



# Breaking New Ground

Investigating and Prosecuting Land Grabbing as an International Crime

February 2018



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# Acknowledgements & Methodology

This report was written by Rochelle Kelava, Cindy Phillips, and Sasha Vukovic of the International Justice and Human Rights Clinic at Peter A. Allard School of Law, University of British Columbia. Clinic Fellow Julie Hunter supervised and assisted with research, and Clinic Director Nicole Barrett reviewed and edited the report. We are truly grateful to Khin Zaw Win (activist and former political prisoner, Myanmar), Martyn Namorong (Papua New Guinea Resource Governance Coalition), Richard Rogers (Global Diligence), Tomaso Ferrando (University of Warwick), Sofía Monsalve (FIAN International), Andrea Nuila Herrmannsdorfer (FIAN International), Jon Festinger, Q.C., and Professor James Stewart, all of whom graciously donated their time and provided valuable input into this project.

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A longer confidential version of this report with detailed case studies was delivered to the International Criminal Court's Office of the Prosecutor (OTP) in December 2017. Nicole Barrett and Sasha Vukovic presented the confidential report and its findings to the OTP in The Hague on 24 February 2018.

Opinions expressed in the report are those of the authors and should not be attributed to other parties. The report does not represent the official position of the Allard School of Law or the University of British Columbia. Reporting of events is based on publicly available information and should not be taken as allegations of guilt against any individual persons or corporate entities. At the time of publication, none of the actors named in the report had been found guilty of crimes against humanity in connection with land grabbing. Versions of events in the report are subject to additional facts and verification.

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**INDIA:** A little girl stands in front of her demolished home, on the outskirts of an open-pit coal mine. In the Jharia region of India, hundreds of villagers are being removed from their homes, which are being demolished to yield coal from this reserve.

Sudipto Das, *Das Lone Existence* (2014 May), retrieved from: <<http://www.allardprize.org/galleries>>.

## Executive Summary

Since 2000, governments, financial investors, and national and transnational corporate actors have been involved in land deals covering over 38.9 million hectares of land in developing countries – an area greater in size than Germany.<sup>1</sup> Conservative estimates suggest that over 12 million people have lost their incomes as a result of the recent land rush – more than a third of the number of people internally displaced due to conflict and a quarter of the number of migrations induced by natural hazards in 2012.<sup>2</sup> In Cambodia alone, an estimated 830,000 people have been affected by land grabbing since 2000, including over 60,000 additional victims in an eighteen-month period beginning in early 2014.<sup>3</sup>

Although some of these land deals occur peacefully and within the bounds of the law, many do not, constituting illegal “land grabs” in violation of international law.<sup>4</sup> Within that context, land grabbing for natural resource exploitation has emerged as a rampant global human rights issue, threatening food security and livelihoods and often resulting in forced eviction and transfer, environmental degradation, and even murder and other forms of physical violence. Vulnerable and marginalized populations – in particular, impoverished communities, women and children, indigenous populations, and ethnic minorities – are especially susceptible, and often lack the resources or knowledge required to exercise their rights. Multinational corporations (“MNCs”), international institutions, national and regional governments, and local business elites have all been implicated in various land grabs around the world.

Accordingly, in a September 2016 policy paper on case selection, the Office of the Prosecutor (“OTP” or “the Office”) of the International Criminal Court (“ICC” or “the Court”) stated that it would

consider giving special consideration to Rome Statute crimes committed by means of (or resulting in) illegal dispossession of land, exploitation of natural resources, and environmental destruction. Driven by this novel policy direction, *Breaking New Ground* (“this manual”) aims to assist international investigative bodies, prosecutors, and judges in evaluating the international law prohibiting serious land grabs as crimes against humanity. It provides a factual overview of the scope of the problem and its impacts, briefly examining land grabs occurring in Papua New Guinea (“PNG”), Brazil, Myanmar, and Cambodia. It then proceeds to lay out the steps to prosecuting land grabbing as a crime against humanity under the Rome Statute.

Specifically, this manual examines the law surrounding the crime of forced transfer and other land grabbing-related crimes, surveying ICC jurisprudence, as well as caselaw from other influential international tribunals (the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) and regional courts, including the European Court of Human Rights, the African Court of Human and Peoples’ Rights, and the Inter-American Court of Human Rights. It explores, in depth, various hurdles to jurisdiction and admissibility, possible defendants and modes of liability, and other elements of a land grabbing action under international criminal law – including the issue of corporate accountability and challenges with respect to bringing corporate executives or the corporate entity itself before the ICC.

In short, *Breaking New Ground* seeks to guide investigative bodies, judges, and prosecutors engaged with the factual and legal dimensions of land grabbing, as well as advocates, political institutions, and companies working to curb this phenomenon. By prosecuting even a few of the most serious instances of the crimes arising from land acquisitions, the ICC can send a strong message to corporations and governments, deterring future violation and beginning to bring justice to victims of illegitimate land seizures. Consistent with the Rome Statute’s affirmation that “the most serious crimes of concern to the international community as a whole must not go unpunished,” ongoing impunity should no longer be tolerated for crimes against humanity arising in connection with land grabbing.





# I. Introduction

Land and the environment have emerged as contemporary battlegrounds for human rights. These finite resources have become among the most contested, through a global rush for land precipitated by growing demand for biofuels, food, and raw materials, as well as financial speculation by private investors on farmland and agricultural commodities.<sup>5</sup> In this global war for land, it is often armed security forces and bulldozers that carry out widespread attacks against civilian populations, as soy, palm oil, and sugar are cultivated on a mass scale to produce food and biofuels. The heavy use of commodities has driven large-scale land acquisitions and increased conflicts between communities and plantation companies, often at the expense of small-scale producers and their families. With demand for sugar, for instance, set to rise by 25 percent this decade, these conflicts will only continue to escalate, placing even more pressure on already contested land.<sup>6</sup>

It is within this context that land grabbing for natural resource exploitation – by governments, national and transnational corporate actors, and financial investors – has emerged as a grave human rights issue. Land grabs have resulted in violence, forced evictions, and environmental degradation,<sup>7</sup> and often victimize the poorest, most socially and economically vulnerable populations<sup>8</sup> of many developing countries. According to a 2012 World Bank study, investors have specifically targeted nations with weak governance where local people lack land rights and/or protection.<sup>9</sup>

As a result, families around the world, from Argentina<sup>10</sup> to Zambia,<sup>11</sup> have woken up to the sounds of bulldozers, evicted from their homes with no or inadequate compensation and, stripped of their rights to remain on land they have occupied and subsisted on for decades – in order to make way for mining, logging, agricultural plantations, infrastructure projects, and the like. As described by one political activist speaking about land grabbing in Myanmar: “people were deprived of their incomes, their livelihoods, and their homes...it’s like death, in a very slow fashion.”<sup>12</sup> Very often, those who have attempted to stand their ground have been forcibly displaced, subjected to false charges and illegal detainment, and even killed.<sup>13</sup>



People were deprived of their incomes, their livelihoods, and their homes...it’s like death, in a very slow fashion.

[Khin Zaw Win, activist & former political prisoner \(1994 to 2005\), Myanmar.](#)



Since 2000, domestic and foreign investors have been involved in land deals covering more than 38.9 million hectares of land in developing countries – an area greater in size than Germany.<sup>14</sup> Because of this, death and destitution have become an all too familiar reality for the poorest citizens and rural communities of many developing countries. In Cambodia alone, an estimated 830,000 people have been affected by land grabbing since 2000, including over 60,000 additional victims in an eighteen-month period beginning from early 2014.<sup>15</sup> Worldwide, the situation is no less dire, with conservative estimates suggesting that over 12 million people have lost their incomes as a result of the recent land rush – more than a third of the number of internally displaced people due to conflict and a quarter of the number of migrations induced by natural hazards in 2012.<sup>16</sup>

In addition, land grabbing is often accompanied by severe environmental degradation and destruction of healthy ecosystems, water, soil, and air.<sup>17</sup> In Papua New Guinea (“PNG”), for instance, where millions of rural people and thousands of unique species of animals depend heavily on the forest for survival, land grabbing and illegal logging have become so pervasive that nearly one-third of the land has been taken from traditional owners and placed in the hands of foreign corporations through deceptive large-scale land deals.<sup>18</sup> The PNG Forest Authority estimates that by 2021, 83 percent of

accessible forest areas will be gone or severely damaged.<sup>19</sup> Left largely unchecked by international law, land grabbing has undeniably become a social and environmental crisis of epic proportions, whereby elites illegally acquire natural resources and abuse human rights with impunity.<sup>20</sup>

As land grabs continue to occur at unprecedented rates worldwide,<sup>21</sup> the International Criminal Court (“ICC” or “the Court”) has emerged as a viable forum to hold those most responsible to account. While the ICC is best known for prosecuting genocide and war crimes, human rights violations that do not have a nexus to an armed conflict still fall within its subject matter jurisdiction<sup>22</sup> – in particular, as crimes against humanity,<sup>23</sup> which, unlike war crimes, may take place during peacetime.<sup>24</sup> Moreover, a policy document released by the Office of the Prosecutor (“OTP” or “the Office”) of the ICC in September 2016 explicitly highlighted that the OTP will give special consideration to crimes falling under the Rome Statute of the ICC (“Rome Statute”)<sup>25</sup> committed by means of (or resulting in) illegal dispossession of land, exploitation of natural resources, and environmental destruction.<sup>26</sup> Accordingly, this manual sets out to explore and define the legal elements that must be established in order to determine whether a particular instance of land grabbing may rise to the level of a crime against humanity – namely, that the alleged crimes form part of a widespread and systematic attack against a civilian population, pursuant to a state or organizational policy.<sup>27</sup>



The Office will...seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources... land grabbing or the destruction of the environment...the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.

Office of the Prosecutor, International Criminal Court, *Policy Paper on Case Selection and Prioritisation*.



Importantly, given its jurisdiction over crimes against humanity committed after the entry into force of the Rome Statute on July 1, 2002,<sup>28</sup> the ICC is able to prosecute land grabbing crimes, which have occurred on an increased basis since 2002. While there are difficulties in estimating the true aggregate scale of land grabbing globally, evidence clearly indicates an increased volume of land deals for agribusiness investments starting in 2005, and a renewed wave of land acquisition in sub-Saharan Africa, Southeast Asia, and Latin America following the spike in global food prices in 2007 and 2008.<sup>29</sup> Promisingly, the OTP’s recent policy focus expands on the ICC’s traditional prosecution of warlords and dictators in situations of armed conflict, and could make it more likely that governments and transnational corporate actors who are involved in land grabs and environmental exploitation around the globe will be prosecuted.<sup>30</sup> This policy also

presents an opportunity for the Court to alleviate concerns over its perceived overemphasis on Africa.<sup>31</sup>

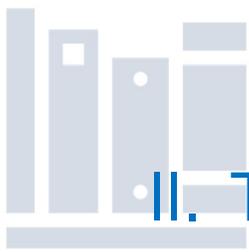
In response to the OTP’s new approach to case selection, *Breaking New Ground* aims to assist international investigative bodies, prosecutors, and judges in evaluating the international law prohibiting crimes against humanity as applied to land grabs. To that end, this manual will trace the evolution of the prohibition against forcible transfer and deportation from the Nuremberg trials to today’s international treaties and case law, illustrating the gravity of the situation through case studies highlighting devastating land grabs in various regions around the world.

The manual begins by establishing a workable definition of land grabbing and core related concepts, in order to distinguish between legitimate land deals and illegal land deals that constitute crimes against humanity. It then identifies key perpetrators as well as the primary victims of land grabbing.

The subsequent legal analysis discusses the sources of international law prohibiting land grabbing, including a survey of the international jurisprudence against forcible transfer and deportation, followed by a detailed explanation on how to build a case for land grabbing as an international crime. The analysis addresses questions of admissibility, applies the required “chapeau elements” for crimes against humanity, evaluates underlying crimes that may constitute crimes against humanity in the context of land grabs, and discusses the most appropriate modes of liability.

Finally, the manual considers appropriate penalties for those convicted of land grabbing as a crime against humanity as well as remedies for victims; identifies potential defences likely to be mounted on behalf of future accused; and discusses some remaining policy considerations.





## II. Terminology: Defining Land Grabbing and Other Core Concepts

Land grabbing is not a new phenomenon. It has been referenced expansively by academics, policy-makers, non-governmental organizations (“NGOs”), and media; however, it remains a contested term in academic and legal discourse.<sup>32</sup> The absence of an accepted legal definition for criminal land grabbing makes it easy for perpetrators to deny their involvement, and difficult for courts to prosecute the activity.<sup>33</sup> This section establishes a workable definition of land grabbing that captures the many ways in which illegal disposessions of land manifest themselves in reality.

Generally, most large-scale land deals involve close partnerships or collusion between foreign investors and national governments, which either broker the deals directly or facilitate their occurrence by creating the enabling political and regulatory environment.<sup>34</sup> Of course, not all transactions between national and transnational economic actors involving large volumes of land constitute land grabs, even where they result in evictions.<sup>35</sup> Of those that do, only some will rise to the level of crimes against humanity under Article 7 of the Rome Statute. Hence, it is important to be able to distinguish between those transactions carried out legally, in accordance with the provisions of international human rights treaties and international standards such as due process,<sup>36</sup> and those denounced as land grabs by civil society groups<sup>37</sup>—the most serious of which may satisfy the requisite legal elements of crimes against humanity.

The term “global land grab,” which gained traction in public discourse after the 2007-2008 global spike in food prices, was initially used in reference to companies and governments seizing ownership of common land thus dispossessing rural communities of what was often formally classified as state-owned public land. Local environments were frequently destroyed in the process.<sup>38</sup> In response, in May 2011, the International Land Coalition (“the Coalition”), a global alliance of over 150 civil society and farmers’ organizations, United Nations’ (“UN”) agencies, NGOs, and research institutes representing over 45 countries, was formed. The Coalition convened in Tirana, Albania to issue the Tirana Declaration.<sup>39</sup> Echoing the assertions made in the Kathmandu, Lima, and Kigali Declarations which called for land governance to better meet the needs of marginalised land users, the Coalition attributed blame to powerful local elites and soundly denounced the growing practice of “land grabbing,”<sup>40</sup> defined in the Declaration as:

[Land] acquisitions or concessions that are one or more of the following:

- (i) in violation of human rights, particularly the equal rights of women;
- (ii) not based on free, prior and informed consent of the affected land-users;
- (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered;
- (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and;
- (v) not based on effective democratic planning, independent oversight and meaningful participation.

A wide array of related terms – including “tainted lands,” “forced evictions,” and “development-induced displacement” – have been used in the ever-expanding body of literature examining the impacts of large-scale land deals globally. While these terms (discussed in more detail below<sup>42</sup>) capture interrelated and oftentimes overlapping concepts of illegal dispossessions of land, the often-cited Tirana Declaration definition of land grabbing will be used in this manual. The specific facts of any given case will determine which instances of land grabbing meet the requisite legal elements for crimes against humanity.

#### “LAND GRABBING” DEFINED

Land acquisitions or concessions that: (i) violate human rights; (ii) are not based on free, prior, and informed consent; (iii) disregard thorough social, economic, and environmental impact assessment; (iv) lack contractual transparency; and/or (v) are not based on effective democratic planning, independent oversight, and meaningful participation.

[International Land Coalition, the Tirana Declaration.](#)





## Related Phenomena: Tainted Lands, Forced Evictions, and Development-Induced Displacement

Related phenomena that are described in the literature dealing with illegal disposessions of land include “tainted lands,” “forced evictions,” and “development-induced displacement or resettlement,” among others – illustrating various concepts that may reasonably be viewed as narrower subsets of “land grabbing” as captured by the Tirana Declaration definition of land grabbing.

### *Tainted Lands*

“Tainted lands” is a term employed by the UN Special Rapporteur on the Right to Food to describe lands which have been obtained by an investor through corrupt means, such as bribing public officials or community leaders in charge of allocating land on behalf of communities, or failing to ensure the land was acquired by the seller through legal and transparent means. Evidently, large-scale land deals that qualify as “tainted lands” also qualify as land grabs within the definition adopted in this manual.<sup>42</sup>

### *Forced Evictions*

The term “forced eviction” is commonly associated with serious land grabs and is defined broadly by the Committee on Economic, Social and Cultural Rights as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”<sup>43</sup> Such removals may:

- Be permanent or temporary;
- Be removals from housing, land, or both;
- Be carried out with or without the use of force, as in cases where harassment, threats, or other intimidation are present;
- Be carried out without proper relocation, compensation, and/or access to productive land;
- Occur in urban or rural areas in developed or developing nations; and
- Affect everyone from a single individual to an entire neighbourhood.

Notably, forced evictions may occur specifically as a result of land grabbing by armed groups or militaries, but it is suggested that they may also occur outside the traditional context of land grabbing. For example, slum clearance and criminalization of poverty may be used as justification to conduct forced evictions and displace people from their homes, as may post-conflict and post-disaster reconstruction, or the improper use of disaster risk reduction laws or housing building standards.<sup>44</sup> Even so, the definition of land grabbing under the Tirana Declaration is likely sufficiently broad to contemplate such events, which, depending on the particular factual circumstances at play, may be of sufficient gravity to warrant prosecution under international criminal law.

### *Development-Induced Displacement*

“Development-induced displacement and resettlement” (also called “project-induced displacement”) is another term that refers to communities and individuals being forced out of their homes, and often their homelands, for the purposes of economic development.<sup>45</sup> While no such nexus to economic or industrial (e.g. agribusiness) development is necessarily required of the land grabs referred to under the Tirana Declaration, illegitimate land seizures (as noted above) are often precipitated by those very goals.



## III. Global Reach of Land Grabbing

The following section examines the scale, nature, and impact of land grabs, identifying the classes of victims and perpetrators who are most entrenched in this phenomenon, and canvassing the primary regions and industries in which it occurs.

### A. Industries and Regions

Agricultural land deals tend to take place in three distinct socio-ecological contexts. In most cases, the land acquired in large-scale land deals was already being used as cropland in areas where population density tends to be relatively high. In other cases, agricultural land deals take place in forested areas. While these areas tend to have lower population density than cropland, disturbing a forest ecosystem

can cause significant ecological impacts. The third context is shrub-and-grasslands, typically a moderately populated ecosystem. Land that is close to water resources and markets can be irrigated and exported from at a relatively low cost and is consequently in high demand.

Poverty and food security are common features of regions with high rates of land grabbing. Indeed, in many targeted countries, over 10 percent of the population is undernourished. For example, Sudan, a country where 26 percent of the population does not have sufficient food resources, has reportedly been targeted in over 20 land grab deals.<sup>46</sup> Tenure insecurity, considered a major driver of land acquisitions, is also a common feature of these regions. For example, Cambodia, Ethiopia, Madagascar, Laos, and Ghana are all characterised by weak land tenure security and simultaneously, significant land acquisition.<sup>47</sup>



This new research shows that, while some deals have fallen by the wayside, the global farmland grab is far from over. Rather, it is in many ways deepening, expanding to new frontiers and intensifying conflict around the world...The global farmland grab remains as much about water as it is about land...When drought hits, as it did in much of Asia and Africa in the first half of 2016, communities living next to these plantations see their access to water evaporate. This is what is currently happening in communities living next to the new sugarcane plantations in Cambodia and Ethiopia's Lower Omo Valley.

GRAIN, "The global farmland grab in 2016: how big, how bad?" in *Against the Grain*.



Geographically, land grabbing takes place all over the world. Africa is the most targeted continent for land deals,<sup>48</sup> but Latin America,<sup>49</sup> Asia,<sup>50</sup> and Eastern Europe<sup>51</sup> are also highly affected.<sup>52</sup> Developing countries in general are targeted because the climate is favourable for the production of crops, local labour is inexpensive, and land is still relatively cheap and perceived as abundant.<sup>53</sup>

On the demand side, investors based out of Europe and Asia are involved in the highest number of land acquisitions.<sup>54</sup> China and India are home to many land grabbers, as are the UK, Germany,<sup>55</sup> the United States, the United Arab Emirates, and Saudi Arabia.<sup>56</sup> The agribusiness sector is one of the primary industries implicated in land grabs; however financial companies and sovereign wealth funds are responsible for about a third of the deals, and on many occasions, there is overlap between the two (for example, agribusiness companies acquiring farmland through their hedge funds).<sup>57</sup> The fact that much of this land is designated for "flex crops"—crops that have multiple uses (food, feed, fuel, industrial material), such as soya, sugarcane, oil palm, and corn—make it impossible to identify a single industry or commodity as the primary driver of land grabbing.<sup>58</sup>



## Papua New Guinea: Decimation through Resource Grabs

### *Introduction and Overview*

Comprised of the Eastern half of New Guinea and about 600 small islands, Papua New Guinea (“PNG”) houses the third largest rainforest in the world after the Amazon and Congo basins, and the largest remaining block of tropical forest in the Pacific region. It is home to approximately 6.5 million people, 83 percent of whom reside in rural areas and live mostly traditional lifestyles based on small-scale agriculture, hunting, fishing, and gathering.<sup>59</sup> PNG has more than 800 indigenous languages, thought to be more than any other nation in the world.<sup>60</sup> The island’s rich cultural diversity is paralleled only by its biodiversity – PNG is home to five percent of the world’s species, of which two-thirds (including 760 kinds of birds) are found nowhere else on Earth.<sup>61</sup>

The country is also richly endowed with natural resources – including gold, copper, silver, natural gas, timber, oil, and fisheries – and is located in close geographic proximity to rapidly expanding Asian markets.<sup>62</sup> Amidst this unparalleled biodiversity and one of the most heterogeneous and diverse indigenous populations in the world, civil society groups report that PNG is being ravaged, its forests destroyed, and its indigenous landowners unlawfully displaced, in what has been called “the largest land grab in modern history.”<sup>63</sup> As a result, despite a wealth of natural resources, PNG remains the poorest country in Asia-Pacific, suffering from high levels of capital flight with revenues accruing to foreign-backed companies rather than the state and indigenous landowners.<sup>64</sup> Considering the intimate relationship between cultural diversity and biodiversity,<sup>65</sup> it is not only PNG’s rainforest or economy that are at risk, but also its millions of indigenous inhabitants, who have sustained themselves for thousands of years in a unique environment that is now being decimated by land grabbing.

### *System of Land Tenure and Special Agriculture Business Leases in PNG*

PNG’s Constitution grants its citizens legal ownership over land that they have traditionally lived on and used. Through a system of customary tenure which applies to 97 percent of PNG’s land,<sup>66</sup> the land is owned by families and administered by clan leaders under customary law.<sup>67</sup> The customary land in PNG is a form of collective and inalienable title; it cannot be sold, but rather, may be opened up to transactions, including leases, through mechanisms such as land registration.<sup>68</sup> As a result, commercial operators such as logging companies, large plantations and miners have often carried out operations on leased customary land.<sup>69</sup> Pursuant to the 1996 Land Act, the government introduced Special Agricultural Business Leases (“SABLS”), designed for local communities to develop their customary land for agriculture by consenting to lease it to interested individuals and companies.<sup>70</sup>

Despite the customary land tenure system, rampant corruption and weak rule of law,<sup>71</sup> coupled with the unyielding pursuit of timber by logging companies on the forests and land that have historically sustained PNG’s indigenous communities, have resulted in land grabbing on a large scale.<sup>72</sup> Between 2002 and 2011, the PNG government distributed at least 5.2 million hectares of customary land – around 12 percent of PNG’s total landmass<sup>73</sup> – through the SABLS to a number of private companies for large-scale agricultural development, without the free, prior and informed consent of all affected landowners.<sup>74</sup> In total, nearly one-third of PNG’s 46 million hectares is now in the hands of foreign corporations, predominantly for logging.<sup>75</sup> Since most of the SABLS last for 99 years,<sup>76</sup> they effectively extinguish customary land rights.

As communities have lost their principle source of livelihood and security, protests and attempts to defend land rights have often been met with force and violent crackdowns by police forces commonly designated to serve the interests of the logging industry.<sup>77</sup> By December 2011, patterns of abuse,

intimidation, and violence against locals by police stationed in logging camps became so widespread that a PNG Police Commissioner ordered the withdrawal of all officers from logging sites across PNG.<sup>78</sup>

Following international uproar in 2011, the PNG government initiated a Commission of Inquiry (“COI”) into SABLs.<sup>79</sup> Of the 42 SABLs examined in the final reports of the COI,<sup>80</sup> only four were found to have involved *bona fide* landowner consent and the undertaking of a commercially viable agriculture project, while the rest were seriously compromised – revealing a trend of mismanagement and corruption in all stages of the process.<sup>81</sup> The largest of the SABLs identified by the COI involved four leases of over two million hectares of land in PNG’s Western Province, belonging to tens of thousands of indigenous people. Testimony from landowners revealed that the majority did not consent to the leases or in some cases have any knowledge of the leases – a prerequisite for an SABL to be granted.<sup>82</sup>

The PNG government has not yet addressed this crisis with any meaningful action, and government officials and companies implicated in the abuse of SABLs continue to operate without being prosecuted or sanctioned.<sup>83</sup> Although over 90 percent of the leases were found unlawful by the official government inquiry, logging has continued, and in April 2014, the National Forest Board issued a new clearance permit over a contested SABL area in West Sepik province covering 105,200 hectares of mostly intact rainforest.<sup>84</sup> Thus, in PNG the government has handed customary land to foreign corporations in enormous quantities for logging and resource extraction; local police and security forces have committed widespread abuses against civilians to protect the interests of logging companies that provide them fuel and transport, accommodation, and allowances; and indigenous peoples have been forcibly transferred from their homes and lost their livelihoods through relocation onto land that is unsuitable for agriculture. In the context of the absence of regulatory or procedural safeguards, grievance mechanisms, and government oversight, an accountability void currently exists that could be filled by international criminal law and the ICC.<sup>85</sup>

### *Jurisdictional Concerns*

While PNG – as a signatory of the revised *Cotonou Agreement*<sup>86</sup> between the African, Caribbean and Pacific Community (the “ACP”) and the European Union (the “EU”) – has committed to take steps towards the ratification and implementation of the Rome Statute and related instruments,<sup>87</sup> it has neither signed nor acceded to the Rome Statute.<sup>88</sup> Nonetheless, Article 12 of the Rome Statute – which specifies preconditions to the exercise of the ICC’s jurisdiction – stipulates that the ICC’s jurisdiction extends beyond simply “[t]he State on the territory of which the conduct in question occurred,” to also cover States “of which the person accused of the crime is a national.”<sup>89</sup> As many instances of land grabbing in PNG involve Australian or Canadian companies and their nationals,<sup>90</sup> a case involving such actors could potentially be brought before the ICC. There also remains the possibility that the ICC may gain jurisdiction over a non-State Party such as PNG via referral of the situation to the ICC Prosecutor by the UN Security Council.



## B. Victims

Land grabbing affects millions of people every year – displacing them from their homes, polluting their lands, decreasing their water supply, and destroying their livelihoods. Vulnerable and marginalized populations are particularly susceptible to land grabbing, often lacking the resources or knowledge required to exercise their rights. This asymmetry between those losing their land and the powerful interests seizing it places the victims of land grabbing in even greater need of protection. Specifically, land grabbing has serious consequences for impoverished communities, women and children, indigenous populations and ethnic minorities.<sup>91</sup>

### *1. How Does Land Grabbing Negatively Impact Local Communities?*

Very often, governments and their elites frame the seizure of land as an inevitable, if unfortunate, aspect of economic development.<sup>92</sup> In the same vein, proponents of large-scale land acquisitions sometimes argue that there are positive impacts for local communities, including an influx of jobs and infrastructure, using attractive slogans such as “poverty alleviation.” While benefits are sometimes experienced in the start-up phase of a project, they tend to plateau and are rarely sustained throughout the project.<sup>93</sup> In many cases, the large-scale crowding out of small farmers, in combination with the strong preference of commercial farmers for capital-intensive crops and the relatively low prevalence of contract farming schemes, actually results in a net employment loss.<sup>94</sup> Moreover, there are some cases where land is needed but labour is not. In those instances, local people are not only expelled from the land that is their primary means of subsistence, but they also rarely receive payment for damages or assistance with resettlement.<sup>95</sup> Those who do gain employment by being incorporated into the deal are at an extreme disadvantage when they then find themselves up against powerful entities as they negotiate leases and labour contracts.<sup>96</sup> As a result, they struggle, and often fail to achieve even the minimum level of fairness in wages and working conditions.<sup>97</sup>

These harmful impacts on communities can accumulate to be as devastating as individual acts of violence. For rural farmers who, without notice or compensation, have seen their land bulldozed, their homes set ablaze, and their families forced to retreat to the outskirts of an urban environment where they have nowhere to live and no means of earning a living, the damage is severe.<sup>98</sup> And where attempts to protest or stand one’s ground result in imprisonment or violence, the situation can quickly escalate to one of life or death.<sup>99</sup>

### *2. Indigent Populations*

Within local communities, poor and indigent persons make up a large part of those victimized by land grabbing schemes. This is partially because most land grabs occur in resource-rich, cash-poor nations, where poverty rates tend to be higher than in their cash-rich counterparts.<sup>100</sup> Poverty rates remain high where agriculture is the primary source of livelihood, as is the case in rural communities.<sup>101</sup> Given that investors often desire arable agricultural land for use in agribusiness initiatives like plantations, low-income rural communities are the most likely to be affected by large-scale land acquisitions.

Smallholder farming families in developing nations produce up to 80 percent of the food consumed in those nations, and yet are among the poorest and most neglected in terms of investment and development initiatives.<sup>102</sup> When their land is illegitimately seized, food security for rural populations across the developing world is jeopardized.<sup>103</sup> Moreover, inequality in access to land creates a higher risk of violent conflict, which in turn leads to the “poverty trap” – a path of violence and social instability that creates a perpetual situation of poverty, and prevents impoverished communities from accessing opportunities for growth.<sup>104</sup>



More than 90 percent of the rural population in sub-Saharan Africa (including 370 million people considered to be poor) access land and natural resources via legally insecure customary and informal tenure systems, as do 40 million Indonesians and 40 million South Americans...In some countries, many more people live in unauthorised settlements and under informal or customary tenure arrangements than in formal land and housing markets.

UN-HABITAT, "Secure Land Rights for All."



Insecurity of tenure and insufficient titling systems also contribute to the problem. In sub-Saharan Africa, more than 90 percent of the population (including 370 million people considered to be poor)<sup>105</sup> retain their land through insecure systems based on customary and informal tenure.<sup>106</sup> Poverty and lack of formal title thus go hand in hand, and are major contributors to cycles of instability and land grabbing.<sup>107</sup>

### 3. Women and Children

Land grabbing crimes have a disproportionate impact on women.<sup>108</sup> In Africa where many of the world's land grabs occur, different crops may be gendered, creating separate and distinct responsibilities for men and women depending on the crop. Research indicates that where crops are commercialized (harvested for sale on the market rather than subsistence), women experience a drop in their share of income.<sup>109</sup> Similarly, where land is acquired for mining operations, the decrease in employment experienced by local communities (those living within 50 kilometres of the mine) is higher for women than for men.<sup>110</sup> Moreover, where locals are forced to seek employment on the plantations occupying the land from which they were removed, the heavy physical nature of the work renders many jobs inaccessible to women.<sup>111</sup>

Additionally, women are often excluded from the consultation and consent process for land acquisitions, where one exists, while in other places (e.g. Cambodia), women campaigning against land grabbing have been violently suppressed and imprisoned.<sup>112</sup> Even where a negotiation process occurs, community representatives may be primarily or exclusively male, preventing women from having a voice at the table.<sup>113</sup> This form of exclusion is one example of the broader threat to female autonomy and control arising from illegitimate land acquisitions. For example, traditional methods of seed swapping or mixing are often used by women in agricultural communities to control and maintain their food supply.<sup>114</sup> However these methods are typically prohibited for use on genetically modified seeds, which are used frequently in large-scale plantations and for commercialized crops.<sup>115</sup> Moreover, in certain African countries only men's land rights are registered, precluding women from claiming any rights themselves.<sup>116</sup> In fact, the Land Coalition estimates that less than five percent of all land is registered in the name of women.<sup>117</sup>

Furthermore, in many countries, women are responsible for taking care of the household by performing daily tasks such as collecting water.<sup>118</sup> The UN Commission on the Status of Women suggests that investments in labour-saving technologies could create more opportunities for women to pursue meaningful work and increased mobility.<sup>119</sup> However, plantations and industrial projects constructed



[C]rimes stemming from the land grabbing have a disproportionate impact on women, who bear the dual responsibility for childrearing and contributing to household income. The loss of land puts women at additional risk of suffering violence, exploitation, joblessness and associated psychosocial hardships. Women who campaigned against land grabbing have been brutally suppressed and illegally imprisoned.

FIDH, "Cambodia: 60,000 new victims of government land grabbing policy since January 2014."



pursuant to large-scale land acquisitions reduce water availability, forcing women to walk further and work harder to obtain the necessities of life for their families.<sup>120</sup>

Finally, it should be noted that when women lose their lands to land grabbing, their children become victims as well. In Haiti, women perform most of the work on the lands, and are involved in all aspects of agricultural food production.<sup>121</sup> As their land is taken over by MNCs and other actors, women are forced to seek work in cities and send their children away to be cared for by others.<sup>122</sup> Because of this, many children are left performing domestic tasks for their new families, without access to basic services like education.<sup>123</sup>



...remaining insecure are the land and resource rights of the majority of indigenous people (an estimated 300 – 370 million across the world), comprising up to 5,000 distinct groups, mainly in rural areas.

UN-HABITAT, “Secure Land Rights for All.”



#### 4. Indigenous and Ethnic Minorities

Indigenous groups and ethnic minorities are also severely impacted by land grabbing. With indigenous concepts of ownership often based on customary law or collective ownership, their traditional land is liable to be marked “vacant” or “underutilized,” leaving it open to seizure and sale. National laws often do not recognize indigenous forms of ownership and may allocate the ownership of all land to the state.<sup>124</sup>

Under international laws, including those related to self-determination, indigenous persons have specific protections, which include the right to freely dispose of their natural wealth and resources.<sup>125</sup> Governments are therefore obliged to ensure land is not taken from indigenous communities without their free, prior and informed consent (“FPIC”). Despite the emerging international law norm requiring FPIC,<sup>126</sup> however, indigenous communities are regularly excluded from the negotiation phase of land deals. In only

about 14 percent of cases has a process of FPIC been conducted, while in 43 percent of cases some limited form of consultation has taken place.<sup>127</sup> Consultation processes are not adequate in every case, sometimes lacking in sincerity and bypassing important groups.<sup>128</sup> For local communities, some common impacts of large-scale land deals conducted without FPIC include: loss of access to land and natural resources, increased conflict over livelihoods, and greater inequality.<sup>129</sup> Compensation paid to communities who have lost their access to land has only materialised in about one-third of cases where it has been promised.<sup>130</sup> Where indigenous land is taken without proper FPIC, it constitutes a land grab within the Tirana Declaration definition and reflects a failure on the part of government to provide indigenous peoples the heightened protection they are owed under international law.

In Colombia, for example, indigenous and Afro-Colombian communities make up the majority of those displaced from their land since the 1980s, along with small farmers.<sup>131</sup> Although this can be attributed in part to internal armed conflict, economic interests surrounding the extractive and agribusiness industries (particularly the African palm industry) are strong motivating factors for the displacement.<sup>132</sup> Thus, in 2011, 15 palm companies were charged by the Colombian Attorney General’s office for participating in the violent displacement of Afro-Colombian communities as part of a plan to seize their land for palm cultivation.<sup>133</sup> While the Colombian government agreed in 2010 to address land restoration for internally displaced persons, the proposed “Victims Bill” contained no mechanism for ensuring the right to consultation and consent for indigenous and Afro-Colombian communities.<sup>134</sup> To remedy this, the government set up consultation meetings with indigenous groups, but reportedly failed to allocate them sufficient time, with many indigenous and Afro-Colombians unaware the meetings were taking place.<sup>135</sup>

Along with indigenous groups, ethnic minorities are vulnerable to land grabbing due to linguistic and cultural differences, which can prevent them from knowing their rights or fully understanding the ramifications of a land deal. Such communities may also be isolated from broader society, rendering them particularly susceptible to exploitation. In Cambodia, for example, around 220,000 people (1.5 percent of the population) belong to indigenous minorities. Local NGO representatives have expressed concerns that such groups have little knowledge of going land prices and are unaware of Cambodia's 2001 Land Law, which prevents the sale of indigenous land to non-community members.<sup>136</sup> In 2008, ancestral land in Kratie Province, Cambodia, communally owned by hundreds of families belonging to the Stieng ethnic group, was given to a Cambodian company for use in a rubber plantation.<sup>137</sup> Despite the 2001 Land Law, the families report that they were never consulted about the proposed development.<sup>138</sup>

The victimization of ethnic minorities is also tied to broader societal issues like systemic racism and discrimination. In Myanmar, NGOs report that minority ethnic groups in Shan State, including the Shan peoples, have frequently been forcibly displaced to make way for rubber plantations.<sup>139</sup> This displacement occurs in the context of decades of discrimination against such groups. The discrimination continues in Myanmar's land legislation, which fails to recognize traditional land uses common to ethnic minorities.<sup>140</sup> Finally, plantation operators often refuse to hire ethnic minorities perceiving them as "backwards" or "lazy."<sup>141</sup>

Lastly, entrenched racism and systems of customary tenure can operate hand-in-hand to disadvantage ethnic minorities faced with land grabbing. The Romani or "Roma" people, a nomadic population occupying regions across Europe and the Americas, have long been subjected to societal and state-sponsored discrimination. In Russia, Roma communities have created settlements where they have lived for decades even though many of the inhabited houses lack registration.<sup>142</sup> The absence of registration allows the state to forcibly evict residents and declare their homes illegal.<sup>143</sup> In 2006, for example, the Russian government destroyed 43 houses after a court order declared them illegally inhabited by the Roma, leaving behind only those houses inhabited by ethnic Russians.<sup>144</sup> However, when the Roma try to register their houses, they are frequently rejected, subjected to blatant discrimination, or victimized by police corruption.<sup>145</sup>

## The Impact of Land Titling

Whether land grabbing occurs in a region depends on many factors, including the strength of governance in the host state, the nature and quality of its arable land, and its legislative regime. Within that regime, the system of land title or tenure plays a crucial role in determining whether local residents are illegitimately deprived of their land.<sup>146</sup> Informal and customary tenure constitute a major form of land ownership in many countries across the world, particularly in developing nations where most land grabs take place.<sup>147</sup> In Cameroon, for example, only 3 percent of the land has been registered and is held under private ownership.<sup>148</sup> The rest is held under various forms of customary tenure. Insecurity of tenure is particularly problematic for indigenous communities, as they are more likely to inhabit rural areas and to lack formal title to their lands.<sup>149</sup>

There are numerous reasons for this lack of formal titling. Many of the nations in question are in post-conflict situations, where administrative services have not yet reached affected areas.<sup>150</sup> In countries with colonial legacies, all land without visible developments was historically allocated to the state, undermining the need for a land title system.<sup>151</sup> Whatever the specific reasons, insecurity of tenure



resulting from informal ownership enables land grabbing by allowing governments and corporate actors to seize and sell occupied land.<sup>152</sup> Empirical evidence supports this: researchers report that in 2012 about 45 percent of agricultural land acquisitions targeted lands already in use by local farmers.<sup>153</sup> Once displaced, the inhabitants are unable to exercise legal remedies on their behalf, because they did not technically own the land in the first place.<sup>154</sup>

While some countries have taken steps to protect customary tenure rights, many others do not secure these rights.<sup>155</sup> Because of this, residents are vulnerable to forced evictions which simply lead to the creation of new settlements in different areas.<sup>156</sup> Insecure tenure and the informal settlements that result from it “combine with other factors...to reduce public revenues, infrastructure investment, employment and economic growth.”<sup>157</sup>

Still, there is ongoing debate over how tenure security ought to be improved.<sup>158</sup> Land title systems such as the ones in place in wealthier developed countries, such as the United States and Australia, may not be suitable for countries with different political, social, and ecological conditions.<sup>159</sup> While legislators and policy-makers continue to grapple with these issues, any solution will require time and careful design. In the meantime, criminal prosecutions of persons involved in land grabbing can help discourage culpable actors from taking advantage of tenure insecurity.

