Land Grabbing Meets the Crime Against Humanity of Forcible Displacement: A Cambodian Illustrative Example

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ABSTRACT

This paper explores the intricate relationship between land grabbing and forcible displacement, focusing on an alleged incident in Dey Krahorm, Chamkarmorn district of Phnom Penh, Cambodia. The analysis demonstrates how land grabbing can be examined within the legal framework prohibiting forcible displacement as a crime against humanity under the Rome Statute. The argument posits that applicable law, in cases of indeterminate land rights leading to forcible displacement, prioritize possession. Consequently, the study underscores the importance of a nuanced understanding of forcible displacement within both national and international legal frameworks, particularly in cases involving land grabs with ambiguous property rights. By delving into this specific instance, the paper contributes to the broader discourse on the intersection of land grabbing and forcible displacement, advocating for legal considerations that acknowledge the complexities of property rights and possession in mitigating the impact of such incidents on affected communities.

Keywords: *Land Grabbing; Land Dispossession; Property Rights; Forcible Displacement; International Criminal Law; International Criminal Justice.*

I. INTRODUCTION

The Office of the Prosecutor of the International Criminal Court (ICC) has signaled land grabbing will be a factor in the court's case selection and prioritisation.[1] Within the limited literature on land grabbing and International Criminal Law (ICL), the concept of forcible displacement as a crime against humanity is prominent.[2] This paper delves into the convergence of these two concepts, highlighting how land grabbing often triggers and involves the crime of forcible displacement as outlawed by the Rome Statute. The paper argues that, in addition to potential human rights approaches to land grabbing,[3] prosecuting forced displacements as crimes against humanity could offer a way to hold perpetrators accountable—even in cases where land ownership is unclear or contested.

I employ the term "forcible displacement" to indicate both deportation and forcible transfer, categorized under crimes against humanity in the Rome Statute.[4] Though deportations have been held to mean forced displacements across national borders, while forcible transfer is sometimes understood to mean forced displacement of persons within national

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1 *Policy Paper on Case Selection and Prioritisation*, by The Office of the Prosecutor (The International Criminal Court, 2016) at paras 7, 41.

2 For examples see Franziska Maria Oehm, "Land Grabbing in Cambodia as a Crime Against Humanity – Approaches in International Criminal Law" (2015) 48:4 Verfassung in Recht und Übersee 469–490; James G Stewart, "A Jurisprudential History of the Displacement Crimes Applicable to Corporate Landgrabbing" in Nina H B Jørgensen, ed, *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge: Cambridge University Press, 2020) 201; Nahid Rabbi, "Development-induced forcible displacement as a crime against humanity of forcible transfer of population under the Rome Statute" (2022) Graduate Theses and Dissertations, online: <https://commons.allard.ubc.ca/theses/573>.

3 For potential human rights approaches see Olivier De Schutter, "The Emerging Human Right to Land" (2010) 12:3 International Community Law Review 303–334; *Addressing the Human Rights Impacts of "Land Grabbing"*, by Lorenzo Cotula, EXPO/B/DROI/2014/06 (Belgium: European Union, 10 December 2014); Jérémie Gilbert, "Land Rights as Human Rights: The Case for a Specific Right to Land" (2013) 10:18 International Journal of Human Rights 115–136; Christophe Golay & Irene Biglino, "Human Rights Responses to Land Grabbing: a right to food perspective" (2013) 34:9 Third World Quarterly 1630–1650.

4 United Nations, *Rome Statute of the International Criminal Court*, 1998 art 7(1)d.

borders,[5] I sidestep the controversial distinction as irrelevant to my argument by using the phrase "forcible displacement" to mean both deportation and forcible transfer. In other words, I employ forcible displacement to mean the unconsented transfer of persons without considering the destination.

Land grabbing causes forcible displacement in various ways, including through converting the use of land and associated resources to the detriment of residing populations, enabling violence that necessitates evictions, facilitating forcible removals, and curtailing access to vital resources. First, land grabbing causes forcible displacement when land and related resources are forcibly or deceitfully acquired to employ land in a manner that displaces the residing population. The conversion frequently ensures land and related resources utilized for sustenance purposes pivotal to human survival (such as housing and agriculture) are employed in other ways. Second, land grabbing engenders violence, necessitating the displacement of people residing on lands. In cases where various groups seek land and related resources, land grabbing may cause violent conflicts, which spur displacement from lands. In addition, land grabbing can also trigger forcible displacement by depriving communities of their right to free and prior consent regarding their land and related resources, leading to unconsented land transfer, forcible evictions and displacements by "new owners." Furthermore, land grabbing causes forcible displacements by denying access to land and related resources necessary for human flourishing. Land and associated resources are pivotal possessions that impact access and ownership of other key resources, such as the determination of mining rights, access to waterways, and soil for growing food. Depriving access to such pivotal resources often undermines the group's ability to continue living on lands and renders territories uninhabitable or economically unviable, thereby forcing displacement.

The relationship between land grabbing and forcible displacements exists because land and associated resources are vital for human survival. Investigating the connection between land grabbing and forcible transfer unravels the connection between the two phenomena, reveals a root cause

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[5] For history and nature of overlap between the terms see Ken Roberts & James G Stewart, "Delimiting Deportation, Unlawful Transfer, Forcible Transfer and Forcible Displacement in International Criminal Law: A Jurisprudential History" (2019) 2019:1 AJICJ 56–95; Stewart, *supra* note 2.

of forcible displacements, demonstrates an implication of land grabbing, and highlights a potential mechanism for recompense when indeterminate property rights exist. Of the various categories of international crimes, the connection between land grabbing and the crime of humanity of forcible displacement is the most explored; however, unlike past scholarship, this piece addressing the relationship also explores how prosecuting forcible displacement may be an instrument for penalizing land grabbing when murky property rights exist. Thus, my analysis enriches the literature by shedding light on the intricate dynamics between land grabbing and forcible displacement as a crime against humanity, offering insights into the consequences and complexities arising from these intertwined issues.

I use the situation of Cambodia by focusing on an alleged land grabbing incident in Dey Krahorm, Chamkarmorn district of Phnom Penh, to demonstrate how land grabbing can meet essential elements of the law prohibiting forcible displacement as a crime against humanity in the Rome Statute. I undertake an illustrative example of Cambodia because of numerous land grabbing allegations involving forcible displacements that could bring such claims within the scope of a potential ICC prosecution, various governments' attempts to transform land tenure in Cambodia, and the existence of a detailed communication filed by Global Due Diligence LLP to the ICC inviting the court to prosecute land grabbing in Cambodia as a crime against humanity of forcible transfer.[6]

In Section II, I explore Dey Krahorm displacements, showing how the events arguably amount to land grabs. I provide a historical account of different land tenure regimes in Cambodia and other issues which seem to exacerbate indeterminate property rights and then delve into factual specifics of the alleged Dey Krahorm land grabbing operations. I highlight how these operations play a significant role in forcibly displacing residing populations from Dey Krahorm. I lead with the illustrative example of the forcible displacement impacts of land grabbing to set the scene for my analysis of the concept of forcible displacement as a crime against humanity and its intersections with land grabs in the next section.

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6 On file with the author is Global Diligence, *Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Communication of Crimes Against Humanity in Cambodia July 2002 to Present* (7 October 2014). Richard Rogers kindly provided the document.

In Section III, I delve into the concept of forcible displacement as a crime against humanity in the Rome Statute, focusing specifically on its link to land grabbing. Though there is literature on the history of forcible displacement as a crime of humanity,[7] the literature has not addressed the relationship with land grabbing, which I emphasize here. Additionally, this section investigates the intersecting aspects of forcible displacement and land grabbing, drawing on the illustrative example of Cambodia/Dey Krahorm discussed in Section Two and allegations from the Communication to the ICC.

Finally, Section IV contains closing remarks of my discussion on land grabbing meeting the crime against humanity of forcible displacement. I conclude arguing that the Rome Statute conception of forcible displacement as a crime against humanity primarily protects possession, which may sometimes differ from ownership. This has significant implications in addressing potentially murky cases of land grabbing causing forcible displacement as a crime against humanity.

II. ILLUSTRATIVE EXAMPLE OF LAND GRABBING MEETING FORCIBLE DISPLACEMENT

As mentioned earlier, land grabbing often leads to a crime against humanity, known as forcible displacement. Examining the link between the phenomena enhances awareness of the consequences of land grabs and sheds light on potential strategies that ICL and national regimes can employ to address forcible displacements. Given that land grabs frequently involve obscuring property rights, forcibly taking over land, and displacing existing populations, my exploration enhances understanding potential impact of land grabbing. As we will explore in more detail later, the alleged forcible displacements in Dey Krahorm occurred against the backdrop of land grabbing facilitated by murky property rights. In the following sub-sections, I provide an overview of the diverse land tenure systems that have led to

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7 Victoria Colvin & Phil Orchard, "A Forgotten History: Forcible Transfers and Deportations in International Criminal Law" (2021) 32:1 Criminal Law Forum 51–95; Grant Dawson & Sonia Farber, *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Brill Nijhoff, 2012).

contentious land occupancy in Cambodia, followed by an analysis of the alleged Dey Krahorm forcible displacements.

A. *Land Tenure in Cambodia*

This subsection explores the various land regimes in Cambodia and problems in determining and verifying land ownership, a development that arguably promotes land grabbing, causing forcible displacement.

The Kingdom of Cambodia "Cambodia" (formerly known as the People's Socialist Community from 1863 to 1953, The Khmer Republic from 1970 to 1975, Democratic Kampuchea from 1975 to 1979, People's Republic of Kampuchea from 1979 to 1989, and State of Cambodia from 1989 to 1993) has undergone multiple land tenure regimes. The differing property systems have resulted in "contemporary confusion over land rights".[8] Due to land and associated resources' anthropocentric, economic, cultural, and spiritual significance, it remains crucial in Cambodia—a country sometimes caricaturised as a neo-patrimonial shadow state.[9] Supporting this classification, at the time of writing this piece, the immediate past Prime Minister of Cambodia was among the longest-serving in the world and successfully transferred power to his son in 2023.[10] Neo-patrimonial issues in Cambodia seemingly extend to land matters revolving around a detrimental collaboration between governmental and non-

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8 Kouland Thin, *Essays on land property rights in Cambodia: Empirical analysis* (Ph.D., University of Hawai'i at Manoa, at 1; Ryutaro Murotani, "Land problems in Cambodia: The historical influence of conflict" in *Confronting Land and Property Problems for Peace* [Routledge, 2014].

