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# No Place Like Home

## Development-Induced Displacement A Crime of Forcible Transfer of Populations

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# Summary

This thesis explores how crimes against humanity in general and the crime of forcible transfer of population in particular, cover the most serious situations of development-induced displacement. The focus lies on the legal protection through international criminal law of persons displaced in an unjustified way as a result of development projects, such as the building of dams, roads, and other infrastructure, as well as the exploitation of natural resources in mining and oil projects, to name just a few examples.

Although efforts have been made to define crimes against humanity, there is, to date, no universally recognised definition of the crime in customary international law. Hence, the critical lack of consistency in approaching development-induced displacement mirrors a broader jurisprudential debate in the international courts and tribunals regarding the crime of forcible transfer of population. At the heart of the debate is the conceptual problem of identifying the contours of the crime of forcible displacement.

However, analysing the relationship between development-induced displacement and crimes against humanity reveals an evolving state of affairs. Although, there is a conspicuous lack of state practice, there is increasingly international recognition that development-induced displacement has many of the same effects upon the displaced as other groups who have been forcibly displaced, such as people who are forced to flee from conflicts or human rights violations.

In this thesis this is exemplified by analysing the circumstances surrounding development-induced displacement during the implementation of the Mombasa-Mariakani Road Dualling Project in Kenya. Applying the elements of the crime against humanity to the facts of this case, the forced evictions in Jomvu arguably satisfy the elements of the crime of forcible transfer of population. It is concluded herein that there exist circumstances under which development-induced displacement can equate to other forms of forcible transfer of population. In these situations responsible actors can not rely on an overriding public interests to avoid criminal responsibility.

# Sammanfattning

Denna uppsats utforskar hur brott mot mänskligheten kan omfatta de allvarligaste situationerna av utvecklingsorsakad tvångsflyttning (*eng. development-induced displacement*), till exempel då lokalbefolkning tvångsflyttas i samband med genomförande av ett utvecklingsprojekt, såsom vid konstruktion av dammar, vägar och annan infrastruktur samt utvinnande av naturresurser i gruvsdrift och oljeutvinning, för att nämna några exempel.

Trots att det har gjorts ansträngningar att definiera 'brott mot mänskligheten', saknas det en erkänd definition av brottet i internationell sedvanerätt. Uppsatsens utgångspunkt är dock att tvångsflyttning av människor mot deras vilja kan utgöra ett brott mot mänskligheten. Forskningsfrågan är därför inte om, utan under vilka omständigheter utvecklingsorsakad tvångsflyttning kan utgöra ett brott mot mänskligheten.

Utvecklingsprojekt är, i stort sett, universellt erkända som positiva och önskvärda. Detta har lett till att utvecklingsorsakad tvångsflyttning, till skillnad från andra handlingar som orsakar tvångsflyttningar, har ansetts försvarbart. Fördelarna för den stora massan har bedömts väga upp de kränkningar av mänskliga rättigheter som den drabbade lokalbefolkningen får utstå.

Dock visar slutsatserna i denna uppsats på att det existerar omständigheter under vilka utvecklingsorsakad tvångsflyttning bör likställas med andra former av tvångsflyttning. I dessa situationer kan argument som stort allmänintresse inte fria de ansvariga personerna från straffrättsligt ansvar för brott mot mänskligheten.

# Preface

I visited Kenya for the first time in October 2016. Spending a few weeks in the country I decided to do some exploring outside Nairobi's vibrant streets. One excursion went to Mombasa to enjoy some lazy days on the beach. To get there from Nairobi I had to travel the A109-highway. The road is no longer than 500 kilometres; however the journey takes approximately nine hours. Indeed, it was a long journey and I was relieved to finally arrived in Mombasa.

Along the way we passed countless settlements with vibrant market places and people carrying out their daily business. One such place was Jomvu, an informal settlement just outside Mombasa, where we stopped for refreshments. In Jomvu I was for the first time introduced to the human rights issues surrounding the Mombasa-Mariakani Road Dualling Project. Today, six month later, I am proud to dedicate this thesis to the population of Jomvu, whom on the night of the 17 May 2015 saw their homes erased by a bulldozer paving the way for development.

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I would like to take this opportunity to thank my supervisor *Britta Sjöstedt*, her support and flexibility has been invaluable.

Since this thesis symbolise the end of an era, I would also like to give a shout out to all the *amazing and inspiring people* I have met during my (many) years in university.

Last but not least, *my dear family*, thank you for unlimited love and support. There really is no place like home!

# Abbreviations

CESCR	United Nation's Committee on Economic, Social and Cultural Rights
HRC	United Nation's Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
KENHA	Kenya National Highways Authority
Nuremberg Charter	Charter of the International Military Tribunal
OTP	International Criminal Court Office of the Prosecutor
RAP	Resettlement Action Plan
Rome Statute	Rome Statute of the International Criminal Court
Tokyo Charter	Charter of the International Military Tribunal for the Far East

# 1 Introduction

## 1.1 Purpose

This thesis explores how crimes against humanity in general and the crime of forcible transfer of population in particular, covers the most serious situations of development-induced displacement. I intend to make a case arguing that the most heinous acts of development-induced displacement are inherently crimes against humanity. Thus, responsible actors may already today be held criminally responsible in a court under universal jurisdiction.<sup>1</sup>

Over thirty years ago, the United Nations General Assembly adopted a declaration on the right of development.<sup>2</sup> It stated that:

*[D]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.*<sup>3</sup>

Indeed, development has the potential to strengthen the local economy and labour market, improve local infrastructure and promote tourism.<sup>4</sup> However, it is not all beneficial, there is increasing evidence to suggest that due to large-scale development projects, such as dams, roads and exploitation of raw materials, the lives of ordinary people may be seriously affected. Exploitation of labour and forced evictions of local residents are examples of common consequences.<sup>5</sup> Additionally, affected areas may be faced with financial debts and the local environment may be severely and permanently damaged. In other words, while the right to development aims to contribute to a world that respects human dignity, large-scale development projects may constitute a threat to people's fundamental human rights.

The term *development-induced displacement*, although no international standing, draws attention to the increasing significance of protection from human rights violations for those affected by development

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<sup>1</sup> Universal jurisdiction is based on the notion that some crimes, i.e. crimes against humanity, are of such exceptional gravity that they affect the fundamental interests of the international community as a whole. Accordingly, the only condition for exercising universal jurisdiction is the nature of the crime.

<sup>2</sup> UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128.

<sup>3</sup> Declaration on the Right to Development, preamble.

<sup>4</sup> Declaration on the Right to Development, preamble.

<sup>5</sup> Michael M. Cernea, Development-induced and Conflict-induced IDPs: Bridging the Research Divide, Forced Migration Review, Special Issue, at 25-27 (December 2006).



projects. The most straightforward definition of development-induced displacement is that, for the purpose of development, communities and individuals are forced out of their homes and their homelands. The consequences for victims may be comparably as dire as those that confront people who are forced to flee from conflicts or natural disasters.<sup>6</sup> However, the development-induced displaced persons are disproportionately disadvantaged when it comes to international attention, aid, sympathy and academic research.

In the context of the right to development, the negative side effects raise the question as to whether or not they are an unavoidable price for development. As this thesis will show, international human rights law sets up certain conditions, which must be fulfilled for a displacement to be considered lawful and justified. In other words, rather than speaking of unfortunate but necessary sacrifices for a good cause, a distinction must be made between displacement in accordance with international human rights law and standards, e.g. carried out after public hearings have been held, compensation has been agreed upon and legal remedies have been made available to the affected individuals, and displacement in violation of these standards.

By presenting the most heinous acts of development-induced displacement as a crime against humanity, to which responsible actors may be held criminally responsible under universal jurisdiction, I hope to contribute to raising international attention to these atrocious acts. I believe that if these kinds of acts were to be prosecuted as crimes against humanity, not only would it offer the victims redress and recognition, but it would also force actors involved in large-scale development projects to begin to recognise and fulfil their responsibilities.

## 1.2 Research question

In this thesis, development-induced displacement will be examined in relation to the crime of forcible transfer of population. Indeed, the crime against humanity belongs to an area of international law where doubts of its scope still remain. This thesis' agreed starting premise is however that forcibly moving individuals from their homes is a crime against humanity. The focus lies on the legal protection through international criminal law of persons displaced in an unjustified way as a result of development projects

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<sup>6</sup> Dawson, Grant & Farber, Sonia, *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement (International Humanitarian Law Series)* Martinus Nijhoff Publishers, 2012, p. 129.

and processes. Thus, this thesis is concerned with when development-induced displacement can constitute crimes against humanity. The following question will be answered in regard to customary international law:

Under which circumstances does development-induced displacement constitute a crime against humanity through forcible transfer of populations?

To satisfactorily answer this question, these subsequent questions will be addressed:

- What is development-induced displacement?
- What international human rights standards must be fulfilled for development-induced displacement to be justified?
- What elements are required for an act to constitute a crime against humanity?

### **1.3 Delimitations**

I have chosen to make four delimitations. Firstly, this thesis is concerned with international customary law. Thus, it does not attend to questions of the limitations imposed by the narrow jurisdiction of the international tribunals in general, and the International Criminal Court (ICC) in particular. Rather, the aim is to clarify when development-induced displacement is a crime against humanity, thereby allowing national authorities of any state to investigate and prosecute people for the crime under universal jurisdiction.

Secondly, it is beyond the scope of this paper to discuss and analyse the existence, recognition and content of the human right to development. The right to development, however, comes into play in the balancing exercise between the individual's interest not to be displaced and the public interest of development.

Thirdly, this thesis is only concerned with the anthropologic and sociological consequences for victims of development-induced displacement to the extent that it can improve the understanding of legal assessment under international criminal law. It is outside the scope of this paper to provide an in depth analysis of the concept itself.

Finally, my intention is not to provide an exhaustive analysis of the human rights regime in relation to development-induced displacement. Rather, I have chosen to delimit the number of rights addressed in this thesis to those most obviously violated in regard to

displacement. This does not mean however that other rights, such as the right to freedom from inhuman or degrading treatment or the right not to be discriminated against, can not be violated as a result of development-induced displacement.

## 1.4 Methodology

For the purpose of this thesis I have relied largely on the legal dogmatic methodology. Although an exposition of this kind may contain other considerations, the core of legal dogmatic consists of the interpretation and systematisation of valid law. This thesis endeavours to contribute to a progressive view of international law. It seeks to move the law forward and interpret it in light of modern norms.

I have extensively used primary legal sources to examine the standards agreed upon by the community of states, which to some extent reflects customary international law. In interpreting the primary legal sources, the customary rules of interpretation reflected in the *Vienna Convention on the Law of Treaties*<sup>7</sup>, have been guiding the conformation. Namely, that a treaty shall be interpreted in accordance with the ordinary meaning and in the light of the treaty's object and purpose.<sup>8</sup>

To answer my research question I have, firstly, examined the relevant customary rules, and secondly, offered supportive arguments to justify the proposed solutions. My intention is not only to describe the substance in the relevant law, but also to propose solutions for a case to which, at least apparently, the law does not provide a single right answer. Thus, in my analysis I have chosen to apply and analyse the findings from examining the law to a real case of development-induced displacement.

Relying on legal justification, the principle of *nullum crimen sine lege*, often referred to as the principle of legality, must be taken into consideration. While it may seem relatively straight forward, the principle can be difficult to apply to customary international law. In the words of one commentator, the principle '*which relies on expressed prohibitions and is based explicitly on the value of legal certainty, sits uneasily with the very nature of customary international law, which is unwritten and frequently*

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<sup>7</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969; see also *Judgment in the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision denying Leave to Appeal*, ICC Appeals Chamber, 13 July 2006, Case No. ICC-01/04-168, para 21, stating; '*the interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32.*'

<sup>8</sup> Vienna Convention on the Law of Treaties, article 31, the general rule on interpretation.

*difficult to define with precision*'.<sup>9</sup> Consequently, the principle imposes certain limitations; new law can not be created from interpreting existing law beyond the reasonable limits of acceptable clarification.

However, in relation to vague and open-ended definitions of offences in customary international criminal law, the principle does not prevent interpreting and clarifying the elements of a particular crime.<sup>10</sup> Furthermore, the principle does not preclude '*the progressive development of the law*'.<sup>11</sup> Including development-induced displacement in the scope of the crime of forcible transfer of population is, as will be analysed in depth in this thesis, not a case of creating a new international crime, but an attempt to clarify the scope of the crime in an unexplored setting.

## 1.5 Material

In the process of identifying customary international law in regard to international criminal law, the importance of the Statute of the International Criminal Tribunal of the Former Yugoslavia (ICTY), the Statute of the International Criminal Tribunal for Rwanda (ICTR) and the Statute of the ICC, as well as jurisprudence from these courts, cannot be emphasised enough.

Complementary to the primary legal sources, this thesis relies on secondary legal sources. Two documents of the International Law Committee (ILC) have been of increasing importance; the *Draft Code of Crimes against the Peace and Security of Mankind*<sup>12</sup> from 1996 and the *First Report on Crimes Against Humanity*<sup>13</sup> from 2015. The former creating an overview on what was considered customary international law in relation to crimes against humanity twenty years ago, and the latter what is considered customary international law today.

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<sup>9</sup> Lamb, Susan B., *Nulla Poena Sine Lege in International Criminal law*, in Antonio Cassasa, Paola Gaeta and John RWD (eds), *The Rome Statue of International Criminal Court: A Commentary*, vol, 1, Oxford University Press (2002), page 743.

<sup>10</sup> Prosecutor v. Zlatko Aleksovski, ICTY, Appeal Judgement 24 March 2000, Case no IT-95-14/1-A, para 127; Procecutor v. Zejnil Delalic at al, ICTY, Appeal Judgement 20 February 2001, Case no IT-96-21-A, para 173.

<sup>11</sup> Prosecutor v. Mitar Vasiljevic, ICTY, Trial Chamber II, 29 November 2002, Case no IT-98-32-T, para 196.

<sup>12</sup> United Nations International Law Committee, *Draft Code of Crimes against the Peace and Security of Mankind*, 1996.

<sup>13</sup> Murphy, Sean D., *First Report of the Special Rapporteur on Crimes Against Humanity* (February 17, 2015). The report is a result of ILC's decision, at its sixty-sixth session in 2014, to move the topic of crimes against humanity onto its current programme of work and to appoint a Special Rapporteur. In 2014, the General Assembly also took note of this development.

Within the context of international human rights law, the most significant documents touched upon are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR). The documents are relied upon to create a general image over the extent to which victims of development-induced displacements rights are violated. There are undoubtedly several other important sources of international human rights law. However, the purpose of this paper is not to provide an exhaustive analysis of rights violated in relation to development-induced displacement, but rather to investigate when the perpetrator can be held criminally accountable. Thus, I have chosen to delimit the legal sources of international human rights law mainly to the international bill of human rights.

For the analysis of an existing case of development-induced displacement I have chosen the Mombasa-Mariakani Road Dualling Project in Kenya. The facts analysed are based, unless otherwise indicated, on a report made by Amnesty International in 2015, named '*Driven Out for Development: Forced Evictions in Mombasa*'<sup>14</sup>. The report focuses on the human rights implications of the road dualling project on people living in the affected areas. It is based on research conducted by Amnesty International in Mombasa in 2015.<sup>15</sup> Researchers visited two informal settlements and interviewed people affected by the project. They also met with representatives of several different government ministries and departments involved in the project. In addition, to provide a balanced overall perspective of the project, I have reviewed a range of project documents, including the Environmental and Social Impact Assessment and Resettlement Action Plan. On the assumption that the factual findings of the Amnesty report are accurate, the conclusions reached therein are adopted for the purpose of the case analysis.

## 1.6 Previous research

While the crime against humanity has been researched extensively, the definition under customary international law remains open-ended. As emphasised above, one of the most important actors within the field of promoting the progressive development of international law and its codification is the ILC. In 2014 the Commission decided to move crimes against humanity onto its current programme of work and to appoint a

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<sup>14</sup> Amnesty International, *Driven out for Development: Forced evictions in Mombasa, Kenya*, (2015), available at: <https://www.amnesty.be/IMG/pdf/afr3224672015english.pdf> [accessed 21 May 2017].

<sup>15</sup> *Ibid.*, page 8.

Special Rapporteur. Appointed for the position of Special Rapporteur was Sean D. Murphy.<sup>16</sup>

In 2015, Murphy published his first report on crimes against humanity. The report provides a general background with respect to the emergence of the concept of crimes against humanity, its application by international courts and tribunals and its incorporation in the national laws of some states. Ultimately, the report proposes two draft articles, one on prevention and punishment of crimes against humanity and the other on the definition of such crimes. Murphy's work on the definition of the crime against humanity has been invaluable for this thesis.