## C. Key Players: Economic and Political Actors

Land grabbing involves many diverse entities, from MNCs, to local business elites, to national and regional governments. Individuals within each of these groups represent potential defendants for criminal proceedings at the ICC. Actors are generally divided across geographic lines, with local investors, businesses, and state forces helping to evict residents with support, financial or otherwise, from foreign entities overseas. Here, we discuss the key players implicated in land grabbing, divided into two primary categories: government and corporate actors.<sup>160</sup>

### 1. Governments

Governments are implicated in land grabbing in myriad ways, including by defining agricultural land as vacant, granting permits to foreign companies, forcibly evicting land users, failing to compensate displaced persons, or seizing land under public interest provisions.<sup>161</sup> Governments participate both by inaction, such as failing to provide sufficient oversight of projects, and by affirmative actions such as helping to facilitate the eviction or suppression of inhabitants.<sup>162</sup> For example, in Ethiopia in 2011, local government and security forces supported by state agents allegedly arrested, harassed and violently suppressed residents in the Lower Omo Valley in order to expel them from their ancestral homelands.<sup>163</sup> The lands in question were needed for a large-scale irrigation scheme linked to the construction of a hydroelectric dam.<sup>164</sup> Apart from forcibly evicting



The institutions who should provide justice to the victims of land grabbing are often the very groups driving the problem – national governments and their elites who frame land seizures as an unfortunate but inevitable step on the path to economic development, and quash any resistance.

[Andrew Simms, “Unprecedented Case Filed at International Criminal Court Proposes Land Grabbing in Cambodia as a Crime Against Humanity,” \*The Huffington Post\* \(6 December 2014\).](#)

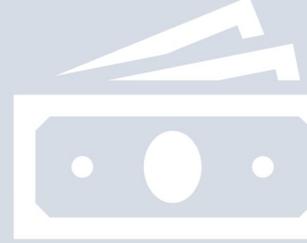


residents, the Ethiopian government also failed to publish any official plans for its commercial irrigation project or carry out project-related impact assessments.<sup>165</sup>

Government actors often grant land to investors, while offering no compensation or legal remedies to displaced land users.<sup>166</sup> Such grants are a particular problem in developing nations, where governments may formally own most of the land being acquired by foreign companies in land deals.<sup>167</sup> A State where land is being acquired may be visibly complicit in land grabs if it helps lease the occupied land and evict the inhabitants, without ensuring that international human rights obligations are respected. However, the host states of acquiring companies or entities are also key players in land acquisitions, perhaps less visibly, by failing to ensure that their companies respect human rights abroad.

One example of an illegitimate land acquisition that could implicate multiple governments occurred in 2001, when the Ugandan government agreed to lease land in its Mubende District to a German company for the establishment of a coffee plantation. Development of the plantation led to the forced eviction of roughly 4000 local inhabitants.<sup>168</sup> Partly financed by a German governmental development agency, the agreement stipulated that inhabitants were to be compensated; however, compensation never materialized.<sup>169</sup> Moreover, local authorities allegedly supported the Ugandan army in its use of violence to remove the inhabitants.<sup>170</sup> In this case, many of the actors involved in the deal share culpability for the abuses suffered by the local land users. The Ugandan government failed to protect its citizens, the German government failed to ensure human rights would be upheld before investing in the project, and various corporations and other entities likewise played a role in facilitating the forced eviction of the Ugandan residents.

Much of the literature on land grabbing focuses on government responsibility, as governments can be easier to hold to account and may be more concerned with their international reputation. They are often seen as having the primary responsibility for preventing land grabs because of their duty to protect their citizenry and in particular, marginalized and disadvantaged groups.<sup>171</sup> This is reflected in the *Voluntary Guidelines on the Governance of Tenure* ("VGGT"), adopted in 2012 by the Committee on World Food Security, which consist of recommendations aimed at promoting transparency and good governance amongst governments.<sup>172</sup> Ultimately, prosecutions for land grabbing crimes would likely look to government actors as plausible defendants. The other key players in land grabbing, creating another potential pool of defendants for ICC prosecutions, are the corporate actors discussed in the following section.



## Corruption and Land Grabbing

Land grabbing and corruption often go hand-in-hand; corruption can allow governments to circumvent legal safeguards and shield their actions from the public eye. Evidence of corruption in a land grabbing case would weaken the defendant's ability to argue that the acquisition in question was legitimate. Experts and civil society organizations focused on corruption, such as Global Witness, ICAR and Transparency International, distinguish between two forms of corruption that infect government actions, tainting the lands given or sold by governments to foreign investors.<sup>173</sup> *Petty corruption* typically involves bribes in the form of money or favours, given to local governments or community leaders in exchange for preferential treatment. *Grand corruption* operates on a larger scale, involving greater amounts of money and implicating higher levels of government (for example, through money laundering schemes). Corrupt government actors can have a serious impact on the structure and content of a land deal, because of the important role they play at each phase of the land acquisition process. Corruption in either form can impact any of the six stages of the land acquisition process, namely:

- (1) the demarcation of land and the rolling out of titling schemes
- (2) the design of land use schemes and the identification of land as "underutilized" or "vacant"
- (3) the use of "public purpose" or "eminent domain" provisions to justify the expropriation of land
- (4) the selling or leasing out of land to investors by the government or by community leaders
- (5) the exercise of remedies in land-related complaints
- (6) the monitoring of investor obligations during the post-project period

At the first stage, the government might refuse to register local farmers' land unless the farmer pays them a bribe. In Sierra Leone and Pakistan, for example, 75 percent of people surveyed by Transparency International report having paid a bribe for land services. At the second stage, land might be labelled "vacant" to enable its seizure and sale by members of the elite hoping to gain personally from the transaction. At the third stage, investors might pressure governments to expropriate land, while a corrupt, non-independent judiciary might refuse to contradict the authorities in determining whether the expropriation was in the 'public interest'. At the fourth stage, leaders acting as community representatives might give away communally owned land in order to benefit personally, without consulting the other community members or obtaining their consent. At the fifth stage, the judiciary might be politicized and controlled by the ruling elite, preventing those impacted by land grabs from obtaining adequate remedies. Finally, at the sixth stage, local authorities might be unwilling to monitor and enforce post-project conditions, where they have been offered bribes or have a vested interest in the project.

In these ways, governments whose actions are influenced by corruption contribute, directly or indirectly, to the human rights abuses that typify land grabs. By targeting land grabbing through international criminal prosecutions, the ICC can stand as a check on corruption, as well as crimes against humanity.

## 2. Corporations

Corporations in all parts of the world are implicated in land grabbing. From mid-2008 to 2009, corporate investment in agriculture increased 200 percent.<sup>174</sup> Corporate structures are complex, multilayered and often lack transparency, making it difficult to determine who owns or is attempting to buy the land in question. Moreover, different economic actors are involved in land deals to varying degrees. The following is a list of actors who may be involved in or profiting from land grabbing:

- Business managers of the agricultural project;
- Parent companies who (fully or partially) own the business managing the project (subsidiary or local branch);
- Investors/shareholders who invest money in a company in return for shares;
- Lenders who make loans to a project or a company (i.e. commercial banks, investment banks, multilateral development banks);
- Investment funds (i.e. hedge funds, pension funds, private equity funds);
- Governments who offer land to the business managing the project and allow a company to be registered and operate in their country or region;
- Brokers who play a role in helping to secure business deals or provide other support to the various actors involved;
- Contractors who carry out certain jobs on the ground on behalf of the project; and
- Buyers who buy the produce grown or processed by the project (e.g. trading companies, processors, manufacturers, and retailers).<sup>175</sup>

Corporate acquisitions of agricultural land are driven by various economic factors, such as: (1) the move towards agrofuels instead of fossil fuels, often driven by government subsidies, (2) population growth and increased food scarcity, (3) concerns about the availability of freshwater, (4) increased demand for raw commodities, (5) subsidies for carbon storage and decreased deforestation, and (6) speculation on future prices of farmland.<sup>176</sup>

Geographically, early research focused on China, the Gulf States, South Korea and India as the major countries involved in land deals.<sup>177</sup> Once these food-importing countries became worried about scarcity in the global food market, they looked to gain direct control over food production by purchasing large tracts of agricultural land.<sup>178</sup> However, more recent studies have looked at EU-based companies, which are also extensively involved in such deals (outside Europe).<sup>179</sup> As of 2016, of the EU member states, UK-based companies were involved in the greatest number of land deals, and controlled the largest amount of land outside Europe.<sup>180</sup>

Food and beverage companies are the biggest buyers of commodities, such as sugar, grown on large plantations which require vast amounts of land.<sup>181</sup> Brazil, for example, is the world's largest sugar producer and is home to many violent land conflicts, particularly in sugar-producing states.<sup>182</sup> According to Oxfam, most of the world's ten biggest food and beverage companies are not transparent about where they source land-intensive commodities and do not commit to preventing land grabs in their supply chains.<sup>183</sup> In addition to agribusiness companies, foreign banks, investment companies (including hedge



...[F]rom mid-2008 to 2009 the number of reported land deals rocketed by around 200 per cent...[s]mall-scale producers are sidelined as the market offers companies huge rewards for exploiting land, but without safeguarding people's rights.

*Jodie Thorpe, Sugar Rush: Land rights and the supply chains of the biggest food and beverage companies.*



funds and private equity funds) and wealthy individuals have spent millions of dollars purchasing agricultural land in developing nations.<sup>184</sup>

Beyond private corporations, international institutions like the International Finance Corporation (“IFC”), the private lending arm of the World Bank, are also implicated in land acquisitions. A 2014 report found that the IFC made a US\$30 million loan to a palm oil and food company without proper investigation and oversight of the company’s operations.<sup>185</sup> The World Bank’s Compliance Advisor Ombudsman launched an investigation into allegations that the company in question conducted or facilitated the forced eviction of local farmers in Honduras, and killed or assaulted several farmers.<sup>186</sup> In 2012, Oxfam called on the World Bank, as the world’s largest development organization, to cease investing in large-scale land acquisitions until policy and institutional protections against land grabbing could be implemented.<sup>187</sup>

Finally, local corporate entities such as small businesses, wealthy businessmen, construction teams and project managers provide on-the-ground support for land acquisitions. These actors may be directly involved in forcibly removing residents and seizing their land, then selling it to foreign companies or governments. For example, in Cambodia, politicians have been accused of displacing dozens of families with the help of local police, after acquiring thousands of acres of land for a sugarcane plantation.<sup>188</sup> In Colombia, there are ties between local companies, the palm oil industry and organized crime.<sup>189</sup> Colombian palm oil is primarily produced by Colombian companies, with two-thirds of its production sold on the domestic market.<sup>190</sup> The palm oil market has relied on collaboration between businessmen and paramilitaries, who combine legal and violent methods of acquiring land, to advance their economic and political interests.<sup>191</sup> In short, a comprehensive investigation into alleged land grabbing would consider a diverse array of actors, from government to corporate, and from foreign to domestic.

## Spotlight

### Brazil: Violence in the Amazon

#### *Introduction and Country Overview*

While South America has concluded fewer large-scale land deals than Africa or Asia, Brazil remains the most dangerous country for land and environmental defenders.<sup>192</sup> Global Witness reports that in 2015

alone, 50 people were killed in Brazil for defending land, bringing the total number of deaths to 207 since 2010.<sup>193</sup> The primary battleground between those protecting and those seizing land is the Amazon, where rural communities are subject to violence and displacement by agribusiness companies and local businessmen, often acting with

“

I’ve never seen, working for the past 10 years in the Amazon, a situation so bad...the rule is impunity...killing has become politically acceptable to achieve economic goals...It has been a humanitarian catastrophe for indigenous peoples and local collectives.

Felipe Milanez, former deputy editor of National Geographic Brazil, as reported by David Hill in “‘Never seen it so bad’: violence and impunity in Brazil’s Amazon,” *The Guardian* (16 February 2016).

”



state support.<sup>194</sup> The Amazon state of Maranhão is the site of some of the most far-reaching land grabs in the region, which have resulted in widespread displacement of inhabitants.<sup>195</sup> Reported evidence suggests that falsification of documents by regional state organs has helped facilitate land acquisitions made by private actors, indicating the existence of a state policy.<sup>196</sup>

As is the case with most land grabs, local actors complicit in land grabbing are supported by a complex web of entities, both local and foreign, governmental and corporate. For example, a 2015 investigation by the international non-governmental organization GRAIN revealed that certain global agriculture funds have invested millions of dollars in Brazilian farmland, purchasing hundreds of farms including some suspected of being acquired through land grabs.<sup>197</sup>

### *Jurisdiction*

Brazil is a State Party to the Rome Statute,<sup>198</sup> bringing Brazilian nationals within the Court's jurisdiction, and potentially the nationals of other states assuming their complicity with the alleged land grabbing in Brazil.<sup>199</sup> Ultimately, then, while local entities engaging in land grabs might be visible targets for prosecution, foreign corporate actors supporting these crimes need not be far behind.





## IV. Sources of Law

There are various sources of international law<sup>200</sup> that directly or indirectly prohibit land grabbing by governmental and corporate actors. In canvassing the relevant sources, this section will discuss specific treaties<sup>201</sup> and international customary law,<sup>202</sup> as well as provide a survey of the jurisprudence pertaining to the crime of forcible transfer.<sup>203</sup> The Rome Statute is the most important treaty considered for the purposes of this manual.<sup>204</sup> It is important to note, however, that while prosecuting land grabbing under international criminal law is a novel and necessary approach in the effort to combat this rampant global crisis, it is neither the first method that has been attempted, nor the only appropriate means to remedy every situation of land grabbing. There are other steps, apart from international criminal law prosecutions, that can and have been taken domestically to combat land grabbing, though ultimately with limited success. For instance, certain conduct associated with land grabs may be prosecuted within domestic legal systems by: (1) holding government and corporate actors to account via civil claims for torts committed in violation of international law; or (2) proceeding via domestic criminal prosecutions.<sup>205</sup>

In terms of the former, attempts to combat land grabbing by means of a civil suit may be possible due to the fact that “almost every international law violation is also an intentional tort, [and] thus victims of international criminal law violations [such as victims of forced transfer] could plead violations of domestic or foreign tort laws.”<sup>206</sup> In the UK, for instance, a civil case naming sugar giant Tate & Lyle as the defendant for alleged connections to land grabbing in Cambodia was slated to start in the Commercial Court in London in October 2014. However, this case has subsequently disappeared, with some suggesting that it may have been stayed while settlement negotiations continue.<sup>207</sup> In any event, leading theorists have argued that “the stigma of criminal offending cannot be adequately conveyed through civil liability alone,” and that “corporate actions that society wants to prohibit outright should be criminalized” rather than simply priced through civil penalties that corporations can pass on to their consumers.<sup>208</sup>

An example of the latter is a special court in Hyderabad, India, created in 1988 to fight elites grabbing public properties in the states of Telangana and Andhra Pradesh. At its height, this special court handled more than 700 cases of land grabbing; however, it has been defunct for the last two years as a result of state bifurcation.<sup>209</sup> In a more recent example, also in India, the Karnataka government established two special courts with exclusive state-wide civil and criminal jurisdiction to handle applications under the *Karnataka Land Grabbing Prohibition Act*. Trials under the Act began in August 2016, and a finding of guilt could result in imprisonment for one to three years, a minimum Rs 25,000 fine (USD 386), and an injunction ordering the return of the seized land.<sup>210</sup> However, district authorities have thus far been uncooperative in transferring cases of land grabbing to the courts in an efficient manner. In Bengaluru, only eight out of 6,000 pending cases have been moved to the special court in its first seven months of operation.<sup>211</sup>

Meanwhile, in Nigeria, Lagos State Governor Akinwunmi Ambode recently signed the *Lagos State Properties Protection Law* prohibiting land grabbing and fraudulent conduct in relation to landed properties, punishable by 10-year jail terms. The law covers not only those who use or threaten violence for the purpose of securing entry into any landed property, but also those who place or cause to be placed on any land or landed property, any agent for the purpose of forcefully taking such land.<sup>212</sup> This law also establishes a task force to enforce its provisions, with the power to arrest alongside any other law enforcement agency in the state, and grants jurisdiction over the offences to a Special Offences Court and other courts. Over a nine-month period leading up to March 2017, the Lagos State Government recorded 1200 cases of land grabbing, though only 250 have been resolved thus far.<sup>213</sup>

Given the principle of complementarity, international criminal proceedings under the Rome Statute must work in conjunction with, rather than as a substitute for, domestic criminal proceedings along the lines of those described above.<sup>214</sup> Keeping in mind the challenges associated with these attempts to combat land grabbing within national legal systems, the following sections explore the various sources of international law that prohibit land grabbing and their potential application to the prosecution of culpable actors under international criminal law.

## A. International Treaties

Prior to the entry into force of the Rome Statute, international criminal law did not always distinguish between the crime of deportation and the crime of forced population transfer. However, deportation – the forced removal of people from one country to another – has long been prohibited as a crime against humanity, recognized as such in all major international criminal law instruments that predated the ICC, including the Nuremberg Charter, the Tokyo Charter, the Allied Control Council Law No. 10, and the statutes of the international criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”).<sup>215</sup> Deportation was taken to include the crime of forced population transfer, which involves the compulsory movement of people from one area to another within the same state, rather than across borders.<sup>216</sup>

Outside of international criminal law, there are many human rights treaties that address land rights and can be seen to prohibit land grabbing, in various ways. The rights protected under these treaties include the most basic – the right to life and to security of the person – as well as a wide range of secondary rights such as the right to adequate food,<sup>217</sup> housing,<sup>218</sup> self-determination,<sup>219</sup> and the exploitation of natural resources.

The Universal Declaration of Human Rights, which sets the international standard for human rights and is considered customary international law that binds all states,<sup>220</sup> includes many provisions that are implicated by the issue of land rights.<sup>221</sup> Additionally, both the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)<sup>222</sup> and the International Covenant on Civil and Political Rights (“ICCPR”)<sup>223</sup> contain numerous provisions that are violated in instances of land grabbing. For example, both conventions outline a commitment to the right of self-determination of all people,<sup>224</sup> which is violated where local communities are evicted from their homelands without being given the possibility to stay.<sup>225</sup> A forthcoming General Comment from the Committee on Economic, Social and Cultural Rights specifically notes:

The obligation to respect economic, social and cultural rights is violated when States Parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. Indigenous peoples’ cultural values and rights associated with their ancestral lands are particularly at risk. States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.<sup>226</sup>



Regardless of the absence of a stand-alone human right to land, existing international human rights standards and other relevant international law address a wide range of land issues.

[UN OHCHR, “Land and Human Rights Standards and Applications”, HR/Pub/15/5/Add.1 \(2015\).](#)



Moreover, Article 11 of the ICESCR protects the right to an adequate standard of living, including adequate food, clothing, and housing.<sup>227</sup> With respect to the right to adequate food, the UN Office of the High Commissioner for Human Rights has stated:

States would be acting in violation of the human right to food if, by leasing or selling land to investors (whether domestic or foreign), they were depriving the local population of access to productive resources indispensable to their livelihoods. They would also be violating the right to food if they negotiated such agreements without ensuring that this will not result in food insecurity, for instance because this would create a dependency on foreign aid or on increasingly volatile and unpredictable international markets, or because the revenues of the most marginal local farmers would decrease as a result of the competition consequent on the arrival of such investors.<sup>228</sup>

The International Convention on the Elimination of all Forms of Racial Discrimination<sup>229</sup> (“ICERD”) may also be applicable in cases where land grabbing is backed by the state and victims are racial minorities.<sup>230</sup>

As previously mentioned, land grabbing centrally implicates the rights of indigenous peoples. Convention No. 169 of the International Labour Organization (“ILO”) – Convention Concerning the Rights of Indigenous Peoples in Independent and Tribal Countries – clearly recognizes the rights of ownership and possession held by indigenous people over the lands that they traditionally occupy and to which they have traditionally had access for their subsistence and traditional activities,<sup>231</sup> including a provision asking governments to take proactive measures and steps to identify and safeguard these rights.<sup>232</sup>

Apart from these binding international instruments, there is a large body of soft law that relates to land grabbing (see footnote 233).<sup>233</sup>

## B. The Rome Statute

Adopted by 120 countries on July 17, 1998, the Rome Statute is the establishing treaty of the International Criminal Court (“ICC”), the permanent international court for the prosecution of the most serious crimes committed after its entry into force on July 1, 2002 in the territories or by the nationals of States Parties.<sup>234</sup> To date, 124 countries have ratified the Rome Statute.<sup>235</sup>

Both the Preamble and Article 1 of the Rome Statute emphasize that the ICC shall be complementary to national criminal jurisdictions, and describe its jurisdiction “over persons for the most serious crimes of concern to the international community as a whole.”<sup>236</sup> As discussed, land grabs are frequently committed under the guise of development and perpetrated against indigent civilian populations with the complicity of government officials, state security forces, and business leaders. Mass human rights violations and environmental degradation associated with extensive or particularly egregious land grabs may rise to the level of “unimaginable atrocities that deeply shock the conscience of humanity” for which the Rome Statute is “determined to put an end to impunity.”<sup>237</sup> In fact, the OTP has explicitly identified the illegal dispossession of land, the illegal exploitation of natural resources, and the destruction of the environment as conduct constituting serious crimes under international law which will be given particular prosecutorial consideration under the Rome Statute going forward.<sup>238</sup>



[T]he most serious crimes of concern to the international community as a whole must not go unpunished...

Preamble to the Rome Statute of the ICC.



Article 5 of the Rome Statute gives the ICC jurisdiction over four types of crimes: war crimes, crimes against humanity, the crime of

genocide, and the crime of aggression.<sup>239</sup> In order for culpable government officials and business leaders to be held criminally accountable by the ICC for any form of land grabbing, the Prosecutor would need to establish the elements of an Article 5 crime as defined in the Rome Statute.<sup>240</sup> Since crimes against humanity can take place in peacetime,<sup>241</sup> as many land grabs do, Section V (“Legal Analysis: Building a Land Grabbing Case”) of this manual will focus on outlining the legal elements necessary to establish that the forced transfer of civilians often associated with land grabbing constitutes a crime against humanity.

This and other jurisdictional requirements are discussed in greater detail under Subsection A (“Jurisdiction and Admissibility”) in Section V. However, it is worth introducing here some of the jurisdictional challenges that may arise in the effort to prosecute land grabs under the Rome Statute. Namely, Article 34 of the Vienna Convention specifies that a treaty does not create either obligations or rights for a third state without its consent.<sup>242</sup> At first glance, this may pose prosecutorial challenges where the land grabbing in question is committed at the hands of a corporate or government actor who is not a national of one of the 124 States Parties that have ratified the Rome Statute to date. Nevertheless, Article 12 of the Rome Statute specifies preconditions to the exercise of jurisdiction and states that the ICC may exercise its jurisdiction with respect to an Article 5 crime not only where the accused’s home state is party to the Rome Statute, but also where the state in which the conduct in question occurred is party to the Rome Statute. Although opposed by the US, this jurisdictional grant allows the ICC to try not only nationals of States Parties, but also nationals of non-ratifying states if they commit Rome Statute crimes within the territory of a State Party. This jurisdiction must, however, be exercised over individuals<sup>243</sup> only so as not to create obligations over a non-party state, in accordance with Article 34 of the Vienna Convention.<sup>244</sup> The threat of prosecution under the Rome Statute, then, has the potential to serve as a powerful deterrent for perpetrators of the most serious land grabs in many vulnerable states and regions around the world, regardless of the status of a given state’s ratification of the Statute.

## C. Survey of Jurisprudence

The international community has long condemned forced displacement and recognized it as a crime that deserves prosecution. As such, there is a large body of international jurisprudence that touches on forcible population transfers. While most of these cases are not directly applicable to land grabbing, which often occurs during peacetime and is generally motivated by financial incentives rather than political or ethnic persecution, the existing case law does provide some useful guidance for potential ICC prosecution of a government or corporate actor charged with forcible transfer in the context of land grabbing. At the same time, these cases make clear that prosecuting forced transfers during peacetime or prosecuting corporate actors<sup>245</sup> for these crimes remain largely untested waters.

Article 7(1)(d) of the Rome Statute lists “deportation or forcible transfer of population” as a crime against humanity.<sup>246</sup> Deportation (forced transfer from one country to another) was originally included as a crime against humanity under the Nuremberg Charter, and has been considered a crime under various international instruments that predate the ICC.<sup>247</sup> Forcible transfer was then added under the Rome Statute to emphasize that internal displacement of a population within its own country constitutes a crime under international law.

In discussions leading up to the enactment of the Rome Statute, the inclusion of “deportation or forcible transfer” as a crime was heavily debated. The Preparatory Committee’s final draft statute contained “deportation or forcible transfer” as a crime against humanity, but reflected ongoing disagreement over its exact definition.<sup>248</sup> The current incarnation appeared for the first time in the *Bureau Discussion Paper* of July 1998.<sup>249</sup> Commentary on the *ILC Draft Code* of 1996 subsequently provided definitions of deportation and forcible transfer that mirror current definitions under the Rome Statute.<sup>250</sup>

The first cases dealing with forced displacement were the Nuremberg trials and other World War II cases, including domestic prosecutions in the United States and Israel.<sup>251</sup> Many of these cases dealt with

deportation, and in doing so developed the related but distinct concept of forcible transfer. Because the distinction between forcible transfer and deportation emerged through, and in light of, these cases, the terminology used in the trial judgements is not always clear.<sup>252</sup> The United States Military Tribunals, for example, refer to “deportation” without providing a definition, but seem to assume deportations only occur across national borders.<sup>253</sup> Moreover, given the post-war context in which these cases occurred, their focus was on deportations prosecuted as war crimes.<sup>254</sup> It was not until some of the earlier ICTY decisions that adjudicators looked specifically at forcible transfer in the context of crimes against humanity.

At the ICTY and ICTR, forcible transfer *per se* is not listed as a crime against humanity.<sup>255</sup> However, the jurisprudence suggests that an act of forcible transfer can underlie a charge of “other inhumane acts” or “persecution.” The ICTY has heard numerous cases involving such charges.<sup>256</sup> In *Prosecutor v Krstić*, the accused was charged with, *inter alia*, “other inhumane acts” and persecution effected through forcible transfer.<sup>257</sup> General Krstić was part of a joint criminal enterprise dedicated to removing Bosnian Muslim civilians from Srebrenica (in former Yugoslavia) to territory under Bosnia-Herzegovina control.<sup>258</sup> In *Krstić*, the Trial Chamber emphasized that both deportation and forcible transfer are condemned under various instruments of international law.<sup>259</sup> Thus, in an action arising out of an illegitimate land seizure, whether the inhabitants were displaced within or across national borders is irrelevant.

Following *Krstić*, in the *Krnjelac* case the accused was charged with persecution for the forced displacement of Muslim and other non-Serb prisoners, from the KP Dom Prison in Bosnia-Herzegovina, to Montenegro and other unknown places.<sup>260</sup> Notably, the Court in *Krnjelac* explored the kind of consent needed to legitimize a population transfer. At first, the Trial Chamber held that some of the transferred prisoners were willingly displaced because they did not have to be forced to leave.<sup>261</sup> However, the Appeals Chamber overturned that finding, stating that the conditions of the coercive prison regime precluded detainees from genuinely consenting to the transfer, despite the appearance of consent.<sup>262</sup> Applied to a potential land grabbing prosecution, the conditions in which displaced persons purportedly “consented” to being transferred, will be relevant in assessing whether the consent was genuine. Where for example inhabitants were pressured to leave by their government, not given the option to stay, or subject to harassment and intimidation (by state forces or others), such evidence will weigh against a finding of genuine consent.<sup>263</sup>

After *Krnjelac*, the Court had a chance to revisit forcible transfer in *Prosecutor v Stakić*. In *Stakić*, the accused was charged with, *inter alia*, forcible transfer for inducing a large number of Muslims and Croats to leave the territory of the Municipality of Prijedor over a five month period in 1992.<sup>264</sup> After being found guilty on several counts, Stakić appealed the judgement, arguing in part that deportation requires intent to permanently displace the transferred populations.<sup>265</sup> The Court dismissed the appeal on this issue, stating first that the protected interests underlying deportation are the same as those underlying forcible transfer.<sup>266</sup> The Court then found that intent to permanently displace is not required.<sup>267</sup> Where an actor is charged in connection to land grabbing, then, a defence arguing the displacement was temporary, as may be the case where the land is used for a project of fixed duration such as a mining operation, is unlikely to succeed.

The elements of forcible transfer were then expanded in *Prosecutor v Popović*. Seven accused were charged in *Popović* with forcible transfer as an underlying act of persecution and “other inhumane acts,” for the forced removal of Bosnian Muslim civilians out of Srebrenica and Žepa to territory within Bosnia-Herzegovina control.<sup>268</sup> In its reasons the Court considered the requirement that victims of forced transfer be “lawfully present” in the area from which they were removed.<sup>269</sup> One of the accused argued that lawful presence should be equated with the legal concept of lawful residence.<sup>270</sup> This interpretation would presumably restrict forcible transfer to persons residing in a given area on a more permanent basis.<sup>271</sup> The Court rejected this argument, finding that the protection extends to those who have come

to live in the community, whether long-term or temporarily.<sup>272</sup> For example, “internally displaced persons who have established temporary homes after being uprooted from their original community” would satisfy the lawful presence requirement.<sup>273</sup>

These findings are crucial when applied to a potential land grabbing prosecution, given that many victims of land grabbing do not have formal title to their lands,<sup>274</sup> but have often lawfully inhabited the area for decades or longer.<sup>275</sup> According to *Popović*, however, land users would not need formal title to the land to be found lawfully present on it. Additionally, *Popović* added to the *Krnjelac* analysis of genuine consent, by establishing that “it is the consent of each individual and not of a collective group or official authorities deciding on behalf of a group, that determines the voluntariness...of a transfer.”<sup>276</sup> Thus in the case of land grabbing, community leaders and government representatives cannot consent to the transfer on behalf of displaced persons.<sup>277</sup>

Finally, in *Prosecutor v Tadić* the Court developed some useful principles regarding the extent of participation required of perpetrators charged under aiding and abetting provisions. *Tadić* was charged with persecution effected through forcible transfer, for participating in the forced transfer of non-Serbs from the Kozarac area in Bosnia-Herzegovina to various detention centres.<sup>278</sup> After discussing several post-WWII cases, the Court concluded that physical presence at the crime scene is not necessary for participatory modes of liability.<sup>279</sup> In fact, “not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced.”<sup>280</sup> Theoretically then, a corporate or foreign actor charged with land grabbing under aiding and abetting or contribution provisions need not be close to the crime either geographically or temporally to substantiate a finding of guilt.

At the ICTR, deportation, persecution and other inhumane acts are also included as crimes against humanity under its enabling statute, though no cases have been brought on the basis of forced displacement.<sup>281</sup> Deportation has never been charged at the ICTR, while persecution and other inhumane acts have not been charged in connection with forcible transfer.<sup>282</sup> However, the Court’s analysis in *Prosecutor v Akayesu* indicates how land grabs might be charged under the rubric of forcible transfer, despite the requirement that crimes against humanity comprise an “attack directed against a civilian population.”<sup>283</sup> The *Akayesu* judgement noted that such an attack can be non-violent in nature, such as where the perpetrator exerts pressure on the population to act in a particular manner.<sup>284</sup> The crime need not be committed as part of a military operation, and may occur during peacetime.<sup>285</sup>

At the ICC, six cases have either dealt with or referred to forcible transfer. The most relevant of these, *Prosecutor v Ruto, Kosgey & Sang*, concerned post-election violence in Kenya in 2007-2008.<sup>286</sup> In the decision confirming charges against Mr. Ruto and Mr. Sang, the Pre-Trial Chamber found a *prima facie* case of “deportation or forcible transfer” for acts committed against Party of National Unity (“PNU”) supporters, a coalition political party formed in Kenya in 2007.<sup>287</sup> The displacement occurred when perpetrators looted and burned down businesses and homes believed to belong to PNU supporters, forcing thousands of persons from their homes.<sup>288</sup> Neither of the accused was charged with directly perpetrating the crimes; Mr. Ruto was alleged to have implemented the attack by paying the perpetrators, and establishing a punishment mechanism for non-compliance.<sup>289</sup> Interestingly, Mr. Sang was a corporate executive in the radio broadcasting business, charged with contributing to the crimes by using his radio station to incite violence, broadcast instructions, and advertise the attacks.<sup>290</sup> The Court’s preliminary remarks concerning Mr. Sang are illuminating as they indicate how a corporate actor might



[I]t is the consent of each individual and not of a collective group or official authorities deciding on behalf of a group, that determines the voluntariness...of a transfer.

*Prosecutor v Popović et al (Judgement) ICTY-IT-05-88-T (10 June 2010) at para 921.*



be charged for forcible transfer at the ICC, with the Court clarifying that “contribution” under Article 25(3)(d) of the Rome Statute does not need to be substantial to underlie a finding of guilt.<sup>291</sup>

The second ICC case involving forcible transfer, *Prosecutor v Muthaura et al*, also dealt with the displacement of Kenyan civilians in the context of political persecution.<sup>292</sup> Again, both accused operated at arms-length from the perpetrators physically carrying out the crimes.<sup>293</sup> Mr. Kenyatta, a prominent PNU supporter, was alleged to have provided financial and logistical support to the perpetrators, who were committing crimes against perceived affiliates of the Orange Democratic Movement (“ODM”).<sup>294</sup> Mr. Muthaura was charged with directing the Mungiki ethnic group to commit crimes against ODM members, as well as providing institutional support with tools obtained by him through his position of authority.<sup>295</sup> The Court in *Muthaura et al* emphasized the various acts amounting to coercion that forced residents to leave the areas in which they were present, including the destruction of homes in residential areas.<sup>296</sup> Following this reasoning, a potential land grabbing prosecution could examine residents having been forced out of their native territory through various coercive acts, such as arbitrary arrests, threats, or livestock killings.<sup>297</sup>

Ultimately, in both *Prosecutor v Ruto, Kosgey & Sang* and *Prosecutor v Muthaura et al*, the Court vacated the charges.<sup>298</sup> In *Prosecutor v Ntaganda*,<sup>299</sup> Bosco Ntaganda was charged under multiple alternate modes of liability for his role in forcibly expelling persons of the non-Hema ethnic group from various provinces in the Democratic Republic of the Congo (“DRC”).<sup>300</sup> As Deputy Chief of Staff of the Union des Patriotes Congolais (“UPC”)’s military wing, Ntaganda was indicted for crimes committed by UPC soldiers.<sup>301</sup> Although this case, like the others before it, arose out of an armed conflict, the Court noted that the UPC soldiers evicted civilians in Mongbwalu (a community in Northeast DRC) because of the area’s strategic importance in the gold market.<sup>302</sup> Specifically, the Court stated that the UPC’s goal was to provide security for the Hema traders.<sup>303</sup> This case thus demonstrates how perpetrators may be guilty of crimes against humanity for forcible population transfers, regardless of whether their motivation was financial, persecutory, or otherwise.

Of the six ICC cases, only *Ntaganda* remains ongoing.<sup>304</sup> In the other three cases, which emanate from the Situation in Darfur, Sudan, the Court issued arrest warrants that have not been honoured by the host states:<sup>305</sup> *Prosecutor v Hussein*, *Prosecutor v Harun & Kushayb*, and *Prosecutor v Bashir*.<sup>306</sup> The underlying conduct in each case related to, *inter alia*, the forcible transfer of various ethnic groups by the Sudanese Armed Forces and Militia. Each of the accused was affiliated with the government, apart from Mr. Kushayb who was a member of the Armed Forces.<sup>307</sup> While these cases have been halted at an early stage and therefore provide little in the way of judicial reasoning, they help illustrate how jurisdictional issues relating to land grabs might be overcome. Though Sudan is not a State Party to the Rome Statute, the Court accepted jurisdiction over the cases because the UN Security Council had referred the Situation in Darfur to the Court.<sup>308</sup>

Overall, the ICC and ad-hoc tribunal jurisprudence provides guidance for future criminal proceedings linking land grabbing to forcible transfer under the Rome Statute. Because these cases occurred in times of conflict, however, it is also helpful to examine case law from other regional bodies. The European Court of Human Rights (“ECHR”), the Inter-American Court of Human Rights (“IACHR”), the African Commission on Human and People’s Rights (“ACHPR”), and the African Court on Human and Peoples’ Rights (“AfCHPR”) have each developed a body of jurisprudence exploring the limitations on government expropriations of land.

The ECHR administers the European Convention on Human Rights, which contains no specific prohibition against forcible transfer or deportation.<sup>309</sup> Still, forced transfers touch on various rights under the Convention and its Protocols, such as the right to liberty and security,<sup>310</sup> the right to respect for private and family life and one’s home,<sup>311</sup> the right to protection of property,<sup>312</sup> and the right to freedom of movement (including the freedom to choose one’s residence).<sup>313</sup> The ECHR has produced some

relevant jurisprudence in the context of government expropriation of land, and forced displacement of Roma populations.

In *Connors v The United Kingdom*, a member of the Roma community was evicted from a gypsy site in England after living there for 13 years, on the grounds that he and his family had committed nuisance at the site.<sup>314</sup> The Court held, in determining whether the interference in the applicant's rights was justified as necessary in a democratic society, "the scope of the margin of appreciation [given to the state to implement social and economic policies] depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant."<sup>315</sup> Where the rights at stake are central to the individual's self-determination or identity, for example, the margin of appreciation will be narrower.<sup>316</sup> Finally the Court held that the vulnerability of the displaced population (in this case, the Roma community) must be taken into consideration in assessing whether the state's actions were justified.<sup>317</sup> In the land grabbing context, this analysis could be applied to show that legitimate expropriation by a state must be proportional to the rights' infringement caused by the land seizure. This is particularly important given that land grabbing often affects rural, indigent populations whose entire livelihood is based around their land; losing it therefore harms their identity and their ability to self-determine. The fact that land grabbing disproportionately affects marginalized and vulnerable populations also indicates that there should be a higher standard in justifying land expropriation, since vulnerability is a relevant factor in the assessment.

