, practiced by Highland Peoples to support their livelihood, as a valid form of land use…" This provision clearly would negate the impact of article 76 1992 Land Law, article 76, which was rigidly interpreted to the effect that swidden plots left fallow for more than three consecutive years were considered abandoned and became the private domain of the state.

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B. The Response to Violations on the Customary Land Rights

The draft GPHPD focuses only on the prevention of future violations rather than on solving the past violation of the traditional lands of indigenous people. In fact many violations of customary lands occurred before and after the draft GPHPD was finalized. Nevertheless, the draft policy did not specifically mention any procedure for the resolution of past violation, but only procedure of resolution for all land claims (provision 2.8). It is not clear whether the resolution of all land claims will allow indigenous people to claim for the violations to customary lands caused by concessions granted by the government, the designation of customary lands as protected areas, and land speculations. Moreover, the procedure for indigenous people to claim their traditional lands is another issue not covered in the draft.

Provision 2.8 states that "adequate" procedures to resolve "all land claims" shall be established and the RGC will respect the "existing" procedures by which indigenous peoples traditionally transfer land. While this provision would be helpful, it would benefit from more detail. For example, there is no indication of the level at which the procedure is to be established, and what kind of land claims would be resolved under that procedure.

In addition, the policy seems to be focusing on one type of remedy – compensation – rather than on rectifying the unlawful intrusion by returning the land to the people of the unlawful intrusion or encroachment upon the lands of the indigenous peoples (provision 2.6). This seems to be inappropriate for the violation on their customary lands because the relationship to land and cultural beliefs attached to the lands cannot be remedied by compensation. The only appropriate remedy would be to allow indigenous peoples to maintain their customary lands for historically cultural practices.

The strength of provision 2.9 is hard to assess: "anyone shall be prevented from abusing highland peoples to secure the ownership, possession or use of lands belonging to highland peoples." One way to interpret this statement is that intrusion and encroachment upon the land of indigenous peoples is unlawful, and therefore void, and the offenders must return the land to the people. Certainly, intrusion and encroachment on traditional lands in the past is not a completed event. That is, every

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day that indigenous people are deprived of their ancestral lands is a continuing abuse. Thus, land and forest concessions granted by the RGC in the past, without agreement from the indigenous peoples, is a continuing abuse and therefore is an unlawful intrusion and encroachment that must be "prevented" by returning the land to the people.

The draft GPHPD has many points that are consistent with the articles in the UN Draft Declaration, and if the draft had been adopted and implemented by the RGC, customary land use of indigenous people in the highland provinces would not have suffered continuing violations. This disappointing result of a seemingly effective process certainly illustrates the need for continuing pressure by stakeholders and the international community. Cambodia, like many other countries with indigenous populations, shows a reluctance to protect the fundamental rights this group of citizens. And, not surprisingly, the development of a good draft policy statement in cooperation with stakeholders and the international community has never been adopted for implementation. (See appendix E for the draft of the GPHPD)

5.2 Opinions on the Draft GPHPD

The draft GPHPD was initiated in the middle 1990s and finalized in 1997. However, the draft policy was not adopted and nobody, including government staff and NGO staff who are working in the field of the customary indigenous land rights, seems to talk about it anymore. Some of the NGO workers, who either heard about it or participated in the process of collecting information from the indigenous communities, seemed to have forgotten all about the draft policy. Only some of the NGO workers, who began working in Ratanakiri province after the draft GPHPD had been finalized, reported that they had heard about the policy. Others knew nothing at all about it. Because of this general lack of knowledge about the draft policy, the field interviews did not really focus on people's interpretation of the draft GPHPD. Instead, the interviews focused on the usefulness and the necessity of resolving and protecting customary land use and land rights of indigenous people.

Therefore, this study focuses on some of the core issues in the draft GPHPD that would lead to the resolution and protection of customary land use and land rights. It is hoped that seeking opinions from various stakeholders including experienced

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local and international NGO workers, knowledgeable indigenous people, and the government staff in Ratanakiri province, will result in stimulating new interest in the consideration and adoption of the policy. The sought opinions will focus on usefulness of the draft, obstacles for adoption and implementation, procedure for implementation, the roles and priority of indigenous people in the implementation of the GPHPD.

5.2.1 Usefulness of the Draft GPHPD

Knowledgeable indigenous people who were interviewed came from two different levels. Some of them are members of the Network for the Protection the Natural Resources at the commune level. The network was set up over the past two to three years ago at the initiation of an Australian expert who has experience in indigenous people's issues. The other group of interviewees are knowledgeable indigenous people who are working for the government at the provincial and district levels and also they were involved with NGOs. These latter knowledgeable people have extensive experience in community work and advocacy work at the provincial and national levels. They have also participated in seminars and workshops on the indigenous issues at provincial and national levels.

A member of Indigenous Community Network in a Tampuan community, Mr. Pen Khat, said he was not sure whether the draft GPHPD is useful because he did not hear about it and he had not seen it yet. However, he believed that if the indigenous people participated in the drafting workshops, the draft GPHPD would benefit indigenous communities because the indigenous participants would raise the points that indigenous communities wanted to be integrated. Similarly, without seeing the draft policy, a knowledgeable Kreung person, also a member of the Network of Natural Resource Protection, Mr. Thong Vay, said that he was not clear whether the policy was useful or not. To find out the usefulness of the draft GPHPD, he added that the draft should be made available at the community level. Community members then could comment on whether the draft would be useful for the indigenous people. In any event, he still hoped that the draft would benefit to both government and indigenous people, and that the customary lands of indigenous people would be secured.

From the views of the knowledgeable indigenous people, it appears that indigenous people have some unsatisfactory experience from non-indigenous people

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regarding the community property. Moreover, they seemed not to rely on outsiders or government to establish, without participation from their communities, a good policy or law that would benefit their communities. However, there clearly is a feeling of trust among members of the indigenous peoples themselves, for instance, to raise the necessary points for the benefit of the entire indigenous community.

The draft of the GPHPD was considered as the first and the right direction to provide indigenous people with rights over customary land use. It was believed that the draft consisted of many inputs from indigenous communities in the highland provinces and involved with many institutional stakeholders. According to Tiann Monie, a former Ratanakiri-based-NGO-working-group representative who worked with National Committee, the policy reflected the consistency of the real situation of indigenous people because it consisted of opinions of indigenous people in Ratanakiri province and from other provinces in Cambodia. The indigenous people have the same type of land utility and similar culture. She also said that they also would understand about national interests, if we [government and NGOs] explain national interests to them. Apart from the contents of the draft policy, an Australian Consultant for an NGO in Ratanakiri province, Mr. Gordon Peterson, said that the draft policy was guided by a key consultant with experience in issues relating to indigenous people from Chiang Mai University, and with the consultation with indigenous communities and government servants who are indigenous people in Ratanakiri province.

In addition, another Australian Expert who has been working for NGO for a long time and knows well the situation of the indigenous people in Ratanakiri, Mr. Graeme Brown, said that there were numerous workshops to collect information with participation from the higher level officials and indigenous people. Further more, he acknowledged that the policy was quite good, and it was not only strong but it was in the right direction because it would provide support for indigenous people to have control over their land development which was consistent to the national plan. The draft also recognizes that indigenous people have visions or ways that are different from the major population. The policy, if adopted, would be the guideline to identify what are the existing rights, especially rights to access to customary lands of the indigenous people. Furthermore, the rights mentioned in the draft policy would also be recognized and protected by the government. The expert also added that if the

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policy is adopted then it means that government agrees to the policy. Indigenous people then would be able to start claiming the rights guaranteed by the policy. He continued that the policy will be an advocacy tool for community and also a benchmark or measuring tool for reports to the government and donors. At the moment it is difficult to measure the implementation of the government's work related to indigenous people's rights since there is no standard policy which requires to be done.

An experienced Cambodian NGO officer in Ratanakiri province, Mr. Him Samith, shared similar opinions to the Australian expert's, that the policy would be a basic document for indigenous people to prevent customary land from being violated. He mentioned that if the draft policy is adopted, the land violators will be afraid of the policy because they know the laws more than the indigenous people do. At the same time, the voice of the indigenous communities will be strengthened because the draft policy will be understood by the communities notwithstanding the generally limited understanding of indigenous people about their rights.

In Mr. Hun Samith's opinion, the situation illustrates that indigenous peoples will participate to prevent violations in their communities if they have documents which allow them to do so. However, the indigenous communities would not dare to act f there is no authorizing document from the government. Presently, the indigenous communities in Ratanakiri province have participated in protecting the community forest after the communities have been approved by the provincial authority. The customary lands can be prevented from being violated in the form of boundaries encroachment because the draft policy, provision (2.2), requires customary lands to be identified and protected. In addition, the policy also requires government, with the agreement of the indigenous communities, to recognize, endorse and protect customary land use rights and demarcation of lands within indigenous village boundaries which are mentioned in provision (2.3). Therefore, if the draft policy is adopted the customary land violation will be prevented by the participation of the indigenous communities due to the provisions allowed by the draft GPHPD.

Most of the customary land violations were caused especially by unclear mapping of land available for land and forest concessions from the central level, so the policy is a necessary tool to guide the government in identifying suitable areas for

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concessions, and areas that do not overlap the boundaries of customary lands of indigenous communities. According to Mr. Him Samith, the granting of concessions was authorized at the national level, and the provincial authority had no authority to intervene or to negotiate in case of land violations occurred. He added that the provincial authority had no right to object to any deal that had been decided by the national level. He also raised an example that in the past a forest community of Poy Commune[23] was only recognized by the provincial level. The national level did not know about that situation when it granted a concession that subsequently caused problems for that forest community. He also continued that, in that case, there was an advocacy campaign from the community to national level. Had the policy been adopted, it would have been very useful for that type advocacy campaign.

However, another experienced Cambodian NGO consultant in Ratanakiri, Mr. Chea Phalla, who has been working in Ratanakiri province since the draft policy was being drafted and who has participated in many research projects, argued that the results of the present land and forest reforms integrated inputs from the draft of the policy and the concepts of the chapter on indigenous community land ownership in the 2001 Land Law were developed from the draft GPHPD. He also added that although the draft GPHPD has not been adopted by the RGC, most of indigenous community land rights covered by the draft were incorporated in the 2001 Land Law (Chapter 3, articles 23-28). On the other hand, Chea Phalla still valued the draft GPHPD, and noted that if it is adopted, it will contribute additional protections and provide benefits and rights to indigenous people to manage natural resources in sustainable ways. This is because the draft GPHPD requires participatory land use planning to be respected to ensure the most effective, adequate and sustainable use of land and natural resources (provision 2.4).

A knowledgeable Kreung indigenous person and also a government staff at the Rural Development Department in Ratanakiri province, Mr. Say Leun, was involved in the drafting seminars. He expressed his regret that the draft has not adopted by the RGC. His opinion was similar to the experts above that some points of the draft GPHPD were integrated into the new land law and community work of NGOs. He added that NGOs, in particular, those working in Ratanakiri province, implement their

[23] One commune in Ratanakiri province

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projects in a manner consistent with the draft GPHPD. Finally, he commented that the draft GPHPD, theoretically, was quite good and very useful for the indigenous communities because it focused on the traditional land and forest use of indigenous people.

The draft policy was not broadly known by the many people because it has not been adopted for implementation. However, the policy will be widely acknowledged by villagers if it is passed and disseminated to local people. Although the policy is not widely known by the indigenous community people, they still value the policy as an important tool for them to realize development. According to a Jarai knowledgeable person, Mr. Long But, who is also a member of the Community Network, that the policy would be important for indigenous villagers. He added that the community people need policy to be used as a guideline for development within the community. However, he also added that community villagers did not know about the draft GPHPD because it has not been adopted for implementation yet. The policy will be disseminated by the NGO workers or Community Network members to the community level if the draft policy is adopted by the government.