The literature on development-induced displacement reflects a broader sense that the international community has not yet directly addressed the problem of development-induced displacement, let alone fashioned a solution. While it has been increasingly researched among sociologists and anthropologists during the last thirty years, only recently has it received attention from legal scholars. In relation to international criminal law in general and crimes against humanity in particular, however, the academic attention remains anything but lively. With this thesis I aim to start filling that gap and contribute to getting the victims of development-induced displacement out from the shadows.

## 1.7 Outline

This thesis is divided into six chapters. Chapter one is the introduction, chapter two is introducing the reader to the development-induced displacement and the applicable human rights framework, chapter three is trying to bridge development-induced displacement to crimes against humanity and chapter four is giving an overview of the elements required for an act to constitute a crime against humanity. Finally, chapter five is providing an in-depth analysis of a real situation where the elements of the crime against humanity may be satisfied and chapter six provides a conclusion and the authors final remarks.

Chapter 1 introduces the reader to the research question of this thesis and its delimitations. Furthermore, the methodology and material on which this thesis relies on is presented together with a short overview of previous research made within the field of development-induced displacement.

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<sup>16</sup> Sean D. Murphy is the Patricia Roberts Harris Research Professor of Law at the George Washington University Law School in Washington, D.C. His primary area of scholarly research are public international law, foreign affairs and the U.S. Constitution, international organizations, international dispute settlement, and law of the sea.

Chapter 2 attempts to define the term development-induced displacement. It highlights the underlying values that shape our approach to development and to development-induced displacement. The chapter also addresses the human rights safeguards applicable to development-induced displacement, in particular, the right to adequate housing. In addition, several guidelines on development-induced displacement, which read out the circumstances under which displacement may be carried out in a lawful way, are touched upon.

Chapter 3 attempts to bridge the alleged crime of development-induced displacement to the international criminal framework of the crime against humanity in general and the crime of forcible transfer of population in particular. The first section of the chapter is concerned with the development of the crime against humanity through the last decades; it attempts to explain how the crime has evolved and why development-related crimes have not been a point of focus in the otherwise rapid expansion of the crime. The second section focuses on debated questions relating to the definition of crime against humanity through forcible transfer of population. Finally, the third section presents a growing coherent basis affirmatively establishing development-induced displacement as a crime against humanity through forcible transfer of population.

Chapter 4 is the main substantive chapter, as it examines the prerequisites required for an act to constitute a crime against humanity in accordance with customary international law. Firstly examining the prohibited act and secondly, the contextual elements of the crime. This chapter presents the facts that are further analysed and discussed in the two final chapters.

Chapter 5 consists of this thesis' main analysis. The findings in chapter 4 are applied to the *Mombasa-Mariakani Road Dualling Project* in Kenya. The following questions are addressed: (1) was there, in fact, a 'deportation or forcible transfer of population', through 'expulsion or other coercive acts'; (2) were the persons subject to such transfer 'lawfully present' in the area from which they were removed; (3) did the acts in question constitute a 'widespread or systematic attack directed against any civilian population'; and (4) are there grounds under international law under which the forcible transfer could take place.

Chapter 6 provides a conclusion and the authors final remarks. It is concluded herein that there exist circumstances under which development-induced displacement can equate to other forms of forcible transfer of population. In these situations responsible actors can not rely on an overriding public interests to avoid criminal responsibility.

## 2 The Alleged Crime

*Development-induced displacement consists of the forcible movement of persons from their homes due to development projects, such as the building of dams, roads, and other infrastructure, as well as the exploitation of natural resources in mining and oil projects, to name just a few examples. In comparison to other forms of forced displacement, development-induced displacement differs in one significant way. Whereas persecution, conflict or natural disasters are never considered to be a 'just cause' in and of themselves, development is by many considered to be valid justification for displacement.*

*This chapter attempts to define the term development-induced displacement. It highlights the underlying values that shape our approach to development and to development-induced displacement. Furthermore, it addresses the human rights safeguards applicable to development-induced displacement, in particular, the right to adequate housing offer significant legal protection and, moreover, can be said to imply a right not to be arbitrarily displaced. In addition, several guidelines on development-induced displacement, which read out the circumstances under which displacement may be carried out in a lawful way, are touched upon.*

### 2.1 Development and its costs

Development comprises all kinds of major projects to develop infrastructure, harness energy, and extract land resources. The most common projects involve the construction of dams, building or expansion of transport routes, and large-scale extraction of natural resources such as minerals and oil.<sup>17</sup> These are projects that are useful for a number of reasons, e.g. dams are necessary for generation of hydroelectric power, which offers a clean, sustainable alternative to fossil fuel power generation at a time when climate change has become one of humanity's greatest threats.<sup>18</sup>

It is obvious that large development projects such as dams, roads, and exploitation of raw materials require landmass, which in turn necessitates displacement of local residents. In addition to physically displacing persons, development projects interfere with the livelihoods of many who do not inhabit land appropriated for development projects, but who depend upon it for activities such as farming, fishing, and collecting

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<sup>17</sup> Dawson, Grant & Farber, Sonia (2012), page 30.

<sup>18</sup> Ibid., page 31.



raw materials.<sup>19</sup> Thus, the displacement can be direct, such as when a government orders individuals to abandon their land to provide space for the development project, or it can be indirect, usually occurring when the development project has secondary effects, such as large areas being flooded due to the installation of dams, rendering the surrounding area uninhabitable.

Usually the most vulnerable and marginalised population groups, such as indigenous people, are disproportionately affected. Apart from threatening life, resources, livelihoods and the natural environment, large development projects may also threaten culture and cultural identity of the victims.<sup>20</sup> When it comes to indigenous communities, displacement does not only dislocate them from their natural environment, it also forces them to abandon their traditional lifestyle.<sup>21</sup> Thus, displacement breaks up living patterns and social continuity, but it may also become a tool for ethnic dislocation and disempowerment in disguise.

Regardless of the type of project that causes displacement, people who are forced from their homes due to development can be affected in similar ways, suffering a range of emotional, physical, and socio-economic harm. Sociologist *Michael Cernea*<sup>22</sup> has identified eight interlinked potential risks of displacement. These are landlessness, homelessness, loss of livelihood, marginalization, food insecurity, increased morbidity, loss of access to common property resources, and community disarticulation or social disintegration.<sup>23</sup> When people are forced to leave their homelands in order to find affordable housing after being evicted or displaced, they risk becoming dislocated from their existing community and social networks. In the worst cases, this may involve breaking up families. Access to work and education opportunities may also become more restricted.<sup>24</sup>

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<sup>19</sup> Michael M. Cernea, *Understanding and Preventing Impoverishment from Displacement: Reflections on the State of Knowledge*, *Refugee Studies* 245, (1995), page 251.

<sup>20</sup> United Nation General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295*, annex.

<sup>21</sup> *Ibid.*

<sup>22</sup> Michael M. Cernea is Research Professor of Anthropology and International Relations at George Washington University. He has carried out research, policy work, and development project work in many countries throughout Africa, Asia, the Middle East, Europe and Latin America. Cernea has written and edited numerous books and studies on development, social change, population resettlement, social forestry, grassroots organizations, and participation.

<sup>23</sup> M. Cernea, *Impoverishment Risks, Risk management, and Reconstruction; A Model of Population Displacement and Resettlement*. Paper presented to the UN Symposium on Hydropower and Sustainable Development, Beijing, 27-29 October 2004, page 14-26.

<sup>24</sup> *Ibid.*, page 14.

## 2.2 Affected regions

Even though development-induced displacement prevails especially in the global south, in countries that are engaged in large-scale projects to increase and improve their economies and domestic infrastructures, it is a worldwide phenomenon. Estimates of global numbers of people who may be affected vary widely. However, approximately fifteen million individuals are affected every year.<sup>25</sup>

Because development projects are dependent upon significant monetary funds, they are most common in countries that possess the resources to pay for such projects or in countries that are seen to be stable enough, both financially and politically, to be attractive to foreign investors and to international lending institutions, such as the World Bank.<sup>26</sup> While this description fits many countries, perhaps the most obvious are the Asian countries, which account for the greatest amount of development-induced displacement in the world. One example, among many, that have led to large-scale displacement is the construction of the enormous Three Gorges Dam in China, a hydroelectric dam in Hubei province, which was completed in 2006. The dam resulted in the displacement of more than one million people.<sup>27</sup>

The occurrence of development-induced displacement is however increasingly an issue in African and Latin American countries. Common factors in the countries where the displacement is extensive is that they either do not have, or are only just now in the progress of developing, domestic policies to govern development-induced displacement.<sup>28</sup> Or they have relatively comprehensive development policies, however, struggle with the implementation of these policies.<sup>29</sup> Thus, the legal framework for addressing the needs of the displaced is non-existent or undeveloped. Another not uncommon factor is that the development plans and resettlement plans largely underestimate the numbers of the displaced, particularly given the complexities in determining which individuals will be negatively affected by development projects in ways other than physical displacement.

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<sup>25</sup> Michael M. Cernea (2006), page 25-27.

<sup>26</sup> Dawson, Grant & Farber, Sonia (2012), page 136-141.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

## 2.3 Defining development-induced displacement

The simplest definition of development-induced displacement is that it means forcing communities and individuals out of their homes and their homelands, for the purposes of development.<sup>30</sup> Displacement must in this context be separated from resettlement. Whereas resettlement can be defined as a planned and organised relocation to a strictly specified new place of residence, accompanied by social support mechanisms and compensation for lost goods; displacement is understood as dislocation from the homeland territory without social support in the new place of residence.<sup>31</sup>

Development-induced displacement is comparable to displacement due to armed conflict or human rights violations.<sup>32</sup> Just like the latter, people displaced as a result of development projects, are compelled to face the challenge of starting a new life in an unfamiliar environment. They suffer from loss of homes and livelihoods, scattering of communities, and sometimes physical and psychological damage associated with involuntary displacement.<sup>33</sup>

However, whereas persecution, conflict or natural disasters are never considered to be a ‘good cause’ in and of themselves, development, including the construction or establishment of dams, ports, mines, railways, highways, airports, irrigation canals, urban infrastructure, forestry and agriculture projects, for reasons of urban or rural economic development is by many considered to be valid justification for displacement.<sup>34</sup>

From an ethical point of view, three theoretical perspectives have been suggested to justify development-induced displacement.<sup>35</sup> First, the public interest perspective, which uses a cost-benefit analysis, wherein displacement is a cost. Where the benefits of the project exceed the costs, the project is considered justified. The second perspective, with self-determination as a central value, considers displacement immoral except in cases where the affected people are offered and accept adequate compensation, and subsequently move voluntarily. Finally, the third perspective accepts development-induced displacement when the project

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<sup>30</sup> Note that the most well-known definition of internally displaced persons established in Guiding Principles of Internal Displacement (1998) omits development projects as a cause of displacement. See section 2.4.1.

<sup>31</sup> Terminski, Bogumil, *Development-induced displacement and resettlement: causes, consequences, and socio-legal context* (2015), page 574.

<sup>32</sup> Dawson, Grant & Farber, Sonia (2012), page 129.

<sup>33</sup> Michael M. Cernea (2006), page 25-27.

<sup>34</sup> Terminski, Bogumil (2015), page 49.

<sup>35</sup> Satiroglu, Irge, *Development-induced displacement and resettlement* (2015), page 142.

decreases social inequalities by primarily benefitting the poor and thus reducing global poverty.<sup>36</sup> Whichever ethical perspective is preferred, it is clear that development-induced displacement is characterised by conflicting interests and conflicting rights. On the one hand, there is the public interest of the people benefitting from the projects. On the other hand, there are the human rights of the potential and actual victims of development-induced displacement.

## **2.4 Protection from development-induced displacement**

Until recently, development-induced displacement was treated mainly as an issue of indigenous rights, focusing on the right to land, the right to culture, and the right to self-determination.<sup>37</sup> Another approach has been to view it as a domestic problem, to which domestic - as opposed to international - solutions are needed.<sup>38</sup> While these approaches to the protection against development-induced displacement are still advocated by some, there has been a notable shift towards viewing development-induced displacement as an international human rights issue, and thus a matter for which both the international community and states are responsible.<sup>39</sup>

There are several human rights that are broadly applicable to the rights of those displaced by development. These rights include, among others, the right to housing, the right to freedom of movement and residence, the rights to private and family life and home and the right to property. Additionally, many other human rights can be implicated in displacement cases. For example, where people are evicted with violence and intimidation, the right to security of the person as well as the right to life may be threatened.<sup>40</sup> The right to freedom of expression and freedom of association may be implicated when community leaders who oppose an eviction are arrested. The right to information and participation is also frequently interfered with in cases of displacement. People living in constant fear of eviction suffer psychologically and physically; therefore, their right to health may not be secure. Other human rights potentially implicated in cases of displacement are the rights to freedom from torture and other cruel,

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<sup>36</sup> Ibid., page 143.

<sup>37</sup> Dawson, Grant & Farber, Sonia (2012), page 132.

<sup>38</sup> Ibid., page 133.

<sup>39</sup> Ibid., page 132-133.

<sup>40</sup> Terminski, Bogumil (2015), page 473-475.

inhuman or degrading treatment or punishment,<sup>41</sup> and freedom from discrimination. The frequent and wide-range of violation indicate that the human rights dimensions of displacement are extensive.

## 2.4.1 The human rights framework

While civil and political rights, such as the right to life, the right to security of the person and the right to non-interference with privacy, family and home, enshrined in the ICCPR may offer more effective protection from a judicial point of view, the principal legal framework for protecting individuals against arbitrary displacement are the socioeconomic rights protected by the ICESCR.<sup>42</sup>

Article 2(1) of the ICESCR states:

*Each State Party is under the obligation to take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*<sup>43</sup>

The principle of progressive realisation, differs from that of the ICCPR, which obliges parties to ‘*respect and to ensure to all individuals within its territory and subject to its jurisdiction*’ the rights in the Convention.<sup>44</sup> The principle of progressive realisation acknowledges that some of the rights in the ICESCR may be difficult in practice to achieve in a short period of time with limited means. Instead, the requirement to take steps imposes a continuing obligation to work towards the realisation of the rights. It also rules out deliberately regressive measures, which impede that goal.<sup>45</sup>

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<sup>41</sup> *Hajrizi Dzemajl et al. v. Yugoslavia*, CAT/C/29/D/161/2000, UN Committee Against Torture (CAT), 2 December 2002. In this case, the Committee held that the burning and destruction of houses, which resulted in displacement, constituted, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment (para. 9.2).

<sup>42</sup> See UN Commission on Human Rights, *Resolution on the Prohibition of Forced Evictions (2004/28)*, 16 April 2004, para. 1, ‘*that the practice of forced eviction that is contrary to laws that are in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing*’.

<sup>43</sup> ICESCR, article 2(1).

<sup>44</sup> ICCPR, article 2(1).

<sup>45</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para 9, ‘*The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time*’.

The UN Committee on Economic, Social and Cultural Rights (CESCR) interprets the principle as imposing minimum core obligations to provide, at the least, essential levels of each of the rights. In regard to arbitrary displacement, some of the rights entail obligations that have an immediate effect, regardless of the state of development of a country.<sup>46</sup> The Committee has for example underlined that:

*[I]n view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.*<sup>47</sup>

Moreover, this approach is reinforced by article 17.1 of the ICCPR, which recognises, inter alia, the right to be protected against ‘*arbitrary or unlawful interference*’ with one’s home.<sup>48</sup> In General Comment No. 7, the Committee has defined forced eviction as:

*[T]he 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>49</sup>

Whereas some evictions may be justifiable, the relevant authorities are still obliged to ensure that they are carried out in accordance with a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected. Even though a number of human rights offer legal protection against arbitrary forms of displacement, the right to housing is generally concerned to be the right which offers the most satisfactory safeguards.

### *The Right to Adequate Housing*

Explicitly recognised in article 12 of the ICESCR, the right to adequate housing is considered to be the principal right for safeguarding individuals’ rights not to be arbitrarily displaced.<sup>50</sup> The CESCR has emphasised that ‘*evictions may be carried out in connection with [...] development and infrastructure projects, such as the construction of dams or other large-*

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<sup>46</sup> Ibid., para. 10. See also para 9, ‘[...] the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content’.

<sup>47</sup> CESCR, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, para 8.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., para 3.