9 Phillipe Le Billon, "The Political Ecology of Transition in Cambodia 1989–1999: War, Peace and Forest Exploitation" (2000) 31 Development and Change 785–805; William Reno, "Clandestine economies, violence and states in Africa" (2000) 53:2 Journal of International Affairs 433–459; Kheang Un & Sokbunthoeun So, "Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform" (2011) 84:2 Pacific Affairs 289–308.

10 Al Jazeera, "Cambodia parliament elects Hun Sen's son, Hun Manet, as new PM", online: <https://www.aljazeera.com/news/2023/8/22/cambodian-parliamentarians-elect-hun-sens-son-hun-manet-as-new-pm>; Sui-Lee Wee, "A 'Once-in-a-Lifetime' Change in Cambodia: A New Leader", *The New York Times* (22 August 2023), online: <https://www.nytimes.com/2023/08/21/world/asia/cambodia-hun-manet-prime-minister.html>.

governmental entities, insufficient institutional capabilities, and a political system driven by patronage.[11]

Before 1863, a period preceding colonialism in Cambodia, land was communally owned and theoretically vested in the king.[12] It could be obtained and transferred through gift, sale, or local acceptance of land tenure.[13] Land could also be attained by clearing and settling on it or using the same for subsistence farming.[14] This practice, known as "acquisition by plough," runs contrary to contemporary land laws—a development that will be further explored below. From 1863 to 1953, the French colonial government ruled the territory, introducing a formal system of private property rights to protect French interests, increase control over peasants, and make unoccupied land available for sale.[15] The formal property rights system significantly changed the existing land tenure regime while integrating traditional acquisition by plough practices through allowing landholders to "become legitimate" after uninterrupted land occupation for a minimum of five years and community acceptance as a means of establishing ownership.[16] During this period, the French colonial apparatus also introduced a notion of concession–a mechanism to secure lad for large-scale development and exploitation.[17]

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11 "Cambodian Parliament Approves Longtime Leader's Son as Prime Minister", online: <https://thediplomat.com/2023/08/cambodian-parliament-approves-longtime-leaders-son-as-prime-minister/>; James WY Wang, "The Cambodian Neopatrimonial State, Chinese Investments, and Anti-dam Movements" in Hsin-Huang Michael Hsiao, Ming-sho Ho & Paul Jobin, eds, *Environmental Movements and Politics of the Asian Anthropocene* (ISEAS–Yusof Ishak Institute, 2021) 295; Un & So, "Land Rights in Cambodia", *supra* note 9.

12 Sokbunthoeun So, *Political economy of land registration in Cambodia* (Ph.D., Northern Illinois University, 2009) at 76.

13 *Ibid*; Thin, *supra* note 8 at 7.

14 So, *supra* note 12 at 76, 77.

15 Thin, *supra* note 8 at 7; Ray Russell, "Land law in the kingdom of Cambodia" (1997) 15:2 Property Management 101 at 103.

16 Russell, *supra* note 15 at 103.

17 Jean-Christophe Diepart & Laura Schoenberger, "Concession in Cambodia: Governing Profits, Extending State Power and Enclosing Resources from the Colonial Era to the Present" in Katherine Brickell & Simon Springer, eds, *The Handbook of Contemporary Cambodia* (New York: Routledge, 2017) 157.

Since independence in 1953, Cambodia has continued to transform land tenure. The independent state commenced by recognizing private property rights in land.[18] By 1970, the monarchy was overthrown, and a new constitution was passed respecting private land rights.[19] Meanwhile, collectivized farming and communal land ownership were implemented in areas controlled by the armed revolutionary group, the Khmer Rouge.[20] In 1975, the Khmer Rouge became the ruling authority in the country. They assumed complete control of all land and abolished private ownership. Land records were destroyed as part of an envisioned collective agriculture-based economy, and individuals were forcibly relocated and compelled to engage in related activities.[21]

The oscillation between private and collective property rights continued in post-Khmer Rouge Cambodia. After the fall of the Khmer Rouge in 1979, a Vietnamese-backed government gained control of the territory and instituted a less intense form of land collectivization. They selectively allocated land and allowed individual families to hold land for residential purposes.[22] The government subsequently prohibited land purchase, sale or rent and allotted ownership to groups based on the population and perceived production ability.[23] In 1989, a new government altered land tenure by reintroducing private property. The failures of collectivized land ownership, low productivity, the emergence of de facto private land ownership, a quest to attract public support for new party leaders, and a need to attain a self-sufficient economy led to the re-emergence of private property.[24] The government resolved to improve land productivity; it was

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18 Russell, *supra* note 15 at 103.

19 *Ibid* at 104.

20 So, *supra* note 12 at 92.

21 Russell, *supra* note 15 at 104, 105; Kate Frieson, "The Political Nature of Democratic Kampuchea" (1988) 61:3 Pacific Affairs 405–427 at 419–421; Smith, Rhona, Ly, Ratana, & Khourn, Chantevy, "Forced displacement, dispossession and property: Cambodia" in Proukaki, Elena Katselli, ed, *Armed Conflict and Forcible Displacement: Individual Rights Under International Law* (London: Routledge, 2018) 170.

22 Russell, *supra* note 15 at 105; So, *supra* note 12 at 94–98.

23 Russell, *supra* note 15 at 105. *Sub-Decree No.6 (Control and utilization of agricultural land)*

24 So, *supra* note 12 at 98–100; Russell, *supra* note 15 at 105.

necessary to make individuals legal landowners. Thus, private land rights were recognized in post-1989 land reform documents.[25]

In addition to recognizing private ownership of land, the 1989 reform had varied effects. The reform did not acknowledge land ownership prior to 1979 and adopted a complicated and inefficient system for recording private ownership.[26] Related problems resulted in only about 10 percent of land registration among more than 4 million land title applications by 1995.[27] Individuals who had not applied for land titles continued to claim land through "acquisition by plough," while individuals with incomplete applications showed application receipts as proof.[28] Many lack appropriate documentation for lands either because they failed to apply for land titles or because applications were not adequately processed. The absence of formal documentation as proof of ownership makes it easier for acquisitive interests to assert ownership claims. Influential individuals also used power and political access to compel people to sell their land at low prices or risk losing the land with no compensation.[29]

A major source of conflict originating from the 1989 reform was the government's long-term leasing system building on the notion of concession. Economic concessions allow companies to occupy land for an extended period to extract natural resources and develop agro-industries.[30] Due to a lack of transparency in granting concessions and issues in determining land ownership, concessions frequently create ownership conflicts.[31] Thus, the 1989 land legislation have been described as "allowing for opportune interpretation and potentially unlawful activity."[32] The various land conflicts led to numerous complaints about the poorly operated land administration system.[33] To remedy flaws in previous land

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25 See Council of Ministers' Instruction No. 03 of 3 June 1989; Sub-decree 25 of 22 April 1989; Land law of 1992.

26 So, *supra* note 12 at 100–106.

27 *Ibid* at 106–111.

28 *Ibid* at 106.

29 *Ibid* at 112, 113.

30 *Ibid* at 113.

31 *Ibid* at 114–116.

32 Russell, *supra* note 15 at 109–110.

33 Judy L Ledgerwood & Judy L Ledgerwood, "Rural Development in Cambodia the View

laws and curb land disputes, the Cambodian government again altered the property regime.

The 2001 land law was initiated to improve land tenure and attain equitable land distribution.[34] However, its application has been problematic. For example, seemingly allowing acquisition by plough, the law specifies that individuals who peacefully occupy land for five years before the enactment of the law may be granted ownership of the land.[35] In the same vein, the 2001 land law permits individuals who had land possession before its enactment to extend their possession period to five years, enabling them to claim ownership.[36] Nevertheless, in a different section, the law dismisses the traditional method of land acquisition by plough and creates social land concessions.[37] This provision enables the government to allocate "undeveloped land" to individuals who can gain ownership rights after five years of uninterrupted occupation and use.[38] These conditions pose significant challenges in an arguably neo-patrimonial state with a legal system that is difficult to access, where the executive branch and financial interests influence judges and prosecutors.[39]

Despite the attempts to establish comprehensive provisions for landholding and transfer practices in 21st-century Cambodia, unclear transfer practices and questionable procedures for determining state title to land create pathways for elites to engage in land grabbing. The problems have led to widespread criticism of the legal framework, which allows ownership to be established through registration of interest instead of

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from the Village" in *Cambodia and the international community: The quest for peace, development, and democracy* (Singapore: Institute of Southeast Asian Studies, 1998) 127 at 132; So, *supra* note 12 at 119, 120.

34 So, *supra* note 12 at 121, 122.

35 *Land Law*, 2001 art 30.

36 *Ibid* art 31.

37 *Ibid* arts 12, 16, 18, 19, 49, 51; Daniel Fitzpatrick, "The legal design of land grabs: Possession and the state in post-conflict Cambodia" in Connie Carter & Andrew Harding, eds, *Land grabs in Asia: what role for the law?* (London: Routledge, 2015) 67 at 68.

38 2003 Sub-Decree no.19.

39 Kheang Un, "State, Society and Democratic Consolidation: The Case of Cambodia" IngentaConnect (2006) 79:2 Pacific Affairs 225–245; Jessie Connell & Mark Grimsditch, "Forced Relocation in Cambodia" in Katherine Brickell & Simon Springer, eds, *The Handbook of Contemporary Cambodia* (Oxon: Routledge, 2017) 223.

possession, potentially denying ownership rights to private individuals and resulting in the state ownership of most land in Cambodia.[40] Cambodia's turbulent history further complicates the issue, as formalized private land holding is relatively new to the Cambodian people and has seen limited uptake.[41] In addition, the collectivization policies under communist governments from 1975 to 1989 halted the development of private property rights and subsequent reforms in 1989 and 2001 have proven inefficient, arguably resulting in various abuses and conflicts over land ownership and contributing to an obscure property regime.