5.2.2 Address of Violations

Although the draft policy mentions the special relationship (provision 2.1) of the indigenous people to their lands, the policy itself does not contain any provisions related to the resolution of past violations that affects the special relation to lands of indigenous people. Moreover, from the NGOs workers' perspectives the past violations would not be resolved or land would not be returned to indigenous people due to the experience and based on legal approach. They seemed to focus more on prevention of the future violations to the special relationship indigenous people have with lands rather than on how to restore the special relationship which had been cut off in the past by various violations. In this critical situation, the past violation on indigenous community lands will badly affect on religions and cultural practice of indigenous people because of the relationship between land and culture. The possibility to demand ancestral lands, respect of cultural rights, and appropriate compensation from government will be ended through the legalization of the past violations if the past violations are ignored or are not resolved properly. The past

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violations took place in 1990s after the 1993 Constitution and before the enactment of a new land law. Even with the promulgation of the land law 2001, the violations have not ended, but have changed in form to small scale plantation of land speculation. The fact that the violations happened in the past does not necessarily mean that there is no present remedy. In other countries, the past violations occurred many centuries earlier. Nevertheless, indigenous peoples still demanded their rights over customary lands and somehow,. some of them at least, have managed to receive their lands and compensation from the government.

A. Past Violations on Customary Lands

According to the study of the IDRC/UNDP CARERE-Ratanakiri, which was prepared for the 6-8th March 2001 Conference on Strengthening Partnership in Community Natural Resources Management, [24] the majority of the external immigrants did not have land at all. However, the Khmer, Lao, and Cham immigrants bought or took land from indigenous communities and declared that the land was theirs by putting up signs and fences. Sometimes they made agreements with indigenous villagers to borrow the land for a certain period of time. As a result, the some families of ethnic Lao and Khmer possess more than 10 ha of plantation land, chamkar land or forestland.

At the time of the study, some highlanders had turned their fallow lands into cash crop plantations, especially along the road, as part of measure to prevent land grabbing by outsiders. Others started to sell their land to the outsiders and some authorities distributed land formally used by indigenous people to the external immigrants. Some of the reasons indigenous villagers gave for selling their lands were they needed cash to buy medicines, purchase draft animals and other materials, and repay debts. Others reportedly sold land because the land had become infertile and they no longer saw a use for it. Some indigenous people stated that they feared of losing land and benefits because they believed that in the future they would lose their lands anyway as more and more land was being lost due to land grabbing and a few powerful village people -- mostly village and commune chiefs -- sold traditional land. The last reason given was that the indigenous villagers are not accustomed to living

[24] Immigration and its Consequences for Highland Communities in Ratanakiri province.

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near immigrants and it made them feel uncomfortable so they just moved further away and sold the land near immigrant settlements.

The NGO workers and indigenous knowledgeable peoples seemed not to have any hope that GPHPD would be used to resolve past violation on the customary lands of indigenous people. Many different opinions were expressed during the field work in Ratanakiri province. According to an experienced Cambodian NGO officer, Mr. Him Samith, the past violations in the form of sale cannot be solved because the indigenous people have sold or exchanged material (motorcycle for instance) for their fallowed chamkar to outsiders. He also stated that the outsiders have already planted fruit trees on the purchased lands therefore, based on the legal approach, they had legal possession which could lead to ownership rights. If the GPHPD is adopted, in his opinion, it would be a bit late to resolve those land issues since the purchased lands have not been abandoned but recognized as continuous occupation by planting trees. Therefore, those lands would not be returned to the state or to the indigenous communities. His explanation referred to the 2001 land law (articles 30 and 31) which state that if a person has occupied land for five consecutive years before the law comes into force, the possessor has the right to request a definitive title of ownership. If the period is less than the requirement of five years, the possession will be extended until the possessor attains the legally prescribed period of five years. However, in order to transform into ownership of immovable property, the possession shall be unambiguous, non-violent, notorious to the public, continuous and in good faith (article 38, of the land law 2001). Eventually, he also raised that past violation was over, so it would be better to think about the future by preventing future violations from happening.

Regarding the causes of sale of fallowed swidden lands; a community-based Cambodian NGO worker, Mr. Long Lon, explained that previously the indigenous people did not sell land because they did not even use currency for trading but exchanged goods between each other. Since 1999-2000, there were many immigrants from lowland provinces that came to settle in areas of indigenous people. The immigrants usually need lands to cultivate so the fallowed swidden chamkars are the target lands which can be cultivated. Normally, the lowland immigrants have provided some amount of money for indigenous people in exchange for fallowed swidden

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chamkars. He mentioned that indigenous people would not give fallow swidden lands to lowland immigrants to plant fruit trees if they were asked for the fallowed chamkars for free. When one group of indigenous people starts selling off their fallow land, others have followed, have sold their fallowed swidden lands to outsiders then they moved to cultivate in a new area of swidden agriculture.

This Cambodian NGO worker, who has experience at the community level, also had similar opinions to another Cambodian NGO officer's ideas mentioned above, that it would not be possible to return indigenous community's lands back to them because the outsiders bought that lands, did not confiscate them from the indigenous people, and the indigenous people agreed to sell voluntarily. However, Mr. Long Lon added that the where the sales were made in ignorance, or involved false documents, it might be possible to take back the land for the indigenous community.

Regarding the past violations over customary lands, the Australian experts Mr. Brown and Mr. Peterson shared similar opinions with other NGO staff by noticing that it would be very difficult to reclaim the lands which have been lost by indigenous communities. Mr. Brown said that "we should not try to solve those problems because there were so many problems that occurred in the past and there were so many vested interests in lands that had already been bought. This will be very difficult and consume a lot of resources." However, he added that in cases where the land has been obviously taken recently by illegal means, it could be questioned in order to set a test case to stop new violations. Mr. Gordon Peterson also added that the provision (2.8) of the draft GPHPD mentioned about the establishment of procedures to resolve all land claim. Therefore, he added that the policy can be used to apply to land that has been encroached already.

A Kreung knowledgeable person, Thong Vay, also shared a similar opinion to the NGO workers', that it would be very difficult to resolve customary lands that had been sold because the indigenous villagers had made thumbprints to sell the land, and although the villagers had been convinced by land speculators, through facilitation from the local authorities. The convincing was done by giving false information that the indigenous villagers would get nothing for their fallowed lands if the State took them, while villagers could get some money for living if they sold the lands to speculators. Most of land speculators bought lands for cashew plantation. Without

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explaining the reasons, a Jarai knowledgeable person, Mr. Long But, believed that past illegal violations could be solved by the policy except lands which have been sold by the indigenous people themselves.

However, according to a government staff, who has been working in the Rural Development Department in Ratanakiri province, before there were many land problems regarding cheating by exchanging between land and materials. It seemed that the exchanged lands and materials was not honest trading and the resulting possession was not good faith possession over land of the outsiders because the indigenous people were illiterates who were vulnerable and easily convinced. Therefore, in this person's opinion, the nature of sale and trading of customary land of indigenous people should be considered before granting a land title, which is an exclusive right over land.

In any event, the indigenous issues should be resolved through social perspective rather than legal approach because the indigenous societies still implement customary laws. The existing traditional authority, which is believed more effective than state law within the indigenous community, is still respected by the community members. The culture of indigenous people is closely woven, as mentioned in the previous chapter, to their customary lands. For the indigenous people, the rights to culture are relevant to rights to customary land. And, based on the Constitution's incorporation of relevant international laws discussed previously, the Cambodian government has to respect the cultural rights of the indigenous people by respecting the customary land use and land rights of indigenous community within its territory.

B. Prevention of Future Violations

Based on what most of NGO workers believed, the lost lands of the indigenous people are difficult to reclaim, however, they expressed the view that the prevention of future violation from occurring is the most significant and practical discourse to consider if the GPHPD is adopted. Many NGO workers and knowledgeable indigenous people are optimistic about the draft GPHPD on protection and safety of customary lands of indigenous people if the draft is made effective. The Australian Expert, Mr. Gordon Peterson, said that the policy normally addressed what was the need for the present, therefore, the present customary lands of indigenous people have

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to be considered by the draft GPHPD. He added that "I think first to protect what is still there, what is not lost, that is the most urgent task, for the villages like Pom Kit[25] and other villages that lost their land already. We want to help them but it will take a long time. The most important thing is to stop any more lost of lands."

The Australian expert also mentioned that the draft GPHPD talks about identification of customary lands of indigenous people and requires the government to provide indigenous people with an effective remedy against any unlawful intrusion or encroachment on customary lands. The customary lands need to be mapped or demarcated in all villages of indigenous people. Then the government must recognize, endorse, and protect those customary lands before the indigenous people decide the types of land titles they really want to be issued, whether communal title or individual titles. According to the policy, if it is adopted, all customary lands of indigenous people need to be mapped in every province. Then the policy can prevent customary land violations from land sales and land encroachment.

Related to this identification mentioned in the draft GPHPD, the experienced Cambodian NGO officer, Mr. Samith, shared similar opinions to Gordon Peterson's – that community boundaries, which will be recognized by the national level, will prevent any mistaken granting concession from the national level over the indigenous community lands. He added that the draft policy will provide indigenous people with the ideas about how to protect their own lands from being violated by outsiders and companies. Moreover, the powerful people or armed forces in the province will be aware of the policy through their participation in developing the policy and again from the dissemination at the community level. They will be on notice that they need to reduce some activities which possibly violate the rights of indigenous people especially rights related to customary lands.

The draft policy, if adopted, will be a tool for strengthening solidarity of indigenous communities through the understanding of community members. According to the Australian expert, Mr. Graeme Brown, one of the major problems is the lack of community solidarity. As long as the indigenous community is not unified, lands and resources in community boundaries, even if they have communal land title from the national level, cannot be protected. However, he added that indigenous lands

[25] Pom Kit is the name of one village in Ratanakiri province

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can be protected if indigenous people are unified, have some identity, feel confident that they have a future and realize that their solidarity can weaken swindling. The policy provides them all of motivation to keep and protect their lands. From the policy indigenous communities know that they have a future and they are legally allowed to have their future, so they are more inclined to remain unified, and more inclined to fight off illegal sales. He raised an example that when land speculators come to buy community lands by convincing people to sell based on false information, or when others force them to sell community lands, which occurred previously, then community peoples will have proof in the policy, which clearly provides protection for their own lands.

The draft policy requires the government to recognize, endorse, and protect traditional land use rights and the demarcation of the lands within village boundaries. And it requires that monitoring on land use and measure shall be set up by Provincial Rural Development Commission (PRDC) and existing village committees, to ensure sustainable ways of using natural resources (Provision 2.3). To respond to the requirement above, individual indigenous community would adopt by-laws[26] in order to legalize the community. It is through this means that an indigenous community could establish itself as a legal entity capable of owning land. However, the by-laws are different from one community to another based on the actual situation of individual community village. From the point of view on one Cambodian NGO worker, Mr. Long Lon, by-laws were usually established by the community themselves through consensus agreement of village members. The provisions of the by-laws would prohibit such things as land sale and impose fines for violators. He also added that indigenous people strictly follow and respect their by-laws more than they do to laws of state authorities, because by-laws are established by their own community and agreed by all members and are enforced by traditional means by fines in wine, cow, warning, or money in a particular amount due to the grade of violations.

To secure protection of indigenous people' lands, a Kreung knowledgeable person, Mr. Thong Vay, expressed his opinion that land title, clear by-laws, and the defined ways of utilizing land indigenous people in sub-decree are needed. He added

[26] By-laws were usually drafted by the community, with initiation from NGOs, and recognized by the authorities from commune to provincial levels.

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that if individual title is offered to individual indigenous villagers, lands will be sold because their education is limited or they will sell when they are sick and need money for medical treatment. Sooner or later, the lands in indigenous communities will be insufficient for them to live and cultivate on. However, he added, if communal land title is established for indigenous people, indigenous peoples' lands will be secured because none of villagers will be able to sell any plot of land within community boundaries to any outsiders. However, the Kreung knowledgeable person said that indigenous people are presently not sure and face a dilemma about whether communal or individual land title is the best option for them if the government provides land title to them in the future.