<sup>50</sup> ICESCR, article 11(1) reads ‘*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate [...] housing [...]*’.

*scale energy projects*'.<sup>51</sup> Limitations on the right to housing must however be in accordance with domestic law, have a substantive and proper justification, and be reasonable and proportional. Proper justification is, according to the Committee '*solely for the purpose of promoting the general welfare in a democratic society*'.<sup>52</sup>

The CESCR has in its General Comment 4 and 7 clarified the safeguards that are protected by the right to housing in relation to forced evictions and displacement.<sup>53</sup> These include legal security of tenure as a core aspect of the right to adequate housing.<sup>54</sup> The Committee has stated:

*[T]enure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.*<sup>55</sup>

Instances of forced eviction are, according to the Committee, 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>56</sup> Where it may be necessary to impose limitations on the right to adequate housing, this must be in accordance with domestic law, have a substantive and proper justification, and be reasonable and proportional.<sup>57</sup>

Prior to any displacements, and particularly those involving forced evictions of large groups, all feasible alternatives must be explored to avoid the need to use force. In addition the following procedural guarantees must be provided; 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 the alternative purpose for which the land or housing is to be used; 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; provision of legal remedies,

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<sup>51</sup> CESCR, *General Comment No. 7*, para 7.

<sup>52</sup> *Ibid.*

<sup>53</sup> CESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11(1))*, 13 December 1991, para 8; CESCR, *General Comment No. 7*, para 13-15.

<sup>54</sup> CESCR, *General Comment No. 4*, para. 8.

<sup>55</sup> *Ibid.*, para. 8(a).

<sup>56</sup> CESCR, *General Comment No. 7*, para 11.

<sup>57</sup> W. Kilin & J. Kiinzli, *The Law of International Human Rights Protection*, Oxford: Oxford University Press, 2009, page. 114-120.

and of legal aid to persons who are in need of it to seek redress from the courts.<sup>58</sup>

## 2.4.2 International standards

In addition to the human rights framework, there are a number of normative instruments that contain standards relating to development-induced displacement. These are not binding upon states, however, they are an indication that development-induced displacement are increasingly being considered as a human rights issue.<sup>59</sup> The increased focus on development-induced displacement requires states to limit their own actions and the actions of those under their legal jurisdiction in order to reduce adverse impacts upon the livelihoods of persons dislocated by development-induced displacement.

Two soft-law instruments are of particular relevance. The first instrument is the United Nations Guiding Principles on Internal Displacement from 1998,<sup>60</sup> of which Principle 6 states that *'every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.'*<sup>61</sup> It explicitly recognises *'cases of large-scale development projects, which are not justified by compelling and overriding public interests'*<sup>62</sup> as a prohibited form of displacement. The Guiding Principles provides starting point for arguing that people should not be forced to flee their homes by development projects.

The second instrument relating to development-induced displacement is the Basic Principles and Guidelines on Development-Based Evictions and Displacement from 2007.<sup>63</sup> These guidelines contain a list of state responsibilities. Among the listed responsibilities are the obligations to *'adopt appropriate legislative and policy measures to ensure the protection of individuals, groups and communities from evictions that are not in*

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<sup>58</sup> CESCR, General Comment No. 7, paras 10-16.

<sup>59</sup> Dawson, Grant & Farber, Sonia (2012), page 146-147.

<sup>60</sup> UN High Commissioner for Refugees (UNHCR), Guiding Principles on Internal Displacement, 22 July 1998, principle 6.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> UN Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Annex I Basic Principles and Guidelines on Development Based Evictions and Displacement*, A/HRC/4/18. The guidelines were contained within a report of the United Nations Special Rapporteur on Adequate Housing to the Human Rights Council.



*conformity with existing international human rights standards*’,<sup>64</sup> and to *‘explore fully all possible alternatives to eviction’*.<sup>65</sup>

These documents highlight that states, even where a development project is justified by public interest, before undertaking a development project must ensure that all feasible development alternatives are explored, persons likely to be displaced by the project are consulted and socio-economic and environmental impact assessments are approved. States must further ensure that the displacement be mandated and carried out in accordance with domestic law and that adequate compensation and legal remedies are guaranteed. Thus, where it is justified and no feasible alternatives exist, states must still take all necessary measures to minimise displacement and mitigate its adverse effects.

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<sup>64</sup> Ibid., para 23.

<sup>65</sup> Ibid., para 38.

### **3 Bridging Development-Induced Displacement to the Crime Against Humanity**

*This chapter attempts to bridge the alleged crime of development-induced displacement to the international criminal framework of the crime against humanity in general and the crime of forcible transfer of population in particular. Although, there is a conspicuous lack of state practice, there is increasingly international recognition that development-induced displacement has many of the same effects upon the displaced as other groups who have been forcibly displaced.*

*The first section is concerned with the development of the crime against humanity through the last decades; it attempts to explain how the crime has evolved and why development-related crimes have not been a point of focus in the otherwise rapid expansion of the crime. The second section focuses on two debated questions relating to the definition of crime against humanity through forcible transfer of population. These are, firstly, if arbitrary transfer of population from one area to another within the same state, and secondly, whether transfer occurring during peacetime, are included in the definition. Finally, the third section presents a growing coherent basis affirmatively establishing development-induced displacement as a crime against humanity through forcible transfer of population.*

#### **3.1 A brief background on the Crime against humanity**

The concept of crimes against humanity has evolved over the past decades, mainly beginning after World War II.<sup>66</sup> Thus, the impact of World War II in defining crimes against humanity cannot be underestimated. The post-war efforts, such as the Nuremberg Charter and the Tokyo Charter, went a long way in shaping the scope of international criminal law. However, they have also narrowed the conception of international crimes targeted in international criminal law to date. The development of international crimes has continuously focused on direct forms of international crimes while ignoring other areas such as development-related crimes, for example widespread destruction of the environment and land grabbing, which have

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<sup>66</sup> Murphy, Sean D., (2015), page 12, para 28.

resulted in substantial numbers of deaths, in some cases on a scale comparable to persecution or genocide.

Although efforts have been made to define crimes against humanity, there is, to date, no single recognised definition of the crime in customary international law.<sup>67</sup> The scope of crime against humanity has evolved over time, however there are some features that seems to be a core aspect of the crime. In 1965 Hannah Arendt characterised the Holocaust as a ‘*new crime, the crime against humanity - in the sense of a crime “against human status” or against the very nature of mankind.*’<sup>68</sup> Fifty years later this core aspect of the *crime against humanity* is still accepted. In the ILC’s report on crimes against humanity from 2015<sup>69</sup>, the Commission affirmed that the concept is generally seen to have two broad features:

*[F]irst, the crime is so heinous that it is viewed as an attack on the very quality of being human. Second, the crime is so heinous that it is an attack not just upon the immediate victims, but also against all humanity, and hence the entire community of humankind has an interest in its punishment.*<sup>70</sup>

Important interpretations have also been made in the statutes and jurisprudence of contemporary international criminal tribunals, such as the ICTY and ICTR, and not least, in the Rome Statute and the jurisprudence of the ICC.<sup>71</sup> The codification and application of the crime against humanity contains several basic elements that are common across the majority of definitions of the crime.<sup>72</sup> In ILC’s report from 2015 the following is acknowledged:

*[T]he crime is an international crime; it matters not whether the national law of the territory in which the act was committed has criminalized the conduct. The crime is directed against a civilian population and hence has a certain scale or systematic nature that generally extends beyond isolated incidents of violence or crimes committed for purely private purposes. The crime can be committed within the territory of a single State or can be committed across borders. Finally, the crime concerns the most heinous acts of violence and persecution known to humankind.*<sup>73</sup>

In the commentary of the draft code from 1994,<sup>74</sup> the ILC noted that it was their understanding that:

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<sup>67</sup> Ibid.

<sup>68</sup> Arendt, Hannah, *Eichmann in Jerusalem: a report on the banality of evil*, Viking Press, New York, 1963, page 268.

<sup>69</sup> See Chapter 1.5 for more information on the report.

<sup>70</sup> Murphy, Sean D., (2015), page 12, para 27.

<sup>71</sup> Ibid., page 12, para 28.

<sup>72</sup> Ibid., page 13, para 28.

<sup>73</sup> Ibid.

<sup>74</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session, Supp. No. 10, U.N. Doc. A/49/10, at 40 (1994).

*[T]he definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part.*<sup>75</sup>

In light of these developments, it is well established under customary international law that an individual who commits acts constituting crimes against humanity can be held liable for those acts.<sup>76</sup> However, exactly what amounts to a crime against humanity is continuously a matter of discussion, as the definition throughout history has reflected and evolved to cover the latest atrocities of humankind. Thus, there is no consensus as to what crimes are so heinous that the international community has a common interest in punishing them. The lack of consensus can be used to narrow the scope of the crime to only the enumerated acts in different statutes. However, it can be argued that acts, carried out in ways limited only by the human imagination for cruelty and that violate fundamental human right, are inherently a crime against humanity if carried out in a widespread or systematic manner and is directed against a civilian population.

### **3.2 Displacement as an international crime**

In the following section two essential aspects trying to link development-induced displacement to the crime against humanity will be addressed. Firstly, if arbitrary transfers of population from one area to another within the same state, and secondly, whether transfer occurring during peacetime, is included in the crime.

Starting with the first aspect, although deportation has long been recognised as a crime against humanity in the major international criminal instruments,<sup>77</sup> prior to the Rome Statute, international criminal law did not distinguish between the crime of deportation, defined as *‘the forced removal of people from one country to another’*, and the crime of forced

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<sup>75</sup> Ibid., at 14.

<sup>76</sup> It was indicated by ICTY in Prosecutor v. Dusko Tadic, Trial Chamber, 1 May 1997, Case no IT-94-1-T, page 233, para 626, *‘since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned’*.

<sup>77</sup> Including the Nuremberg Charter, the Tokyo Charter, the Allied Control Council Law No. 10, and the statutes of the ICTY and ICTR.

population transfer, defined as the ‘*compulsory movement of people from one area to another within the same State*’.<sup>78</sup>

The ICTY stated in the *Prosecutor v. Stakic*<sup>79</sup> that deportation requires a displacement across state borders.<sup>80</sup> Such interpretation would in most cases result in the exclusion of development-induced displacement in crime against humanity trials. However, the Court confirmed that population transfers not meeting these criteria could nonetheless merit a conviction for the separate crime of inhuman acts. In *Prosecutor v. Krnojelac*<sup>81</sup>, the Appeals Chamber held that acts of forcible displacement underlying the crime of persecution were not limited to displacements across a national border. It further stated that ‘*the prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference*’.<sup>82</sup> The Appeals Chamber emphasised that it is ‘*the forced character of displacement and the forced uprooting of the inhabitants of a territory*’<sup>83</sup> that entail ‘*the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent*’.<sup>84</sup> In later jurisprudence, the definition of deportation as a crime against humanity has, in several cases, included the crime of forced population transfer within a state’s borders.<sup>85</sup>

When the Rome Statute was adopted, forcible transfer of population was included ‘*to make it expressly clear that transfers of populations within a State’s borders were also covered*’.<sup>86</sup> Thus, it is clear that the internal element of development-induced displacement itself should not exclude the alleged crime from being tried as a crime against humanity.

Moving on to the second question regarding crimes carried out in peacetime. Article 7(1) of the Rome Statute defines crimes against

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<sup>78</sup> *Prosecutor v. Radislav Krstic*, ICTY, Trial Chamber, 2 August 2001, Case No. IT-98-33-T, para 521; see also para 522, stating that ‘*this distinction has no bearing on the condemnation of such practices in international humanitarian law. Article 2(g) of the Statute, Articles 49 and of the Geneva Convention concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Article 85(4)(a) of Additional Protocol I, Article 18 of the ILC Draft Code and Article 7(1)(d) of the Statute of the International Criminal Court all condemn deportation or forcible transfer of protected persons. Article 17 of Protocol II likewise condemns the “displacement” of civilians*’.

<sup>79</sup> *Prosecutor v. Milomir Stakic*, ICTY, Appeals Chamber, 22 March 2006, Case No. IT-97-24-A.

<sup>80</sup> *Ibid.*, paras 288-303.

<sup>81</sup> *Prosecutor v. Milorad Krnojelac*, Appeals Chamber, 17 September 2003, Case No. IT-97-25-A.

<sup>82</sup> *Ibid.*, para 218.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> See e.g. *Prosecutor v. Radislav Krstic* (2001), para 521.

<sup>86</sup> Lee, Roy S. (edit.), *The International Criminal Court: the making of the Rome Statute: issues, negotiations, results*, Kluwer Law International, The Hague, 1999, page 86.

humanity as an act ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>87</sup> The crime, as defined in the Rome Statute, does not retain the nexus to an armed conflict that characterised the statute of the ICTY.<sup>88</sup> The fact that the Rome Statute includes crimes of forcible transfer during peacetime creates a ground for arguing that development-induced displacement constitutes a crime against humanity. This is further supported by the Court’s jurisprudence. In 2010 the ICC investigated a case of forcible transfer in Kenya.<sup>89</sup> From December 2007 to February 2008, approximately 350,000 people were displaced within the borders of Kenya as the result of post-election violence.<sup>90</sup>

In addition, the Appeal Chamber of the ICTY in *Prosecutor v. Tadić*<sup>91</sup> clarified that there is no logical or legal basis for retaining a connection to armed conflict, since Nuremberg had been discarded in state practice. It also held that:

*[I]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all.*<sup>92</sup>

### 3.3 Creating a case

As shown in the previous section, development-induced displacement has not been a point of focus in the evolution of international criminal law. However, recent indications suggest that there has been a shift of focus in international law. One of the most recent of such indications is the ICC’s *Office of the Prosecutor’s* (OTP) policy paper on case selection and

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<sup>87</sup> Rome Statute, article 7(1).

<sup>88</sup> ICTY Statute, article 5(1), stating that ‘*The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population*’.

<sup>89</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC, Pre-Trial Chamber II, 31 March 2010, Case No. ICC-01/09, (hereinafter Kenya Authorization Decision 2010).

<sup>90</sup> The accused were discharged from the process in 2016 due to an incidence of witness interference and political meddling that was reasonable likely to intimidate witnesses.

<sup>91</sup> *Prosecutor v. Dusko Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72.

<sup>92</sup> *Ibid.*, para 140.

prioritisation from September 2016.<sup>93</sup> In the new policy, the OTP mentions destruction of the environment, illegal exploitation of natural resources and illegal dispossession of land to be prioritised in case selection, emphasising that:

*[T]he 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.*<sup>94</sup>

Indications from the international community suggest that there is an increasing interest in development-induced displacement. In 2010, Walter Kälin, the former Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, included a section on persons that are internally displaced by development in his final report to the Human Rights Council.<sup>95</sup> He noted that:

*[T]he stereotypical image of internally displaced persons, reinforced by media reports, remains that of people who flee conflict areas and end up destitute in camps or collective shelters. The reality is far more complex. Every year more people are displaced by natural disasters and development projects than by conflict and violence.*<sup>96</sup>

The Human Rights Council, to whom the Rapporteur on the Human Rights of Internally Displaced Persons reports, and one of the foremost entities addressing violations of human rights within the UN system, has also devoted new attention to development-induced displacement. In 2000, the Human Rights Commission appointed a Special Rapporteur on Adequate Housing; and, in 2001, it appointed a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. The mandates of both Rapporteurs include reporting on persons displaced by development.<sup>97</sup>

The Human Rights Council intensified its focus on development-induced displacement in 2007, when it adopted a set of guidelines addressing forced displacement caused by development. The guidelines begin by noting that:

*[F]orced evictions share many consequences similar to those resulting from arbitrary displacement, including population transfer, mass expulsions,*

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<sup>93</sup> ICC Office of the prosecutor, *Policy paper on case selection and prioritisation*, 15 September 2016.

<sup>94</sup> *Ibid.*, para 40-41.

<sup>95</sup> Kälin, W, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, Human Rights Council, U.N. Doc A/HRC/13/21, 5 January 2010.

<sup>96</sup> *Ibid.*, page 11.

<sup>97</sup> Dawson, Grant & Farber, Sonia (2012), page 134.

*mass exodus, ethnic cleansing and other practices involving the coerced and involuntary displacement of people from their homes, lands and communities.*<sup>98</sup>

Although, there is a conspicuous lack of state practice, the increasing involvement of the United Nations reflects a potential turning point for development-induced displacement.<sup>99</sup> Furthermore, the OTP's policy paper case selection and the increasing international recognition that development-induced displacement has many of the same effects upon the displaced, as other groups that are forcibly displaced; thus, presents a growing coherent basis for affirmatively establishing development-induced displacement as a crime against humanity.

