

## Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law

By *Franziska Maria Oehm*\*

**Abstract:** *In October 2014, a communication was filed to the International Criminal Court (ICC) in The Hague according to Art. 15 Rome Statute.<sup>1</sup> Therein, senior officials of the Kingdom of Cambodia are accused of systematic land grabs that could constitute human rights abuses and because of gravity and extent could have amounted to crimes against humanity, Art. 7 Rome Statute.*

*Due to the fact that land grabbing continues to be an issue of concern both from a legal and from a global development perspective, the communication filed to the ICC raises the general question about proper legal mechanisms for regulation of awards and lack of respect for land rights. This article appraises the specific case of Cambodia with domestic elites as possible immediate land grabbers, including the definition and history of land grabbing and of Cambodia as such, as well as national and international law regulating investment in farmland. Furthermore it focuses on the communication filed to the ICC by examining requests from Art. 7 Rome Statute. The article considers the scope and factual requirements of crimes against humanity in the specific case of land grabbing. It additionally questions international criminal law as a proper protection mechanism in cases where domestic legal proceedings are unable or unwilling to prosecute alleged perpetrators. The article intends to detect a link between international investment and international crimes and recommends further discussion on land grabbing and possible deterrent effects arising from international criminal investigations.*

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1 The communication is still confidential under request of the International Criminal Court, only an executive summary is available here: [https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf) (last accessed on November 5 2015).

## A. Introduction

On April 17, 1975, the Khmer Rouge under their leader Pol Pot took full control of the city of Phnom Penh in Cambodia.<sup>2</sup> One of the darkest periods in Cambodian history began. Besides killing thousands of prisoners and other Cambodians, Khmer Rouge created the state of Democratic Kampuchea to establish socialism in all fields, which called for the collectivization of all private property.<sup>3</sup> All Cambodians were required to contribute their private possessions to be used collectively. Most Cambodians, especially on the countryside were forced to work on expropriated land.<sup>4</sup>

Since the loss of power of the Khmer Rouge and their total collapse in 1999, the new Cambodian Constitution protects the right to private ownership of property including land.<sup>5</sup> Nevertheless, land and expropriation has still been the single most contentious issue in Cambodia in the last decade. Over 2.2 million hectares of Cambodian land have been granted to large firms in the form of economic land concessions. These concessions and various other land grabs have affected more than 500,000 Cambodians since 2003.<sup>6</sup> Non-governmental organizations (NGO) frequently claim forced evictions, whether in the form of threats, intimidation, violence, or the actual removal of people from the premises in many cases.<sup>7</sup> Evictions negatively influence people's lives in many different ways and aggravate people's ability to provide for their own needs, mainly because of the distance and squalor of the relocation sites.<sup>8</sup>

The article examines the phenomenon of investment in farmland and the often associated problem of land grabbing and evictions. Furthermore it mentions different approaches to protect people from land grabbing, namely the UN Voluntary Guidelines, the Principles for Responsible Agricultural Investment (PRAI) and Cambodian domestic law. The second part of the article will focus on the communication that was filed to the International Criminal Court (ICC). It determines that land grabbing in Cambodia could constitute a crime against humanity according to Art. 7 Rome Statute<sup>9</sup>. The requirements of crimes against humanity will then be reviewed in light of the allegations of the communication. In conclu-

2 *Ben Kiernan*, *How Pol Pot Came to Power: Colonialism, Nationalism and Communism in Cambodia, 1930 – 1975*, Yale 2004.

3 *Ibid.*, p. 205.

4 *Sean Bergin*, *The Khmer Rouge and the Cambodian Genocide*, New York 2009, p. 28.

5 Art. 44 of the Cambodian Constitution, see also: *Sorpong Peou*, *Intervention & Change in Cambodia: Towards Democracy?*, Singapore 2000, p.186 f. and p. 471 f.

6 Numbers and further information by LICADHO CANADA (Cambodian League for the Promotion and Defense of Human Rights) available under: <http://licadhocanada.com/about-cambodia/land-evictions-in-cambodia/> (last accessed on 05 November 2015).

7 *Ibid.*

8 *Ibid.*

9 The Statute of the International Criminal Court was adopted on 17 July 1998 in Rome by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. At writing, 123 countries are state parties.

sion, the potential approach of international criminal law to protect people from land grabbing in addition to the guidelines and principles mentioned above will be discussed.

## B. What does land grabbing mean?

As stated before, it will be examined in the following if land grabbing in Cambodia could constitute a crime against humanity. Since land grabbing is the basis of charges but cannot be considered a legal concept<sup>10</sup>, it has to be explained and contextualized first. In general, land grabbing possibly occurs in the context of investment in farmland in the Global South. Different approaches to investment in farmland with the common goal of agricultural development will be explained in the following.

### I. Competing approaches to agricultural development in countries of the Global South

World Bank's report "Raising Global Interest in Farmland"<sup>11</sup> comes to the conclusion that the demand for land has enormously increased.<sup>12</sup> Compared to the average annual global expansion of agricultural land of less than 4 million hectares before 2008, approximately 56 million hectares worth of large-scale farmland deals were announced before the end of 2009.<sup>13</sup> Not all of those farmland deals have been implemented<sup>14</sup>, but the rise is still notable. Furthermore, some consider it to be desirable and still one of the most effective strategies for economic growth of least or less developed countries.<sup>15</sup> In general, two competing approaches to the future of agriculture in the Global South must be distinguished.

One approach states that countries of the Global South must give up their peasant structures and open their agricultural markets to high intensive agriculture, which can be achieved by genetic engineering and higher technology. Therefore, foreign investment appears to be indispensable.<sup>16</sup>

10 The term land grabbing is mostly used by academics, lawyers or NGOs but may not be considered as an official term used e.g. in UN documents.

11 Klaus Deiniger / Derek Byerlee, World Bank Report 'Raising global interest in Farmland, 2011, available here: <http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf> (last accessed on 05 November 2015).

12 On food price crisis of 2007-2008 and the rush to farmland see: *Olivier de Schutter*, The Green Rush. The Global Race for Farmland and the Rights of Land users, Harvard International Law Journal 52 (2011), p. 504.

13 *Deiniger / Byerlee*, (note 11), p. xiv.

14 World Bank Reports states that only 21 percent of the announced deals have been started. Plans are scaled back due to a variety of reasons including unrealistic objectives, price changes, and inadequate infrastructure, technology, and institutions, see *ibid.*, p. xiv, xxxii.

15 World Bank, UNCTAD, FAO, IFAD: Principles for Responsible Agricultural Investment (RAI) that Respects Rights, Livelihoods and Resources, Knowledge Exchange Platform for Responsible Agro-Investment, 2009.

16 *Paul Collier*, The politics of Hunger: How illusion and Greed Fan the Food Crisis, Foreign Affairs, 87 (2008), p. 67.