Decisions from the African Commission on Human and People's Rights ("ACHPR," issuing non-binding decisions) and the African Court on Human and People's Rights ("AfCHPR," issuing binding and enforceable judgments) have also contemplated the issue of forced evictions.<sup>318</sup> Like the European Convention on Human Rights, the African Charter contains no specific prohibition against forcible transfer, but contains parallel rights which are implicated by forced transfers.<sup>319</sup> In *Endorois v Kenya*, the ACHPR found that the Kenyan government violated the Endorois' rights by forcibly evicting them from their ancestral lands.<sup>320</sup> While the government cited conservation and economic development goals as the justification for the evictions, the Commission found these reasons insufficient to justify infringing the Endorois' cultural and religious rights.<sup>321</sup> This was due in part to the government's failure to meaningfully consult, adequately compensate, or obtain informed consent from the displaced persons.<sup>322</sup>

The *Endorois* decision suggests that governments should do more than simply cite tentative predicted economic development in justifying expropriation of land. In that situation, the government had resettled many of the Endorois, and implemented various programs putatively intended to increase the household income of the rural poor.<sup>323</sup> However, the Commission held that the Endorois should have directly shared in the mining concessions that the government received in exchange for leasing the land.<sup>324</sup> Thus for legitimate expropriations that entail serious rights' infringements, there should be a real tangible benefit to the affected community.

In May 2017, the AfCHPR issued a historic judgment in favour of the indigenous Ogiek community of Kenya, who have been subject to routine arbitrary forced evictions by the Kenyan government from their ancestral land in the Mau Forest without consultation or compensation.<sup>325</sup> In October 2009, the Kenya Forestry Service issued a 30-day eviction notice to the Ogieks and other settlers of the Mau Forest, demanding that they leave on the basis that the forest constituted a reserved water catchment zone, and was in any event part of government land under Section 4 of the Government Land Act.<sup>326</sup>

In its ruling, the AfCHPR recognized the Ogieks as an indigenous population deserving of special protection,<sup>327</sup> and ruled that the Kenyan government had violated seven separate articles of the African Charter, including the Ogieks' right to land (Article 14 of the Charter read in conjunction with the UN Declaration on the Rights of Indigenous Peoples);<sup>328</sup> their right to "enjoy and freely dispose of the

abundance of food produced by their ancestral lands” (Article 21);<sup>329</sup> and the Ogieks’ right to development (Article 22).<sup>330</sup>

Finally, the IACHR has also addressed forced transfers, specifically in the context of indigenous and cultural rights.<sup>331</sup> The IACHR administers the American Convention on Human Rights, which has been ratified or signed by 25 American nations.<sup>332</sup> The American Convention operates similarly to the European Convention and African Charter, with no specific prohibition on forcible transfer but many associated rights protected therein.<sup>333</sup> In *Case of the Saramaka People v Suriname*, the Court explored the



[The right to compensation] extends not only to the total deprivation of property title...but also to the deprivation of the regular use and enjoyment of such property.

*Case of the Saramaka People v Suriname*, Inter-Am Ct HR (ser C) No 172 (12 Aug 2008) at para 139.



consultative and compensatory measures the Suriname government was required to take before granting logging and mining concessions to private companies within the Saramaka peoples’ traditional territory.<sup>334</sup> The Court emphasized the State’s obligation to engage in culturally appropriate consultation that takes into account traditional methods of decision-making.<sup>335</sup> Moreover, it found that the community must be made aware of possible risks associated with the proposed project, to ensure their consent (should they give it) is informed.<sup>336</sup> Additionally, the Court stated that the right to compensation “extends not only to the total deprivation of property title...but also to the deprivation of the regular use and enjoyment of such property.”<sup>337</sup>

The Court’s comments in the *Saramaka People* case set out the parameters for proper consultation and consent, before indigenous or ancestral land can be taken by the State. Presumably, the duty to obtain informed consent would apply equally to corporate actors negotiating directly with local land users. Hence inhabitants would have to be informed of any possible risks before they could provide “genuine consent,” as set out in *Krnjelac* and *Popović*. Where residents are to be displaced temporarily, for example, they should be informed of the project’s potential environmental impacts on their land. Furthermore, the Court’s statements regarding compensation support the ICTY’s interpretation of “lawful presence” in *Popović*, indicating that residents can have land rights that give rise to correlative duties on behalf of the State (and possibly third parties), even where they do not have formal title to the land in question.

As a whole, jurisprudence from the regional human rights bodies provides valuable insight into how the ICC might approach a forcible transfer case arising out of land grabbing. Although the human rights courts each function within a specific legislative context, they have directly addressed development-induced displacement and at minimum could be cited as reflections of the international community’s values. Conversely, while international criminal cases from the ad-hoc tribunals and ICC have not dealt directly with these issues, they have developed an analysis of forcible transfer that helps illustrate how a land grabbing case might be brought on that basis as a crime against humanity. Ultimately, a land grabbing prosecution would be carving a new path in the international criminal court system, but could still draw upon existing case law for guidance.



# V. Legal Analysis: Building a Land Grabbing Case

## A. Jurisdiction and Admissibility

As noted, ICC jurisdiction is limited under Article 5 of the Rome Statute to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The acts associated with land grabbing do not tend to fit the definition of an “act of aggression,” as required under the crime of aggression. While it is possible that in some contexts, land grabs may involve “a specific intent to destroy a protected group” as required under the crime of genocide, many are simply driven by a desire for the land in question. Moreover, while some land grabs may constitute war crimes, most are committed in peacetime under the guise of development. Therefore, given that crimes against humanity can take place in peacetime,<sup>338</sup> the following section explores how a land grabbing case might be brought under the rubric of crimes against humanity, specifically where it involves, as it often does, the forced transfer of civilians. In doing so, this section begins by looking at jurisdiction and admissibility requirements as applied to a potential land grabbing case. It then explores the chapeau or “preconditions” that must first be satisfied before any case may proceed at the Court, before looking at the relevant underlying crimes that typify land grabs. Next it discusses possible defendants for a land grabbing prosecution, and the modes of liability under which they might be charged. Finally, it outlines two primary challenges to bringing a case, and ways in which those challenges might be overcome.

### 1. Jurisdiction

Pursuant to Article 12 of the Rome Statute, there are four circumstances in which the ICC has jurisdiction over crimes against humanity: (a) where the accused is a national of a country that is a State Party to the Rome Statute; (b) where the crime took place within the borders of a State Party’s territory; (c) where a non-State Party has accepted jurisdiction with respect to the crime in question under Article 12(3) of the Rome Statute; or (d) where the situation has been referred to the Court by the UN Security Council. Additionally, the purported crime must have taken place after the date by which the Rome Statute entered into force for the nation under consideration (July 2002 for most nations). While referral by the Security Council is not listed under Article 12, William Schabas notes that “it seems to be presumed that the Court may exercise jurisdiction anywhere to the extent that the “exercise of jurisdiction” is authorized by the Security Council.”<sup>339</sup> This presumption is confirmed by the Court’s acceptance of jurisdiction in the cases arising out of the Situation in Darfur, Sudan, which were referred to the Court by the Security Council, although the crimes were committed on the territory of a non-State Party, by nationals of a non-State Party.<sup>340</sup>



The impact of the crimes may be assessed in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.

Office of the Prosecutor, International Criminal Court, *Policy Paper on Case Selection and Prioritisation*.



Although one of these preconditions must be established before the Court may accept jurisdiction over a case, that jurisdiction is only “triggered” or exercised under Article 13 of the Rome Statute. That provision establishes three mechanisms for the exercise of jurisdiction: (1) where the situation was referred by the Security Council, (2) where the situation was referred by a State Party, or (3) where the Prosecutor has initiated an investigation *proprio motu* (and received the approval of the Pre-Trial Chamber pursuant to Article 15 of the Rome Statute).

Thus where the accused is a national of a country that has signed and ratified the Rome Statute, as in the Cambodia case, jurisdiction will not be a hurdle.<sup>341</sup> Similarly, territorial jurisdiction (where the crime was committed on the territory of a State Party) provides a promising tool for land grabbing prosecutions, as there are 124 countries to date that are States Parties to the Rome Statute.<sup>342</sup> While some commentators argue that the ICC should not be permitted jurisdiction over nationals of non-State Parties as it would infringe upon State sovereignty,<sup>343</sup> others point out that under international law, States do not have exclusive jurisdiction over their nationals committing acts abroad.<sup>344</sup> In fact, the State of nationality “has no legal right under international law to induce the territorial State to refrain from prosecuting or to impel it to agree to resort to interstate dispute resolution.”<sup>345</sup> The Rome Statute’s legislative history (*travaux préparatoires*) demonstrates that proposals advocating for territorial jurisdiction enjoyed broad support from attending States, while the proposal requiring consent of the State of nationality to confer jurisdiction enjoyed very little support.<sup>346</sup> Territorial jurisdiction therefore has a strong legal and conceptual foundation and could be used to bring culpable actors before the ICC, even where the individuals’ home States had not accepted the jurisdiction of the Court.

Still, many horrific instances of land grabbing have occurred in countries that have not ratified the Rome Statute – such as Papua New Guinea, Eritrea, and Myanmar – where territorial jurisdiction cannot be found. These situations may arise where, for example, the acquiring entity is a domestic corporation run by a national of the country where the land is located. Where the crimes were committed in the territory of a country that does not fall under ICC jurisdiction, and those involved in the crime are nationals of non-State Parties, jurisdiction would have to be established under Article 12 (c) or (d), i.e. on an *ad hoc* basis, or through a Security Council referral, respectively.

## 2. Gravity

Once jurisdiction has been established, the Court must then determine whether the case is in fact admissible. The admissibility analysis involves two elements; gravity and complementarity – each of which must be satisfied before the Court may proceed with the case.

Because the ICC only has jurisdiction over the most serious crimes, any potential case must be of “sufficient gravity” to warrant the court’s involvement.<sup>347</sup> In assessing the gravity of a situation or case, the OTP has considered the following factors: the scale of the crimes, the severity of the crimes, the systematic nature of the crimes, the manner in which they were committed, and the impact on the victims.<sup>348</sup> The gravity threshold has been interpreted by Pre-Trial Chamber I (“PTC I”) in the February 2006 *Lubanga* decision, as follows: (i) the relevant conduct must be either systematic or large-scale, and (ii) due consideration must be given to the “social alarm” such conduct may have caused in the international community.<sup>349</sup> Furthermore, the Chamber held that the perpetrator of the relevant conduct must be among the senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the court.<sup>350</sup>

As noted in Section II, the definition of land grabbing is necessarily broad. Consequently, not all incidents of land grabbing will pass the gravity threshold and constitute crimes against humanity. In some cases, the area of land and number of people affected may not warrant the court’s attention; in others, the land deal and associated human rights violations may not have been executed in a systemic manner. In many cases, because land grabbing deals involve so many individuals, at both the corporate and

government level, it will likely be difficult both to determine who is most responsible for the crime and to hold that person to account.

That said, there are certainly cases of land grabbing in which the effects of the crime, in terms of numbers of people impacted, the area of land, and the human rights violations associated with the crime, are of sufficient gravity to warrant the ICC's attention. For example, land grabs in Karen State, Myanmar in 2015, involved the systematic eviction of hundreds of villagers and burning of villagers' homes, following villagers' peaceful attempts to reclaim land they had previously farmed on for generations.<sup>351</sup> Among those destroyed was the house of 27-year-old Mu Kalote's mother, whose family members said they had no idea the home was part of the disputed area and no signs had been posted indicating they had to leave.<sup>352</sup> Left with little recourse, the majority of farmers impacted by this deal were pushed into neighbouring Thailand for survival, while those who remained to protest the illegitimate taking of their land were criminalized.<sup>353</sup> Not only is this land grab systemic and large-scale in terms of the area of land and number of people affected, but it has also caused alarm in the international community with many news sources and NGO's reporting on the issue and calling on the government of Myanmar to remedy the situation.<sup>354</sup>

### 3. Complementarity

Once the gravity threshold has been satisfied, the case will be admissible before the ICC where complementarity can be established. The principle of complementarity stems from the idea that the ICC is not designed to replace national court systems, hence the court does not have jurisdiction if "the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling* or *unable* to carry out the investigation or prosecution."<sup>355</sup> As noted, there is a strong connection between land grabbing and corruption, and land grabs are often made possible by weak legal systems that do not hold government officials or large corporate actors to account.<sup>356</sup> In Cambodia, for example, though the judiciary has indicated a willingness to prosecute land crimes, in practice the trials are delayed, many officials are corrupt, and justice is highly unlikely to be achieved.

When unfulfilled promises of judicial action are the status quo, courts can then determine whether a state is effectively unwilling or unable to carry out the investigation or prosecution. Article 17 of the Rome Statute establishes various situations in which a state may be deemed unwilling or unable to genuinely prosecute, including where the national judicial system has collapsed or is unavailable (17(3)), where investigations are not impartial or independent (17(2c)), or where there is an unjustified delay in proceedings (17(2b)), among other factors. Among other jurisprudence, the *Gaddafi* and *Al-Senussi* admissibility decisions have further expanded on these terms.

## Spotlight

### Myanmar: From Bullets to Bulldozers

#### *Introduction and Country Overview*

Land disputes are a major problem in Myanmar, where ethnic minority farmers are forcibly displaced from their homes to make way for plantation agriculture, resource extraction, and infrastructure projects – often without adequate consultation, due process of law, or compensation.<sup>357</sup> Seventy percent of



people in Myanmar are farmers, most of whom are ethnic minorities living in war-torn areas.<sup>358</sup> Sixty years of civil war have had devastating consequences for ethnic minority farmers, “whose relationship with the land is spiritual, cultural and social.”<sup>359</sup> Tensions over land have intensified in recent years as the country has embarked on a process of democratic transition and reform, while the military continues to control key government ministries.<sup>360</sup> Throughout this transition, land grabbing has forced many people to flee into economically precarious and politically uncertain situations as internally displaced persons or refugees.<sup>361</sup>

One of the largest land grabs in Myanmar occurred in 2007, when one of the country’s largest businesses with reported connections to the military junta<sup>362</sup> began a 200,000 acre mono-crop plantation project in Kachin State.<sup>363</sup> The majority of villagers living in the area were farmers tending small-scale farms in the valley, many of whom have since had their crops destroyed and land confiscated.<sup>364</sup> At that time, about 330 villagers were paid 80,000 Kyats (US\$70) per acre, but over 100 received no compensation; the ones who did “took the money because they needed it to live, but they were not satisfied with the compensation.”<sup>365</sup> As a result of these actions, four villages were wiped off the map and nine relocated.

As of 2010, seven villages, with a total estimated population of 5,000, are still located within the boundaries of the project area, while another seven are located within the project’s expansion area.<sup>366</sup> Conflicts between company employees, local authorities, and local residents have flared and turned violent several times over the past few years, culminating with an attack on residents of Ban Kawk village in 2010.<sup>367</sup> A letter to the government, signed by forty-eight farmers, states “[t]hey threatened the local residents and took away their farms without negotiating with the people. They came at night time and bulldozed away our farmlands. They confiscated cemeteries and burned farmhouses. They confiscated lands belonging to religious organizations.”<sup>368</sup> Officials across the project area use various forms of intimidation and pressure to force residents from their lands, including instituting regulations contrary to traditional practice.<sup>369</sup> The punishment for non-compliance is seizure of farmlands by the government.<sup>370</sup>

### *Background: Myanmar’s Legislative Regime*

In 2012, several new laws in Myanmar changed the legal basis for land use rights, with the aim of encouraging domestic and foreign investment in land.<sup>371</sup> The most significant of these laws are the “Farmland Law” and the “Vacant, Fallow and Virgin Land Law” (“VFV”). Under the Farmland Law, plots of land can only be legally bought and sold with a Land Use Certificate – so farmers who have been growing on family land can now only possess land by means of official registration.<sup>372</sup> Under the VFV, land that is not currently titled is deemed a “wasted asset,” and can be reallocated by the government to investors,<sup>373</sup> despite the fact that much of that so-called “vacant” land has been occupied and worked by villagers their entire lives. Moreover, Article 37 of Myanmar’s constitution establishes the state as the ultimate owner of all land in the country.<sup>374</sup>

The implications of this legal framework are that rural farmers are afforded little opportunity to assert their land rights. As Human Rights Watch reports, “Villagers and local groups say that government land registration services are effectively inaccessible to them, and farmers assert that local government offices fail to uphold their rights against more powerful moneyed interests. In some cases, villagers allege that local government officials have acted as brokers for land deals or facilitated the granting of licenses for mining and other projects, leaving long-time residents and farmers empty-handed and without effective recourse.”<sup>375</sup>

### *Legal Challenges and Activism on the Ground*

In Myanmar, farmers typically complain about land issues first to their local village representatives, who are frequently unable to resolve the disputes.<sup>376</sup> The case might then carry on to the district and state

level, however national Agriculture Ministry officials have conceded that farmer representation at the regional level is weak.<sup>377</sup> While the land administration system allows for review of local level decisions, there is no mechanism to challenge or review decisions by an independent administrative or judicial body.<sup>378</sup> Under the 2012 Farmland Law, decisions made by the Farmland Management Body regarding land classification and land ownership may not be appealed in a court of law.<sup>379</sup> Companies with close military connections play an increasing role in the economy in Myanmar and are often felt to be above the law.<sup>380</sup>

### *Jurisdictional Concerns*

While there is strong evidence for a land grabbing case that meets the ICC's gravity threshold, Myanmar has not ratified the Rome Statute, and thus, jurisdiction would pose a significant hurdle to admissibility. In the event that the ICC could establish jurisdiction, there might be issues of complementarity with respect to judicial action already taken domestically in Myanmar. That said, the judicial action could be considered inadequate, given that the compensation offered was meagre and available only to a fraction of those affected by the forced displacement; Myanmar's judiciary could likewise be considered "unwilling" to prosecute the perpetrators of this land grab. Further evidence of a weak or corrupt legal system in Myanmar could be used to support this proposition.



## B. Chapeau Elements

Article 7 of the Rome Statute sets out the common fundamental features of all crimes that must be satisfied before delving into the *actus reus* or *mens rea* of any particular crime. These preconditions or “chapeau” elements transform an ordinary crime into a crime against humanity: they are essential in bringing a crime that might be prosecuted domestically into the realm of international law. Where the preconditions are not met, the conduct in question might still be criminal or inhumane, but will not constitute a crime against humanity under the Statute.<sup>381</sup>



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...(d) deportation or forcible transfer of population.

[Article 7 of the Rome Statute of the ICC.](#)



Article 7 states: “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.” Subsection (d) lists deportation or forcible transfer of population as one such act.<sup>382</sup> This section will therefore address the three chapeau elements: (1) that the attack was *widespread or systematic*, (2) *directed against any civilian population*, and (3) committed with *knowledge of the attack*.

### 1. Widespread or Systematic

To be a crime against humanity, the acts in question must be part of a widespread or systematic attack. This requirement is disjunctive and will thus be satisfied so long as the attack was *either* widespread or systematic; it need not be both.<sup>383</sup>

The meaning of “widespread” has been elucidated in several cases at the ICC. In *Prosecutor v Bemba* and *Prosecutor v Katanga and Ngudjolo*, the ICC focused on the geographical scope of the attack and the number of victims in assessing whether an attack was widespread.<sup>384</sup> The Pre-Trial Chamber stated that a widespread attack could involve an attack over a large geographical area, or an attack over a small geographical area with a large number of victims.<sup>385</sup> The Court in *Bemba* expanded further on the meaning of widespread in stating that the attack should be massive and frequent, of a large-scale nature, with a multiplicity of victims.<sup>386</sup>

While “widespread” thus refers to scale and volume, “systematic” emphasizes the planned or organizational nature of the attack. In *Katanga and Ngudjolo*, the Court referred to the improbability of the acts having occurred randomly.<sup>387</sup> The systematic element thus overlaps with the requirement that the attack be committed pursuant to a state or organizational policy (elucidated further in Subsection B(2) “Attack Directed Against a Civilian Population,” below). As the Court states in *Prosecutor v Gbagbo*, the notion of “policy” as well as “systematic attack” both denote the planned nature of the attack.<sup>388</sup>

Ultimately, the attack cannot consist simply of random or isolated events targeting a small number of victims. Many land grabs would meet this requirement, as they are widespread, involving sizable tracts of land home to many communities and individual land users. The Land Matrix, an online database that compiles aggregate data about all land acquisitions worldwide, indicates 42.2 million hectares of land sold in 1,204 land deals as of 2016.<sup>389</sup> Of these, 691 deals involve regions the size of Nairobi, while 5,494 involve regions the size of Manhattan.<sup>390</sup> As noted, much of the land sold in global land acquisitions is characterized by high population density.<sup>391</sup> Insofar as any of these acquisitions constitute “land grabs,” an attack will be considered widespread so long as it is large-scale, affecting a multiplicity of victims, even where the acquired land itself constitutes a small geographical area.

Alternatively, land grabs are often systematic, in particular when perpetuated by government. The planned nature of land seizures can be inferred from proactive steps taken by government to evict land users, often without proper consultation, the various documentation required to give title to the land grabber, and government failure to compensate local inhabitants for the seized land.<sup>392</sup>

## 2. *Attack Directed against a Civilian Population*

Article 7(2)(a) of the Rome Statute expands on this element, stating that an “attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.”<sup>393</sup> In *Bemba*, the Court thoroughly analyzes each component of this chapeau element. An “attack” means a campaign or operation carried out against a civilian population. That attack must be part of a “course of conduct,” meaning the attacks must form part of a series or an overall flow of events. Further, the attack must involve “multiple” acts meaning more than a few, many, or several.<sup>394</sup> While much of the international case law focuses on attacks that occur during wartime, an attack need not be militaristic and may in fact occur during peacetime.<sup>395</sup> According to the ICTR, an attack may also “be non-violent in nature, like imposing a system of apartheid.”<sup>396</sup>

Beyond the nature and scale of the attack, there are other requirements pertaining to the intended objective or victims of the attack. It must be “directed against a civilian population,” which indicates both that the attack is aimed against a collective rather than an individual person, and that the collective is composed of non-combatants.<sup>397</sup> It can be “any” civilian population, and a common nationality, ethnicity or analogous defining features need not tie the group together.<sup>398</sup> Finally, the attack is “directed against” the given group, indicating that the civilian population was the primary purpose of the attack rather than being merely incidental.<sup>399</sup>

Applying the lens of forcible transfer as a crime against humanity, land grabs tend to involve numerous acts of displacement against many persons. The acts are often aimed at the collective, namely, the persons inhabiting the land, who (far from being combatants) often include vulnerable and marginalized populations such as indigenous communities.<sup>400</sup> The attacks on local land users form part of an overall flow of events, whereby governments and corporations aim to gain financially by selling and seizing inhabited land for little or no compensation, without the consent of those legally entitled to reside there (bearing in mind that persons may be lawfully present in an area without owning the land in question). While the overriding objective of land grabbing is economic gain, the imminent goal is to remove inhabitants in order to facilitate the transfer of land. The acts of transfer committed are therefore “part of” the attack, in that (following *Bemba*) there is a nexus between the acts committed and the overall attack.<sup>401</sup> This campaign against the civilian population is sometimes couched in terms of beneficial investment that will help decrease endemic poverty, yet more often than not displaced persons are left without any means of subsistence, resulting in even greater financial hardship.<sup>402</sup>

Land grabs can thus constitute a course of conduct directed against a civilian population. However, they must also be committed pursuant to or in furtherance of a state or organizational policy; this reintroduces the notion of a “systematic” attack. The ICC Elements of Crimes state that a policy may be demonstrated by the active promotion or encouragement of an attack against a civilian population, by a state or organization.<sup>403</sup> An organization is defined as an “association, whether or not governed by institutions, that sets itself specific objectives.”<sup>404</sup> It must possess a set of structures that allow for the coordination necessary to carry out an attack against a civilian population.<sup>405</sup> Perpetrators of land grabbing can therefore act pursuant to non-state organizational policies and still satisfy the preconditions for crimes against humanity.

Where a state policy is in question, the Court in *Situation in the Republic of Kenya* stated that such a policy does not need to be adopted at the highest level of the state, and could be implemented by a

regional or local state organ.<sup>406</sup> The policy does not need to be formally set out, and can be inferred from various factors, including: (i) that the attack was planned, directed or organized, (ii) a recurrent pattern of violence, (iii) the use of public or private resources to further the policy, (iv) the involvement of the state or organizational forces in the commission of crimes, (v) statements, instructions or documentation attributable to the state or the organization condoning or encouraging the commission of crimes, and (vi) an underlying motivation.<sup>407</sup> Finally, while the perpetrator need not be motivated by the policy, their acts must be committed “pursuant to or in furtherance of it” meaning they must either act deliberately to enforce the policy, or engage in conduct envisaged by the policy and with knowledge thereof.<sup>408</sup>

In most cases, land grabs involve the transfer of land from national or local governments to foreign or domestic entities. These entities receive the land without, for example, performing thorough impact assessments or obtaining the free, prior and informed consent of the inhabitants,<sup>409</sup> able to circumvent these safeguards in part due to the state’s willingness to actively promote or encourage large-scale land acquisitions. Where government actors are targeted for prosecution, an organizational policy will likely be easier to demonstrate, particularly where state resources are used to forcibly remove local land users.<sup>410</sup> Governments are also more likely to make public statements, which can provide evidence for the existence of state policies.<sup>411</sup> While it may be more difficult to demonstrate awareness of such policies on the part of corporate actors, aggregate data suggests that some investors specifically choose to invest in countries with weak governance, where procedural and substantive protections are poor.<sup>412</sup> Corporate executives might be shown to have knowledge of such policies where, for example, they know that land tenure is insecure or the host state has communicated an intention to remove local inhabitants.

### 3. Knowledge of the Attack

Finally, the chapeau elements require that the acts were committed as part of the attack, with knowledge of the attack. The Elements of Crimes elaborate on this requirement by stating that the perpetrator does not need to have knowledge of the precise details or exact characteristics of the attack. According to *Bemba*, the perpetrator must be aware that the attack is taking place, and that his or her action is part of the attack. In *Bemba*, the Court focuses solely on “awareness that the attack is taking place” at the preconditions stage. It then returns to the analysis of knowledge when looking at the particular mode of liability under which the suspect is charged.<sup>413</sup>

Insofar as perpetrators use force or the threat of force to evict inhabitants, it can reasonably be inferred that they are aware of the broader campaign to vacate the land so that it may be taken over by the acquiring entity.<sup>414</sup> Where a government official is charged in connection to land grabbing, knowledge of any attempts to remove residents, failure to consult, or failure to implement proper monitoring regimes, can often be derived from their participation in negotiations with the purchaser. Where a corporate representative is charged, knowledge of the attack might be inferred where it is commonly known that residents have been inadequately compensated or improperly relocated, such as where protests against the project are ongoing. Mistreatment of residents may also be widely publicized, in the news or other media.

## C. Underlying Crimes

Article 7(1)(a) to (k) of the Rome Statute lists the underlying crimes that constitute “crimes against humanity” when committed in the context of the abovementioned chapeau elements. The following crimes occur most frequently across the incidences of land grabbing explored throughout this manual:

- Deportation or *forcible transfer* of populations;
- *Murder*;
- *Illegal imprisonment* or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- *Other inhumane acts* of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health; and
- *Persecution* against an identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in conjunction with any of the underlying crimes referred to under Article 7(1) or those within ICC jurisdiction.

Pursuant to Articles 7 and 22 of the Rome Statute, the definitions of each underlying crime must be strictly construed, cannot be extended by analogy, and will be interpreted in favour of the individual being investigated, prosecuted, or convicted in case of any ambiguity. This is because crimes against humanity “are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.”<sup>415</sup> While this manual will explore each of the abovementioned acts, it focuses on forcible transfer, given its clear connection to most land grabbing cases.

### 1. *Deportation or Forcible Transfer of Population*

“Deportation or forcible transfer of population” is a crime against humanity set out in Article 7(1)(d) of the Rome Statute. As defined in Article 7(2)(d), it refers to “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.” As noted previously, the distinction is such that deportation requires removal across a national border, while forcible transfer does not.<sup>416</sup> The following table summarizes its *actus reus* and *mens rea* requirements:

## Crime Against Humanity of Deportation or Forcible Transfer of Population

<b><i>Actus reus</i></b> <sup>417</sup>	<b><i>Mens rea</i></b> <sup>418</sup>
<ul style="list-style-type: none"> <li>• Use of <i>force or coercion</i> to expel one or more persons to another location;               <ul style="list-style-type: none"> <li>▪ “Forcibly” is interpreted broadly and is not restricted to physical force<sup>419</sup></li> <li>▪ Includes threats of force or coercion caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment<sup>420</sup></li> <li>▪ Satisfied where a group of civilians flees their homes for fear of reprisal or other forms of discrimination<sup>421</sup></li> <li>▪ Characterized by involuntariness or lack of genuine choice by the victim<sup>422</sup></li> </ul> </li> <li>• The persons were <i>lawfully present</i> in the area;               <ul style="list-style-type: none"> <li>▪ The Rome Statute does not refer to the lawfulness of the victim’s residency or possession of a particular home or plot of land<sup>423</sup></li> <li>▪ The ICC has previously considered whether victims were unlawfully present in the town or its area, as opposed to their individual dwellings<sup>424</sup></li> </ul> </li> <li>• The expulsion was <i>without grounds permitted under international law</i>; and               <ul style="list-style-type: none"> <li>▪ Economic policy is not recognised as a ground that justifies forced transfer of a population<sup>425</sup></li> <li>▪ Transfer is warranted only where motivated by an individual’s own genuine wish to leave, by a concern for the security of the population, or by imperative military necessity</li> </ul> </li> <li>• It was part of a widespread or systematic attack.</li> </ul>	<ul style="list-style-type: none"> <li>• The perpetrator must have forcibly displaced the victims with <i>intent and knowledge</i>;               <ul style="list-style-type: none"> <li>▪ Intent means to engage in the conduct and to cause the consequence, or being aware that it will occur in the ordinary course of events<sup>426</sup></li> <li>▪ Knowledge requires awareness that a circumstance exists or a consequence will occur in the ordinary course of events<sup>427</sup></li> </ul> </li> <li>• The perpetrator was aware of the factual circumstances establishing the lawfulness of the victims’ presence; and</li> <li>• The perpetrator knew that the conduct was, or intended that it be, part of a widespread or systematic attack directed against a civilian population.</li> <li>• Satisfied when the authority forcing the evacuation of the population takes measures that would prohibit or be at odds with the return of the population</li> </ul>

“Deportation or forcible transfer” is the crime most commonly identified in the numerous land grabs documented in human rights reports, news articles, and interviews. Illegitimate land seizures often consist of land transfers that disregard the rights of the occupants, forcibly displacing them from their land or relocating them without proper compensation and consultation. While there are many examples of this, the Cambodia case, as delineated in a Communication to the ICC under Article 15 of the Rome Statute – is perhaps the most illustrative.<sup>428</sup> The Communication alleges various acts of forcible transfer that purportedly occurred across various regions in Cambodia, between 2002 and 2014.<sup>429</sup> These acts were allegedly triggered by different events, but all are said to involve families and individuals being forced off their land as part of an overall attack on the civilian population by what the Communication calls “the ruling elite;” namely, senior members of the Royal Government of Cambodia, senior members of State security forces, and government-connected business leaders.<sup>430</sup>

### 2. Murder

Article 7(1)(a) of the Rome Statute sets out the essential elements of murder as a crime against humanity:

1. The perpetrator killed, or caused the death of, one or more persons;
2. The killing was committed as part of a widespread or systematic attack directed against a civilian population; and

3. The perpetrator knew that the killing was part of or intended the killing to be part of a widespread or systematic attack against a civilian population.<sup>431</sup>

The following table summarizes its *actus reus* and *mens rea* requirements:

Crime Against Humanity of Murder	
<i>Actus reus</i>	<i>Mens rea</i>
<ul style="list-style-type: none"> <li>• A victim is dead and the death resulted from “the act of murder,” being an act or omission of the perpetrator causing death<sup>432</sup></li> <li>• Requires a chain of causation between the action or omission of the perpetrator and death of a victim<sup>433</sup></li> <li>• The death is provable by circumstantial evidence provided that it is the only reasonable conclusion that can be made in the circumstances<sup>434</sup></li> <li>• Lethal force by State Security Forces to suppress civilian demonstrations and alleged dissidents has been accepted as murder by the ICC Pre-Trial Chamber<sup>435</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Neither Article 7 nor the Elements of Crimes give much clue as to how <i>mens rea</i> should be understood, so Article 30 of the Rome Statute applies and the material elements must be committed with intent and knowledge<sup>436</sup></li> <li>• The perpetrator must have intended to kill one or more persons<sup>437</sup> <ul style="list-style-type: none"> <li>▪ This encompasses cases of <i>dolus directus</i> of the first degree (direct intent) and second degree (oblique intention)</li> <li>▪ But it does not cover subjective or advertent recklessness<sup>438</sup></li> </ul> </li> <li>• The perpetrator knew that the killing was part of or intended the killing to be part of a widespread or systematic attack against a civilian population<sup>439</sup></li> </ul>

The Rome Statute outlines the law of attempts as it relates to crimes against humanity in Article 25(3)(f), which states that criminal responsibility and liability for punishment for a crime will be imposed on perpetrators “taking action that commences [a crime’s] execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions.” In the land grabbing context, civilians have been murdered while attempting to protect their land, or simply as a way of suppressing opposition to proposed projects. In Laikipia County, Kenya, for example, the indigenous Maasai community claim they were approached by a man who informed them the land they had lived on for 30 years had been sold to a private party.<sup>440</sup> The Maasai rejected the sale as they had neither given consent nor been consulted, and thus refused to vacate the area; following this, they claim to have been subjected to violence, abuse and torture by police, and employees of the land claimant.<sup>441</sup> One community member describes how a resident was murdered; drowned by employees of the land claimant while police watched.<sup>442</sup> His ten-year-old son claims to have witnessed the murder, which was later explained away as an accidental drowning.<sup>443</sup> This murder is just one of a series of alleged attacks against the Maasai, motivated by land ownership conflict; other related incidents have included assaults, arbitrary arrests, harassment, livestock seizures, and entrapment.<sup>444</sup>

A land grabbing prosecution arising out of the attacks on the Maasai could target individual members of the police, employees or representatives of the purchasing party, or State officials who may have been involved in the sale, although the Maasai state that “how the land ownership changed hands is not clear.”<sup>445</sup> The various alleged acts could be sufficient to constitute a “widespread or systematic attack against a civilian population,” insofar as the police are alleged to have been patrolling the lands for weeks on end, indicating a certain level of planning and organization.<sup>446</sup> Ultimately this is just one example of how land grabs can turn deadly, culminating in the death of innocent civilians trying to protect their lands and livelihoods.

### 3. Imprisonment or Other Severe Deprivation of Physical Liberty

Imprisonment or other severe deprivation of physical liberty (“illegal imprisonment”) is a crime against humanity under Article 7(1)(e) of the Rome Statute. The following table summarizes its *actus reus* and *mens rea* requirements:

Crime Against Humanity of Illegal Imprisonment	
<i>Actus reus</i>	<i>Mens rea</i>
<ul style="list-style-type: none"> <li>• The perpetrator imprisoned one or more persons or otherwise severely deprived them of physical liberty<sup>447</sup></li> <li>• The gravity of the conduct was such that it was in violation of the fundamental rules of international law<sup>448</sup></li> <li>• The imprisonment is <i>arbitrary</i>, meaning deprivation of liberty without due process of law, as in the case where no legal basis can be called upon to justify the initial deprivation of liberty<sup>449</sup></li> <li>• If national law is used to justify the imprisonment, the relevant provisions and their enforcement must not be arbitrary or violate international law<sup>450</sup></li> <li>• If at any time the initial legal basis for imprisonment ceases to apply, lawful deprivation of liberty may become unlawful<sup>451</sup></li> <li>• Reference should be made to human rights law to assess the legality of the deprivation from the point of view of international law, including a number of human rights instruments which enshrine the right of an individual not to be deprived of their liberty<sup>452</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Article 7 does not provide guidance as to how <i>mens rea</i> should be understood, so Article 30 of the Rome Statute applies and the material elements must be committed with intent and knowledge<sup>453</sup></li> <li>• The perpetrator was aware of the factual circumstances that established the gravity of the conduct<sup>454</sup></li> <li>• The perpetrator knowingly or intentionally committed the conduct as part of a widespread or systematic attack against the civilian population<sup>455</sup></li> </ul>

Illegal imprisonment occurs frequently in the land grabbing context, used by perpetrators to threaten or pressure local land users into leaving their lands “voluntarily.” In the Lower Omo Valley in Ethiopia, for example, residents claim the government has been conducting arbitrary arrests and detentions, jailing indigenous people to prevent them from opposing the land acquisitions in that area.<sup>456</sup> Since mid-November 2015, the Ethiopian government has put the regime (“Oromia”) under martial law, purportedly as part of a broad campaign against those resisting land grabs.<sup>457</sup> The indigenous people say “the arrests are a show of force, to intimidate us not to oppose the land grabbing policy.”<sup>458</sup> In a potential land grabbing prosecution, the persons conducting these arrests could be charged under crimes against humanity (barring other evidentiary difficulties) where, for example, it can be shown they knew there was no lawful basis for the arrests. This may be established by pointing to a lack of evidence of any wrongdoing committed by the detained person, in conjunction with evidence of other alleged attacks on Oromia residents.

### 4. Other Inhumane Acts

“Other inhumane acts” can be viewed as a catch-all category<sup>459</sup> for crimes against humanity under Article 7(1)(k) of the Rome Statute, which requires that any such acts be “of a similar character intentionally

causing great suffering, or serious injury to body or to mental or physical health.”<sup>460</sup> The following table summarizes its *actus reus* and *mens rea* requirements:

Crime Against Humanity of Other Inhumane Acts	
<i>Actus reus</i>	<i>Mens rea</i>
<ul style="list-style-type: none"> <li>• The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;<sup>461</sup></li> <li>• The nature and gravity of the act was of a character similar to any other underlying crime referred to in Article 7(1) of the Rome Statute;<sup>462</sup> and</li> <li>• The conduct was committed as part of a widespread or systematic attack directed against a civilian population.<sup>463</sup></li> </ul>	<ul style="list-style-type: none"> <li>• The perpetrator was aware of the factual circumstances that established the character of the act;<sup>464</sup> and</li> <li>• The perpetrator <i>knew</i> that the conduct was part of or <i>intended</i> it to be part of a widespread or systematic attack directed against a civilian population.<sup>465</sup></li> </ul>

The parameters for interpreting “other inhumane acts” can be identified by drawing on the provisions of the 1948 Universal Declaration on Human Rights and the 1966 UN Covenants on Human Rights, which identify a set of basic human rights. Under appropriate circumstances, the infringement of these rights may amount to a crime against humanity.<sup>466</sup> Deprivations of food, adequate water, and medical assistance, as well as sub-par sanitary conditions have been held to constitute an attack on human dignity capable of amounting to other inhumane acts.<sup>467</sup>

Large-scale land deals increase local food insecurity, as arable land produce is exported rather than reaching the local market, forcing smallholder farmers to purchase foods, as opposed to harvesting it on their lands.<sup>468</sup> This phenomenon is apparent in Ethiopia, which has been reported to be both an epicenter of land grabbing, as well a place where extreme food insecurity exists.<sup>469</sup> Agricultural products account for 46 percent of Ethiopia’s Gross Domestic Product (GDP), 90 percent of its exports and 83 percent of its employment, and smallholder agriculture is a means of livelihood for the vast majority of Ethiopians.<sup>470</sup> However, the Ethiopian government and transnational corporations are reportedly displacing and dispossessing Ethiopians of their land and handing over control and ownership to non-local corporations and governments.<sup>471</sup> These features very likely compounded if not produced the conditions leading to the 2008 famine in Ethiopia.<sup>472</sup>

Some of the negative impacts of these vast land deals include displacement of local farmers, uncompensated dispossession of their land, continued food scarcity as investors export what is grown, unsustainable resource use, and environmental damage to lands, atmosphere and water.<sup>473</sup> Moreover, it is likely that such dispossession of land and displacement of people will cause poverty levels to increase, ultimately forcing many people to migrate away from agricultural areas.<sup>474</sup> Such effects may fall into the category of inhumane acts in extreme cases, such as when rural Ethiopians experience dramatic food scarcity in conjunction with their land being grabbed.