The policy, after its adoption, will be an effective guideline in protecting, customary lands of indigenous people through the understanding of the authority and local villagers. According to a former Ratanakiri-based NGO representative, Ms. Tiann Monie, the provincial authority was the key person to disseminate information which is relevant to customary lands of indigenous people to investors. She added that normally, after getting land or forest concessions, the concessionaires would come to contact and inform the provincial authority before the implementation of the granted concession projects. If the policy is effective and the provincial authority understands the policy, the provincial authority will share information about the real situation of indigenous peoples' life and also inform the investors of what the policy mentions about the customary land rights. She felt that if the provincial authority explained clearly to investors the relevant information regarding indigenous people life and rights, the investors would not violate the customary lands of indigenous people.

The adoption of the draft policy will contribute to prevent the violation over the customary lands of indigenous people in Cambodia. Based to the stakeholders' opinions from interviews in Ratanakiri province, the policy will be a tool for indigenous people to prevent any violations caused by outsiders and companies, and also the applicable information for provincial authority to inform the concessionaires to respect the culture and lifestyle of the indigenous people in the province when they come to start implementing the projects. Moreover, the customary lands will be identified which provides a clear map for national level not to grant concessions overlapping on the customary land of indigenous people. The policy will encourage

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indigenous people to participate in sustainable use of natural resources within their boundaries. Therefore, the policy should be re-considered for adoption as soon as possible and working group should resume any necessary modification to produce a sound policy for implementation.

5.2.3 Obstacles of Adoption of the GPHPD

This part will discuss the different opinions from various types of NGO workers and indigenous people regarding the possible obstacles occurred since the finalization of the draft GPHPD until present. The second part will offer the suggested resolutions to deal with the obstacles of the adoption.

A. Obstacles for Adoption

The reasons that the draft GPHPD has been forgotten since it was finalized in 1997 were still unclear among the stakeholders in Ratanakiri province. Many people, including those involved in the process of drafting, expressed many different obstacles based on information they received during and after the process of drafting. Some people, who have been working in the field of indigenous people' rights for along time and wish to see the draft adopted, also expressed a number of possible reasons that they had heard and that they believe are likely the true for obstacles for adoption of the policy. The interested groups, indigenous people themselves, who wish to see the draft GPHPD effectively implemented also shared what they believed are obstacles which could be the root causes for not adopting the draft GPHPD. From the interviews conducted in Ratanakiri province, the possible obstacles are conflict of interests, between RGC and indigenous communities, on the exploitation of national resources in areas of indigenous communities, the fear of slow development, fear of territory separation, and other purposes for the claimed-national interests.

A Kreung knowledgeable person and also a member of the Community Network in Laak commune, Mr. Thong Vay, said that his community did not know about the real obstacles because the community was not close to the RGC. However, he thought that RGC has had a lot of other work to do such as elections and other development so the RGC has forgotten about the draft GPHPD. He also suggested that

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reasons should be found out whether the draft policy harms any national interests which caused RGC not to adopt it.

The indigenous government staff and an experienced with NGO worker, Mr. Say Leun and Ms. Ting Pip, respectively, had participated in the seminar on the drafting of the policy. They shared a similar belief, that one possible reason for the delay of the adoption may be that the policy had not been submitted by IMC to the RGC for approval. Moreover, Mr. Say Leun added that the content of the draft was consistent to the outputs of a seminar in Ratanakiri province in 1994. The seminar produced a lot of outputs from the indigenous communities which probably made the RGC unhappy. Therefore, the RGC has not taken any consideration for adoption. The draft GPHPD provides rights to indigenous communities practice of traditional agriculture which demands more space of land, in particular, for swidden cultivation. If individual titles are provided for individual members of indigenous communities, the indigenous areas, they [the government] believed, will be developed and there will be more land left from land titling for investment. However, he added that if communal land titles are provided for indigenous communities, the government does not have lands in indigenous areas for, they said, investment. The communities have rights, provided by policy, within their boundaries which include many types of land and forest for traditional gathering. He also added that if traditional rights of indigenous communities are recognized in legal documents, none of the outsiders will be allowed to take benefit within indigenous areas, therefore, RGC did not adopt the draft policy.

Finally, he said, the government drafted the policy just to make indigenous communities happy, and he believes that the good policies have never been adopted for implementation. Similar to Say Leun's opinions, a Tampuan knowledgeable person and also a member of the Community Network, Mr. Pen Khat, thought that the draft policy provides more rights to indigenous communities, so the RGC did not want indigenous people to have those rights. If the indigenous communities know about the rights and have those rights, the RGC would not have rights to manage natural resources within the indigenous community areas.

The Cambodian NGO officer, Mr. Samith, expressed his personal opinion, which is contradictory to the opinions of the above knowledgeable indigenous

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persons. In his opinion, obstacle was likely at the national level and the IMC had forwarded the draft to national level for approval but it was ignored and was not taken into consideration. He also predicted that it could be related to the political interests since the indigenous population is very small and could not provide more benefits in political support and election votes, if compared to the majority in the lowland areas of the country.

According to the NGO representative from Ratanakiri assigned to work with the national on the policy, Ms Tiann Monie, the national level was not satisfied with the section on land written in the draft policy even after the land section was modified many times. The unsatisfactory points in the land section were related to sacred forest, reserved land for swidden cultivation, and also concession lands which affected on cultivation, and village lands of indigenous people. She added that based on those reasons, the RGC did not agree with the content of the policy initiated and compiled by the NGO working group, and the RGC decided to wait for the land law to be promulgated first before approval.

According to a Cambodian NGO consultant, Mr. Chea Phalla, who was uncertain about his views, the obstacles could be from lack of financial support from donors to the project. A department of ethnic minorities was supposed to be created to work on this issue, but the budget was limited for a period of time. He also added that conflicts of interests or inconsistent tasks of relevant institutions could be one of the obstacles. Moreover, he also stated that at the national level there was lacking of facilitation in order to unify the relevant ministries. He also heard that, in another way, there was an idea among some ministries that separation of territory would be possible to occur if the draft policy is adopted. However, economic development is the significant objective of the government after its engagement in war so many years. National interest is the top priority over all other interest groups' priority.

The alleged fear of the separation of the territory of the indigenous people in Cambodia seems to be based on a misconception of the underlying issues. As Anaya (2002) stated, the essential meaning, or substance, of the rights of self-determination is the right of all peoples to control their own destinies under conditions of equality. This does not mean that not every group can be identified as a peoples, with a free standing right to form its own states or to dictate any one particular form of political

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arrangement. Rather, self-determination means that peoples are entitled to participate equally in the constitution and development of the governing institutional order under which they live and to live within a governing order in which they may live and develop freely on a continuous basis.

Indigenous people in Cambodia do not have any history of struggle to separate into an independent state either before and after the colonial era. Therefore, what the rights of self-determination of indigenous people would like to have are the rights to manage their customary land based on what they have practiced since their ancestors without direction by the institutions which are unfamiliar to their cultural and religious practice.

According to an Australian expert, Mr. Brown, there were many possible reasons for not adopting the draft GPHPD. He understood that another national policy, economic development policy, was placed higher than the draft of GPHPD because the economic development policy will provide benefits more for national interest than will the draft GPHPD. The economic development could target the highland areas where large tracts of land are available for industrial agriculture. He also added that for this reason, the government is required to control the areas in order to have a large scale plantation to support economic development. Another Australian consultant, Mr. Peterson, shared the same opinions with Mr. Brown that if the indigenous people' rights are fully recognized, the economic development would be slow down because the indigenous peoples communities would have a large of land to manage through customary way just for a subsistent economy.

In addition, Mr. Brown stated that the highland areas have been sought for settlement areas of immigrants from lowland areas. The settlement policy would be involved in taking lands away from indigenous communities for the new settlers from the lowland areas. These reasons could be why the government did not accept the policy and why the government will not implement the policy – because it will slow down the policy of industrialization.

According to Mr. Peterson, one of the obstacles for adoption was, it was believed, raised in the stage of discussion -- that the land law in effect at the time (the 1992 Land Law) did not have any mechanism to recognize customary boundaries. He stated that he also heard, perhaps the idea came from the council of ministers, that it

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was said the policy had to conform to the existing laws. Since 1999, the council of ministers has looked again but stuck again by replying that the new land law was in the process of preparation so the policy could not be adopted but had to wait for the new land law to be promulgated first. He also expressed his own ideas that actually it should be the opposite way around. In most countries, the law should conform with the policy which has to be created first and the law after.

Moreover, Mr. Peterson provided more tentative reasons that the highland region, Ratanakiri province in particular, has been considered a development region by the national level, taking the central highland of Vietnam as the model. That model introduced cash crop plantations, limited the land of indigenous people, and promoted immigration from other provinces to plant cash crops and promoted industrialization of the province. He stressed that although the new land law was passed and recognized the customary land rights of indigenous people, the national level of government may try to slow the process of implementing that law, so that economic development can still proceed according to their vision, until there is not much land left for communal titling anyway.

B. Resolution of obstacles

To resolve the obstacles blocking adoption, the former Ratanakiri-based NGO representative, Ms. Tiann Monie suggested that a thorough study comparing the chapter on immovable property of indigenous community in the 2001 Land law with the land section of the draft GPHPD, should be conducted in order to examine the consistencies and the conflicting clauses within both documents. She added that after studying the two documents, more research on the situation of indigenous communities should be conducted in order to compare legal documents to the practical situation of the indigenous land use. After completion of both studies, the integrated outcomes from the comparative studies should be documented and presented to the government for approval and implementation of the policy.

A Cambodian NGO consultant, Mr. Chea Phalla, suggested conducting further discussion among donors to examine the draft policy to find out whether the draft should proceed or be modified before advocating for approval at the national level. Similar to Mr. Phalla's viewpoint, the Australian expert in Ratanakiri province,

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Graeme, said that donors should look closely at what the government is doing to the draft of the policy. Otherwise it could be said that the policy supports the indigenous people' rights but in actual fact, there is an industrial development policy which allows land to be taken away. The Cambodian consultant, Chea Phalla, continued that apart from the advocacy of donors, the indigenous communities should speak up to demand for the real needs and reveal the present issues from the community level to the government. To get this kind of work done, he also mentioned that indigenous community would need initiation and help from NGOs in order to be able to bring their voice to reach the national level. He also mentioned that SEILA[27] would likely play a significant role to help indigenous communities to bring their voice heard to the government because SEILA has been working with commune council on decentralization.

However, the Australian NGO consultant, Mr. Gordon Peterson, argued that the idea which alleged that indigenous people slow down development was not a view for development. He gave the reasons that if the indigenous land is under the community management, it would be managed more sustainably for watershed protection, for long term diversification of cropping. However, if it is converted into industrial plantation then mono-agriculture will be planted which will affect the living of the indigenous people. He also raised an example in Vietnam where the World Bank funded a coffee program. Indigenous people converted to coffee and immigrants came in and took the land and grew coffee. They grew so much coffee that coffee price went down. Then people could no longer make a living and their income from coffee was less than from growing rice on the same land. The lesson learnt from Vietnam's experience, he suggested, were valuable, and t the high level the government officials need to get a comprehensive exposure to impacts of industrialized development regions. Development can cause many adverse impacts on environment, economy, and society of the local people especially indigenous people who are very vulnerable. When the society breaks down, there is an increase of prostitutes, HIV/AIDS, drug use, poverty, and seasonal migration to the city. So these

[27] SEILA is a multi-donor organization established by the RGC to work on rural development and decentralization

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social impacts can be clearly seen and the government should not consider national economic interests exclusively.

Mr. Peterson, expressed his own opinions that an educational approach is the best option. A study tour should be available at the higher level of government, the ministerial level and in the council of ministers in particular. He believed that the study tours can involve them in looking at case studies and progressive policies on indigenous domain laws from other countries where there are indigenous people such as South America, Northeast India, and the Philippines. Apart from education, he added, the government should think alternatively that indigenous areas, for instance Ratanakiri and Mondulkiri provinces, have potential for eco-tourism which is the most profitable industry.