In contrast, the Food Sovereignty approach demands protection of peasant structures. Once developed as a critical reaction to the neo-liberal developments after Bretton Woods, it points out that people have the right to define their own agricultural policy appropriate to their circumstances and needs and their right to food in terms of Art. 11 of the Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>17</sup> Furthermore the negative impact of large scale investment, namely the undercutting of local product prices due to genetically modified seeds that may dominate crop production or simply the sale on world markets of food goods produced at low cost instead of leaving them for local nutrition, supports the sovereignty approach.

## II. Defining land grabbing

According to the more critical approaches to investment in farmland and development, civil society claims in this regard the increasing expulsion of peasants from the Global South. This appropriation and expulsion is often called land grabbing.

Nonetheless, not every large-scale investment leads to land grabbing. Well-managed large-scale investments could also emerge as “win-win-win” solutions.<sup>18</sup> The local communities could benefit from newly created employment opportunities and improved food security and the host government could benefit from greater certainty in revenue collection and taxes and export tariffs investors have to pay. Furthermore the investor could benefit from a stable supply of agricultural commodities.<sup>19</sup> But this scenario requires certain assumptions. One of them is the ability of host governments to ensure that significant benefits from the investment will accrue to local communities.<sup>20</sup>

Cross border large-scale investments are – in the majority of cases – based on the same model. States as investors or private investors on one side and public agencies of governments on the other side enter into lease agreements or acquisitions of farmland. In most of the cases the farmland in question has been owned or at least used by local peoples for generations. A first problem may therefore be the determination of user’s rights and owner’s rights.<sup>21</sup> Consequently, this may lead to legal insecurity and the denial of access to legal remedies in case of evictions for some affected communities.<sup>22</sup> Furthermore, traditional us-

17 See: United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 12, 1999, E/C.12/1999/5. On the Right to Food and Food security see e.g.: *Kerstin Mechlem*, Food Security and the Right to Food in the Discourse of the United Nations, *European Law Journal* 2004, 631.

18 *de Schutter*, (note 12), p. 520.

19 *Ibid.*

20 *Ibid.*

21 *Olivier de Schutter*, Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge, 2009, p.7, <http://search.oecd.org/site/swacmali2010/44031283.pdf> (last accessed on 05 November 2015).

22 *Ibid.*

age of farmland did not request land titles so far and therefore land is often considered to be state property. Prior involvement of peasants with regard to the future use of land rarely takes place.<sup>23</sup>

Furthermore, in regions or countries with weak governmental structures, awards are mostly unregulated and often dominated by corruption.<sup>24</sup> Residents might be requested to leave their land. However, any resistance against the request may lead to forcible transfer. This practice leads to *de facto* forced displacement of peasants and other inhabitants to give up their livelihoods, irrespective of governments offering compensation or not.

Subsequently, investors use the land for producing food goods, which may sometimes be used for supporting the local market. However, in many cases investors use the opportunity to produce food at low costs to later sell them for far more on the world market. Thus, investment in production of foods is often not aimed at local development but at export. This could be considered as a negative socio-economic impact of investment in the Global South.<sup>25</sup>

### C. The regulation of large-scale investments in farmland

#### I. International law approaches

In 2012, the Food and Agriculture Organization's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO Guidelines) were established as the most comprehensive framework in this context. The Committee on World Food Security (CFS)<sup>26</sup> has unanimously adopted the Guidelines.<sup>27</sup> The Guidelines were negotiated with strong participation of NGOs and are di-

- 23 For existing debates about prior involvement of local communities, especially about the concept for indigenous peoples' right to free prior and informed consent see e.g.: UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 2 October 2007, A/RES/61/295, *Gant McGee*, The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development", *Berkeley Journal of International Law* 27 (2009), p. 570.
- 24 On this problem in general: *Olivier de Schutter*, How not to think of land-grabbing: three critiques of large-scale investments in farmland, *The Journal of Peasant Studies* 38 (2011), p. 265. For Cambodia particularly: Transparency International: Corruption and Cambodia's Government System – National Integrity System Assessment 2014, Phnom Penh 2014, p.6. <http://www.ticambodia.org/files/2014EN-NISA-WEB.pdf> (last accessed on 05 November 2015).
- 25 A structured overview about positive and negative impacts of foreign direct investment in farmland is available here: Gesellschaft für Technische Zusammenarbeit, Foreign Direct Investment (FDI) in Land in developing countries, p.23, <http://www.responsibleagroinvestment.org/rai/sites/responsibleagroinvestment.org/files/gtz-foreign-direct-investment.pdf> (last accessed on 05 November 2015).
- 26 The Committee (CFS) combines as members the UN bodies WFP, FAO and IFAD as well as member states of the UN and civil society and NGOs.
- 27 Committee on World Food Security, <http://www.fao.org/cfs/cfs-home/en/> (last accessed on 05 November 2015).

rected at state administration as well as non-state actors. They are intended to enable the protection of legitimate land rights of inhabitants dominated by a strong human rights approach to strengthen tenure governance.<sup>28</sup> Furthermore, recommendations for sustainable investment and development are included.<sup>29</sup> However, the term “legitimate land rights” inherently causes problems. It is questionable how these legitimate land rights can be identified and defined when confronted with a lack of official land titles.

For creating a system of official land titles, states must implement criteria for distribution first. In his article, former UN Special Rapporteur on the right to food *Olivier de Schutter* explains different approaches to determine land rights for the protection of land users.<sup>30</sup> He criticizes that allegedly simple solutions such as titling schemes “may not be adequate once we take into account the specific context of developing countries and the comparative situations of different groups of land users”<sup>31</sup>. Especially the possibility of collective and individual property must be taken into account.<sup>32</sup>

The attempts to determine land rights in Cambodian national law will be examined in the following paragraph (C II.).

Another framework, the Principles for Responsible Agricultural Investment (PRAI), originally drafted by the World Bank in 2010<sup>33</sup>, was approved by the 41st Session of the Committee on World Food Security in October 2014. The Principles address all types of investment in agriculture and food systems and provide a framework that all stakeholders can use when developing national policies, programs, regulatory frameworks, corporate social responsibility programs, individual agreements and contracts.<sup>34</sup> The main difference between these two norm sets though is the addressee. However, they both can be seen as a response to the supportive approach to land investment and try to find a way of balancing foreign direct investment and sustainable development.

Both the Principles and the Guidelines are voluntary and non-binding, so-called soft law.<sup>35</sup>

Nevertheless, they represent the first time that governments, private sector, civil society organizations, UN agencies, development banks, foundations, research institutions and

28 *Jochen von Bernsdorff*, ‘Landgrabbing’ und Menschenrechte: die FAO Voluntary Guidelines on the Responsible Governance of Tenure, INEF Forschungsreihe, 11/2012, p. 24 f.

29 FAO Voluntary Guidelines, Section 12, available under [http://www.fao.org/fileadmin/templates/cfs/Docs1112/VG/VG\\_Final\\_EN\\_May\\_2012.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs1112/VG/VG_Final_EN_May_2012.pdf) (last accessed on 05 November 2015).