It is possible to argue that international criminal law presents an opportunity for the international community to begin vindicating the development-related crimes. This is substantiated by the fact that the drafters of the Rome Statute believed that the term's fluidity would account for progressive development that would capture previously unimagined crimes of such magnitude.<sup>100</sup> Indeed, this indicates that the scope of crimes against humanity is intended to be interpreted in light of modern norms. The desire for flexibility is further highlighted by the inclusion of 'other inhumane acts'. In its case *Prosecutor v. Kuprelkic* the ICTY explained that other inhumane acts was '*designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition*'.<sup>101</sup> Thus, even if a particular act or omission has not yet been prosecuted or explicitly defined as a crime against humanity, it is by no means precluded from being characterised as one in the future.

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<sup>98</sup> *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Annex I Basic Principles and Guidelines on Development Based Evictions and Displacement*, page 15.

<sup>99</sup> Dawson, Grant & Farber, Sonia (2012), page 147.

<sup>100</sup> Robinson Darryl, *Defining "Crimes Against Humanity" at the Rome Conference*, *The American Journal of International Law*, Vol. 93, No. 1, pp. 43-57 (1999), page 54-57.

<sup>101</sup> *Prosecutor v. Kupreskic et al.*, ICTY, Trial Chamber, 14 January 2000, Case No IT-95-16, para 563.



# 4 Crime of Forcible Transfer of Population

*As indicated in the previous chapter, the definition of crimes against humanity in general and forcible transfer of population in particular has been subject to different formulations over the past decades.<sup>102</sup> According to the ILC the most widely accepted formulation is that of article 7 of the Rome Statute, stating:*

*[F]or 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; [...].<sup>103</sup>*

*In this chapter the elements of the crime of forcible transfer of will be examined and analysed to show how they can apply to cases of development-induced displacement.*

*This chapter presents the prerequisites that must be satisfied for an act to constitute a crime against humanity. Firstly examining the prohibited act and secondly, the contextual elements of the crime. The contextual elements have been divided into four parts, these are that the act is (1) part of a widespread or systematic attack, (2) directed against any civilian population, (3) pursuant to or in furtherance of a policy and (4) carried out with knowledge of the attack. The examination will take its starting point in the definition of the crime as it is presented in the Rome Statute and further move on to consider deviant customary elements of the crime.*

## 4.1 The prohibited act

There is no internationally recognised, legally binding definition of the term ‘forcible transfer.’ However, all population transfers have the common feature of large-scale movement of groups of people. In order to distinguish population transfer from other migratory processes, the involuntary or

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<sup>102</sup> Murphy, Sean D., (2015), page 6, para 8.

<sup>103</sup> Rome Statute, Article 7.

forced character of transfer must be considered.<sup>104</sup> However, drawing a clear line between voluntary and involuntary population transfers can be difficult. If a voluntary population transfer is triggered by the action or inaction of a State, making living conditions so difficult for certain population groups that they prefer to migrate, this may not be considered a voluntary process.

‘Forcible transfer of a population’ is recognised as a crime against humanity in a broad range of instruments.<sup>105</sup> In article 7(2)(d) of the Rome Statute, deportation or forcible transfer of population is defined as *‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law’*. This definition is accordingly based on three cumulative conditions: (1) forcible character; (2) lawful presence of the displaced; (3) absence of grounds permitted under international law. If one of these conditions is absent, the act is not considered a crime of ‘forcible transfer of population’.<sup>106</sup>

The limited scope means that not all large-scale movements of people constitute a crime. Justifications such as voluntariness, national welfare and temporariness are regularly offered, but should be considered carefully as they often conceal a wish to disguise the criminal elements of the act.

#### **4.1.1 Forcible character of the displacement**

‘Forcible transfer of population’ must be forced in order to be a crime against humanity.<sup>107</sup> However, ‘forced’ does not require actual physical force, but includes the threat of force or coercion, physiological oppression, or other means of rendering displacement involuntary.<sup>108</sup> Thus, the forcible

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<sup>104</sup> This is reflected in Article 3 of the United Nations Population Transfer Declaration, which defines unlawful population transfer as *‘a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory without the free and informed consent of the transferred population and any receiving population’*.

<sup>105</sup> Including the ICTY Statute, article 5(d); the ICTR Statute, Article 3(d); the Statute of the Special Court of Sierra Leone, article 2(d); UN TAET Regulation 2000/15 on the establishment of the Cambodian Extraordinary Courts, section 5.1(d); and the Rome Statute, article 7(1)(d).

<sup>106</sup> Prosecutor v. Kupreskic et al. (2000), para. 566.

<sup>107</sup> ICC, Elements of Crimes, 2011, article 7(1)(d); Prosecutor v. Radislav Krstic (2001), para 281; Prosecutor v. Milorad Krnojelac (2003), para 475.

<sup>108</sup> Prosecutor v. Milomir Stakic (2006), para 281; Prosecutor v. Milorad Krnojelac (2003), para 475; see also ICC, *Elements of Crimes*, Art 7(1)(d) suggesting that a broad definition of the forcible character is included, *‘such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment’*.

character of displacement can be inferred from surrounding circumstances. Coercive pressures on people to flee their homes can include *'destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, [and] denying them access to schools.'*<sup>109</sup>

Large-scale development projects are often based on the same model. Development corporations on one side and governments on the other side enter into an agreement in which the corporation is contracted to carry out a development project. The land acquired for the project is, however, inhabited by local residents. Thus, to realise the development plans, the local residents must vacate the area. Even though residents may be requested to leave their homes, they are not afforded a real option, since any resistance to the request will lead to forced evictions. Furthermore, if the area concerned is considered public land it may result in denial of access to legal remedies or compensation for the affected people.<sup>110</sup>

Thus, an important component of the term 'forcible' is, as stated by the ICTY, that *'the displacement of persons is only illegal where it is forced, i.e. not voluntary.'*<sup>111</sup> This may seem like an obvious observation. However, it is not unusual in cases of displacement, as described above, that the responsible actor claims that the transfer was carried out with consent from the affected persons. Thus, even in cases of voluntary departure, it is of importance to establish real consent of the persons concerned.<sup>112</sup> The fact that a person has expressed consent does not eliminate the need for an inquiry into the genuine voluntary nature of such consent.<sup>113</sup> In the case of *Prosecutor v. Simic et al*<sup>114</sup>, the ICTY stated that *'an apparent consent induced by force or threat of force should not be considered to be real consent'*.<sup>115</sup>

## 4.1.2 Lawfully present

The second constitutive element of 'forcible transfer of population' requires the lawful presence of the affected people in the area from where they are

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<sup>109</sup> Triffterer, Otto, Ambos, Kai, Bassiouni, M.Cherif & Schabs, William A. (red.), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, 1. Aufl., Nomos-Verl.-Ges., Baden-Baden, 1999, page 162.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Prosecutor v. Simic et al.*, ICTY, Trial Chamber II, 17 October 2003, Case No. IT-95-9-T, para. 125.

<sup>112</sup> *Prosecutor v. Milorad Krnojelac* (2003), para. 229.

<sup>113</sup> *Prosecutor v. Milomir Stakic* (2006), para.279.

<sup>114</sup> *Prosecutor v. Simic et al.*, ICTY, Trial Chamber II, 17 October 2003, Case No. IT-95-9-T.

<sup>115</sup> *Prosecutor v. Simic et al.* (2003), para.125.

transferred. The notion of ‘lawfully present’ does however not equate with that of residence or landownership.

It is not clear in customary international law whether or not ‘lawfully present’ is limited to domestic law. Though it has not been confirmed in state practice or in jurisprudence of the international tribunals, most doctrinal sources consider that lawful presence must be assessed not only on the basis of domestic law but also by reference to international law. Taking into account the rules of interpretations enshrined in the Vienna Convention on the Law of Treaties, seen to the object and purpose of the crime against humanity, the only fair conclusion is that ‘lawfully present’ can not be determined on the sole ground of domestic law.

*Any other reading would make the definition of deportation meaningless as it would permit a government to declare that the people to be deported were not “lawfully present” in the territory of a State [...] and escape international criminal responsibility.*<sup>116</sup>

The ICCPR and ICESCR contains several provisions that refer to ‘law’ and ‘lawfulness’. Of particular relevance is the right to adequate housing in article 11(1) ICESCR. In interpreting this provision, CESCR has underlined that in cases where justification of evictions are considered, *‘it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality’*.<sup>117</sup> The Human Rights Committee (HRC) has also deliberated on the term ‘law’. In General Comment no 16, the HRC underlined that ‘law’ *‘should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’*.<sup>118</sup>

Taking all this into consideration, it is reasonable to conclude that ‘lawfully present’ relates to domestic law, provided that the law is in compliance with the state’s international obligations. Any other conclusion would allow the states to displace people, as long as pre-established domestic laws existed.

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<sup>116</sup> Triffterer, Otto, Ambos, Kai, Bassiouni, M. Cherif & Schabs, William A. (edit.) (1999), page 248.

<sup>117</sup> CESCR, General Comment No. 7, para 14.

<sup>118</sup> HRC, General Comment No. 16, para 4; emphasised in CESCR, General Comment No. 7, para 14.

### 4.1.3 Absence of grounds permitted under international law

The last requirement is ‘absence of grounds permitted under international law’. Most states carry out legitimate acts of deportation and forcible transfer of population on a frequent basis, e.g. deportations of aliens, not lawfully present in the territory of the state. Thus there are circumstances under which forcible transfer of population is permitted.

It is clear that the general reference to international law encompasses international human rights law. This is required by the very object and purpose of the crime against humanity, which is conventionally viewed as an implementation of human rights norms within international criminal law.<sup>119</sup> Most human rights instruments permit states to place restrictions on the rights of people when specific circumstances are met.

The CESCR has stated, in relation to the right to adequate housing, that there are situations where it may be necessary to impose limitations.<sup>120</sup> Limitations must however be in accordance with domestic law, have a substantive and proper justification, and be reasonable and proportional. Proper justification is, according to the Committee ‘*solely for the purpose of promoting the general welfare in a democratic society*’.<sup>121</sup> Thus, the right to development could be argued constituting a ground permitted under international law. However, the right to development is not an absolute right but must be balanced against the rights of the forcible transferred persons in order to be proportional.

Limitations on the freedom of residence and movement may also be imposed by states when specific circumstances are met. The ICCPR provides that the freedom of movement and choice of residence:

*[S]hall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*<sup>122</sup>

Thus, arguing for an overriding public interest of development may not be enough to constitute a ground permitted under international law. Even in the case where public interest of development overrides individuals wishes to remain in an area, displacement may still not be carried out in a manner which is inconsistent with other rights, such as the right to security of the person, the right to non-interference with privacy, family and home and the right to effective remedies.

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<sup>119</sup> See e.g. Rome Statute, Article 21(3).

<sup>120</sup> CESCR, General Comment No. 7, para 5.

<sup>121</sup> Ibid.

<sup>122</sup> ICCPR, article 12.

Development-induced displacement, as discussed in chapter two, often violates central human rights of the potential and actual victims.<sup>123</sup> The people being displaced are often not compensated or offered shelter, leaving them without social and economic security. Forcible transfer of population carried out in such way is not in accordance with international human rights law and can therefore not be justified under international law.

The criminality of the act depends on the purpose for and means by which the perpetrator accomplishes the forced transfer.<sup>124</sup> For example, if the transfer is motivated by development and accomplished with due regard for human rights, characterisation as a crime against humanity is unlikely. On the contrary, a brutal transfer even for purportedly justifiable reasons of development would however most likely amount to an unlawful act.

## 4.2 Contextual elements of the crime

### 4.2.1 Widespread or systematic attack

The requirement that the act must be part of a ‘widespread or systematic attack’ first appeared in the statute of the ICTR, however; the ICTY also maintained that the requirement was implicit.<sup>125</sup> This is also reflected in the ILC’s commentary of the 1996 draft Code of Crimes against the Peace and Security of Mankind, where the ILC stated that acts constituted a crime against humanity ‘*when committed in a systematic manner or on a large scale*’.<sup>126</sup> ‘Committed in a systematic manner’ criminalises acts which are conducted pursuant to a preconceived plan or policy. Thus, random acts which are not committed as part of a broader plan or policy, or committed by a person acting on his or her own initiative, are excluded. ‘On a large scale’, targets acts which are directed against a multiplicity of victims. Isolated inhumane acts directed against a single victim are accordingly disqualified.

It is firmly established in customary law that widespread or systematic is a disjunctive requirement.<sup>127</sup> Jurisprudence from ICTY and ICTR establishes ‘widespread’ and ‘systematic’ as disjunctive, meaning that

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<sup>123</sup> Terminski, Bogumil (2015), page 473.

<sup>124</sup> Rome Statue, article 7(2)(d), ‘*without grounds permitted under international law*’; Prosecutor v. Milomir Stakic (2006), para 278.

<sup>125</sup> Prosecutor v. Dusko Tadic (1997), para 648; Prosecutor v. Blaškić, ICTY, Trial Chamber, 3 March 2000, Case No. IT-95-14-T, para. 202.

<sup>126</sup> ILC (1996), at 47.

<sup>127</sup> *Ibid.*, at 47-48; see also Prosecutor v. Kunarac et al., ICTY, Appeals Chamber, 12 June 2002, Case Nos. IT-96-23 & IT-96-23/1-A, para 97.

either condition may be met to establish the existence of the crime.<sup>128</sup> Once either requirement is met, it is not necessary to consider whether the alternative requirement is also satisfied.<sup>129</sup> ICC has in its Kenya Authorization Decision from 2010 stated that *'this contextual element [of widespread or systematic] applies disjunctively, such that the alleged acts must be either widespread or systematic to warrant classification as crimes against humanity'*.<sup>130</sup>

The assessment of what constitutes a 'widespread' or 'systematic' attack is dependent on the interpretation of these terms.<sup>131</sup> Guidance can, to some extent, be found in the jurisprudence of the international courts. For example, in *Prosecutor v. Kunarac*<sup>132</sup> the ICTY emphasised that:

*A Trial Chamber must first identify the population which object of the attack and, in light of the means, methods, resources, and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities of any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population.*<sup>133</sup>

These elements will be further elaborated on in the following sections.

### *Widespread*

The adjective 'widespread' implies the large-scale nature of an attack and the number of targeted persons.<sup>134</sup> According to the ICTY *'the adjective "widespread" connotes the large-scale nature of the attack and the number of targeted persons'*.<sup>135</sup> This requirement excludes isolated acts of violence,

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<sup>128</sup> See, e.g., *Prosecutor v. Jean-Paul Akayesu* (1998), ICTR, Trial Chamber, 2 September 1998, Case No. ICTR-96-4-T, para. 579: *'the act can be part of a widespread or systematic attack and need not be a part of both'*; *Prosecutor v. Dusko Tadic* (1997), para 648: *'either a finding of widespreadness [...] or systematicity [...] fulfills this requirement'*.

<sup>129</sup> *Prosecutor v. Kunarac* (2002), para 93.

<sup>130</sup> Kenya Authorization Decision (2010), para. 94; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, ICC, Pre-Trial Chamber II, 15 June 2009, Case No ICC-01/05-01/08, para 82.

<sup>131</sup> *Prosecutor v. Kunarac* (2002), para 95.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, para 95.

<sup>134</sup> *Prosecutor v. Kunarac et al*, ICTY, Trial Chamber, 22 February 2001, Case No. IT-96-23, para. 428; *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, ICC, Pre-Trial Chamber, 30 September 2008, Case No. ICC-01/04-01/07, para. 394.