The foreign expert, Mr. Brown, had similar ideas to Mr. Peterson's on how to resolve the obstacles. He preferred to use an educational approach to resolve all problems related to the GPHPD policy adoption. He said, first, that education would let people see that social problems may occur if indigenous people' rights are not respected. For example, when customary land is taken away, indigenous people lose their visions, and become very destructive or dependent. Second, education would allow people to realize that indigenous people have their land rights and their management rights that would not stop economic development for the nation. He further stated that indigenous people don't want to have a fast development but sustainable development. There should not be fears that indigenous people would lock up the land and resources rights that are given to them. This has not been the experience from other countries. Giving land and resources back to many indigenous people does not lock it up.

Similar to Mr. Brown's opinions, the foreign consultant to an NGO, Mr. Peterson, said that after traditional land boundaries in all villages are formulated, companies can come in and invest on customary land if the villages agree, but they need to have negotiation and talk about project for economic development such as who will implement the project, what will be the cost of rental or what will be the sharing of the profits. He added that having negotiated the deal between indigenous people and companies, customary land recognition will not be against economic

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development but it will provide benefit sharing to local people then the strategic poverty reduction of the government will be accomplished.

According to an experienced Cambodian NGO officer, Mr. Him Samith, the NGOs should be strong to advocate to the national level because up to now the IMC has not been able to push for adoption. The advocacy can be done at the provincial level and especially regional levels. He added that if the regional level urges the national level and donors are taking consideration the indigenous issues, they will use their influence to make a move for adoption of the draft GPHPD at the national level. Therefore, the indigenous people' rights will be given more consideration by the RGC. He also added that at the present time many donors are interested in indigenous people' rights and he hopes that if they urge the government to adopt the draft GPHPD, the adoption will occur.

A Tampuan knowledgeable person who also serves as a district government official, Ms. Tin Pip, expressed her opinion that the IMC should find out the reasons which caused the delay in the adoption of the policy. Then the IMC should organize workshops, with participation from various stakeholders and indigenous communities in order to find the resolution for the adoption and whether any further modification is needed.

5.2.4 Implementation of GPHPD

This section will look at how the implementation of the draft GPHPD should be conducted if it is adopted by the RGC. The stakeholders, both NGO workers and knowledgeable indigenous people, have expressed their ideas of how the policy should be implemented through their lessons learnt from their long experience with indigenous communities in the highland areas. The implementation is divided into three parts. The first part is the dissemination strategy which the interviewees suggested. The second part discusses the involved people in implementation. The final part is the roles and priority of indigenous people in implementation. The last part will be divided into two processes, lessons learnt or experiences from the past, and the proposed roles of indigenous people in implementation required by the policy such as mapping of boundaries and development and environment protection activities.

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A. Dissemination

The Cambodian NGO officer, Mr. Him Samith, mentioned that dissemination is an important strategy to be implemented for the newly-launched policy and also for the draft GPHPD if it is adopted. He said that the policy must be disseminated to commune councils and representatives of indigenous communities through workshops. The contents of workshops should focus more on the necessary applicable provisions for the indigenous communities in order to ensure the people understand these points. He suggested that if this happens, indigenous people would be equipped with knowledge to debate and interpret the policy when there is any conflict related to the indigenous community's lands from outsiders, powerful people, or companies. He also expected that after the workshop, the representatives would be able to extend the dissemination within their own communities. He recommended that the role of the indigenous communities would be very important and they should be in charge of implementation of the policy within their communities, with guidance of NGOs.

The Tampuan knowledgeable person and also a district government staff, Ms. Tin Pip, expressed that if the policy is adopted, then the provincial authority must be made aware of the new policy. The policy would be more effective if all levels of authority and indigenous peoples understand what the policy includes, especially regarding the rights of indigenous people over customary land. In order to be extensively understood among indigenous people, she also added that dissemination should be conducted by groups of facilitators with participation from government and NGOs.

For the foreign expert, Mr. Brown, the policy needs to be signed and accepted at the level of the prime minister in order to make it become the most effective for implementation. He stated that the policy needs to be recorded down and interpreted into different indigenous languages so that indigenous people will understand it; it would not be useful if it is written only in Khmer. In addition, he said, the explanation needs to be in video cassettes to explain the meaning of what the policy mentions or at least it needs to be on television to explain what it means. Similarly, a Cambodian NGO officer, Mr. Sambo, agreed that dissemination would be a good option to make

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people understand the policy and dissemination should be conducted through commune council, by going down to see people in villages, and broadcasting through media such as radios and televisions.

The former Ratanakiri-based NGO representative, Ms. Tiann Monie, expressed her ideas regarding the need for dissemination at three levels – national, provincial, and community levels. First of all the policy should be understood by relevant ministries. Second, the provincial authority has to be clear with the policy because the authority will be working with various departments in province. When the provincial authority understands the policy, there will be good cooperation with relevant departments and NGOs in the province. Third, at the community level, the dissemination should be conducted in the areas where ideas or inputs for drafting policy were collected, and by explaining about the modification and existing collected ideas from the communities in the policy. Oral explanations would be necessary for indigenous people at the community level because their education is limited.

A Jarai knowledgeable person and also a member of the Community Network, Mr. Sev Khamphorn, said that the policy should be disseminated by NGOs to the community level so that indigenous people can understand what the RGC provides or does not allow to indigenous people. He added that when indigenous people understand it, they will be able to protest to the province in case of any violations occurring in their communities. He also stated that presently there is a Community Network that can implement the policy at the community level. However, if there is no network at the commune, it would be difficult to implement the policy when it is adopted.

It is seen that, based on the interviewees' opinions, dissemination of the policy should be conducted by all stakeholders such as government authorities, NGO workers, and community people, through media and extension workers at the community level. No one suggested that an independent institution be established to be in charge of the policy implementation including the dissemination or education of the peoples about the policy. Nevertheless, it might be very helpful to have an independent body, such as one established in Canada, the independent British Columbia Treaty Commission. This commission has various roles including the role to raise public awareness and provide information to the public about the treaty and

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the role of the commission. From this experience, the establishment of an independent institution or ethnic minority department should be considered and to play exclusive roles about the indigenous people' issues and implement the policy.

B. Procedure

Budget is the main thing to support and run the project, for instance, the implementation of the policy. As noted by one expert, the effective and proper management of funds is very important, particularly if any funds are provided by donors. The Australian expert, Mr. Brown, said that if there is any funding programme, a funding agreement should be conducted as a partnership between donors and the ministry. Within the funding agreement, funds may go straight to community organizations, civil society, or government that plays roles as partnership in indigenous people' issues.

As for the procedure for actual implementation, Mr. Brown, preferred to have the Ministry of Rural Development (MRD) staff who have an interest in supporting indigenous people come to develop the relationship with leaders and indigenous people in Ratanakiri province. They could work out some sorts of plan for implementation. He added that procedural work would need external facilitators to initially plan and then the assigned people would have experience and commitment to think about balance. The balance of procedure should be acceptable to both government and donors before launching the implementation. In addition, the foreign expert said that IMC can play a role to bring all ethnicities together, since there is no history of coming together of different ethnicities, by developing inter-ethnicities relationships. This would involve different ethnicities to come together by sharing their experiences, concerns, and visions; and government people would listen and take the different groups' ideas as inputs for formulation of procedure.

Similarly, the Kreung government staff and knowledgeable person, Mr. Say Leun, expressed that government staff had to go down and work with indigenous communities in order to collect information and suggestions from communities regarding traditional land use. He added that the collected suggestions should be analyzed and balanced, between legal and traditional approaches, for creation of the procedure for implementation. After receiving information from indigenous

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communities, the initiation for the establishment of procedure should be developed by the IMC with the participation of NGOs through conducting workshops. After the draft of procedure is completed, it should be endorsed by the Provincial Executive Committee[28] or authority by signing in front of participants from indigenous communities.

According to the Cambodian NGO officer, the procedure for implementation of the policy has to be discussed and approved by the relevant departments and provincial authority. However, before discussing the draft procedure, a schematic idea should be discussed at the village level and inputs from indigenous villages and communes should be compiled. When the ideas from all communes are collected, a district-level workshop should be conducted for improvement. After the district-level workshops, a provincial-level workshop should be conducted with the participants from relevant departments in the province and indigenous community representatives. Outputs of the provincial-level workshop will be put forward for the approval from the Provincial Executive Committee. Therefore, during the implementation if there is any obstacle, the approved procedure will be referred to. He also agreed that the IMC should be in charge of dissemination, implementation, and evaluation of the policy.

Apart from above people's opinions, the Foreign NGO consultant, Mr. Peterson, expressed that to implement policy, first a pilot project has to be launched in order to see the consequences. From the experience of the pilot project, a procedure or law can be developed based on the guided experience of the pilot project. The policy is the framework for guiding the direction of the pilot project. On the other hand, the pilot project is a good way of starting thinking of the policy. Therefore, a pilot project should be done first before fully implementing the draft GPHPD, but the draft GPHPD needs to be adopted.

C. Implementers

For the former Ratanakiri-based NGO representative, Tiann Monie, the implementation of the policy should be conducted by the relevant ministries or departments, and NGOs should integrate the policy into their projects that share the

[28] Provincial Executive Committee is a committee for facilitation between NGOs and provincial authority regarding development work within the province.

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same objectives. For instance, there are NGO workers who are working closely in the indigenous communities so those NGO workers should be trained on the policy in order to be able to extend the policy in the target areas. She added that the implementation would not face any obstacles because presently SEILA is playing a significant role in facilitation, between NGOs and authority, at the provincial level. Moreover, she mentioned that there is a monthly meeting of the Executive Committee; with participation by relevant provincial departments, NGOs, and representatives of communities; which is open for ideas pertaining to development. Similar to Tiann Monie's ideas, a Cambodian NGO consultant, Mr. Chea Phalla said that policy can be integrated into various projects of NGOs for dissemination to indigenous communities. Moreover, the traditional authority would play important roles as partners for dissemination of the policy and they should also be given chance to prioritize projects for commune and village development.

In contrast to the NGO workers, a Jarai knowledgeable person, Mr. Sev Khamphorn, expressed his opinion that indigenous people should be directly responsible for the implementation. He gave the reasons that if the indigenous people depend on authority, they do not fully support indigenous communities. On the other hand, the community people understand well about what are the impacts on their lands and forest and know the good or not so good people for the indigenous community. He added that only people at commune level should be in charge of implementation but there should be some support from authorities at the district and provincial levels.

An experienced Cambodian NGO worker, Mr. Long Lun, said that the commune council would be the one who has more responsibility than others because the commune council has its office within the community and the members have been elected by the local residents. In addition, he stressed, commune council members know more both about the local traditional and relevant laws of the government, and also day-by-day situation in the locality. The composition of the implementers should be commune council members, indigenous elderly, chief of villages, and possibly someone from district authority.

Similar to Tiann Monie's opinion, an Australian expert, Mr. Brown, indicated that IMC, Department of Ethnic Minority would be the best for implementation of the policy. He also suggested that implementation of the policy should come through the

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indigenous peoples organizations, for example, the Highland Association, and the Natural Resource Management Network. He added the organizations would be able to explain issues to their own people in their own languages about the policy and also play other roles in implementation but the organizations would need to be given permission to play this role. NGOs can also have roles as well in implementation the policy, said Mr. Brown. Not just one agency plays the roles, the partnership between the IMC and community organization is important for implementation.

According to an indigenous government staff at the provincial level, Mr. Say Leun, the policy, if adopted, should be implemented by in cooperation between the government and NGOs because the RGC does not have any budget for policy implementation and it gets support from NGOs. He also added that the office for implementation should be based in the Provincial Department of Rural Development and the Provincial Department of Rural Development should have more responsibility for the implementation with participating by relevant departments and indigenous people.