30 *de Schutter*, (note 12), 525 ff.

31 *Ibid.*

32 *Ibid.*, p. 533 ff.; With a focus on indigenous peoples see also: *Jo M. Pasqualucci*, The Evolution of International Indigenous Rights in the Inter-American Human Rights System, *Human Rights Law Review* 6,(2006), p. 296 .

33 Critical review of the 2010 PRAI: *de Schutter*, (note 12), p. 521 ff.

34 See: <http://www.fao.org/cfs/cfs-home/resaginv/en/> (last accessed on 05 November 2015).

35 *Daniel Thürer*, Soft Law, in: *Rüdiger Wolfrum* (Hrsg.), *Max Planck Encyclopedia of International Law*, Heidelberg 2009.

academia have agreed on what constitutes responsible investment in agriculture and food systems that contribute to food security and nutrition.<sup>36</sup> In the first draft of the Principles, the lack of participation was often criticized.<sup>37</sup> But their legal nature, which requires certain awareness and room to negotiate by host states when it comes to large-scale investments, often impedes their impact on weak governments. Thus, the Guidelines as well as the Principles in theory pave the way to global agreement about the future and impact of agro-investment and provide a framework for both the public and the private sector. Nevertheless, they require the participation of the host state and are often useless if these states lack the capacity to manage investment in farmland and to create an appropriate legal framework.<sup>38</sup>

## II. National (Cambodian) Law

The United Nations Development Program's Human Development Index gave Cambodia a rank of 136 out of 187 countries worldwide, placing it below the regional Southeast Asian average.<sup>39</sup> Approximately 80 percent of the population of Cambodia lives in rural areas. While the overall share in economy of the agricultural sector in the economy has continuously decreased over the past two decades, around 70 to 75 percent of Cambodians still depend primarily on agriculture to earn their living.<sup>40</sup> It is argued that 'agricultural growth in Cambodia has not only been low relative to growth in the industrial and service sectors, it has also been unimpressive relative to its neighbors during comparable stages of development'.<sup>41</sup>

Twenty percent of the population, mostly in rural areas remain food-poor and do not receive the minimum amount of calories per day to satisfy basic nutritional needs.<sup>42</sup>

Therefore, after some prior considerations, in 2003, a National Poverty Reduction Strategy was adopted in Cambodia with the further aim of improving rural living conditions, including a strong focus on improving access to land.<sup>43</sup> As such, the government's land poli-

36 The full document and the Principles can be found here: [http://www.fao.org/fileadmin/templates/cfs/Docs/1314/rai/CFS\\_Principles\\_Oct\\_2014\\_EN.pdf](http://www.fao.org/fileadmin/templates/cfs/Docs/1314/rai/CFS_Principles_Oct_2014_EN.pdf) (last accessed on 05 November 2015).

37 *de Schutter*, (note 12), p. 521 ff.

38 *de Schutter*, (note 21), p. 265.

39 United Nations Development Programme, Human Development Report 2014, Table II, Development Index, <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf> (last accessed on 05 November 2015).

40 United Nations Development Programme, Raising Rural Incomes in Cambodia, p. 3.

41 World Bank (2006), Halving Poverty by 2015, p. viii, available at: [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/02/22/000012009\\_20060222102151/Rendered/PDF/352130REV0pdf.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/02/22/000012009_20060222102151/Rendered/PDF/352130REV0pdf.pdf) (last accessed on 05 November 2015).

42 Ministry of Planning Cambodia, Cambodia Human Development Report 2007, p. 9, download available here: <http://www.mop.gov.kh/LinkClick.aspx?fileticket=xbJTEoNgXOc%3d&tabid=193&mid=613> (last accessed on 05 November 2015).

43 *Christoph Sperfeldt / Farrah Tek / Billy Chia-Lung Tai*, 'An Examination of Policies Promoting Large-Scale Investments in Farmland in Cambodia', submitted to Cambodian Human Rights Ac-

cy was to promote sustainable economic and social development and to reduce poverty. Strategies were for example to make property rights legally clear and secure, to prove concessions for social purposes by distributing vacant state land to socially needy households and to manage land in an environmentally sustainable way that provides access to natural resources.<sup>44</sup>

The basis for the implementation of the two stated policy aims – attracting private investment to enhance growth in the agricultural sector and to improving land management, including the redistribution of land – was provided through the adoption of the 2001 Cambodian Land Law.<sup>45</sup> The 2001 Land Law generally distinguishes five main categories of property of land: private land, state public land, state private land, communal land and land of indigenous communities. Thus, Cambodian Land Law recognizes different types of land rights<sup>46</sup>, especially communal land and land of indigenous peoples. However, indigenous communities need to be recognized as legal entities to be eligible for collective ownership of their lands because of Art. 8 Land Law.

Moreover, foreigners are not allowed to own land, but are able to own property on land. However, an enterprise with at least 51 percent Cambodian ownership may be an owner of land. The law then establishes a system of land registration through a cadastral administration.<sup>47</sup> The 2001 Land Law provides for the lease of land in the form of land concessions as a mechanism for intensifying land use and making more land available for private investors and landless or land-poor people. Accordingly, such concessions can serve social or economic purposes. Land concessions are only granted from state private land (Art. 58), shall not exceed 10,000 ha (Art. 59) and shall have a maximum lease duration of 99 years (Art. 61).<sup>48</sup>

Art. 59 additionally prohibits the grant of concessions in different locations (jointly exceeding the 10,000 ha limit) to the same person or entity. Moreover, economic land concessions must be developed within 12 months after issuance, otherwise they shall be canceled (Art. 62).

Economic land concessions (ELCs) were further specified in subsequent sub-decrees. The ELC Sub-Decree which came into force in 2005 determines the procedures, mechanisms and other arrangements for granting state private land as economic land concessions for agricultural production.<sup>49</sup> It also highlights the government's expectations with regard

tion Committee (CHRAC), 2012, p. 70, available at: [http://www.chrac.org/eng/CHRAC%20Documents/Report\\_An%20Examination%20of%20Policies%20Promoting%20Large\\_Scale%20Investments%20in%20Cambodia\\_2012\\_English.pdf](http://www.chrac.org/eng/CHRAC%20Documents/Report_An%20Examination%20of%20Policies%20Promoting%20Large_Scale%20Investments%20in%20Cambodia_2012_English.pdf) (last accessed on 05 November 2015).

44 Royal Government of Cambodia, Council for Social Development, National Poverty Reduction Strategy 2003-2005, p. 52-54, available here: <https://www.imf.org/external/np/prsp/2002/khm/01/122002.pdf> (last accessed on 05 November 2015).

45 *Sperfeldt / Tek / Chia-Lung Tai*, (note 43), p. 15.

46 See *de Schutter*, (note 12), p. 525 ff.

47 *Sperfeldt / Tek / Chia-Lung Tai*, (note 43), p.15.