Furthermore, legal pluralism creates an additional layer of ambiguity, encompassing at least three sets of norms at work: social norms, formal statutes, and neo-patrimonial administrative conventions.[42] Social norms exemplified by the concept of acquisition by plough are affirmed and restricted by the 2001 Land Law. As previously stated, according to norms accepted by the Land Law, five years of continuous possession enjoyed for five years prior to the promulgation of the law can be converted into ownership.[43] Also, possession extended for five years after the law's effective date can be granted ownership.[44] At the same time, in other instances, the law restricts social norms, such as the prohibition of private possession of "state public land" after the promulgation of the law.[45] Moreover, the 2001 Land Law is arguably not implemented holistically and forms a competing norm to which people turn in a quest to secure land rights amidst neo-patrimonial practices.[46] The different normative bases pose land ownership

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40 Fitzpatrick, *supra* note 37. The state owns approximately 80% of the land in the country.

41 Though the French introduced formal private ownership in 1884, it was not until 1925 the colonial government introduced fixed asset registration as a prelude to recognising ownership. By 1975, only 10 percent of the land was registered. So, *supra* note 12 at 138.

42 *Legal Pluralism and Equity: Some Reflections on Land Reform in Cambodia*, Brief, by Daniel Adler, Doug Porter & Michael Woolcock, Brief (Washington, DC: World Bank, April 2008) online: <https://openknowledge.worldbank.org/handle/10986/30542> [*Legal Pluralism and Equity*].

43 *The 2001 Land Law*, *supra* note 35, s 30.

44 *Ibid*, s 31.

45 Adler, Porter & Woolcock, *supra* note 42; *The 2001 Land Law*, *supra* note 35, ss 43, 259.

46 Adler, Porter & Woolcock, *supra* note 42.

problems, with elites likely to forum shop—selecting frameworks that legitimize their claims.[47]

Thus, the combination of radical changes in property rights evidenced by the oscillation of land tenure regimes and related conflicts,[48] inadequate land ownership records, neo-patrimonial politics,[49] lack of an independent judiciary,[50] and legal pluralism[51] seemingly obscures land ownership in Cambodia, leaving land tenure arguably in a degree of uncertainty. This ambiguity in property rights often facilitates land grabbing, enabling powerful actors to easily establish ownership claims at the expense of existing occupants, frequently resulting in forced displacement.

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47 Simon Springer, "Illegal Evictions? Overwriting Possession and Orality with Law's Violence in Cambodia" (2013) 13:4 Journal of Agrarian Change 520–546.

48 Cambodia is one of the countries in the world that has experienced the most radical changes in land tenure. Anne Y Guillou, "The Question of Land in Cambodia: Perceptions, Access, and Use since De-collectivization" (2006) 9–10 Moussons Recherche en sciences humaines sur l'Asie du Sud-Est 299–324; Murotani, *supra* note 8.

49 Un & So, "Land Rights in Cambodia", *supra* note 9.

50 Un, "State, Society and Democratic Consolidation", *supra* note 39; Connell & Grimsditch, *supra* note 39.

51 Adler, Porter & Woolcock, *supra* note 42; Springer, "Illegal Evictions?", *supra* note 47.

Table on Land Tenure Regimes in Cambodia[52]

Government Timeframe	Significant land legislation and provision
Pre-colonial era prior to 1863	Land vested in the Monarch.
French Colonial Administration 1861– 1953	Land Act 1884 and Civil Code 1920 permitted alienation of land as private property and maintained acquisition by the plough.
People's Socialist Community (independent rule) 1953 – 1970	1952 Constitution protected private property rights.
The Khmer Republic 1970 – 1975	1972 Constitution continued recognizing private property rights.
Democratic Kampuhea (Khmer Rouge regime) 1975 – 1979	1976 Constitution. Abolished private property and destroyed all land records. Introduced Agrarian Collectives.
People's Republic of Kampuchea 1979 – 1989	1981 Constitution. Land vested in the state. Implemented Policies of collectivization. 1985 Sub-decree prohibited the purchase, sale or rent of land.
State of Cambodia (Independent rule) 1989 – 1991	1989 Constitution reintroduced private property rights. 1989 Sub-decree No.25 granted private house ownership rights. 1989 Council of Ministers Instruction No. 3 abolished ownership before 1979.
1991 – 1993 United Nations Transitional Authority in Cambodia	1992 Land Law. Non-utilization of land for three years constitutes abandonment.
The Kingdom of Cambodia 1993 – present	1993 Constitution and 2001 Land Law. Extended private ownership rights to residential and agricultural land Ownership requires a certified government document known as a title certificate – temporary possession and acquisition by the plough nullified.

Against this background of multiple land tenure regime changes arguably causing "contemporary confusion over land rights,"[53] several independent sources allege widespread land grabbing and forcible displacement has taken place in Cambodia. In the next subsection, I will

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[52] Adapted from Russell, *supra* note 15 at 104; Springer, "Illegal Evictions?", *supra* note 47 at 528.

[53] Thin, *supra* note 8 at 1; Murotani, *supra* note 8.

discuss an alleged Dey Krahorm land grabbing incident that seems to have resulted in forcible displacements.

B. *Dey Krahorm Forcible Displacement*

This subsection presents information regarding the alleged January 2009 forcible displacements that took place in Dey Krahorm. I contend that land grabbing involving murky property rights serves as a catalyst for the commission of the crime against humanity known as forcible displacement. To exemplify the potential intersection of ICL with instances of land grabbing through the lens of forced displacement, my focus centers on an alleged land grabbing and forcible displacement episode in Dey Krahorm, situated along the Tonle Bassac riverside in the Chamkarmorn district of Phnom Penh. I highlight contentions over land rights in Dey Krahorm and then delve into the incident below.

Similar to most of Cambodia, land tenure in Phnom Penh is contestable.[54] Ruling elites comprising senior members of the Royal Government of Cambodia, senior members of State security forces, and government-connected business leaders have capitalized on the widespread tenure insecurity to seize and allocate millions of hectares of valuable land.[55] The seizures have resulted in the forcible displacement of a significant number of Cambodians. Relevant estimates of resulting forcible transfers vary from "tens of thousands"[56] to above 770,000.[57] In Phnom Penh alone, more than 133,000, comprising about 10% of its population, have been forcibly displaced.[58] The usual rationalization provided by the government when forcibly evicting individuals from homes occupied for years to distant relocation sites lacking basic amenities and losing lands is that such actions

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54 Thin, *supra* note 8.

55 *Supra* note 6 at paras 3, 4.

56 "Forced evictions in Cambodia make thousands of people homeless: UN expert" (30 January 2009), online: *United Nations, Human Rights, Office of the Human Right Commissioner* <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8516&LangID=E>.

57 *Supra* note 6 at para 7.

58 *Land Grabbing & Poverty in Cambodia: The Myth of Development* (Cambodia: LICADHO, May 2009) at 1 online: <https://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf> ; *Supra* note 6 at para 7.

are necessary for development.[59] As will be shown below, this trend seems to extend to Dey Krahorm displacements.

The issue of ambiguous land rights resulting in indeterminate property rights is intensified in the Dey Krahorm (meaning red earth or soil) incident highlighted below. Situated in Phnom Penh, Dey Krahom has been a site of land dispute with residents involved in struggles over land. Following years of civil war, Phnom Penh underwent rehabilitation and repopulation.[60] In the 1980s, trees were cleared, and red soil was conveyed to the area.[61] However, formal land titles were not granted to the inhabitants.[62] Over time, informal land occupation became generally acceptable and "de facto transferable."[63] In 2003, in a seemingly win-win situation, residents of Dey Krahorm were promised a social land concession "to lose some land at the site but in return would receive new and better housing on the remaining land".[64] Subsequently, community representatives appointed by government authorities consented to an alternative housing arrangement and signed an agreement to that effect.[65] According to the agreement, residents were to give all of Dey Krahorm to 7NG, a private corporation linked to the ruling Cambodian People's Party

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59 *Dey Krahorm Community Land Case Explained*, by LICADHO/LICADHO Canada (Phnom Penh, Cambodia: LICADHO Canada, January 2008) at 1 online: <https://www.licadho-cambodia.org/reports/files/118DeyKrahormCommunityLandCaseExplained.pdf>.

60 *Rights razed: Forced evictions in Cambodia*, by Amnesty International, ASA 23/002/2008 (Amnesty International) at 5 online: <https://www.amnesty.org/en/documents/asa23/002/2008/en/> [*Cambodia*].

61 LICADHO/LICADHO Canada, *supra* note 59 at 4; Amnesty International, *supra* note 60 at 22.

62 *Eviction and Resistance in Cambodia: Five Women tell their Stories* (London, United Kingdom: Amnesty International, 2011) at 24 online: <https://www.inclusivedevelopment.net/wp-content/uploads/2020/01/amnesty-evictions-and-resistance-in-cambodia.pdf>.

63 Amnesty International, *supra* note 60 at 5.

64 LICADHO/LICADHO Canada, *supra* note 59 at 4, 5; *Losing Ground: Forced Evictions and Intimidation in Cambodia* (Phnom Penh, Cambodia: The Cambodian Human Rights Action Committee (CHRAC), September 2009) at 33 online: <https://data.opendevelopmentcambodia.net//dataset/1af15ccf-eefc-5dba-b38c-d61ba17b3850#:~:text=Published%20by%3A%20Open%20Development%20Cambodia,excluded%20from%20decisions%20affecting%20them.>.

65 LICADHO/LICADHO Canada, *supra* note 59 at 6, 7.

headed by Hun Sen, the then–prime minister, in exchange for apartments 20 kilometres away.[66] Many affected residents maintain the agreement to accept housing outside Dey Krahorm was reached without their knowledge.[67] 7NG and the Phnom Phem Municipal authorities subsequently embarked on a campaign to force residents to accept the agreement and give up homes and lands in Dey Krahorm.[68] This effort included threats, physical violence, and the filing of criminal complaints against subsequent community representatives.[69]

The conflict over ownership of Dey Krahorm arguably further placed ownership in an indeterminate state. Residents of Dey Krahorm and 7NG company both claim to have ownership rights. The Cambodia League for the Promotion and Defense of Human Rights (LICADHO), a Cambodian human rights non-governmental organization (NGO), notes "the main difficulty posed by the Dey Krahorm case is that ownership of the land the villagers have occupied for many years has not been clearly established".[70] Community members claim possession and ownership arising from peacefully living in Dey Krahorm since the 1980s, and some land law provisions appear to protect such individuals.[71] Conversely, 7NG claims ownership from land title documents issued in 2006 and the disputed ownership agreement.[72] Despite the institution of cases, courts are yet to decide on the ownership of the land and the legality of the disputed agreement.[73] 7NG made offers of apartments at the proposed relocation site in Damnak Trayeung or cash payments (claimed to be insufficient).[74] Some

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66 *Ibid* at 6; "Lake inferior", *The Economist* (29 January 2009), online: <https://www.economist.com/asia/2009/01/29/lake-inferior>.