5.2.5 Roles and Priority of Indigenous people

A. Lessons Learnt/ Past Experience

Based on a Tampuan knowledgeable person and also member of the Community Network, Mr. Pen Khat, indigenous communities in Ratanakiri province have been mapped. The mapping was conducted by the Provincial Environment Department if there was any request from indigenous communities to map. The process of mapping was identified and agreed by all of the traditional authority, community ethnic elders, based on the tracks of the old traditional boundaries recognized by neighboring indigenous communities. Before and after mapping the community members had been called for a meeting to disseminate the agreed boundaries. The mapping used the Global Positioning System (GPS) with participation from traditional authority, village development committee, village chiefs, commune chiefs, and the district authority. However, the boundaries resulted from mapping have been recognized up to the provincial level only. The mapping documents have been maintained by the village development committee for extension to community members on forest and land management.

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In addition, a Kreung knowledgeable person and also member of the Community Network, Mr. Thong Vay, said that the indigenous village boundaries were mapped in 2000-2003 in Ratanakiri province. He added that it took three days for the discussion among the elders and village chiefs from involved villages. After the agreement was reached, they began to identify and demarcate the boundaries between their villages. The NGOs supported field work of mapping and after the boundaries were mapped the indigenous community members established by-laws among themselves in order to classify the areas within the village boundaries. The classified areas are conservation, cemetery, water resource, mine deposit, bamboo, prohibition, cultivation, and others.

Based on the interview with a foreign consultant, Mr. Peterson, since 1998 – and even without an adopted policy or new land law – a project on land planning of indigenous people has been carried out. He also added that the section of indigenous community property in the 2001 Land Law was largely based on the experience from Krala village and other villages where land use planning based on the traditional tenure system projects had been conducted. The experience of implementing the previous projects had influenced the land law, therefore, the implementation of some form of monitoring the program will need to be followed or formatted in order to maintain consistency with this policy.

In addition, the Tampuan member of Community Network, Mr. Pen Khat, mentioned that the Natural Resources Management Community in each village played its roles based on the community by-laws only. If there are no by-laws, the community would not be able to perform any activities for protection the natural resources within the community. He raised an example that outsiders would ask for authorized documents when they came if the community prevented their activities from cutting or destroying the natural resources. The outsiders would stop their activities if the communities have enough authorized documents.

According to a government official in Ratanakiri province, Mr. Hem Chhon, indigenous communities presently have a better understanding of what is required for the protection of natural resources and the number of indigenous land issues have decreased. The establishment of the community committee contributed a lot to the better understanding of the communities regarding the protection natural resources. If

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the policy is adopted, it will contribute to strengthen the indigenous communities through the network on the protection of natural resources. He also added that the community committees had developed their by-laws for the protection the resources of their communities.

A Jarai knowledgeable person and member of the community network natural resource management, Mr. Sev Khamphorn, said normally he went to villages to educate indigenous people in his commune about the importance of land and not to sell lands because the community would not have land to settle. He advised the community members to plant cash crop trees for sale, for instance cashew trees. He advises villages that although the individual family may own the cash crop, the members do not own the land and are not allowed to sell it.

B. Proposed Roles of Indigenous people

In the opinion of a foreign expert, if the policy requires the boundaries to be identified or demarcated, between community and community, the role players in decision making should be prioritized to the communities elders and the new decision making structure within communities. He added that even in fact sometimes it happens that community leaders have been told to agree to what the authority told them where the boundaries were in order to keep the indigenous lands safe.

However, a Kreung government staff, Mr. Say Leun, expressed his ideas about the present village development committee (VDC) which has been established in every indigenous village. He mentioned that the committee would have the duty to implement the policy such as looking after and protecting their village boundaries if the draft GPHPD is adopted for implementation. The draft would be an effective instrument for the committee to follow or enforce because, for example, if there is no document of GPHPD, the work of village committee will not be effective in protection land within village boundaries. However, he also provided an alternative – an independent and impartial group, with participation from indigenous people and Khmer people who live in the highland areas. Such a group should be formed in order to be in charge of the implementation of this policy.

Related to the policy itself, this Kreung government staff and also an experienced NGO worker, expressed that the policy did not provide rights to

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indigenous communities to protect and manage natural resources and lands. Therefore, he suggested that the policy should state clearly that "indigenous communities have rights to participate in protection and management natural resources and lands by themselves."

His suggestion is not a new idea, as it has been mentioned in a number of relevant international laws. However, his suggestion has not yet been implemented for the indigenous people in Ratanakiri province. The rights to participation of indigenous people in natural resources management have been mentioned in a number of international laws. Relevant to rights to participation in natural resources management, article 15 of the ILO Convention No. 169 requires government to safeguard the rights of indigenous people to the natural resources pertaining to their lands and those rights include the right to participate in the use, management and conservation of these resources. In addition, the Declaration on the Rights to Development, article 8 (2), also states that "States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights."

Similar to the above opinions, another Kreung knowledgeable person, Mr. Thong Vay, said if the implementation involves the indigenous people; the elders, village chief, the existing village community committee; should play the roles in implementation. However, he expected some support from the authority for land safety and also technical, guidance, and finance from civil society.

In addition, a Tampuan member of Community Network, Mr. Pen Khat, would like to see the community committee implement the policy because this committee has been playing many roles for the communities and can educate community members frequently. He added, therefore, community committee members have to be invited to attend the training or workshop on policy in order that they can carry out community extension. He also expressed his concerns that if the village committee members do not attend the seminar, but only government authorities attend, the extension will not be effective because the authority would inform villagers about the policy and villagers may not completely understand their rights and the policy. He also added that if the communities understand well about the policy, after it is adopted, the community would strictly implement regardless of the district or provincial authorities

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in case of violation caused from them. He noted that normally, community members will organize themselves and go all together to protest anarchical activities over their natural resources.

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CHAPTER 6
DISCUSSION AND RECOMMENDATIONS

6.1 Discussion

A. Customary Land Use

Indigenous peoples usually settle in their ancestral lands and mostly the lands are in a marginalized area with a large space. They live differently from the major population by having a strong and collective attachment to their ancestral lands where they habitat (Davis: 1993). Indigenous peoples do not view land as a commodity which can be bought or sold in impersonal markets but they traditionally use land based on the customary law of the particular community. The customary land use of indigenous peoples has been found to be similar from one ethnic group to another for indigenous and tribal peoples in Asia, especially the practice of swidden agriculture for subsistent economy.

Swidden agriculture is a traditional cultivation system practiced by indigenous peoples especially in tropical areas. The pattern of swidden cultivation is similar among the indigenous and tribal peoples in South and Southeast Asia. This cultivation system is the inherited agricultural technique of indigenous peoples inherited from ancestral age, and illustrates that indigenous peoples have been connections with their ancestors' culture and way of life. The continuous practice represents that indigenous peoples have not abandoned their ancestors' land, but they have traditionally occupied the land from one generation to another. This means that the indigenous peoples have been physically present on their customary land continuously.

As James (1996) claimed, people are indigenous because their ancestral roots are imbedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands. Goodland (1991) found that the areas of the land inherited from the ancestors are the most important for the survival of the indigenous peoples and their culture. The continuous habitation in the areas is the most fundamental need for the tribal survival and cultural viability and their economic resource management, sociopolitical organization, and

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belief systems are woven into the particular land areas. A forced change in land use could endanger the well being of indigenous people and threaten the sustainability of their culture, which is closely tied to the land. Government has the responsibility under international law (see chapter 3) to respect customary land rights of indigenous people.

B. Land Law 1992 Vs Customary Land Use

Normally, swidden cultivation requires many plots of land for rotating, by leaving the land fallow after the current cultivating plot fertility is decreased. The period of fallow swidden plots is long or short depending on the quality of the soil. The method of soil recuperation was recognized in the 1992 Cambodian Land Law, article 70, but the provision implies the additional requirement of doing something in order to prove continuous possession: “the act to keep a low yield soil in order to make it fertilized cannot be considered as an abandonment. The manner of possessing the temporary possession in such condition during that period is considered as has continuously possessed.” In addition, article 68 appears to require that there must be activities on the lands in order to satisfy the requirement that the land is continuously possessed, as follows: "The temporary possessor shall continuously possess and maintain the temporary possession which means shall regularly do other things as usual without abandoning during any period of time that might contrast with the process of the property itself.”

The shifting of swidden plots is rotated within a recognized historical community boundary. The fallow swidden plots are not considered as abandoned plots by indigenous peoples but cultivated after a period of time. Therefore, the cultivating cycle means that indigenous swiddeners have continuously occupied the swidden plots, including both fallow and those plots being cultivated, because of the requirement of the swidden agricultural system. While there was ambiguity in the 1992 Land Law about the rights of indigenous peoples to their customary land, the ambiguity was clearly resolved in the 2001 Land Law, which specifically addresses the swidden cultivation system at article 25 paragraph 2, which states that “the lands of indigenous communities include not only lands actually cultivated but also includes [lands] reserved necessary for the shifting of cultivation which is required by the agricultural

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methods…" According to concepts of the continuous occupation on the lands, including swidden plots of both actual cultivation and fallow plots, the indigenous peoples in Cambodia have possession rights over their swidden cultivation lands. Therefore, given the ambiguity of the 1992 Land Law and the strengthening of those rights in the 2001 Land Law, the indigenous peoples' swidden lands cannot be considered to have been subject to article 76 of the 1992 Cambodian Land Law, which stated that "any land which the temporary possessor has abandoned for three consecutive years shall become the private domain of the state." Therefore, the granting land concessions of the government to private companies which overlapped the indigenous peoples' swidden cultivation lands constitutes a violation of customary land rights of indigenous communities in Cambodia.

Many key informants suggested that it was too late to resolve all the violations of the customary lands of indigenous peoples in Ratanakiri province and to think about the prevention of the future violations. The suggestion probably arises from their experience pertaining to advocacy to produce legal protection on customary land rights and insufficient response from the government to accept the ideas from civil society. For instance, it took exhaustive advocacy on the part of civil society and international agencies to produce the GPHPD, which was subsequently ignored by the government. There was reluctance, mentioned in chapter 4, on the part of the government to integrate the chapter on indigenous peoples' property rights in the new land law. In addition, the resolutions of past violations through the judicial system have not been successful and have been unjust for the indigenous peoples. Nevertheless, it seems unjust simply to ignore violations and this will be argued in section D.

C. Land Law 2001 Vs GPHPD

The Land Law 2001 is the first land law that explicitly recognizes traditional land use rights of indigenous people in Cambodia. Many NGOs believed that chapter 3 of the 2001 Land Law, on immovable property of indigenous communities, was developed from the draft GPHPD. This section will focus on whether chapter 3 of the 2001 Land Law agrees with the draft GPHPD and to what extent there are contradictions between these two documents.

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It is clear that the 2001 Land Law 2001 does not speak at all about the special relationship that indigenous people have with their lands such as sacred lands and religious sites (rather than swidden plots which are recognized by the law), which is the most important element for them to have customary land rights. In contrast, the draft GPHPD states that the government will respect this relationship and traditional and neighboring lands and natural resources, which indigenous peoples depend upon for their livelihood (2.1). In addition, the draft GPHPD requires the government to identify and protect the lands which are traditionally used and occupied by the indigenous people without conditions (2.2). However, the 2001 Land Law, article 23, tries to characterize the communities in a legal context in order to be subjected under the land law, and then sets a limitation for the land of the indigenous communities only with residential and traditional cultivation lands (article 25), and the traditional agricultural practice has to be recognized by the administrative authorities.

Similarly, both documents recognize the traditional agricultural system of the indigenous people but the draft GPHPD additionally considers the appropriate forest products gathering for support livelihoods as the valid form of land use of indigenous people (2.5).

Contradictorily, while the draft GPHPD requires the government to establish adequate procedures to resolve all land claims and to respect the existing indigenous procedure for transforming land rights (2.8) in the hope that the indigenous community members will be unified and maintain their unique tradition, the Land Law 2001, article 28, provides the rights of transferring the adequate share of individual ownership from the land used by communities. This provision seems to encourage the indigenous community members to assimilate with the majority culture and practice other farming methods instead of the recognized swidden cultivation. Providing for individual rights under article 28 may be used to break down the community rights practiced by the unified indigenous communities.