48 *Ibid.*

49 *Sperfeldt / Tek / Chia-Lung Tai*, (note 43), p. 16.

to economic land concessions and their purposes, for instance to develop intensive agricultural and industrial-agricultural activities, to increase employment in rural areas within a framework of natural resource management and to encourage small as well as large investments in economic land concession projects.<sup>50</sup> The sub-decree further sets out the criteria and conditions that have to be fulfilled before an economic land concession can be granted.<sup>51</sup> In addition, this sub-decree reiterated that the right over a concession did not create ownership over the land.<sup>52</sup>

This process entails the constant consideration of alternative models of land use and investment. Among the most important criteria is the completion of environmental and social impact assessments with respect to proposed investment plans and the extensive consultations with local authorities and affected populations.<sup>53</sup>

Summing up, this new law prescribes a number of criteria that investors must fulfill before they can be granted an economic land concession. However, large areas of land appear to have been granted with no or deficient consultation, and without genuine and comprehensive environmental and social impact assessments.<sup>54</sup> An existing cadastral commission and the National Authority, which was mandated by law for land dispute resolution and was established to resolve land disputes consistently from across the country appears to lack of effectiveness, impartiality and credibility.<sup>55</sup> According to the former UN Special Rapporteur on Cambodia, *Surya P. Subedi*, the National Authority has proven to be largely ineffective in settling land disputes.<sup>56</sup> Furthermore, the Government and the judiciary are often unwilling or unable to regulate the conduct of private enterprises involved and fail to provide redress for violations committed by private enterprises.<sup>57</sup>

Thus, the Cambodian government and judiciary and the lack of access to remedies in case of violations convert important laws and aims into a white elephant.

50 2005 ELC Sub-Decree, Art. 3, taken from *Sperfeldt / Tek / Chia-Lung Tai*, (note 43), p. 16.

51 *Ibid.*, p. 16. Criteria include: (1) the land has been registered and classified as state private land; (2) a land use plan has been adopted by the local committees and the proposed use is consistent with the plan; (3) environmental and social impact assessments have been completed with respect to the proposed development; (4) solutions for resettlement are in place, in accordance with existing legal framework and procedures, and there shall be no involuntary resettlement by lawful landholders; and (5) public consultations are conducted with local authorities and residents. Thus, the Sub-Decree provides numerous safeguards, which are intended to avoid adverse impacts of concession projects on local populations.

52 *Ibid.*, p.17, 2007 Sub-Decree on the Mortgage and Transfer of the Rights, Art. 3 and 4.

53 *Ibid.*, p. 30, 2005 ELC Sub-Decree, Art 4(2), (3), (5).

54 See for instance 2007 SRSG Report, 10; ADHOC (2012), Report on Land and Housing Rights, 18-19 available here: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-63-Add1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-63-Add1_en.pdf) (last accessed on 05 November 2015).

55 UN Human Rights Council, A/HRC/27/70, Report of the Special Rapporteur *Surya P. Subedi* on the situation of human rights in Cambodia 2014, p. 13, para. 48.

56 *Ibid.*, para. 49.

57 *Ibid.*

### D. Land grabbing as a crime against humanity according to Art. 7 Rome Statute

In October 2014, a communication was filed to the International Criminal Court (ICC) according to Art. 15 Rome Statute.<sup>58</sup> Senior Cambodian officials are accused of alleged systematic land grabs that could constitute human rights abuses and because of their gravity and extent could amount to crimes against humanity according to Art. 7 Rome Statute. Approaching the problem of land grabbing from an international criminal law perspective might be considered as fairly progressive. On the one hand, such an approach raises the question about the function and scope of international criminal law. On the other hand, it challenges the factual requirements of Art. 7 Rome Statute, in particular the distinction between crimes against humanity and other (criminal) human rights violations.

From a historic perspective, the notion of ‘crimes against humanity’ was used for the first time in a declaration on the occasion of the mass killings of Armenians in the Ottoman Empire.<sup>59</sup> The prosecution of crimes against humanity began in Nuremberg with the International Military Tribunal in 1945.<sup>60</sup> The elaboration and development of the offense passed through other international criminal tribunals and Art. 7 of the Rome Statute.<sup>61</sup> Crimes against humanity are considered to be international crimes. International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned, as opposed to the responsibility of the state.<sup>62</sup> Crimes against humanity derive from international human rights law rather than from international humanitarian law.<sup>63</sup>

The ICC has jurisdiction over crimes against humanity according to Art. 5 (1) (b) Rome Statute. The Rome Statute includes only so-called core crimes,<sup>64</sup> and the jurisdiction of the court is limited to those crimes. In the preamble, the State Parties to the Rome Statute refer to the most serious crimes of concern to the international community as constituting scope of the court’s jurisdiction. It will be examined in the following what requirements must be met to constitute crime against humanity.

58 The communication is still confidential under request of the ICC; an executive summary is available here [https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf) (last accessed on 07 November 2015).

59 *Antonio Cassese*, International Criminal Law, Oxford 2008, p. 101.

60 For more details see *Kevin Jon Heller*, The Nuremberg Military Tribunals and the Origins of International Criminal Law, p. 231 ff.

61 On the development of crimes against humanity see e.g.: *Guénaél Mettraux*, Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Ruanda, 44 Harvard International Law Journal (2002), 237.

62 *Cassese*, (note 59), p. 11 ff. on the sources and historical evolution of international crimes.

63 *Ibid.*, p. 99.

64 The core crimes are: genocide, Art. 6, crimes against humanity Art. 7, war crimes, Art. 8 and the crime of aggression, Art. 8 *bis* Rome Statute.

### I. The substantive elements of crimes against humanity

The communication states that ‘there is a reasonable basis to believe that members of the government have committed, aided and abetted, ordered and/or incited the crimes of forcible transfer, murder, illegal imprisonment, other inhumane acts and persecution (...)’.

<sup>65</sup> It is questionable how these allegations could be covered by the scope of crimes against humanity.

The definition of crimes against humanity under ICC jurisdiction can be found in Art. 7 Rome Statute.

1. For the purpose of this Statute “crime against humanity” means any of the **following acts** when committed as part of a **widespread** or **systematic attack** directed against any **civilian population**, with **knowledge** of the attack:

[...]

(a) Murder;

(d) **Deportation or forcible transfer of population**; [...]

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

2. For the purpose of paragraph 1:

[...]

(d) "**Deportation or forcible transfer of population**" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are **lawfully present**, without **grounds permitted under international law**;

[...] <sup>66</sup>

Hence, crimes against humanity means any of the acts listed in Art 7 (1) a) to k) Rome Statute when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. At present, international criminal law requires a two-step test for crimes against humanity. The first requirement is the so-called contextual element or *chapeau* of the general context of criminal conduct.<sup>67</sup> If such a context exists, the second requirement is the class of the individual offence committed, for example murder or deportation.<sup>68</sup>

### II. Contextual element of Art. 7 (1) Rome Statute

First, as *chapeau*, a widespread or systematic attack directed against any civilian population, with knowledge of the attack must be fulfilled. This requirement is often called the

<sup>65</sup> Global Diligence, (note 55), para. 11.