67 LICADHO/LICADHO Canada, *supra* note 59 at 7.

68 *Ibid*.

69 *Ibid* at 8.

70 *Ibid* at 9.

71 *Ibid* at 9, 10. For other arguments regarding the possessory and ownership rights of residents see also *ICJ's Comments on the Initial Report of Cambodia on the implementation of the International Covenant on Economic, Social, and Cultural Rights* (International Commission of Jurists, April 2009).

72 LICADHO/LICADHO Canada, *supra* note 59 at 6, 7, 19.

73 *Ibid* at 15.

74 *Ibid* at 16; note 62 at 25, 26; *Eviction and Resettlement in Cambodia: Human Costs, Impacts*

families at Dey Krahorm accepted 7NGs terms and agreed to move out, while others declined the offer, refusing to depart the lands.[75] The remaining residents of Dey Krahorm, through petitions, complaints to government officials, and mass protests, attempted to defend their land tenure and prevent forcible displacements.[76]

About 400 families who refused 7NG's offer and did not depart Dey Krahorm have arguably been deprived of their lands and forcibly displaced.[77] Without adequate notice and commencing in the early morning hours of Saturday, January 24, 2009, hundreds of military and police personnel, coupled with demolition crews, allegedly destroyed structures and attacked residents in furtherance of a forcible transfer.[78] Tear gas, rubber bullets, bulldozers, and excavators were used to terrorize residents and compel them to forcibly relocate.[79] By 12 noon, Dey Krahorm was levelled to the ground, and residents were transferred to a resettlement area at Damnak Trayeung.[80] At least 18 people were hurt during the forcible transfers, including 5 suffering serious injuries.[81] A subsequent forcible relocation resulted in individuals being moved from Damnak Trayeung to Kandal Province, 40 kilometres North-West of Phnom Penh.[82]

Various organizations report similar incidents, indicating that the Dey Krahorm forcible displacement is not an isolated occurrence in Cambodia.

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and Solutions, by Office of the High Commissioner for Human Rights (Phnom Penh, Cambodia: United Nations, 2012) at 31, 32 online: <https://cambodia.ohchr.org/sites/default/files/Thematic-reports/Resettlement_Study-28_Feb_2012_Eng.pdf>.

75 *Supra* note 58 at 8, 14; LICADHO/LICADHO Canada, *supra* note 59 at 23.

76 LICADHO/LICADHO Canada, *supra* note 59 at 14; note 62 at 26.

77 "Nightmare at Dey Krahorm: Forced Eviction in the Heart of Phnom Penh" (8 February 2009), online: *LICADHO* <https://www.licadho-cambodia.org/articles/20090208/85/index.html>. The UN office of the High commission estimates more than 144 families were affected. See Office of the High Commissioner for Human Rights, *supra* note 74 at 32.

78 *Supra* note 62; Office of the High Commissioner for Human Rights, *supra* note 74 at 80.

79 *Supra* note 77; note 62 at 26.

80 LICADHO/LICADHO Canada, *supra* note 59 at 6.

81 *Supra* note 77.

82 *Supra* note 62 at 28.

For example, the UN Office of the High Commissioner for Human Rights notes:

> In the cases of Dey Krahorm, Spean Ches and Sambok Chab, the authorities did not give due notice to the people prior to the eviction; they conducted the eviction during the night or early morning; individual housing and property were destroyed, and—and in the case of Dey Krahorm and Spean Ches—unnecessary and disproportionate force was used by authorities against the villagers.[83]

Likewise, Raquel Rolnik, the former UN Special Rapporteur on adequate housing reports:

> a consistent pattern of violation of rights ... systematic lack of due process and procedural protections; inadequate compensation; lack of effective remedies for communities facing eviction; excessive use of force; and harassment; intimidation and criminalization of NGOs and lawyers working on this issue.[84]

The forced displacements in Dey Krahorm seem to indicate an effort to unjustly acquire land and related resources, transferring ownership and possession in situations where property rights are ambiguous and contested. In such cases, land and affiliated resources can be acquired through coercion or deception and handed over to state-affiliated companies. This results in the forced displacement of residents, denial of consent for land transfers, and subsequent land use harming the local population.

The systemic nature of land grabbing and forcible displacements in Cambodia arguably amounts to a crime against humanity. Below, I conduct a historical analysis of the crime against humanity of forcible displacement in the Rome Statute and emphasize connections arising with alleged Dey Krahorm land grabs and forcible transfers.

III. CRIME AGAINST HUMANITY OF FORCIBLE DISPLACEMENT IN THE ROME STATUTE

Expanding upon the preceding segment that delved into the forcible displacement resulting from an alleged Dey Krahorm land grabbing incident, I commence this section with a historical examination of the crime against humanity of forcible displacement outlined in the Rome Statute. This analysis furnishes crucial contextual information regarding the confluence of forcible displacement and land grabbing. Although existing

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83 Office of the High Commissioner for Human Rights, *supra* note 74 at 4.

84 *Supra* note 56.

literature addresses the historical aspects of forcible displacement, I emphasize the interplay with land grabbing in contrast to the focus of prevalent scholarship. Subsequently, I evaluate the constituent elements of the crime against humanity of forcible displacement, underscoring its relevance to land grabbing in Dey Krahorm and how the crime's physical and mental elements may arguably be proved despite unclear land tenure. To begin, I start by setting out the parameters of the crimes against humanity I use to highlight the overlap between ICL and land grabbing, namely, forcible displacement. I focus on the Rome Statute provision of forcible displacement for three reasons. First, the provision reflects development in international law prohibiting widespread and systematic forcible displacement as a crime against humanity.[85] Second, the ICC established under the statute has emerged as a global tribunal for addressing atrocities.[86] Third, the Prosecutor of the court has expressed an interest in prioritizing cases within the jurisdiction of the ICC related to land grabs.[87] Presumably, this interest includes conceiving land grabbing as coming under the purview of forcible displacement as a crime against humanity.

The Rome Statute describes forcible displacement as "deportation or forcible transfer of population", a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." [88] Deportation or forcible transfer of population is conceived as "forced displacement of persons concerned by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law."[89] Land grabbing, frequently causes forced displacement of persons from areas in which they are lawfully present as part of a widespread or systematic attack against civilian populations, thus potentially presenting overlaps with Rome's Statute prohibition on forcible

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85 Dawson & Farber, *supra* note 7; *Rome Statue*, *supra* note 4 art 7(1)(d).

86 David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford, United States: Oxford University Press, 2014).

87 The Office of the Prosecutor, *supra* note 1.

88 *Rome Statute of the International Criminal Court*, 1998 art 7(1)(d). The Rome Statute also prohibits forcible displacement as a war crime. See *Ibid* art 8(2)(a)(vii), (2)(b)(viii), (2)(e)(viii).

89 *Rome Statute of the International Criminal Court*, *supra* note 88 art 7(2)(d).

displacement as a crime against humanity. I trace the development of the prohibition, emphasizing the intersections below.

The Rome Statute's proscription of forcible displacement as a crime against humanity follows international humanitarian and criminal law developments. These spheres of international law emerged from efforts to regulate war practices, make conflict less inhumane, and penalize international crimes.[90] The Lieber Code of 1863 made the first attempt to restrain forcible displacement, stipulating that "private citizens are no longer murdered, enslaved or carried off to distant parts."[91] Probably the prohibition was established with the intention of preventing a wartime strategy involving the forced displacement of civilians, which aimed to enable the conquering power to acquire new lands, diminish the potential for future conflicts by severing ties of conquered individuals to their familiar surroundings, and exploit labour to advance goals of the conquering force.[92] The stipulation of the Code influenced national and international regulations on the law of war and the formation of international customary law.[93]

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90 Some trace International Humanitarian law to Henry Dunant's effort to assist those wounded in the Battle of Solferino (24 June 1859). His experience and thoughts from the war are detailed in *A Memory of Solferino*, 1862. See Francois Bugnion, "The International Committee of the Red Cross and the Development of International Humanitarian Law" (2004) 5:1 Chicago Journal of International Law 191–215. Others attribute contemporary International Humanitarian Law to the Lieber Code created to regulate American Civil War (1861 – 1865). See R R Baxter, "The first modern codification of the Law of War: Francis Lieber and General Orders No. 100" (1963) 3:25 International Review of the Red Cross 171–189. International Criminal Law originated from efforts to penalise war crimes after the Second World War, see Bosco, *supra* note 86.

91 *Instructions for the Government of Armies of the United States in the Field, 1863*, (1863) art 23. Exceptions included forcibly displacing individuals who refused to swear oath of allegiance to the conquering power. *Ibid* art 156. See also Colvin & Orchard, "A Forgotten History", *supra* note 7.

92 Such strategies can be glimpsed from biblical accounts of forcible displacements. See *Amplified Bible* (The Lockman Foundation, 2015) bk 2 Kings 24:10-15, 2 Kings 25: 1-30, 2 Chronicles 36: 17-21, Ezra 4: 10-24; Alfred de Zayas, "Forced Population Transfer" in *Max Planck Encyclopedias of International Law* at para 2.

93 Theodor Meron, "Deportation of Civilians as a War Crime under Customary Law" in Theodor Meron, ed, *War Crimes Law Comes of Age: Essays* (Oxford: New York: Oxford University Press, 1999) 142.

Various international instruments built on the initial restriction of forcible displacements. The 1874 Project of an International Declaration concerning the Laws and Customs of War and the 1880 Laws of War on Land restricted forcible displacement by protecting family honour and rights, religious convictions, and lives and property of persons.[94] Arguably, the provisions also proscribe land grabbing since land and associated resources are essential for human sustenance with cultural and spiritual significance of forcible displacement. The 1899 and 1907 Hague Conventions built on the motive of constraining forcible displacements and preventing land grabbing by providing "family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. Private property must not be confiscated."[95] This provision was relied on in the *International Military Tribunal* at Nuremberg to argue that displacements conducted during the war in a bid to unjustly acquire territory contravened international conventions.[96] Noteworthy, Cherif Bassiouni presumes that by constraining property seizures and prohibiting pillaging, the 1899 and 1907 Hague Conventions indicate civilian populations are to remain on lands during war.[97] This logic is arguably justified by the inevitable infringement on family life, personal security and private property that land grabbing involving forcible displacement entails.