<sup>135</sup> *Prosecutor v. Kunarac* (2001), para. 428.

by persons acting on their own will as opposed to as part of a broader initiative.<sup>136</sup>

‘Widespread’ contains two key dimensions. Firstly, it can be a matter of the numbers of victims affected. According to the ICC there is however no specific numerical threshold of victims that must be met for an attack to be deemed widespread.<sup>137</sup> In light of the means, methods, resources and result of the attack upon the population, such as the size of the civilian population that was allegedly attacked, it can be determined whether the attack was widespread.<sup>138</sup> Secondly, ‘widespread’ can be in relation to the size of the geographical area in which the attack is carried out or to the attack occurring in different locations. For example, in the *Bemba* case<sup>139</sup>, the ICC found that there was sufficient evidence to establish that an attack was ‘widespread’ on the basis of reports of attacks in various locations over a large geographical area.<sup>140</sup>

The number of victims affected and the size of the geographical area can have a cumulative effect. The ICC has emphasised that *‘the assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts’*.<sup>141</sup> However, it is not required that both dimensions are realised for an act to be considered ‘widespread’. Thus, a ‘widespread’ attack can for example be in a small geographical area but against a large number of victims or vice versa.<sup>142</sup>

### *Systematic*

Similar to the term ‘widespread’, the term ‘systematic’ excludes isolated acts of violence. Coherent jurisprudence of the ICTY, ICTR and ICC establishes that systematic refers to the organized nature of acts of violence, such as a pattern or methodical plan making the random occurrence of the acts improbable.<sup>143</sup>

In addition, the ILC has in its commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, stated that the ‘systematic’ requires that the inhumane acts are committed *‘pursuant to a preconceived plan or policy’*<sup>144</sup> and that the *‘implementation of this plan or policy could result in the repeated or continuous commission of inhuman*

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<sup>136</sup> Murphy, Sean D., (2015), page 62, para 128.

<sup>137</sup> Ibid.

<sup>138</sup> Kenya Authorization Decision (2010), para. 95.

<sup>139</sup> Prosecutor v. Jean-Pierre Bemba Gombo.

<sup>140</sup> Ibid., paras. 117-124.

<sup>141</sup> Kenya Authorization Decision (2010), para. 94.

<sup>142</sup> Prosecutor v. Blaškić (2000), para. 206.

<sup>143</sup> Prosecutor v. Kunarac et al (2001), para. 429; see also Kenya Authorization Decision (2010), para. 96; Prosecutor v. Katanga (2008) para. 394.

<sup>144</sup> ILC (1996), at 47.



acts'.<sup>145</sup> The ICC has also emphasised the term 'systematic' in connection to a preconceived plan, stating that:

*[Systematic] has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts, or as 'patterns of crimes' such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis."*<sup>146</sup>

If a group of perpetrators employs similar means and methods to attack different locations or they approach targeted groups simultaneously this may indicate that the acts are not occurring coincidentally. For example, the ICC has found an attack to be 'systematic' for the following reasons:

*[T]he perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting.*<sup>147</sup>

In conclusion, 'systematic' implies that an attack is carried out in an organised manner.<sup>148</sup> This can be established by either proof of a pattern or methodical plan or policy,<sup>149</sup> or by the non-coincidental repetition of a similar criminal conduct on a regular basis.<sup>150</sup>

### *Attack*

As defined under article 7(2) of the Rome Statute attack means 'a course of conduct involving the multiple commission of acts'.<sup>151</sup> These acts do not need to be carried out using violence or be organised by the military. This is emphasised in the *Elements of Crimes* of the ICC, which provides that the acts referred to 'need not constitute a military attack'.<sup>152</sup>

Development-induced displacement usually involves exploitation of huge land areas, which requires that local residents must be removed from the region. If the residents do not leave the area voluntarily it may result in forced evictions under the guise of the establishment of large development projects. In many cases, although being aware of the

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<sup>145</sup> Ibid.; see also ILC (1991), at 103, stating that 'the systematic element relates to a constant practice or to a methodical plan to carry out such violations'.

<sup>146</sup> Prosecutor v. Katanga (2008), para. 397.

<sup>147</sup> The Prosecutor v. Bosco Ntaganda, ICC, Pre-Trial Chamber II, 13 July 2012, Case No. ICC-01/04-02/06-36-Red, para. 31.

<sup>148</sup> Prosecutor v. Kunarac et al (2001), para. 429.

<sup>149</sup> See e.g., Prosecutor v. Dusko Tadic (1997), para. 648.

<sup>150</sup> Prosecutor v. Kunarac (2002), para. 94.

<sup>151</sup> Rome Statute, article 7(2).

<sup>152</sup> ICC, Elements of Crimes, article 7(3).

consequences, governments not only support these projects, but may through their authorities, assist in the evictions. According to the ILC, deliberate failure to take actions may be assimilated with an attack, if the failure was aimed to encourage such an attack.<sup>153</sup> This is emphasised in jurisprudence of the ICTY, ICTR and ICC.<sup>154</sup> For example, in *Prosecutor v. William Samei Ruto and Joshua Arap Sang*<sup>155</sup>, the ICC stated:

*However, there has been overall agreement that crimes against humanity are not isolated events that randomly occur (not spontaneous), but are the result from a deliberate attempt to target a civilian population, either by taking actions against civilians or deliberately abstaining to take action against such an attack.*<sup>156</sup>

In situations where a state intentionally encourages crimes through inaction the deliberate failure may amount to an attack. Thus, the most reasonable conclusion is that inactions can constitute a crime against humanity. Any other interpretation would lead to the conclusion that governmental actors, who deliberately fail to prevent the displacement of people through e.g. arbitrary evictions, cannot be held responsible under international criminal law.

## 4.2.2 Directed against any civilian population

### *Directed against*

The term ‘directed against’ emphasises that civilians must be the primary, rather than an incidental, target of an attack. The ICTY has, for example, repeatedly defined ‘directed against’ as ‘*an expression, which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack’.*<sup>157</sup> In order to determine whether an attack may be said to be ‘directed against’ a civilian population ‘*the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course*’<sup>158</sup> may be considered.

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<sup>153</sup> Murphy, Sean D., (2015), page 68, para 141.

<sup>154</sup> See e.g. *Prosecutor v. Georges Rutaganda*, ICTR, Trial Chamber, 6 December 1990, Case No. ICTR-96-3-T, para 84, ‘*this act or omission includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals*’; *Prosecutor v. Kupreskic et al. (2000)*, paras. 551-55.

<sup>155</sup> *Prosecutor v. William Samei Ruto and Joshua Arap Sang*, ICC Trial Chamber, 5 April 2016, Case No. ICC-01(09-01/11, Annex I.

<sup>156</sup> *Ibid.*, para 44. Referring to e.g. *Prosecutor v. Jean-Pierre Bemba Gombo* (2009), para 159, *Prosecutor v. Katanga* (2014), para 1108-1110; *Prosecutor v. Dusko Tadic* (1997), para 543.

<sup>157</sup> *Prosecutor v. Kunarac* (2002), para 91.

<sup>158</sup> *Ibid.*, para 91-92; see also *Prosecutor v. Milomir Stakic* (2006) para 624.

To establish whether a case of development-induced displacement is targeting a civilian population one must first ask whether the civilian population are the intended target of the attack. As for a development project, the intended outcome would usually not be an attack on the civilian population but rather economic welfare etc. However, the overall intention of the project is not to be confused with the intention of the attack carried out to achieve the goal of development. The attack is the act of displacement, not the development project as such.

This conclusion is also supported by the ICC. The Court has found that there is sufficient evidence that an attack is ‘directed against’ the civilian population if the civilians are being attacked inside their houses or in their courtyards.<sup>159</sup> Thus, being forcibly transferred through e.g. forced evictions carried out during night-time by demolition workers escorted by armed forces, the purpose of development may likewise constitute an attack.

#### *Any civilian population*

According to ILC the word ‘any’ indicates that ‘civilian population’ is to have a wide definition and should be interpreted broadly.<sup>160</sup> The ‘civilian population’, which the attack is directed against, must not have a distinguishing feature. An attack can be committed against any civilian population, ‘regardless of their nationality, ethnicity or any other distinguishing feature’.<sup>161</sup> The ILC has underlined that, during peacetime, ‘civilian’ includes all persons.<sup>162</sup> To establish whether a civilian population is targeted, the ICTY has further emphasised that it is the intention of the attack rather than the physical result of the attack that should be guiding the assessment.<sup>163</sup>

Furthermore, ‘population’ does not require the entire population of a given geographical location to be subject to an attack.<sup>164</sup> Rather, the term implies the collective nature of the crime, meaning it is an

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<sup>159</sup> Prosecutor v. Jean-Pierre Bemba Gombo (2009), para. 94: ‘having reviewed the Disclosed Evidence as a whole, the Chamber believes that there is sufficient evidence, in particular, statements of witnesses victimised [...] establishing that civilians have been attacked often inside their houses or in their courtyards by armed MLC soldiers’.

<sup>160</sup> Murphy, Sean D., (2015), page 65, para 135; see also Prosecutor v. Dusko Tadic (1997), para. 643; Prosecutor v. Kupreskic et al., para. 547: ‘a wide definition of civilian and population is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity’.

<sup>161</sup> See, e.g., Prosecutor v. Kunarac et al, para. 423; Prosecutor v. Katanga (2008), para 399; Prosecutor v. Jean-Pierre Bemba Gombo 2009, para 76.

<sup>162</sup> Murphy, Sean D., (2015), page 66, para 135.

<sup>163</sup> See, e.g. Prosecutor v. Blaškić (2000), para. 401.

<sup>164</sup> Prosecutor v. Jean-Pierre Bemba Gombo (2009), para. 77: ‘the Prosecutor need not prove that the entire population of the geographical area, when the attack is taking place, was being targeted’.

attack upon multiple victims.<sup>165</sup> Thus, it is sufficient to show that enough individuals were targeted or that they were targeted in such way that it is clear that the attack is directed against the population, rather than a limited and randomly selected number of individuals.<sup>166</sup>

### 4.2.3 Pursuant to or in furtherance of a policy

A policy element is required for the crime against humanity according to the Rome Statute.<sup>167</sup> The requirement has been addressed in several cases before the ICC. The Court has emphasised that the policy required to establish a crime does not need to be formally established or declared in advance of an attack.<sup>168</sup> Rather, the policy can be assumed from the repetition of acts, preparatory activities or collective mobilisation.<sup>169</sup> Thus, the policy need not be concrete or precise, and may evolve over time.<sup>170</sup>

The ILC, in its first report on the crime against humanity from 2015, includes the policy element as defined in the Rome Statute, in the definition of the crime against humanity.<sup>171</sup> Suggesting that customary international law requires an attack to be pursuant to or in furtherance of a policy is however not all uncontroversial.

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<sup>165</sup> Prosecutor v. Dusko Tadic (1997), para. 644.

<sup>166</sup> Prosecutor v. Milomir Stakic (2006) para 627; Prosecutor v. Jean-Pierre Bemba Gombo (2009), para 77.

<sup>167</sup> Rome Statute, article 7(2)(a), stating that '*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>168</sup> Prosecutor v. William Samei Ruto and Joshua Arap Sang, ICC Trial Chamber, 5 April 2016, Case No. ICC-01(09-01/11) para 301, stating: '*it is possible - and sensible - to construe 'organisational policy' to mean no more than 'coordinated course of action.'* The concept will thus include, as an attack against a civilian population, the conduct of one individual who executed multiple large-scale attacks against innocent civilians in a systematic way, or one planned large-scale attack that inflicted a widespread harm to a civilian population'.

<sup>169</sup> Prosecutor v. Katanga, Judgement pursuant to article 74 of the Statute, ICC, Trial Chamber II, 7 March 2014, Case No. ICC-01/04-01/07 para 1109, stating: '*it is important to underline that it is relatively rare, although cannot be wholly excluded, that a State or organisation seeking to encourage an attack against a civilian population might adopt and disseminate a pre-established design or plan to that effect. In most cases, the existence of such a State or organisational policy can therefore be inferred by discernment of, inter alia, repeated actions occurring according to a same sequence, or the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation*'.

<sup>170</sup> Ibid., para 1110: '*some aspects of the policy pursued against a civilian population will only crystallise and develop as actions are set in train and undertaken by the perpetrators*'.

<sup>171</sup> Murphy, Sean D. (2015), page 84, para 177.

There are divergent opinions on whether the existence of a policy or plan constitutes a distinct legal requirement of the contextual elements of the crime against humanity. The statutes of the ICTY and the ICTR contain no policy requirement in the definition of crimes against humanity. However, in the early jurisprudence of the courts, the policy element was considered a constitutive element of crimes against humanity.<sup>172</sup> In later jurisprudence, the policy element has been downplayed. Thus, ICTY and ICTR regard it as sufficient simply to prove the existence of a widespread or systematic attack.<sup>173</sup> For example, in *Prosecutor v. Kordic*<sup>174</sup>, the ICTY stated that, '*in the Chamber's view, the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity*'.<sup>175</sup>

A systematic attack inevitably implies a policy element. However, in regard to a widespread attack the policy element raises the question as to how an attack can be widespread but not systematic, and still somehow be connected to a policy. In other words, can a widespread attack, which is not organised or planned, be the object of a policy? If the answer is no, the requirement of a policy leads to the conclusion that widespread is not disjunctive to systematic.

Customary international law clearly provides for 'widespread' and 'systematic' in the alternative. 'Widespread' by its inherent meaning in customary international law lacks guidance and organisation. Thus, if 'pursuant to or in furtherance of a policy' were interpreted in accordance with the ordinary meaning given to the term 'policy', the conclusion would be contradictory. A uniform interpretation of the crime against humanity under customary international law would instead be to accept 'policy' to consist of the deliberate denial of protection for victims of 'widespread' but unsystematic crimes, such as a 'policy' of toleration.

Such interpretation would cover cases where government officials, who has the ability to intervene, adopts a 'policy' of toleration in regard to widespread atrocities carried out by internal or external actors. For example, this may be the case when large corporations, through different illegal means, force the transfer of the local residents from an area to gain easier access to natural resources or land for the purpose of large-scale development projects. If the government, for economic or political gain, consciously refrains from putting a stop to the forcible transfer of the population, this could then satisfy the policy requirement.

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<sup>172</sup> *Prosecutor v. Tadic* (1997), para. 653; *Prosecutor v. Akayesu* (1998), para. 580.

<sup>173</sup> *Prosecutor v. Kunarac et al.* (2002), para. 98; *Prosecutor v. Jean-Paul Akayesu* (1998), para. 580.

<sup>174</sup> *Prosecutor v. Kordic* (2004).

<sup>175</sup> *Ibid.*, supra note 52, para. 182.

### *The Entity behind the Policy*

Another question, which arises from the requirement of a policy, is which entity has authority to carry out a policy for it to be sufficient to constitute a crime against humanity. The ILC, commenting on the 1991 draft provision on crimes against humanity, stated:

*[ILC] does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code.*<sup>176</sup>

In the 1996 draft Code of Crimes against the Peace and Security of Mankind, the ILC further defined crimes against humanity as an attack ‘[...] committed in a systematic manner or on a large scale and instigated or directed by a Government or by an organization or group’.<sup>177</sup>

Article 7 of the Rome Statute explicitly contemplates crimes against humanity by non-state perpetrators. Jurisprudence from the ICC suggests that ‘organisational’ includes any organisation or group with the capacity and resources to plan and carry out a widespread or systematic attack.<sup>178</sup> For example, in its Kenya Authorization Decision 2010<sup>179</sup>, the Court stated:

*[T]he formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn about whether a group has the capability to perform acts which infringe on basic human values.*<sup>180</sup>

As such, the ICC rejected the idea that only State-like organisations may qualify as organisations for the purpose of article 7.<sup>181</sup> In difference to the Rome Statute, neither the statutes of ICTY nor ICTR mentions a policy prerequisite, however, jurisprudence of the courts seems to have accepted the possibility of non-state actors being prosecuted for crimes against humanity. For example, in the Tadić case<sup>182</sup>, the ICTY stated that:

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<sup>176</sup> ILC (1991), at 103-04.

<sup>177</sup> ILC (1996), at 47.

<sup>178</sup> Prosecutor v. Katanga (2008), para. 396, citing jurisprudence of ICTY and ICTR: ‘accordingly, in the context of a widespread attack, the requirement of an organisational policy pursuant to article 7(2) (a) of the Statute ensures that the attack, [...] must still be thoroughly organised and follow a regular pattern. [...] Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population’; see also Prosecutor v. Jean-Pierre Bemba Gombo (2009), para. 81.

<sup>179</sup> Kenya Authorization Decision (2010).

<sup>180</sup> Ibid., para. 90.

<sup>181</sup> Ibid., para. 90.

<sup>182</sup> Prosecutor v. Dusko Tadic (1997).

*[T]he law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory.*<sup>183</sup>

The organisation of large-scale development projects usually involves a large range of different actors. The various stakeholders of a development project may include local governments, municipal authorities, shareholders, development corporations, building corporations, property owners, etc. The state carries the primary responsibility for respecting, protecting and promoting the human rights of potentially affected people. The state has the primary responsibility under international human rights law to ensure that non-state actors are prevented from violating rights and that they are held accountable where breaches do occur. However, the jurisprudence from the international tribunals, although unambiguous, may suggest that private corporations and shareholders not directly linked to the state may also be considered as the entity behind the policy. Due to the lack of state practice it is however difficult, as things stand today, to argue that such interpretation is in accordance with customary international law.