<sup>66</sup> The Rome Statute of the International Criminal Court, 1998, Art. 7 (emphasis added).

<sup>67</sup> Cassese, (note 59), p.109.

<sup>68</sup> *Ibid.*

contextual element in which one of the acts listed in Art. 7 (1) a) to k) Rome Statute must be committed.<sup>69</sup> This first part of the provision endorses the mass crime prevention rationale of crimes against humanity.<sup>70</sup>

Although it was discussed by some states at Rome Statute negotiations, by not mentioning it, the Rome Statute excludes any *nexus* between crimes against humanity and armed conflict.<sup>71</sup> Thus, crimes against humanity can be committed during time of war and peace. The fact that Cambodia is not in an armed conflict does not pose an obstacle to the commission of crimes against humanity according to Art. 7 Rome Statute. However, there are two further requirements that must be taken into account.

The first one is the ‘widespread or systematic’ requirement, Art. 7 (1) Rome Statute. It is the most widely accepted international element for distinguishing crimes against humanity from common crimes, which do not raise the level of crimes under international law.<sup>72</sup>

The term ‘widespread’ replaces the term ‘large scale’ which means that ‘the acts are directed against a multiplicity of victims’.<sup>73</sup> The communication states that NGOs have estimated that 770,000 people have been adversely affected by land grabbing since the year 2000. This figure amounts to 6% of the total population of Cambodia. According to various NGOs, a significant proportion of the 770,000 people have already been illegally and forcibly transferred. The communication sets out that in Phnom Penh alone, over 145,000 people (10% of the capital city’s population) have been forcibly displaced.<sup>74</sup>

Second, the attack must be of systematic nature.<sup>75</sup> Systematic is defined as an attack “pursuant to a preconceived plan or policy”<sup>76</sup>. The systematic requirement helps to distinguish between planned, directed and organized attacks and spontaneous or isolated acts of violence.<sup>77</sup> The Court has to take into account the dimensions of the acts of forcible transfer, murder, imprisonment, persecution and other inhumane acts in Cambodia. However, especially forcible transfer is very likely to having been committed as part of a previously planned and at least economic agenda.

69 *Ibid.*, p.

70 Charles C. Jalloh, What makes a crime against humanity a crime against humanity?, *American University International Law Review*, 28, 2013, p. 381 (408).

71 William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford 2010, p. 144.

72 *Prosecutor v. Tadić*, [IT-94-I-T], Opinion and Judgment, Trial Chamber, 7 May 1997, paras. 646 and 648, cited by: Rodney Dixon / Christopher K. Hall in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Oxford 2008, art. 7, para. 11.

73 International Law Commission, *Draft Code of Crimes 1996*, art. 18.

74 Global Diligence, note 55, para. 7.

75 The requirements ‘widespread’ and ‘systematic’ must only be fulfilled alternatively, not cumulatively. See e.g. Kai Ambos, “Verbrechenselemente” sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs, *Neue Juristische Wochenschrift* 6 (2001), p. 405 ff.,.

76 International Law Commission, I Y.B. ILC 47 (1996).

77 *Cassese*, (note 59), p. 98.

Art. 7 (2) a) captures the contextual element of ‘systematic’, clarifying that an “attack directed against any civilian population means a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. It requires that the State or organization actively promote or encourage such an attack against a civilian population. The state or non-state policy element still remains unclear and has been cause for quite some discussions among ICC judges.<sup>78</sup>

According to the communication in the case of Cambodia, ruling elite allegedly committed crimes, with the intention of “self-enrichment and maintaining power at all costs” pursuant to a state policy.<sup>79</sup> To prosecute and forcibly transfer or deport people who are not willing to leave land for the purpose of leasing or selling it to foreign investors could be qualified as governmental policy. However, it remains questionable if this economically driven policy will be considered as a state policy. It could be argued that the State of Cambodia and multinational corporations jointly planned an alleged policy of intimidation and use of force against any resistance to expropriation or relocation.

Moreover, the notion of ‘attack against any civilian population’ establishes that crimes against humanity can be committed by individuals of a state apparatus against their own citizens, but the civilian population must be the primary object of the attack and not just an incidental victim.<sup>80</sup> Consequently, Cambodian state officials may be possible perpetrators of crimes against humanity in their own territory directed against other Cambodians.

‘Attack’ is defined as a course of conduct involving the commission of acts of violence.<sup>81</sup> According to the case law of the ad hoc tribunals of Ruanda and former Yugoslavia, an attack is not limited to the use of armed force but may also encompass any mistreatment of the civilian population.<sup>82</sup> Moreover, in the *Bemba-Case* at the ICC, the

78 Most recently in the Kenya situation, see Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 115–128. Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010. See also: *Claus Kieß*, On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision, *Leiden Journal of International Law*, 3 (2010), p. 855, *Jalloh*, (note 70), p. 409 ff. On policy requirement in general, see *Bernhard Kuschnick*, Der Gesamtbestand des Verbrechens gegen die Menschlichkeit, Berlin 2009, p.234 with further references to, *inter alia*, *Prosecutor v. Akayesu*, [ICTR-94-4-T] (2. September 1998), para. 580, *Prosecutor v. Niyitegeka*, [ICTR-96-14-T] (16. Mai 2003), para. 439, *Prosecutor v. Fofana and Kondewa*, [SCSL-04-14-A] (28 May 2008), para. 246,.

79 Global Diligence, (note 1), para. 4.

80 *Schabas*, (note 71), p. 152.

81 *Ibid*.

82 *Ibid*, art.7, p. 153 with further notes: *Kumarac et al.* [IT-96-23/1-A], Judgment 12 June 2002, para 86; *Vasiljevic* (IT-98-32-T), Judgment 29 November 2002, paras 29-30 In *The Prosecutor v. Akayesu*, the ICTR even abstained from the ‘violent’ component, [ICTR-94-4-T] (September 2nd, 1998), and defined “an ‘attack’ may be non-violent in nature, like imposing a system of apartheid. Nevertheless, apartheid is declared a crime against humanity in Article 1 of the Apartheid Conven-

Court determined that the commission of the acts referred to in Art. 7(1) Rome Statute constitutes the attack itself and, beside the commission of the acts, no additional requirement for the existence of an attack needs to be proven.<sup>83</sup> Different from many of the specific acts of crimes against humanity that involve physical violence, offences such as persecution may be perpetrated through legislation and government policy.<sup>84</sup>

Furthermore, the perpetrator must have knowledge of the attack. According to the Elements of Crimes, which serve as a source of international criminal law and which assist the Court in the interpretation and application of Art. 6, 7 and 8 of the Rome Statute in a manner that is consistent with the Statute<sup>85</sup>, the perpetrator must have known or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>86</sup> This element is primarily needed to distinguish between perpetrators and participants and the ensuing liability – political or military hierarchy often plays an important role.<sup>87</sup>

### III. Murder, illegal imprisonment, other inhumane acts and persecution

The communication claims that those who challenged land grabbing in Cambodia, for example by resisting the evictions, have been illegally detained and in some cases murdered before, during or after the evictions.<sup>88</sup> Furthermore, their treatment afterwards, concerning adequate housing, healthcare or sanitation, may be considered to be ‘other inhumane acts’.<sup>89</sup> The concrete number of people murdered, detained or persecuted is a question of fact and will not be discussed any further in this article. But even if murders occurred in relatively small numbers, it could be seen as part of a systematic attack against the civilian population to frighten all (political) opponents with all necessary means.