## 5. Persecution

Persecution is a crime against humanity under Article 7(1)(h) of the Rome Statute. As defined in Article 7(2)(g), persecution is “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity,” on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, committed in connection with any act referred to in Article 7(1) or any crime within the jurisdiction of the ICC. The following table summarizes the *actus reus* and *mens rea* requirements of persecution:

Crime against Humanity of Persecution	
<i>Actus reus</i> <sup>475</sup>	<i>Mens rea</i> <sup>476</sup>
<ul style="list-style-type: none"> <li>• The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights;</li> <li>• The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such;</li> <li>• Such targeting was based on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law;</li> <li>• The conduct was committed in connection with any act referred to in Article 7(1) of the Statute or any crime within the jurisdiction of the Court; and</li> <li>• The conduct was committed as part of a widespread or systematic attack directed against a civilian population.</li> </ul>	<ul style="list-style-type: none"> <li>• Focus on the perpetrator’s subjective identification of the group or collectivity, including those “defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group”<sup>477</sup></li> <li>• The perpetrator <i>knew</i> that the conduct was part of or <i>intended</i> the conduct to be part of a widespread or systematic attack directed against a civilian population</li> <li>• No additional mental element is necessary for the connected act.</li> </ul>

Persecution may comprise “a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature that violate an individual’s right to the equal enjoyment of his basic rights,” and its severity may be assessed by considering the context and cumulative effect of the acts as a whole.<sup>478</sup> Examples include:

- Acts of harassment, humiliation, psychological abuse, and other outrages on personal dignity;
- The cumulative denial of the right to employment, the freedom of movement, proper judicial process, and proper medical care;
- The destruction or confiscation of civilian property during peacetime, when such property is a vital asset for the owners or given population’s livelihood and the cumulative effect of its destruction is the displacement of civilians, particularly when the destruction is committed with a recklessness towards the lives of inhabitants and has the same effect as forcible transfer;
- The indiscriminate and extensive looting of homes, buildings, businesses, civilian personal property, and livestock.<sup>479</sup>

As noted under “Victims” in Section III, in discussing indigenous and ethnic minorities, land grabbing may intersect with discriminatory actions and systemic racism. Where this connection exists in a given land grabbing case, persecution may be an appropriate crime under which to charge the accused. The *actus reus* for persecution includes that the perpetrator targeted the person or persons on the basis of their identity in a group or collectivity, and the targeting was based on grounds universally recognized as impermissible under international law. In northeastern Shan State in Myanmar, Global Witness reports that Myanmar’s armed forces worked with district governments and private companies to confiscate huge tracts of land from local land users.<sup>480</sup> The confiscations mainly targeted agricultural land used for *taungya* (shifting cultivation), which is characteristically occupied by ethnic minorities in northern Myanmar.<sup>481</sup> CSOs suggest “in the context of decades of discrimination towards ethnic minority groups, this can be seen as an attempt by the Burmese authorities to undermine these groups’ means of subsistence and way of life.”<sup>482</sup> Although ethnic minorities comprise at least one third of Myanmar’s population, Burmese nationalist movements have dominated the political sphere and have attempted to impose an idea of “Burmese-ness” that has led to the suppression of other social identities.<sup>483</sup> Hence, when minority ethnic groups like the Shan are forcibly displaced from their native territories to make way

for rubber plantations, this displacement could underlie a charge of persecution, insofar as the Shan and other minorities are targeted because of their ethnic identity, a prohibited ground of discrimination under international law. As always, this would be subject to further evidence demonstrating that the chapeau elements of persecution have been met.

## D. Defendants

As discussed under “Key Players” in Section III, land grabbing typically (though not always) involves both government and corporate entities. For the purposes of an ICC prosecution, potential defendants could be taken from either or both of these categories. However, legal constraints such as jurisdictional limitations, as well as strategic and policy considerations, will likely affect which actors may in fact be targeted.

### 1. Government Actors

Government officials at the local, regional or national level could be subject to ICC prosecution for their role in land grabbing. In the state that is home to the land in question, members of the national government (such as Ministers) could be charged under the theory of superior responsibility for the actions of their subordinates, where those persons are engaged in crimes.<sup>484</sup> Alternatively, Ministers could be charged for their own actions where, for example, they sell land to investors knowing the buyers intend to forcibly remove the current inhabitants.<sup>485</sup> Local or regional government officials who direct state forces to clear the land in order to enable its sale, will also be liable to indictment insofar as they can be shown to have knowledge of the assaultive and violent conduct employed by those forces. In Ethiopia, for example, residents of the Lower Omo Valley have allegedly been subject to arbitrary arrests and detentions, beatings and mistreatment by government, federal police and special military forces, as part of an attempt to remove them from the land.<sup>486</sup> As one resident stated, “now the people live in fear – they are afraid of the government.”<sup>487</sup>



Now the people live in fear – they are afraid of the government.

Pastoralist tribesman in southern Ethiopia.



Insofar as the underlying crimes occurred in a state that has signed on to the Rome Statute, the Court will have jurisdiction over government actors in that state.<sup>488</sup> Barring any evidentiary difficulties, it may be easier to build a case against local and regional government actors because they are more likely to have awareness of the situation on the ground and the extent to which the land being sold is already occupied. It is less clear, however, whether the Court would be able to prosecute members of (foreign or domestic) governments who simply failed to provide sufficient oversight of companies within their jurisdiction engaging in land grabbing (overseas or at home). Even if the government exerted some measure of control over the company in question, aiding and abetting and contribution provisions under the Rome Statute require that the accused facilitated the crime and did so with some level of intent or knowledge.<sup>489</sup> Both requirements would be difficult to satisfy here. Therefore, state officials at any level of government who were directly involved in the land acquisition negotiations or sale, would be the most plausible defendants for an ICC prosecution. However, public perception of the ICC ought to be taken into consideration in building a potential prosecution, given the allegations that the Court has disproportionately focused on Africa. Because many land grabs occur in developing nations, sanctioning government executives from these countries might be seen as a case of “blaming the global south.”<sup>490</sup> Focusing on corporate actors in foreign or Western jurisdictions could reallocate some of the responsibility for these crimes and bolster the credibility of the Court.<sup>491</sup>

## 2. Corporate Actors

The first question to answer in building a case against a corporate actor who has engaged in crimes, is who in the corporation ought to be targeted. As is explored further under “Corporate Criminal Liability” (below), corporations themselves cannot yet be prosecuted at the ICC; to do so would likely require an amendment to the Rome Statute.<sup>492</sup> Insofar as corporations intentionally contribute to land grabbing by, for example, providing the resources needed to evict local inhabitants, prosecutors must find an individual within that corporation who is responsible for the crime.

### Corporate Criminal Liability

When one looks to the land grabs occurring in PNG, Brazil, Myanmar, Cambodia, or any number of similar situations around the world, a common thread seems to be the involvement of corporations who ultimately reap profit off the losses of individual victims.<sup>493</sup> IBM, for instance, was condemned for selling a revolutionary data management system to the Nazis, allowing them to organize data about millions of people under their control and thereby implement a brutally efficient extermination program during World War II.<sup>494</sup> Scholars assert that individuals atop businesses routinely weigh decisions according to a self-serving economic scale, in order to pursue the central and morally neutral goal of profit-maximization.<sup>495</sup> Meanwhile, several levels of control and ownership insulate them from any real sense of responsibility for actions undertaken by the corporation.<sup>496</sup> The larger the corporation involved, the larger the consequences of this amoral profit motive. According to business and human rights scholar Beth Stevens, “[t]he enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate.”<sup>497</sup>

#### *Criminal Accountability for Global Supply Chains*

Regulation difficulties have certainly been the case with many of the reports of land grabbing explored throughout this manual. In keeping with leading corporate theorists who agree that objectionable corporate actions ought to be stigmatized through criminal liability,<sup>498</sup> culpable corporate actors could be prosecuted alongside government officials, with a view to stemming the global land grabbing phenomenon. This criminal accountability approach is supported by the argument that corporate war crimes or crimes against humanity should incorporate both the direct perpetrators of the crime and those who benefit indirectly through an intermediary, thereby potentially encapsulating the entire corporate supply chain.<sup>499</sup>

#### *Limitations of Corporate Liability under the Rome Statute*

In demanding corporate accountability, it is thus desirable to: (1) establish individual criminal responsibility on behalf of corporate officers charged with crimes against humanity for their involvement in land grabbing; and (2) explore novel approaches to corporate criminal liability under international criminal law. The latter contemplates the possibility of extending criminal liability beyond individual business leaders, to capture the corporation as a legal “person” itself.

However, while the ICC is well known for prosecuting heads of state, political and military leaders, and leaders of irregular warring factions, corporate “persons” are not subject to criminal liability

under Article 25(1) of the Rome Statute, which specifically limits ICC jurisdiction to “natural persons.” During the drafting of the Rome Statute, some argued that corporations ought to be included in order to facilitate victims’ compensation. It was, however, ultimately deemed more appropriate to exclude corporations from ICC jurisdiction due to evidentiary challenges in prosecuting legal entities and the rejection of corporate criminal liability in many national legal systems. Ultimately, the philosophy of the Nuremberg Tribunal that “international crimes are committed by men, not by abstract entities” prevailed.<sup>500</sup> The restriction to natural persons suggests that, barring an amendment to Article 25(1), the ICC is limited prosecuting corporate officers, managers, and employees, but not the corporate entity itself. Nevertheless, the ICC’s broadened focus makes it more likely that key individuals will be prosecuted where they are affiliated with corporations involved in land grabs and environmental exploitation.<sup>501</sup>

### *Coupling of Corporate Criminal Liability with International Crimes in National Systems*

Notwithstanding the Rome Statute’s limitations, legal persons are conceptually still bound by international criminal law. The mere fact that the Rome Statute does not permit international criminal prosecutions of corporations says nothing about whether international norms apply to legal persons. In fact, “international law and domestic legal systems may choose to enforce international norms through civil or administrative proceedings, as well as criminal prosecutions.”<sup>502</sup> Not surprisingly, leading theorists suggest civil redress is insufficient, as “the stigma of criminal offending cannot be adequately conveyed through civil liability alone.” Likewise, “corporate actions that society wishes to prohibit outright should be criminalized” rather than simply priced through civil penalties.<sup>503</sup>

With that in mind, some international criminal scholars suggest coupling corporate criminal liability with international crimes in national systems. One such example is the November 2013 Swiss Federal Prosecutor’s investigation into the giant Swiss gold refining company, Argor-Heraeus, for the war crime of pillage – one of the first criminal cases involving corporate responsibility for international crimes.<sup>504</sup> Although the federal prosecutor ultimately declined to prosecute Argor-Heraeus, the investigation broke ground on an uncharted relationship between business, human rights atrocities, and international criminal law.<sup>505</sup> In June 2014, members of the African Union (AU), who approved a protocol that gave the newly reconstituted African Court of Justice and Human Rights the ability to try corporations for international crimes, adopted corporate criminal liability for international crimes.<sup>506</sup> These developments suggest that the view that corporations are not subject to criminal liability under international law may now be outdated – a view which “always had the (unintended) effect of obscuring the many opportunities for corporate criminal liability for international crimes within national legal systems throughout the world, which some see as both the history and future of [international criminal law].”<sup>507</sup>

Choosing the appropriate defendant would require prosecutors to consider the advantages and disadvantages of trying high level executives (e.g. the CEO) as opposed to country managers or regional actors. Jurisdictionally, if the corporation is based out of a country that is not a State Party to the Rome Statute, it might be easier to indict country managers (so long as they operate out of countries that fall under ICC jurisdiction).<sup>508</sup> However, where the corporate executive is charged under indirect modes of liability such as aiding and abetting, international jurisprudence from the ICTY and ICTR suggests that the conduct of the aider and abettor need not be geographically connected to the crime.<sup>509</sup> Given that

premise, it seems that the crime itself is taken to have been committed where it was directly perpetrated. This is supported in the case law: prosecutorial indictments specify the location of the crime as where it was physically committed, with no reference to the specific location of the aider or abettor.<sup>510</sup> The Court seems to use the same approach when assessing its jurisdiction over a case.<sup>511</sup>

The jurisprudence to date thus suggests that a corporate executive who is a national of a non-State Party to the Rome Statute, for example the United States, could be indicted for aiding and abetting a crime that occurred in, say, Brazil. Yet there are three problems with this analysis. The first applies to the United States specifically; the bilateral non-surrender agreements negotiated by the George W. Bush Administration prior to 2009 protect US Nationals from standing trial at the ICC for any potentially relevant crimes committed in the over 100 signee countries, and are worded such that they seem to protect private corporate actors in addition to government personnel.<sup>512</sup> Second, the existing case law typically focuses on actors who are nationals of the state in which the crime occurred.<sup>513</sup> The fact that a geographical connection is not required for aiding and abetting might not apply *mutatis mutandis* to a jurisdictional analysis, particularly as the stated law derives from ad-hoc tribunals rather than the ICC.<sup>514</sup> Finally, the biggest difficulty is that non-States Parties to the Rome Statute would be unlikely to arrest one of their citizens and deliver him or her to the ICC for trial.

This third problem moves away from jurisdictional issues into strategic and political considerations. While the Court might assert jurisdiction over a high-level corporate executive who is not a national of a State Party to the Rome Statute, it is not clear whether that individual's home state would honor an arrest warrant issued by the ICC. This raises the spectre of non-enforceable arrest warrants, such as those the ICC issued in connection to the Situation in Darfur, Sudan.<sup>515</sup> Moreover, to date no cases have been brought at the ICC dealing with land grabbing and its associated crimes. International human rights lawyer Richard Rogers suggests that strategically, foreign corporate actors might not be desirable defendants for early cases at the ICC as they have never been prosecuted by the Court, suggesting it may be better to focus on one novel issue at a time.<sup>516</sup>

Other strategic considerations include difficulties in proving *mens rea* for high-level corporate executives. While they could be indicted as superiors under the theory of superior responsibility, it must still be shown they had knowledge of the actions being committed by their subordinates. Where the individual is head of a MNC, they might have little to no knowledge of the company's specific projects or transactions.

Overall, these issues indicate that regional or country managers might be preferable among the possible corporate defendants. As alluded to, some of the jurisdictional and evidentiary difficulties might not arise because domestic actors would be closer to the crime both psychologically and geographically. Insofar as the country in which the manager operates is a State Party to the Rome Statute, the Court will have an easier time establishing jurisdiction over the case. It is also more likely that regional or country managers would have knowledge of the company's operations in that region; they may have negotiated with local governments or business elites, visited the project site, signed off on the provision of funds or other resources, or in extreme cases, hired the perpetrators themselves.

Still, there are some disadvantages to prosecuting actors further down the corporate ladder. If the Court's goal in trying corporate actors would be to promote "deterrence and motivate corporations to monitor more strictly their business activities,"<sup>517</sup> this might be better achieved by targeting high-level executives. Such individuals have more power within the corporation to determine its business practices, and are more likely to be concerned about prosecution if high-level executives in other companies have been tried and jailed. Furthermore, it may help to prevent scapegoating, by precluding corporate executives from shifting the blame to low-level managers who could be tried at the ICC without receiving as much media attention. Prosecuting a corporate CEO for the company's actions ties the problematic behaviour to the company itself, leaving less room for it to claim that the crimes were committed by "one bad apple."

In Cambodia, for example, there is evidence linking government-connected business leaders and senior members of the Cambodian government to crimes carried out by State security forces on the ground. Yet there are also widely reported allegations that these crimes were committed with the complicity of a MNC.<sup>518</sup> Insofar as the Prosecutor is satisfied there is sufficient evidence of each party's culpability, they may initiate an investigation *proprio motu* on the basis of such information.<sup>519</sup>

Ultimately, choosing an appropriate defendant for a prosecution at the ICC would require the Prosecutor to weigh legal, strategic and political considerations. For any potential defendant, the goals of deterrence and denunciation would have to be balanced against the evidentiary and jurisdictional obstacles that might arise.

## Spotlight

### Cambodia: Blood Sugar

#### *Introduction and Overview*

In a confidential communication to the ICC, senior members of the Royal Government of Cambodia ("RGC"), State security forces, and government-connected business leaders were alleged to have committed land grabs for natural resource exploitation on a particularly massive scale<sup>520</sup> that amount to grave violations of international criminal law.<sup>521</sup> Over a decade of evidence of mass human rights violations collected by multiple independent sources<sup>522</sup> indicates that government and corporate actors, in conjunction with State security forces, "have committed serious crimes as part of a widespread and systematic attack against the Cambodian civilian population, pursuant to a State policy," thereby fulfilling the legal elements of crimes against humanity under Article 7 of the Rome Statute.<sup>523</sup>

The RGC has granted over 2.2 million hectares<sup>524</sup> of Cambodian land to large firms via economic land concessions ("ELCs"), leading to the exploitation of oil, gas, and mineral reserves, forests, and, more recently, land for agribusiness, by domestic and foreign corporations and the country's elite.<sup>525</sup> So massive and disruptive has the resultant practice of forced eviction and illegal land grabbing become that an estimated 830,000<sup>526</sup> people have been forced off of their land largely without consultation or compensation<sup>527</sup> since the year 2000. In the process, they have been subjected to forcible transfer, murder, illegal imprisonment, persecution, and other inhumane acts in the process<sup>528</sup> – seemingly the "unimaginable atrocities that deeply shock the conscience of humanity," for which the Rome Statute is "determined to put an end to impunity."<sup>529</sup>

Among those implicated in the most egregious land grabs have been politically-connected corporate leaders and sugar companies<sup>530</sup> –uprooting thousands of Cambodians to make way for sugar plantations. Many of these sugar plantations have been implicated in child labour, military backed land grabs, forced evictions, and food shortages for local families.<sup>531</sup>

#### *Jurisdiction*

Many of the alleged crimes have taken place in Cambodia since the Rome Statute entered into force in July 2002, satisfying the temporal jurisdiction of the ICC under Article 11. Cambodia signed the Rome Statute on October 23, 2000, and acceded to it on April 11, 2002, without any declarations or reservations.<sup>532</sup> Multinational sugar companies with headquarters in the UK – which in 2001 also ratified



the Rome Statute – would likely also fall under the Rome Statute’s jurisdiction. Those headquartered in the US could conceivably also be brought before the ICC. Article 12 of the Rome Statute specifies preconditions to the exercise of jurisdiction and suggests that the ICC may try not only nationals of States Parties, but also nationals of non-ratifying states if they commit certain crimes within the territory of the State Party.<sup>533</sup> So long as the Court exercises its jurisdiction over individuals and does not create obligations over a non-party state, it will not violate Article 34 of the Vienna Convention.<sup>534</sup> Collectively, this would suggest that the acts in question fall under the ICC’s jurisdiction.



## E. Modes of Liability

There are a range of modes of liability that will connect governmental and corporate actors to the international crimes that arise from land grabbing, despite their tendency to distance themselves from the crimes being committed on the ground. In many instances of land grabs, it is state security and private police forces, or even armed thugs that are the direct or principal perpetrators carrying out the forced transfers and other acts that may constitute crimes against humanity.<sup>535</sup> Meanwhile, “to the extent that corporate officers and managers play a role at all in the atrocities, they are more likely to remain behind the scenes, issuing secret orders, turning a blind eye to “efficient” business practices, or supplying the means to commit the crime.”<sup>536</sup> However, as stated by the ICTY in the Čelebići Case, “[t]he principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the [ICTY] Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question.<sup>537</sup> Similarly, Article 28 (responsibility of commanders and other superiors) and Article 25(3) (individual criminal responsibility) of the Rome Statute do not necessitate direct participation in the crime for the ICC to hold those in power, including corporate officers and managers, individually criminally liable. Rather, beyond convicting defendants as direct perpetrators, the Court may also impose liability for acts that were directly committed by others by invoking theories of intermediary participation, such as command responsibility and accomplice liability, or hybrid modes of liability such as indirect co-perpetration.<sup>538</sup> Each of these potential modes of liability is discussed below.

### 1. Direct and Indirect Responsibility of Commanders and Other Superiors

“Command” or “superior responsibility,” as governed by Article 28 of the Rome Statute, is a form of indirect responsibility for crimes within the jurisdiction of the Court, including crimes against humanity.<sup>539</sup> Under Article 28 of the Rome Statute, official commanders – or those effectively acting in that role – who are superiors of the main perpetrators of crimes against humanity can be held equally liable for crimes they have not personally committed, but for which they are nevertheless responsible.<sup>540</sup> They may be held: (1) *directly* responsible for positive acts such as giving unlawful orders to subordinates, soliciting and inducing, or aiding and abetting the commission of crimes; or (2) *indirectly* responsible (under the theory of command responsibility) for their culpable omission to prevent, punish, or report crimes they knew would be or had been committed, thus failing to supervise properly and control the conduct of those acting under their effective authority and control.<sup>541</sup> Article 28 of the Rome Statute applies not only to “immediate commanders of the forces that committed the crimes, but it is applicable to superiors at every level, irrespective of their rank” or the number of men under their command,<sup>542</sup> and even extends beyond military commanders to cover civilians;<sup>543</sup> more specifically, Article 28(a) covers military commanders and civilians acting as military commanders, while Article 28(b) covers civilians acting in a civilian capacity.<sup>544</sup> One scholar suggests that government officials, corporate officers and managers, and even teachers and leaders of social groups and churches may be considered civilian superiors.<sup>545</sup>

#### i. Mens Rea Requirements

Per Article 28(a) of the Rome Statute, a military commander (or person effectively acting as a military commander) can be held criminally liable for crimes committed by forces under their effective command and control if they either knew (i.e. had actual knowledge) or should have known (i.e. had constructive knowledge) of a subordinate’s criminal activities<sup>546</sup> and failed to take “all necessary and reasonable measures within his or her power to prevent or repress their commission,” or to inform the competent authorities. However, there is a higher *mens rea* requirement to hold civilian authorities criminally liable

for their subordinates' conduct. Specifically, Article 28(b)(i) of the Rome Statute requires that the superior "either knew, or consciously disregarded information which clearly indicated the subordinates were committing or about to commit" a crime.<sup>547</sup> The "actual knowledge" standard can be proven by either direct or circumstantial evidence, taking into account factors such as "the number, type, scope or time of the illegal acts, the type of troops or the logistics involved, as well as the location or the spread of occurrence."<sup>548</sup> It will also be proven where, "a priori, a military commander is part of an organized structure with established reporting systems."<sup>549</sup>

## ii. Actus Reus Requirements

To establish a superior-subordinate relationship, Article 28(b)(ii) of the Rome Statute requires that the superior have effective authority or control over subordinates that committed the crimes and that the impugned activities fall within the scope of that authority.<sup>550</sup> Such authority can be express or implied, as there is no formal requirement for an order to be given in writing or otherwise.<sup>551</sup> Furthermore, it is possible that this superior-subordinate relationship could be established where clients act at the request of the corporation when they commit the crime.<sup>552</sup> However, the standard for effective authority and control that triggers superior responsibility extends beyond a mere ability to influence local armed groups; instead, "it requires actual and effective subordination stemming from an exercise of that influence" – which, according to the ICTR in *Musema*, will be easier to prove when a corporation directly employs the perpetrators.<sup>553</sup>

## 2. Holding Corporate Leaders to Account: Accomplice Liability and Indirect Co-Perpetration

Building a case against corporate actors further along the supply chain is perhaps more complex, even where the "should have known" standard is likely met, given the difficulties that can arise in establishing a superior-subordinate relationship to those carrying out the crimes.<sup>554</sup> In such cases, Article 25 of the Rome Statute (individual criminal responsibility), which provides that a person can commit a crime "as an individual, jointly with another or through another person," may be appropriate in that it does not necessitate a superior-subordinate relationship. Unlike command responsibility, aiding and abetting liability under Article 25(3)(c) does require that the accused acted knowingly.<sup>555</sup> As a result, Article 25 "might be an appropriate mechanism for holding corporate actors accountable for transactions with suppliers whom they know procure raw materials by means of grave human rights abuses."<sup>556</sup> Under Article 25, subparagraphs (a) through (c) of paragraph 3 establish the basic concepts of individual criminal attribution. Subparagraph (a) refers to three forms of perpetration: on one's own, as a co-perpetrator, or through another person. Subparagraph (b) contains different forms of participation: ordering, soliciting, or inducing commission. Subparagraph (c) establishes criminal responsibility for aiding and abetting, and subparagraphs (d), (e), and (f) provide for expansions of attribution: contributing to the commission or attempted commission of a crime by a group, incitement to genocide, and attempt.<sup>557</sup>

### i. Soliciting or Inducing a Crime Against Humanity

Article 25(3)(b) covers someone who "orders, solicits, or induces" the commission or attempted commission of a crime. Soliciting or inducing a crime against humanity encapsulates a wide range of behaviours amounting to "encouraging, requesting, commanding, inciting or influencing, physically or psychologically, another person to commit a crime." The ICTY in *Blaškić* held that the incitement must be direct and explicit and the commission of the crime must follow. However, a superior-subordinate relationship is not required, and it is not necessary to prove the crime would not have been perpetrated without the accused's involvement.<sup>558</sup>



[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person...[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

[Article 25 of the Rome Statute of the ICC.](#)



## ii. Aiding and Abetting or Otherwise Contributing to a Crime Against Humanity

While aiding and abetting under Article 25(3)(c) of the Rome Statute has not yet been adjudicated at the ICC, the *ad hoc* tribunals have dealt with this mode of liability. The wording of the aiding and abetting provision under the ICTY statute, however, differs from that of the Rome Statute. Under the Rome Statute a person is criminally responsible for a crime within the jurisdiction of the Court if that person, “*for the purpose of facilitating [its] commission...aids, abets, or otherwise assists in its commission*” [emphasis added].<sup>559</sup> The ICTY has no parallel intent qualification.<sup>560</sup> Thus, aiding and abetting at the ICC likely requires the accused to have provided assistance with the specific intent of facilitating the crime.<sup>561</sup>

Moreover, it is unclear whether the accused must have *substantially* contributed to the crime to be found guilty under the Rome Statute. Although substantial contribution in some form or another is often an element of accomplice liability under international law,<sup>562</sup> the unique wording of, and lack of case law conducted under, the Rome Statute provision make it more difficult to say whether the requirement would apply. The ICTY in *Tadić* established a broad concept of complicity which captures “all acts of assistance” that “encourage or support” the commission of a crime.<sup>563</sup> The assistance need not be direct, tangible, or have a causal effect on the crime.<sup>564</sup> Furthermore, in *Mbarushimana* the Pre-Trial Chamber of the ICC acknowledged that there is ongoing scholarly debate over whether substantial contribution is in fact a requirement under the Rome Statute.<sup>565</sup> Thus, it remains possible that actors could be found guilty under the aiding and abetting provisions without having contributed substantially to the crime. It may be argued that “the assistance provided only has to meet a very low threshold for there to be the objective element for accomplice liability under the [Rome Statute].”<sup>566</sup>

Apart from aiding and abetting, criminal liability can also be attributed to a person under Article 25(3)(d) of the Rome Statute if they are someone who “in any other way contributes” to a crime or an attempted crime by a group of persons acting with a common purpose. Under sections 3(d)(i) and (ii), such “contributions” may have the aim of furthering the group’s criminal activity or purpose, or may simply be made with “the knowledge of the intention of the group to commit the crime.”

While there is a lack of case law before the ICC convicting corporate actors, several trials conducted in Nuremberg included charges against business leaders, where “[b]usinesses could not avert prosecution solely because a dictator conceived of the plan to violate international law and the businesses played no role in the initial planning.”<sup>567</sup> Following this, in *IG Farben*, 13 of 24 high-level members of a German conglomerate of chemical firms were found guilty of enslavement and/or plunder.<sup>568</sup> Similarly, in *Zyklon B*, the owner of a poison gas firm was charged with war crimes for “having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used.”<sup>569</sup> The principle that emerged from this decision was that “civilians who are accessories to war have themselves committed war crimes.”<sup>570</sup> Some authors have suggested that these cases show “a symbiotic relationship between big business and a criminal regime which could not have survived without the former’s unflinching support.”<sup>571</sup>

### iii. Indirect Co-Perpetration

Indirect co-perpetration is a mode of liability charged in many of the recent cases before the ICC, suggesting that it “represents the next major trend in [international criminal law’s] experimentation with standards of blame attribution.”<sup>572</sup>

As an amalgamation of two distinct modes of group liability, it combines the elements of *co-perpetration* (describing the horizontal axis of criminal responsibility for crimes committed “jointly with another”) and *indirect perpetration* (describing the vertical axis of criminal responsibility for crimes committed “through another person” who effectively functions as the perpetrator’s agent) which are contained within Article 25(3)(a) of the Rome Statute.<sup>573</sup> As a result, this mode of liability represents a notion of “diagonal responsibility,” which allows the ICC to hold one corporate or governmental leader responsible as a perpetrator for crimes committed by forces belonging to and controlled by a separate group or organization with whom the leader co-operated.<sup>574</sup> This mode may be useful in cases involving multiple organizations and perpetrators and complex networks and supply chains of criminal activity, where not all of the direct perpetrators of the crime can be considered to fall directly under the control of the impugned organizational leaders.<sup>575</sup>

The test for indirect co-perpetration is complex, involving five objective and four subjective elements.<sup>576</sup> The objective elements required to prove indirect co-perpetration include:

- (i) The existence of an agreement or common plan between two or more persons;
- (ii) Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime;
- (iii) Control over the organisation;
- (iv) Organised and hierarchical apparatus of power; and
- (v) Execution of the crimes secured by almost automatic compliance by the subordinates with the orders given by the leader.

The subjective requirements required to prove indirect co-perpetration include:

- (i) The suspects must carry out the subjective elements of the crimes, in accordance with Article 30 of the Statute;
- (ii) Both suspects must be mutually aware that implementing their common plan would result in the realisation of the objective elements of the crime, and undertake such activities with the specific intent to bring about the objective elements of the crime, or be aware that the realisation of the objective elements would be a consequence of their acts in the ordinary course of events;
- (iii) The suspects must be “aware of the factual circumstances enabling them to exercise control over the crime through another person,” including awareness of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near automatic compliance with their orders; and
- (iv) The suspects must be “aware of the factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person,” requiring that each suspect was aware: “(i) of his essential role in the implementation of the common plan; (ii) of his ability – by reason of the essential nature of his task – to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.”

Applying this in the land grabbing context, leaders of multinational sugar or rubber companies who do not themselves control the direct perpetrators of crimes against humanity, but are supplied by,

co-operate with, and fund government officials or local businessmen in developing countries – who in turn enlist state or private security forces to forcibly grab and clear land in order to make way sugar and rubber plantations – could conceivably be held responsible by the ICC through indirect co-perpetration.

## F. Challenges to Building a Case

There are several challenges to building a case against governments and corporations charged with crimes against humanity for their involvement in land grabbing. This section canvasses the two major arguments likely to be made in their defence, specifically in response to a charge of forcible transfer.<sup>577</sup>

### 1. *Mens Rea*

As indicated above, corporations implicated in land grabbing may be more likely to be charged under aiding and abetting, or contribution, provisions, rather than direct perpetration or command responsibility. Under Article 25(3)(c) of the Rome Statute, as noted, the accused must have contributed to the crime purposively, by specifically intending to facilitate its commission.<sup>578</sup> Corporate actors are thus likely to argue that even insofar as their actions *in fact* contributed to the commission of a crime, the contribution was unintentional.

This hurdle would be the most difficult to overcome with respect to corporate actors. Given the complex, stratified nature of many corporate structures, different parts of the organization as well as different people might be involved at various stages of the process. In some cases, there may be no single individual with complete knowledge of the resources provided by the corporation and the crimes committed using those resources. However, it might be possible to demonstrate intent by adducing internal company documents (such as memos) or witness statements that reveal a plan to remove local inhabitants. In *Prosecutor v Ruto, Kosgey & Sang*, where a corporate executive was charged with forcible transfer under Article 25(3)(d), witness accounts of statements made by the accused (Mr. Sang) on his radio show were the primary source of evidence used to show *prima facie* specific intent.<sup>579</sup>

Specific intent might also be established by reference to the nature of the assistance given by the corporation to the perpetrators. The ICTY Appeals Chamber in *Prosecutor v Perišić* was unable to find the accused guilty under aiding and abetting because his actions (providing military assistance and supplies) could have been intended to further lawful activities: namely, the war effort.<sup>580</sup> The Chamber stated that “the types of aid provided...do not appear incompatible with lawful military operations.”<sup>581</sup> While the ICTY later reversed this finding when it (along with various other *ad hoc* tribunals) rejected a specific intent requirement for aiding and abetting,<sup>582</sup> the *Perišić* judgement reveals how specific intent might be assessed in contexts where it remains a necessary element. Thus, following *Perišić*, where a corporation has provided aid that seems solely aimed at facilitating the underlying crime, the requisite intent may be inferred. Drawing from domestic jurisprudence in the United States, other factors that may help prove specific intent are whether the corporation benefits from the successful commission of the offence, or has knowledge of the crimes while providing continuous assistance to the perpetrators.<sup>583</sup>

Ultimately, the analysis of specific intent will require an assessment of the entire fact pattern surrounding the alleged crimes. Depending on the actor’s knowledge of the crimes committed, as well as the nature and quantity of the assistance given by him to the perpetrators, specific intent may be demonstrated and *mens rea* consequently established.

### 2. *Consent*

Because population transfer is not unlawful when done with the consent of the relevant population, governments and corporations might claim that inhabitants consented to the transfer by engaging in consultation or receiving some form of compensation. The consent defence is linked to the concept of

legitimate expropriation, where the government legitimately seizes land for public purposes. As legitimate expropriation is explored further in this manual in Part VI “General Guidelines for Legitimate Expropriation” (at page 61), this section focuses on consent as invoked by corporate defendants.

The clearest path to tackling this defence is to show the alleged consent given by the local residents was not genuine. The case law clearly and consistently states that consent must be given freely, and is determined by assessing all the circumstances “including the vulnerability of the person.”<sup>584</sup> Moreover, consent must be given by each individual who is displaced, not the group as a whole or authorities deciding on behalf of the group.<sup>585</sup> In many cases where land grabbing occurs, local populations are inadequately consulted. In Papua New Guinea, for example, the Incorporated Land Owner Group is a state-created entity that provides collective title to groups of land owners who apply to have their interests recognized.<sup>586</sup> In one example of inadequate consultation, a member of the collective signed off on transferring land to a foreign company despite the fact that not every land owner in the group had consented to the sale.<sup>587</sup> Residents are also often promised compensation that never comes.

Additionally, consent is vitiated not just by physical force, but by threat of force or coercion.<sup>588</sup> Where corporations inform residents the land is being acquired one way or another, inhabitants might agree to relocate based on the perception they have no ability to choose otherwise. The European Parliament Directorate-General for External Policies reports that the Swedish-owned company EcoEnergy, for example, was granted a long-term lease over Tanzanian agricultural land for a sugar project that would allegedly entail the displacement of thousands of local farmers.<sup>589</sup> It is reported that while the farmers were offered a choice between two forms of compensation, they were not offered the choice of whether or not to be relocated at all.<sup>590</sup> In response to these allegations, EcoEnergy states that they have followed the IFC Performance Standards on Land Acquisition and Involuntary Resettlement, and that involuntary resettlement does not give displaced persons the choice “whether to be resettled or not,” but rather “how” they would like to be resettled.<sup>591</sup> Ultimately, however, where the choice is simply how to be resettled, it is arguable whether displaced persons’ consent was genuine, in that their ability to withhold consent might not have been known to them.

Notably, the accused invoked consent in several ICTY decisions to argue the transfer in question was not forced, and in each case it was found to be based on the absence of a genuine choice.<sup>592</sup> Ultimately, establishing consent on the basis of superficial consultation or nominal compensation would be very difficult, in particular given that land grabbing victims tend to derive from vulnerable populations.



## VI. General Guidelines for Legitimate Expropriation

Under Article 7(2)(d) of the Rome Statute, the definition of forcible transfer incorporates a justification element, by stating that displacement must have occurred “without grounds permitted under international law.”<sup>593</sup> Accordingly, governments and corporations who comply with international legal principles can defend against a charge of forcible transfer by arguing that the residents in question were legitimately evicted. This justification is particularly relevant and potent in the context of land grabbing because governments who seize land from local communities often do so under the guise of “public interest” provisions. In such cases, governments claim that foreign investment will help alleviate poverty and ultimately improve the lives of local residents. In Tanzania, for example, the government can lease “general land” to foreign investors to help with poverty reduction.<sup>594</sup> In practice, however, the Tanzanian government has taken village land and labelled it “general land,” rendering it available to outside buyers even where it remains occupied by local residents.<sup>595</sup>

Where governments can meet the requirements for proper expropriation of land, forcible transfer will be difficult to argue. However, in many cases, states do not respect the full range of international legal obligations that govern involuntary evictions.