The 2001 Land Law does not provide any compensation for the indigenous communities that lost their lands in the past and it does not include a policy against relocation of the indigenous peoples from their lands. In contrast, the draft GPHPD requires the government to provide indigenous peoples with effective remedies for any unlawful intrusion or encroachment upon their lands (2.6). Finally, the draft GPHPD,

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prohibits the government from relocating the indigenous people from lands they occupy, however if the relocation is necessary as an emergency case which creates danger to the Cambodia nation, the relocation shall be taken place on the basis of the free and informed consent of the affected persons (2.11). This provision is similar to the international laws article 15 of ILO Convention 169 and the article 27 of the Draft UN Declaration on the Rights of Indigenous Peoples.

These international laws state clearly that compensation is to be provided for the affected concerned people. ILO Convention 169, article 15, requires the governments to compensate concerned people for any exploration activities which damaged their lands and natural resources or in case of relocation, indigenous people have rights to return or receive compensation from the government if the return is not possible and they prefer to do so. In addition, the Draft UN Declaration on the Rights of Indigenous Peoples, article 27, provides indigenous peoples rights to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. But if restitution to the lands is not possible the, indigenous people have rights to just and fair compensation.

The absence of these points in the 2001 Land Law, makes indigenous peoples vulnerable by cutting off the continuously physical presence on the customary land used since the time of their ancestors. This will not allow the indigenous peoples to claim for the customary land rights over their customary land that they have maintained for centuries. The absence of the core element of relationship to lands in the land law has an especially harsh result since the past violations allegedly involved conflict of interests, lack of protection by the government, and misuse of power on the part of some government officials related to land speculation in indigenous peoples customary lands. It seems that the government does not intend to do what is required to protect customary land rights of indigenous people, which can also be seen from the fact that government has still not implemented the GPHPD.

D. Resolutions of Past Violations of Customary Lands

It is still possible to resolve the past violations on the customary lands of the indigenous people in Ratanakiri province in particular and indeed it would be unjust

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not to do so. First of all, we have to look at the categorized violations on the customary land violations. There are three types of violations: granting concessions, protected areas establishment, and land speculation.

The first category of violations, which have been caused by granting land and forest concessions, involved the government and private companies, for these grants were created by contracts entered into by the government and the concessionaires and including some provisions relevant to the indigenous communities. For example, The Hero Company Management Plan (section 11.5.1) excludes the logging operation within the areas of important sites to culture and tradition, areas which communities wish to protect, and areas where traditional use of forest is threatened by logging. The problems relevant to the indigenous communities included breaches of the Operation Plan mentioned by the government. The mentioned areas were not unknown by the company, however, the communities were not consulted to identify those indigenous communities' sacred areas. Therefore, the breach of these provisions by the concessionaires is a basis for the government to cancel the concessions. Civil society and indigenous communities should advocate to the government concerning the breach of the contract by the company in the hope of canceling or revising the contract.

Similar to the forest concession, the granting of land concessions that overlapped the indigenous peoples' customary lands was the result of unclear geographical information at the top level and the lack of information regarding the locations of the indigenous communities. As mentioned in chapter 2, the Oil Palm Company promised to build infrastructure such as houses for the poor people, a road, a school, and a hospital in the areas of concession. Moreover, the projects of the Oil Palm Company has ceased for unknown reasons. It is generally accepted that the company did not fulfill their obligations mentioned in the project submitted to the government. Therefore, the company breached the contract they had with the government, which for a basis for its termination.

The two cases mentioned above are the violations of the projects signed by the government. The government can take action to resolve the breaches of these contracts by canceling or reviewing the contracts of concession. At this critical situation, if there is any reasonable and strong demand from indigenous communities, with support from NGOs, before the registration of communal land title arrives, the government may

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take into consideration the proposal for resolutions of the concession violations. The International Development Agencies which are involved in land reform in Cambodia should advocate for the introduction of practical mechanisms relevant to customary land rights of indigenous peoples that are in their respective policies on indigenous peoples. For example, ADB played an important role in advocating for integrating the chapter on indigenous property in the 2001 Land Law at a critical time when it was generally believed that the chapter on indigenous peoples land rights was on the verge of being excluded from law.

In other countries, an independent institution has been established to deal specifically with indigenous people's customary land rights including past violations and future protection. For instance, in Canada, due to the British Columbia Treaty Commission (1999), the Commission was established for negotiation of the comprehensive lands claims. The Commission has a mandate to facilitate the negotiation of modern treaties, known in Canada as comprehensive land claims; in the province of British Columbia. The comprehensive claims are based on claims to aboriginal title arising from traditional use and occupancy of land.

The Commission consists of five Commissioners: two nominated by the First Nations Summit, one nominated by each of the federal and provincial Governments, and a chief Commissioner chosen by all three principals. The Treaty Commission is an independent and neutral body responsible for facilitating treaty negotiations among Canada, British Columbia and First Nations in British Columbia province. It oversees the treaty negotiation process to make sure the parties are being effective and making progress in negotiations.

The Treaty Commission is responsible for accepting First Nations into the treaty process, and assesses when the parties are ready to start negotiations. It develops policy and procedures applicable to the six stage treaty process, monitors and reports on the progress of negotiations, identifies problems, offers advice and sometimes assists the parties in resolving disputes. It allocates negotiation support funding, primarily in the form of loans, to First Nations in the treaty process.

A part from the negotiation process role, the Treaty Commission has a major role to play in public information and education aiming to raise public awareness and understanding of the historical and legal reasons for treaty making and the Treaty

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Commission's role in the British Colombia treaty process, and to provide public information on the treaty process, the Treaty Commission and the status of negotiations at each table.

According to the Special Rapporteur (Daes: 2001) through the negotiation mechanism, the indigenous communities have received many kinds of benefits. Sometimes the indigenous peoples received full rights over the claimed lands and have rights to harvest forest and wildlife, financial compensation, resource revenue-sharing; specific measures to stimulate economic development; and a role in the management of heritage resources and national parks of the settlement area. Co-management arrangements have reflected the principle of parity of membership between Aboriginal and government representatives; and have respected and incorporated the traditional knowledge of Aboriginal people, as well as scientific knowledge.

The resolution of the past violations, I believe, will not slow down the economic development but will avoid the continued suffering of local indigenous communities in the development areas, and the local indigenous communities and government will benefit from the economic development. Resolving the past issues will also build trust to new investors that there will not be any problem for the investment in the future and they can expect to have good cooperation with indigenous communities. Alternatively, Ratanakiri province has great potential for economic development in eco-tourism according to indigenous experts (mentioned in chapter 5). As Colchester (1994) mentioned, "ecotourism has now become big business and profit-sharing with local people has been a popular way by which conservationists have hoped to reconcile indigenous people with protected areas." Therefore, other sectors of development should be studied rather than agricultural plantation per se.

On the other hand, based on the Declaration on the Rights to Development (DRD), human beings are the central subject of development, and everyone has responsibility for development. This means that economic development, raised by the Cambodian government, is not the responsibility of the government alone but also every Cambodian person, including the indigenous people within Cambodia. The indigenous communities have the right to participate in the formulation of economic plan (Article 2 of DRD). Therefore, the land and forest concessions can be revised by

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the government and reflect consultation with the affected indigenous communities. Article 1 of the DRD mentions that the right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate.

Regarding the Protected Areas, mentioned in chapter two, indigenous peoples have been relocated from their ancestral lands by the previous regimes based on reasons of insecurity, and without consideration of the social impacts. Now that there is security in the region, there relocated indigenous peoples should be returned to their ancestral lands within Virakchey National Park within an appropriate time and according to appropriate procedures. The return to the ancestral sites will be important for indigenous people themselves and the protected areas. The indigenous people will resume their special relationship to ancestral lands and practice swidden agriculture within the historical boundaries. The swidden cultivation will not damage the environment, for as Goodland (1991) noted, the swidden agriculture method used in tropical forest land use does not damage the environment when practiced by appropriate number of people. Moreover, as Ghai (1992) argued, "indigenous peoples have a deep and intimate knowledge of the local ecology, the flora and the fauna, a knowledge born out of centuries of constant interaction with the environment and handed down from generation to generation." Ghai (Ibid) also continued that "such knowledge and skills are indispensable in evolving responses to changing material conditions to preserve and enhance environmental quality." Moreover, the presence of the indigenous peoples in the protected areas can contribute to assess the relevance and validity of the solutions to environmental problems devised by outsiders. As Colchester (1994:30) quoting from Schaller (1993) stated, "Conservation cannot be imposed from above. Any conservation effort must involve the local people, based on their interests, skills, self-reliance, and traditions, and its must initiate programs that offer them spiritual and economic benefits…"

E. State Sovereignty Vs Indigenous People's Rights

The rights of self-determination of indigenous people do not mean that indigenous people have rights to establish self-government within one state. Particularly, the indigenous people in Ratanakiri province do not have rights to establish their independent state within Cambodia. Article 13, of the ILO No. 169,

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states clearly that the term “territories and/or lands” which is mentioned by the convention, and for indigenous peoples, does not implicate any national sovereignty or ownership but includes the total environment of the areas. Moreover, the article realizes that the cultural relationship to lands and traditional agricultural land can not be clearly separated from the surrounding environment due to the cultural practice and agricultural methods requirement and the recognition of indigenous peoples’ land areas gives them a stable base for economic, social, and cultural undertakings and future survival. In addition, according to Colchester (1994) the resolution of the 1982 World National Parks Congress, held in Bali, Indonesia, affirmed the rights of traditional societies to the social, economic, cultural and spiritual self-determination, but significantly not political self-determination. This view is consistent with article 3 of the 1993 Constitution of Cambodia, which provides that the “Kingdom of Cambodia is an indivisible State.”

The indigenous people in the highland area go along well with the majority Khmer. They consider themselves as Khmer and refer to themselves as “Khmer Leu”, literally meaning “Upper Khmer”, because they live in the upper land of the country. Historically, it is believed that ancient people, presently the indigenous groups in the northeastern highland, share the common ancestry with lowland Khmers. According to White (1996), the analytical studies of the myth origin showed that all of the highland groups allude to the notion of a common ancestry with early Khmers. Moreover, Hean (1996) stated that the indigenous people like the term “Khmer Leu” because the word refers to a general word which does not belong to any specific ethnic group.

Therefore, by using the word of Khmer, the indigenous people imply that indigenous people do not have any attempt to create an independent state within Cambodia, but intend to live as Cambodians who have rights to maintain their culture and traditional land use passed from generations. Significantly, there is no documentation that shows that indigenous people manage to separate territory from Cambodia, especially after Cambodia independence in 1953. In conclusion, there is no basis for indigenous people to declare an independent state, especially if the government provides minimal rights to self-determination on their land management through traditional agricultural practices.

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F. Future of Indigenous People

The traditional land violations against indigenous people in Ratanakiri have been occurring since the social and political changes in early 1990s. As mentioned in chapter two, the violations have been transformed from large scale plantations to small scale private plantations in recent years. The early violation was caused by the government's granting of concessions to private companies for industrial agricultural plantations and log cutting. During that time the density of the population was low in Ratanakiri province, and there was less in-migration, then large space of land were granted for private companies in the name of national economic development.

Later on, from the late 1990s until the present, the in-migration of the Khmer lowlanders has increased significantly in Ratanakiri province. The increase of lowland Khmers has increased the demand for more lands for them for settlement, small scale plantations, and land speculation. As a result, the traditional land use of indigenous people is threatened and negative impacts have affected the indigenous communities. The violation on traditional lands of indigenous people has never been resolved properly since the customary laws are generally ignored by the judicial system, and legal-based resolution has made indigenous people more vulnerable on traditional land ownership.