### IV. Act of deportation or forcible transfer of population

Examining the phenomenon of land grabbing in an international criminal context, the forcible transfer of population according to Art. 7 (1) (d) Rome Statute may be the most relevant offence.

tion of 1973 [...]. This decision has been kept up in *Prosecutor v. Rutaganda*, [ICTR-96-3] (December 6<sup>th</sup>, 1999), para.70; *Prosecutor v. Musema*, [ICTR-96-13], (January 27<sup>th</sup>, 2000), para. 204.

83 *Prosecutor vs. Bemba*, [ICC-01/05-01/08], June 15<sup>th</sup>, 2009, p.75.

84 *Schabas*, (note 71), p. 153.

85 Art. 9 Rome Statute, *Cassese*, (note 59), p. 58 ff. The Elements of Crimes are available here: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (last accessed on 05 November 2015).

86 Elements of Crimes, Crimes against Humanity, Introduction, para. 3, <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

87 *Schabas*, note 59, p. 156.

88 Global Diligence, (note 1), para. 13.

89 *Ibid.*, para. 15.

In Art. 7 (2) (d), ‘forcible transfer’ is defined as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”

In the Elements of Crimes, it is added that,

- “a) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
- b) Such person or persons were lawfully present in the area from which they were so deported or transferred
- c) The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.<sup>90</sup> In a footnote it is explained that forcible is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment.”<sup>91</sup>

Forced displacement refers to the act of the perpetrator while lawful presence is a question of the status of the displaced person.<sup>92</sup>

Accordingly it must be examined if the requirements of Art. 7 (1) (d) and (2) (d) Rome Statute are fulfilled in the case of alleged land grabbing in Cambodia.

## 1. Forcible transfer

Pursuant to the evidence some NGOs collected, entire villages have been burned to the ground, possessions have been stolen or destroyed and evictions have been perpetrated by armed police, gendarmes, the Royal Cambodian Armed Forces as well as by private security forces with the support of the state apparatus. It can be assumed that the alleged perpetrators forced people to leave their dwellings. Forcible transfer refers to a situation where the individual has no free or genuine choice to remain in the territory.<sup>93</sup> But not every eviction is a crime. Furthermore, two requirements namely *lawfully present* and *without grounds permitted under international law* constitute the core definition for evictions as a crime against humanity.

## 2. Lawfully present

First, the deported or forcibly transferred person must have been lawfully present in the area from which he or she was deported. According to the plain meaning rule, it could be assumed that lawful presence requires valid legal certificates and documentation from the

<sup>90</sup> Schabas, (note 71) , p. 163.

<sup>91</sup> *Ibid.*

<sup>92</sup> Kuschnick, (note 78), p. 410.

<sup>93</sup> Schabas, (note 71) , p. 165.

inhabitants of their concrete dwellings. This in turn would in the present case dismiss the possibility of finding land grabbing in Cambodia under Art. 7 Rome Statute, because especially documented land titles (individual as well as communal) in particular, or further documents are not available in most cases. Nevertheless, in the communication it is argued that the Rome Statute does not refer to the lawfulness of an individual's residency or possession of a particular home or plot of land. It is submitted that lawful presence relates to the victim's presence *in the area* – meaning village, city, region, or country – rather than in his or her individual dwelling.<sup>94</sup> The ICTY adopted this approach in the *Stakić* case where the Trial Chamber held:

“The protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State. The Trial Chamber is therefore of the view that it is the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal.”<sup>95</sup>

Moreover it is argued, similarly to the ad hoc tribunals, that international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), to which Cambodia is a party, protects a person's choice of residence within a territory and prohibits interference with his home.<sup>96</sup> According to the Representative of the UN Secretary-General on Internally Displaced Persons ‘the protection of ‘home’ relates not only to dwellings but also to all types of residential property regardless of legal title or nature of use’.<sup>97</sup> The communication argues furthermore that international courts have thus addressed cases of forcible transfer (or deportation) by assessing whether a population was lawfully present in an area, such as a town or city. For example, in the ICTY case of *Popović et al.* the Trial Chamber found that the entire population of the city Zepa was lawfully present even though 65% were internally displaced persons who had moved into the city during the war.<sup>98</sup> In the

94 The communication Global Diligence submitted is still confidential at request of the ICC OTP. Global Diligence provided the author certain extracts from law section on art.7 ICC Statute, which can only be used but can not be cited correctly in terms of the original document. Therefore, the author will name them as ‘Global Diligence, communication to the ICC, law section, extract’.

95 ICTY, Trial Chamber II, *Prosecutor v. Milomir Stakić*, [IT-97-24-T], “Judgment,” 31 July 2003, para. 677, also cited by Global Diligence, communication, law section, extract.

96 “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence” and “[n]o one shall be subjected to arbitrary or unlawful interference with his [...] home,” in International Covenant on Civil and Political Rights, Article 12(1) and 17 respectively, [Ratified: 16 December 1966, Entered into Force: 23 March 1976].

97 Global Diligence, communication, law section, extract.

98 See for example the approach taken by the ICTY Trial Chamber in *Popović et al.*: “With regard to the requirement of lawful presence, the Trial Chamber, as previously indicated, is satisfied that the population of Srebrenica was lawfully present and recalls that in mid-1995, the population in Sre-

ICC Situation in the Republic of Kenya, in determining the lawful presence, the Pre-Trial Chamber considered whether the victims were not lawfully present in the town or its area, not in their individual dwellings.<sup>99</sup> Thus, the interpretation of lawful presence in international criminal law will not strictly be determined on the basis of plain meaning but takes into account that residence shall be protected, regardless of title.

### 3. Without Grounds Permitted Under International Law

A further element that needs to be satisfied is that forcible transfers were not permissible under international law.<sup>100</sup> Forcible transfer may be permitted under certain circumstances. Restrictions must be in accordance with law and must be necessary in a society in the interest of national security or public safety, for the maintenance of public order, for the protection of health or morals, or for the protection of the rights of others, provided such restrictions are consistent with other human rights guarantees.<sup>101</sup> ICC Statute Commentary authors interpreted Art. 7 and indicated that “it is possible that the forced displacement of population for public projects, such as the construction of a highway or dam might fall within the scope of Art. 7 (1) d, if there were no ‘compelling and overriding public interest’ justifying this measure which met ‘the requirements of necessity and proportionality’, the procedures used did not satisfy due process or if the individuals were not fairly compensated and given freedom of choice concerning their new homes.”<sup>102</sup>

There are limited and exceptional circumstances where a state is entitled to even forcibly transfer civilians in times of war or peace. Different jurisdictions will be examined to define the requirements of forcible transfer that is permitted under international and national law.

brenica was approximately 42,000, 85 per cent of whom were internally displaced persons. The Trial Chamber finds that the population of Srebrenica was lawfully present there,” in ICTY, Trial Chamber II, *Prosecutor v. Popović et al.*, [IT-05-88-T], “Judgment,” 10 June 2010, para 923 see also: Global Diligence, communication, law section, extract.