After World War I (1914-1918), the move to penalize forcible displacements suffered setbacks and later gained traction. Due to the war entailing forcible displacements precipitated by land grabbing, the 1919 Report of the Commission of the Responsibilities of the Authors of War included "deportation of civilians" as part of war crimes and crimes against

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94 *Project of an International Declaration concerning the Laws and Customs of War*, (27 August 1874) art 38; Oxford, *The Laws of War on Land*, (9 September 1880) art 49.

95 *The Hague Convention 1899, Regulations concerning the Laws and Customs of War on Land* (The Hague), (29 July 1899) art 46; *The Hague Convention 1907, Regulations concerning the Laws and Customs of War on Land* (The Hague), (18 October 1907) art 46.

96 Quoted in M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011) at 386, 387.

97 *Ibid* at 381. Pillaging is forbidden in *The Hague Convention 1899, Regulations concerning the Laws and Customs of War on Land*, *supra* note 95 art 47; *The Hague Convention 1907, Regulations concerning the Laws and Customs of War on Land*, *supra* note 95 at 47.

the laws of humanity.[98] Despite the widespread condemnation of this practice, the 1923 Treaty of Lausanne pardoned Turkish officials from relevant wrongdoing during the war.[99] Emphasizing the overlap between land grabbing causing forcible displacements, the Treaty was condemned for approving the "compulsory transplanting of peoples from lands where their ancestors have lived for many hundreds of years."[100] Interestingly, during World War II (1939-1945), both Allied and Axis powers engaged in, or condoned, forcible displacement.[101] However, the practice was subsequently criticized in various reports, treaties, and declarations.[102] The documents arguably provide some historical legal foundation for land grabbing intersecting with forcible displacement as a war crime and crime against the laws of humanity in the Charters of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East.[103]

International military tribunals established following World War II debatably conceived various acts, including land grabbing, as falling under the concept of forcible displacement.[104] Forcible displacements indictments in the International Military Tribunal at Nuremberg included a war crime charge of "deportation for slave labour and for other purposes of the civilian

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98 "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" (1920) 14:1/2 The American Journal of International Law 95–154 at 144.

99 *Treaty of Peace with Turkey, and Other Instruments Signed at Lausanne on July 24, 1923* (Treaty of Lausanne), (24 July 1923).

100 Bassiouni, *supra* note 96 at 383. For proceedings and effects of the Treaty of Lausanne, see Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (Oxford, United Kingdom: Oxford University Press, 2014).

101 Bassiouni, *supra* note 96 at 384.

102 *Ibid* at 384–386. Examples of such documents include the Polish government's Decree on the Punishment of German War Crimes Committed in Poland (1942), the Declaration Regarding German Atrocities Against Jews in German Occupied Countries (1942), the Declaration referring to the Systematic Torture and Murder of Civilians (1944), and the Punishment of War Crimes: Recommendations of the London International Assembly (1943).

103 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (Nuremberg Charter), (8 August 1945) art 6; *Charter of International Military Tribunal for the Far East* (Tokyo Charter), (19 January 1946) art 5.

104 Colvin & Orchard, "A Forgotten History", *supra* note 7 at 64.

population of and in occupied territories"[105] and a crime against humanity charge of "deportation and other inhumane acts committed against civilian populations before and during the war."[106] Relevant charges included the partitioning of Slovenia among Axis powers and forcible transfers of peoples from Slovenia—a land grab causing the forcible displacement of "tens of thousands of persons."[107] Again highlighting the connection between the unjust acquisitions of land and related resources resulting in the forcible displacements of residents, pertinent legal precedents permanently were summarised in the ICTY in the words:

> "Nuremberg jurisprudence dealt with very specific forms of deportation committed during World War II … When adjudicating the Nazi policy of 'driving out' all persons (believed to be) of "non-Aryan race" from territories under German rule as well as the "gathering" of Europe's Jewish population and other 'undesirable' groups in concentration and extermination camps, Nuremberg concentrated not so much on where the victims had been taken, *but on having been forced to leave their homes and prevented from ever returning."*[108]

Attempts to restrict forcible displacement intersecting with land grabbing continued after the Nuremberg trials. For example, *the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War* contained provisions arguably restricting such overlap. Aimed at constraining forcible displacements during conflicts, Article 49 of the Convention provides "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[109] The provision also constrains Occupying Powers from transferring their civilian population into occupied

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105 *Indictment presented to the International Military Tribunal (Nuremberg, 18 October 1945)*, (3 July 2015) Count 3(B).

106 *Ibid* Count 4(A).

107 *Ibid* Count 3(B); Marjan Drnovšek, "History and Concealment Slovenian Girls, Stay at Home!" in Marina Lukšič Hacin & Jernej Mlekuž, eds, *Go Girls! : When Slovenian women left home* (ZRC SAZU, Založba ZRC, 2009) 17 at 55.

108 See Separate and Partially Dissenting Opinion of Judge Schomburg in *Prosecutor v Mladen Naletilić and Vinko Martinović*, ICTY IT-98-34-A, Judgement (3 May 2006) at para 11. Emphasis added.

109 The prohibition is subject to specified exceptions that would be discussed below.

territory.[110] Furthermore, Additional Protocol II to the Convention extends the prohibition to the forced movement of civilians during internal armed conflicts.[111] These limitations on forcible displacements restrain land grabbing by ensuring civilian populations remain in place during and after conflicts.

These aforementioned developments spurred an international legal effort to recognize forcible displacement as a crime against humanity against civilian populations, even in times of peace. The attempt commenced with the International Law Commission's (ILC) compilation of international law principles identified in the Charter and Judgment of the Nuremberg tribunal, describing forcible displacement as a crime against humanity.[112] Subsequently, the ILC's 1954 Draft Code of Offences against the Peace and Security of Mankind proposed recognizing forcible displacement "committed against any civilian" as a crime under international law.[113] Then, the 1991 Draft Code of Offences provided for forcible displacement as constituting "systematic or mass violations of human rights" and "exceptionally serious war crimes."[114] During discussions on the 1991 draft at the ILC, it was noted that forcible displacements included land grabbing, described as attempts to "uproot a people from their ancestral lands".[115] Thereafter, the 1996 Draft Code of Crimes against the Peace and Security of Mankind contained similar provisions restricting forcible displacement.[116]

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110 *The Geneva Conventions of 12 August 1949*, (12 August 1949) art 49. Articles 146 and 147 of the Fourth Geneva Convention make contravening actions a grave breach with High Contracting Parties obligated to penalize same.

111 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1977.

112 International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 1950 art VI.

113 International Law Commission, *Draft Code of Offences against the Peace and Security of Mankind*, 1954 art 2(11).

114 *Draft Code of Offences against the Peace and Security of Mankind*, 1991 arts 21, 22.

115 *Yearbook of the International Law Commission 1991: Report of the Commission to the General Assembly on the work of its forty-third session*, II (New York: UN, 1994) Part II A/CN.4/SER.A/1991/Add.l (Part 2) at 104, 105.

116 *Draft Code of Crimes against the Peace and Security of Mankind*, 1996 art 18(g), 20(a)(vii). For relevant commentary see United Nations & International Law Commission,

Notably, a*d hoc* international criminal tribunals have been involved in penalizing forcible displacements involving land grabbing as crimes against humanity. Such tribunals include the International Criminal Tribunal for the Former Yugoslavia (ICTY),[117] and the Extraordinary Chambers in the Courts of Cambodia (ECC).[118] The ICTY highlighted the intersection between forcible displacements and land grabbing by emphasizing what the crime of forcible displacement safeguards, i.e., "the right of victims to stay in their home and community and the right not to be deprived of their property by being forcibly displaced to another location."[119] An overlap with land grabs exists because lands and associated resources are necessary for homes, establishing communities, and vital property others frequently seek to unjustly acquire or control. Similarly, in a noteworthy case involving Cambodia, courts traced the origins of armed struggle in the country to land grabbing culminating in forcible displacements as crimes against humanity.[120] The tribunal stated:

Yearbook of the International Law Commission 1996. . Volume 2, Part 2. (New York: United Nations, 1998).

117 *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, 2009 art 5(d). Generally, ICTY jurisprudence recognized deportations and forcible transfers as distinct crimes with a close relationship. ICTY cases involving deportations and forcible transfers include *Prosecutor v Radislav Krstić*, ICTY IT-98-33-T, Judgement (02 August 2001) [*Prosecutor V Krstić*]; *Prosecutor v Milomir Stakić*, ICTY IT-97-24-T, Judgement (31 July 2003); *Prosecutor v Milorad Krnojelac*, ICTY IT-97-25-T, Judgement (15 March 2002); *Prosectutor V Zoran Kupreškić et al*, ICTY IT-95-16-T, Judgement (14 January 2000); *Prosecutor v Mladen Naletilić and Vinko Martinović*, ICTY IT-98-34-T, Judgement (31 March 2003); *Prosecutor v Mladic*, ICTY IT-09-92-T, Judgement Volume IV of V (22 November 2017); *Prosecutor v Vlastimir Dordevic* ICTY IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011); *Prosecutor v Radoslav Brdanin*, ICTY IT-99-3-T, Judgement (1 September 2004). For an analysis of relevant cases see Roberts & Stewart, "Delimiting Deportation, Unlawful Transfer, Forcible Transfer and Forcible Displacement in International Criminal Law", *supra* note 5; Stewart, *supra* note 2.

118 *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic of Kampuchea* art 5.

119 *Prosecutor v Milan Martić*, ICTY IT-95-11-T, Judgement (12 June 2007) at para 106; *Prosecutor v Milomir Stakić*, *supra* note 117 at para 681.