#### **4.2.4 With knowledge of the attack**

Government officials with interest in development projects may knowingly accept that their activities will almost certainly contribute to gross human rights violations through the forcible transfer of population, even though they rarely act with that aim. In general, a person is criminally responsible for certain conduct only when a mental element with respect to this conduct exists. However, in regard to crimes against humanity, apart from the required criminal intent for the underlying offences, e.g. forcible transfer of population, the perpetrator must also commit the act ‘with knowledge of the attack’. Thus, in addition to criminal intent, it must be established that the intent is adjoined to the contextual elements, i.e. a widespread or systematic attack against a civilian population.<sup>184</sup>

Neither the statute of the ICTY nor the ICTR elaborate on the nature of intent needed in relation to the contextual elements of the crime against humanity.<sup>185</sup> However, in jurisprudence from the tribunals there seems to be no dispute that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a

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<sup>183</sup> Ibid., para. 654.

<sup>184</sup> Murphy, Sean D., (2015), page 73, para 151; Prosecutor v. Blaškić (2000) para 244.

<sup>185</sup> Ibid.

part of that attack.<sup>186</sup> This approach is also reflected in the ICC's Elements of Crimes, which for each of the proscribed acts requires that *'the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population'*.<sup>187</sup>

The Elements of Crimes further emphasises that 'knowledge' should not be interpreted as requiring proof that the perpetrator knew that the conduct was part of a widespread or systematic attack against a civilian population.<sup>188</sup> Rather, as confirmed by the ICTY, 'knowledge' *'can be implied from the circumstances'*.<sup>189</sup> Assuming that 'knowledge' can be implied from circumstantial evidence, it may, consequently, be sufficient that a perpetrator is aware of the risk that his or her conduct is part of an attack. It is not necessary to prove that the perpetrator has actual knowledge. This definition of 'knowledge' has been confirmed by ICTY in its later jurisprudence.<sup>190</sup>

In a few judgments from the international courts, the threshold for knowledge, either explicitly or implicitly, has accepted that the perpetrator had knowledge of a possible, as distinct from inevitable, outcome of his actions combined with a positive mental or emotional disposition towards it.<sup>191</sup> This suggests that the perpetrator does not need to have detailed knowledge of the particularities of an attack, but must simply be aware of the facts related to the attack, which increase the gravity of his or her conduct.

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<sup>186</sup> The requirement was first formulated in Prosecutor v. Dusko Tadic (1997), para 656-657: *'the perpetrator must know of the broader context in which his act occurs'*, and para 248: *'the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fits in to such pattern'*.

<sup>187</sup> ICC, *Elements of Crimes* (2000), article 7(1)(a); Murphy, Sean D., (2015), page 73, para 151.

<sup>188</sup> ICC, *Elements of Crimes* (2000), article 7(2).

<sup>189</sup> See Prosecutor v. Dusko Tadic (1997), para. 657, stating *'while knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances'*.

<sup>190</sup> Prosecutor v. Kunarac et al. (2002), para. 102, the Appeals Chamber underlined that *'the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack'*.

<sup>191</sup> See e.g. Prosecutor v. Blaškić (2004), para 42.



# 5 Forcible Transfer in Mombasa, Kenya

*In May 2015, government officials forcibly evicted over one hundred people from Jomvu, an informal settlement in Mombasa. The forced evictions were carried out to make way for a highway expansion project financed by a number of international development banks. A bulldozer razed their homes, leaving many homeless and destroying their means of a livelihood.*

*In this chapter the findings in chapter 4 are applied to the forced evictions carried out in Jomvu in 2015, and it is analysed whether or not they constitute a crime against humanity. The following questions are addressed: (1) was there, in fact, a ‘deportation or forcible transfer of population’, through ‘expulsion or other coercive acts’; (2) were the persons subject to such transfer ‘lawfully present’ in the area from which they were removed; (3) did the acts in question constitute a ‘widespread or systematic attack directed against any civilian population’; and (4) are there grounds under international law under which the forcible transfer could take place.*

*The facts presented in this chapter on how the evictions was carried out are based, unless otherwise indicated, on a report made by Amnesty International in 2015, named “Driven Out for Development: Forced Evictions in Mombasa”<sup>192</sup>. It is based on research conducted by Amnesty International in Mombasa in 2015.<sup>193</sup> On the assumption that the factual findings of the Amnesty report are accurate, the conclusions reached therein are adopted for the purpose of this analysis.*

## 5.1 The Mombasa-Mariakani Road Dualling Project

The development of transport and infrastructure is a key strategy for achieving economic growth, wealth creation and poverty eradication in Kenya.<sup>194</sup> To achieve this strategy, the so-called *Vision 2030*<sup>195</sup> has been

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<sup>192</sup> Amnesty International, *Driven out for Development: Forced evictions in Mombasa, Kenya*, (2015), available at: <https://www.amnesty.be/IMG/pdf/afr3224672015english.pdf> [accessed 21 May 2017].

<sup>193</sup> *Ibid.*, page 8.

<sup>194</sup> Office of the Prime Minister, Ministry of Planning, National Development and Vision 2030, Sessional Paper No. 10 of 2012, on Kenya Vision 2030, 2012, page 13.

implemented. One of its flagship schemes is the Mombasa-Mariakani Road Dualling Project, which is funded mainly by international investors, such as the African Development Bank Group, the European Investment Bank and the EU - Africa Infrastructure Trust Fund.<sup>196</sup>

The stretch of road is approximately 41 kilometres and forms part of the 500 km Mombasa-Nairobi highway that also constitutes part of the Northern Corridor linking the Kenyan Coast with the neighbouring countries of Uganda, Sudan and Rwanda.<sup>197</sup> The project essentially involves widening part of the current A 109 highway by 60 metres to ensure a smooth flow of traffic, which according to the lead engineering consultant will improve travel time, result in lower emissions and fuel consumption, reduce congestion, and improve the safety, surface drainage and pedestrian mobility along the road.<sup>198</sup>

However, since commercial and residential properties, as well as a number of large factories currently occupy the land parallel to the existing highway, its widening will inevitably lead to displacement.<sup>199</sup> The Resettlement Action Plan (RAP) for the project identified 488 households representing 1352 persons that would have to be relocated for the realisation of the project.<sup>200</sup> In charge of implementing the project, the Environmental and Social Impact Assessment Report of October 2014 and the Resettlement Action Plan (RAP) of October 2014 is the Kenya National Highways Authority (KENHA), an agency of the national government under the Ministry of Transport.<sup>201</sup> The RAP states that:

*[The project] will be implemented by compensating the individuals affected by the proposed road upgrading activities. The compensation and assistance allowances will enable the [project affected persons] to relocate and pave way for the road construction. In compliance with both the national regulations and the AfDB policy and procedures, all [project affected persons] will be resettled and compensated before the construction activities commence.*<sup>202</sup>

Thus the following four components must be satisfied before the relocation can begin; (1) notification; (2) verification of properties of project affected persons and estimation of their type and level of losses; (3) preparation of

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<sup>195</sup> Office of the Prime Minister, Ministry of Planning, National Development and Vision 2030, Sessional Paper No. 10 of 2012, on Kenya Vision 2030, 2012.

<sup>196</sup> Ibid., page 16; see also Amnesty International (2015), page 16.

<sup>197</sup> Ibid., see also Environmental and Social Impact Assessment Report by AECOM RoA (Pty) Ltd and CAPE Consult for Kenya National Highways Authority, October 2014, Executive summary.

<sup>198</sup> Environmental and Social Impact Assessment Report (2014), page 21.

<sup>199</sup> Environmental and Social Impact Assessment Report (2014), Executive summary.

<sup>200</sup> *Resettlement Action Plan* (2014), page 10.

<sup>201</sup> Environmental and Social Impact Assessment Report (2014), Executive summary.

<sup>202</sup> Resettlement Action Plan (2014) page XXVI.

entitlement persons for Land Acquisition, and; (4) relocation and resettlement of the project affected people.<sup>203</sup> According to the RAP, the time scale for the resettlement process was estimated to take fourteen months taking into account potential conflicts and grievance resolutions that may take place throughout the process.<sup>204</sup>

## 5.2 Background

Mombasa County, where the project is partly carried out, is one of the most densely populated counties in Kenya. Unresolved historical land ownership disputes have led to large areas of land being occupied by people who do not have a legally recognised right to the land.<sup>205</sup> One informal settlement along the A109 highway between Mombasa and Mariakani, affected by the RAP, is Jomvu.<sup>206</sup> The section of Jomvu that is close to the highway is located on land that has been set aside for the construction of roads.<sup>207</sup> Known as the road reserve, such land is considered public land and is held by the national government, thus few of the structure owners have security of tenure.<sup>208</sup> The section of Jomvu along the highway comprises small residential and commercial properties, as well as a few small factories.<sup>209</sup>

On 19 and 20 January 2015, KENHA issued eviction notices to residents and business owners in Jomvu, stating that they had infringed on the national road reserve.<sup>210</sup> The notices gave the project-affected persons 30 days to leave the area and stated that failure to do so would lead to KENHA taking steps to remove the structures. According to Amnesty International's report, the notice did not state the purpose of the eviction, nor whether affected people would be entitled to any legal redress, compensation or assistance towards resettlement.<sup>211</sup> Instead, by citing the Kenya Traffic Act, making it an offence to encroach onto a road or areas reserved for the road, the Authority informed the affected people that if they remained in the area, this would constitute an offence, which upon

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<sup>203</sup> Ibid., page XXI.

<sup>204</sup> Ibid., page XXII para 6.

<sup>205</sup> Amnesty International (2015), page 6.

<sup>206</sup> RAP (2014), page XII.

<sup>207</sup> Ibid., page 18; see also *Services for conduct of an eviction audit and preparation of a corrective action plan for the Mombasa-Mariakani Road Project*, Final audit report, March 2016, para 1.4.

<sup>208</sup> The Kenya Roads Act 2007, section 49.1; Final Eviction Audit Report (2016), para 2.2.5.

<sup>209</sup> RAP (2014), page 9; Final Eviction Audit Report (2016), para 4.1.

<sup>210</sup> *Environmental and Social Impact Assessment Report (2014)*, page 3; Amnesty International (2015), page 20-21.

<sup>211</sup> Amnesty International (2015), page 20-21.

conviction could lead to imprisonment or a fine.<sup>212</sup> Around the same time, unidentified people came to the settlement and painted large yellow crosses on the homes and shops of those to be evicted.<sup>213</sup> The 30 days passed by without any communication on the impending evictions or compensation.

On 17 May 2015, around midnight, an unknown demolition group with a bulldozer entered the area of Jomvu accompanied by armed police. According to Amnesty International researchers *'the bulldozer, accompanied by armed police, systematically demolished shops and homes that bore yellow crosses and were adjacent to the highway'*.<sup>214</sup> Neither the demolition workers, nor the police, announced who had ordered the evictions. The demolition stopped at around 4 am. At this time more than 30 structures had been demolished, leaving in excess of a hundred people homeless.<sup>215</sup> Before leaving, the demolition workers told the people whose houses were not yet demolished, to demolish their homes themselves. They also announced that they would return the following night to complete the task of demolishing all marked structures. As a result, many people started demolishing their own homes as they felt that they had no choice and this way they could salvage some of the more expensive construction material for reuse. However, the bulldozer did not return.<sup>216</sup>

The following month, neither the government, nor any other agency, visited the area to explain what was happening or address the needs of those who had been forcibly evicted. It was not until August 2015, three months after the evictions, that KENHA organised a public meeting. Those attending were informed that the area needed for the project would be cleared of all structures by June 2016.<sup>217</sup> At the time of writing, people have not seen any compensation nor have they been offered any social support to resettle elsewhere. Thus, many of the affected people remain without a place to live.<sup>218</sup>

### 5.3 Responsible actors

The Government of Kenya (the Ministry of Transport and Infrastructure), through the KENHA, is the main responsible actor for the Mombasa-

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<sup>212</sup> Ibid.

<sup>213</sup> Ibid.; see also Final Eviction Audit Report (2016), para 1.4.

<sup>214</sup> Amnesty International (2015), page 22.

<sup>215</sup> Ibid., page 5.

<sup>216</sup> Ibid., page 23; Final Eviction Audit Report (2016), para 1.4.

<sup>217</sup> Ibid., page 32.

<sup>218</sup> Amnesty International (2015), page 55; contradictory numbers is found in the Final Eviction Audit Report (2016), para 4.2.3.

Mariakani Road Dualling Project.<sup>219</sup> KENHA is an explicit regulatory function. The organisation of the project involves a large range of actors. The various stakeholders of the highway project include, inter alia, the national government, municipal authorities, international and national shareholders such as the African Development Bank Group, the European Investment Bank and the EU - Africa Infrastructure Trust Fund and contracted road construction and demolition workers.

It is noteworthy to mention that the state carries the primary responsibility for respecting, protecting and promoting the human rights of the people of Jomvu.<sup>220</sup> The development-induced displacement, through forced evictions and demolition of structures, was carried out by KENHA, with assistance of the County Commissioner's office and OCPD Changamwe Police Station.<sup>221</sup>

Due to the limited information available on the details concerning the displacement, it is currently not possible to identify a public official who individual criminal responsibility can be imposed on. Thus, the present analysis will not deal with the criminal responsibility of specific or identifiable individuals, but rather whether the kind of conduct carried out within the *Mombasa-Mariakani Road Dualling Project* can amount to a crime against humanity.

## 5.4 Forcible transfer of population

On the question of whether there was in fact a forcible transfer of population as defined in customary international law, it is clear from the facts given in the background that the requirements, namely, that there be transfer of one or more persons and that such transfer be coerced or forced, have been met. Because the transfers were executed without the consent of the individuals concerned and a range of coercive measures were employed to force people to flee their homes, including destruction of their homes, it is reasonable to conclude that the acts fall within the range of practices proscribed as forcible transfer in customary law.<sup>222</sup> To constitute forcible transfer of population under the scope of a crime against humanity, it must further be established that the people forcibly transferred were lawfully in the area and that the impugned acts do not fall under any exception in international law allowing for a forcible transfer of population.

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<sup>219</sup> RAP, Executive summary.

<sup>220</sup> Final Eviction Audit Report (2016), para 1.1; Environmental and Social Impact Assessment Report (2014), Executive summary.

<sup>221</sup> Eviction Audit Report (2016), para 1.4.

<sup>222</sup> See Chapter 4.1.1 for a definition of 'forcible' in customary international law.

### 5.4.1 Legality of the evictions

As concluded in Chapter 4.1.2, it is reasonable to assume that ‘lawfully present’ relates to domestic law, provided that the law is in compliance with the state’s international obligations. Thus, to answer the question of whether or not the persons subject to forcible transfer in the *Mombasa-Mariakani Road Dualling Project* were ‘lawfully present’ in the area from which they were removed, two sub-questions must be addressed, specifically; (1) were the persons subject to the forcible transfer ‘lawfully present’ under Kenyan domestic law and, (2) assuming that the persons subject to the forcible transfer were not lawfully present under Kenyan domestic law, is that law compatible with international law?

#### *Kenyan Domestic Law*

Kenya’s Constitution of 2010 recognises a number of economic, social and cultural rights including the right to housing. Article 43 (1b) of the Constitution states that *‘[e]very person has a right to accessible and adequate housing and to reasonable standards of sanitation’*.<sup>223</sup> The right to housing is limited by Article 40(3) of the Constitution which gives the state the right to compulsorily acquire land and deprive any individual of his right to land for public purpose.<sup>224</sup>

Kenya’s Land Act of 2012 covers compulsory acquisition of interests in land as well as eviction due to unlawful occupation of land.<sup>225</sup> According to the act, compulsory acquisition of land is only lawful when it can be demonstrated that the land is required for fulfilling a public purpose.<sup>226</sup> To be lawful the procedure must further allow notice, compensation and judicial intervention.<sup>227</sup> In cases of compulsory acquisition, the act provides for just compensation, however only for those whose interests in the land have been established.<sup>228</sup> The protection that the Act affords through the process of compulsory acquisition therefore does not apply to people and informal settlements occupying public land.

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<sup>223</sup> Kenya: Constitution of 2010, article 43 (1b).

<sup>224</sup> Kenya: Constitution of 2010, article 40 (3).

<sup>225</sup> Kenya: Act No. 6 of 2012, Land Act, 2012, part VIII and XI.