- 99 For example, the ICC considered the “Turbo Town area” or the “greater Eldorat area” or the “Kapsabet town area.” See ICC Pre-Trial Chamber II, Situation in The Republic of Kenya, *Prosecutor v. William Samoei Ruto Et al.* [ICC-01/09-01/11], Decision on the Confirmation of Charges Pursuant to Art. 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, paras. 251, 255, 261.
- 100 Elements of Crimes, Art. 7 (1) (d), p.6 <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (last accessed on 05 November 2015).
- 101 *Christopher K. Hall* in: *Otto Triffterer* (ed.), Commentary on the Rome Statute of the International Criminal Court, Oxford 2008, Art. 7, para. 105.
- 102 *Ibid.*

## a) International (criminal) law

First of all, the decisions of international criminal law should be examined. The communication cites that the Extraordinary Chambers in the Court of Cambodia (ECCC) recently made clear that “[e]conomic policy is not one of the grounds recognised under international law that justifies forced transfer of a population.”<sup>103</sup>

In any event, as the ECCC Trial Chamber noted: “Displacement is not justifiable where the humanitarian or military situation causing the displacement is itself the result of the accused’s own unlawful activity.”<sup>104</sup>

The communication furthermore cited Art. 49 of the Geneva Convention as an international law criterion to define permitted forcible transfer. Under the Convention, “Individual or mass forcible transfers [...] are prohibited, regardless of their motive. Nevertheless, the occupying power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.” The commentary on Art. 49 states that ‘no other grounds of exception’ are permitted for forcible transfer.<sup>105</sup> Furthermore, the communication mentions the ICTY *Naletilić* case. The Trial Chamber in this case found that transfer in general is warranted only in three instances: (i) transfers motivated by an individual’s own genuine wish to leave; and (ii) evacuation motivated by concern for the security of the population or (iii) by imperative military necessity.<sup>106</sup> Any measures taken for such reasons must conform to the principle of proportionality.

This reasoning may be controversial. It must be taken into account that Art. 21 ICC Statute provides a hierarchy of sources for interpretation of the Statute.<sup>107</sup> According to Art. 21 (1) (b) ICC Statute, the Court shall apply “rules of international law, including the established principles of the international law of armed conflict.” So far, the Court in various cases referred to the Geneva Conventions or the Hague Convention to define for example the term “international armed conflict”<sup>108</sup> or the nature of the war crime of pillage<sup>109</sup>. Both cases were related to war crimes, Art. 8 ICC Statute, and therefore armed conflicts.

But the problem with these two examples, both the Geneva Convention and the ICTY *Naletilić* case, is that both refer to situations of militarily induced transfers. Land grabbing in Cambodia is not to be considered as militarily induced, but as a case of forcible resettle-

103 ECCC, Trial Chamber, Case 002/01 Judgment, (002-19-09-2007-TC), 7 August 2014, para. 549.

104 *Ibid.*, para. 450.

105 Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *Commentary on Article 49*, note 24.

106 ICTY, Trial Chamber, *Prosecutor v. Naletilić et al.*, [IT-98-34-T], “Judgment,” 31 March 2003, paras. 518, 519.

107 *Schabas*, (note 71), p. 385.

108 *Prosecutor vs. Lubanga*, [ICC-01/04-01/06], Decision on the Confirmation of the Charges, 29 January 2007, paras. 208-209.

109 *Prosecutor vs. Bemba*, [ICC-01/05-01/08], Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute.

ment for economic reasons. Possible forcible transfers do not take place in a military context, although military forces may be involved in the execution. Though, it could be questioned if international law of armed conflict may also serve for interpreting forcible transfer in, for example, an economic context. Such argumentation is lacking as it does not refer to the contextual elements of the act in question.

Apart from the Geneva Convention, Global Diligence mentions that both the right to adequate housing (laid out in Article 11(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR)) and the right to choose one's residence (laid out in Article 12(1) of the ICCPR) are relevant.

The ICESCR protects the right to adequate housing, which encompasses the right to security of tenure and protection against forced eviction.

Art. 4 ICESCR provides that states can place limitations on the rights contained in the Covenant but only if the eviction is compatible with the nature of the ICESCR rights, and the eviction is aimed at promoting the general welfare of society.<sup>110</sup>

The basic principles and guidelines on development-based evictions and displacement – developed by the UN Special Rapporteur on the Right to Adequate Housing - provide that the notion actions promoting the general welfare of society refer to “steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable.”<sup>111</sup>

According to article 12(3) ICCPR, the freedom of choice of one's residence shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in covenant.

The UN Human Rights Committee recalls that laws authorizing the application of restrictions should be (1) precise (2) proportionate and necessary and (3) consistent with the fundamental principles of equality and non-discrimination.<sup>112</sup>

Summing up, according to the communication, forcible transfer can only be considered permissible under international law, if it is compatible with the nature of the ICESCR rights and aimed at promoting the general welfare of society; consistent with the rights recognized in the ICCPR; necessary to protect national security, public order, public health or morals or the rights and freedoms of others; proportionate to its protective functions and protected

110 ‘Only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society,’ in International Covenant on Economic, Social and Cultural Rights, Article 4. Cambodia ratified the Covenant on 26 May 1992.

111 UN Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, “*Basic Principles and Guidelines on Development-Based Evictions and Displacement*,” [A/HRC/4/18], para. 21, fn. (d). see: [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf) (last accessed on 05 November 2015).

112 Human Rights Committee, “*General Comment 27: Freedom of Movement (Art 12)*,” CCPR/C/21.Rev.1/ADD.9, 11 February 1999, paras. 13 – 18.

interests. Moreover, it must be the least intrusive means of achieving the desired result, provided for in a national law of general application that is precise, proportionate, necessary, and non-discriminatory and not arbitrary or unreasonable.