As noted in “Underlying Crimes” in Section V, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has stated that economic policy is not a recognized ground that justifies forced transfer of a population.<sup>596</sup> Moreover, “[d]isplacement is not justifiable where the humanitarian or military situation causing the displacement is itself the result of the accused’s own unlawful activity.”<sup>597</sup> Under the 1949 Geneva Convention, the only exceptions applicable to forcible transfer as a war crime include evacuations if the “security of the population or imperative military reasons so demand.”<sup>598</sup> The ICTY Trial Chamber has likewise found transfer to be warranted only where transfers are motivated by an individual’s own genuine wish to leave, evacuation is motivated by concern for the security of the population, or out of imperative military necessity.<sup>599</sup>

Other human rights instruments, such as the ICCPR and the ICESCR, provide relevant considerations, particularly on the issue of forced transfer during peacetime. Article 12(3) of the ICCPR establishes the freedom to choose one’s residence,<sup>600</sup> while the ICESCR protects the right to adequate housing, which encompasses the right to security of tenure and protection against forced eviction.<sup>601</sup> The UN Committee on Economic, Social and Cultural Rights (CESCR), has stated:

[A]ll persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. [...] In this regard, the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.<sup>602</sup>

CESCR General Comment 7, which discusses the right to adequate housing under Art. 11 of that treaty, establishes the procedural safeguards that should be applied to render a forced eviction reasonable, proportional, and not arbitrary.<sup>603</sup> These include:

- An opportunity for genuine consultation with those affected;
- Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;

- Information on the proposed evictions, and, where applicable, the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- Especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- All persons carrying out the eviction to be properly identified;
- Evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- Provision of legal remedies and;
- Provision, where possible, of legal aid for persons in need of it to seek redress from the courts.<sup>604</sup>

In all cases, “[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.”<sup>605</sup> National laws that provide for eviction must be precise, proportionate, necessary, and non-discriminatory, and comply with the safeguards mentioned above in order to be lawful under international law.<sup>606</sup> The *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR* also establish that restrictions on the right to choose one’s residence must be set out in national law and must not be arbitrary or unreasonable.<sup>607</sup>

Proper expropriation requires protective and consultative measures to be taken before, during, and after an eviction. The *Basic Principles and Guidelines on Development-Based Evictions and Displacement* (“*Principles*”), set out in a report by the Special Rapporteur on the Right to Adequate Housing, further reinforces these provisions, laying out a framework for proper expropriation of land by states.<sup>608</sup> The *Principles* apply, among other things, to evictions ostensibly conducted in service of the public good.<sup>609</sup> They state that for evictions to be legitimate they must be:

- (a) authorized by law;
- (b) carried out in accordance with international human rights law;
- (c) undertaken solely for the purpose of promoting the general welfare;
- (d) reasonable and proportional;
- (e) regulated so as to ensure full and fair compensation and rehabilitation; and
- (f) carried out in accordance with the present guidelines.<sup>610</sup>

The concept of “general welfare” is tied to human rights, such that a state’s actions under (c) must be consistent with its international human rights obligations.<sup>611</sup>

Based on the existing international law, governments claiming legitimate expropriation would thus be precluded from simply citing public interest as the justification for seizing land and displacing local residents. Even where a national law confers wide discretion on the state to define and determine “public interest,” evictions must still meet the above requirements. For example, “public purpose” is defined by the Ethiopian Expropriations of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005 as “the use of land defined as such by the decision of the



States shall ensure that evictions only occur in exceptional circumstances... Any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.

[UN OHCHR, \*Basic Principles and Guidelines on Development-Based Evictions and Displacement\*, A/HRC/4/18.](#)



appropriate body.”<sup>612</sup> This definition is vague and somewhat tautological, suggesting that land seizures for use in irrigation schemes without consultation or compensation of residents do not meet the standards of international law, even where they are done in service of an (as-defined) public purpose.<sup>613</sup>

Olivier de Schutter, the former Special Rapporteur on the Right to Food, suggests that states would be violating the right to food<sup>614</sup> if by selling land to investors they were to deprive residents of access to resources essential to their livelihoods.<sup>615</sup> In some instances of land grabbing, residents are relocated to areas which cannot sustain crops. For populations whose way of life is built on subsistence farming, this change can be disastrous. In Papua New Guinea, there is no State mechanism for relocating people displaced by extractive projects, nor are there State-supported forums for displaced persons to lodge complaints.<sup>616</sup> For example, Barrick Gold purportedly engages in a formal relocation process for local residents displaced by the Porgera Gold Mine<sup>617</sup> in Enga province, Papua New Guinea.<sup>618</sup> However, the land to which residents were removed was largely non-arable, leading to increased food insecurity and destitution, and forcing displaced persons to trespass onto the mine in order to extract and sell gold found within the rocks.<sup>619</sup> The inherent conflicts created by this situation have led to violence and multiple deaths associated with the mine’s operation.<sup>620</sup> By allowing Barrick Gold to acquire land without ensuring protection for the inhabitants, the Papua New Guinean government is in violation of the human right to food – among others. Thus, as local activist Martyn Namorong points out, “that is where the ICC could play a role in protecting the rights of citizens – where the State is failing to do so.”<sup>621</sup>

For an eviction to be “carried out in accordance with international human rights law” it must respect all fundamental human rights, beyond the right to food, which are implicated by land grabbing.<sup>622</sup> Notably, indigenous rights norms also impart a consultation requirement such that governments relying on “public interest” provisions must still consult indigenous populations occupying the land.<sup>623</sup>

Collectively, these standards suggest that expropriation can only be legitimate where reasonable and proportionate, regulated by law with some provision for just compensation, and involving some form of consultation and/or consent. Situations where state forces use violence or excessive force in removing inhabitants, including burning down residents’ homes, shooting livestock, carrying out evictions in the middle of the night, or assaulting residents, violate these precepts.

Thus, while *some* expropriation of land for public purposes can be justified, the test for proper expropriation is strict and evictions will only be lawful under specific circumstances.





## VII. Remedies

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation* released by the UN Office of the High Commissioner for Human Rights point to various international legal instruments that suggest victims of gross violations of international human rights law have a right to remedy and reparation<sup>624</sup> – among them, (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.<sup>625</sup>

### A. Reparations: Trust Fund for Victims

Reparations in international law are guided by the principle of proportionality; namely, they should be proportional to the injury caused by the wrongful act, where the term “injury” incorporates both material and moral damages.<sup>626</sup> Reparations should also be aimed at remedying the damage committed through the wrongful act.<sup>627</sup> Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>628</sup>

#### 1. Restitution

The first form of reparations that should be sought is *restitutio in integrum* (“restoration to original condition”), which aims to put things as they were before the wrongful act took place.<sup>629</sup> Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.<sup>630</sup> In the land grabbing context, true restitution would facilitate the return of displaced individuals to their rightfully owned land and allow those individuals to continue to cultivate that land and/or use it in the way they had been prior to the illegitimate land deal that was responsible for their displacement.

#### 2. Compensation

In the *Factory at Chorzow* case,<sup>631</sup> the Permanent Court of International Justice stated that when restitution is not possible, there should be a lump sum payment corresponding to the amount which would be awarded under *restitutio in integrum* principles. In lieu of restitution, compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case.<sup>632</sup> It will always be difficult for the ICC to achieve full reparation, not only because of the number of victims and the amount of harm they have potentially suffered, but also because the accused are typically individuals, with limited resources and capabilities to repair the atrocities for which they are responsible.<sup>633</sup> For these reasons, the TFV plays a crucial role in allowing the ICC to provide adequate and effective reparations.

#### 3. Rehabilitation, Satisfaction, and Guarantees of Non-Repetition

Rehabilitation should include medical and psychological care as well as legal and social services. Satisfaction should include (but is not limited to) effective measures aimed at the cessation of continuing violations and a public apology, including acknowledgment of the facts and acceptance of responsibility.<sup>634</sup> Guarantees of non-repetition should include (but are not limited to) “promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement ... as well as by economic enterprises.”<sup>635</sup>



## A Note on the Trust Fund for Victims

The establishment of the ICC on 1 July 2002 resulted in the creation of the Trust Fund for Victims (“TFV”) under Article 79 of the Rome Statute. The TFV promotes community reconciliation, acceptance, and rebuilding community safety nets, and addresses issues of victims’ stigma, discrimination or trauma<sup>636</sup> – highly relevant issues with respect to the most harmful impacts experienced by *victims of land grabbing*.

The TFV has a mandate to implement Court-ordered reparations awards against convicted persons, when directed by the Court to do so. Of all remedies, reparations are unique because they directly acknowledge victims’ suffering, offer measures of redress, as well as some form of compensation for the violations suffered.<sup>637</sup> Resources for the TFV are collected through fines or forfeiture.<sup>638</sup> The TFV could be a potential venue for facilitating land return and compensation payments to land grabbing victims.

## B. The Right of Return

Persons forcibly transferred from their homes in violation of international standards are entitled to return to their home areas and property, a specific remedy known as the “right of return.”<sup>639</sup> Some experts have recognized the right of return as a customary international law norm.<sup>640</sup>

Although there is no specific provision in international covenants affirming the right of internally displaced persons to return to their places of origin, this right, or at least States’ obligations not to impede people from returning to their places of origin, is implied.<sup>641</sup> For example, Article 12 of the ICCPR recognizes the right to enter one’s own country, as well as the right to choose freely one’s own place of residence, which incorporates the right to return to one’s home area.<sup>642</sup> Moreover, the UN High Commissioner for Refugees has affirmed the right of all refugees and internally displaced persons to return to their homes and places of residence in their place of origin, should they so wish.<sup>643</sup>

The UN Security Council has also stated, “all displaced persons have the right to return in peace to their former homes and should be assisted to do so.”<sup>644</sup> The UN Committee on the Elimination of Racial Discrimination (“CERD”), has stated: “All... refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.”<sup>645</sup>

The principle further provides that special efforts should be made to ensure the full participation of all internally displaced persons in the planning and management of such processes. The participation of women, in particular, is essential.<sup>646</sup>

When displaced persons are unable to return to their homes because their property has been destroyed, they are entitled to compensation. The right to an effective remedy, contained in ICCPR Article 2(3), suggests that there should be a right to financial compensation when a displaced person cannot repossess his or her property.<sup>647</sup> This is likely to occur in situations of land grabbing in which the project has progressed past the planning stages and land has already been seized and destroyed.

## C. Reputational Damage and Loss of Bargaining Power

With respect to corporate actors, criminal proceedings raise the spectre of negative publicity and reputational damage. The publication of adverse publicity orders (advertisements explaining the crime committed and its consequences, published at the company's expense) are also sanctions for corporate criminal activity in the domestic law of some countries, such as the United States.<sup>648</sup> Both sanctions can have an important deterrent effect because of the incidental loss of profits that negative publicity can cause.

Other possible sanctions consist of restraining the corporation from the performance of some activities, denial, suspension or retraction of licenses, loss of rights (such as benefitting from subventions or tax breaks), or prohibitions on advertising or selling on specific markets.<sup>649</sup> Corporations can also be put under "corporate probation," with the corporation being restructured, required to submit periodical reports, or put under the supervision or control of a consultant who could recommend or impose appropriate measures for the prevention of future crimes.

## D. Jail Time for Executives

One of the main goals of criminal liability for corporations is deterrence. In a domestic context, this is often thought to be achieved through punishment, mainly in the form of imprisonment. Deterrence would also be a goal of international criminal prosecution of corporations, and could likewise potentially be achieved through punishment in the form of jail time for executives. There are, of course, difficulties with this remedy in cases in which the accused is a corporation rather than an individual person.

That said, corporations are controlled by people who are fundamentally self-interested, and whose own motivations must inevitably seep into the decisions they make on behalf of the corporation. Thus, in order for deterrence mechanisms to be effective, the remedies imposed on corporations must be seen to not only punish the corporation itself (in the form of fines and reputational damage) but also the individuals who made the decisions that resulted in the crimes. This could include both high-level and low-level executives, and in-country officials who are making day-to-day decisions.

Criminal proceedings with the potential to result in imprisonment of high-level executives would send a strong message that crimes against humanity and human rights violations will not be tolerated, and thus deter other executives from committing similar violations. However, it would likely be difficult to connect these individuals to the crimes themselves and to prove they had the requisite knowledge or awareness of the crimes to warrant imprisonment.

On the other hand, punishment of lower-level officials would be simpler to facilitate as their decisions are more likely to be directly connected to the crimes. It also has the potential for a different form of deterrence that would result from the knowledge that the decisions made on the ground must adhere to international human rights standards, and will be subject to scrutiny and punishment if they fail to do so. That is to say, if low-level officials are pressured into making poor decisions, and it is known that those decisions could result in jail time, such jobs could appear more risky and consequently less appealing. There might then be fewer willing to take up these operational positions, resulting in a form of *internal* reputational damage.



## VIII. Conclusion

Land grabbing is a global phenomenon that involves grave crimes, often resulting in extensive human rights violations that disproportionately impact vulnerable populations. The forced displacement of thousands of families due to land grabbing has fostered increased poverty, child malnutrition, infant mortality, illiteracy, domestic violence, crime, and rampant unemployment.<sup>650</sup> While land grabbing has received some attention from the global community, it will likely continue to occur unless culpable actors are held accountable under international criminal law.

Recent land acquisitions in different parts of the world have given rise to crimes of sufficient gravity to warrant investigation and prosecution by the ICC. By prosecuting these crimes, the ICC would help encourage corporate and government actors to comply with human rights, and would begin to bring justice to those victimized by illegitimate land seizures. This manual has laid out some of the mechanics, considerations, and potential cases involved in such an undertaking. Prosecutions of peacetime forcible transfers and other land grabbing-related crimes would be new ground for the ICC and would “send the message that the worst things cannot happen with impunity anymore.”<sup>651</sup> Ultimately, bringing a land grabbing case under the auspices of crimes against humanity could deter future violations, act as a needed wake up call to perpetrators and their enablers, and offer a beacon of hope for victims.





## Appendix A: Table of Cases – Forcible Transfer

The following table contains an exhaustive list of ICC cases in which “deportation or forcible transfer” was charged, as well as a sampling of seminal cases from other *ad hoc* tribunals and regional human rights bodies dealing with forcible transfer. For a complete list of ICTY cases involving forcible transfer, see the discussion under footnote 256 of this manual.

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Bashir</i> (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009) <sup>652</sup>	ICC	Republic of Sudan	Deportation or forcible transfer	Ethnic persecution	State official (President of the Republic of Sudan)	Mr. Bashir alleged to have helped design and implement a persecutory campaign against civilians belonging to the Fur, Masalit and Zaghawa ethnic groups, in which they were forcibly transferred from towns in West and South Darfur. <b>Mode of Liability (Charged):</b> Direct perpetration (Article 25(3)(a) Rome Statute)	Arrest warrants issued, not honoured by the Republic of Sudan or neighbouring States	--
<i>Prosecutor v Harun &amp; Kushayb</i> (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07 (27 April 2007) <sup>653</sup>	ICC	Republic of Sudan	Deportation or forcible transfer, persecution (forcible transfer)	Ethnic persecution	Harun: State official (Minister of State for the Interior of the Government of Sudan)  Kushayb: Military official (Sudanese Armed Forces)	Mr. Harun alleged to have overseen the counter-insurgency in Darfur, in his capacity as Minister of State, wherein Sudanese Armed Forces and Militia forcibly transferred Fur, Masalit and Zaghawa civilians in various predominantly Fur towns in Sudan. Mr. Kushayb alleged to have implemented the counter-insurgency plan, first as a senior and well known leader in the tribal hierarchy, then as a member of the Sudanese Armed Forces with the authority to command soldiers. <b>Modes of Liability (Charged):</b> Harun: Contributing in any other way (Article 25(3)(d) Rome Statute) Kushayb: Contributing in any other way (Article 25(3)(d) Rome Statute)	Arrest warrants issued, not honoured by the Republic of Sudan or neighbouring States	--

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Hussein</i> (Decision on the Prosecutor's Application under Article 58 Relating to Abdel Raheem Muhammad Hussein) ICC-02/05-01/12 (1 March 2012) <sup>654</sup>	ICC	Republic of Sudan	Deportation or forcible transfer, persecution (forcible transfer)	Ethnic persecution	State official (Minister of the Interior and Special Representative of the President in Darfur)	Mr. Hussein alleged to have facilitated crimes in his capacity as a government official, by coordinating security entities, recruiting, arming and funding police and militia forces; namely, the forced transfer of Fur, Masalit and Zaghawa civilians in various Sudanese towns and surrounding areas by Sudanese Armed Forces and Militia.  <b>Mode of Liability (Charged):</b> Direct perpetration (Article 25(3)(a) Rome Statute)	Arrest warrant issued, not honoured by the Republic of Sudan or neighbouring States	--
<i>Prosecutor v Muthaura et al</i> (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012)	ICC	Kenya	Deportation or forcible transfer, persecution (forcible transfer)	Political persecution	Muthaura: State official (Cabinet Secretary)  Kenyatta: State official (Deputy Prime Minister)  Ali: State official (Commissioner of Police)	Mr. Muthaura alleged to have directed the Mungiki ethnic group to commit crimes against perceived affiliates of the political "Orange Democratic Movement," in the context of post-election violence in Kenya in 2007-2008, including forcible transfer effected through coercive acts such as destroying residential homes. Mr. Kenyatta alleged to have provided financial and logistical support to the perpetrators. Mr. Ali alleged to have instructed Kenyan police not to obstruct, or respond to, the crimes committed by perpetrators against ODM members. Perpetrators displaced residents through a wide range of coercive acts, for example by destroying homes in residential areas.  <b>Modes of Liability (Charged):</b> Muthaura: Direct perpetration (Article 25(3)(a) Rome Statute) Kenyatta: Direct perpetration (Article 25(3)(a) Rome Statute) Ali: Contributing in any other way (Article 25(3)(d)(i) Rome Statute)	Charges vacated (Muthaura, Kenyatta)  Charges not confirmed (Ali)	--

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Ntaganda</i> (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014)	ICC	Democratic Republic of the Congo	Deportation or forcible transfer, persecution (forcible transfer)	Ethnic persecution	Military official (Deputy Chief of Staff, Forces Patriotiques pour la Libération du Congo)	Mr. Ntaganda alleged to have helped attack the non-Hema (ethnic) civilian population and expel them from Mongbwalu (community) in the Democratic Republic of the Congo, in his capacity as a leader of the military wing of the Union des Patriotes Congolais (“UPC”). UPC evicted civilians in part because of the area’s strategic importance in the gold market. The UPC’s goal was to provide security for the Hema traders.  <b>Modes of Liability (Charged as Alternatives):</b> Ordering (Article 25(3)(b) Rome Statute) Inducing (Article 25(3)(b) Rome Statute) Contributing in any other way (Article 25(3)(d) Rome Statute) Command responsibility (Article 28(a) Rome Statute)	Trial commenced 2 September 2015, ongoing.	--

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Ruto, Kosgey &amp; Sang</i> Decision on Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11 (23 January 2012) <sup>655</sup>	ICC	Kenya	Deportation or forcible transfer, persecution (forcible transfer)	Political persecution	Ruto: State official (Education Minister)  Sang: Corporate executive (Radio broadcaster)  Kosgey: State official (Industrialization Minister)	After the 2007 election in Kenya, violence broke out, involving attacks on political supporters of a certain affiliation. Perpetrators looted and burned businesses and homes of perceived supporters, leading to thousands of displaced persons. Supporters also targeted on basis of ethnicity. Mr. Ruto accused of implementing the attack by paying perpetrators and punishing non-compliance. Mr. Sang accused of using his radio station to incite violence, broadcast instructions and advertise the attacks. Mr. Kosgey accused of helping plan the attacks by attending meetings and strategizing.  <b>Modes of Liability (Charged):</b> Ruto: Direct perpetration (Article 25(3)(a) Rome Statute) Sang: Contributing in any other way (Article 25(3)(d) Rome Statute) Kosgey: Direct perpetration (Article 25(3)(a) Rome Statute)	Charges vacated (Ruto, Sang)  Charges not confirmed (Kosgey)	--
<i>Prosecutor v Krnojelac</i> (Judgement) ICTY-IT-97-25-A (17 September 2003) <sup>656</sup>	ICTY	Former Yugoslavia	Persecution (forcible transfer)	Ethnic persecution	Prison camp commander	As camp commander of the KP Dom prison in Bosnia-Herzegovina, Mr. Krnojelac forcibly transferred Bosnian Muslims and other non-Serb civilians to Montenegro and other unknown places. Despite appearance of consent to the transfer, conditions of the coercive prison regime precluded detainees from genuinely consenting.  <b>Mode of liability:</b> Joint criminal enterprise	Guilty	15 years imprisonment

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Krstić</i> (Judgement) ICTY-IT-98-33-T (2 August 2001) <sup>657</sup>	ICTY	Former Yugoslavia	Other inhumane acts (forcible transfer), persecution (forcible transfer)	Ethnic persecution	Military official	General Krstić procured buses and supervised the forced transfer of 25,000 Bosnian Muslim civilians, from outside Srebrenica to Bosnia-Herzegovina territory. He also attended meetings where the transfer of civilians was planned. Court emphasized that both deportation and forcible transfer are condemned under various legal instruments of international law. <b>Mode of liability:</b> Joint criminal enterprise	Guilty (other inhumane acts)  Guilty (persecution)	46 years imprisonment

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Popović et al (Judgement) ICTY-IT-05-88-T (10 June 2010)</i> <sup>658</sup>	ICTY	Former Yugoslavia	Persecution (forcible transfer), other inhumane acts (forcible transfer)	Ethnic persecution	<p>Popović: Military official (Chief of Security of the Drina Corps)</p> <p>Beara: Military official (Chief of the Admin. for Security)</p> <p>Nikolić: Military official (Chief of Security of the Zvornik Brigade)</p> <p>Borovcanin: Military official (Deputy Commander of the SBP of the RS MUP)</p> <p>Miletić: Military official (Chief of Admin. for Operations and Training)</p> <p>Gvero: Military official (Assist. Commander for Morale)</p> <p>Pandurević: Military official (Commander of the Zvornik Brigade)</p>	<p>Seven accused were charged for the forced removal of Bosnian Muslim civilians out of Srebrenica and Zepa to territory within Bosnia-Herzegovina control. Court held that "lawful presence" does not equal the legal concept of "lawful residence." "Lawful presence" includes those who have come to live in the community, whether long-term or temporarily. Will include internally displaced persons who have established temporary homes after being uprooted from their original community.</p> <p><b>Modes of Liability:</b>  Popović, Beara, Nikolić, Miletić, Gvero: Joint criminal enterprise  Borovcanin, Pandurević: Joint criminal enterprise, superior responsibility</p>	<p>Not guilty (Popović: other inhumane acts)</p> <p>Not guilty (Beara: other inhumane acts)</p> <p>Not guilty (Nikolić: other inhumane acts)</p> <p>Guilty (Borovcanin: persecution, other inhumane acts)</p> <p>Guilty (Miletić: persecution, other inhumane acts)</p> <p>Guilty (Gvero: persecution, other inhumane acts)</p> <p>Guilty (Pandurević: persecution, other inhumane acts)</p>	<p>Life imprisonment (Popović, Beara,</p> <p>35 years imprisonment (Nikolić)</p> <p>17 years imprisonment (Borovcanin)</p> <p>18 years imprisonment (Miletić)</p> <p>5 years imprisonment (Gvero)</p> <p>13 years imprisonment (Pandurević)</p>

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Prosecutor v Stakić</i> (Judgement) ICTY-IT-97-24-A (22 March 2006) <sup>659</sup>	ICTY	Former Yugoslavia	Other inhumane acts (forcible transfer), persecution (forcible transfer)	Ethnic persecution	State official (President of the Prijedor Crisis Staff)	Mr. Stakić organized, approved and implemented the forced transfer of Bosnian Muslims and Croats from the Municipality of Prijedor to various locations within and across state borders, in his capacity as President of various boards and assemblies in Prijedor and as President of the Prijedor Crisis Staff. Court found the same protected interest underlies deportation and forcible transfer. Court also found that forced displacement does not require intent to permanently displace. <b>Mode of Liability:</b> Joint criminal enterprise	Guilty (other inhumane acts) Guilty (persecution)	40 years imprisonment
<i>Prosecutor v Tadić</i> (Opinion and Judgement) ICTY-IT-94-1-T (7 May 1997) <sup>660</sup>	ICTY	Former Yugoslavia	Persecution (forcible transfer)	Ethnic persecution	State official (Secretary of the Local Commune, President of the SDS Local Board)	Mr. Tadić participated in the forced transfer of non-Serbs from the Kozarac area in Bosnia-Herzegovina to various detention centres. Court elaborated on criminal liability under aiding and abetting provisions, finding that physical presence at the crime scene is not necessary to establish guilt. Stated that connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced. <b>Mode of Liability:</b> Aiding and abetting	Guilty	20 years imprisonment

Case Name	Court/ Source	Location of the Crime	Applicable Underlying Crime(s)	Reason for Displacement	Perpetrator Type	Facts	Verdict	Remedy
<i>Connors v The United Kingdom</i> No.66746/01, Council of Europe: European Court of Human Rights (27 May 2004)	ECHR	United Kingdom	Alleged violations of the European Convention on Human Rights, Article 8 and Protocol No. 1, Article 1	Government expropriation of land, eviction on behavioural grounds	United Kingdom government	Connors was a member of the Roma community who was evicted from a gypsy site in England after living there for 13 years, on the grounds that he and his family had committed nuisance at the site. The Court held that the state's right to implement [land and other] policies must be balanced against the intrusion into affected persons' rights. The centrality of the rights to the individual as well as the vulnerability of the displaced population are both relevant in assessing State action.	Guilty of violating Article 8, no finding on Protocol No. 1, Article 1	Fine
<i>African Commission on Human and Peoples' Rights v Kenya</i> African Ct. H.P.R. (26 May 2017)	AfCHPR	Kenya	Alleged violations of the African Charter on Human and Peoples' Rights, Articles 1, 2,4, 8, 14, 17 (2,3), 21, 22	Government expropriation of land, eviction for reserved water catchment zone	Kenyan government	The indigenous Ogiek community of Kenya have been subject to routine arbitrary forced evictions by the Kenyan government from their ancestral lands in the Mau Forest without consultation or compensation. The Court recognized the Ogieks as indigenous peoples with a right to their land, and ruled that Kenya had violated equality rights, and the right to land, food, and development, among others.	Guilty of violating Articles 1, 2, 8, 14, 17 (2,3), 21, 22	Reparations, to be established in a separate decision
<i>Case of the Saramaka People v Suriname</i> Inter-Am. Ct. H.R. (ser. C) No. 172, §133 (Aug. 12, 2008)	IACHR	Suriname	Alleged violations of the American Convention on Human Rights, Articles 3, 21, 25	Government expropriation of land (for economic reasons)	Suriname government	The Saramaka peoples applied to the Court to challenge the granting of logging and mining concessions on their traditional territory. In deciding, the Court explored the consultative and compensatory measures the Suriname government was required to take towards the indigenous land users. The Court held that the government must engage in culturally appropriate methods of consultation, and should inform the community of potential risks of the project. These obligations extend to predicted deprivations of the use and enjoyment of property (not simply deprivation of title).	Guilty of violating Articles 3, 21, 25	Compensate the community, demarcate and grant them title over their lands, review all concessions already granted <i>[Recommended]</i>

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# Endnotes

- <sup>1</sup> Global Witness & Friends of the Earth Europe, “Regulating Risk: Why European investors must be regulated to prevent land grabs, human rights abuses and deforestation” (4 November 2016) at 4, online: <[https://www.globalwitness.org/documents/18640/Global\\_Witness\\_Regulating\\_Risk.pdf](https://www.globalwitness.org/documents/18640/Global_Witness_Regulating_Risk.pdf)>. **Note:** One hectare is equivalent to approximately 2.47 acres. The area of a standard football (soccer) field is 0.72 hectares.
- <sup>2</sup> Kyle F Davis, Paolo D’Odorico & Maria Cristina Rulli, “Land grabbing: a preliminary quantification of economic impacts on rural livelihoods” (2014) 36:2 *Popul Environ* 180 at 190, online: <[https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4223572/pdf/11111\\_2014\\_Article\\_215.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4223572/pdf/11111_2014_Article_215.pdf)>.
- <sup>3</sup> The International Federation for Human Rights (FIDH), “Cambodia: 60,000 new victims of government land grabbing policy since January 2014” (22 July 2015), online: Worldwide Movement for Human Rights <<https://www.fidh.org/en/region/asia/cambodia/cambodia-60-000-new-victims-of-government-land-grabbing-policy-since>>.
- <sup>4</sup> **See, for example:** various provisions of the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), the Universal Declaration of Human Rights (“UDHR”), the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), and the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, among others. **See:** “International Treaties” in Section IV for details.
- <sup>5</sup> Global Witness & Friends of the Earth Europe, *supra* note 1 at 4; **see also:** Ward Anseeuw et al, “Land rights and the rush for land: findings of the global commercial pressures on land research project” (January 2012) at 10, online <[http://www.landcoalition.org/sites/default/files/documents/resources/ILC%20GSR%20report\\_ENG.pdf](http://www.landcoalition.org/sites/default/files/documents/resources/ILC%20GSR%20report_ENG.pdf)>; **see also:** Olivier De Schutter, “Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge” (11 June 2009) at 4, online: <<http://www.oecd.org/site/swacmaliz010/44031283.pdf>>.
- <sup>6</sup> Jodie Thorpe, “Sugar Rush: Land rights and the supply chains of the biggest food and beverage companies” (2013) at 1 & 4, online: <[https://www.oxfam.org/sites/www.oxfam.org/files/bn-sugar-rush-land-supply-chains-food-beverage-companies-021013-en\\_1.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/bn-sugar-rush-land-supply-chains-food-beverage-companies-021013-en_1.pdf)>; **see also:** Oxfam America, “The truth about land grabs”, online: <<https://www.oxfamamerica.org/take-action/campaign/food-farming-and-hunger/land-grabs/>>.
- <sup>7</sup> Global Witness & Friends of the Earth Europe, *supra* note 1 at 3-4; **see also:** Olivier De Schutter, The International Corporate Accountability Roundtable & Global Witness, “Tainted Lands: Corruption in Large-Scale Land Deals” (15 November 2016) at 6, online: <<https://www.globalwitness.org/en/reports/tainted-lands-corruption-large-scale-land-deals/>>; **see also:** Saturnino Borrás Jr & Jennifer Franco, “From Threat to Opportunity? Problems with the Idea of a ‘Code of Conduct’ for Land-Grabbing” (18 February 2014) 13:2 *Yale Hum Rts Dev LJ* 507 at 508–9, online: <<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1096&context=yhrdlj>>; **see also:** Global Witness, International Land Coalition & Oakland Institute, “Dealing with Disclosure: Improving Transparency in decision-making over large-scale land acquisitions, allocations and investments” (April 2012) at 3, online: <[https://www.globalwitness.org/sites/default/files/library/Dealing\\_with\\_disclosure\\_1.pdf](https://www.globalwitness.org/sites/default/files/library/Dealing_with_disclosure_1.pdf)>.
- <sup>8</sup> UN-HABITAT & Office of the UN High Commissioner for Human Rights (OHCHR), “Forced Evictions: Fact Sheet No. 25/Rev. 1” (May 2014) at 7, online: <<http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf>>.
- <sup>9</sup> Klaus W Deininger & Derek Byerlee, “Rising global interest in farmland: can it yield sustainable and equitable benefits?” (2011), online: <<http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf>>; **as referenced in:** Global Witness & Friends of the Earth Europe, *supra* note 1 at 5.
- <sup>10</sup> CAPOMA, Chaya Comunicación & La Soja Mata, “Soy and Agribusiness Expansion in Northwest Argentina” (September 2009) at 22, 28, 32, 35 & 37, online: <[https://lasojamata.iskra.net/files/Soy\\_Expansion\\_Northwest\\_Argentina.pdf](https://lasojamata.iskra.net/files/Soy_Expansion_Northwest_Argentina.pdf)>.
- <sup>11</sup> Jack Zimba, “The day the bulldozers came”, *Zambia Daily Mail* (28 December 2015), online: <<https://www.daily-mail.co.zm/?p=54163>>.
- <sup>12</sup> Interview with Khin Zaw Win, Tampadipa Institute of Myanmar (14 February 2017).
- <sup>13</sup> **See, for example:** Richard J Rogers & Alexandre Prezanti, “Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia, July 2002 to Present” (7 October 2014) at para 19. **Note:** This communication is still confidential but an executive summary is available online:

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<[https://www.fidh.org/IMG/pdf/executive\\_summary-2.pdf](https://www.fidh.org/IMG/pdf/executive_summary-2.pdf)>; **see also:** Global Witness, "On Dangerous Ground: 2015's deadly environment - The Killing and criminalization of land and environmental defenders worldwide" (June 2016), online: <[https://www.globalwitness.org/documents/18482/On\\_Dangerous\\_Ground.pdf](https://www.globalwitness.org/documents/18482/On_Dangerous_Ground.pdf)>. In the year 2015, for instance, approximately 156 people were killed defending their land from destructive industries.

<sup>14</sup> Global Witness & Friends of the Earth Europe, *supra* note 1 at 4.

<sup>15</sup> FIDH, *supra* note 3.

<sup>16</sup> Davis et al., *supra* note 2.

<sup>17</sup> Friends of the Earth Europe, "Land Grabbing", online: <<http://www.foeeurope.org/land-grabbing>>.

<sup>18</sup> **Note:** For more on the situation in PNG, see "Spotlight: PNG" on page 14 of this manual.

<sup>19</sup> Oakland Institute & Pacific Network on Globalisation (PANG), "On Our Land: Modern land grabs reversing independence in Papua New Guinea" (2013) at 3–4, online: <[https://www.illegal-logging.info/sites/default/files/OI\\_Report\\_On\\_Our\\_Land.pdf](https://www.illegal-logging.info/sites/default/files/OI_Report_On_Our_Land.pdf)>.

<sup>20</sup> Global Witness, International Land Coalition & Oakland Institute, *supra* note 7 at 3.

<sup>21</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 1.

<sup>22</sup> Efrat Bouganim-Shaag & Yael Naggan, "Emerging Voices: Peace-Time Crimes Against Humanity and the ICC" (30 August 2013), *Opinio Juris* (blog), online: <<http://opiniojuris.org/2013/08/30/emerging-voices-peace-time-crimes-humanity-icc/>>.

<sup>23</sup> **Note:** The ICC's jurisdiction is limited by Article 5 of the Rome Statute of the ICC to include the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Thus, if a situation of land grabbing is to be prosecuted by the ICC, the case must satisfy the requisite legal elements under at least one of those headings. Most instances of land grabbing do not neatly fall within the definition of an "act of aggression" as required under Article 8 *bis* of the Rome Statute to constitute the crime of aggression, or the requirement for a specific intent to destroy a protected group as required under Article 6 of the Rome Statute to constitute a crime of genocide. Moreover, war crimes, as defined under Article 8 of the Rome Statute, will only be applicable in situations that fit within the established framework of the international law of armed conflict. Crimes against humanity, however, may take place in the context of peacetime, as do many of the situations of land grabbing that are explored throughout this manual. Per Article 7 of the Rome Statute, crimes against humanity encompass various inhumane acts (including, but not limited to, murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, various forms of sexual violence, persecution, enforced disappearance of persons, and the crime of apartheid) that are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

<sup>24</sup> Bouganim-Shaag & Naggan, *supra* note 22; **see also:** International Criminal Court (ICC), "Elements of Crimes" (2011), online: <<https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/o/elementsofcrimeseng.pdf>> [hereafter "Elements of Crimes"].

<sup>25</sup> The International Criminal Court, *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF 183/9, 37 ILM 1002 (1998), 2187 UNTS 90 (entered into force 1 July 2002) [hereafter "Rome Statute"].

<sup>26</sup> Office of the Prosecutor of the International Criminal Court (OTP), "Policy Paper on Case Selection and Prioritisation" (15 September 2016) at 5 & 14, online: <[https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf)>.

<sup>27</sup> Rome Statute, *supra* note 25 at Article 7.

<sup>28</sup> *Ibid* at Article 11.

<sup>29</sup> **Note:** The difficulties referenced are due in part to a lack of transparency as data remain restricted by parties concerned about the sensitivity of information in many countries, along with methodological and conceptual challenges faced by data sets which must take into account the complexity of land deals that are continuously being restructured, transferred, and cancelled; **for further explanation, see:** Lorenzo Cotula, "Addressing the human rights impacts of 'land grabbing'" (2014) at 9–10, online: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO\\_STU\(2014\)534984\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534984/EXPO_STU(2014)534984_EN.pdf)>.

<sup>30</sup> Adam Taylor, "Is environmental destruction a crime against humanity? The ICC may be about to find out", *Washington Post* (16 September 2016), online: <<https://www.washingtonpost.com/news/worldviews/wp/2016/09/16/is-environmental-destruction-a-crime-against-humanity-the-icc-may-be-about-to-find-out/>>.

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- <sup>31</sup> Cherif Bassiouni et al, "Africa Question: Is the ICC Targeting Africa Inappropriately?" (March 2013), online: ICC Forum <<http://iccforum.com/africa>>.
- <sup>32</sup> Franziska Maria Oehm, "Land Grabbing in Cambodia as a Crime Against Humanity—Approaches in International Criminal Law" (2015) 48 VRÜ 469 at 471, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2841165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841165)>.
- <sup>33</sup> Interview with Sofía Monsalve, FIAN International (22 March 2017).
- <sup>34</sup> Borrás Jr & Franco, *supra* note 7 at 509.
- <sup>35</sup> UN-HABITAT & OHCHR, *supra* note 8 at 3–4.
- <sup>36</sup> *Ibid* at 5; **see also**: the discussion in Section VI "General Guidelines for Legitimate Expropriation" starting at page 61 of this manual.
- <sup>37</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 7.
- <sup>38</sup> Borrás Jr & Franco, *supra* note 7 at 509.
- <sup>39</sup> International Land Coalition ("the Coalition"), *Tirana Declaration* (endorsed by the Coalition's Assembly of Members 27 May 2011), online: <<http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>>.
- <sup>40</sup> **Background**: the Tirana Declaration was issued by Coalition members from more than 45 countries in Africa, Latin America, North America, Asia and Europe while they were gathered in Tirana, Albania, from 24-26 May 2011, the International Year of Forests, at the invitation of the National Federation of Communal Forests and Pastures of Albania (NFCFPA) and the Government of Albania for an international conference under the theme of "securing land access for the poor in times of intensified natural resource competition." **See**: International Land Coalition, "Tirana Declaration: Assembly of Members 2011, Tirana, Albania," online: <<http://www.landcoalition.org/en/resources/tirana-declaration>>.
- <sup>41</sup> **See**: "Related Phenomena: Tainted Lands, Forced Evictions, and Development-Induced Displacement" at page 12 of this manual.
- <sup>42</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 6–7.
- <sup>43</sup> UN-HABITAT & OHCHR, *supra* note 8 at 3–4.
- <sup>44</sup> *Ibid* at 2.
- <sup>45</sup> David Randford, Anna Maria Rodriguez-Delgado, Terese Wurth, "Land Acquisition and Forced Displacement: An Analysis from an International Human Rights Law Perspective" (May 2015) at 4, online: <<https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/10009/Land%20Acquisition%20And%20Forced%20Displacement.%20An%20Analysis%20From%20An%20International%20Human%20Rights%20Law%20Perspective.pdf?sequence=1&isAllowed=y>>.
- <sup>46</sup> GRAIN, "Land Grabbing and the Global Food Crisis" (2011), online: <[https://www.grain.org/bulletin\\_board/entries/4429-new-data-sets-on-land-grabbing](https://www.grain.org/bulletin_board/entries/4429-new-data-sets-on-land-grabbing)>. **Note**: Accurate as of 2009. Compiled by GRAIN in August 2011 based on data from Gulf Research Centre, World Food Programme, FAO and press reports.
- <sup>47</sup> Kersting Nolte, Wytske Chamberlain & Markus Giger, "International Land Deals for Agriculture: Fresh insights from the Land Matrix (Analytical Report II)", Land Matrix (2016), online: <[http://landmatrix.org/media/filer\\_public/ab/c8/abc8b563-9d74-4a47-9548-cb59e4809b4e/land\\_matrix\\_2016\\_analytical\\_report\\_draft\\_ii.pdf](http://landmatrix.org/media/filer_public/ab/c8/abc8b563-9d74-4a47-9548-cb59e4809b4e/land_matrix_2016_analytical_report_draft_ii.pdf)> [hereafter "Land Matrix"]. **Note**: this information is sourced from the *Land Matrix*, a database that, as of 2016, captured 1,204 concluded deals, covering over 424.4 million hectares of land. The database is not limited to "land grabs" but includes all manner of deals involving large-scale land acquisition.
- <sup>48</sup> *Ibid* at vi. **Note**: There is a concentration of land acquisitions in West and Eastern Africa, stretching from Sudan to Mozambique. Deals are further concentrated along riverbeds, including the River Nile, the Senegal River, and the Niger.<sup>8</sup> Among the main target countries in sub-Saharan Africa are Cameroon, Ethiopia, the Democratic Republic of Congo, Ghana, Madagascar, Mali, Somalia, Sudan, the United Republic of Tanzania, and Zambia.
- <sup>49</sup> *Ibid*. **Note**: Brazil is a major target country in Latin America.
- <sup>50</sup> *Ibid*. **Note**: Asia has the second largest number of deals after Africa. Deals in Asia originate mainly from a few countries in South-East Asia, including Cambodia, Laos, Indonesia and the Philippines.