<sup>226</sup> *Ibid.*, Part VIII, para 110 (1), stating *‘land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose’*.

<sup>227</sup> *Ibid.*, part VIII.

<sup>228</sup> *Ibid.*, part VIII, para 109.

Unlawful occupation of public land, according to the Act, means *'any person who, without, express or implied, lawful authority or without any right or license, under customary or statutory land law so to do occupies, or erects any building on any public land'*.<sup>229</sup> Furthermore, according to the Kenyan Traffic Act of 2013, it is an offence to encroach onto a road or areas reserved for the road including by erecting a building, constructing a fence or planting a tree. The Act grants the KENHA authority to remove such encroachments from the road or areas reserved for the road.<sup>230</sup>

The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012 gives effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons and the United Nations Guiding Principles on Internal Displacement. It requires the government to provide full information to internally displaced persons and ensure their effective participation in the planning, management of the displacement and in defining suitable durable solutions.<sup>231</sup> According to the Act, an 'internally displaced person' means:

*[A] person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of [...], large scale development projects, [...], and who have not crossed an internationally recognized State border.*<sup>232</sup>

The Act sets principles for suitable solutions for internally displaced people including enjoyment of an adequate standard of living and access to mechanisms that restore housing, land or property. Furthermore, the Act provides that displacement should be carried out in a manner that respects human rights, especially of those who may be vulnerable to discrimination and marginalization.<sup>233</sup>

Section 21 and 22 of the Act focus on displacement resulting from large-scale development projects. They state that displacement due to large-scale development projects may be permissible in exceptional cases where there are no feasible alternatives to displacement.<sup>234</sup> However, in cases where displacement is permissible, certain safeguards against forced evictions must be fulfilled, these include, inter alia, to hold public hearings on the planned displacement, to demonstrate that all feasible alternatives to displacement have been duly considered and to provide access to effective

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<sup>229</sup> Ibid., part XI, para 155.

<sup>230</sup> Kenya: Act No. 39 of 2013, Traffic Act, 2013, part X, para 91.

<sup>231</sup> Kenya: Act No. 56 of 2012, *The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act*, 2012.

<sup>232</sup> Ibid., part I, para 2.

<sup>233</sup> Ibid., part V, para 22(4).

<sup>234</sup> Ibid., part V, para 21-22.

remedies.<sup>235</sup>

Since, Jomvu is an informal settlement, the majority of people living there would qualify as unlawful occupants, and are therefore not granted legal protection, such as notice, compensation or judicial intervention under the Kenyan Land Act. During a public sensitisation meeting, KENHA explained that there would be land acquisition, compensation and the disbursement of a disturbance allowance. For people occupying the land without a title, KENHA representatives said that they would only recognise formal documentation, thus excluding the majority of the victims.<sup>236</sup>

However, as established in the previous chapter, ‘lawfully’, should not be taken to refer solely to domestic law, such interpretation would accord the government a *carte blanche* to behave as it likes, provided that it did so in accordance with pre-established domestic rules. Thus, ‘lawfully present’ should be taken to refer to Kenyan domestic law to the extent that it is consistent with Kenya’s international obligations.

#### *Kenya’s International Obligations*

The Government of Kenya is obligated under a range of regional and international human rights treaties, to respect, protect and fulfil human rights, in particular the right to adequate housing.<sup>237</sup> The CESCR, established to oversee implementation of the ICESCR to which Kenya is party, has emphasized that even when an eviction is considered to be justified, ‘*it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality*’.<sup>238</sup> From the description of evictions carried out in Jomvu, it is clear that the KENHA showed obvious disregard for people’s safety, human rights and dignity. Moreover, they neglected to put in place the necessary human rights safeguards, such as meditation, procedural safeguards and compensation, against forced evictions before carrying out the demolitions in Jomvu.<sup>239</sup>

The CESCR has further emphasised that evictions are only to be considered justified when they are carried out in strict compliance with principles of international law and due process requirements.<sup>240</sup> Among the

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<sup>235</sup> Ibid.

<sup>236</sup> Amnesty International (2015), page 33.

<sup>237</sup> The human rights treaties include ICESCR, which guarantees among others, the rights to health, education, water, sanitation and housing. The right to adequate housing is guaranteed under Article 11(1) of the ICESCR. The obligations to respect, protect and fulfil these and other human rights extends to all levels of government from the national to the local, as well as to state agencies.

<sup>238</sup> CESCR, General Comment No. 7, para 14.

<sup>239</sup> Eviction Audit Report (2016), para 1.4.

<sup>240</sup> CESCR, General Comment No. 7, para 14.



safeguards listed by the Committee, lawful evictions may not take place in particularly bad weather or at night.<sup>241</sup> Contrary to this safeguard, the Jomvu evictions were carried out from midnight to early morning, at a time when people were asleep. The timing of the forced eviction not only caught people by surprise, which made them unable to react, but also instilled fear and panic among community members.

The CESCR, has also clarified that a government should respect the right to adequate housing including by refraining from the use of forced evictions, protecting people from interference with their rights by third parties such as landlords, and adopting appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to adequate housing.<sup>242</sup> Thus, while it is clear that many of the people in Jomvu were not lawfully present in the area under domestic land law, excluding these people from legal protection is clearly in conflict with international law.

Although KENHA officials had issued eviction notices to Jomvu residents in January 2015 and painted large yellow crosses marking their homes and businesses for demolition. The authority had not taken any steps to consult with the affected people, to inform them about the timeline for the eviction, its process or made any information on compensation or resettlement measures available to them.

In regard to lawfully present it may also be noted that the ICC, when investigating forcible transfer in Kenya as the result of post-election violence following the 2007-2008 national election, found nothing to indicate that the targeted civilians were not lawfully present in the areas from which they were evicted, or that such evictions were justified under international law.<sup>243</sup> The destruction of property, forced evictions and displacement of people were, however, likewise carried out in some of Nairobi's informal settlements.<sup>244</sup>

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<sup>241</sup> Ibid., para 15.

<sup>242</sup> Ibid., para 13.

<sup>243</sup> Kenya Authorisation Decision (2010).

<sup>244</sup> Ibid., para 76.

## 5.5 Satisfaction of the contextual elements

### 5.5.1 The forced evictions is part of a widespread or systematic attack

This section aims to determine whether the forced evictions were committed as part of a widespread or systematic attack. To begin with, it must be noted that an act can, as mentioned in Chapter 4.2.1., be part of a widespread or systematic attack and need not be part of both.<sup>245</sup> The term ‘widespread’ may be understood as requiring a minimum scale of crimes, while the term ‘systematic’ refers to the methods and policy of the crimes.

Seen in a larger perspective the forced evictions as a result of development projects can constitute part of a ‘widespread’ attack. In order to prove a pattern, it has to be established that the same things happened in the same manner on different occasions with sufficient frequency.<sup>246</sup> Similar acts have been taken place in numerous places around Kenya, directed against a multiplicity of victims. E.g. in October and November 2011, state authorities carried out mass forced evictions in five informal and formal settlements in Nairobi. The settlements were located close to the Jomo Kenyatta International Airport. Thousands of people were affected by the evictions, some carried out at night despite an existing temporary injunction from the High Court preventing demolition and evictions taking place pending a hearing regarding ownership of the land on which the settlement was located. Government officials maintained that evictions close to the airports were necessary because the settlements were around restricted airport areas.<sup>247</sup> Another example is from January 2014, when the Kenya Forest Service forcibly evicted hundreds of people belonging to Sengwer, an Indigenous People living in Embobut Forest in the Cherengany Hills area of Kenya.<sup>248</sup>

In April 2016 the CESCR, in its concluding observations on the combined second to fifth periodic reports of Kenya, emphasised that:

*[C]ommunities and persons living in informal settlements are under constant threat of eviction due to the lack of legal security of tenure and that*

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<sup>245</sup> ILC (1996), at 47-48; see also Prosecutor v. Kunarac et al., ICTY, Appeals Chamber, 12 June 2002, Case Nos. IT-96-23 & IT-96-23/1-A, para 97.

<sup>246</sup> Prosecutor v. William Samei Ruto and Joshua Arap Sang (2016), Annex I, page 42, para 112.

<sup>247</sup> Amnesty International, *Kenya: Submission to the United Nations Committee on Economic, Social and Cultural Rights on the 57th session*, (2016), page 5-7.

<sup>248</sup> Ibid.

*forced evictions continue without prior notice and provision of adequate alternative housing or compensation.*<sup>249</sup>

The Committee further stated that Kenya had not enacted a legislative framework to recognise and protect communities' right to land and that explicitly prohibits forced evictions and define the circumstances and safeguards subject to which evictions may be carried out.<sup>250</sup>

Thus, seen in this context, considering the previous history of forced evictions in Kenya and the criticism from the CESCR, the forced evictions carried out in Jomvu may be seen as part of a widespread attack on the civilian population. As far as the multiple commissions of acts are concerned, there is no requirement that more than one type of the enumerated acts of crimes against humanity be committed.<sup>251</sup> This requirement either refers to more than one generic act, even though this is not required, or more than a few isolated incidents. Thus, in the case at hand, the numerous incidents of forcible transfer of population may suffice to establish this prerequisite. It is not obligatory to prove that there was a separate attack against the same civilians in the context where the forcible transfer took place.

Since there is not sufficient jurisprudence on what numbers of victims are needed for an attack to count as widespread it is difficult to make an assessment whether the forced evictions in Kenya are to be seen as widespread.<sup>252</sup> However, the forced evictions carried out as a part of the *Mombasa-Mariakani Road Dualling Project* may still amount to a crime against humanity on the basis of being systematic. The forced evictions in Jomvu can be characterised as systematic as they were organised and conducted on the basis of a government policy for the *Mombasa-Mariakani Road Dualling Project* and involved public resources, such as police assistance to carry out the demolitions.<sup>253</sup> Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, an isolated act can constitute a crime against humanity if it is the product of a political system. Therefore, it is reasonable to conclude that there has been a widespread or systematic attack as defined in customary international law.

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<sup>249</sup> CESCR, *Concluding Observations on the combined second and fifth periodic reports of Kenya*, 6 April 2016, para 47-48.

<sup>250</sup> Ibid.

<sup>251</sup> *Prosecutor v. Blaškić* (2000), para. 206.

<sup>252</sup> See Chapter 4.2.1.

<sup>253</sup> Amnesty International (2015), page 22.

## 5.5.2 The affected group is a civilian population

To conclude whether or not a crime against humanity has taken place, it must secondly be determined whether there was an attack against a civilian population. The term ‘population’ does not require that crimes against humanity be directed against the entire population of a geographic territory or area.<sup>254</sup> Furthermore, the victims of the act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated acts form part of the attack.<sup>255</sup> Thus, it need not be proven that the whole population of Jomvu was forcibly transferred. To establish the existence of an ‘attack directed against a civilian population’ it is sufficient to show that enough individuals were targeted that it is clear that the attack was not limited to a randomly selected number of individuals.<sup>256</sup>

As to the term ‘directed against’, this requires that the civilian population is the intended target of the attack and not only an incidental victim of the attack. Directed against places emphasises on the intention of the attack. At a first glance, such interpretation of ‘directed against’ seem to exclude development-induced displacement in general, and in this particular case it could be argued that the intention of the forced evictions in Jomvu is to clear land to enable an expansion of the highway, which in turn would ensure smooth flow of traffic, improved travel times, and result in less negative environmental impacts, as emissions and fuel consumption would be reduced.

However, the overall intention of the *Mombasa-Mariakani Road Dualling Project* is not to be confused with the intention of the forced evictions carried out in Kenya.<sup>257</sup> The attack is the act of forced evictions, not the *Mombasa-Mariakani Road Dualling Project* as such. Therefore when assessing whether the attack was directed against the civilian population, instead of focusing on the aim of the road project, the means and methods used in relation to the forcible transfer of population should be assessed. As the ICC concluded in its *Bemba case*<sup>258</sup>, it is sufficient evidence that an attack is directed against the civilian population if it is evident that people

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<sup>254</sup> Prosecutor v. Jean-Pierre Bemba Gombo (2009), para. 77: ‘the Prosecutor need not prove that the entire population of the geographical area, when the attack is taking place, was being targeted’.

<sup>255</sup> See, e.g., Prosecutor v. Kunarac et al, para. 423; Prosecutor v. Katanga (2008), para 399; Prosecutor v. Jean-Pierre Bemba Gombo 2009, para 76.

<sup>256</sup> Prosecutor v. Milomir Stakic (2006) para 627; Prosecutor v. Jean-Pierre Bemba Gombo (2009), para 77.

<sup>257</sup> Prosecutor v. Kunarac (2002), para 91; Prosecutor v. Milomir Stakic (2006) para 624.

<sup>258</sup> Prosecutor v. Jean-Pierre Bemba Gombo (2009).

where being attacked inside their houses or on their courtyards.<sup>259</sup>

The lack of warnings and the decision to carry out the demolitions at night time, when it is fair to assume that the people of Jomvu were asleep inside their homes, therefor not only represents an obvious disregard for the people's safety but also indicates that the attack was directed against a civilian population.

### 5.5.3 The attack is pursuant to a policy

The requirement of a 'policy' constitutes a basis for ensuring that random or isolated acts are excluded from the scope of crimes against humanity. However, as indicated in the Chapter 4.2.3, it is uncertain whether or not international customary law indeed requires a link to a policy for an attack to constitute a crime against humanity. Assuming it does, it would be sufficient to show that the policy provides certain guidance regarding the prospective victims in order to coordinate the activities of the perpetrators. As implied in previous chapter, the policy behind an attack may be one of mere deliberate inaction or toleration.

Although the Resettlement Action Plan provides for both consultation and compensation, a large proportion of the victims in Jomvu - those counting as unlawful occupants - are left without protection. This exclusion can be argued to actively pave the way for violations in regards to their human rights, in particular their right to housing.

Additionally, the government officials apathy in regard to enact a legislative framework to recognise and protect communities' right to land and to explicitly prohibit forced evictions becomes particularly disturbing when the government itself deliberately and arbitrarily displaced the very people it is then called upon to protect. In its concluding observations on Kenya from 2016, the ICESCR recommended that Kenya 'take concrete steps to guarantee security of tenure for all, including residents of informal settlements'.<sup>260</sup> The Committee further recommended that Kenya, with reference to its General Comment No. 7 on the right to adequate housing and the guidelines on development-based evictions and displacement:

*[I]mplement judicial orders that provide remedies to victims of forced evictions as a matter of priority and adopt a moratorium on mass evictions*

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<sup>259</sup> Ibid., para. 94: 'having reviewed the Disclosed Evidence as a whole, the Chamber believes that there is sufficient evidence, in particular, statements of witnesses victimised [...] establishing that civilians have been attacked often inside their houses or in their courtyards by armed MLC soldiers'.

<sup>260</sup> CESCR, *Concluding Observations on the combined second and fifth periodic reports of Kenya*, 6 April 2016, para 47-48.

*at the national level until adequate legal and procedural safeguards are in place.*<sup>261</sup>

The execution of the evictions was announced by governmental officials and carried out with assistance from the police. In addition, the government officials' inaction to take legislative measures, possibly due to political or economic gain, to prevent this type of forced eviction amounts to a policy of toleration.

#### **5.5.4 The perpetrator had knowledge of the attack**

The present analysis does not, as described under Chapter 5.3, deal with the criminal responsibility of specific or identifiable individuals. Rather it is concerned with whether or not the kind of conduct carried out in the *Mombasa-Mariakani Road Dualling Project* can amount to a crime against humanity. Assuming public officials involved had knowledge of the attack, this would open up for a conviction under international criminal law. However, in this particular case, and with the limited information available, the knowledge requirement will be discussed mainly in general terms.

The knowledge element of crimes against humanity requires that the accused (a) knows of the existence of the attack; and (b) knows that his or her individual act forms part of the attack. This knowledge may be general, that is, without possessing detailed information of its specific characteristics and circumstances.<sup>262</sup> In this case, such circumstances could be a pattern of illegal and violent evictions carried out during night time in, or the criticism on the lack of protection for victims of forced evictions repeatedly raised by CESCR. Consequently, it is enough that the perpetrator was aware that his or her conduct was part of a widespread or systematic attack and was pursuant to some kind of policy.

It is established that there must be a nexus between the acts of the accused and the attack. However, this does not mean that the criminal conduct needs to be committed in the midst of the attack, but it could be committed before or after the attack or even geographically far away from the attack, as long as it has a connection to it.<sup>263</sup> Likewise, it may be suffice to prove that the accused knew that he was in a position to stop the attack, but deliberately and knowingly decided not to stop it, thus broadening the

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<sup>261</sup> Ibid.