#### b) Domestic Law

Almost every legal framework mentions that evictions are possible, but must be *provided for* in a national law that is precise, proportionate, necessary, and non-discriminatory. Even if an eviction is provided for in national law, it will still be arbitrary, and therefore unlawful, if it does not comply with the safeguards contained in the national laws. Further, compliance with national law is only one of the cumulative requirements for lawfulness under international law. According to the Office of the High Commissioner of Human Rights in Cambodia, even under the Land Law, ‘forced evictions are illegal and resettlement can only be undertaken as a last resort and, when the exceptional circumstances of lawful evictions arise, proper consultations with affected communities should take place and compensation provided.’<sup>113</sup>

Under Cambodian law, the safeguards that must be complied with in order to evict an owner include: *public interest* ‘after fair and just *compensation* provided in advance’, and a *court order*.<sup>114</sup>

The safeguards, which must be complied with to evict persons without formal land title, underlie various conditions. First, forced removal of occupants without title may only be carried out by the competent authorities acting on behalf of the state and courts.<sup>115</sup> Second, with regard to disputes flowing from an economic land concession, lawful possessors must be voluntarily re-settled. Involuntary resettlement is prohibited.<sup>116</sup> Furthermore, violence may not be used against a possessor in good faith whether or not his title has been established.<sup>117</sup> And under no circumstances shall private force be used to protect a person’s title to property or to enforce a court order for the expulsion or forced removal of an occupant.<sup>118</sup>

113 Office of the High Commissioner of Human Rights Cambodia, Evictions and Resettlement in Cambodia – A Study on Selected Urban Resettlement Cases, p.13, available here: [http://cambodia.ohchr.org/WebDOCs/DocProgrammes/Resettlement\\_Study-28\\_Feb\\_2012\\_Eng.pdf](http://cambodia.ohchr.org/WebDOCs/DocProgrammes/Resettlement_Study-28_Feb_2012_Eng.pdf) (last accessed on 05 November 2015).

114 Cambodian Constitution Art. 44, Land Law Art. 5, and the 2010 Law on Expropriation, Art. 7 (emphasis added).

115 Art. 35 Cambodian Land Law.

116 ELC sub-decree 146, Art. 4(4).

117 Land Law 2001 Art. 253 “Any person who uses violence against a possessor in good faith of an immovable property; whether or not his title has been established or it is disputed, shall be fined from 1,500,000 Riel to 25,000,000 Riel and/or imprisoned from six (6) months to two (2) years irrespective of the penalty for violence against a person”.

118 Land Law 2001 Art. 255 “Under no circumstances shall the use of private force be authorized in order to protect a person’s title to property or to enforce a court order for the expulsion or forced

### c) Summary

In summary, evictions taking place in Cambodia could fall under the current definition in Art. 7 (1) (d) Rome Statute. Nevertheless, referring to Art. 49 of the Geneva Convention as well as to the ICTY *Naletilić* case, this seems problematic because of the military context of both sources. In general, the court has not decided yet whether the broad provision of Art. 21 (1) (b) Rome Statute includes the application of principles of the international law of armed conflict to non-military contexts and interpretation of the Rome Statute.<sup>119</sup>

### E. International criminal investigations as an answer to land grabbing in Cambodia?

In Cambodia, a significant implementation gap exists between law and practice. Plenty of existing laws are not equally applied or effectively upheld. This cuts across all institutions, contributing to the weakness of the entire system.<sup>120</sup> Cambodia has no shortage of laws against corruption or on land titles and compensation. The constitution provides for an independent judiciary, but many courts are subject to influence and interference from the executive branch and widespread corruption among judges, prosecutors and court officials remains problematic.<sup>121</sup> Lack of resources, low salaries, and poor training contributes to a high level of corruption and inefficiency in the judicial branch.<sup>122</sup> A shortage of judges and courtrooms delays many cases, which leads to unfair trials and impunity.<sup>123</sup>

Approaches like the UN Voluntary Guidelines or the Principles for Responsible Agricultural Investment to fight unregulated awards of land concessions or implementation in national law such as the ELC process require at least stable government structures. According to a position paper submitted by the Cambodian Human Rights Action Committee the entire ELC process suffered from a growing divergence between law and practice.<sup>124</sup> Available literature and case studies have all pointed to the consistent failure by various levels of

removal of an occupant. Any person who uses private force for the above purposes shall be fined from three million (3,000,000) Riel to twenty five million (25,000,000) Riel and/or imprisoned from six (6) months to two (2) years.

119 This does not apply for the interpretation of e.g. war crimes. In the *Katanga* case for example, Pre Trial Chamber I turned to Additional Protocol I of the Geneva Conventions for guidance to the interpretation of Art. 8 (2) b) Rome Statute. See *Katanga et al.* (ICC-01/04-01/07), Decision on the confirmation of charges, 30 September 2008, paras. 266, 276, 312 f.

120 Transparency International, Corruption and Cambodia's Government System – National Integrity System Assessment 2014, Phnom Penh 2014, p.7, <http://www.ticambodia.org/files/2014EN-NIS-A-WEB.pdf> (last accessed on 05 November 2015).

121 Country Reports on Human Rights Practices for 2013, United States Department of State, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/documents/organization/220395.pdf> (last accessed on 05 November 2015).

122 *Ibid.*

123 *Ibid.*

124 *Sperfeldt / Tek / Chia-Lung Tai*, note 41, p. 59.

authorities to adhere to existing regulations.<sup>125</sup> Ultimately, this ever-widening gap between law and reality has made it increasingly impossible for policy-makers to achieve the initial policy objectives of benefiting the local population. In fact, numerous communities appear to be worse off than before and the reduction of rural poverty in many cases cannot be substantiated.<sup>126</sup> Thus, what really lacks in the Cambodian system is legal certainty.

It is questionable if international criminal procedure can provide an appropriate influence for enforcing the rule of law in Cambodia. However, the communication fully uses the possibilities opened up by the Rome Statute and Art. 7. This opens the floor for further discussion on interpretation of the Rome Statute and the global role of international criminal law, the International Criminal Court and its function for justice.

In Cambodia, for the first time, government might fear international criminal investigations. An international criminal approach might be useful for putting national shortcomings in the spotlight. Additionally, fear of investigations on an international level might create a deterrent effect – one of the most desirable and controversial functions of (international) criminal law.<sup>127</sup>

## F. Conclusion

The Preamble of the ICC Statute recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. Hence, if a domestic judicial system is unable to prosecute international crimes or execute domestic laws, a communication to the ICC may be the only option for victims. However, it has to be taken into account that the ICC is a court of last resort with limited capacity. In contrast to these factual limits, crimes against humanity may cover an indefinite number of cases.

Therefore, the court has to clarify what exactly constitutes a crime against humanity.

Apart from substantive questions on the scope of crimes against humanity, the communication highlights the relationship between international investment, economic powers and their governmental collaborators as alleged perpetrators of international crimes. Rethinking this relationship might be as necessary as the review of the scope of Art. 7 Rome Statute.

125 *Ibid.*, p. 58.

126 *Ibid.*

127 On deterrence in international criminal law, *inter alia*, Goran Sluiter et al (eds.): *International Criminal Procedures, Rules and Principles*, Oxford 2013, p. 56 ff. In international law in general e.g.: Paul Robinson / Adil Ahmad Haque: *Advantaging Aggressors: Justice & Deterrence in International Law*, Harvard National Security Journal 3 (2011), p. 143.