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<sup>51</sup> *Ibid.* **Note:** Deals are concentrated mostly in the southwestern corner of Russia, but also in Bulgaria and Romania.

<sup>52</sup> GRAIN, *supra* note 46. **Note:** this data set documents 416 recent, large-scale land grabs by foreign investors for the production of food crops, covering nearly 35 million hectares of land in 66 countries. This is not an exhaustive list of all land deals. It focuses only on those deals that: were initiated after 2006, have not been cancelled, are led by foreign investors, are for production of food crops, and involve large land areas. Deals for sugar cane and palm oil production were included but other crops, like jatropha or cotton (which are often implicated in land grabbing by other sources), were not.

<sup>53</sup> Land Matrix, *supra* note 47.

<sup>54</sup> GRAIN, *supra* note 46. **Note:** These two regions account for two thirds of investments in the 2011 GRAIN data set.

<sup>55</sup> *Ibid.* **Note:** According to the GRAIN report, the UK serves as a tax haven for land grabbers, and often companies' operations reside elsewhere.

<sup>56</sup> *Ibid.* **Note:** Per the GRAIN data set, the US tops the list of land grabbers at 41 cases, followed by the UAE and Saudi Arabia with 39 combined.

<sup>57</sup> *Ibid.*

<sup>58</sup> Land Matrix, *supra* note 47.

<sup>59</sup> Oakland Institute & PANG, *supra* note 19 at 6.

<sup>60</sup> The Commonwealth, "Papua New Guinea", online: *The Commonwealth* <<http://thecommonwealth.org/our-member-countries/papua-new-guinea>>.

<sup>61</sup> *Ibid.*; **see also:** World Wildlife Fund (WWF), "The Area: Forests of New Guinea", online: <[http://wwf.panda.org/what\\_we\\_do/where\\_we\\_work/new\\_guinea\\_forests/area\\_forests\\_new\\_guinea/](http://wwf.panda.org/what_we_do/where_we_work/new_guinea_forests/area_forests_new_guinea/)>.

<sup>62</sup> Central Intelligence Agency (CIA), "East & Southeast Asia: Papua New Guinea" (12 January 2017), online: *The World Factbook* <<https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html>>; **see also:** The World Bank, "Papua New Guinea Overview" (28 September 2016), online: *The World Bank* <<http://www.worldbank.org/en/country/png/overview>>.

<sup>63</sup> Global Witness, "The people and forests of Papua New Guinea under threat: the government's failed response to the largest land grab in modern history" (November 2014) at 1–2, online: <[https://www.globalwitness.org/documents/10526/png\\_brief.pdf](https://www.globalwitness.org/documents/10526/png_brief.pdf)>.

<sup>64</sup> Global Witness, "Papua New Guinea", online: *Global Witness* <<https://www.globalwitness.org/fr/countries/papua-new-guinea/>>.

<sup>65</sup> World Wildlife Fund (WWF), "Cultural diversity and biodiversity are intimately related", online: WWF Global <[http://wwf.panda.org/about\\_our\\_earth/biodiversity/biodiversity\\_and\\_you/people\\_and\\_biodiversity/](http://wwf.panda.org/about_our_earth/biodiversity/biodiversity_and_you/people_and_biodiversity/)>.

<sup>66</sup> Global Witness, *supra* note 63 at 2; **see also:** Department of Lands and Physical Planning figure, as cited in 2011 civil society submission on SABLs to 78th Session of UNCERD, available here: The Centre for Environmental Law and Community Rights (CELCOR) et al, "Request for Consideration under the Urgent Action/Early Warning Procedure to Prevent Irreparable Harm to Indigenous Peoples' Rights in Papua New Guinea" (2011) 78th Sess Comm Elimin Racial Discrim, online: <<http://www.forestpeoples.org/sites/fpp/files/publication/2011/03/png-cerd-2011-ew-ua-final.pdf>>.

<sup>67</sup> Tim Anderson, "Land registration, land markets and livelihoods in Papua New Guinea" (2010) at 12, online: <<http://www.tim-anderson.info/wp-content/uploads/2015/04/In-Defence-of-Melanesian-Customary-Land.pdf#page=13>>.

<sup>68</sup> *Ibid.*; **also discussed in:** interview with Martyn Namorong, National Coordinator, Papua New Guinea Resource Governance Coalition (17 February 2017).

<sup>69</sup> *Ibid.*

<sup>70</sup> Global Witness, *supra* note 63 at 2.

<sup>71</sup> **Note:** PNG ranked 136 out of 176 nations on the Corruption Perceptions Index 2016. **See:** Transparency International, "Corruption Perceptions Index 2016", online: Transparency International <[https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016)>; **see also:** Global Witness, *supra* note 64.

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- <sup>72</sup> Global Witness, *supra* note 64.
- <sup>73</sup> Global Witness, *supra* note 63 at 2.
- <sup>74</sup> *Ibid* at 1.
- <sup>75</sup> Oakland Institute & PANG, *supra* note 19 at 4.
- <sup>76</sup> *Ibid* at 11.
- <sup>77</sup> Global Witness, *supra* note 64.
- <sup>78</sup> Oakland Institute & PANG, *supra* note 19 at 16.
- <sup>79</sup> Global Witness, *supra* note 63 at 2.
- <sup>80</sup> John Numapo, "Final Report of the Commission of Inquiry into the Special Agricultural and Business Lease (SABL)" (24 June 2013), online: <<http://www.coi.gov.pg/documents/COI%2oSABL/Numapo%2oSABL%2oFinal%2oReport.pdf>>; **see also:** Nicholas Mirou, "Report of the Commission of Inquiry into Special Agriculture and Business Lease (COI SABL)" (24 June 2013), online: <<http://www.coi.gov.pg/documents/COI%2oSABL/Mirou%2oSABL%2oFinal%2oReport.pdf>>.
- <sup>81</sup> Prime Minister Hon Peter O'Neill CMG MP, "Statement on the Report on the Commission of Inquiry into Special Agriculture and Business Leases" (21 July 2011) at 2, online: <<http://www.coi.gov.pg/documents/COI%2oSABL/PM%2oStatement%2oCOI%2oSABL%2oFinal%2oReport.pdf>>; **see also:** Global Witness, *supra* note 63 at 2.
- <sup>82</sup> Jemima Garrett, "PNG's land scandal inquiry names an Australian-led company" (12 February 2014), online: ABC News <<http://www.abc.net.au/news/2014-02-12/an-png-land-scandal-inquiry-names-an-australian-led-company/525528>>.
- <sup>83</sup> Global Witness, *supra* note 63 at 1–2, 5.
- <sup>84</sup> Global Witness, *supra* note 64.
- <sup>85</sup> Interview with Martyn Namorong, National Coordinator, Papua New Guinea Resource Governance Coalition (17 February 2017); **see also:** Oakland Institute & PANG, *supra* note 19 at 16.
- <sup>86</sup> *The Cotonou Agreement*, 23 June 2000 at 7 (revised in Ouagadougou on 22 June 2010), online: <[http://www.europarl.europa.eu/intcoop/acp/03\\_01/pdf/mn3012634\\_en.pdf](http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf)>; **see also:** Global Witness, *supra* note 63 at 3.
- <sup>87</sup> *The Cotonou Agreement*, *supra* note 86 at 27.
- <sup>88</sup> International Criminal Court (ICC), "The States Parties to the Rome Statute", online: <[https://asp.icc-cpi.int/en\\_menus/asp/states%2oparties/pages/the%2ostates%2oparties%2oto%2othe%2orome%2ostatute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%2oparties/pages/the%2ostates%2oparties%2oto%2othe%2orome%2ostatute.aspx)>.
- <sup>89</sup> Rome Statute, *supra* note 25 at Article 12.
- <sup>90</sup> Canada ratified the Rome Statute on July 7, 2000, and Australia did so on July 1, 2002.
- <sup>91</sup> Cotula, *supra* note 29; **see also:** Sam Rith & Sebastian Strangio, "Ethnic minorities most vulnerable to land grabs, rights groups say" (30 October 2008), online: Phnom Penh Post <<http://www.phnompenhpost.com/national/ethnic-minorities-most-vulnerable-land-grabs-rights-groups-say>>; **see also:** Oxfam International, *Our Land Our Lives* (October 2012) online: <[https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en\\_1.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf)>; **see also:** ABColombia, *Returning Land to Colombia's Victims* (May 2011), online: <<https://www.abcolombia.org.uk/wp-content/uploads/2017/07/Returning-Land-Report-%C6%92-for-web.pdf>>; **see also:** Carol Schachet, "Women Farmers and Land Grabs in Haiti" (25 February 2016), online: <<https://grassrootsonline.org/in-the-news/newsarticleswomen-farmers-and-land-grabs-haiti/>>; **see also:** Sara Balestri & Simona Beretta, *Poverty Eradication: Access to Land, Access to Food* (September 2015), online: <<http://indiaenvironmentportal.org.in/files/file/Poverty-Eradication.pdf>>.
- <sup>92</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 8–9; **see also:** Andrew Simms, "Unprecedented Case Filed at International Criminal Court Proposes Land Grabbing in Cambodia as a Crime Against Humanity", *Huffington Post* (6 December 2014) at para 2, online: <[http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing\\_b\\_5938500.html](http://www.huffingtonpost.co.uk/andrew-simms/land-grabbing_b_5938500.html)>; **see also:** The Economist, "When others are grabbing their land", *The Economist* (5 May 2011), online: <<http://www.economist.com/node/1864885>>.

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<sup>93</sup> Land Matrix, *supra* note 47. **See, for example:** Transnational Institute Agrarian Justice Programme, "The Global Land Grab: A Primer" (October 2012) at 15–16, online <<https://www.tni.org/files/download/landgrabbingprimer-feb2013.pdf>>, discussing the company Chikweti Forests in Mozambique, a subsidiary of a Swedish investment fund, which allegedly promised to provide 3000 jobs in exchange for receiving a large land lease. However, it is reported that the company only provided 900 jobs, many of which are said to involve short-term seasonal work during the agricultural season, forcing workers to leave their fields during the most important time of the year when they would have had work regardless. The work on the plantations is also allegedly characterized by long hours, minimum wage, and zero workers' benefits.

<sup>94</sup> Global Witness & Friends of the Earth Europe, *supra* note 1 at 47.

<sup>95</sup> Transnational Institute Agrarian Justice Programme, *supra* note 93.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> **For example:** Manny (name changed), is a farmer in the Philippines who lives with his wife, children and grandchildren. He has lived and worked on the land since the 1970s, and has a leasehold agreement with its owners. However despite that lease, it is reported that the land was sold to APECO (a special economic zone intended for an air strip and water port, among other things) without making any mention of Manny's tenancy. Now, living in fear of eviction, Manny says "This is how we earn our money. This is how we send our kids to school. If you take this away from us, you're taking away our source of income and our source of life. If I am forced to leave, in effect it's like APECO has killed us already." **See:** Oxfam International, "Land grabs in the Philippines: 'It's like they have killed us already'", online: <<https://www.oxfam.org/en/countries/land-grabs-philippines-its-they-have-killed-us-already>>.

<sup>99</sup> **For example:** Global Witness reports that between 2002 and 2013, 908 citizens were killed protecting their rights to land. In Colombia in 2012 and 2013, seven activists were killed trying to protect indigenous lands from mining operations. In Mexico in 2011, Pedro Juarez Urbina and Armando Hernandez Estrada were shot dead while attempting to barricade a group of loggers from carrying out their logging operations. These are just some of the many examples of environmental and land defenders murdered in the course of protecting their land. **See:** Global Witness, "Deadly Environment" at 4 & 15, online: <<https://www.globalwitness.org/en-gb/campaigns/environmental-activists/deadly-environment/>>.

<sup>100</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 14.

<sup>101</sup> UN Habitat, "Secure Land Rights for All (2008)" at 16, online: <<https://unhabitat.org/books/secure-land-rights-for-all/>>.

<sup>102</sup> Harold Liversage, "Responding to 'Land Grabbing' and Promoting Responsible Investment in Agriculture" (June 2010) at 3, online: <<https://www.tni.org/files/Liversage%20Responsible%20Land%20Investment.pdf>>.

<sup>103</sup> Shepard Daniel, "Land Grabbing and Potential Implications for World Food Security" (2011) in M. Behnassi et al, *Sustainable Agricultural Development* (eds) at 33, online: <[https://link.springer.com/chapter/10.1007%2F978-94-007-0519-7\\_2](https://link.springer.com/chapter/10.1007%2F978-94-007-0519-7_2)>.

<sup>104</sup> Balestri & Beretta, *supra* note 91 at 97.

<sup>105</sup> **Note:** Statistics taken from Commission on Legal Empowerment of the Poor and United Nations Development Programme, *Making the Law Work for Everyone, Volume II Working Group Reports* (2008) at 78 which uses the internationally-recognized criterion of living on less than \$2 a day as the measure of poverty.

<sup>106</sup> UN Habitat, *supra* note 101 at 14; **referencing:** Commission on Legal Empowerment of the Poor, "Making the Law Work for Everyone: Volume II Working Group Reports" at ch 2, online: <<http://legalempowerment.undp.org/reports/>>.

<sup>107</sup> **Note:** See the discussion under "The Impact of Land Titling" in Section III "Global Reach of Land Grabbing" starting at page 19 of this manual.

<sup>108</sup> Keri Vacanti Brondo, "Gendered Environmental Rights and Responsibilities" in *Land Grab: Green Neoliberalism, Gender, and Garifuna Resistance in Honduras* (Tucson: University of Arizona Press, 2013) at 80, online: <<https://books.google.ca/books?id=C1Q3FbC64ykC&printsec=frontcover#v=onepage&q&f=false>>. Deere and Leon (as cited by Keri Brondo) posit three specific reasons for this asymmetry: first, there is a positive correlation between a woman's ownership of productive resources and her risk of poverty. Second, land ownership is associated with increased productivity. And third, female property owners have more bargaining power within relationships and thus higher levels of decision making within households.

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- <sup>109</sup> Oxfam International, "Promises, Power and Poverty" (9 April 2013) at 9, online: <[https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp170-promises-power-poverty-land-women-090413-en\\_3.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp170-promises-power-poverty-land-women-090413-en_3.pdf)>.
- <sup>110</sup> Anja Tolonen & Global Witness, "Extracting Equality: Gender and the African Mining Industry" (25 January 2017), online: <<https://www.globalwitness.org/en/blog/extracting-equality-gender-and-african-mining-industry/>>.
- <sup>111</sup> Oxfam International, *supra* note 109 at 9.
- <sup>112</sup> FIDH, *supra* note 3.
- <sup>113</sup> Oxfam International, *supra* note 109 at 11.
- <sup>114</sup> *Ibid* at 7.
- <sup>115</sup> *Ibid*.
- <sup>116</sup> Balestri & Beretta, *supra* note 91 at 94.
- <sup>117</sup> *Ibid*, **referring to:** Anseeuw et al, *supra* note 5.
- <sup>118</sup> UN Commission on the Status of Women, "Interactive Expert Panel: Gender Equality and Sustainable Development" (1 March 2011, 55<sup>th</sup> Session) at 3, online: <<http://www.un.org/womenwatch/daw/csw/csw55/panels/IssuesPaper-Panel4.pdf>>.
- <sup>119</sup> *Ibid* at 4.
- <sup>120</sup> Oxfam International, *supra* note 109 at 10.
- <sup>121</sup> Schachet, *supra* note 91.
- <sup>122</sup> *Ibid*.
- <sup>123</sup> *Ibid*.
- <sup>124</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 16 & 18.
- <sup>125</sup> De Schutter, *supra* note 5 at 12; **see also:** UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> [hereafter "ICCPR"]; **see also:** UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol 993, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> [hereafter "ICESCR"]; **see also:** *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61<sup>st</sup> Sess, UN Doc A/61/L.67 (2007), online: <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>.
- <sup>126</sup> *Declaration on the Rights of Indigenous Peoples*, *supra* note 125; **see also:** *Declaration on the Right to Development*, GA Res 41/128, UNGAOR, 41<sup>st</sup> Sess, UN Doc A/RES/41/128 (1986) 186, online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/41/128](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/41/128)>. **Note:** For a summary of international and domestic laws referencing FPIC, **see:** Parshuram Tam, "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices" (2005) presented at Workshop on Free, Prior and Informed Consent and Indigenous Peoples, Organized by the Secretariat of UNPFII.
- <sup>127</sup> Nolte, Chamberlain & Giger, *supra* note 47 at vii.
- <sup>128</sup> *Ibid*.
- <sup>129</sup> *Ibid* at 39.
- <sup>130</sup> *Ibid* at 42.
- <sup>131</sup> ABColombia, *supra* note 91 at 8.
- <sup>132</sup> *Ibid* at 3–4.
- <sup>133</sup> *Ibid* at 3.
- <sup>134</sup> *Ibid* at 7–8.

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<sup>135</sup> *Ibid* at 9.

<sup>136</sup> Rith & Strangio, *supra* note 91.

<sup>137</sup> Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Land Grabbing and Poverty in Cambodia: The Myth of Development* (2009) at 19, online: <<https://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf>>.

<sup>138</sup> *Ibid* at 19.

<sup>139</sup> Global Witness, "Guns, Cronies and Crops" (26 March 2015) at 12, online: <<https://www.globalwitness.org/en/campaigns/land-deals/guns-cronies-and-crops/>>.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid*.

<sup>142</sup> The International Federation for Human Rights (FIDH), *Forced Evictions and the Right to Housing of the Roma in Russia* (July 2008) at 19, <<https://www.fidh.org/IMG/pdf/Romrussies501angconj2008-2-1.pdf>>.

<sup>143</sup> *Ibid* at 20.

<sup>144</sup> *Ibid* at 36.

<sup>145</sup> *Ibid* at 19 & 27.

<sup>146</sup> Olivier De Schutter, "The Green Rush: The Global Race for Farmland and the Rights of Land Users" (2011) 52:2 *Harvard International Law Journal* 504 at 524, online: <[http://www.harvardilj.org/wp-content/uploads/2011/07/HILJ\\_52-2\\_De-Schutter1.pdf](http://www.harvardilj.org/wp-content/uploads/2011/07/HILJ_52-2_De-Schutter1.pdf)>.

<sup>147</sup> UN Habitat, *supra* note 101 at 13.

<sup>148</sup> Lorenzo Cotula, "Land Deals in Africa: What is in the Contracts?" (2011) at 16, online: <<http://pubs.iied.org/pdfs/12568IIED.pdf>>.

<sup>149</sup> UN Habitat, *supra* note 101 at 14.

<sup>150</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 15.

<sup>151</sup> Cotula, *supra* note 148 at 17.

<sup>152</sup> De Schutter, The International Corporate Accountability Roundtable & Global Witness, *supra* note 7 at 16; **see also**: Amnon Lehari, "Land Law in the Age of Globalization" (2016) *Comparative Property Law: Global Perspectives* 290-310 at 6, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2545844](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545844)>; **see also**: Liz Alden Wily, "The Law and Land Grabbing: Friend or Foe" (2013) at 13-14, Presented at the Law and Development Conference 2013, Kyoto, 30-31 May 2013, online: <<http://www.lawanddevelopment.net/img/2013papers/LizAldenWily.pdf>>.

<sup>153</sup> Anseeuw et al, "Transnational Land Deals for Agriculture in the Global South: Analytical Report Based on the Land Matrix Database" (April 2012) at section VII; online: <[https://www.oxfam.de/system/files/20120427\\_report\\_land\\_matrix.pdf](https://www.oxfam.de/system/files/20120427_report_land_matrix.pdf)>; **see also**: Wily, *supra* note 152 at 6.

<sup>154</sup> **Note**: The fact that inhabitants did not legally own the land before being displaced does not, however, imply that they were evicted legally. For further discussion of land grabbing in the context of government expropriation, see the discussion in Section VI "General Guidelines for Legitimate Expropriation" starting at page 61 of this manual. **See**: Connie Carter & Andrew Harding, *Land Grabs in Asia: What Role for the Law?* (Routledge, 2015) at 147; **see also**: Cultural Survival, "Dispossession and Land Tenure in Tanzania: What Hope from the Courts?", online: <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/dispossession-and-land-tenure-tanzania-what-hope-courts>>; **see also**: De Schutter, *supra* note 146 at 524.

<sup>155</sup> Wily, *supra* note 152 at 12-14; **see also**: De Schutter, *supra* note 146 at 524.

<sup>156</sup> UN Habitat, *supra* note 101 at 5.

<sup>157</sup> *Ibid*.

<sup>158</sup> **Note**: For an example of an indigenous community that opposes the imposition of a land title system on land held under customary tenure, **see**: Pacific Islands News Association, "World Bank brings back land registration agenda through

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environmental conservation”, online:

<<http://www.pina.com.fj/index.php?p=pacnews&m=read&o=208129971758do52483595db7875c2>>. The Melanesian Indigenous Land Defence Alliance argues that customary tenure requires flexibility and communal ownership, which are not possible under a formal land title system. **See also:** De Schutter, *The International Corporate Accountability Roundtable & Global Witness*, *supra* note 7 at 15–19; **see also:** De Schutter, *supra* note 146 at 525; **see also:** UN Habitat, *supra* note 101 at 20.

<sup>159</sup> De Schutter, *supra* note 146 at 525, 526–531. De Schutter argues that Western-style property rights are likely not an appropriate solution, given problems with inadequate monitoring, corruption, communal ownership and social inequality in developing nations.

<sup>160</sup> **Note:** See the discussion under Subsection D “Defendants” in Section V “Legal Analysis” starting at page 49 of this manual, exploring which actors might be appropriate defendants for an ICC prosecution arising out of land grabbing.

<sup>161</sup> Wily, *supra* note 152 at 212; **see also:** De Schutter, *The International Corporate Accountability Roundtable & Global Witness*, *supra* note 7 at 24–29.

<sup>162</sup> De Schutter, *The International Corporate Accountability Roundtable & Global Witness*, *supra* note 7 at 14; **see also:** Amnesty International UK, “Africa: Forced evictions reach crisis levels” (4 October 2006), online: </press-releases/africa-forced-evictions-reach-crisis-levels>.

<sup>163</sup> Human Rights Watch, “What Will Happen if Hunger Comes?” (18 June 2012), online: <<https://www.hrw.org/report/2012/06/18/what-will-happen-if-hunger-comes/abuses-against-indigenous-peoples-ethiopia-lower>>.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> De Schutter, *supra* note 5 at 7.

<sup>167</sup> *Ibid* at 7.

<sup>168</sup> European Parliament, Directorate-General for External Policies, Policy Department, “Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union” (May 2016) at 17, online: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578007/EXPO\\_STU\(2016\)578007\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578007/EXPO_STU(2016)578007_EN.pdf)>.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> Thorpe, *supra* note 6 at 15.

<sup>172</sup> De Schutter, *The International Corporate Accountability Roundtable & Global Witness*, *supra* note 7 at 31–32.

<sup>173</sup> *Ibid* at 6–8, 24–29; Transparency International, “What Is Corruption?” (accessed July 25, 2017), online: <<https://www.transparency.org/what-is-corruption/>>.

<sup>174</sup> Thorpe, *supra* note 6 at 3.

<sup>175</sup> European Parliament, *supra* note 168 at 19.

<sup>176</sup> De Schutter, *supra* note 5 at 4.

<sup>177</sup> Transnational Institute Agrarian Justice Programme, *supra* note 93 at 12; **see also:** European Parliament, *supra* note 168 at 12.

<sup>178</sup> Transnational Institute Agrarian Justice Programme, *supra* note 93 at 12.

<sup>179</sup> European Parliament, *supra* note 168.

<sup>180</sup> *Ibid* at 15.

<sup>181</sup> Thorpe, *supra* note 6 at 2.

<sup>182</sup> *Ibid* at 6.

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<sup>183</sup> *Ibid* at 12.

<sup>184</sup> Global Witness & Friends of the Earth Europe, *supra* note 1 at 4. **Note:** Some examples of companies which have made large agricultural land acquisitions include BlackRock Inc (an American company), which established a US\$200 million agricultural hedge fund in 2008, Renaissance Capital (a Russian company) which bought 300,000 hectares of land in Ukraine, and Palmer Capital (a German company) which, along with Bidwells (a UK company), created a \$425 million fund to purchase farmland in Europe. **See:** Maya Montenegro, "Hungry for Land" (Seed Magazine, 24 January 2017), online: <[http://seedmagazine.com/content/article/hungry\\_for\\_land/](http://seedmagazine.com/content/article/hungry_for_land/)>.

<sup>185</sup> Human Rights Watch, "World Bank Group: Inadequate Response to Killings, Land Grabs" (10 January 2014), online: <<https://www.hrw.org/news/2014/01/10/world-bank-group-inadequate-response-killings-land-grabs>>.

<sup>186</sup> *Ibid*.

<sup>187</sup> Oxfam International, *supra* note 91 at 3. World Bank officers are less viable (and less desirable) as prospective defendants as the organization already maintains investigatory and due diligence mechanisms for its investments. Still, they play a pivotal role in land acquisitions that should not go unnoticed.

<sup>188</sup> Asian Human Rights Commission, "Killing of a villager working against illegal land concession by a tycoon senator" (7 February 2007), online: <<http://www.humanrights.asia/news/urgent-appeals/UP-017-2007>>; **see also:** Mu Sochua & Cecilia Wikstrom, "Land Grabs in Cambodia" (The New York Times, 18 July 2012), online: <<http://www.nytimes.com/2012/07/19/opinion/land-grabs-in-cambodia.html>>.

<sup>189</sup> Jacobo Grajales, "State Involvement, Land Grabbing and Counter-Insurgency in Colombia" (2013) 44:2 Dev Change 211; **see also:** ABColombia, *supra* note 91.

<sup>190</sup> Grajales, *supra* note 189 at 226.

<sup>191</sup> *Ibid* at 222–223.

<sup>192</sup> Global Witness, *supra* note 13.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Ibid*.

<sup>195</sup> GRAIN, "Foreign pension funds and land grabbing in Brazil" (16 November 2015), online: <<https://www.grain.org/article/entries/5336-foreign-pension-funds-and-land-grabbing-in-brazil#sdfootnote1sym>>; **see also:** Linda Farthing, "The Land Grabbers" (2 February 2017), online: Jacobin <<https://www.jacobinmag.com/2017/02/tiaa-pensions-investment-deforestation-theft-indigenous-palm-soy-agribusiness/>>.

<sup>196</sup> "Advogados denunciam a indústria da grilagem no Piauí" [translation: Lawyers denounce the grilagem industry in Piauí] (5 February 2012), online: Portal AZ <<https://www.portalaz.com.br/noticia/geral/237397/advogados-denunciam-a-industria-da-grilagem-no-piaui>>. **Note:** A "state or organizational policy" need not be formalized. **See:** *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) at para 81, which states that "an attack which is planned, directed or organized- as opposed to spontaneous or isolated acts of violence- will satisfy this criterion." **See also:** Subsection B "Chapeau Elements" in Section V "Legal Analysis" starting at page 40 of this manual for further discussion of the "state or organizational policy" requirement for crimes against humanity under the Rome Statute.

<sup>197</sup> GRAIN, *supra* note 195. The investment giant is managed by an American pension fund and contains sizable contributions from pension funds in Sweden and Canada.

<sup>198</sup> *International Criminal Court*, *supra* note 88.

<sup>199</sup> **See:** Caspar Plomp, "Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court" (2014) 30:79 *Utrecht J Int Eur Law*, online: <<http://www.utrechtjournal.org/articles/10.5334/ujel.cl/>> at 10–11, **referring to:** *Prosecutor v Tadić* (Opinion and Judgement) ICTY-IT-94-1-T (7 May 1997); **see also:** the discussion under Subsection D "Defendants" in Section V "Legal Analysis" starting at page 49 of this manual. International jurisprudence suggests there need not exist any geographical connection between the act of the aider and abettor, and the act of the principal perpetrator.

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<sup>200</sup> **Note:** Based on Article 38(1) of the Statute of the International Court of Justice, sources of international law include treaties, international customary law, general principles of law, judicial decisions, and writings of eminent legal scholars.

<sup>201</sup> **Note:** Article 1 of the *Vienna Convention on the Law of Treaties* (the “Vienna Convention”) defines a treaty as “an international agreement concluded between States in written form and governed by international law,” which when ratified or acceded to by a state “establishes on the international plane its consent to be bound by” the treaty. **See:** *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 34 (entered into force 27 January 1980), online: <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> [hereafter the “Vienna Convention”].

<sup>202</sup> **Note:** While international crimes that are based on international customary law apply universally, those that result from specific treaties to criminalize such conduct require contracting states to implement legislation for its criminal prosecution in their domestic legal systems. **See:** Peace Palace Library, “International Criminal Law Research Guide”, online: <<http://www.peacepalacelibrary.nl/research-guides/international-criminal-law/international-criminal-law/>>.

<sup>203</sup> **Note:** For a summary of the international jurisprudence, see “Appendix A: Table of Cases – Forcible Transfer” starting at page 68 of this manual.

<sup>204</sup> **Note:** International criminal law is the subset of public international law dealing with criminal responsibility for international crimes. Notably, international crimes are not subject to any statute of limitations, cases can be brought by any country relying on universal jurisdiction for international crimes, and they could result in the criminal prosecution of either natural persons or corporations within national systems that so allow. **Note also:** Where possible, this manual will also explore corporate criminal liability for international crimes. For a detailed discussion on the concept of corporate criminal liability, **see:** “Corporate Criminal Liability” in Section V “Legal Analysis” starting at page 50 of this manual.

<sup>205</sup> **Note:** Domestic criminal prosecutions may be undertaken, for instance, in countries where international criminal law has been incorporated into domestic law. The following report provides an overview of crimes against humanity statutes and criminal code provisions in many such jurisdictions, including Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Colombia, The Democratic Republic of Congo, The Republic of Congo, Costa Rica, Croatia, Denmark, Ecuador, Estonia, The European Union, Finland, France, Georgia, Germany, Ireland, Italy, The Ivory Coast, Japan, Korea (South), Kyrgyzstan, Latvia, Lichtenstein, Luxembourg, Mali, Malta, Mexico, Netherlands, New Zealand, Nigeria, Norway, Peru, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, and Uruguay: Library of Congress, “Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Countries” (April 2010), online: <<https://loc.gov/law/help/crimes-against-humanity/crimes-against-humanity.pdf>>.

<sup>206</sup> Roger Alford, “The Future of Human Rights Litigation after Kiobel” (2014) 89 *Notre Dame Law Review* 4, online: <[http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2079&context=law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2079&context=law_faculty_scholarship)>.

<sup>207</sup> Corporate War Crimes, “Did the Cambodian Sugar Case Settle?” (1 May 2015), *Corporate War Crimes* (blog), online: <<https://corporatewartcrimes.com/2015/05/01/did-the-cambodian-sugar-case-settle/>>.

<sup>208</sup> James G Stewart, “The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute” (19 February 2014), 7 *NYU Journal of International Law and Politics* (2014) at 55. Available at SSRN: <https://ssrn.com/abstract=2354443> or <http://dx.doi.org/10.2139/ssrn.2354443>.

<sup>209</sup> M Sagar Kumar, “Special court on land-grab defunct after state split”, *Times of India* (3 January 2017), online: <<http://timesofindia.indiatimes.com/city/hyderabad/special-court-on-land-grab-defunct-after-state-split/articleshow/56306386.cms>>.

<sup>210</sup> Indian Realty Exchange, “Special Courts in Karnataka for Land Grabbing Cases” (8 September 2016), IRX Live (blog), online: IRX Live <<http://irxlive.com/latest-buzz/special-courts-in-karnataka-for-land-grabbing-cases>>.

<sup>211</sup> Manjunath Hebbar, “Special court on land grab cases gets no help from Bengaluru dist officials”, *Deccan Herald* (7 April 2017), online: Deccan Herald <<http://www.deccanherald.com/content/605116/special-court-land-grab-cases.html>>.

<sup>212</sup> Law Pavilion, “Lagos State Property Protection Law, 2016” (28 September 2016), Law Pavilion (blog), online: Law Pavilion <<http://lawpavilion.com/blog/lagos-state-property-protection-law-2016/>>.

<sup>213</sup> Kazeem Ugboaga, “Lagos Records 1,200 Land Grabbing Cases In 9 Months”, *PM News* (19 May 2017), online: PM News Nigeria <<https://www.pnewsnigeria.com/2017/03/16/lagos-records-1200-land-grabbing-cases-9-months/>>.

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<sup>214</sup> **Note:** Recall that the Rome Statute provides the ICC with jurisdiction over certain “international core crimes”—namely, genocide, war crimes, crimes against humanity, and aggression. Among the goals expressed in its Preamble and Article 1 are the combatting of impunity and prevention of the recurrence of violence, which are to be achieved by combining the activities of the ICC and national jurisdictions within a complementary system of criminal justice, in order to ensure that the most serious crimes committed in each situation do not go unpunished.

<sup>215</sup> Human Rights Watch, “Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq” (2004), online: <<https://www.hrw.org/reports/2004/iraq0804/4.htm>>.

<sup>216</sup> *Ibid.*

<sup>217</sup> **Note:** The human right to adequate food, under Article 11 of the ICESCR, guarantees for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate, and safe to ensure freedom from hunger.

<sup>218</sup> **Note:** The right to adequate housing, outlined in Article 11(1) of the ICESCR, prohibits forced evictions including development-based evictions and displacement. General Comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights provides guidelines based on the principle that no eviction shall take place unless “(a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the guidelines.”

<sup>219</sup> **See:** Article 1, paragraph 2 of the ICCPR and the ICESCR. **Note:** As regards indigenous peoples, this principle is further reaffirmed by Article 3 of the UN Declaration on the Rights of Indigenous Peoples. The right to self-determination, as recognized by the African Commission on Human and Peoples’ Rights, imposes on governments and obligation to protect individuals under their jurisdiction from being deprived of their access to productive resources. The UN Committee on the Elimination of Racial Discrimination refers to the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.

<sup>220</sup> Jootaek Lee, “Contemporary Land Grabbing: Research Sources and Bibliography” (2014) 107 Law Library Journal 259-285, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2563604](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563604)>.

<sup>221</sup> **See:** *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3<sup>rd</sup> Sess, Supp No 13, UN A/810 (1948) 71. **Note:** Some of the provisions relevant to land grabbing include: the right to freedom and equality (Art 1); non-discrimination (Art 2); right to life and security of person (Art 3); prohibition of slavery (Art 4); prohibition against inhuman treatment (Art 5); equal protection (Art 7) prohibition against arbitrary arrest and detention (Art 9); the right to own property alone as well as in association with others and prohibition against arbitrary deprivation of one’s property (Art 17); the right to realization of the economic, social, and cultural rights indispensable for human dignity (Art 22); the right to just and favorable conditions of work and to protection against unemployment (Art 23); and the right to a standard of living adequate for human health and well-being (Art 25).

<sup>222</sup> ICESCR, *supra* note 125 at 3.

<sup>223</sup> ICCPR, *supra* note 125 at 171.

<sup>224</sup> **Note:** This commitment is made most clearly in shared Article 1 of the ICESCR and ICCPR.

<sup>225</sup> **See:** Dorothee Cambou & Stefaan Smis, “Permanent sovereignty over natural resources from a human rights perspective: natural resources exploitation and indigenous peoples’ rights in the Arctic” (2014) 22:1 Michigan State Int’l L Rev 347, 357-358. **See also:** De Schutter, *supra* note 7 at 12.

<sup>226</sup> **See:** General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, Advance Unedited Version, Committee on Economic, Social and Cultural Rights, E/C.12/GC/24, 23 June 2017.

<sup>227</sup> **Note:** Other rights conferred by ICESCR relevant to land grabbing are: equal protection without discrimination (Art 2.2); the equal right of men and women to the enjoyment of all economic, social, and cultural rights (Art 3); the right to work (Art 6); the right to the enjoyment of just and favorable conditions of work (Art 7); the right of trade unions (Art 8); the right to social security (Art 9); the right to the enjoyment of the highest attainable standard of physical and mental health (Art 12); the right to education (Art 12); and the right to take part in cultural life (Art 15). Other rights conferred by ICCPR relevant to land grabbing are: non-discrimination (Art 2.2), the equal right of men and women to the enjoyment of all civil and political rights (Art 3), the right to life (Art 6), the right to liberty and security of person (Art 9), the right to liberty of movement and freedom

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to choose one's residence (Art 12), the right to peaceful assembly (Art 21), and the right to freedom of association with others (Art 22).

<sup>228</sup> De Schutter, *supra* note 5.

<sup>229</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, UN, Treaty Series, vol 660, p 195 (1965).

<sup>230</sup> Lee, *supra* note 220.

<sup>231</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, UN, Treaty Series, vol 1650, p 383 (1991), Articles 13-19.

<sup>232</sup> *Ibid* at Article 14. **Note:** Other notable provisions of the Convention Concerning Indigenous and Tribal Peoples include: the right of indigenous peoples to non-discrimination (Art 2.1); the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and the lands they occupy or otherwise use, and the right to exercise control over their own economic, social, and cultural development (Art 7.1); and the right of full enjoyment of their customs and customary laws (Art 8). Also, Articles 16 and 17.2 provide for the right not to be removed from the lands that they occupy, and the right to be consulted whenever consideration is being given to alienate their lands or otherwise transmit their rights outside their own community.

<sup>233</sup> **Note:** Although soft law is not binding, either on the International Criminal Court or generally, it can reflect international values and expectations about State conduct, and holds potential for emerging as hard law in the future.

The *Guiding Principles on Business and Human Rights*, adopted by the UN Human Rights Council in 2011, emphasize the obligations of states and corporations in protecting and respecting human rights, respectively, and the rights of victims to access the appropriate remedy for wrongs done to them; **see:** Lee, *supra* note 220; **see also:** John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008). The *Guiding Principles* have been criticized, however, for failing to effectively restrain corporations' behaviors, since they do not clearly impose extraterritorial obligations on states to prevent their corporations from human rights abuses; **see:** Lee, *supra* note 220.