120 *Nuon Chea & Khieu Sampshan*, 2014 Extraordinary Chambers in the Courts of Cambodia, Trial Chamber at paras 91, 552, Case 002, Case 002/01,; *Khieu Samphân & Nuon Chea*, 2016 Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber 1/520 at paras 656, 657, 660; Mydans, Seth, "Nuon Chea, Khmer Rouge's

> In 1967, there was a spontaneous uprising in Samlaut village in Battambang that was the result of land disputes caused by members of the army and civil servants taking land from Samlaut village … Nonetheless, the 1967 Samlaut rebellion in Battambang marked the beginning of armed struggle and civil war in Cambodia.[121]

Also, emphasizing the overlap between land grabbing and forcible displacements arising from land being a cherished property upon which homes are built and communities established, prosecutors at the ECC argued:

> Three ICTY Trial Chambers have assessed the harms arising from forced movements, whether across States or within them, noting (1) "that any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location;" (2) that "among the legal values protected by deportation and forcible transfer are the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location;" and (3) "The protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State." A fourth Trial Chamber has stated: "The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference.[122]

Subsequently, the ECC held more than 330,000 people were forcibly displaced from various locations in Cambodia and penalized Khmer Rouge members for such forcible transfers precipitating bodily and mental harm, and violating international rights and freedoms related to movement, property, family, life, and personal dignity.[123]

Therefore, the Rome Statute's eventual recognition of forcible displacement as a crime against humanity, a concept I contend encompasses land grabbing, unfolded within the context of approximately three centuries

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Chief Ideologist, Dies at 93", *The New York Times* (4 August 2019), online: <https://www.nytimes.com/2019/08/04/obituaries/nuon-chea-dead-cambodia.html>.

121 *Nuon Chea & Khieu Sampshan*, *supra* note 120 at para 91.

122 *Nuon Chea, Ieng Sary, Khieu Samphan*, 2013 Extraordinary Chambers in the Courts of Cambodia, Trial Chamber at para 18, Co-Prosecutors' Rule 92 Submission on the Crime Against Humanity of Other Inhumane Acts in Respect of Forced Transfer.

123 *Nuon Chea & Khieu Sampshan*, *supra* note 120 at paras 630–639.

of progress in international humanitarian law and ICL. The establishment of the ICC by the Rome Statute marked a pivotal moment, creating a permanent institution to address the shortcomings of ad hoc criminal tribunals and provide a more efficient and effective mechanism for deterring and punishing future atrocities.[124] Ad hoc tribunals had faced criticism for their inefficiency, ineffectiveness, bureaucratic nature, and reliance on episodic support from the Security Council.[125] The ICC's conception of crimes against humanity (including forcible displacement) has evolved into a contemporary solution for combating widespread or systematic violations of human rights against civilian populations.[126] Crimes against humanity remove the requirement of an armed conflict nexus, allowing for their prosecution during times of peace and civil strife and extending to actions committed by governments against their own populations.[127] This expansion opens the door to the potential prosecution of land grabbing that occurs without any connection to armed conflict—a possibility further explored in the next sub-section.

Before proceeding to the next sub-section, I will enumerate limited exceptions under which forcible displacements exist under international law. Exceptions in international humanitarian law arguably extend to crimes against humanity.[128] One such exception arises from the Geneva Convention, where Article 49 allows displacement for reasons such as ensuring population security or imperative military necessity. Additionally, International Human Rights Law presents further allowances, such as Article 4 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which permits evictions that promote the general welfare

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124 Bosco, *supra* note 86.

125 Ralph Zacklin, "The Failings of Ad Hoc International Tribunals" (2004) 2:2 Journal of International Criminal Justice 541–545; Bosco, *supra* note 86 at 38.

126 Leila Nadya Sadat, "Crimes Against Humanity in the Modern Age" (2013) 107:2 American Journal of International Law 334–377.

127 Darryl Robinson, "Defining "Crimes Against Humanity" at the Rome Conference" (1999) 93:1 The American Journal of International Law 43–57.

128 Kai Ambos & Steffen Wirth, "The Current Law of Crimes Against Humanity: An analysis of UNTAET regulation 15/2000" (2002) 13:1 Criminal Law Forum 1 at 60; Hall, Christopher K & Ambos, Kai, "Crimes Against Humanity" in Triffterer Otto, ed, *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article-* at 268.

of society, particularly safeguarding the rights of vulnerable individuals.[129] Moreover, the Universal Declaration of Human Rights permits property deprivation only when it is not arbitrary.[130] Acknowledging the potential correlation between arbitrary property deprivation and human rights violations such as forced displacements, international courts have taken steps to mitigate human rights violations arising from arbitrary property infringement. They have debatably achieved this by striving to find a delicate equilibrium between a state's right to regulate its citizens and the imperative to uphold human rights and comply with international law. This attempt has been furthered through measures such as respecting states' territorial sovereignty and upholding their eminent domain powers while ensuring respect for human rights and international legal prohibitions.[131]

A state's eminent domain power is potentially an additional exception to restrictions on forcible displacement as a crime against humanity. Yet, the seeming tension between limitations on a state's power to displace people and the exercise of eminent domain is not necessarily contradictory. This is because governments' use of eminent domain powers is assumed (and expected) to be in the best interest of its citizens,[132] while forcible displacements, classified as crimes against humanity, defeats the presumption if it can be shown that there is a systemic plan to curtail individuals' abilities to dwell in homes and thrive on lands and communities of their choice.[133] Put in another way, without compelling

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129 See also *Basic Principles and Guidelines on Development-Based Evictions and Displacement: Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, by Special Rapporteur on adequate housing, A/HRC/4/18 (United Nations, 2007) online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/Guidelines_en.pdf>; José Alvarez, "The Human Right of Property" (2018) 72:3 University of Miami Law Review 580.

130 United Nations, *The Universal Declaration of Human Rights*, (1948) art 17.

131 *Handbook No. 4: The right to property. A guide to the implementation of Article 1 of Protocal No. 1 to the European Convention on Human Rights*, by Monica Carss-Frisk, in *Human rights handbooks series* (Germany: Council of Europe, 2003) online: <https://edoc.coe.int/en/european-convention-on-human-rights/5759-the-right-to-property.html>.

132 Arthur Lenhoff, "Development of the Concept of Eminent Domain" (1942) 42:4 Columbia Law Review 596–638.

133 *Prosecutor v. Milan Martić*, *supra* note 119 at para 106.

evidence showing otherwise, the power of eminent domain is presumed to serve the general population's needs and is not implicated in international law.[134] However, this assumption can be challenged by widespread and systematic accusations of forcible displacements amounting to crimes against humanity, supported by relevant evidence.[135] Such proof can establish that forcible displacements amount to crimes against humanity and fall outside the scope of recognized eminent domain powers, defeating the presumption. Admittedly, the scope and limit of international law vis a vis states territorial sovereignty and the important roles of state property matters implicated in forcible displacement cases[136] lead to hesitations on international regulation of property—an area closely related to land grabs. Due to divergence between these concerns and my principal argument in this paper, which is prosecuting forcible displacements as a crime against humanity can be a means of penalizing land grabbing when there is uncertainty regarding who owns the property, i.e., land and associated resources, I do not expatiate on the relationship between land grabbing and eminent domain here.

In this section, I have provided a historical analysis of the crime against humanity of forcible displacement to highlight the scope of the crime in the Rome Statute of the ICC and emphasized intersections with land grabbing. In what follows, I argue elements of the crime against humanity of forcible transfers overlap with land grabbing in Cambodia. Below, I employ the Dey Krahorm illustrative example to illuminate the possible relationship.

A. *Land Grabbing and Chapeau Elements of Crime Against Humanity of Forcible Displacement*

In this subsection, I examine the Chapeau elements found in the Rome Statute's definition of crimes against humanity and build on allegations contained in Global Diligence's Communication to the ICC, arguing that the Dey Krahourm land grabbing incident highlighted in the illustrative example may qualify as part of a crime against humanity.[137] Thus, this sub-

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134 For such perspectives expressed by Inter-American Courts of Human Rights and United States of America courts, see Alvarez, *supra* note 129 at 620, 635, 636.

135 *Ibid* at 630.

136 *Ibid* at 639.

137 *Supra* note 6.

section explores the normative intersection between forcible displacement as a crime against humanity and the underlying concept of land grabbing that forms the core of this article.

The Rome Statute details the elements of crimes against humanity that may be prosecuted in peace time. Crimes against humanity involve the commission of acts referred to in Article 7(1) against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such an attack.[138] An attack is a course of conduct involving the multiple commission of prohibited acts and may not involve a military expedition.[139] The attack must be widespread or systematic to be a crime against humanity.[140] A widespread nature may be deduced from many victims or the broad geographical extent of the attack. Systematic refers to the organized nature of the attacks and the recurrence of similar criminal conduct on a regular basis.[141] Furthermore, a crime against humanity must be pursuant to or in furtherance of a state or organizational policy—indicating a planned, directed, or organized conduct.[142] The existence of such policy may be inferred from evidence of repeated perpetration of similar acts or collective mobilizations organized by the state or organization.[143]

The chapeau elements are arguably satisfied in the Dey Krahorm example discussed above. The existence of alleged widespread attacks becomes apparent through numerous repeated occurrences of forcible displacement driven by land grabbing, which has affected a significant number of victims. Various NGOs estimate that between 2000 and 2014, more than 500,000 victims were negatively impacted by land grabbing and

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138 *Rome Statue*, *supra* note 4 art 7(1).

139 *Elements of Crimes* (The Hague: International Criminal Court, 2011) art 7(Intro)(3); *Rome Statute of the International Criminal Court*, *supra* note 88 art 7(2)(a); *Situation in the Central African Republic in the Case of Prosecutor v Jean-Pierre Bemba Gombe*, 2009 The International Criminal Court Pre-Trial Chamber II at para 75, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo [*Prosecutor v. Bemba*].

140 *Rome Statute of the International Criminal Court*, *supra* note 88 art 7(1).

141 *The Prosecutor v Germain Katanga*, ICC 01/04-01/07, Judgment pursuant to article 74 of the Statute 2014 (7 March 2014) at para 1111.

142 *Supra* note 139 art 7(Intro)(3); *Prosecutor v. Bemba*, *supra* note 139 at para 81.