The 2001 Land Law, as mentioned earlier, is the first Cambodian Land Law which explicitly recognizes traditional land use of indigenous communities in Cambodia. However, the relevant sub-decree, on registration communal land title of indigenous communities required by the land law, is still at the drafting stage. As a result, the traditional land violation in Ratanakiri province has continued, as mentioned in the case study of land speculation with help from local authority, after the promulgation of the new land law. This shows that even with the promulgation of the new Land Law, there are continued difficulties in preventing the traditional land violation of the indigenous communities, especially through land speculation. Since the sub-decree on communal land registration for indigenous people takes time to complete, traditional land is still being threatened by land speculations. Until all traditional lands are registered, it will be difficult to prevent further violations. However, the problem is whether the past violations will be resolved by the sub-

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decree before conducting communal land registration in the future or whether the communal land registration will be conducted only for those remaining customary lands of the indigenous communities. If the registration is conducted for the remaining lands, the past violation will be legalized and indigenous people continue to suffer spiritually and economically, and without the benefit of any compensation.

The draft GPHPD, which was finalized in 1997, occurred at the right time in the middle of the granting concessions and at the beginning of the land speculation in Ratanakiri province. The draft GPHPD consisted of many positive points for resolution and protection of customary lands of indigenous people. However, the draft GPHPD has been ignored since it was completed. The failure to adopt and enforce this important policy permits the continued violation over the customary land of indigenous peoples. Without adoption of the draft GPHPD, the traditional land will continue to be lost pending the future registration of communal land titles.

If the draft GPHPD is adopted before the establishment of the sub-decree on communal land registration, the past customary land violations of indigenous people would be resolved and it would paves the way for a smooth process of the communal land registration. In addition, the traditional authority of the indigenous communities will be more effective and active in local natural management through customary laws. The natural resources will be sustained under the protection and traditional agricultural method of indigenous communities.

6.2 Recommendations

1. Civil society and relevant stakeholders should resume their work to update and review the final draft GPHPD by integrating the resolution of past violations of customary lands of indigenous people.

2. Civil society, members of the international community, and donors should play a role to encourage government to adopt the updated draft GPHPD. If it is possible the draft GPHPD should be promulgated as a Royal Decree or Sub-decree on Indigenous People's Rights and Development (IPRD).

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3. An independent Institution/Secretariat of IPRD should be established or transformed from IMC to be in charge of Indigenous People's Affairs. The Institution/Secretariat should begin its work prior to the process of communal land registration. Therefore, the Institution/Secretariat should conduct research or take a census on the indigenous population, existing traditional lands, and the affected-traditional land claims. The results, which should include findings and recommendations, should be submitted to the RGC for appropriate resolution.

4. The roles of Institution of IPRD should rely on the experience of the British Columbia Treaty Commission including the composition and roles of the Commission.

5. The World Bank and ADB should provide technical and financial support to the Institution of IPRD to develop the necessary documents, consistent with their policies on Indigenous Peoples and other international laws. In addition, these development agencies should encourage the government to approve legal documents for the implementation of the Institution of IPRD pertaining to customary land rights.

6. The Secretariat and the Council for Land Policy should work closely with the Institution of IPRD before and during the communal land registration process.

7. The RGC, based on the findings and recommendations of the Institution/Secretariat, should take appropriate measures, revise or cancel the forest and land concessions, to resolve the affected traditional lands of indigenous communities.

8. The indigenous people should establish their network between communities in Ratanakiri province to share experiences about traditional land management and to make their views known to the RGC.

9. The indigenous people in Ratanakiri province should initiate some projects within their communities in order to get recognition and endorsement from the government.

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10. The NGOs should provide financial and technical support to the network of indigenous peoples in running and developing the activities of the network. In addition, the NGOs should initiate connections between the network of indigenous people in Ratanakiri province and indigenous people's network in other countries in order to build capacity in dealing with the management of community and customary land rights.

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BIBLIOGRAPHY

ADB, Policy on Indigenous Peoples, Definition of Indigenous Peoples, 1994. http://www.adb.org/Documents/Policies/Indigenous_Peoples/IPPP.pdf Access on 18 February 2004.

ADB, Indigenous Peoples/Ethnic Minorities and Poverty Reduction Cambodia, Manila, Philippines, 2002. http://www.adb.org/Documents/Reports/Indigenous_Peoples/CAM/default.asp Access on 18 February 2004.

Anaya James S., Indigenous Peoples in International Law, Oxford University Press, 2000.

Baird I., Tubtim K, Baird M. The Kravet and the Kreung: Observations of Livelihoods and Natural Resources in Two Highlanders Villages in the Districts of Veun Say and Ta Veng, Ratanakiri Province, Cambodia, Cambodia, 1996.

Baird I., The Ethnoecology, Land use, and Livelihoods of the Brao-Kravet Indigenous Peoples in Kok Lak Commune, Veun Say District, Ratanakiri Province, Northeast Cambodia; Cambodia; 2000.

Bodley J., Editor, Tribal Peoples and Development Issues: Global Overview, Washington State University, California, 1988.

Cambodian Human Rights and Development Association, Complaint Code No. 033/RTK/2003, Ratanakiri Province, Cambodia, 2003.

Camille B., An Economic Analysis of Tropical Forest Land Use Options, Ratanakiri province, Cambodia, 1997.

CARERE, NTFP, and IDRC, Seminar on Security of Land Tenure for Ethnic Minorities in Ratanakiri province, March 1997.

Chayan Vadhanaphuti and White C., Enhancing the Capacity of the Inter-Ministerial Committee for Highland Peoples Development in the North-East of Cambodia, UNDP-HPP, Phnom Penh, no date.

Colchester M., Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation, UNRISD, Geneva, Switzerland, 1994.

Copyright by Mahidol University

Colm S., Option for Land Security among Indigenous Communities Ratanakiri, Cambodia, Cambodia, 1997.

Colm S., Effects of Oil Palm Plantation Development on Indigenous Communities Ratanakiri Province, Cambodia, Natural Resource Management Project, May 1996

Daes A. E., "Indigenous Peoples and their Relationship to land", 2001. In Alfredsson G. and Stavropoulou M., 2002, "Justice Pending: Indigenous Peoples and Other Good Causes, Kluwer Law International, The Hague, The Netherlands.

Davis H. S., editor, "Indigenous Views of Land and the Environment", World Bank Discussion Papers 188, Washington D.C., 1993.

Davis H. S., "The World Bank and Indigenous Peoples", no date. http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/TheWorldBankAndIndigenousPeoples1999/$FILE/WBandIndigenousPeoples.pdf Access on 14 February 2004.

Forest People Programme, Summary of Issues and Concerns Regarding the Revision of the World Bank's Indigenous Peoples Policy, England, 2001.

Fox J., Mapping a Changing Landscape: Land Use, Land Cover, and Resource Tenure in Northeastern, Program on Environment, East-West Center, Honolulu, Hawaii, (no date.)

Goodland R., "Prerequisites for Ethnic Identity and Survival." In West C. P. and Brechin R. S., 1991, "Resident Peoples and National Parks: Social Dilemmas and Strategies in International Conservation", The University of Arizona Press, Tucson.

Ghai D., Conservation, Livelihood and Democracy: Social Dynamics of Environmental Changes in Africa, UNRISD, Geneva, Switzerland, 1992.

Griffiths T. and Colchester M., Indigenous Peoples, Forests and the World Bank: Policies and Practice, Forest People Programme, England, 2000.

Hallman G. D., Ecotheology: Voice from South and North, editor, WCC Publications, Geneva 2, Switzerland, 1994.

Copyright by Mahidol University

Hayami Yoko, Challenges to Community Rights in the Hill Forests: State Policy and Local Contradictions-A Karen Case, 7th International Conference on Thai Studies, Amsterdam, 4-8 July, 1999.

Hean Sokhom, The Khmer Leu in Ratanakiri and Mondulkiri. In Interdisciplinary Research on Ethnic Groups in Cambodia, Phnom Penh, Cambodia, 1996.

High Court of Australia, Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (12 December 2002), http//:www.austlii.edu.au/au/cases/cth/high_ct/2002/58.html, Access on 9 January 2004

Human Rights Watch, Repression of Montagnards: Conflict over land and religion in Vietnam's Central Highlands, New York, 2002.

ILO, Convention No. 169: Its Nature and Fundamental Principles, Last Updated April 1998, http://www.ilo.org/public/english/employment/recon/eiip/publ/1998/169guide/169guide.htm#C1, Access on 16 January 2004.

ILO, A manual: ILO Convention on Indigenous and Tribal Peoples, 1989, (No. 169), 2000. http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/manual.pdf, Access on 8 January 2004.

IMC, General Policy for Highland Peoples Development, Final draft, Cambodia, 1997

IMC, National Workshop on Use and Management of land and Forest Resources, Indigenous Communities in Northeast Cambodia, Cambodia, 1999.

IMC, Report of Workshop on Improvement of Policy for Highland Peoples Development in Cambodia, Cambodia, 1997.

John P. McAndrew, Indigenous Adaptation to a Rapidly Changing Economy: The Experiences of the two Tampuan Villages in Northeast Cambodia, CIDSE Cambodia, Phnom Penh, August 2000

Kingdom of Cambodia, Ministry of Environment, Biodiversity and Projected Areas Management Project, Project Implementation Plan, December 1999.

Kingdom of Cambodia, Land Law of Cambodia, Phnom Penh, 2001.

Copyright by Mahidol University

Kymlicka W., "The God, the Bad, and the Intolerable: Minority Group Rights", 1996. In Hayden P., 2001, "The Philosophy of Human Rights", Paragon House, University Avenue West, United States.

Legal Aid of Cambodia (LAC), Cambodian Association for Human Rights and Development (ADHOC), Oxfam Great Britain, and Human Rights Watch, Cambodia: Landmark Indigenous Land Rights Case To Be Heard in Ratanakiri Provincial Court, 2001, http://www.hrw.org/backgrounder/asia/landrights-bck.htm, Access on 18 May 2003.

McCausland C., Spiritual Health and Natural Resources. In International Conference on Strengthening Partnerships in Community Natural Resource Management, Ratanakiri Province, Cambodia, 2001.

Ministry of Environment, Cambodia, Concepts on Protected Areas Management, Phnom Penh, 1995.

Moses T., 1997, "Renewal of the Nation". In Alfredsson G. and Stavropoulou M., 2002, Justice Pending: Indigenous Peoples and Other Good Causes, Kluwer Law International, The Hague, The Netherlands.

NTFP Project, The Natural Resources and Livelihood Study; Ratanakiri province, Northeast of Cambodia, Cambodia, 1997.

NTFP Project, "Workshop on Community Forest Protection Poey Commune". In Colm S., 1997, "Option for Land Security Among Indigenous Communities", Ratanakiri, Cambodia.

Office of the UNHCHR, "Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples", Geneva, 2003. http://www.unhchr.ch/indigenous/Barnes-BP21.doc, Access on 17 March 2004.

Ojendal J., Hassenskog M., Lilja M., Sith Samnith and Wallgren P.; Addressing Anarchy: Decentralization and Natural Resource Management in Ratanakiri Province, Northern Uplands of Cambodia; Stockholm Environment Institute; Stockholm; 2001.

Copyright by Mahidol University

Paterson G., Traditional Resource Tenure and Livelihood Systems of Ethnic Minorities in Ratanakiri Province, Cambodia: "Responding to Rapid Change.", Regional workshop 8-10 April 1997, Phnom Penh, Cambodia, 1997.

Pelzer J. K., "Swidden Cultivation in Southeast Asia: Historical, Ecological, and Economic Perspectives". In Kunstadter P., 1978, Farmers in the Forest, East-West Population Institute, University Press of Hawaii, Honolulu.

Power P. A., Land Mobilization Programme in PaPua New Guinea, PaPua New Guinea, July 2001, http://www.pngbuai.com/300socialsciences/management/land-development/indigenouslandgroupsregistration1.html, Access on 9 March 2004.