Apart from the *Guiding Principles*, in 2012 the Food and Agriculture Organization of the UN adopted the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. The *Voluntary Guidelines* suggest that securing tenure rights and equitable access to land, fisheries, and forests is essential for the realization of the right to adequate food; **see:** Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome (2012).

Other soft law instruments include a report presented to the Human Rights Council by Olivier De Schutter, the Special Rapporteur on the Right to Food, titled *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge of Large-Scale Land Acquisitions or Leases*. The report suggests that the human right to food cannot be realized if people lose access to land without being provided with suitable alternatives, and extends the principle of FPIC to non-indigenous rural communities; **see:** De Schutter, *supra* note 5; **see also:** Lee, *supra* note 220. Thus, De Schutter proposes a set of 11 core principles and measures for host states and investors to follow when conducting land deals.

In addition to De Schutter's report, the Special Rapporteur on adequate housing released a report entitled *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, recognizing forced evictions as a gross violation of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement. This report suggests that forced evictions intensify inequality, social conflict, segregation and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women, children, minorities and indigenous peoples. The report provides practical guidelines to assist states and agencies in developing policies, legislation, procedures and preventative measures to ensure that development-based evictions are not undertaken in contravention of existing international human rights standards and do not thus constitute "forced evictions"; **see:** UN OHCHR, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, A/HRC/4/18, at 4-5, online: <[http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf)>. For further exploration of the *Guidelines on Development-Based Evictions*, **see:** Section VI "General Guidelines on Legitimate Expropriation" starting at page 61 of this manual.

Finally, in 2015 the UN Office of the High Commissioner for Human Rights released the *Principles for Responsible Contracts*, intended to guide actors in international investment negotiations. The accompanying *Guiding Principles* outline the

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following ten principles for integrating the management of human rights risks into contract negotiations: 1) *Preparation and planning* recommends that parties be prepared, and have the capacity, to properly address human rights implications of the project. (2) *Managing potential adverse human rights impacts* recommends that the parties agree on a set of human rights baselines, assess their own capacities to manage human rights risks, ensure adequate funding for mitigation efforts, agree on an initial plan to communicate with potentially affected individuals and communities about the project, and agree on a financial mechanism for compensation that will be explained to potential beneficiaries (3) *Project operating standards* recommends that the laws, standards and regulations governing the project should facilitate the prevention, mitigation and remedy of any negative human rights impact of the project. (4) *Stabilization clauses* (clauses that address changes in the law during the term of the contract) should be drafted so as not to interfere with the state's efforts to implement laws aimed at meeting its human rights obligations. (5) *Additional goods or service provisions* (any goods or service provided by the investor that are not related to any project activity) should be carried out in a manner compatible with all parties' human rights obligations. (6) *Physical security for the project* recommends that physical security for the project's facilities and personnel be provided in a manner consistent with human rights' obligations. (7) *Community engagement* recommends the project have a community engagement plan through its life cycle. (8) *Project monitoring and compliance* recommends that the state monitor the project's compliance with human rights' standards. (9) *Grievance mechanisms for harms to third parties* recommends that individuals affected by the project who are not party to the contract, have access to non-judicial remedies. (10) *Transparency and disclosure of contract terms* recommends that the contract's terms be disclosed and any disclosure be based on compelling justifications: **see**: United Nations Office of the High Commissioner for Human Rights, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations*, HR/PUB/15/1 (New York and Geneva: 2015).

<sup>234</sup> Rome Statute, *supra* note 25; **see also**: International Criminal Court (ICC), "Understanding the ICC", online: <<https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>>.

<sup>235</sup> **Note**: In total, there are 139 signatories to the Rome Statute. Of the 124 countries that have ratified the Rome Statute, 34 are African States, 19 are Asia-Pacific States, 18 are Eastern European States, 28 are Latin American and Caribbean States, and 25 are Western European and other States. Some notable non-party, non-signatory states include China, Cuba, India, Indonesia, Iraq, Lebanon, Malaysia, Myanmar, Nepal, Pakistan, PNG, Rwanda, Saudi Arabia, South Sudan, and Turkey. **See**: ICC, *supra* note 88; **see also**: "Chapter XVIII: Penal Matters: 10. Rome Statute of the International Criminal Court", UN Treaty Collection, online: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en)>.

<sup>236</sup> Rome Statute, *supra* note 25 at Preamble & Article 1.

<sup>237</sup> *Ibid* at Preamble.

<sup>238</sup> OTP, *supra* note 26 at paras 5 & 41.

<sup>239</sup> Rome Statute, *supra* note 25 at Article 5. **Note**: Despite the Court's jurisdiction over the four categories of crimes under the Rome Statute, jurisdictional issues arise with respect to nationals of non-States Parties to the Rome Statute. These and other jurisdictional issues are discussed further under Subsection A "Jurisdiction and Admissibility" in Section V "Legal Analysis" starting at page 35 of this manual.

<sup>240</sup> **See, for example**: Rogers & Prezanti, *supra* note 13. In their communication to the ICC, the authors argue that the cumulative effect of the alleged crimes associated with land grabbing in Cambodia have pushed the situation beyond the boundaries of human rights abuses and domestic crimes, to the point where the crimes fulfil all of the legal elements of crimes against humanity under the Rome Statute.

<sup>241</sup> Bouganim-Shaag & Naggan, *supra* note 22.

<sup>242</sup> Vienna Convention, *supra* note 201 at Article 34.

<sup>243</sup> **Note**: Article 25 of the Rome Statute limits the ICC's jurisdiction to natural persons. For a discussion of issues related to the liability of juridical persons such as corporations, see "Corporate Criminal Liability" under Subsection D "Defendants" in Section V "Legal Analysis" starting at page 50 of this manual.

<sup>244</sup> Julia Graff, "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo" (16 January 2004), 11:2 Human Rights Brief 23, online: <<https://www.wcl.american.edu/hrbrief/11/2graff.pdf>>; **see also**: Michael P Scharf, "The ICC's jurisdiction over the nationals of non-party states: A critique of the US position" (2004), 64:1

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Law and Contemporary Problems 67 at 116, online:

<<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1201&context=lcp>>.

<sup>245</sup> **Exception:** Joshua Arap Sang, a corporate executive in the radio broadcasting business, was charged at the ICC for his involvement in post-election violence in Kenya in 2007-2008. This is discussed further in the following paragraphs. **See:** *Prosecutor v Ruto, Kosgey & Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11 (23 January 2012).

<sup>246</sup> Rome Statute, *supra* note 25 at Article 7.

<sup>247</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 82 UNTS 280, London (8 August 1945) [hereafter the "Nuremberg Charter"].

<sup>248</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) at 164.

<sup>249</sup> *Ibid.*

<sup>250</sup> International Law Commission, 48<sup>th</sup> Session, *Draft Code of Crimes against the Peace and Security of Mankind* (1996) at 49, online: <[http://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_4\\_1996.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf)>.

<sup>251</sup> **See:** International Military Tribunal, *Trial of the German Major War Criminals* (Nuremberg: 1947); **see also:** United States Military Tribunal, *United States v Krupp et al* (Nuremberg: 1948); **see also:** United States Military Tribunal, *United States of America v Erhard Milch* (Nuremberg: 1947); **see also:** District Court of Jerusalem, *Attorney General v Adolf Eichmann*, Criminal Case No. 40/61 (1961).

<sup>252</sup> Guido Acquaviva, *Forced Displacement and International Crimes* (UNHCR: Geneva, June 2011) at 10, online: <<http://www.refworld.org/pdfid/4fdf1dbd2.pdf>>.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid* at 10 & 12.

<sup>255</sup> **Note:** However, deportation is listed as a crime under the ICTY and ICTR statutes: **see:** UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002) (25 May 1993) [hereafter "ICTY Statute"]; **see also:** UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as amended on 13 October 2006) (8 November 1994) [hereafter "ICTR Statute"].

<sup>256</sup> **Note:** Apart from the cases discussed under this section, the following is an exhaustive list of ICTY cases in which forcible transfer has been charged, either as an underlying act of persecution or "other inhumane acts": **see:** *Prosecutor v Stanišić & Župljanin* (Judgement) ICTY-IT-08-91-A (30 June 2016); **see also:** *Prosecutor v Šešelj* (Judgement) ICTY-IT-03-67-T (31 March 2016); **see also:** *Prosecutor v Karadžić* (Judgement) ICTY-IT-95-5/18-T (24 March 2016); **see also:** *Prosecutor v Popović et al* (Judgement) ICTY-IT-05-88-T (10 June 2010); **see also:** *Prosecutor v Đorđević* (Judgement) ICTY-IT-05-87/1-A (27 January 2014); **see also:** *Prosecutor v Stanišić & Simatović* (Judgement) ICTY-IT-03-69-A (9 December 2015); **see also:** *Prosecutor v Prlić et al* (Judgement) ICTY-IT-04-74-T (29 May 2013); **see also:** *Prosecutor v Gotovina et al* (Judgement) ICTY-IT-06-90-A (16 November 2012); **see also:** *Prosecutor v Perišić* (Judgement) ICTY-IT-04-81-A (28 February 2013); **see also:** *Prosecutor v Krajišnik* (Judgement) ICTY-IT-00-39-A (17 March 2009); **see also:** *Prosecutor v Šainović et al* (Judgement) ICTY-IT-05-87-A (23 January 2014); **see also:** *Prosecutor v Martić* (Judgement) ICTY-IT-95-11-A (8 October 2008); **see also:** *Prosecutor v Mrkić et al* (Judgement) ICTY-IT-95-13/1-T (27 September 2007); **see also:** *Prosecutor v Simić et al* (Judgement) ICTY-IT-95-9-A (28 November 2006); **see also:** *Prosecutor v Brđanin* (Judgement) ICTY-IT-99-36-A (3 April 2007); **see also:** *Prosecutor v Orić* (Judgement) ICTY-IT-03-68-T (30 June 2006); **see also:** *Prosecutor v Naletilić & Martinović* (Judgement) ICTY-IT-98-34-A (3 May 2006); **see also:** *Prosecutor v Limaj et al* (Judgement) ICTY-IT-03-66-T (30 November 2005); **see also:** *Prosecutor v Blagojević & Jokić* (Judgement) ICTY-IT-02-60-T (17 January 2005); **see also:** *Prosecutor v Kordić & Čerkez* (Judgement) ICTY-IT-95-14/2 (26 February 2001); **see also:** *Prosecutor v Blaškić* (Judgement) ICTY-IT-95-14-A (29 July 2004); **see also:** *Prosecutor v Todorović* (Sentencing Judgement) ICTY-IT-95-9/1-S (31 July 2001); **see also:** *Prosecutor v Vasiljević* (Judgement) ICTY-IT-98-32-T (29 November 2002); **see also:** *Prosecutor v Kvočka et al* (Judgement) ICTY-IT-98-30/1-T (2 November 2001); **see also:** *Prosecutor v Kunarac et al* (Judgement) ICTY-IT-96-23-T (22 February 2001); **see also:** *Prosecutor v Mucić et al* (Judgement) ICTY-IT-96-21-A (20 February 2001); **see also:** *Prosecutor v Kupreškić et al* (Judgement) ICTY-IT-95-16-T (14 January 2000); **see also:** *Prosecutor v Tadić* (Judgement) ICTY-IT-94-1-A (15 July 1999); **see also:** *Prosecutor v Tolimir* (Judgement) ICTY-IT-05-88/2-T (12 December 2012).

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<sup>257</sup> *Prosecutor v Krstić* (Judgement) ICTY-IT-98-33-T (2 August 2001) at para 519.

<sup>258</sup> *Ibid* at 15–16, 126–130.

<sup>259</sup> *Ibid* at para 523, **referring to:** Geneva Convention IV, Additional Protocols I and II, the 1996 ILC Draft Code, the Rome Statute, and the Statute of the ICTY.

<sup>260</sup> *Prosecutor v Krnojelac* (Judgement) ICTY-IT-97-25-T (15 March 2002) at para 472.

<sup>261</sup> *Ibid* at para 483.

<sup>262</sup> *Prosecutor v Krnojelac* (Judgement) ICTY-IT-97-25-A (17 September 2003) at para 233.

<sup>263</sup> **Note:** For an example where residents were given a choice between receiving compensation or different land in exchange for their current land, but not given the option to simply stay on their land, see the discussion under Subsection F(2) "Challenges to Building a Case: Consent" in Section V "Legal Analysis" starting at page 59 of this manual, referring to Swedish-owned company EcoEnergy acquiring land in Tanzania; **see also:** European Parliament, *supra* note 168 at 18.

<sup>264</sup> *Prosecutor v Stakić* (Judgement) ICTY-IT-97-24-T (31 July 2003) at 88–92.

<sup>265</sup> *Prosecutor v Stakić* (Judgement) ICTY-IT-97-24-A (22 March 2006) at para 265.

<sup>266</sup> *Ibid* at para 277.

<sup>267</sup> *Ibid* at para 307. **Note:** While the judgement refers only to deportation in discussing the intent to permanently displace, the Court indicates that the same considerations apply to forcible transfer given that the same underlying interests are protected by both crimes. This was confirmed in *Prosecutor v Popović*, where the Court held that the intent to permanently displace is not required for either forcible transfer or deportation: **see:** *Prosecutor v Popović*, *supra* note 256 at para 905.

<sup>268</sup> *Prosecutor v Popović*, *supra* note 256 at 352 & 360–375.

<sup>269</sup> *Ibid* at 355.

<sup>270</sup> *Ibid* at para 899.

<sup>271</sup> *Ibid* at para 900.

<sup>272</sup> *Ibid*.

<sup>273</sup> *Ibid*.

<sup>274</sup> **See, for example:** the discussion under "The Impact of Land Titling" in Section III "Global Reach of Land Grabbing" starting at page 19 of this manual.

<sup>275</sup> **See, for example:** the discussion under Subsection B(4) "Victims: Indigenous and Ethnic Minorities" in Section III "Global Reach of Land Grabbing" starting at page 18 of this manual, referring to the Roma populations in Russia; **see also:** reference to the Maasai community in Kenya in John Kisimir & Mali Ole Kaunga, "Segera: A Report of Abuse, Torture and Land Grabbing in Laikipia, Kenya" (3 August 2015), online: <[https://www.culturalsurvival.org/sites/default/files/media/laikipia\\_report\\_final-1.pdf](https://www.culturalsurvival.org/sites/default/files/media/laikipia_report_final-1.pdf)>.

<sup>276</sup> *Prosecutor v Popović*, *supra* note 256 at paras 897 & 921.

<sup>277</sup> **See, for example:** the discussion of land sales made by Incorporated Land Groups on behalf of individual landowners in PNG, under Subsection F(2) "Challenges to Building a Case: Consent" in Section V "Legal Analysis" starting at page 59 of this manual.

<sup>278</sup> *Prosecutor v Tadić*, *supra* note 256.

<sup>279</sup> *Ibid* at para 691.

<sup>280</sup> *Ibid* at para 687.

<sup>281</sup> ICTR Statute, *supra* note 255; **see also:** Human Rights Watch, "Case Law of the International Criminal Tribunal for Rwanda: Summary of Judgements Against the Accused" (February 2004), online: <[https://www.hrw.org/reports/2004/ij/ict/1.htm#\\_Toc62641376](https://www.hrw.org/reports/2004/ij/ict/1.htm#_Toc62641376)>.

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- <sup>282</sup> Human Rights Watch, *supra* note 281.
- <sup>283</sup> Rome Statute, *supra* note 25 at 3-4.
- <sup>284</sup> *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) at para 581.
- <sup>285</sup> **See:** Rogers & Prezanti, *supra* note 13 at 78.
- <sup>286</sup> *Prosecutor v Ruto, Kosgey & Sang*, *supra* note 245.
- <sup>287</sup> *Ibid.*
- <sup>288</sup> *Ibid* at 90–100.
- <sup>289</sup> *Ibid* at para 317.
- <sup>290</sup> *Ibid* at 129–137.
- <sup>291</sup> *Ibid* at para 354.
- <sup>292</sup> *Prosecutor v Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (9 June 2014).
- <sup>293</sup> *Ibid.*
- <sup>294</sup> *Ibid* at paras 102 & 384. **Note:** The Orange Democratic Movement was a Kenyan political party opposed to the Party of National Unity.
- <sup>295</sup> *Ibid* at para 377.
- <sup>296</sup> *Ibid* at para 244.
- <sup>297</sup> **For example:** in Laikipia County, Kenya, the Maasai community, which has occupied a given piece of land for over 30 years, claims to have been approached in October 2014 by a man who informed them their land had been sold to the North Tetu Cooperative Society. Since then, attempts to evict the Maasai have allegedly involved harassment, assaults and torture committed by security forces, and livestock seizures by patrolling police. **See:** Kisimir & Kaunga, *supra* note 275.
- <sup>298</sup> International Criminal Court (ICC), “Situation in the Republic of Kenya” (ICC-01/09), online: <<https://www.icc-cpi.int/kenya>>.
- <sup>299</sup> *Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda) ICC-01/04-02.06 (9 June 2014).
- <sup>300</sup> *Ibid* at 6 & 14.
- <sup>301</sup> *Ibid.*
- <sup>302</sup> *Ibid* at para 65.
- <sup>303</sup> *Ibid.*
- <sup>304</sup> International Criminal Court (ICC), “Case Information Sheet: Situation in the Democratic Republic of the Congo, *Prosecutor v Ntaganda*”, ICC-01/04-02/06 (as updated January 2017), online: <<https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf>>.
- <sup>305</sup> International Criminal Court (ICC), “Situation in Darfur, Sudan” (ICC-02/05), online: <<https://www.icc-cpi.int/darfur>>; **see also:** *Prosecutor v Hussein* (Decision on the Prosecutor’s Request for a Finding of Non-Compliance against the Republic of Sudan) ICC-02/05-01/12-33 (26 June 2015).
- <sup>306</sup> *Prosecutor v Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009); **see also:** *Prosecutor v Harun and Kushayb* (Decision on the Prosecution Application under Article 58(7) of the Statute) ICC-02/05-01/07 (27 April 2007); **see also:** *Prosecutor v Hussein* (Public Redacted Version of “Decision on the Prosecutor’s Application under Article 58 Relating to Abdel Raheem Muhammad Hussein”) ICC-02/05-01/12 (1 March 2012).
- <sup>307</sup> *Prosecutor v Bashir*, *supra* note 306 at paras 209 & 214; **see also:** *Prosecutor v Harun and Kushayb*, *supra* note 306 at paras 80 & 95; **see also:** *Prosecutor v Hussein*, *supra* note 306 at para 4.

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<sup>308</sup> *Prosecutor v Bashir*, *supra* note 306 at 13–16; **see also:** *Prosecutor v Harun and Kushayb*, *supra* note 306 at 5–9; **see also:** *Prosecutor v Hussein*, *supra* note 306 at 4–6.

<sup>309</sup> European Court of Human Rights, *European Convention on Human Rights* (as amended by Protocols Nos. 11 and 14) [entered into force: 21 September 1970], online: <[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)>.

<sup>310</sup> *Ibid* at Section I, Article 5.

<sup>311</sup> *Ibid* at Section I, Article 8.

<sup>312</sup> *Ibid* at Protocol I, Article 1.

<sup>313</sup> *Ibid* at Protocol IV, Article 2.

<sup>314</sup> *Connors v. The United Kingdom*, 66746/01, Council of Europe: European Court of Human Rights (27 May 2004), online: <<http://hudoc.echr.coe.int/eng?i=001-61795>>.

<sup>315</sup> *Ibid* at para 82.

<sup>316</sup> *Ibid*.

<sup>317</sup> *Ibid* at para 84.

<sup>318</sup> **See:** 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, online: <[http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf) f> [hereafter "Endorois decision"]. The AfCHPR implements the protective mandate of the ACHPR in ensuring the protection of human rights in Africa through its administration of the African Charter on Human and Peoples' Rights. African Court on Human and Peoples' Rights, "Welcome to the African Court", online: <<http://en.african-court.org/>>.

<sup>319</sup> **Note:** Specifically, the right to liberty and security of the person (Article 6), the right to freedom of movement and residence (Article 12), the right to property (Article 14), the right to self-determination (Article 20), the right to freely dispose of wealth and natural resources (Article 21), the right to development (Article 22), and the right to an environment satisfactory to development (Article 24). **See:** Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>320</sup> Endorois decision, *supra* note 318. **See also:** Lucy Claridge, "Briefing: Landmark Ruling Provides Major Victory to Kenya's indigenous Endorois" (July 2010) at 5, online: <<http://www.refworld.org/pdfid/4ca571e42.pdf>>.

<sup>321</sup> Claridge, *supra* note 320.

<sup>322</sup> *Ibid*.

<sup>323</sup> *Ibid* at 4.

<sup>324</sup> *Ibid* at 5.

<sup>325</sup> *African Commission on Human and Peoples' Rights v The Republic of Kenya*, Application No 006/2012 (Judgment), online: <<http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>>.

<sup>326</sup> *Ibid* at para 8.

<sup>327</sup> *Ibid* at para 112.

<sup>328</sup> *Ibid* at para 131.

<sup>329</sup> *Ibid* at para 201.

<sup>330</sup> *Ibid* at para 210-211.

<sup>331</sup> **See:** *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, Inter-Am Ct HR (ser C) No 245 (27 June 2012) at §165; **see also:** *Case of the Sawhoyamaya Indigenous Community v Paraguay*, Inter-Am Ct HR (ser C) No 146 (29 March 2006) at §165; **see also:** *Garifuna Community of Punta Piedra and its Members v Honduras*, Inter-Am Ct HR (Report No 30/13) Case 12.761 (21 March 2013). **Note:** For further discussion, **see:** Honduran Black Fraternal Organization (OFRANEH), "Inter-American Court of Human Rights condemns the State of Honduras for violation of the collective rights of the Garifuna people", *Jubileo*

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*Sur/Americas*, online: <<http://jubileosuramericas.net/inter-american-court-of-human-rights-condemns-the-state-of-honduras-for-violation-of-the-collective-rights-of-the-garifuna-people/>>; **see also**: Blue Ocean Law & The Pacific Network on Globalization, "Resource Roulette: How Deep Sea Mining and Inadequate Regulatory Frameworks Imperil the Pacific and its Peoples" (June 2016) at 51–53, online: <<http://cer.org.za/wp-content/uploads/2016/08/Resource-Roulette-Deep-sea-Mining-and-Inadequate-Regulatory-Frameworks.pdf>>.

<sup>332</sup> Inter-American Court of Human Rights, "Inter-American Court History", online: <<http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh>>.

<sup>333</sup> **Note**: Specifically, these include the right to personal liberty (Article 7), the right to property (Article 21), and the right to freedom of movement and residence (Article 22). **See**: Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, online: <<http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>>.

<sup>334</sup> *Case of the Saramaka People v Suriname*, Inter-Am Ct HR (ser C) No 172 (12 Aug 2008) at §133, online: *ESCR-Net* <<https://www.escr-net.org/caselaw/2014/case-saramaka-people-v-suriname>>.

<sup>335</sup> *Ibid* at para 133.

<sup>336</sup> *Ibid*; **see also**: Blue Ocean Law & The Pacific Network on Globalization, *supra* note 331 at 53.

<sup>337</sup> *Case of the Saramaka People v Suriname*, *supra* note 334 at para 139.

<sup>338</sup> Bouganim-Shaag & Naggan *supra* note 22.

<sup>339</sup> Schabas, *supra* note 248 at 300.

<sup>340</sup> ICC, *supra* note 305.

<sup>341</sup> **See**: "Spotlight: Cambodia" for a case study on the situation in Cambodia, starting at page 53 of this manual.

<sup>342</sup> ICC, *supra* note 88.

<sup>343</sup> Madeline Morris, "High Crimes and Misconceptions: The ICC and Non-Party States" (2001) at 50-51, online: <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1200&context=lcp>>.

<sup>344</sup> Scharf, *supra* note 244 at 74.

<sup>345</sup> *Ibid* at 75.

<sup>346</sup> *Ibid* at 77.

<sup>347</sup> Rome Statute, *supra* note 25 at Article 17(1)(d).

<sup>348</sup> OTP, *supra* note 26 at para 32.

<sup>349</sup> *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I (7 February 2007).

<sup>350</sup> *Ibid* at para 50.

<sup>351</sup> Human Rights Watch, "The Farmer Becomes the Criminal" (2016), online: <<https://www.hrw.org/report/2016/11/03/farmer-becomes-criminal/human-rights-and-land-confiscation-karen-state>>.

<sup>352</sup> *Ibid*.

<sup>353</sup> Su Phyo Win & Myat Nyein Aye, "Kayin Farmers Criminalized for Fighting Land Grabs: HRW Report", *Myanmar Times*, online: <<http://www.mmtimes.com/index.php/national-news/23480-kayin-farmers-criminalised-for-fighting-land-grabs-hrw-report.html>>.

<sup>354</sup> **See, for example**: Human Rights Watch, "Burma: Farmers Targets of Land Grabs" (2016), online: <<https://www.hrw.org/news/2016/11/03/burma-farmers-targets-land-grabs>>; **see also**: Brian McCartan, "Myanmar: Land Grabbing as Big Business", *Cent Tricontinental*, online: <<http://www.cetri.be/Myanmar-Land-grabbing-as-big>>.

<sup>355</sup> Rome Statute, *supra* note 25 at Article 17(1)(a).

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<sup>356</sup> **See:** the discussion under Subsection C “Key Players: Economic and Political Actors” in Section III “Global Reach of Land Grabbing” starting at page 20 of this manual.

<sup>357</sup> Human Rights Watch, “The Farmer Becomes the Criminal” (3 November 2016), online: <<https://www.hrw.org/report/2016/11/03/farmer-becomes-criminal/human-rights-and-land-confiscation-karen-state>>.

<sup>358</sup> Transnational Institute (TNI), “The Meaning of Land in Myanmar” (28 January 2016), online: <<https://www.tni.org/en/publication/the-meaning-of-land-in-myanmar>>.

<sup>359</sup> *Ibid.*

<sup>360</sup> Human Rights Watch, *supra* note 357.

<sup>361</sup> *Ibid.*

<sup>362</sup> Kachin Development Networking Group, “Tyrants, Tycoons and Tigers: Yuzana Company Ravages Burma’s Hugawng Valley” (2010) at 1, online: <<http://www.burmalibrary.org/docs09/TyrantsTycoonsandTigers.pdf>>.

<sup>363</sup> *Ibid.*

<sup>364</sup> *Ibid.*

<sup>365</sup> Saw Yan Naing, “Kachin Farmers Urge Govt to Address Yuzana Land Confiscation” (11 May 2016), *The Irrawaddy*, online: <<https://www.irrawaddy.com/news/burma/kachin-farmers-urge-govt-address-yuzana-land-confiscation.html>>.

<sup>366</sup> Kachin Development Networking Group, *supra* note 362 at 3.

<sup>367</sup> *Ibid* at 22.

<sup>368</sup> *Ibid* at 43.

<sup>369</sup> *Ibid* at 18.

<sup>370</sup> *Ibid.*

<sup>371</sup> TNI, *supra* note 358.

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.*

<sup>376</sup> Human Rights Watch, *supra* note 357.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

<sup>380</sup> Kachin Development Networking Group, *supra* note 362.

<sup>381</sup> Jonas Nilsson, “Commentary Rome Statute: Part 2, Articles 5-10” (30 June 2016), online: <<https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-5-10/>>.

<sup>382</sup> Rome Statute, *supra* note 25 at 3.

<sup>383</sup> *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19 (31 March 2010) at para 94.

<sup>384</sup> *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196; **see also:** *Prosecutor v Katanga and Ngudjolo* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008).

<sup>385</sup> *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at para 83.

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<sup>386</sup> *Ibid.*

<sup>387</sup> *Prosecutor v Katanga and Ngudjolo*, *supra* note 384 at para 394.

<sup>388</sup> *Prosecutor v Gbagbo* (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11-656 (12 June 2014) at para 216.

<sup>389</sup> Land Matrix, "It's a Big Deal", online: <<http://www.landmatrix.org/en/get-the-idea/big-deal/>>.

<sup>390</sup> *Ibid.*

<sup>391</sup> Nolte, Chamberlain & Giger, *supra* note 47 at 37–38; **see also**: the discussion under Subsection A "Industries and Regions" in Section III "The Global Reach of Land Grabbing" starting at page 13 of this manual.

<sup>392</sup> **See, for example**: the discussion of forced evictions and violence allegedly perpetrated by State forces in Mubende District, Uganda, and in the Lower Omo Valley, Ethiopia, under Subsection C(1) "Key Players: Economic and Political Actors: Governments" starting at page 20 of this manual.

<sup>393</sup> Rome Statute, *supra* note 25.

<sup>394</sup> *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196.

<sup>395</sup> Rogers & Prezanti, *supra* note 13 at 78, **citing**: Elements of Crimes, *supra* note 24 at Article 7, Introduction 3; **see also**: *Prosecutor v. Bemba* (Decision on the Charges), *supra* note 196 at para 75; **see also**: *Situation in the Republic of Kenya*, *supra* note 383 at para. 80.

<sup>396</sup> Rogers & Prezanti, *supra* note 13 at 78–79, **citing**: *Prosecutor v Akayesu*, *supra* note 284 at para 581.

<sup>397</sup> *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at paras 77–78.

<sup>398</sup> *Ibid* at para 76.

<sup>399</sup> *Ibid.*

<sup>400</sup> **See**: the discussion under Subsection B(4) "Victims: Indigenous and Ethnic Minorities" in Section III "Global Reach of Land Grabbing" starting at page 18 of this manual.

<sup>401</sup> *Prosecutor v. Bemba* (Decision on the Charges), *supra* note 196.

<sup>402</sup> **See, for example**: the *Endorois v Kenya* case discussed under Subsection C "Survey of Jurisprudence" in Section IV "Sources of Law" starting at page 29 of this manual, and the alleged actions of the Chikweti Forests company in Mozambique discussed at footnote 93.

<sup>403</sup> Elements of Crimes, *supra* note 24.

<sup>404</sup> *Prosecutor v Bemba* (Judgement Pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016) at para 158.

<sup>405</sup> *Ibid.*

<sup>406</sup> *Situation in the Republic of Kenya*, *supra* note 383 at para 89.

<sup>407</sup> *Prosecutor v Bemba*, *supra* note 404 at para 160.

<sup>408</sup> *Ibid* at para 161.

<sup>409</sup> **Note**: The definition of land grabbing in the Tirana Declaration includes the failure to perform thorough impact assessments, and the failure to obtain the free, prior and informed consent of indigenous land users, as two conditions either one of which, when satisfied, constitutes a land grab. **See**: International Land Coalition, *supra* note 39.

<sup>410</sup> **For example**: In 2011, the Ethiopian local government allegedly provided security forces and state support to help forcibly remove residents from the Lower Omo area, in order to implement a large-scale irrigation scheme. **See**: the discussion under Subsection C "Key Players" in Section III "Global Reach of Land Grabbing" starting at page 20 of this manual.

<sup>411</sup> **For example**: The Ugandan National Forestry Authority admits to authorizing the removal of local residents in Mubende and Kiboga (districts in central Uganda) by claiming the inhabitants were encroaching illegally and could legitimately be evicted. **See**: Oxfam International, "Land and Power: The Growing Scandal Surrounding the New Wave of Investments in

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Land" (22 September 2011) at 15, online: <<http://policy-practice.oxfam.org.uk/publications/land-and-power-the-growing-scandal-surrounding-the-new-wave-of-investments-in-l-142858>>.

<sup>412</sup> Oxfam International, "Poor Governance, Good Business: How Land Investors Target Countries with Weak Governance" (7 February 2013), online: <<https://www.oxfam.org/sites/www.oxfam.org/files/poor-governance-good-business-oxfam-mbo70213.pdf>>.

<sup>413</sup> *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at paras 88–89.

<sup>414</sup> **Note:** For further discussion of the specific modes of liability under which government and corporate actors could be charged, refer to Subsection E "Modes of Liability" in Section V "Legal Analysis" starting at page 55 of this manual.

<sup>415</sup> **See:** the discussion on Article 7(1)(a) in Elements of Crimes, *supra* note 24 at 5.

<sup>416</sup> Rogers & Prezanti, *supra* note 13 at 94; **citing:** *Prosecutor v Krstić*, *supra* note 289 at para 521.

<sup>417</sup> *Ibid* at 94–96, **citing:** discussion on Article 7(1)(d) 4 in Elements of Crimes, *supra* note 24 at 7.

<sup>418</sup> *Ibid* at 95, 109–110; **citing:** discussion on Articles 30, 7(1)(d) 3 & 5 in Elements of Crimes, *supra* note 24 at 7.

<sup>419</sup> *Ibid* at 95; **citing:** footnote 12 in Elements of Crimes, *supra* note 24 at 6.

<sup>420</sup> *Ibid*.

<sup>421</sup> *Ibid* at 96; **citing:** *Prosecutor v Krstić* (Judgement), *supra* note 289 at para 529.

<sup>422</sup> *Ibid*; **citing:** *Prosecutor v Stakić* (Judgement), *supra* note 265 at para 279.

<sup>423</sup> *Ibid* at 97, para 163.

<sup>424</sup> *Ibid* at 99, para 167; **referencing:** the ICC's consideration of the "Turbo Town area," the "greater Eldorat area," and the "Kapsabet town area" in *Prosecutor v Ruto et al* (Decision on the Confirmation of Charges), ICC-01/09-01/11 (23 January 2012) at paras 251, 255 & 261.

<sup>425</sup> *Ibid* at 100, para 168; **referencing:** *ECCC Case 002/01* (Judgement) No. 002/19-09-2007 (7 August 2014) at para 549. **Note:** in its judgement, the ECCC goes on to say at para 550 that "even if [the Court] were to accept that...the economic situation could justify evacuation, the evacuation [must] respect the requirement of proportionality."

<sup>426</sup> Rome Statute, *supra* note 25 at Article 30.

<sup>427</sup> *Ibid*.

<sup>428</sup> Rogers & Prezanti, *supra* note 13.

<sup>429</sup> *Ibid* at 51–60.

<sup>430</sup> *Ibid* at 4–5, 51–60.

<sup>431</sup> *Ibid* at 152, **citing:** discussion of Article 7(1)(a) in Elements of Crimes, *supra* note 24 at 5.

<sup>432</sup> Nilsson, *supra* note 381; **citing:** *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at para 132; **see also:** *Prosecutor v Kvočka et al* (Judgement), IT-98-30/1-A (28 February 2005) at para 261.

<sup>433</sup> *Ibid* at 153; **citing:** *Prosecution v Katanga* (Judgement) ICC-01/04-01/07 (4 March 2014) at para 767.

<sup>434</sup> *Ibid*; **citing:** *Prosecution v Katanga* (Judgement), *supra* note 433 at para 768.

<sup>435</sup> *Ibid*; **citing:** "Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", ICC-01/11 (27 June 2011) at paras 36–41.

<sup>436</sup> *Ibid*, **citing:** *Prosecutor v Katanga* (Judgement) ICC-01/04-01/07-3436 (7 March 2014) at para 780.

<sup>437</sup> *Ibid*, **citing:** *Prosecutor v Katanga and Ngudjolo* (Decision on the Confirmation of Charges), *supra* note 384 at para 423.

<sup>438</sup> *Ibid*, **citing:** *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at paras 135 & 352–369.

<sup>439</sup> Rogers & Prezanti, *supra* note 13 at 152; **citing:** discussion of Article 7(1)(a) in Elements of Crimes, *supra* note 24 at 5.

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<sup>440</sup> Kisimir & Kaunga, *supra* note 275.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid* at 3.

<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid* at 11.

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid* at 2.

<sup>447</sup> **See:** discussion of Article 7(1)(e)(1) in Elements of Crimes, *supra* note 24 at 7.

<sup>448</sup> **See:** discussion of Article 7(1)(e)(2) in Elements of Crimes, *supra* note 24 at 7.

<sup>449</sup> Rogers & Prezanti, *supra* note 13 at 164; **citing:** *Prosecutor v Krnojelac* (Judgement), *supra* note 260 at para 114.

<sup>450</sup> *Ibid.*

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid;* **referencing:** Article 9 of the Universal Declaration of Human Rights (1948), Article 9 of the ICCPR, and Article 37(b) of the Convention on the Rights of the Child.

<sup>453</sup> Nilsson, *supra* note 381.

<sup>454</sup> Rogers & Prezanti, *supra* note 13 at 163; **citing:** discussion of Article 7(1)(e)(3) in Elements of Crimes, *supra* note 24 at 7.

**Note also:** The Prosecutor need not prove that the perpetrator made any legal evaluation that the imprisonment violated international law; **see:** Nilsson, *supra* note 381; **citing:** Darryl Robinson, "Article 7(1)(e) – Crime Against Humanity of Imprisonment or Other Severe Deprivation of Physical Liberty", in Roy S Lee (Ed), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers, 2001) at 88-89.

<sup>455</sup> *Ibid;* **citing:** discussion of Article 7(1)(e)(4)-(5) in Elements of Crimes, *supra* note 24 at 7.

<sup>456</sup> Malkamuu Jaatee, Anywaa Survival Organization, "Land Grabbing and Violations of Human Rights in Ethiopia" (28 January 2016), online: <<http://genocidewatch.net/2016/02/01/land-grabbing-in-ethiopia/>>.

<sup>457</sup> *Ibid.*

<sup>458</sup> *Ibid.*

<sup>459</sup> Rogers & Prezanti, *supra* note 13 at para 352, **citing:** *Prosecutor v Milomir Stakić*, *supra* note 265 at paras 315-6.

<sup>460</sup> **Note:** Unlike the equivalent provisions in the Nuremberg Charter and the ICTR and ICTY Statutes, the Rome Statute limits the scope of "other inhumane acts," as regards to the action constituting an inhumane act and the consequences required as a result of that action. For instance, none of the acts constituting crimes against humanity according to Articles 7(1)(a) to (j) can simultaneously be considered as "other inhumane acts," and inhumane acts are to be considered "as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law;" **see:** *Katanga and Ngudjolo* (Decision on the Confirmation of Charges), *supra* note 384 at paras 448 & 450. Moreover, the provision "must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity;" **see:** *Prosecutor v Mathaura et al* (Decision on the Confirmation of Charges) ICC-01/09-02/11-382-Red (23 January 2012) at para 269.

<sup>461</sup> **See:** Article 7(1)(k)(1) in Elements of Crimes, *supra* note 24 at 12.

<sup>462</sup> *Ibid.* **See:** Article 7(1)(k)(2).

<sup>463</sup> *Ibid.* **See:** Article 7(1)(k)(4).

<sup>464</sup> *Ibid.* **See:** Article 7(1)(k)(3).

<sup>465</sup> *Ibid.* **See:** Article 7(1)(k)(5).

<sup>466</sup> Rogers & Prezanti, *supra* note 13 at 175; **see also:** *Prosecutor v Kupreškić*, *supra* note 256 at para 566.

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<sup>467</sup> *Ibid* at 175. **See also:** *Case 002/01* (Judgement), E313 (7 August 2014) at paras 457 & 564-565 (ECCC).