<sup>262</sup> Prosecutor v. Dusko Tadic (1997), para. 657: *'while knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances'*.

<sup>263</sup> Prosecutor v. William Samei Ruto and Joshua Arap Sang (2016), Annex I, para 31; Prosecutor v. Mile Mrkšić et al., ICTY Appeals Chamber, 5 May 2009, Case No. IT-95-13/1, para 41.

attack. The relationship between the conduct and the attack will be dependent on the circumstances surrounding the act, such as whether there are similarities between the acts of the accused and the attack.<sup>264</sup> The perpetrator's ability to impact the attack against the civilian population, including the ability to deter or stop it, should also be taken into consideration.

Consequently, in the present context, this would, most likely, be a public official. However the criminal responsibility of each individual who may eventually be indicted in this particular case must be determined on the basis of evidence which is currently not available and beyond the scope of this analysis.

## **5.6 The forced evictions in Jomvu constitute a crime against humanity**

In May 2015, KENHA officials forcibly evicted over one hundred people from Jomvu informal settlement in Mombasa. The forced evictions were carried out to make way for a highway expansion project financed by a number of international development banks. Armed police drove the population of Jomvu from their beds in the middle of the night, without warning. A bulldozer razed their homes, leaving many homeless and destroying their means of livelihood. People were not consulted before the evictions nor compensated afterwards. They do not know where, or even if, they will be relocated.

The development of transport and infrastructure is a key strategy for achieving economic growth, wealth creation and poverty eradication in Kenya. To achieve these goals the relocation of people may be necessary. The long-term positive outcome for the area may outweigh the negative consequences for the affected people. However, the capacity to show that displacement is necessary in a certain case does not amount to a free card to carry out the displacement without concern for any human rights safeguards. Forced evictions may violate international human rights law. It is obvious from Amnesty International's report that Government officials have not adhered to essential safeguards, set down in international human rights law and standards, to prevent the evictions from being unlawful. Thus, it is possible that the forcible transfer of population in Jomvu constitutes a crime against humanity even though positive outcomes can be demonstrated.

To determine whether the forced evictions in Jomvu

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<sup>264</sup> Prosecutor v. Jean-Pierre Bemba Gombo (2009), paras 61, 67-68.

constitutes a crime against humanity through forcible transfer of population in customary international law, a number of questions must be answered in the affirmative. The questions which have been addressed are (1) was there, in fact, a deportation or forcible transfer of population in Jomvu, through expulsion or other coercive acts; (2) were the persons subject to the deportation or forcible transfer legally present in the area from which they were removed; (3) did the acts in question constitute a widespread or systematic attack directed against any civilian population, and; (4) were there grounds under international law under which the deportation or forcible transfer could lawfully take place.

The first part of the assessment examined whether there was in fact a forcible transfer of population as defined in customary international law. It was concluded herein that the requirements, namely, that there be the transfer of one or more persons and that such transfer be coerced or forced, have been met. As the transfers were executed without the consent of the individuals concerned and a range of coercive measures were employed, it is reasonable to conclude that there was, in fact, a forcible transfer of population of the population of Jomvu.

Part two addressed the legality of the evictions; in particular whether those subject to the forcible transfer in Jomvu were legally present in the area. Legally present requires that the domestic laws defining the legality or illegality of the people of Jomvu's presence comply with Kenya's international obligations. Even if it is accepted that most of those evicted were not lawfully present under Kenyan domestic law, it is important to note that the authorities did not seek to distinguish between people in the area being legally present or not when carrying out the evictions. It may be argued that the authorities should not be permitted to rely on the lack of distinction for the purposes of asserting the legality of the evictions and demolitions. The prerequisite for crimes against humanity does not require that all of the victims of forcible transfer of population be lawfully present.

Examining the legality of the evictions, international law exceptions allowing for forcible transfers was also addressed. It was concluded herein that it may be argued that there is a strong public interest for developing infrastructure in the area. The road will connect Mombasa to several of Kenya's neighbouring countries, making the port increasingly important in the area. This may, by extension, lead to economic growth, wealth creation and poverty eradication. However, arguing for an overriding public interest of development may not be enough to constitute a ground permitted under international law. Even though there may be a strong public interest of development in the area, this does not mean that the development projects be carried out in a manner which is inconsistent with other rights, such as the right to adequate housing, the right to security of the person, the right to non-interference with privacy, family and home and the right to



effective remedies.

Thus, the requirements under international law allowing for the limitation of the people of Jomvu's rights have not been met. Although a strong public interest can be argued to outweigh the negative consequences of displacement for the affected individuals in certain cases, forced transfer of population through unlawful evictions does not adequately safeguard the rights of the affected people. In Jomvu, the evicted individuals did not have adequate access to information regarding the evictions nor had any compensation or resettlement measures been offered to them. Furthermore, as emphasised by the CESCR, as the evictions in Jomvu were carried out at night time they are illegal regardless of overriding public interests.

The third part examined whether or not the forcible transfer of population was committed as part of a widespread or systematic attack directed against any civilian population. It was concluded herein that the requirements of customary international law have been fulfilled. Taking into consideration the means and manner in which the forced evictions were conducted, it is reasonable to conclude that it constituted part of an attack.

It is clear that the conflict of land in Kenya is the result of systematic deficiencies in the land management framework. Kenya has repeatedly been criticised by CESCR and numerous international and domestic NGOs for disregarding its international human rights obligations in regard to housing. Furthermore, it has been established that similar acts were carried out in similar manner on different occasions around Kenya. Thus, related acts have been taken place in numerous places, creating an attack directed against the civilian population. In addition, the government officials which so far have been incapable of addressing the issues surrounding informal settlements and land disputes, possible due to political or economic gain, has relied increasingly on pointing towards development project and an overriding public interest to remove people from the areas. The forced evictions in Jomvu add to this pattern which has resulted in large-scale displacement of Kenya's most vulnerable populations.

Thus, considering that the forced evictions carried out in Jomvu arguably satisfies the elements of the crime of forcible transfer, it may be concluded that there is a supportive basis to affirm that there are circumstances under which development-induced displacement constitutes a crime against humanity through forcible transfer of population.

## 6 Conclusion

Referring back, the purpose of this thesis is to explore how crimes against humanity in general and the crime of forcible transfer of population in particular, covers the most heinous situations of development-induced displacement. Indeed, the crime against humanity belongs to an area of international law where doubts of its scope still remain. This thesis' agreed starting premise is however that forcibly removing individuals from their homes is a crime against humanity.

The research question is concerned with what is required for development-induced displacement to constitute a crime against humanity through forcible transfer of a population. To satisfactorily answer the question three subsequent questions were relied upon. Before concluding, these will shortly be addressed.

*Firstly, what is development-induced displacement?*

Development-induced displacement consists of the forcible movement of persons from their homes due to development projects, such as the building of dams, roads, and other infrastructure, as well as the exploitation of natural resources in mining and oil projects, to name just a few examples. Similarly to those displaced due to armed conflict or human rights violations, individuals displaced by development suffer from the loss of their homes and livelihoods, the dispersal of their communities, and the physical and psychological damage associated with other types of involuntary displacement.

However, in comparison to other forms of forced displacement, development-induced displacement differs in one significant way. Whereas persecution, conflict or natural disasters are never considered to be a 'good cause' in and of themselves, development, including the construction or establishment of dams, ports, mines, railways, highways, airports, irrigation canals, urban infrastructure, forestry and agricultural projects, for reasons of urban or rural economic development is by many considered to be valid justification for displacement.

Development-induced displacement prevails especially in the global south in countries that are engaged in large-scale projects to increase and improve their economies and domestic infrastructures. The most obvious are the Asian countries, which account for the greatest amount of development-induced displacement in the world. However, the occurrence of development-induced displacement is increasingly an issue in Africa and Latin America.

*Secondly, what international human rights standards must be fulfilled for development-induced displacement to be justified?*

A large number of human rights guarantee legal protection against displacement to a lesser or greater degree. In particular, the right to adequate housing offer significant legal protection and, moreover, can be said to imply a right not to be arbitrarily displaced. In addition, several guidelines on development-induced displacement spell out the circumstances under which displacement may be carried out in a lawful way.

The CESCR has indicated, in relation to the right to adequate housing and not to be arbitrarily displaced, that there are situations where it may be necessary to impose limitations. Such limitations must however be in accordance with domestic law, have a substantive and proper justification, and be reasonable and proportional. Proper justification is, according to the Committee solely for the purpose of promoting the general welfare in a democratic society.

Additional safeguards provided under international human rights law state that an eviction must not be carried out before all feasible alternatives are explored, adequate compensation must be provided for affected people, and where reasonably possible, those affected must be provided with adequate alternative housing. Finally, a number of procedural guarantees, for example relating to information, consultation and legal remedies, must be complied with. In other words, international human rights law does not prohibit displacement necessitated by large-scale development projects altogether, nor does it however consider such displacements per se as sacrifices for a good cause. Instead a distinction is made between arbitrary evictions on the one hand, and lawful evictions on the other.

*Finally, what elements are required for an act to constitute a crime against humanity?*

Although efforts have been made to define crimes against humanity, there is, to date, no single recognised definition of the crime in customary international law. The scope of crime against humanity has evolved over time, important interpretations have been made in the statutes and jurisprudence of contemporary international criminal tribunals, such as the ICTY and ICTR, and not least, in the Rome Statute and the case law of the ICC. Thus, the codification and application of the crime contains several basic elements that are common across the majority of definitions.

Two especially debated questions in relation to the definition of crime against humanity through forcible transfer of population are, firstly, if arbitrary transfer of population from one area to another within the *same* state, and secondly, whether transfer occurring during peacetime, are

included in the definition. Seen to the latest development in jurisprudence and the adoption of the Rome Statute, it is fair to assume that both questions can be answered in the affirmative.

The definition of the elements of the crime against humanity through forcible transfer of population as presented in the Rome Statute states *'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; [...]'*. According to the ILC this is the most widely accepted formulation, although there are deviant customary elements.

Beginning with the prohibited act, forcible transfer of population. All population transfers have the common feature of large-scale movement of groups of people. However, for an act to be considered forcible transfer of population, three cumulative conditions must be established, which are (1) forcible character; (2) lawful presence of the displaced; and (3) absence of grounds permitted under international law. If one of these conditions is absent, the act is not considered a crime of forcible transfer of population. The limited scope means that not all large-scale movements of people constitute a crime. Justifications such as voluntariness, national welfare and temporariness are regularly offered. However these should be considered carefully as they often conceal a wish to disguise the criminal elements of the act.

For the prohibited act to constitute a crime against humanity, four prerequisites must additionally be satisfied, namely that the act is (1) part of a widespread or systematic attack, (2) directed against any civilian population, (3) pursuant to or in furtherance of a policy and (4) carried out with knowledge of the attack.

Returning to the main question for this thesis, *under which circumstances does development-induced displacement constitute a crime against humanity through forcible transfer of populations?*

Analysing the relationship between development-induced displacement and crimes against humanity reveals an evolving state of affairs. Although, there is a conspicuous lack of state practice, there is increasingly international recognition that development-induced displacement has many of the same effects upon the displaced as other groups who have been forcibly displaced. This provides a growing coherent basis for affirmatively establishing development-induced displacement as a crime against humanity.

This can be illustrated by the findings from the analysis in Chapter 5 of the implementation of the Mombasa-Mariakani Road Dualling Project in Kenya. Large parts of Kenya's population live in informal settlements; in Mombasa it is approximately 65 % of the county's population. The land conflict in Kenya is the result of systematic deficiencies in the land management framework. Kenya has repeatedly been criticised by CESCR and numerous international and domestic NGOs for disregarding its international human rights obligations.

The people, mostly tenants, living in informal settlements, have no positive right under current Kenyan law to reside on the land. However, in almost all cases they do not have an alternative option since informal settlements represent the only means in the absence of sufficient formal housing stock. The Kenyan government so far has been incapable of resolving issues relating to informal settlements and land disputes, such as security of tenure. Such inaction may correlate to the fact that many government officials have profited from the development of the informal settlements. What is obvious is that the settlements are a permanent feature in the Kenyan community.

In the last decade, Kenya has experienced rapid development within several sectors, such as in energy and infrastructure. This has led to increasing economical welfare and a higher standard of living for some. However, not all benefit from such development. In the areas where the development projects are carried out, the population have seen their homes and means of income destroyed. It appears that Kenyan government officials, whom so far have been incapable of addressing the issues related to informal settlements and land disputes, rely increasingly on pointing the finger towards development projects and an overriding public interest to remove people from the areas, resulting in large-scale displacement.

The forced evictions related to the Mombasa-Mariakani Road Dualling Project fit this pattern. In May 2015, government officials forcibly evicted over one hundred people from Jomvu, an informal settlement in Mombasa. The forced evictions were carried out to make way for a highway expansion project financed by a number of international development banks. Armed police drove the population of Jomvu from their beds in the middle of the night, without warning. A bulldozer razed their homes, leaving many homeless and destroying their means of a livelihood. The affected people were not consulted before the evictions nor were they compensated afterwards.

Considering the circumstances and context surrounding the forced evictions in Jomvu, it was concluded that the acts arguably satisfied the elements of the crime of forcible transfer. Thus, it may be concluded that there is a reasonable basis to believe that a crime against humanity can be committed through development-induced displacement. However, the

analysis also highlights shortcomings in the assessment in relation to deficient definition and scanty jurisprudence on the crime against humanity. Two possible weaknesses that progressively became increasingly evident were, firstly, the definition of ‘lawfully present’, and secondly, the complexity surrounding the element of ‘knowledge’ in customary international law.

Beginning with the definition of ‘lawfully present’, development-induced displacement mainly occurs in countries with underdeveloped land laws, often due to either a long history of internal conflicts over land or to corrupt regimes. Thus, similarly to the situation in Jomvu, many of the affected people of development-induced displacement do not have legal security of tenure, let alone ownership. On the contrary, it is common that the affected people live in informal settlements on government or communal land or on land subject to land disputes.

It is unclear in relation to customary international law if the term ‘lawfully present’ is merely in regard to domestic law or also includes international law. If ‘lawfully present’ is to be interpreted in regard to domestic law, a result would be that many of the potential victims of development-induced displacement are left vulnerable and defenceless.

The second shortcoming is the difficulty to tie acts constituting part of a widespread or systematic attack to individual perpetrators, as development projects are usually complex with a broad spectrum of involved actors. Firstly, it must be established who is actually responsible for development-induced displacement, considering both government and private actors. Although there are indications that non-state actors can commit crimes against humanity, at the time of writing, the limited state practice and jurisprudence of the international courts make it unlikely. Thus, a connection to the actions or inactions of a responsible state must be established.

Secondly, the mental element of crimes against humanity requires that the perpetrator (a) knows of the existence of the attack; and (b) knows that his or her individual act forms part of the attack. Although a person need not be the actual perpetrator of an attack in order to bear individual criminal responsibility, the complex structures surrounding development projects makes it particular difficult to tie single acts to an attack. This is especially the case when the act is one of mere toleration or deliberate inaction for the purpose of economical or political gain.

Indeed, the threshold for crimes against humanity is high. However, as indicated above, there are circumstances under which development-induced displacement may constitute a crime against humanity through forcible transfer of population. This demonstrates that arguing for an overriding public interest is by no means a disclaimer against crimes against humanity. Rather, even in a case where the public interest of

development overrides the affected individuals' wish to remain in a particular area, the act of forcible transfer of population through unlawful displacement may still amount to a crime against humanity.

To sum up, the right to housing and to not be forcibly displaced are fundamental human rights that can be violated in a variety of ways, limited only by the human imagination for cruelty. The rights need to be protected in all instances, regardless of the motivations of the perpetrators, for the effects are the same. Thus, a broad approach is warranted, as well as one that focuses upon prevention through the potential liability of the individual, which drives the actions of any state.

Victims of displacement associated with large-scale development projects often find themselves in the shadow of those forced to flee as a result of conflict or natural disasters. On the contrary, politicians and other authorities almost universally support development projects. It is a remaining common thought that the benefits of these projects far outweigh their negative effects on the livelihoods, homes and health of a few local residents. However, given the similar levels of hardship that victims of displacement endure, irrespective of the precise cause of the displacement, the disparity in attention is not justified. It is about time that victims of development-induced displacement receive international recognition. Many more initiatives are urgently needed and special efforts must be undertaken to ensure that these pleas for justice have an impact beyond academic buildings.

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