PRDC, Provincial Land Title Department, CARERE, NTFP and IDRC, "Seminar on Security of land Tenure for Ethnic Minorities in Ratanakiri Province." In Colm S., 1997, "Option for Land Security among Indigenous Communities", Ratanakiri, Cambodia.

Ratanakiri PRD, MOE, Ratanakiri Provincial Environment Department, Ratanakiri Provincial Culture Department, CIDSE, UNDP-CARERE, NTFP, ADHOC, and Virak Chey National Park, Cultural Resource Study: Impacts of the Hero Taiwan Company Concession on Site of Religious and Cultural Significance in O' Chum District, Ratanakiri, Cambodia, 2000.

Ratanakiri PRDC, CIDSE, CARERE/IDRC, NTFP, ICC and Health Unlimited, International Conference on Strengthening Partnerships in Community Natural Resource Management; March 6-8, 2001, Volume I & II, Cambodia, 2001.

Roy R. D., "Occupations and Economy in Transition: A Case Study of the Chittagong Hill Tracts". In ILO, 2000, Traditional Occupations of Indigenous and Tribal Peoples: Emerging Trends, Cnossos/Dumas-Titoulet Imprimeurs, France.

Russell R., A Clash of Cultures: Land Law and Land use Issues in Ratanakiri Province in Cambodia, University of the South Pacific, Fiji, 1998

Sadruddin Aga Khan and Hassan bin Talal, Indigenous Peoples: A Global Quest for Justice, Zed Books Ltd., London and New Jersey, 1987.

Sengupta Arjun, The Right to Development as the Human Right, the paper for Harvard School of Public Health, December 1999.

Copyright by Mahidol University

http://www.hsph.harvard.edu/fxbcenter/FXBC_WP7--Sengupta.pdf, Access on 8 August, 2004.

Seng Narong and Moul Phat, The Three Training Workshops on Highland Development Management in Cambodia, IMC, Phnom Penh, 2000.

Simbolon I., Access to Land of Highland Indigenous Minorities: The Case of Plural Property Rights in Cambodia, Draft Working Paper, April 2002.

Sugiarti S., A preliminary Socio-Economic study of Ratanakiri province of Northeast Cambodia, IDRC/CARERE, 1997

Tennant A., "UNTAC's 'top-down' approach: insensitivity or pragmatism?" http://www.c-r.org/accord/cam/accord5/acc3.shtml#Annex%205, Access on 9 March, 2004.

The Raoul Wallenberg Institute Human Rights, Justice Pending: Indigenous Peoples and Other Good Causes, Edited by Gudmundur Alfredsson and Rolf Ring, Kluwer Law International, Hague, The Netherlands, 2002.

Tiann Monie, Report on the Land Rights of Indigenous Communities in Cambodia, UNDP/CARERE, IDRC, Cambodia, 2000.

Ting Peap and Tiann Monie, Land Conflict Resolution at the District Level, Indigenous Women's Network Ratanakiri province, Cambodia, no date.

United Nations, Declaration on the Rights to Development, Adopted General Assembly in December 1986.

United Nations, Seeds of A new partnership: Indigenous Peoples and the United Nations, United Nations, New York, 1994.

United Nations, Report of the World Conference on Human Rights, A/CONF.157/24, October 1993. http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.24+(PART+I).En?OpenDocument, Access on 17 March 2004.

United Nations, United Nations Guide for Indigenous Peoples, no date. http://www.unhchr.ch/html/racism/00-indigenousguide.html, Access on 17 March 2004.

UNDP, Leaflet No. 11: UNDP and Indigenous Peoples, not date, New York, NY 10017, USA.

Copyright by Mahidol University

http://www.unhchr.ch/html/racism/indileaflet11.doc, Access on 17 March 2004.

UNHCHR, Expert Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, Geneva, 2003. http://www.unhchr.ch/indigenous/Barnes-BP21.doc, Access on 17 March 2004.

Wallgren P. and Watt L., "Literature Review". In World Bank, 2002, "Cambodia: Rural Investment and Local Government Project Indigenous Upland Ethnic Minorities Impact Screening Study", Phnom Penh, Cambodia.

Way F., and Beckett S., Governance Structures for Indigenous Australians on and off Native Title Lands: Discussion Paper 4 - Land- Holding and Governance Structures under Australian Land Rights Legislation, University of New South Wales and Murdoch University. http://www.austlii.edu.au/au/other/IndigLRes/1998/3/4.html, Access on 8 January, 2004.

White J., "The Indigenous Highlanders of the Northeast: Uncertain Future". In Center for Advanced Study, "Interdisciplinary Research on Ethnic Group in Cambodia, Final Draft Report, Phnom Penh, Cambodia, 1996.

Williams S., Where has all the land gone? Land Rights and Access in Cambodia, Oxfam GB, Phnom Penh, Volume 1, Cambodia, 1999.

World Bank, General Guideline, no date. http://www.worldbank.org/afr/ik/guidelines/generalguides.pdf, Access on 15 March 2004

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APPENDIX A

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INTERVIEW GUIDE REGARDING GENERAL POLICY OF HIGHTLAND PEOPLES' DEVELOPMENT

1. Could you describe how the Indigenous Peoples participated in the process of the drafting the General Policy?
2. Why do you think the General Policy has not been adopted? What have been the obstacles?
3. How would you like to see the obstacles overcome?
4. Do you think that the General Policy is helpful for the Indigenous Peoples? In what ways?
5. If the General Policy is adopted, how do you think it should be implemented? Or what is the position of *your organization* on the implementation of the General Policy?
6. In your opinion, what are the obstacles for the implementation?
7. In your opinion, who is in charge of the implementation of the General Policy?
8. Who will participate in the implementation of the General Policy?
9. What procedure will be used for the implementation of the General Policy?
10. How was the procedure formulated? By whom?
11. How do the Indigenous Peoples identify customary lands?
12. How does the Policy define the customary lands?
13. Who should participate in the actual demarcation of the customary lands?
14. After the demarcation, how do indigenous peoples recognize the customary lands?
15. How will the procedure of the endorsement be formulated and implemented?
16. In your opinion, how will the Policy prevent demarcated customary lands from being abused?
17. How does the Policy resolve the issue of formerly occupied and used customary lands of the Indigenous Peoples?
18. How does the Policy resolve the issues of violation, intrusion, encroachment and swindling vis a vis customary lands?

Note: the word "traditional lands" has the same meaning as the word "customary lands" in the Khmer word used " Dei Prapei nei"

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APPENDIX B

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NAME OF KEY INFORMANTS

No.	Name	Ethnic group or Work
1	Mr. Graeme Brown	Indigenous Expert, Advocacy Network
2	Mr. Gordon Peterson	NGO Consultant, NTFP
3	Mr. Meas Samay	Former Government Officer/ presently NGO staff, NTFP
4	Mr. Hem Chhorn	PRD government officer
5	Mr. Him Samith	NGO Officer, CIDSE
6	Mr. Chea Sambo	NGO Officer, CIDSE
7	Mr. Long Lon	NGO staff, CIDSE
8	Ms. Tiann Monie	Former Ratanakiri-based NGO Representative, NGO officer
9	Mr. Chea Phalla	NGO Consultant, PLG
10	Mr. Pen Khat	Tompuan/Community Network member
11	Ms. Tin Pip	Tompuan/District government staff
12	Mr. Say Leun	Kreung/government staff and Community Network officer
13	Mr. Thorng Vay	Kreung/Community Network member
14	Mr. Long But	Jarai/Community Network member
15	Mr. Sev Khamphorn	Jarai/ Community Network member

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APPENDIX C

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CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES (ILO No. 169)

(Part II. Land)

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

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2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

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2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) The provision of the means required to promote the development of the lands which these peoples already possess.

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APPENDIX D

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DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

(Part VI)

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

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Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

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APPENDIX E

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CAMBODIAN LAND LAW 2001
(Part 02: Immovable Property of Indigenous Communities)

Article 23

An indigenous community is a group of people who reside in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use.

Prior to their legal status being determined under a law on communities, the groups actually existing at present shall continue to manage their community and immovable property according to their traditional customs and shall be subject to the provisions of this law.

Article 24

An individual who meets the ethnic, cultural and social criteria of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered to be a member of the indigenous community and is eligible to have the benefit of the guarantees, rights (rights guarantees?) and protections provided by this law.

Article 25

The lands of indigenous communities are those lands where the said communities have established their residence and where they carry out traditional agriculture.

The lands of indigenous communities include not only lands actually cultivated but also includes reserved necessary for the shifting of cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities.

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The measures and demarcating of those immovable properties of indigenous communities shall be determined according to the factual situation as asserted by the communities, in agreement with their neighbors, and as prescribed by procedures in Title VI of this law and relevant sub-decrees.

Article 26

Ownership of the immovable properties described in Article 25 is granted by the State to the indigenous communities as communal ownership. This communal ownership includes all of the rights and protections of ownership as are enjoyed by private owners under this law, but the community does not have the right to dispose of any communally owned property that is State public property to any person or group.

The exercise of all ownership rights related to immovable properties of a community and the specific conditions of the land use shall be subject to the responsibility of the traditional authorities and mechanisms for decision-making of the community, according to their customs, and shall be subject to the laws of general enforcement related to immovable properties, such as the law on the environmental protection.

The provisions of this article are not an obstacle to the undertaking of works done by the State that are required by the national interests or a national emergency.

Article 27

For the purposes of facilitating the cultural, economic and social development (evolution or progress) of members of indigenous communities and in order to allow such members to freely leave the group or to be relieved from its constraints, the right of individual ownership of an adequate share of land used by the community may be transferred to them.

Immovable property that is subject to such private individual ownership cannot be fall under the general definition of public properties of the State.

Article 28

No external authority other than the community may acquire any rights on immovable properties belonging to an indigenous community.

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APPENDIX F

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GENERAL POLICY FOR HIGHLAND PEOPLES' DEVELOPMENT

(Final Draft, September 1997)

Section 2: Land

2.1. The Government respects the special relationship Highland peoples have with their traditional and neighboring lands, from which they depend for their livelihood and use natural resources.

2.2 The Government shall make sure that the lands Highland Peoples traditionally occupy and use are identified and protected.

2.3 With the agreement of the Highland People's community and the Land Title Authority, the Government shall recognize, endorse and protect traditional land use rights and the demarcation of the lands within village boundaries. The PRDC and existing village committees shall monitor land use and set up measures to ensure sustainable ways of using natural resources.

2.4 Participatory land use planning shall be undertaken in the highland areas to ensure the most effective, adequate and sustainable use of land and natural resources.

2.5 The Government recognizes the use of swidden systems of agriculture and the appropriate forest products gathering, practiced by Highland Peoples to support their livelihood, as a valid form of land use. Measure shall be taken by the Government to understand and improve those systems so as to decrease negative environmental impacts and to promote sustainable agriculture.

2.6. Traditional lands belonging to and used by the Highland Peoples shall be respected. The Government shall provide Highland Peoples with effective remedies against any unlawful intrusion or encroachment upon their lands.

2.7. The rules and procedures for securing effective land rights shall be made available to the Highland Peoples' communities in a way they understand.

2.8. Adequate procedures shall be established to resolve all land claims. Existing indigenous procedures for transferring land rights shall be respected.

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2.9. Anyone shall be prevented from abusing Highland Peoples to secure the ownership, possession or use of lands belonging to Highland Peoples.

2.10. Land belonging to a Highland Peoples' community can only be sold or leased after consultation with and the expressed consent of the community.

2.11. Highland Peoples shall not be removed from the lands they occupy (principle of non-relocation). However, where their relocation is considered absolutely necessary as an emergency measure in case of clear and present danger to the existence of the Cambodian nation, such relocation shall only take place with the free and informed consent of the affected persons. If there is no such consent, relocation can only take place following appropriated procedures established by national laws and regulations, including public inquiries where appropriate, in which Highland Peoples must be effectively represented. As initial compensation they must be provided with lands of quality and legal status at least equal to that of the lands previously occupied by them. Furthermore any Highland Peoples' member must be fully compensated for any resulting loss or injury.

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