<sup>468</sup> Logan Cochrane, "Food Security or Food Sovereignty: The Case of Land Grabs" (2011), online: <<https://sites.tufts.edu/jha/archives/1241>>; **citing:** Food First, "Landmark Conference on Land Grabbing" (2011), online: <<http://www.foodfirst.org/en/Land+grabbing>>.

<sup>469</sup> Cochrane, *supra* note 468.

<sup>470</sup> *Ibid*; **citing:** USAID, "Ethiopia – FY 2010 Implementation Plan" (2010) Online: <[http://www.feedthefuture.gov/documents/FTF\\_2010\\_Implementation\\_Plan\\_Ethiopia.pdf](http://www.feedthefuture.gov/documents/FTF_2010_Implementation_Plan_Ethiopia.pdf)>.

<sup>471</sup> **Note:** The Economist noted a parallel in the \$100-million Saudi investment to grow and export rice, wheat and barley on a 99-year land-lease in Ethiopia, while the United Nations World Food Program planned to spend \$116-million, over a five-year period, providing emergency food aid to Ethiopia. **See:** Cochrane, *supra* note 502; **citing:** Economist, "Outsourcing's Third Wage" (21 May 2009), online: <[http://www.economist.com/node/13692889?story\\_id=13692889](http://www.economist.com/node/13692889?story_id=13692889)>

<sup>472</sup> Cochrane, *supra* note 468, **citing:** Alvaro Mellado Dominguez, "Why was there still malnutrition in Ethiopia in 2008? Causes and Humanitarian Accountability" (21 February 2010), *The Journal of Humanitarian Assistance*, online: <<http://sites.tufts.edu/jha/archives/640>>.

<sup>473</sup> *Ibid*.

<sup>474</sup> *Ibid*.

<sup>475</sup> **See:** elements discussed under Article 7(1)(h) in *Elements of Crimes*, *supra* note 24 at 10; **see also:** discussion in Rogers & Prezanti, *supra* note 13 at 185-188.

<sup>476</sup> **See:** discussion of Article 7(1)(h)(6) in *Elements of Crimes*, *supra* note 24 at 10

<sup>477</sup> *Prosecutor v Naletilić & Martinović* (Judgement) ICTY-IT-98-34-T (31 March 2003) at para 63.

<sup>478</sup> Rogers & Prezanti, *supra* note 13 at 185-186; **citing:** *Prosecutor v Tadić* (Judgement), *supra* note 256 at paras 697 & 710.

<sup>479</sup> *Ibid* at 187-188.

<sup>480</sup> Global Witness, *supra* note 139 at 4.

<sup>481</sup> *Ibid* at 5.

<sup>482</sup> *Ibid*.

<sup>483</sup> *Ibid* at 12.

<sup>484</sup> **Note:** For further discussion of the principle of superior-subordinate responsibility, see Subsection E "Modes of Liability" in Section V "Legal Analysis" starting at page 55 of this manual.

<sup>485</sup> **Note:** National government officials may also be engaged in land grabbing through forgery, by providing fake titles to facilitate land acquisitions for personal benefit or other reasons. This has been cited as a problem in Uganda, where the Uganda Land Commission has been implicated in forging land titles which are then linked to land grabbing. **See:** Milton Olupot, "Uganda: Land Titles Scam Exposed", *New Vis Kampala* (20 March 2007), online: <<http://allafrica.com/stories/200703200092.html>>; **see also:** Olive Nakatudde, "Parliament to Vet New Land Commission Board Today", *Uganda Radio Network* (28 August 2013), online: <<http://ugandaradionetwork.com/story/parliament-to-vet-new-land-commission-board-today>>.

<sup>486</sup> Jaatee, *supra* note 456.

<sup>487</sup> *Ibid*.

<sup>488</sup> **See:** further discussion under Subsection A(1) "Jurisdiction" in Section V "Legal Analysis" starting at page 35 of this manual.

<sup>489</sup> Rome Statute, *supra* note 25.

<sup>490</sup> Interview with Tomaso Ferrando, University of Warwick (3 March 2017).

<sup>491</sup> *Ibid*.

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<sup>492</sup> David Scheffer, "Corporate Liability under the Rome Statute" (7 July 2016), 57 Harvard Intl LJ 35, online: <[http://www.harvardilj.org/wp-content/uploads/Scheffer\\_0615.pdf](http://www.harvardilj.org/wp-content/uploads/Scheffer_0615.pdf)>.

<sup>493</sup> **See, for example:** the "Spotlight" case studies, which detail reports of various local and international companies implicated in land grabs.

<sup>494</sup> Beth Stephens, "The Amoral of Profit: Transnational Corporations and Human Rights" (2002) 20:1 Berkeley J of Intl L 45 at 45, online: <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1207&context=bjil>>.

<sup>495</sup> *Ibid* at 46.

<sup>496</sup> *Ibid*.

<sup>497</sup> *Ibid*.

<sup>498</sup> Stewart, *supra* note 208 at 53.

<sup>499</sup> *Ibid* at 25-26.

<sup>500</sup> Graff, *supra* note 244 at 23; **see also:** Scheffer, *supra* note 526.

<sup>501</sup> OTP, *supra* note 26 at 14.

<sup>502</sup> Stephens, *supra* note 494 at 65 & 77.

<sup>503</sup> Stewart, *supra* note 208 at 55.

<sup>504</sup> James G Stewart, "The Argor Heraeus Decision on Corporate Pillage of Gold" (19 October 2015), online: <<http://jamesgstewart.com/the-argor-heraeus-decision-on-corporate-pillage-of-gold/>>.

<sup>505</sup> Stewart, *supra* note 208 at 2.

<sup>506</sup> *Ibid* at 42. **See:** Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 15 May 2014, STC/Legal/Min/7(l) Rev. 1, Art. 46C. The provision was adopted by the Assembly of the African Union in its Twenty-Third Ordinary Session between 26-27 June 2014 in Malabo, Equatorial Guinea. **See also:** Decision on the Draft Legal Instruments, Doc. Assembly/AU/8(XXIII), at 1 in African Union, Decisions, Declarations and Resolution, Assembly/AU/Dec.517-545(XXIII), online: <<http://summits.au.int/en/23rdsummit/documents/decisions-declarations-and-resolutionassembly-union-twenty-third-ordinary-sess>>.

<sup>507</sup> Stewart, *supra* note 208 at 45.

<sup>508</sup> **Note:** This is assuming the Security Council has not referred the situation to the Court. As noted in Section V: Legal Analysis under "Jurisdiction", the Court has jurisdiction over nationals of non-state parties to the Rome Statute where the crime occurred on the territory of a State Party, the non-State Party has accepted the Court's jurisdiction with respect to the crime in question, or the situation has been referred by the Security Council. **See, for example:** *Prosecutor v Bashir*, *supra* note 306.

<sup>509</sup> Caspar Plomp, *supra* note 199 at 10, **referring to:** *Prosecutor v Tadić*, *supra* note 256; **see also:** *Prosecutor v Perišić*, *supra* note 256; **see also:** Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court*, International Humanitarian Law Series (Martinus Nijhoff Publishers, 2012) at 83.

<sup>510</sup> **See, for example:** *Prosecutor v Bashir*, *supra* note 306; **see also:** *Prosecutor v Muthaura*, *supra* note 292; **see also:** *Prosecutor v Perišić*, *supra* note 256; **see also:** *Prosecutor v Ntaganda*, *supra* note 299.

<sup>511</sup> **See, for example:** *Prosecutor v Bashir*, *supra* note 306 at para 38; **see also:** *Prosecutor v Muthaura et al* (Decision on the Appeal against the Decision on the Confirmation of Charges) ICC-01/09-02/11 (24 May 2012).

<sup>512</sup> Scheffer, *supra* note 492 at 37.

<sup>513</sup> **See, for example:** cases listed under footnote 256 of this manual; **see also:** *Prosecutor v Tadić*, *supra* note 256.

<sup>514</sup> **Note:** However, the mere fact that this requirement is elucidated at the *ad hoc* tribunals rather than the ICC, is not determinative. **See:** Caspar Plomp, *supra* note 199 at 7-8, for an explanation of why ICTY and ICTR jurisprudence can be used as evidence of international norms and in cases at the ICC.

<sup>515</sup> **See:** *Prosecutor v Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009); **see also:** *Prosecutor v Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (12 July 2010); **see also:**

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*Prosecutor v Harun & Kushayb* (Warrant of Arrest for Ahmad Harun) ICC-02/05-01/07 (27 April 2007); **see also:** *Prosecutor v Harun & Kushayb* (Warrant of Arrest for Ali Kushayb) ICC-02/05-01/07 (27 April 2007); **see also:** *Prosecutor v Hussein* (Warrant of Arrest for Abdel Raheem Muhammad Hussein) ICC-02/05-01/12 (1 March 2012). Sudan and its neighbouring states did not comply with the warrants, and the indicted individuals remain at large. Office of the Prosecutor of the International Criminal Court (OTP), *Twenty-Fourth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593* (2005), online: <[https://www.icc-cpi.int/itemsDocuments/161213-otp-rep-24-darfur\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/161213-otp-rep-24-darfur_Eng.pdf)>.

<sup>516</sup> Interview with Richard Rogers, Partner at Global Diligence LLP (UK) (23 February 2017).

<sup>517</sup> Graff, *supra* note 244 at 26.

<sup>518</sup> **See, for example:** Sochua & Wikstrom, *supra* note 188.

<sup>519</sup> Rome Statute, *supra* note 25 at Article 15.

<sup>520</sup> FIDH, *supra* note 3; **see also:** Cambodian League for the Promotion and Defense of Human Rights (LICADHO), Statement, "2014 Brings a New Wave of Cambodian Land Conflicts" (1 April 2014), online: <<http://www.licadho-cambodia.org/pressrelease.php?perm=342>>.

<sup>521</sup> Rogers & Prezanti, *supra* note 13 at 5.

<sup>522</sup> **Note:** sources include UN human rights offices, UN Special Rapporteurs, international human rights organizations, Cambodian NGOs and media; **see:** *ibid* at 17.

<sup>523</sup> Rogers & Prezanti, *supra* note 13 at 4-5.

<sup>524</sup> LICADHO Canada, "Land Grabbing in Cambodia," online: <<http://licadhocanada.org/about-cambodia/land-evictions-in-cambodia/>>.

<sup>525</sup> Global Witness, "Cambodia offers a stark illustration of how natural resources can be a curse, not a blessing, to a country's population" (2016), online: <<https://www.globalwitness.org/en/campaigns/cambodia/#more>>.

<sup>526</sup> FIDH, *supra* note 3.

<sup>527</sup> Global Witness, *supra* note 525.

<sup>528</sup> International Federation for Human Rights (FIDH) & Global Diligence LLP, "Questions & Answers: Crimes against Humanity in Cambodia from July 2002 until Present" (October 2014) at 5, online: <[https://www.fidh.org/IMG/pdf/qanda\\_cambodia\\_icc-2.pdf](https://www.fidh.org/IMG/pdf/qanda_cambodia_icc-2.pdf)>.

<sup>529</sup> Rome Statute, *supra* note 25 at Preamble.

<sup>530</sup> Arnim Scheidel, "'Blood sugar' land grab by Phnom Penh Sugar Company, Kampong Speu, Cambodia" (6 July 2016), *Environmental Justice Atlas*, online: <<https://ejatlas.org/conflict/blood-sugar-land-grab-by-phnom-penh-sugar-company-kampong-speu-cambodia>>; Simms, *supra* note 92 at para 5; **see also:** *Song Mao & Others v Tate & Lyle Industries Limited & T&L Sugars Limited*, Claim No 2013, Folio 451 (UK, EWHC (Comm), 28 March 2013) (QB) (Particulars of Claim, Claimant), online: <<https://business-humanrights.org/sites/default/files/media/documents/tate-lyle-particular-of-claim-28-mar-2013.pdf>> [hereafter "UK Civil Case"].

<sup>531</sup> Oxfam Australia, "Banking on Shaky Ground: Australia's Big Four Banks and Land Grabs" (April 2014) at 3, online: <[https://www.oxfam.org.au/wp-content/uploads/site-media/pdf/2014-47%20australia%27s%20big%204%20banks%20and%20land%20grabs\\_fa\\_web.pdf](https://www.oxfam.org.au/wp-content/uploads/site-media/pdf/2014-47%20australia%27s%20big%204%20banks%20and%20land%20grabs_fa_web.pdf)>.

<sup>532</sup> United Nations Treaty Collection (UNTC), "Status of Treaties: XVIII Penal Matters: 10 Rome Statute of the International Criminal Court" (accessed 14 December 2016), online: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf>>.

<sup>533</sup> Graff, *supra* note 244; **see also:** Scharf, *supra* note 244 at 116.

<sup>534</sup> Vienna Convention, *supra* note 201.

<sup>535</sup> **See, for example,** reports of evictions and land seizures in PNG, Brazil, Myanmar, and Cambodia, which were allegedly carried out by private security, police, and military forces, as well as land clearance agents, often hired by involved companies or businessmen. While some parties have conducted internal investigations and set up reparations processes in response to

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the reports, others have denied direct involvement in illegal land clearances. For further information, refer to the “Spotlight” case studies.

<sup>536</sup> Graff, *supra* note 244 at 25.

<sup>537</sup> *Prosecutor v Zejnil Delalić et al* (Judgement), IT-96-21-T (16 November 1998) at para 319, online: <[http://www.icty.org/x/cases/mucic/tjug/en/981116\\_judg\\_en.pdf](http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf)> [hereafter the “Čelebići Case”]; **see also:** Jules Lobel, “Affidavit of Jules Lobel on Direct and Indirect Command Responsibility for War Crimes and Crimes Against Humanity Under International Law (November 2004) at 1, online: <<https://ccrjustice.org/sites/default/files/assets/Lobel%20Affidavit%20on%20Sup%20%20Responsibility%202006.pdf>>.

<sup>538</sup> Graff, *supra* note 244 at 25; **see also:** Elies van Sliedregt & Sergey Vasiliev, *Pluralism in International Criminal Law* (Oxford, UK: Oxford University Press, 2014) at 114, online: <<https://books.google.ca/books?id=9vqKBAAQBAJ&lpq=PP1&dq=Pluralism%20in%20International%20Criminal%20Law&pg=PP1#v=onepage&q=Pluralism%20in%20International%20Criminal%20Law&f=false>>.

<sup>539</sup> **Note:** This was affirmed in *Prosecutor v Bemba* (Decision on the Confirmation of Charges), *supra* note 196 at para 407.

<sup>540</sup> **Note:** The ICC entered its first conviction pursuant to command responsibility (for the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging) in *Prosecutor v Bemba* (Trial Judgment), *supra* note 404 at para 752.

<sup>541</sup> Lobel, *supra* note 537 at 1–2; **see also:** *ibid* at paras 201–213. **Note also:** Criminal responsibility of commanders for failing to take measures to prevent or punish the commission of war crimes by their subordinates is a long-standing rule of customary international law, with many commanders being found guilty in trials following WWII. It has also been confirmed in several cases before the ICTY; **see:** International Committee of the Red Cross (ICRC), “Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes”, online: <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter43\\_rule153?OpenDocument&highlight=civilians](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153?OpenDocument&highlight=civilians)>, **citing:** United Kingdom, Military Court at Wuppertal, *Rauer* case; United States, Military Tribunal at Nuremberg, *Von Leeb* (*The High Command Trial*) case and *List* (*Hostages Trial*) case; United States, Supreme Court, *Yamashita* case; IMT (Tokyo), *Case of the Major War Criminals* and *Toyoda* case; ICTY, *Martić* case, Review of the Indictment, *Karadžić and Mladić* case, Review of the Indictments, *Delalić* case, Judgment, *Aleksovski* case, Judgment, *Blaškić* case, Judgment, *Kunarac* case, Judgment, *Kordić and Čerkez* case, Judgment, *Krstić* case, Judgment and *Kvočka* case, Judgment.

<sup>542</sup> *Prosecutor v Bemba* (Trial Judgment), *supra* note 404 at para 179.

<sup>543</sup> **Note:** The ICTR, in the *Akayesu* case in 1998 and in the *Kayishema* and *Ruzindana* case in 1999, and the ICTY in the *Delalić* case in 1998, have adopted this principle. The Statutes of the ICTY, ICTR and Special Court for Sierra Leone refer in general terms to a “superior,” as do many military manuals and national legislation; **see:** ICRC, *supra* note 541, **referring to:** ICTY Statute; ICTR Statute; Statute of the Special Court for Sierra Leone at Article 6(3); the military manuals of Belgium, Netherlands, Sweden, Uruguay, and Yugoslavia; the legislation of Belarus, Cambodia, Canada, Estonia, France, Germany, Netherlands, Rwanda, and United States; and the draft legislation of Argentina, El Salvador, and Lebanon.

<sup>544</sup> **Note:** In *Bemba*, the ICC Pre-Trial Chamber affirmed that military-type commanders may include those superiors who have authority and control over irregular forces, including rebel groups, paramilitary units, armed resistance movements and militias, where they are structured in a military like hierarchy and operate with a chain of command; **see:** *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at para 408.

<sup>545</sup> Graff, *supra* note 244 at 25.

<sup>546</sup> **Note:** Constructive knowledge is sufficient under Article 28(a)(i) of the Rome Statute. However, this “should have known” standard differs from the “had reason to know” standard in the statutes of the *ad hoc* tribunals, and according to *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at para 433, “requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime.”

<sup>547</sup> **Note:** The “consciously disregarded” standard was used by the ICTR in the *Kayishema* and *Ruzindana* case in 1999 to delineate the meaning of “had reason to know” for non-military commanders; **see:** ICRC, *supra* note 541, **referring to:** ICTR, *Kayishema and Ruzindana* case, Judgment. **Note also:** It is a much higher *mens rea* standard than the “should have known” standard under Article 28(a) of the Rome Statute, and falls somewhere between “actual knowledge” and

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“recklessness;” **see**: Kai Ambos, in Otto Triffterer (Ed), *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article* (München: Beck, 2008) at 870.

<sup>548</sup> Linnea Kortfält, “Commentary Rome Statute: Part 3” (30 June 2016), online: <<https://www.casematrixnetwork.org/index.php?id=337#4025>>.

<sup>549</sup> *Prosecutor v Hadžihasanović* (Judgement), IT-01-47-A (22 April 2008) at para 94.

<sup>550</sup> **Note**: In *Prosecutor v Bemba* (Decision on the Charges), *supra* note 196 at para 417, the ICC summarized factors which “may indicate the existence of a superior's position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower level, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.”

<sup>551</sup> *Prosecutor v Blaškić* (Judgement), ICTY-IT-95-14-A (3 March 2000); **see also**: Lobel, *supra* note 537 at 3.

<sup>552</sup> Graff, *supra* note 244.

<sup>553</sup> *Ibid* at 25; **see also**: Summary of *The Prosecutor v Alfred Musema* (Judgement and Sentence) ICTR-96-13-T (27 January 2000), online: <<http://www.internationalcrimesdatabase.org/Case/121/Musema/>>.

<sup>554</sup> **See, for example**: the case study on the situation in Cambodia, highlighted in the “Spotlight” starting at page 53 of this manual. With allegations of land clearances orchestrated by government-connected business leaders and companies operating sugar plantations in Cambodia, displaced villagers filed a lawsuit in 2013 against a multinational firm which purchased all of the implicated company's sugar cane over a two-year period. The multinational denied that its supplier was involved in land clearances and contends it engaged a third-party organization to ensure legal, ethical, and sustainability standards were being followed. **See also**: Kate Hodal, “Cambodia's sugar rush leaves farmers feeling bitter at ‘land grab’”, *The Guardian* (9 July 2013), online: <<https://www.theguardian.com/world/2013/jul/09/cambodia-sugar-land-grab-claims>>.

<sup>555</sup> Graff, *supra* note 244 at 26; **see also**: the discussion under Subsection F(1) “Challenges to Building a Case: Mens Rea” in Section V “Legal Analysis” starting at 59 of this manual.

<sup>556</sup> *Ibid* at 26.

<sup>557</sup> Kirsten Bowman, “Commentary Rome Statute: Part 3” (30 June 2016), online: <<https://www.casematrixnetwork.org/index.php?id=337#4025>>.

<sup>558</sup> *Prosecutor v Kvočka et al*, *supra* note 256 at para 252; **see also**: *Prosecutor v Naletilić & Martinović*, *supra* note 477 at para 60; **see also**: *Prosecutor v Kordić and Čerkez*, *supra* note 256 at para 387; **see also**: discussion in Lobel, *supra* note 537 at 4.

<sup>559</sup> Rome Statute, *supra* note 25 at Article 25.

<sup>560</sup> ICTY Statute, *supra* note 255 at 6.

<sup>561</sup> Bowman, *supra* note 557 at Article 25(3)(c).

<sup>562</sup> James Stewart, “The ICTY Loses its Way on Complicity- Part 1” (3 April 2013), *Opinio Juris* (blog), online: <<http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>>

<sup>563</sup> *Prosecutor v Tadić* (Opinion and Judgement), *supra* note 256 at para 689; **see also**: discussion in Lobel, *supra* note 537 at 3.

<sup>564</sup> Andrew Clapham, “On Complicity” (10 April 2002) at 11, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1392988](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392988)>.

<sup>565</sup> *Prosecutor v Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10 (16 December 2011) at para 281.

<sup>566</sup> Clapham, *supra* note 564 at 12.

<sup>567</sup> MD Byrne, “When in Rome: Aiding and Abetting in Wang Xiaoning v Yahoo” (2008-2009) 34 *Brook J Int'l L* 151 at 177.

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<sup>568</sup> Caspar Plomp, *supra* note 199, in reference to: *Trial of Carl Krauch and Twenty-Two Others* (1948), X L Rep Trials War Crim 1.

<sup>569</sup> *Ibid*, in reference to: *Trial of Bruno Tesch and Two Others* (1946), I L Rep Trials War Crim 93.

<sup>570</sup> *Ibid*.

<sup>571</sup> *Ibid*.

<sup>572</sup> **Note:** A non-exhaustive sample of cases involving indirect co-perpetration at the ICC is noted in James G Stewart, "The Strangely Familiar History of the Unitary Theory of Perpetration" (4 January 2016) at 14-15, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2710906](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710906)>; **see:** *Prosecutor v Bemba* (Warrant of Arrest), ICC-01/05-01/08-15 (10 June 2008) at para 21; **see also:** *Prosecutor v Katanga and Chui* (Decision on the Confirmation of Charges), ICC-01/04-01/07-717 (30 September 2008) at para 492; **see also:** *Prosecutor v Al Bashir* (Warrant of Arrest), ICC-02/05-01/09-1 (4 March 2009) at 7; **see also:** *Prosecutor v Kenyatta et al* (Decision on the Confirmation of Charges), ICC-01/09-02/11-382-Red (Jan. 23, 2012) at para 300; **see also:** *Prosecutor v Ruto et al* (Decision on the Confirmation of Charges), ICC-01/09-01/11 (23 January 2012) at paras 290-292; **see also:** *Prosecutor v Bosco Ntaganda* (Confirmation on the Confirmation of Charges) ICC-01/04-02/06 (8 June 2014) at para 97; **see also:** *Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges), ICC-02/11-01/11 (12 June 2014) at para 226.

<sup>573</sup> **Note:** For a summary of the distinctions between co-perpetration, indirect perpetration, and indirect co-perpetration, **see:** Women's Initiatives for Gender Justice, "Expert Paper: A Review of the International Criminal Court's Current Jurisprudence and Practice" (November 2013) at 73, online: <<http://iccwomen.org/documents/Modes-of-Liability.pdf>>.

<sup>574</sup> Stewart, *supra* note 562 at 15.

<sup>575</sup> **See, for example:** *Katanga & Ngudjolo* (Decision on the Confirmation of Charges), *supra* note 384. In that case, though Katanga and Ngudjolo acted with a common plan, some of the members within the two organizations only accepted orders from the leader of their own ethnic group. Therefore, not all the direct perpetrators of the crime were considered to fall directly under the control of the two leaders.

<sup>576</sup> **Note:** These requirements were set out by the ICC in the *Katanga & Ngudjolo* (Decision on the Confirmation of Charges) *supra* note 384, at paras 500, 511-512, 515, 522, 524-534, 538-539; they were confirmed by Pre-Trial Chamber I in *Abu Garda* (Confirmation of Charges Decision), ICC-02/05-02/09-243-Red (8 February 2010), and by Pre-Trial Chamber II in *Ruto, Kosgey & Sang* (Confirmation of Charges Decision), ICC-01/09-01/11-373 (5 February 2012), and in *Muthaura, Kenyatta & Ali* (Confirmation of Charges Decision), ICC-01/09-02/11-382-RED (29 January 2012); **see also:** Women's Initiatives for Gender Justice, *supra* note 573 at 60-61.

<sup>577</sup> **Note:** A third challenge that should be noted is the possibility that accused persons may attempt to claim sovereign immunity for "official state acts." Personal immunity, which is linked to an office of government such that it creates impunity for an individual occupying that office for so long as they retain the position, does not apply in proceedings at the ICC pursuant to Article 27(2) of the Rome Statute. However, the law on functional immunity, which attaches to acts such that "official" acts are attributed to the state rather than the individual performing them, is less clear. In *Jurisdictional Immunities of the State (Germany v Italy)*, [2012] ICJ Rep 99, the International Court of Justice stated that criminality does not preclude an act from being "an official state act." Still, some of the jurisprudence suggests that international crimes cannot be considered official state acts: such crimes constitute an exception to functional immunity as a matter of customary international law. **See:** Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law*, 1st ed (Oxford, United Kingdom: Oxford University Press, 2014) at 149. Other authors suggest that the functional immunity principle no longer applies to international crimes, because it conflicts with more recent rules of international law which aim to hold individuals responsible regardless of their official status. As Dapo Akande and Sangetta Shah state in an article discussing immunities of state officials, "the very purpose of international criminal law is to attribute responsibility to individuals, including state officials, and to defeat the defence of official capacity or act of state." **See:** Akande & Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (March 2017), *The European Journal of International Law* Vol. 21, No. 4 online: <<http://www.globalresearch.ca/immunities-of-state-officials-international-crimes-and-foreign-domestic-courts/5495640>>. Finally it should be noted that corrupt acts are not covered under functional immunity, because they are generally undertaken for the individual's benefit rather than for the state. **See:** International Law Commission, "Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction", 67th Sess, UN Doc A/CN.4/686 (2015) 3 at para 58; **see also:** "Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?", Allard International Justice and Human Rights Clinic (Vancouver: Allard School of Law, December 2016) at 17. This is important given the ties between land grabbing

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and corruption, which are discussed under Subsection C “Key Players: Economic and Political Actors” in Section III “Global Reach of Land Grabbing” starting at page 22 of this manual.

<sup>578</sup> Rome Statute, *supra* note 25 at 17–18.

<sup>579</sup> *Prosecutor v Ruto, Kosgey & Sang*, *supra* note 245 at paras 357–363.

<sup>580</sup> *Prosecutor v Perišić*, *supra* note 256 at paras 55–58.

<sup>581</sup> *Ibid* at para 65.

<sup>582</sup> **See:** James G Stewart, “Judicial Rejection of ‘Specific Direction’ is Widespread (23 December 2015), *James G Stewart* (blog), online: <<http://jamesgstewart.com/judicial-rejection-of-specific-direction-is-widespread/>>, **referring to:** *Prosecutor v Šainović* (Judgement) ICTY-IT-05-87-A (23 January 2014) at paras 1617-1651; **see also:** *Prosecutor v Popović* (Judgement) ICTY-IT-05-88-A (30 January 2015) at para 1758; **see also:** *Prosecutor v Stanišić* (Judgement) ICTY-IT-08-91-A (30 June 2016) at paras 94-109; **see also:** *Prosecutor v Nyiramasuhuko* (Judgement) ICTR-98-42-A (14 December 2015) at 1240; **see also:** *Prosecutor v Charles Ghankay Taylor* (Judgement) SCSL-03-01-A (26 September 2013) at paras 466-481; **see also:** *ECCC Case 002/01*, *supra* note 440 at paras 707-710.

<sup>583</sup> Sabine Michalowski, “Doing Business with a Bad Actor: How to Draw the Line Between Legitimate Commercial Activities and Those That Trigger Corporate Complicity Liability”, 50:3 *Texas International Law Journal* 403 at 438 online: <<http://www.tilj.org/content/journal/50/16%20MICHALOWSKI%20FINAL.pdf>>, **referring to:** *Direct Sales Co v United States* 319 US 703 (1943); **see also:** *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 766 (9th Cir. 2011).

<sup>584</sup> *Prosecutor v Tolimir*, *supra* note 256 at para 795.

<sup>585</sup> *Ibid* at para 796.

<sup>586</sup> Almah Tararia & Lisa Ogle, “Incorporated Land Groups and the Registration of Customary Lands: Recent Developments in PNG” (2010), online: <<http://milda.aidwatch.org.au/sites/default/files/Incorporated%20land%20groups%20and%20the%20registration%20of%20customary%20lands.pdf>>.

<sup>587</sup> Interview with Martyn Namorong, National Coordinator, Papua New Guinea Resource Governance Coalition (17 February 2017).

<sup>588</sup> Elements of Crimes, *supra* note 24 at 6.

<sup>589</sup> European Parliament, *supra* note 168 at 18.

<sup>590</sup> *Ibid*.

<sup>591</sup> Per Carstedt, Agro EcoEnergy Bagamoyo, “Response Re: ActionAid Tanzania Report”, online: <<https://business-humanrights.org/sites/default/files/documents/Bagamoyo%20EcoEnergy%20Response%20re%20ActionAid%20Tanzania%20Report.pdf>>.

<sup>592</sup> **See:** *Prosecutor v Krnojelac*, *supra* note 262; **see also:** ICTY cases listed under footnote 256 of this manual.

<sup>593</sup> Rome Statute, *supra* note 25 at 4.

<sup>594</sup> De Schutter, *supra* note 7 at 23.

<sup>595</sup> The Oakland Institute, “Understanding Land Investment Deals in Africa, Country Report: Tanzania” (2011) at 10, 25 & 36, online: <[https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI\\_country\\_report\\_tanzania.pdf](https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_country_report_tanzania.pdf)>.

<sup>596</sup> *ECCC Case 002/01*, *supra* note 425 at para 549.

<sup>597</sup> *Ibid* at para 450.

<sup>598</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, at Article 49.

<sup>599</sup> *Prosecutor v Naletilić & Martinović* (Judgement) ICTY-IT-98-34-A (3 May 2006) at paras 518 & 519.

<sup>600</sup> ICCPR, *supra* note 125, at Article 12(3).

<sup>601</sup> ICESCR, *supra* note 125, at Article 11.1.

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<sup>602</sup> Committee on Economic, Social and Cultural Rights, General Comment no. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), E/C.12/GC/24, 13 December 1991, at paras 8(a) and 18.

<sup>603</sup> Committee on Economic, Social and Cultural Rights, General Comment 7: Forced evictions and the right to adequate housing, E/1998/22, 20 May 1997, annex IV at 113, paras 15(a) to (h).

<sup>604</sup> *Ibid.*

<sup>605</sup> *Ibid* at para 17.

<sup>606</sup> Francis Deng, Representative of the Secretary-General, Questions of Human Rights, Mass Exoduses and Displaced Persons: Report submitted pursuant to Commission on Human Rights resolution 1997/39, "Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement," 11 February 1998, paras 176 & 177.

<sup>607</sup> *Ibid* at paras 175–176, 178; **see also:** UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4 at paras 15–16.

<sup>608</sup> UN OHCHR, *supra* note 233.

<sup>609</sup> *Ibid* at para 8.

<sup>610</sup> *Ibid* at para 21.

<sup>611</sup> *Ibid* at 6.

<sup>612</sup> De Schutter, *supra* note 7 at 26.

<sup>613</sup> Human Rights Watch, *supra* note 163.

<sup>614</sup> **Note:** Recall that the right to food is protected under the ICESCR, as discussed under footnote 217 of this manual.

<sup>615</sup> De Schutter, *supra* note 5 at 5.

<sup>616</sup> Interview with Martyn Namorong, National Coordinator, Papua New Guinea Resource Governance Coalition (17 February 2017).

<sup>617</sup> **Note:** However, in 2015 Barrick Gold Corp (through its subsidiary, Ivanhoe Mines Ltd) sold 50 percent of its shares in the Porgera Mine to Chinese company Zijin Mining Group Co; **see:** Cecilia Jamasmie, "Barrick Sells 50% in Papua New Guinea Unit to China's Zijin" (26 May 2015), online: <<http://www.mining.com/barrick-sells-50-in-papua-new-guinea-unit-to-chinas-zijin/>>.

<sup>618</sup> Interview with Martyn Namorong, National Coordinator, Papua New Guinea Resource Governance Coalition (17 February 2017).

<sup>619</sup> *Ibid*; **see also:** Christopher Albin-Lackey, "Papua New Guinea: Serious Abuses at Barrick Gold Mine" (2011), online: Human Rights Watch <<https://www.hrw.org/news/2011/02/01/papua-new-guinea-serious-abuses-barrick-gold-mine>>.

<sup>620</sup> Amnesty International Public Statement, "Papua New Guinea: Forced Evictions and Destruction of Property by Police in Porgera Must End" (11 May 2009), online: <<https://www.amnesty.org/download/Documents/44000/asa340012009en.pdf>>.

<sup>621</sup> Interview with Martyn Namorong, National Coordinator, Papua New Guinea Resource Governance Coalition (17 February 2017).

<sup>622</sup> **For example:** the right to adequate housing, the right to self-determination and the exploitation of resources, the right to development, and indigenous rights including the right to free, prior and informed consent. **See:** the discussion under Subsection A "International Treaties" in Section IV "Sources of Law" starting at page 27 of this manual; **see also:** the rights conferred by the ICESCR and ICCPR, as discussed under footnotes 217–219 and 227 of this manual.

<sup>623</sup> **See:** Tam, *supra* note 126.

<sup>624</sup> **See:** UN OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, A/RES/60/147 (21 March 2006), online: <<https://www.un.org/ruleoflaw/files/BASICP-1.PDF>>.

<sup>625</sup> *Ibid* at Article 11.

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- <sup>626</sup> Octavio Amezcua-Noriega, "Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections" (2011), at 3, online: <[https://www.essex.ac.uk/tjn/documents/Paper\\_1\\_General\\_Principles\\_Large.pdf](https://www.essex.ac.uk/tjn/documents/Paper_1_General_Principles_Large.pdf)>; **see also:** UN OHCHR, *supra* note 677 at Article 15.
- <sup>627</sup> Amezcua-Noriega, *supra* note 626 at 3.
- <sup>628</sup> UN OHCHR, *supra* note 624 at Article 18.
- <sup>629</sup> **See:** text with commentaries by the special rapporteur John Crawford, adopted by the ILC at its 53th session, 2001: John Crawford, "The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries" (2001) at Art 35, para 2, online: <[http://assets.cambridge.org/97805218/13532/frontmatter/9780521813532\\_frontmatter.pdf](http://assets.cambridge.org/97805218/13532/frontmatter/9780521813532_frontmatter.pdf)>.
- <sup>630</sup> UN OHCHR, *supra* note 624 at Article 19.
- <sup>631</sup> *Factory at Chorzow (Germany v Poland)*, 1927 PCIJ (ser A) No 9.
- <sup>632</sup> UN OHCHR, *supra* note 624 at Article 20.
- <sup>633</sup> Amezcua-Noriega, *supra* note 626 at 8.
- <sup>634</sup> UN OHCHR, *supra* note 624 at Article 22.
- <sup>635</sup> *Ibid* at Article 23.
- <sup>636</sup> The Trust Fund for Victims, "TFV Strategic Plan 2014-2017: Approved by the TFV Board of Directors" (August 2014) at 6, online: <[http://www.trustfundforvictims.org/sites/default/files/media\\_library/documents/pdf/TFV\\_Strategic\\_Plan\\_2014\\_2017\\_\\_approved.pdf](http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV_Strategic_Plan_2014_2017__approved.pdf)>.
- <sup>637</sup> *Ibid* at 18.
- <sup>638</sup> *Ibid*.
- <sup>639</sup> Human Rights Watch, "Iraq: Forcible Expulsion of Ethnic Minorities" (2003) at 28, online: <<https://www.hrw.org/reports/2003/iraq0303/Kirkuko303.pdf>>.
- <sup>640</sup> **See:** "Current Trends in the Right to Leave and Return", UN Doc E/CN.4/Sub.2/1985, emphasizing that the right to return is part of the whole body of human rights, and stating that the "concordance of State practice and common opinion juris, [the right to return] created a legal obligation according to customary international law."
- <sup>641</sup> Human Rights Watch, *supra* note 639 at 28.
- <sup>642</sup> ICCPR, *supra* note 125.
- <sup>643</sup> Human Rights Watch, *supra* note 639 at 28.
- <sup>644</sup> *Ibid*; **see:** UN Security Council Resolution 820 (1993) dealing with Bosnia and Herzegovina; similar language by the Security Council affirming this right to return can also be found in resolutions addressing the conflicts in Abkhazia and the Republic of Georgia, Azerbaijan, Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia, and Tajikistan.
- <sup>645</sup> *Ibid*; **see also:** CERD, "General Recommendation No 22: Article 5 and Refugees and Displaced Persons" (1996), online: <<http://www.refworld.org/docid/4a54bc34o.html>>.
- <sup>646</sup> *Ibid*.
- <sup>647</sup> *Ibid*.
- <sup>648</sup> Anca Iulia Pop, "Criminal Liability Of Corporations—Comparative Jurisprudence" (2006) at 41, online: <<http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1115&context=king>>.
- <sup>649</sup> *Ibid*.
- <sup>650</sup> LICADHO Canada, *supra* note 524.
- <sup>651</sup> Interview with Sofía Monsalve, FIAN International (22 March 2017).

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<sup>652</sup> **See also:** *Prosecutor v Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir), *supra* note 515, **and** *Prosecutor v Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir), *supra* note 515.

<sup>653</sup> **See also:** *Prosecutor v Harun & Kushayb* (Warrant of Arrest for Ahmad Harun), *supra* note 515 **and** *Prosecutor v Harun & Kushayb* (Warrant of Arrest for Ali Kushayb), *supra* note 515.

<sup>654</sup> **See also:** *Prosecutor v Hussein* (Warrant of Arrest for Abdel Raheem Muhammad Hussein), *supra* note 515.

<sup>655</sup> **See also:** *Prosecutor v Ruto & Sang* (Decision on Defence Applications for Judgments of Acquittal)

ICC-01/09-01/11 (5 April 2016).

<sup>656</sup> **See also:** *Prosecutor v Krnojelac*, *supra* note 262.

<sup>657</sup> **See also:** *Prosecutor v Krstić* (Judgement) ICTY-IT-98-33-A (19 April 2004).

<sup>658</sup> **See also:** *Prosecutor v Popović et al*, *supra* note 256.

<sup>659</sup> **See also:** *Prosecutor v Stakić*, *supra* note 265.

<sup>660</sup> **See also:** *Prosecutor v Tadić*, *supra* note 256; *Prosecutor v Tadić*, *supra* note 199.



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