143 *The Prosecutor v Germain Katanga*, *supra* note 141 at para 1109.

forced displacement in Cambodia. For example, the Cambodian Human Rights and Development Association "ADHOC," estimates there have been 770,000 victims of land dispossession, affecting about 6% of the population in that period.[144] Similarly, LICADHO, another NGO, estimates about 500,000 people have been impacted by land grabbing involving displacements.[145] Correspondingly, a joint statement released in 2013 by various Cambodian NGO heads (i.e. the Cambodian Human Rights Action Committee "CHRAC", ADHOC, and the NGO Forum on Cambodia and the Housing Rights Task Force "HRTF") submits more than 700, 000 individuals have been impacted by land grabbing and forcible displacement.[146] In Phnom Penh alone, land grabbing and forcible displacements have supposedly impacted around 145,000 people, representing about 10% of the city's population.[147]

The phenomenon of forced displacement resulting from land grabbing can be viewed as systematic and indicative of state policy due to the alleged active involvement of various government entities in perpetrating and promoting actions leading to forced displacements. [148] The systematic nature is discernible in several key aspects. First, the initiation and execution of land deals that result in the dispossession of peasant communities and subsequent forced displacements often involve prominent figures from both the government and the business sector.[149] These transactions frequently yield substantial profits for those involved, indicating an incentive for collusion between influential individuals within

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144 *Supra* note 6 at para 87.

145 LICADHO, "Statement: 2014 Brings a New Wave of Cambodian Land Conflicts" (1 April 2014), online: *LICADHO* <https://www.licadho-cambodia.org/pressrelease.php?perm=342>.

146 "Joint Media Statement: Situation of Land/Housing Rights and Activists in 2012 and the Way Forward" (23 January 2013), online: <https://www.adhoccambodia.org/joint-media-statement-situation-of-landhousing-rights-and-activists-in-2012-and-the-way-forward/>.

147 *Ibid.*

148 *Supra* note 6 at para 146.

149 Andreas Neef & Jamaree Chiengthong, "The Politics and Ethics of Land Concessions in Rural Cambodia" (2013) 26:6 Journal of Agricultural and Environmental Ethics 1085–1103; Alice Beban, Sokbunthoeun So & Kheang Un, "From Force to Legitimation: Rethinking Land Grabs in Cambodia" (2017) 48:3 Development and Change 590–612.

the state and corporate interests.[150] Furthermore, security forces closely affiliated with the ruling elite are frequently deployed to carry out forced evictions amid claims that the land ownership is indeterminate or the land is reserved for investment purposes.[151] Their involvement and repeated assertions arguably show a coordinated effort to ensure land grabs and forcible displacements, suggesting a deliberate strategy involving the state apparatus.

Additionally, when violent crimes occur during the displacements, perpetrators tend to enjoy impunity, ostensibly shielded from prosecution by the ruling elites and the judiciary. A UN Special Rapporteur underscores several issues pertaining to the judiciary in Cambodia.[152] These concerns include challenges related to the judiciary's independence; its limited capacity to effectively manage a high caseload, particularly concerning land disputes; and the utilization of the judicial system to criminalize individuals and communities who assert rights to land ownership.[153] Also, satisfying the principle of complementarity restricting the ICC's jurisdiction,[154] there are no known "genuine domestic proceedings in which those most responsible" for alleged crimes have been investigated or prosecuted.[155] This protection from legal consequences further underscores the complicity of those in power in endorsing and perpetuating alleged crimes against humanity. In light of these factors, there seems to be a reasonable basis to assert that the requisite elements for crimes against humanity may be met in Cambodia. The systematic nature of land grabbing causing forcible displacements, the involvement of state organs, and the protection of wrongdoers by ruling elites and the judiciary collectively contribute to a situation that raises

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150 *Supra* note 66.

151 *Supra* note 6 at para 149,150; Jessica Embree, "Criminalizing Land-Grabbing: Arguing for ICC Involvement in the Cambodian Land Concession Crisis" (2015) 27 Florida Journal of International Law at 16, 17.

152 *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi : addendum*, by Surya P Subedi, A/HRC/21/63/Add.1 (Geneva: United Nations, 24 September 2012) online: <https://digitallibrary.un.org/record/735314?ln=en>.

153 *Ibid* at paras 181, 182.

154 *Rome Statute of the International Criminal Court*, *supra* note 88 arts 1, 17, Preamble; Bartram Brown, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" (1998) 23 Yale Journal of International Law 383.

155 *Supra* note 6 at para 25.

concerns about the commission of crimes against humanity in the region. This systematic and widespread pattern of behavior underscores the need to address land grabbing spurring forcible displacements and seek accountability for those responsible.

In this sub-section, I have examined the possible convergence of the chapeau of elements of crimes against humanity and the act of land grabbing leading to forced displacements. In the following sub-section, I explore the correlation between land grabbing and the components of forced displacement. I argue land grabbing intersects with elements of forcible displacement, and ICL may, through forcible displacement, penalize land grabbing where indeterminate property rights exist.

In order to classify forcible displacement as a crime against humanity, it is necessary to first establish the fundamental chapeau elements detailed in the preceding section. The following subsection delves into the physical and mental dimensions of forcible displacement, often intertwined with land grabbing. To illuminate the link between the two concepts, I begin by analyzing the criteria for forced displacement as outlined in the Rome Statute. Following this, I explore how these constitutive elements manifest in the context of the Dey Krahorm illustrative example.

1. Physical Elements

The Rome Statute and Elements of Crime enumerate the physical elements of forcible transfer. The *actus reus* of forcible displacement entails forcibly uprooting individuals from territory and environment in which they have been lawfully present without grounds permitted by international law.[156] Thus, the physical elements of forcible displacements are (a) the use of force or coercion to expel one or more persons to another location, (b) the persons were lawfully present in the area, and (c) the expulsion was without grounds permitted under international law.[157]

The Rome Statute also clarifies the meaning of "forcibly" as "threats of force or coercion, 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."[158]

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156 *Rome Statute of the International Criminal Court*, *supra* note 88 art 7(2)(d); *Prosecutor v Milomir Stakić*, *supra* note 117 at para 677; note 139 art 7(1)d.

157 *Supra* note 139 art 7(1)(d).

158 *Ibid* n 12.

Therefore, a physical element of forcible displacement as a crime against humanity is achieved when force, which may entail physical coercion and encompasses actions that strip individuals of genuine freedom of choice, is applied.[159] Persons will be considered involuntarily displaced when they lack authentic choices regarding their transfer, meaning their consent is not freely given or a product of their will. [160] Relevant determinations entail interrogating the context of the transfer to ascertain the affected individual's true intention regarding the displacement.[161] Displaced persons' seeming consent procured under pressure is void if it is elicited through force or the threat of force.[162] International courts have assessed consent on an individual basis, with courts disregarding collective agreements or decisions made by group leaders alone.[163] Noteworthy, agreements reached by leaders of conflicting sides or mediated by a neutral party do not necessarily validate consent in cases of forced displacement.[164]

Dey Krahorm land grabs have involved both physical force and other coercive acts arguably resulting in forcible displacements. With a backdrop of unclear land tenure flowing from numerous land tenure regimes, de facto land rights, and disputes on property transfer, 7NG corporation and Phnom Phem Municipal authorities have arguably coerced residents through deception, threats, physical violence, and criminal complaints in a manner invalidating genuine consent.[165] In a bid seemingly to intimidate residents and coerce consent, purported collective leaders conveying "consent" were also appointed by 7NG and local authorities. The intimidation culminated in hundreds of military and police personnel allegedly destroying structures and attacking residents on Saturday, January

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159 *Prosecutor v Mićo Stanišić and Stojan Župljanin*, ICTY IT-08-91-A, Judgement (30 June 2016) at para 918 (International Criminal Tribunal for Yugoslavia, Appeal Chamber).

160 *Prosecutor v Milorad Krnojelac*, ICTY IT-97-25-A, Judgement (17 September 2003) at para 229 (International Criminal Tribunal for Yugoslavia, Appeal Chamber); *Blagoje Simić, Miroslav Tadić and Simo Zarić*, ICTY IT-95-9-T, Judgement (17 October 2003) (International Criminal Tribunal for Yugoslavia, Trial Chamber).

161 *Blagoje Simić, Miroslav Tadić and Simo Zarić*, *supra* note 160 at para 126.

162 *Prosecutor v Milorad Krnojelac*, *supra* note 160 at paras 226–233.

163 *Blagoje Simić, Miroslav Tadić and Simo Zarić*, *supra* note 160 at paras 127, 128.

164 *Ibid.*

165 LICADHO/LICADHO Canada, *supra* note 59 at 9.

24, 2009.[166] The residents were subsequently forcibly transferred to other locations.[167] Therefore, the facts of the Dey Krahorm case appear to reveal the displaced were not given a genuine choice to stay or leave their residential lands, where they had an arguable lawful presence.

I proceed to examine the lawful presence of the displaced individuals in Dey Krahorm. Lawful presence refers to valid residency under domestic and international law.[168] This requirement does not mean that victims must have had formal legal residence in the area; rather, it includes individuals who have settled and lived within a community.[169] As discussed in Section 2.1.0. of this paper, land tenure issues have long plagued Cambodia. Consequently, many Cambodian residents affected by land matters face uncertainties about their land rights due to historical and contemporary challenges. Despite these issues, Dey Krahorm residents managed to exercise de facto land rights. The complexity in this situation is further heightened by disputes involving purported community representatives transferring rights to the 7NG company and some community members accepting funds to relinquish their land rights.[170]

Notwithstanding the aforementioned factors, some residents may be deemed to have been lawfully present in Dey Krahorm because it can be shown that they did not consent to the supposed community representatives, nor did they accept payments and agree to transfer their land rights.[171] Considering their continuous presence in Dey Krahorm and the controversial nature of these transactions, it is plausible to argue that these residents are lawfully present, even amid the ambiguous property disputes. This perspective finds support in international legal precedents where the presence of individuals in areas has been pivotal in determining their legality. For instance, in the case of *Prosecutor v Vujadin Popović et al.*, a case where the trial chamber found a population of 85% internally

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166 *Supra* note 77; note 62 at 26.

167 LICADHO/LICADHO Canada, *supra* note 59 at 6; note 62 at 28.

168 Thomas Jupe, "The lawful presence element in the International Criminal Court: why Myanmar's domestic laws should not be relied upon in a case for deportation or forcible transfer" Griffith Law Review 1–18 at 12.

169 *The Prosecutor v Bosco Ntanganda*, ICC-01/04-02/06, Judgment (8 July 2019) at para 1069 (International Criminal Court, Trial Chamber).

170 LICADHO/LICADHO Canada, *supra* note 59 at 6, 7, 8.

171 *Ibid* at 13–15.

displaced persons who had moved into the city during war were lawfully present.[172] The tribunal emphasized the reason for the prohibition against forcible transfer and deportation, which is to prevent civilians from being uprooted and communities from being destroyed, by stating:

> the clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities... the requirement for lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for 'residency' to be demonstrated as a legal standard.[173]

This line of reasoning supports the argument that formal land titles and resolved ownership disputes are not always necessary for lawful presence on the land, especially in the face of contested claims by entities like the 7NG company.[174] Given the disputed nature of the land ownership claims, the limited acceptance of relevant transactions, and the fact of residency on the disputed lands, it is probable that the displaced residents would be deemed legal or lawful occupants. Thus, their lawful presence can be substantiated, and they should be protected against any attempts at land grabbing involving forcible displacements.

I now assess whether the expulsion falls within the permissible grounds outlined in international law jurisprudence. As detailed in Section III., restricted justifications exist for forcibly displacing a population under international law. They provide forcible displacements might be deemed justifiable in peacetime under certain circumstances: to ensure population safety, fulfill military needs, promote societal welfare—particularly by safeguarding the rights of vulnerable populations—when property rights are not arbitrarily violated, and when carried out with appropriate safeguards to further state goals and public interests.[175] In this particular instance, it is improbable that the alleged forcible displacement of Dey Krahorm falls under any of the aforementioned exceptions, except potentially for the purpose of enhancing societal well-being and advancing state objectives. The

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172 *Prosecutor v Vujadin Popović et al*, ICTY-IT-05-88-T, Judgement (10 June 2010) at para 923 (International Criminal Tribunal for Yugoslavia, Trial Chamber).

173 *Ibid* at para 900.

174 For example, see Jupe, "The lawful presence element in the International Criminal Court", *supra* note 168 at 13, 14.

175 See Section III.

argument can be made because the purported displacement does not seem connected to population security or military necessities. However, a more in-depth analysis would likely demonstrate that justified property deprivation promoting societal well-being and state objectives cannot be supported here. This is because there appears to be a lack of overriding public interest or compelling reasons to relocate residents.[176] 7NG company seems to have acquired the land for substantially commercial purposes, and the transfer done in collaboration with other parties seems to have violated several international human rights standards.[177] For example, it is unlikely that the purported consent obtained from disputed community leaders, which sometimes included inadequate compensation and, in some cases, no compensation at all, and the concerted use of coercion to convince and relocate residents would be considered in accordance with the required safeguards.[178]

In this subsection, I analyzed the overlap in the physical element of forcible displacement and land grabbing, arguing land grabs frequently entail forcibly displacing residing populations. In the next sub-section, I explore the connection between land grabbing and the *mens rea* of forcible displacement.

2. Mental Element

I commence this sub-section illustrating the connection between land grabbing and forcible displacement by analyzing the mental elements of the crime in the Rome Statute and emphasizing constitutive elements arising in the Dey Krahorm situation.

The Rome Statute provides that perpetrators should have committed the physical elements with intent and knowledge.[179] In other words, perpetrators must intend to forcibly displace the persons and have knowledge of the expected outcome. The ICC Elements of Crimes clarify the intent and knowledge requirements are fulfilled if perpetrators are aware of the factual circumstances establishing the lawfulness of persons'

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176 *Supra* note 6 at 121.

177 *Ibid* at 99–109; Rabbi, *supra* note 2 at 154, 155.

178 LICADHO/LICADHO Canada, *supra* note 59 at 14; note 77.

179 *Rome Statue*, *supra* note 4 art 30.

presence and the conduct was part or intended to be part of a widespread or systematic attack directed against a civilian population.[180]

In relation to Dey Krahorm perpetrators were arguably aware of the lawfulness of residents' presence. This came be gleaned from the residents' establishing homes, living, and forming communities on relevant lands for decades;[181] the recognised transferable de facto land rights;[182] the purported use of fraudulent community representatives to transfer land ownership to 7NG company;[183] subsequent community representatives disavowing the contested agreement transferring title to the company,[184] and the various offers to compensate residents to transfer land rights to the company.[185]

In addition, perpetrators arguably knew the conduct was part of or intended to be part of a widespread or systematic attack directed to acquire land and related resources from civilian populations entailing forcible displacements—an issue addressed above in Section III.A. This argument can be further substantiated by land remaining a necessary item for sustenance and principal source of wealth in Cambodia and the substantial allegations of land grabbing, transferring vital land and associated resources resulting in numerous forcible displacements.[186] As previously indicated, the numerous occurrences and civilian victims, is unlikely to have occurred without the knowledge and intent of ruling elites have led a UN Commissioner for Human Rights and a UN Special Rapporteur on adequate housing to issue statements to call attention to a consistent pattern of rights violation, lack of due process, and use of force to the detriment of residents.[187]

In sum, in this section, I analyze the overlap in the Rome Statute provision on forcible displacement and land grabbing. I argue the intersection arises through land grabbing frequently resulting in forcible displacement. I have illustrated my argument via an alleged incident in Dey

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180 *Supra* note 139 art 7(1)(d)(3) and 7(1)(d)(5).

181 LICADHO/LICADHO Canada, *supra* note 59 at 4.

182 Amnesty International, *supra* note 60 at 5.

183 LICADHO/LICADHO Canada, *supra* note 59 at 6, 7.

184 *Ibid* at 7, 8.

185 *Ibid* at 8.

186 *Supra* note 146.

187 Office of the High Commissioner for Human Rights, *supra* note 74; note 56.

Krahorm, Cambodia and relied on various NGO reports and a Communication filed to the ICC alleging the crime against humanity of forcible displacement. In the next section, I provide a conclusion.

IV. CONCLUSION

Almost two decades later, victims of Dey Krahorm forcible evictions continue their pursuit for justice.[188] This paper contends ICL can offer a potential remedy through the relationship between land grabbing and forcible displacement. I argue that ICL may address land grabbing through focusing on incidents of forcible displacement, land grabs frequently engender. By tracing the conception of forcible displacement as a crime against humanity and acknowledging emerging jurisprudence, this perspective recognises the utility of ICL in penalising pervasive incidents of land grabs involving forcible displacement during incidents of arguably indeterminate property rights. As highlighted by Global Diligence's Communication regarding the alleged Dey Krahrom land grabbing and forced displacements to the ICC, such use may serve as a means of putting an end to impunity for those responsible for forcibly displacing local population in cases of land grabs.

This approach of categorizing forcible displacements as a crime against humanity presents at least three distinct benefits when addressing the issue of land grabbing. First, considering differing regimes of property rights that have existed in Cambodia and the problem of indeterminate property rights arising in cases similar to this where property rights are contested, an ICL paradigm centering forced displacement does not engage with thorny questions of property rights and avoids a formal title versus informal control debate but focuses on determining if elements of the crime against humanity of forcible displacement have occurred. This approach principally protects possession of land and associated resources. Second, forcible displacement, as a crime against humanity is a potential means for combatting land grabbing occurring during peace time, unlike other tools requiring an armed conflict nexus.[189] Third, due to the lack of other

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188 "Video: Dey Krahorm Community Demands Justice a Decade after Brutal Eviction" (24 January 2019), online: <https://www.licadho-cambodia.org/video.php?perm=77>.

189 For example, see *Rome Statute of the International Criminal Court*, *supra* note 88 art

violations of ICL, this approach may serve as a mechanism for attaining justice for land grabbing victims that do not fall under any other category of ICL and have no remedy under national jurisdictions or international human rights law.

Critics of this pragmatic approach may argue that attempting to curtail land grabbing through prosecuting the crime against humanity of forcible displacement serves as a backdoor approach to curtailing property acquisition, extends the boundaries of ICL, and reduces complex questions to simplistic legal solutions. Supporters of such perspectives might contend that ICL was established to address and penalize the "most serious crimes of concerns to the international community as a whole."[190] Expanding its scope to encompass issues bordering on possession and arguably having an ancillary impact on property rights would magnify an already substantial jurisdiction and distract from core crimes.[191] ICL may also be said to proffer simplistic solutions; distract from developmental ends; and inadequately take into account hard cases, complex historical events, and different political structures.[192]

I offer a multifaceted response to the criticisms. My response to the criticism of extending the boundary of ICL to property is that my analysis focusing on the convergence between land grabbing and forcible displacements centres the core crime of "deportation and forcible transfers", a crime against humanity.[193] A focus which does not centre property ownership. Furthermore, prosecuting cases of the crime against humanity of forcible displacement falls within the core mandate of the ICC, and the consideration of precipitating factors such as land grabbing does not amount to a distraction. Yet, I admit that a weakness of this approach

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8(2)(b)(xvi), 8(2)(e)(v); James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Institute, 2011).

190 *Rome Statue*, *supra* note 4 Preamble.

191 For example, Frédéric Mégret refers to the remarkable power of international criminal lawyers to reframe various issues to require international criminal justice—in this case examining issues of property rights as forcible transfers. Frédéric Mégret, "International criminal justice: A critical research agenda" in *Critical Approaches to International Criminal Law* (London: Routledge, 2014) 17.

192 For criticisms of International Criminal Law see Christine Schwöbel, ed, *Critical Approaches to International Criminal Law: An Introduction* (London: Routledge, 2014).

193 *Rome Statue*, *supra* note 4 art 7(1)(d).

is an arguable ancillary impact on property rights and the prudence of making relevant determinations in cases of land grabs involving forcible displacement.

To the criticism of simplistic solutions and limitations of international criminal justice, I respond that state parties to the Rome Statute believe international criminal justice solutions are valuable, succeed in curtailing perpetrators' impunity, and inhibit atrocity.[194] This belief has some empirical data in support. [195] It is crucial to acknowledge that while there are constraints to the solutions provided by ICL, the existing tools can still yield positive outcomes.[196] Ultimately, my aim is to propose practical solutions that can make a meaningful difference, not flawless remedies. Notably, arguments regarding the possible engagement of crimes against humanity having an ancillary impact on disputed property rights also have implications under national jurisdictions, including Canada—a fertile area for further research.

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194 *Rome Statue*, *supra* note 4 Preamble.

195 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W. W. Norton & Company, 2010); Kathryn Sikkink & Hun Joon Kim, "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations" (2013) 9:1 Annual Review of Law and Social Science 269–285.

196 Antonio Cassese, "Reflections on International Criminal Justice Announcement" (2011) 9:1 J Int'l Crim Just 271–280; Sarah M H Nouwen & Wouter G Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2010) 21:4 European Journal of International Law 941–965; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95:1 The American Journal of International Law 7–31.